UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: MISSION COAL COMPANY, LLC, *et al*.,[1] Debtors.	Chapter 11 Case No. 18-04177 (TOM) (Jointly Administered) **Proposed Hearing Date: November 19, 2018 at 10:00 a.m. (CT)** **Proposed Objection Deadline: November 16, 2018 at 4:00 p.m. (CT)**

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' MOTION FOR AN ORDER PURSUANT TO BANKRUPTCY RULE 2004 AUTHORIZING THE EXAMINATION AND PRODUCTION OF DOCUMENTS BY THE DEBTORS

The Official Committee of Unsecured Creditors (the "Committee") of Mission Coal Company, LLC ("Mission Coal") and certain of its affiliates, as debtors and debtors-in-possession (collectively, the "Debtors"), by and through its undersigned counsel, hereby respectfully moves (the "Motion"), pursuant to Bankruptcy Code sections 105(a), 363, 364, and Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") for the entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Proposed Order") authorizing Thomas M. Clarke, Ana M. Clarke, Kenneth R. McCoy, Jason R. McCoy, Charles A. Ebetino, Jr. (collectively, the "Principals"), Mission Coal Funding, LLC (the "Second Lien Lenders"), and the Debtors (together with the Principals, Second Lien Lenders, and the Debtors, the "2004 Recipients"), to appear for examination and produce documents and communications within their respective possession, custody, or control that are responsive to the categories set

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Mission Coal Company, LLC (8465); Beard Pinnacle, LLC (0637); Oak Grove Land Company, LLC (6068); Oak Grove Resources, LLC (0300); Pinnacle Land Company, LLC (6070); Pinnacle Mining Company, LLC (7780); Seminole Alabama Mining Complex, LLC (6631); Seminole Coal Resources, LLC (1795); Seminole West Virginia Mining Complex, LLC (7858); Seneca Coal Resources, LLC (1816); and Seneca North American Coal, LLC (5102). The location of the Debtors' service address is: 7 Sheridan Square, Suite 300, Kingsport, Tennessee 37660.

forth in the document requests attached hereto as **Exhibit B** (the "2004 Document Requests"), by no later than December 3, 2018 at 4:00 p.m. (Prevailing Central Time). In support of this Motion, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. Mission Coal, a company that was barely nine months old when it filed for bankruptcy, is saddled with excessive debt and ownership/management teams that are incapable of operating the Debtors' business in good faith.

2. Behind the guise of Mission Coal is Thomas M. Clarke – a business man of questionable character who fled the nursing home industry in the late 1990's amidst allegations of fraud and mismanagement. See Matt Robinson and Bryan Gruley, *What's a Nursing-Home Operator Doing Running an Iron Mine?*, BLOOMBERG BUSINESSWEEK (Mar. 21, 2018), https://goo.gl/Y7q2c6. A review of Clarke's previous business transactions shows a pattern remarkably similar to Mission Coal: "acquire a legitimate company, leverage that company in order to take in substantial funds, pay those funds (under the guise of 'management' or purportedly valid fees) to himself or other entities he controls, default on the acquired company's debts, delay or simply ignore payments to creditors, and leave the former entity in ruins or bankruptcy." [DE Compl. (defined below) ¶ 6].

3. In the months and years leading up to Mission Coal's formation, there were numerous allegations surrounding instances of self-dealing by its owners, below-market coal sales to affiliates, owner distributions and other transfers to affiliates and insiders which have robbed Mission Coal of cash flow and its ability to turn a profit despite, arguably, one of the better coal markets in recent years.

4. Perhaps most egregiously, the Committee has information and belief that Mr. Clarke sold his stock and other interest in Mission Coal in the days leading up to the Petition Date.

5. As detailed below, the long list of alleged malfeasance by the Principals and questionable transactions by the Debtors and their predecessors are identified in litigation

pending in Delaware initiated by Cleveland-Cliffs, Inc. All potentially fraudulent transfers and value-destructive behavior identified in the Delaware Litigation (defined below) should be examined in detail by the Committee. In addition, the Committee should investigate whether other additional transactions or transfers occurred that were not identified in the Delaware Litigation or since Mission Coal's formation. The possibility of numerous avoidance actions coupled with the Debtors' gross mismanagement and insider domination of certain of the Debtors' operational decision-making (including facts surrounding the Second Lien Loans [defined below] by an entity with substantial insider ownership) demonstrate the necessity of having the Committee investigate exactly these types of insider transactions. The Committee, as an independent party and a fiduciary for all unsecured creditors, is well-equipped to investigate the types of issues addressed in this Motion, as it is customary for a committee to investigate exactly these types of insider transactions.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

