

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF KENTUCKY

IN RE: CHAPTER 11  
LICKING RIVER MINING, LLC, *et al.* CASE NO. 14-10201  
DEBTORS IN POSSESSION (ASHLAND, LONDON, &  
LEXINGTON DIVISIONS)  
JOINTLY ADMINISTERED

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IN RE: CHAPTER 11  
HARLAN COUNTY MINING, LLC CASE NO. 14-52501  
OAK HILL COAL, INC. CASE NO. 14-52502  
SANDLICK COAL COMPANY, LLC CASE NO. 14-52503  
U.S. COAL MARKETING, LLC CASE NO. 14-52504  
(LEXINGTON DIVISION)  
DEBTORS IN POSSESSION JOINT ADMINISTRATION  
APPLICATION PENDING

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**MOTION FOR ORDER AUTHORIZING ADDITIONAL DEBTORS TO EMPLOY  
NIXON PEABODY AS COUNSEL**

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Harlan County Mining, LLC, Oak Hill Coal, Inc., Sandlick Coal Company, LLC, and U.S. Coal Marketing, LLC, as debtors and debtors in possession (collectively, the “Additional Debtors”), and Licking River Resources, Inc., Licking River Mining, LLC, S. M. & J., Inc., J.A.D. Coal Company, Inc., Fox Knob Coal Co., Inc., and U.S. Coal Corporation, as jointly-administered debtors and debtors in possession (collectively, the “Jointly-Administered Debtors,” and together with the Additional Debtors, the “Debtors”), by counsel, and pursuant to 11 U.S.C. §§ 327(a) and 328(a) of Title 11 of the United States Code (the “Bankruptcy Code”) and Rule 2014 and 6003 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), hereby move the Court for an order authorizing them to employ Nixon Peabody LLP

(“Nixon Peabody”) as their bankruptcy counsel, effective as of the commencement of the Additional Debtors’ bankruptcy cases (the “Motion”).

### **JURISDICTION AND VENUE**

1. On May 22, 2014, an involuntary petition seeking relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”) was filed against Licking River Mining, LLC (“LR Mining”). On May 23, 2014, involuntary petitions seeking relief under Chapter 11 of the Bankruptcy Code were filed against Licking River Resources, Inc. (“LRR”) and Fox Knob Coal Co., Inc. (“Fox Knob”). On June 3, 2014, an involuntary petition seeking relief under Chapter 11 of the Bankruptcy Code was filed against S. M. & J., Inc. (“SM&J”). On June 4, 2014, an involuntary petition seeking relief under Chapter 11 of the Bankruptcy Code was filed against J.A.D. Coal Company, Inc. (“JAD”).<sup>1</sup> On June 10, 2014, an involuntary petition seeking relief under Chapter 11 of the Bankruptcy Code was filed against U.S. Coal Corporation (“U.S. Coal”). The foregoing involuntary petitions are collectively referred to as the “Involuntary Petitions,” and the dates upon which the Involuntary Petitions were filed are collectively referred to as the “Commencement Dates.”

2. On June 12, 2014, the Court entered an order for relief in each of the Subsidiary Debtors’ bankruptcy cases (the “Subsidiary Relief Date”). On June 27, 2014, the Court entered an order for relief in U.S. Coal’s bankruptcy case (the “U.S. Coal Relief Date,” and together with the Subsidiary Relief Date, the “Relief Dates”).

3. On June 13, 2014, the Court entered an Order [Doc 91] directing the joint administration of the Subsidiary Debtors’ bankruptcy cases. On June 27, 2014, the Court entered an Order [U.S. Coal Doc 48] directing that the bankruptcy case of U.S. Coal be jointly

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<sup>1</sup> LR Mining, LRR, Fox Knob, SM&J, and JAD are collectively, referred to as the “Subsidiary Debtors”

administered with the Subsidiary Debtors' bankruptcy cases. Contemporaneously herewith, the Debtors are filing a motion requesting that the Additional Debtors' bankruptcy cases be jointly administered with the Jointly-Administered Debtors' bankruptcy cases.

