

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

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: **Chapter 11**
In re: : **Case No. 12-51502-659**
: **(Jointly Administered)**
PATRIOT COAL CORPORATION, *et al.*, :
: **Hearing Date:**
Debtors. : **November 19, 2013 at 10:00 a.m.**
: **(prevailing Central time)**
: **Re: ECF No. 4882**
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**OBJECTION OF ALPHA NATURAL RESOURCES, INC. AND CERTAIN OF ITS
SUBSIDIARIES TO DEBTORS' RENEWED MOTION FOR AUTHORIZATION TO
ASSUME UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY**

Alpha Natural Resources, Inc. and certain of its subsidiaries (collectively, “Alpha”) file this objection (the “Objection”) to the Debtors’ Renewed Motion for Authorization to Assume Unexpired Leases of Nonresidential Real Property (ECF No. 4882) (the “Renewed Assumption Motion”).¹ In support of the Objection, Alpha relies on the Declaration of R. Freal Mize in Support of Objection of Alpha Natural Resources, Inc. and Certain of its Subsidiaries to Debtors’ Renewed Motion for Authorization to Assume Unexpired Leases of Nonresidential Real Property (the “Mize Declaration”), attached hereto as Exhibit A. In further support of this Objection, Alpha respectfully states as follows:

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Renewed Assumption Motion.

Preliminary Statement

1. Granting the Renewed Assumption Motion as to the Boone East Lease² at this time would sidestep the Adversary Proceeding to which the Boone East Lease is subject, effectively granting the Debtors the relief that they seek in that Proceeding. While Alpha appreciates that the time limits of section 365(d) compelled the Debtors to file the Renewed Assumption Motion, it would not only be premature to grant the Renewed Assumption Motion but inappropriate to determine what amounts to such declaratory judgment in this procedural posture until there is a final decision in the Adversary Proceeding.

2. As to the other agreements that the Debtors seek to assume (i.e. those listed in Appendix A to the Renewed Assumption Motion), the Debtors set forth no basis, nor can Alpha ascertain any basis, for the zero dollars cure amount listed for each agreement. According to a review of Alpha's books and records, outstanding cure amounts of over \$1 million, much of which relate to post-petition amounts past due, are currently owing to Alpha. Accordingly, the Renewed Assumption Motion should be denied as to those agreements listed in Appendix A until the Debtors amend the proposed order to require payment of \$1,236,227.89 in cure as a condition to assumption.

Background

3. In 2005, in fulfillment of the terms of a settlement agreement (the "Settlement Agreement") between an Alpha affiliate and a Patriot affiliate, Debtor Eastern Royalty LLC ("ERC") entered into a coal lease (the "Boone East Lease"), four assignments (the "Assignments"), and a payment agreement (the "Payment Agreement") with Alpha subsidiaries Boone East Development Company ("Boone East"), Performance Coal Company, and New

² Capitalized terms used in the Preliminary Statement but not otherwise defined therein have the meaning ascribed below.

River Energy Corporation (collectively, the “Alpha Entities”). The Settlement Agreement provides that the Settlement Agreement, Payment Agreement, Boone East Lease, and the Assignments represent “the full and complete understanding, agreement and arrangement of the parties, and is the integrated memorial of their agreement.” In turn, the Payment Agreement attached the Assignments and the Boone East Lease as exhibits and required their execution. The Payment Agreement also provides for tonnage payments for coal mined from the premises that are the subject of the Assignments and the Boone East Lease “as additional consideration for th[ose] coal reserves to be assign [sic] and leased to ERC.”

4. On July 9, 2012, the Debtors filed a Motion for an Order (i) Confirming the Massey Payment Agreement is Not an Executory Contract or, Alternatively, (ii) Approving Rejection of the Massey Payment Agreement (the “First Day Rejection Motion”) (ECF No. 24). After a status conference on July 26, 2012, the United States Bankruptcy Court for the Southern District of New York (the “New York Bankruptcy Court”) advised the Debtors and the Alpha Entities that the First Day Rejection Motion was not appropriate for disposition on motion, and must be determined by an adversary proceeding. Subsequently, the Debtors withdrew, without prejudice, the portion of the First Day Rejection Motion seeking an order that the payment agreement is a non-executory contract and adjourned the balance of the motion *sine die* (ECF No. 282).

5. On August 6, 2012, ERC filed a complaint commencing an adversary proceeding, captioned Eastern Royalty LLC v. Boone East Development Co., Adv. Pro. No. 12-04353-659 (the “Adversary Proceeding”), in the Bankruptcy Court. ERC sought a declaratory judgment that the Payment Agreement was non-executory and was not integrated with certain other agreements, including the Boone East Lease, Assignments, and Settlement Agreement. On

September 7, 2012, the Alpha Entities filed an answer and counterclaim to complaint in the Adversary Proceeding.