7. The Committee consents to the entry of a final order in connection with this Motion if it is determined that the Court, absent the consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

BACKGROUND

8. The potentially fraudulent transfers made by the Debtors, including the sale of coal to an affiliated company below market price, transfers made to affiliated companies with no consideration received in return, and false management fees, are the subject of a lawsuit filed by Cleveland-Cliffs Inc. ("Cliffs") in Delaware state court (the "Delaware Litigation") against Seneca Coal Resources, LLC ("Seneca"), the Principals, Lara Natural Resources, LLC ("Lara Natural Resources"), and Iron Management II, LLC ("Iron Management II") ("Iron Management" and along with Seneca, the Principals, and Lara Natural Resources, the

"Defendants").[2] The Delaware Litigation has not been adjudicated, and the Committee has not been privy to any of the discovery conducted in such matter. The severity of the allegations set forth below alone give weight to the Committee's argument that there needs to be a truly unbiased investigation on the potential fraudulent transfers.

a. The Delaware Litigation

9. At the time the Delaware Litigation was filed, Seneca was majority-owned by Iron Management II and Lara Natural Resources, and its controlling members were Kenneth McCoy, Jason McCoy, and Thomas Clarke, with Charles Ebetino as a minority shareholder. [DE Compl. ¶ 19]. At that time, Lara Natural Resources' sole members were Thomas and Ana Clarke, and Iron Management II's majority members were Kenneth and Jason McCoy. [DE Compl. ¶¶ 25-26].

10. Seneca is now a subsidiary of Mission Coal.

11. Mission Coal was created in January 2018, and at that time, Seneca's assets (and those of the other affiliated companies) were transferred to it. [DE Compl. ¶¶ 95, 97]. Currently, through Iron Management II and Iron Management III, LLC ("Iron Management III"), Kenneth McCoy and Jason McCoy own the majority of Mission Coal Company (57.7%). Its other owners are Charles & Elizabeth Ebetino (through ENECo, Inc.) (15.107%), Michael Zervos (15.107%), Mark Bartoski (4.532%), and Robert McAtee (7.553%). Lara Natural Resources is now owned by Kenneth and Jason McCoy. Currently, Mission Coal owns the majority of Seneca (66.195%), and Lara Natural Resources owns the rest. Seneca in turn owns Seneca North American Coal, LLC (fka Cliffs North America Coal, LLC DE), which has five subsidiaries: Beard Pinnacle, LLC; Oak Grove Resources, LLC; Pinnacle Mining Company, LLC; Oak Grove Land Company, LLC; and Pinnacle Land Company, LLC.

[2] This action was originally filed by Cliffs in the United States District Court for the Northern District of Ohio on December 20, 2016. It was transferred by that court on May 12, 2017 to the District of Delaware. That court dismissed the case for lack of diversity jurisdiction, and it was refiled by Cliffs in Delaware state court on May 10, 2018. The publicly available complaint filed in Delaware state court is attached hereto as **Exhibit C** (the "Delaware Complaint" or "DE Compl.").

12. The Delaware Litigation[3] stems from the December 2015 sale of two Cliffs mines to Seneca. [DE Compl. ¶¶ 31-37]. To consummate this sale, Seneca assumed all the liabilities of the mines, including all workers' compensation obligations, agreed to perform certain post-closure requirements, and Seneca agreed to make certain quarterly payments to Cliffs based on coal sales. Seneca never fulfilled any of these obligations to Cliffs, instead making cash transfers to affiliated companies and engaging in other fraudulent transfers, prompting Cliffs to sue Seneca for RICO violations, fraudulent conveyance, common law conspiracy, and breach of contract. [DE Compl. ¶¶ 37-40].

b. Sale of Coal Below Market Price

13. The Delaware Litigation revealed Seneca's sale of coal below market prices, benefitting its affiliate while rendering it unable to pay back its creditors. Under a certain Override Right Agreement, Seneca was required to provide Cliffs with quarterly statements that listed the quality of coal sold per quarter and the average sales price per ton for the coal. [DE Compl. ¶ 47]. These reports show that, among other things, Seneca sold coal to its affiliate on nearly 50 occasions at a price substantially below market rates. [DE Compl. ¶ 53].

