

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:)
) Chapter 11
PATRIOT COAL CORPORATION, *et al.*,) Case No. 12-51502-659
) (Jointly Administered)
 Debtors.)
) Re: Docket Nos. 3857, 3858
)
) Hearing Date:
) May 21, 2013 at 11:00 a.m. (CST)

**REPLY OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
TO THE OBJECTIONS OF PEABODY ENERGY CORPORATION TO DEBTORS'
MOTION FOR LEAVE TO SERVE RULE 2004 SUBPOENAS ON THIRD PARTIES**

The Official Committee of Unsecured Creditors (the "**Committee**") of the above debtors and debtors-in-possession (collectively, the "**Debtors**") submits this reply (the "**Reply**") to the objections [ECF Nos. 3972, 3973] of Peabody Energy Corporation ("**Peabody**") to the Debtors' Motion (the "**Motion**") for Leave to Serve Rule 2004 Subpoenas on Morgan Stanley ("**Morgan Stanley**") [ECF No. 3857] and Duff & Phelps Corp. ("**Duff & Phelps**") [ECF No. 3858] and respectfully represents as follows:

REPLY

1. As the Court is aware, the Debtors and the Committee are conducting a Rule 2004 investigation of the transactions in which the Debtors were spun off from Peabody. That investigation began more than four months ago, on January 11 of this year, when the Debtors and the Committee provided Peabody with a document request and began the meet and confer process under the local rules. Although the parties have negotiated for months over the scope of Peabody's production and the terms of a confidentiality agreement, Peabody has never come to terms and has produced nothing.

2. Ultimately, the Debtors and the Committee were forced to move for authority to take Rule 2004 discovery from Peabody. The Court granted that motion on April 23, more than three weeks ago. Despite the Court's rulings, the parties have not yet been able to reach a mutually acceptable form of order or agree on the terms of a confidentiality agreement.

3. Now, against this backdrop, Peabody seeks to insert itself in the Debtors' efforts to take third party discovery from Morgan Stanley and Duff & Phelps. Although the Debtors have reached consensual orders with both Morgan Stanley and Duff & Phelps – neither of which oppose the Motion – Peabody has appeared and objected. At the same time, it has repeatedly attempted to insert itself in the negotiations with Morgan Stanley and Duff & Phelps outside of Court, which threatens to delay this aspect of the estate's discovery to the same extent Peabody has managed to stall the discovery sought from it.

4. Peabody asserts that the material sought from Morgan Stanley and Duff & Phelps is either privileged or confidential. On this basis, it seeks a right to "pre-review" their productions.

5. This objection has no merit. Peabody has provided no basis – none – to believe that Morgan Stanley or Duff & Phelps possess any Peabody privileged information. Nor has it explained how material in the hands of two third parties remains privileged. Similarly, Peabody identifies no litigation that was imminent at the time of the spinoff, the existence of which might somehow support a work product claim. In any event, even if such privileged materials exist, the recipients of the subpoena may withhold it from production and provide an appropriate privilege log. Moreover, the form of confidentiality agreement the parties have been negotiating provides that inadvertent productions will not waive the privilege.

6. There is similarly no basis to delay a response to the subpoenas to allow Peabody to “pre-review” the third party productions for confidentiality. The Debtors have agreed to treat both productions as “professionals eyes only” for a period of thirty days, to allow Peabody to review and designate appropriate materials “confidential” under the parties’ pending confidentiality agreement.

7. At bottom, Peabody has failed to provide any basis to support the “pre-review” it seeks. In light of the extensive delays in Peabody’s own production, the Court should not allow it to interfere with the estate’s efforts to obtain discovery from others.

8. Finally, Peabody has also objected to the scope of certain document requests in the proposed Rule 2004 subpoenas. The Debtor’s Reply responds by narrowing those requests. The Court should approve the Subpoenas as modified.

CONCLUSION

9. For the foregoing reasons, Peabody’s Objection should be overruled and the Motion granted, on the modified terms proposed by the Debtors.

[Signature page follows]

Dated: May 17, 2013

Respectfully Submitted,

KRAMER LEVIN NAFTALIS & FRANKEL LLP

/s/ P. Bradley O'Neill

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CERTIFICATE OF SERVICE

I certify that on May 17, 2013 a copy of the foregoing pleading was served through the Court's CM/ECF system on those parties receiving ECF notices in these proceedings.

/s/ P. Bradley O'Neill _____