6. On September 21, 2012, ERC filed a motion for judgment on the pleadings in the Adversary Proceeding (the “Rule 12(c) Motion”). The Alpha Entities filed an opposition to the Rule 12(c) Motion on October 18, 2012, and ERC filed its reply on November 1, 2012. Oral argument was held before the Bankruptcy Court on February 26, 2013. No decision has been rendered.

7. On January 15, 2013 the Debtors filed a Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Non-Residential Real Property (ECF No. 1995, the “NRRP Motion”), which again sought to assume the Boone East Lease and certain other agreements with Alpha, without assuming the Payment Agreement or the Assignments. Thereafter, on January 24, 2013, the Debtors and Alpha entered into a Stipulation and Order Extending Time under 11 U.S.C. § 365(d)(4) for Leases of Non-Residential Real Property with Alpha Natural Resources, Inc. (ECF No. 2781, the “Alpha Stipulation”). The Alpha Stipulation extended the time for the Debtors to assume or reject the Boone East Lease, as well as other agreements and non-residential real property leases to which Alpha was a party (collectively, the “Alpha Agreements”), through April 6, 2013. The Alpha Stipulation also provided that the NRRP Motion was withdrawn with respect to the Alpha Agreements. Alpha Stip. ¶ 3.

8. As set forth in the Renewed Assumption Motion, the Alpha Stipulation was extended from time to time until it expired on October 28, 2013. Thereafter, the Debtors filed the Renewed Assumption Motion on October 28, 2013, which sought to assume eight agreements between the Debtors and Alpha (the “Proposed Assumed Agreements”), including the Boone East Lease. The Renewed Assumption Motion also sought the same relief previously

sought in the First Day Assumption Motion and the withdrawn NRRP Motion – namely, to exclude a number of agreements from the scope of the proposed assumption, including the Payment Agreement (the “Proposed Excluded Agreements”).

Objection

A. The Renewed Assumption Motion Cannot Be Decided Until a Final Decision is Rendered in the Adversary Proceeding on the Integration between the Boone East Lease, the Payment Agreement, and Assignments.

9. While the deadlines under Section 365(d)(4) required the Debtors to file the Renewed Assumption Motion, the Court plainly cannot address the relief it seeks as to the Boone East Lease until there is a final decision in the Adversary Proceeding. If granted, the Renewed Assumption Motion would effectively grant the Debtors the declaratory judgment prayed for in the Adversary Proceeding before the Court had determined even the Rule 12(c) Motion, much less entered a final judgment. Even if this were not determinative, there can be no determination of the Debtors’ request for a declaratory judgment on a simple motion. Indeed, the New York Bankruptcy Court advised the Debtors and Alpha of this in a chambers conference held on July 26, 2012.

10. Currently, the Rule 12(c) Motion is pending in the Adversary Proceeding. If the Rule 12(c) Motion is decided in favor of the Alpha Entities, discovery will be necessary. If the Rule 12(c) Motion is decided in favor of the Debtors, the Alpha Entities reserve their rights to appeal the decision. In either event, a final decision on whether the Boone East Lease, Assignments, Payment Agreement, and Settlement Agreement are integrated will not be made before the hearing on the Renewed Assumption Motion, making the relief it seeks entirely premature.

11. Without a decision in the Adversary Proceeding, there would be no way to resolve the integration issues that are essential to a determination of which of the Alpha Agreements can be independently assumed or rejected. The Debtors have tried twice before to make a motion to assume these same Alpha Agreements. Each time, the Debtors have attempted to assume the Boone East Lease while rejecting the Payment Agreement – in effect, keeping all of the benefits of the Boone East Lease without any of the attendant obligations. A final decision in the Adversary Proceeding, after discovery, trial, and a potential appeal, is the only permissible method to determine whether the Debtors can accomplish this goal and assume the Boone East Lease while rejecting the Assignments and Payment Agreement. As such, insofar as it relates to the Boone East Lease, the Court should deny the Renewed Assumption Motion without prejudice or defer decision pending resolution of the Adversary Proceeding.

B. The Debtors Cannot Assume the Remaining Proposed Assumed Agreements Until the Debtors Cure All Defaults.

12. While the Renewed Assumption Motion also seeks to assume additional agreements that are unrelated to the Adversary Proceeding (i.e. those Proposed Assumed Agreements listed in Appendix A to the Renewed Assumption Motion), the Debtors' proposed zero dollar cure amount for each of these agreements ignores the substantial cure payments that must be made to Alpha as a condition to assumption. All of these amounts, which total approximately \$1.2 million as of October 29, 2013 are payable by the Debtors under the Proposed Assumed Agreements, such that Alpha fails to understand the basis for the proposed zero dollar cure amount. See Mize Decl. ¶ 2.