c. Defendants' Use of Seneca Funds for Their Personal Benefit

14. The Delaware Litigation outlines the plan and conspiracy among the Principals to use Seneca as their personal ATM rather than paying their creditors. [See DE Compl. ¶ 59]. Specifically, it references an email sent by Thomas Clarke on December 18, 2015 to Jason and Kenneth McCoy in which Clarke referred to a bridge loan that Seneca had obtained as a "blessing" and in which he further stated that this loan would allow them to "all pay down our debt . . . . both corporately and personally." [DE Compl. ¶ 59].[4] Soon afterwards, they began transferring money from Seneca to the Principals and their companies. [DE Compl. ¶ 64]. On

[3] Given that the above captioned bankruptcy matters were recently filed, it remains unclear how the automatic stay will impact the Delaware Litigation, given that the Principles are named defendants in the Delaware Litigation.

[4] This email is attached to the Delaware Complaint as an exhibit; however, the complaint was filed under seal and certain portions, including most of the exhibits in their entirety, are redacted. Thus, the Committee has not yet been able to review these relevant documents.

December 24, 2015, Seneca transferred $50,000 to Lara Natural Resources. [DE Compl. ¶ 64]. On December 30, 2015, Seneca transferred $2.3 million to ERP Compliant Fuels, LLC, an affiliate owned by Thomas Clarke. [DE Compl. ¶ 65].

15. On January 5, 2016, Thomas Clarke, as a representative for Lara Natural Resources, and Jason McCoy, as representative for Iron Management II, agreed in a phone conversation to transfer equal amounts of $1 million of Seneca assets for their personal benefit.[5] [DE Compl. ¶ 66]. That same day, Seneca wired $1 million to Lara Natural Resources and $1,050,000 to Iron Management II (the extra $50,000 to Iron Management II was made to equalize the previous $50,000 transfer to Lara Natural Resources on December 24, 2015). [DE Compl. ¶ 66]. These transfers were made without adequate consideration or equivalent value, and were made to insiders. [DE Compl. ¶ 68]. This money was not used for any legitimate business purpose; "[i]nstead, Kenneth and Jason McCoy evenly split the $1,050,000 transferred to Iron Management. Kenneth McCoy moved his half directly into his personal bank account; Jason McCoy used some or all of his half to settle a personal debt with a friend. Similarly, the other $1,050,000 was transferred to Lara Natural Resources, whose account is controlled by Thomas and Ana Clarke. The Clarkes used these funds to cover personal expenses." [DE Compl. ¶ 67].

16. Seneca continued to make fraudulent transfers. On January 7, 2016, it made a "loan" transfer to Clarke's ERP Compliant Fuels, LLC for $1 million, and on January 12, 2016, Seneca made two more "loan" transfers—a $2 million transfer to ERP Federal Mining Co. and a $1 million transfer to ERP Environmental Fund, Inc., both owned in part by the Principals and/or their affiliated entities. [DE Compl. ¶¶ 70-71]. Seneca also made a $300,000 transfer to ERP Environmental Fund, Inc. on February 3, 2016, and a $300,000 transfer to Iron Management II on February 9, 2018. [DE Compl. ¶¶ 74, 76]. On February 24, 2016, Seneca transferred $31,923.18 to Lara Natural Resources. [DE Compl. ¶ 76].

[5] This phone conversation was memorialized in a January 5, 2016 email, attached to the Delaware Complaint as an exhibit, and also redacted in its entirety.

17. In April 2016, Seneca transferred $500,000 to ERP Mineral Reserves, LLC; ERP Mineral Reserves in turn moved the $500,000 to Iron Group (an entity that pays salaries to those associated with Iron Management II). [DE Compl. ¶ 81]. This was done to artificially improve Iron Group's finances, so that it could secure a $900,000 loan that would be used to purchase a helicopter. [DE Compl. ¶ 81].[6]

18. Additionally, several internal emails among the Principals confirmed their on-going scheme to cause the transfer of Seneca assets for their personal benefit.[7] [DE Compl. ¶¶ 82-83]. The "loans" from Seneca were used to pay off individual debts, personal vacations, private jet travel, clothing allowances, and other personal expenses of the Principals. [DE Compl. ¶ 101].