4. No trustee or examiner has been appointed in the Chapter 11 cases of any of the Debtors. The Official Committee of Unsecured Creditors (the "Committee") was appointed in the Jointly-Administered Debtors' bankruptcy cases on June 18, 2014 [*See* Doc 145].

5. On September 15, 2014, the Committee filed a Motion [Doc 468] requesting, among other things, that the Court compel the Jointly-Administered Debtors to file Chapter 11 petitions for the Additional Debtors, which are subsidiaries of U.S. Coal.

6. On October 27, 2014, the Court entered an Order [Doc 574] which authorized, compelled, and directed the Jointly-Administered Debtors to file Chapter 11 petitions for the Additional Debtors. Contemporaneously with the filing of this Motion, voluntary Chapter 11 petitions were filed for each of the four Additional Debtors as directed by the Court.

7. The Debtors all continue to operate their businesses and manage their properties as debtors in possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.

8. This Court has jurisdiction over all of the Debtors' Chapter 11 cases under 28 U.S.C. §§ 157 and 1334. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A).

9. The Debtors all maintain their principal places of business in Fayette County, Kentucky. Accordingly, venue for all of the Debtors' Chapter 11 cases is proper in this District under 28 U.S.C. §§ 1408 and 1409.

### **BACKGROUND**

10. Information regarding the Debtors' businesses and operations can be found in the

Declaration of John Collins in Support of the Debtors' First Day Pleadings [Doc 13] and the Declaration of John Collins Regarding the Motion of the Official Committee of Unsecured Creditors for an Order Compelling the Debtors to File Chapter 11 Petitions for Non-Debtor Subsidiaries [Doc 542], which are fully incorporated herein by reference.

### **PREVIOUS RELIEF**

11. Certain first-day motions were previously filed in the Jointly-Administered Debtors' Chapter 11 cases. Among the first-day motions filed by the Subsidiary Debtors was the Motion for Interim and Final Approval of Debtors' Application to Employ Nixon Peabody as their Counsel as of the Relief Date [Doc 25] which was subsequently joined by U.S. Coal [Doc 160] (together, the "Original NP Employment Applications"). The Court entered its Final Order [Doc 276] granting the Original NP Employment Applications on a final basis on July 11, 2014. By this Motion, the Debtors are simply seeking to employ Nixon Peabody to represent the Additional Debtors as well.

### **BASIS FOR RELIEF**

12. Pursuant to this Motion, the Debtors seek entry of an order authorizing the employment and retention of Nixon Peabody as attorneys for the Additional Debtors effective as of the Relief Date, pursuant to § 327(a) of the Bankruptcy Code, Bankruptcy Rules 2014(a) and 2016 and Local Rule 2014-1, and—to the extent required by the foregoing—consistent with the guidelines (the "Guidelines") adopted by the Executive Office for United States Trustees from time to time under 28 U.S.C. § 586(a)(3). Pursuant to § 328(a) of the Bankruptcy Code, the Debtors further request that the Court approve the retention of Nixon Peabody under a general retainer, as the Additional Debtors' attorneys, in accordance with Nixon Peabody's discounted hourly rates in effect at the time services are rendered and normal reimbursement policies.

13. The Debtors seek retention of Nixon Peabody as their attorneys pursuant to § 327(a), which provides that a trustee (or debtor or debtor in possession, by virtue of §§ 1101(1) and 1107(a)), subject to court approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title. 11 U.S.C. § 327(a).

14. The Debtors seek retention of Nixon Peabody under a general retainer pursuant to § 328(a) of the Bankruptcy Code, which provides that a debtor, subject to court approval, may employ or authorize the employment of a professional person under § 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. 11 U.S.C. § 328(a).

15. Bankruptcy Rule 2014(a) requires that an application for retention include: specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. Fed. R. Bankr. P. 2014.