13. Prior to assumption of the Proposed Assumed Agreements, the Debtors are required, pursuant to section 365(b)(1) of the Bankruptcy Code, to cure, or provide adequate assurance that the Debtors will promptly cure, all outstanding defaults under the Proposed

Assumed Agreements. 11 U.S.C. § 365(b)(1); see also In re Daugherty, 102 B.R. 167, 168 (Bankr. E.D. Mo. 1989) (stating that a debtor must promptly cure all defaults under an executory contract or unexpired lease prior to assuming it); In re Burger Boys, Inc., 94 F.3d 755, 763 (2d Cir. 1996) (stating that, prior to assumption of an executory contract or unexpired lease, the debtor must cure all pre- and post-petition defaults).

14. In the Renewed Assumption Motion, the Debtors have purported to provide for cure amounts (the “Proposed Cure Amounts”) of zero dollars for each of the Proposed Assumed Agreements. The Debtors further submit that this the Proposed Cure Amounts will “fully satisfy the Debtors’ obligations to cure outstanding defaults” under the Proposed Assumed Agreements.

15. A reasonable review of Alpha’s books and records with respect to the Proposed Assumed Agreements reveals that there are amounts outstanding under the Proposed Assumed Agreements that create defaults which the Debtors must cure before they can be permitted to assume the Proposed Assumed Agreements. As of October 29, 2013, the amounts outstanding under the Proposed Assumed Agreements are set forth in the Mize Declaration and below:

- a. The Debtors owe at least \$587,441.73 in respect of the coal lease between Debtor Robin Land Company, LLC (“Robin Land”) and Black King Mine Development Co. (“Black King”) (Debtors’ Contract ID: LND 843). This amount is comprised of \$514,143.78 in pre-petition royalties due to Black King from Robin Land covering the time period from May 2011 through June 2012. In addition, Robin Land owes Black King \$73,297.95 in property taxes for the years of 2011, 2012, and the first half of 2013, all of which has been invoiced to the Debtors.
- b. The Debtors owe at least \$52,042.45 in property taxes for 2011 and the first half of 2012, which amount has been invoiced to the Debtors, in respect of the coal

lease between Debtor Pine Ridge Coal Company, LLC (“Pine Ridge”) and Central West Virginia Energy Co. (Debtors’ Contract ID: LND 020).

- c. The Debtors owe at least \$596,743.71 in respect of the Boone East Lease. This amount is comprised of \$91,473.41 in pre-petition royalties due to Boone East from Eastern Royalty, LLC (“ERC”) covering the time period from May 2012 through July 2012. In addition, ERC owes Boone East \$505,270.30 in property taxes for 2010, 2011, 2012 and the first half of 2013, all of which has been invoiced to the Debtors.³

16. Fixing the Proposed Cure Amounts at zero dollars when, in reality, the cure amounts are over \$1 million is not only without basis,⁴ it seeks relief that would be in clear violation of the provisions of section 365(b)(1) of the Bankruptcy Code. As such, the Renewed Assumption Motion should be denied unless and until the Debtors amend the proposed order to reflect those cure amounts actually due and owing.

17. For all the foregoing reasons, Alpha respectfully requests entry of an order (a) denying without prejudice or deferring consideration of the Renewed Assumption Motion as it relates to the Boone East Lease, (b) denying the Renewed Assumption Motion as to the remaining agreements unless and until correct cure amounts are made conditional, and (c) granting such other and further relief as the Court may deem just and proper.

³ This amount does not include additional amounts in overrides due to Boone East in respect of the property that is the subject to the Boone East Lease pursuant to the Payment Agreement. Alpha reserves its right to amend or supplement the Objection to the extent the Court needs to reach cure payments due in respect of such agreements.

⁴ Tellingly, the Renewed Assumption Motion fails to include any declaration or other factual basis for its asserted zero dollar Proposed Cure Amounts.

Reservation of Rights

18. Alpha reserves the right to amend or supplement the Objection in advance of the hearing in all respects, including, without limitation, as to additional cure amounts that may accrue.