d. Fabricated Management Fees

19. As alleged in the Delaware Litigation, Jason McCoy and representatives from ERP Compliant Fuels, LLC discussed additional transfers from Seneca to both Lara Natural Resources and Iron Management II under the guise of so-called "management fees." [DE Compl. ¶ 72]. Seneca and the Principals set no dollar amount based on any negotiated terms, and instead simply agreed to transfer money on a monthly basis to their individual companies. [DE Compl. ¶ 73]. On January 29, 2016, Seneca transferred $70,000 to Iron Management and $116,000 to Lara Natural Resources for concocted "management fees." [DE Compl. ¶ 73]. These were allegedly to compensate these entities for Seneca's use of their employees; however, these two entities do not have any full-time employees other than the Principals. [DE Compl. ¶ 73]. Thus, in reality, these "fees" were not for value, nor for any pre-arranged debt or bargained-for services. [DE Compl. ¶ 73].

20. On November 8, 2016, Seneca paid a $31,923.18 "management fee" to Lara Natural Resources with the Defendants' understanding that $25,000 would be redirected to Ana

[6] Correspondence from Jason McCoy outlining this plan is attached to the Delaware Complaint as an exhibit, but is also redacted in its entirety.

[7] These emails are attached to the Delaware Complaint as exhibits, but are also redacted in their entirety.

Clarke. [DE Compl. ¶ 84]. Between December 5 and December 20, 2016, Seneca moved $3.6 million to Seminole Coal Resources, LLC ("Seminole"), ERP, and ERP's affiliate Federal Mining Complex, for no consideration.

21. Seneca continued to make monthly "management fee" payments between $20,000 and $30,000 to Iron Management II and Lara Natural Resources through 2017. [DE Compl. ¶ 80].[8]

e. Additional Financial Transactions Worthy of Investigation

22. Cliffs filed its initial complaint in the Northern District of Ohio on December 20, 2016, and sought expedited discovery. [DE Compl. ¶ 89]. In response, the Principals sent Cliffs declarations admitting to the transfers to Lara Natural Resources and Iron Management in December 2015 and January 2016, as well as to the payment of the "management fees." [DE Compl. ¶ 91]. The declarations also promised that if a transfer by Seneca was contemplated in the future, Defendants would provide thirty days' written notice to Cliffs prior to the transfer. [DE Compl. ¶ 92]. Defendants quickly breached that promise, and unbeknownst to Cliffs, made 60 transfers to affiliates for tens of millions of dollars from January 12, 2017 to June 20, 2017.[9] [DE Compl. ¶¶ 92-93].

23. On May 12, 2017, the Cliffs litigation was transferred to the District Court for the District of Delaware. While the Cliffs litigation was pending, in June 2017, Seneca obtained a $17.255 million secured loan from Bay Point Advisors ("Bay Point") that was later refinanced. Shortly thereafter, in July 2017, there was a roof fall at the Oak Grove mine.

f. Creation of Mission Coal and Subsequent Financial Transactions

24. In January 2018, Defendants created Mission Coal and restructured Seneca to be a subsidiary of Mission Coal. [DE Compl. ¶¶ 95, 97]. Since then, Mission Coal has been the vehicle for further fraudulent activity. To perform the corporate restructuring, Defendants used

[8] A chart of these transfers is attached to the Delaware Complaint as an exhibit, but is also redacted in its entirety.

[9] Records of these transfers are attached to the Delaware Complaint as exhibits, but are also redacted in their entirety.

proceeds from a loan secured by Seneca's assets. [DE Compl. ¶ 96]. However, instead of going to Seneca, some of the loan funds went to Mission Coal, and some were used to pay off a note to Thomas Clarke. [DE Compl. ¶¶ 96-97]. Mission Coal did not use any of the loan proceeds to pay debts owed to Cliffs or other creditors. [DE Compl. ¶ 138].

25. Further investigation of the circumstances surrounding the formation of Mission Coal and what has occurred since formation is needed as well to fully evaluate potentially voidable transactions.[10]

26. In the days leading up to the Petition Date, the Debtors hired two "independent directors." The Committee anticipates that the Debtors will seek to have the independent directors, with the help of Debtors' counsel, lead the Debtors' investigation of the pre-petition transactions involving the Principals, and will argue that it is the Debtors' obligation to undertake such an investigation. The Committee has seen this strategy employed before in unrelated chapter 11 cases. One cannot expect the independent directors to be able to examine the potentially fraudulent transfers involving the Principals with an independent lens, especially if they will be advised by Debtors' counsel. By contrast, the Committee can, and is prepared, to continue its truly unbiased investigation on the potential fraudulent transfers, and can report back to the Court on the investigation's results in a matter of weeks.

g. The Bankruptcy Cases

27. On October 14, 2018 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Alabama (the "Court"). Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtors continue to operate their businesses and properties as debtors-in-possession. No trustee or examiner has been appointed in these cases.