### **BASIS FOR RELIEF**

#### **A. Nixon Peabody's Qualifications**

16. The Debtors have determined that it is necessary to engage attorneys with knowledge and experience in the area of bankruptcy reorganization. Such legal counsel will

enable the Debtors to carry out their duties in these Chapter 11 cases and to assist in the reorganization of their estates. The Debtors, therefore, propose to retain the law firm of Nixon Peabody as counsel in their chapter 11 cases.

17. The Debtors have selected Nixon Peabody as their attorneys because of the firm's knowledge of the Debtors' business and financial affairs and its extensive general experience and institutional knowledge, and, in particular, Nixon Peabody's recognized expertise with reorganizations under Chapter 11 of the Bankruptcy Code. Nixon Peabody has been actively involved in many of the largest Chapter 11 cases filed in the last 10 years. Nixon Peabody represents or has represented parties in recent cases such as: *In re Calpine Corp.*; *In re Delta Air Lines, Inc.*; *In re Eastman Kodak Co.*; *In re Exide Techs., Inc.*; *In re Saint Vincents Catholic Med. Ctr. of New York*; *In re WorldCom, Inc.*; *In re Global Crossing, Ltd, et al.*; *In re Ponderosa Pine Energy Partners, Ltd, et al.*; *In re Laurence, Scott and Electromotors Limited*; *In re Cedenco JV Australia Proprietary Ltd., et al*; *Cedenco Ohakune, et al.*; *In re Peninsula Hospital Center, et al.*; *In re Interfaith Medical Center, Inc.*; *In re Sound Shore Medical Center of Westchester, et al.*; *In re Amherst Computers*; *In re BankEast Corp.*; *In re CD Liquidation Co., LLC f/k/a Cynergy Data, LLC, et al.*; *In re Lyondell Chemical Company, et al.*; *In re Lehman Brothers Holdings Inc., et al.*; *In re South Bay Expressway, et al.*; *In re Gloucester Engineering Co., Inc.*; *In re Samson Manufacturing Corporation*; *In re Isaacson Steel* and many others.

18. In addition to their recognized expertise in complex Chapter 11 cases, Nixon Peabody is familiar with the Debtors' business and financial affairs, making the firm well qualified to provide the services required by the Debtors in connection with these Chapter 11 cases. Recently, Nixon Peabody was retained by the Debtors to provide analysis and advice with respect to a variety of restructuring alternatives available to the Debtors. Once it was determined

that the Debtors would seek relief under Chapter 11, the Debtors retained Nixon Peabody to represent them both in preparing for and administering the resulting Chapter 11 cases. In the weeks leading up to the Relief Date, Nixon Peabody was actively involved in all aspects of the Debtors' preparations.

19. The Debtors firmly believe that Nixon Peabody, because of its significant experience in Chapter 11 cases, is well qualified and uniquely situated to assist the Debtors in carrying out their duties under the Bankruptcy Code, and Nixon Peabody has stated its desire and willingness to act as bankruptcy counsel to the Debtors in these cases. Accordingly, the Debtors believe that they will be unduly prejudiced if they are forced to retain counsel other than Nixon Peabody in connection with the prosecution of these Chapter 11 cases.

**B. Scope of Services**

20. Subject to the order of this Court, the Debtors propose to employ Nixon Peabody to serve as the Additional Debtors' bankruptcy and restructuring counsel in these Chapter 11 cases, and in particular to render the following professional services:

- a. Advise the Additional Debtors with respect to their powers and duties as debtors in possession in the continued operation of their business and the management of their properties;
- b. Advise the Additional Debtors and take all necessary or appropriate actions at the Additional Debtors' direction with respect to protecting and preserving the Additional Debtors' estates, including the defense of any actions commenced against the Debtors, the negotiation of disputes in which the Additional Debtors are involved, and the preparation of objections to claims filed against the Additional Debtors' estates;