Dated: November 12, 2013

Respectfully Submitted,

/s/ David A. Sosne

David A. Sosne (#28365)

SUMMERS COMPTON WELLS LLC

8909 Ladue Road

St. Louis, MO 63124

Tel. (314)991-4999

Fax (314)991-2413

Email: dasattymo@summerscomptonwells.com

James L. Bromley*

Luke A. Barefoot*

CLEARY GOTTLIEB STEEN & HAMILTON LLP

One Liberty Plaza

New York, NY 10006

Tel. (212)225-2000

Fax (212)225-3999

* *admitted pro hac vice*

Exhibit A

Mize Declaration

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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In re: :
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: **Chapter 11**
PATRIOT COAL CORPORATION, *et al.*, : **Case No. 12-51502-659**
: **(Jointly Administered)**
:
Debtors. :
:
----- X

**DECLARATION OF R. FREAL MIZE IN SUPPORT OF OBJECTION OF ALPHA
NATURAL RESOURCES, INC. AND CERTAIN OF ITS SUBSIDIARIES TO DEBTORS’
RENEWED MOTION FOR AUTHORIZATION TO
ASSUME UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY**

I, R. Freal Mize, do hereby declare as follows:

1. I am the Senior Director, Land Management-CAPP North of Alpha Appalachia Services, Inc. I am duly authorized to make this Declaration on behalf of Alpha Natural Resources, Inc. and certain of its subsidiaries and submit this Declaration in support of the Objection of Alpha Natural Resources, Inc. and Certain of its Subsidiaries to Debtors’ Renewed Motion for Authorization to Assume Unexpired Leases of Nonresidential Real Property (the “Objection”).¹ Except as otherwise noted, I have personal knowledge of the matters set forth herein and, if called as a witness, I would testify thereto. Certain of the disclosures set forth herein relate to matters within the knowledge of other employees of Alpha Natural Resources, Inc. and certain of its subsidiaries and are based on information provided by them.

2. I have conducted a reasonable review of Alpha’s books and records to ascertain amounts due and unpaid which represent defaults under the terms of certain agreements with the

¹ Capitalized terms used but not defined in this Declaration have the meaning ascribed to them in the Objection.

Debtors. Based on this review, I have determined that, as of October 29, 2013, the following amounts are due and owing under the applicable Proposed Assumed Agreement.²

3. The Debtors owe at least \$587,441.73 in respect of the coal lease between Debtor Robin Land Company, LLC ("Robin Land") and Black King Mine Development Co. ("Black King") (Debtors' Contract ID: LND 843). This amount is comprised of \$514,143.78 in pre-petition royalties due to Black King from Robin Land covering the time period from May 2011 through June 2012. In addition, Robin Land owes Black King \$73,297.95 in property taxes for the years of 2011, 2012, and the first half of 2013, all of which has been invoiced to the Debtors.

4. The Debtors owe at least \$52,042.45 in property taxes for 2011 and the first half of 2012, which amount has been invoiced to the Debtors, in respect of the coal lease between Debtor Pine Ridge Coal Company, LLC ("Pine Ridge") and Central West Virginia Energy Co. (Debtors' Contract ID: LND 020).

5. The Debtors owe at least \$596,743.71 in respect of the Boone East Lease. This amount is comprised of \$91,473.41 in pre-petition royalties due to Boone East from Eastern Royalty, LLC ("ERC") covering the time period from May 2012 through July 2012. In addition, ERC owes Boone East \$505,270.30 in property taxes for 2010, 2011, 2012 and the first half of 2013, all of which has been invoiced to the Debtors.³

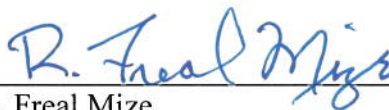
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² Alpha reserves the right to amend or supplement the Declaration in advance of the hearing in all respects, including, without limitation, as to additional cure amounts that may accrue.

³ This amount does not include additional amounts in overrides and tonnage royalties due to Boone East in respect of the Boone East Lease.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on November 7, 2013
Julian, WV



R. Freal Mize
Senior Director, Land Management-CAPP North
Alpha Appalachia Services, Inc.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:) Chapter 11
) Case No. 12-51502-659
PATRIOT COAL CORPORATION,) Jointly Administered
et al.,) Honorable Kathy Surratt-States
 Debtors.)
)

CERTIFICATE OF SERVICE

I, David A. Sosne, hereby certify that on the 12th day of November, 2013, a copy of the following document was served via electronic filing in the CM/ECF system for the United States Bankruptcy Court for the Eastern District of Missouri, which electronic filing included service upon the most recently filed and posted Core Parties List:

1. Objection of Alpha Natural Resources, Inc. and Certain of its Subsidiaries to Debtors' Renewed Motion for Authorization to Assume Unexpired Leases of Non Residential Real Property.

Respectfully Submitted,
SUMMERS COMPTON WELLS LLC

Date: November 12, 2013

By: /s/ David A. Sosne
David A. Sosne, #28365MO
8909 Ladue Road
St. Louis, Missouri 63124
(314)991-4999/(314)991-2413/FAX
dasattymo@summerscomptonwells.com