[10] Mission Coal also wholly owns Seminole. Seminole's assets include operating assets from the bankruptcy estate of Walter Energy, Inc., which ERP acquired on February 1, 2016. Seminole, in turn, owns two subsidiaries: Seminole Alabama Mining Complex, LLC and Seminole West Virginia Mining Complex, LLC.

28. On October 25, 2018, the Bankruptcy Administrator appointed the nine-member Committee. [Docket No. 147]. The Committee convened and selected counsel on October 30, 2018.

h. The Debtors' Prepetition Capital Structure

29. As of the Petition Date, the Debtors state they have approximately $175 million in total unfunded debt obligations consisting of $104 million owed under a certain first lien credit agreement by and among Mission Coal, as borrower, Lara Natural Resources, LLC as a Loan Party (a non-debtor), Delaware Trust Company, as Administrative Agent, and the First Lien Lenders (the "First Lien Loans" or "First Lien Credit Agreement") and $71 million owed under the Second Lien Credit Agreement by and among Mission Coal, Seminole Coal Resources, LLC, Seneca Coal Resources, LLC, collectively as the borrowers and the guarantors parties thereto, and Second Lien Lenders (the "Second Lien Loans" or "Second Lien Credit Agreement").

30. Based on the Committee's limited, preliminary review, it appears there may be grounds for asserting significant avoidance claims against parties, including the First Lien Lenders and the Second Lien Lenders (collectively, the "Prepetition Secured Parties") which could provide substantial recoveries to general unsecured creditors. Additionally, there appears to be grounds to recharacterize or equitably subordinate the validity and priority of the Second Lien Loans based upon the insider ownership and questionable conduct of the certain Second Lien Lenders.

31. Moreover, the Committee has not yet had the opportunity to investigate whether the Prepetition Secured Parties have properly perfected their interest in any of the prepetition collateral. After investigation, the Committee may determine that certain of the Prepetition Secured Parties' liens are not properly perfected, thereby uncovering substantial sources of value recoverable through avoidance actions.

RELIEF REQUESTED

32. Pursuant to Bankruptcy Rule 2004, the Court should authorize the issuance of subpoenas/document requests to the 2004 Recipients in substantially the form and manner set

forth in the Proposed Order attached hereto as **Exhibit A**, and the 2004 Document Requests, which are attached hereto as **Exhibit B**.

33. Moreover, the Committee needs to be informed in short order to meaningfully participate in these seminal case events. As a fiduciary for all unsecured creditors, the Committee is granted broad statutory powers to, among other things, "investigate the acts, conduct, assets and liabilities and financial condition of the debtor, . . . and any other matter relevant to the case or to the formulation of a plan." 11 U.S.C. §1103(c)(2).

34. While the Debtors have produced certain documents related to the Delaware Litigation and the Debtors, given the nature of the numerous allegations surrounding instances of self-dealing by the Debtors' Principals, below-market coal sales to affiliates, owner distributions, and other transfers to affiliates and insiders, the Committee believes that pursuant to its duties and in an effort to investigate any possible avoidance actions, including fraudulent transfers, this Motion is necessary and appropriate.

35. The examination of the 2004 Recipients and the 2004 Document Requests will inform whether, and to what extent, the 2004 Recipients may have (i) breached any fiduciary duties; (ii) made or received transfers that may constitute fraudulent transfers or preferences; (iii) coordinated their actions; and/or (iv) breached any covenant of good faith and fair dealing. Moreover, the documents in the possession and/or control of the 2004 Recipients will help the Committee determine whether any causes of action may have arisen out of the Second Lien Loans.

36. Pursuant to Bankruptcy Rule 2004, the 2004 Recipients should be ordered to appear for examination by the Committee as specified in the Proposed Order attached as **Exhibit A**.

37. Also pursuant to Bankruptcy Rule 2004, the Court should authorize the issuance of subpoenas/document requests to the 2004 Recipients in substantially the form and manner set forth in the Proposed Order and the 2004 Document Requests, which are attached hereto as **Exhibit B**.