- c. Draft all necessary or appropriate motions, applications, answers, orders, reports, and other papers in connection with the administration of the Additional Debtors' estates on behalf of the Debtors;
- d. Represent the Additional Debtors in negotiations with all other creditors, and other parties in interest, including governmental authorities;
- e. Take all necessary or appropriate actions in connection with a plan or plans of reorganization and related disclosure statement(s) and all related documents, and such further actions as may be required in connection with the administration of the Additional Debtors' estates;
- f. Perform for, and advise the Additional Debtors (as applicable) as to, all other necessary legal services in connection with the Chapter 11 cases, including, without limitation, any general corporate legal services;
- g. Represent the Additional Debtors on matters relating to the assumption or rejection of executor contracts and unexpired leases;
- h. Advise the Additional Debtors with respect to general corporate, real estate, litigation, environmental, labor, regulatory, tax, and other legal matters which may arise during the pendency of these Cases; and
- i. Perform all other legal services that are necessary for the efficient and economic administration of these Cases;

provided, further, that the scope of services to be provided by Nixon Peabody will specifically include any general corporate legal services falling within the scope of services normally provided by general outside corporate counsel including the legal services required to consummate a going concern sale of substantially all of the Additional Debtors' assets.



21. In addition, by separate applications the Additional Debtors are also seeking to employ DelCotto Law Group PLLC as local counsel and GlassRatner Advisory & Capital Group as financial advisor.

22. Nixon Peabody will work closely with these other professionals that may be retained by the Debtors to prevent unnecessary or inefficient duplication of services, and will take whatever steps are necessary and appropriate to avoid any such unnecessary duplication.

23. Each of these firms works under the direction of the Debtors' management. The Debtors' senior management is committed to minimizing the duplication of services in order to reduce professional costs, among other things.

**C. Disinterestedness of Nixon Peabody**

24. To the best of the Debtors' knowledge, the partners, counsel, and associates of Nixon Peabody do not have any connection with, nor any interest adverse to, the Additional Debtors, their creditors, or any other party in interest, or their respective attorneys and accountants, except as set forth in the Drebsky Declaration. Nixon Peabody has fully informed the Additional Debtors of its ongoing representations as described in the Drebsky Declaration and the Debtors have consented to Nixon Peabody's continued representation of such entities in matters unrelated to these proceedings.<sup>2</sup>

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<sup>2</sup> Prior to the filing of the Involuntary Petitions it was anticipated that U.S. Coal and all of the affiliates would collectively file jointly administered voluntary chapter 11 cases. Nixon Peabody was accordingly initially engaged by U.S. Coal and all of its affiliates to proceed with such course of action. While Nixon Peabody does not believe that there was any conflict of interest or materially adverse interest in representing all of the entire U.S. Coal organization, in an abundance of caution Nixon Peabody withdrew as counsel to U.S. Coal and its related non-debtor affiliates with respect to any advice concerning a restructuring. Further, Nixon Peabody continues to represent U.S. Coal in certain litigations pending in New York regarding "put rights" claimed by several of U.S. Coal's junior creditors, in which those junior creditors argue that U.S. Coal should buy back some of their common stock and certain other claims relating to a purported management rights agreement, including in connection with counterclaims which have been asserted. In one of those actions, Nixon Peabody also represents JAD Coal Company, Inc. Nixon Peabody does not believe that any conflict exists as a result of this litigation as all of the Debtors' interests are commonly aligned.

25. Based upon the Drebsky Declaration, the Debtors submit that Nixon Peabody is a “disinterested person,” as such term is defined in § 101(14) of the Bankruptcy Code, as modified by § 1107(b).

26. Nixon Peabody has informed the Debtors that Nixon Peabody will conduct an ongoing review of its files and promptly supplement its disclosure to the Court in the event the circumstances change or new information is discovered from that presented in the Drebsky Declaration.

**D. Compensation**

27. Nixon Peabody intends to apply to the Court for allowances of compensation and reimbursement of out-of-pocket expenses incurred after the Relief Date in connection with these Chapter 11 cases on an hourly basis, subject to Court approval and in accordance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and further orders of this Court, and—to the extent required by the foregoing—consistent with the Guidelines.