38. Until the 2004 Recipients appear for examination by the Committee and the 2004 Recipients produce the documents requested by the 2004 Document Requests, the Committee will not be able to fully discharge its fiduciary duty to all creditors by investigating potential claims and causes of action, including claims and causes of action against the Principals and Prepetition Secured Parties.

REQUESTED DISCOVERY

39. The Committee respectfully submits that sufficient cause exists for the Court to authorize the issuance of subpoenas for the 2004 Recipients to appear for examination as detailed in the Proposed Order attached as **Exhibit A**, and to produce the 2004 Document Requests on an expedited basis in order for the Committee to investigate whether there are grounds for potential avoidance actions and other causes of action. The Committee seeks information regarding the topics and subject matters set forth in **Exhibit B** attached hereto.

40. In particular, the Committee seeks information about the numerous allegations surrounding instances of self-dealing by the Principals, below-market coal sales to Mission Coal's affiliates, the Principals' distributions, and other transfers to affiliates and insiders which have deprived Mission Coal of cash flow and its ability to turn a profit despite, arguably, one of the better coal markets in recent years.

41. Discovery is appropriate for a number of independent reasons, including, without limitation: (i) the existence of potential avoidance actions for a bankruptcy estate with excessive debt and ownership/management teams that are incapable of operating the Debtors' business in good faith; and (ii) the extent, nature, validity and priority of the Second Lien Loans and whether these loans should be recharacterized or equitably subordinated in light of the insider ownership and questionable conduct of such parties; and (iii) the effort of the Debtors and their "independent board members" to forestall the Committee's investigation efforts by performing their own cursory review. These circumstances require that the 2004 Recipients not delay the Committee's efforts to obtain necessary information critical to the Committee's ongoing investigation.

42. Each request in the 2004 Document Requests seeks information concerning the acts, conduct, property, liabilities, and/or financial condition of the Debtors, or matters affecting the administration of the Debtors' estates. As a result, the 2004 Document Requests fall squarely within the scope of discovery permissible under Bankruptcy Rule 2004. The relief requested herein should be granted to permit the Committee to adequately investigate claims against the Debtors' estates and prevent further dissipation of assets. Accordingly, the Committee respectfully submits that the Motion should be granted, and the Committee be authorized to conduct the Bankruptcy Rule 2004 discovery requested herein on an expedited basis.

BASIS FOR RELIEF

43. The facts and circumstances outlined above demonstrate that good cause exists to allow the Committee to pursue the requested Bankruptcy Rule 2004 discovery in order to aid the Committee's investigation into potential causes of action. The examination of the 2004 Recipients and the 2004 Document Requests are intended to provide a more complete picture of the specific conduct of the 2004 Recipients that is not otherwise available to the Committee, and will provide the requisite facts needed to determine whether any potential causes of action exist and should be pursued.

44. As previously stated, the Committee is a fiduciary for all unsecured creditors. Thus, the Committee is granted broad statutory powers to, among other things, "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor . . . and any other matter relevant to the case or to the formulation of a plan." 11 U.S.C. § 1103(c)(2). To permit the Committee to exercise its investigative powers, Bankruptcy Rule 2004 provides that "[o]n motion of any party in interest, the court may order" the production of documents. Fed. R. Bankr. P. 2004(c).

45. Discovery under Bankruptcy Rule 2004 includes within its scope, *inter alia*, any matter that may relate to the property and assets of the estate; the financial condition of the debtor; and any matter that may affect the administration of a debtor's estate. See Fed. R. Bankr. P. 2004(b); see also In re Teleglobe Commc'ns Corp., 493 F.3d 345, 354 n.6 (3d Cir. 2007)

(Rule 2004 allows parties with an interest in the bankruptcy estate to conduct discovery into matters affecting the estate); Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 564-65 (3d Cir. 2003) ("creditors' committee may certainly assist a debtor in locating property under Bankruptcy Rule 2004"); In re Wash. Mut., Inc., 408 B.R. 45, 50 (Bankr. D. Del. 2010) ("[t]he purpose of the examination is to enable the trustee to discover the nature and extent of the bankruptcy estate."); In re Johns-Manville Corp., 42 B.R. 362, 364 (S.D.N.Y. 1984) ("The examination of witnesses having knowledge or the debtor's acts, conduct, liabilities, assets, etc. is [] proper"). Bankruptcy Rule 2004 affords **both debtors and creditors the broad rights of examination of a debtor's or third-party's records**. See Snyder v. Soc'y Bank, 181 B.R. 40, 41-42 (S.D. Tex. 1994) (emphasis added) (citing Cameron v. United States, 231 U.S. 710, 716 (1914)).

46. Indeed, the scope of inquiry under Bankruptcy Rule 2004 is broad because "[t]he purpose of a Rule 2004 examination is to assist a party in interest in determining the nature and extent of the bankruptcy estate, revealing assets, examining transactions and assessing whether wrongdoing has occurred." In re Recoton Corp., 307 B.R. 751, 755 (Bankr. S.D.N.Y. 2004). This broad inquiry extends to third parties "[b]ecause the purpose of the Rule 2004 investigation is to aid in the discovery of assets, any third party who can be shown to have a relationship with the debtor can be made subject to a Rule 2004 investigation." In re Ionosphere Clubs, Inc., 156 B.R. 414, 432 (S.D.N.Y. 1993), aff'd, 17 F.3d 600 (2d Cir. 1994); see also In re Mittco, Inc., 44 B.R. 35, 36 (Bankr. D. Wis. 1984) ("[w]hen there is a showing that the purpose of the examination is to enable a party to probe into matters which may lead to the discovery of assets by examining not only the debtor, but also other witnesses, such inquiry is allowed"); In re Wilcher, 56 B.R. 428, 433 (Bankr. N.D. Ill. 1985) (Rule 2004 examination "may extend to creditors and third parties who have had dealings with the debtor"). This is because "[t]he clear intent of Rule 2004 . . . is to give parties in interest an opportunity to examine individuals having knowledge of the financial affairs of the debtor in order to preserve the rights of creditors." In re GHR Cos., Inc., 41 B.R. 655, 660 (Bankr. D. Mass. 1984).

47. Furthermore, even in instances where estate representatives try to ascertain whether or not to pursue estate claims, Bankruptcy Rule 2004 is recognized as a proper pre-litigation device that can uncover facts and circumstances that may demonstrate whether a debtor's estate holds a claim against a third party and the strength of any such claim. In fact, "[o]ne of the primary purposes of a Rule 2004 examination is as a pre-litigation device." Wash. Mut., 408 B.R. at 53. Similarly, as noted in Bennett Funding Group, Bankruptcy Rule 2004 "is properly used as a pre-litigation device to determine whether there are grounds to bring an action." Bennet Funding, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996); see also, In re Blitz U.S.A., Inc., Case No. 11-13603 (PJW) (Bankr. D. Del. June 12, 2012); In re Cynergy Data, LLC, Case No. 09-13038 (KG) (Bankr. D. Del. April 21, 2010); In re Amp'd Mobile, Inc., Case No. 07-10739 (BLS) (Bankr. D. Del. Aug. 5, 2008) (granting Rule 2004 request for investigation into claims for potential improper use and/or conversion of intellectual property); In re Rosenberg, 303 B.R. 172, 175 (B.A.P. 8th Cir. 2004) (use of Rule 2004 to investigate potential claims against the debtor's employer permitted where the claim is an asset of the estate); In re Hughes, 281 B.R. 224, 226 (Bankr. S.D.N.Y. 2002) (rejecting argument that a subpoena issued against an accounting firm seeking the production of documents was improper because it was primarily sought for the purpose of investigating potential claims that the debtor may have against the accounting firm).

48. As set forth herein, there are numerous allegations against the Principals related to transfers and other dealings which could have a significant impact on the Mission Coal bankruptcy estates. Accordingly, the Committee's Motion seeking authorization to issue subpoenas for the examination of the 2004 Recipients and the production of documents by the 2004 Recipients should be granted.

RESERVATION OF RIGHTS

49. The Committee reserves all rights to serve additional requests for documents or examinations in the course of its investigation, pursuant to Bankruptcy Rule 2004 or otherwise,

and to propound discovery in connection with this matter and/or any other matter that may arise in these cases.

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CONCLUSION

WHEREFORE, the Committee respectfully requests the Court grant the Motion and enter the Proposed Order attached hereto as **Exhibit A**, and grant the Committee such further relief as is just and appropriate.

Dated: November 12, 2018

BAKER DONELSON BEARMAN CALDWELL & BERKOWITZ, P.C.

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