28. Hourly rates for the Nixon Peabody attorneys with primary responsibility for this matter are:

- a. Dennis J. Drebsky (Partner – Financial Restructuring), \$995;
- b. Lee Harrington (Partner – Financial Restructuring), \$695;
- c. Christopher M. Desiderio (Associate – Financial Restructuring), \$615;
- d. Meghan K. McGuire (Associate – Commercial Litigation), \$420.

29. Other attorneys and paralegals will, from time to time, assist in the representation of the Debtors in connection with the Chapter 11 cases at the same hourly rates set for the above in the case of attorneys.

30. The Debtors believe that these rates are consistent with or below market rates for comparable services.

31. Nixon Peabody will maintain detailed records of actual and necessary costs and expenses incurred in connection with the legal services described above.

32. The Debtors understand that Nixon Peabody is customarily reimbursed for all expenses incurred in connection with the representation of a client in a given matter, including, but not limited to, photocopying services, printing, delivery charges, filing fees, postage and computer research time.

33. The Debtors submit that for all of the reasons stated in this Application and in the Drebsky Declaration, the retention of Nixon Peabody as the Additional Debtors' bankruptcy and restructuring counsel in these Chapter 11 cases is warranted. Further, as stated in the Drebsky Declaration, Nixon Peabody is a "disinterested person" within the meaning of § 101(14) of the Bankruptcy Code, as required by § 327(a) of the Bankruptcy Code, and does not hold or represent an interest adverse to the Debtors' estates, nor has any connection to the Debtors, their creditors or their related parties except as may be disclosed in the Drebsky Declaration.

34. Accordingly, the Debtors respectfully request that the Court authorize the retention of Nixon Peabody as counsel to the Additional Debtors.

**STATEMENT REGARDING U.S. TRUSTEE GUIDELINES**

35. As this Court is aware, the Executive Office for United States Trustees ("EOUST") recently adopted new Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases (the "Appendix B Guidelines"). By their terms, the Appendix B Guidelines "apply to the USTP's review of applications for compensation filed by attorneys in larger chapter 11 cases,"

and are intended as an update to the original Guidelines (the “Appendix A Guidelines”) adopted by the EOUST in 1996. The Appendix A Guidelines have been a part of this Court’s local procedures for years. In other Chapter 11 cases where it has been retained, Nixon Peabody has filed its fee applications in compliance with the Appendix A Guidelines.

36. Among other things, the Appendix B Guidelines ask attorneys in larger Chapter 11 cases to provide additional documentation and make significant new disclosures in connection with their retention under § 327 and compensation under § 330 of the Bankruptcy Code. As the Appendix B Guidelines themselves acknowledge, “the Guidelines do not supersede local rules, court orders, or other controlling authority,” and it remains to be seen how the Appendix B Guidelines will actually be incorporated into larger Chapter 11 cases.

37. The Debtors and Nixon Peabody intend to make a reasonable effort to comply with the U.S. Trustee’s requests for information and additional disclosures as set forth in the Appendix B Guidelines both in connection with this application and the interim and final fee applications to be filed by Nixon Peabody in the course of its engagement. It is the Debtors’ and Nixon Peabody’s intention to work cooperatively with the U.S. Trustee Program (the “USTP”) to address the concerns that prompted the EOUST to adopt the Appendix B Guidelines; however, in doing so, the Debtors and Nixon Peabody reserve all rights as to the relevance and substantive legal effect of the Appendix B Guidelines in respect of any application for employment or compensation in these cases that falls within the ambit of the Appendix B Guidelines.

WHEREFORE, the Debtors respectfully request that the Court enter an order granting the relief requested herein and such other and further relief as is just and proper.

Dated: November 4, 2014

LICKING RIVER MINING, LLC

By: /s/ John A. Collins

Title: CEO

LICKING RIVER RESOURCES, INC.

By: /s/ John A. Collins

Title: CEO

S. M. & J., INC.

By: /s/ John A. Collins

Title: CEO

FOX KNOB COAL CO., INC.

By: /s/ John A. Collins

Title: CEO

J.A.D. COAL COMPANY, INC.

By: /s/ John A. Collins

Title: CEO

U.S. COAL CORPORATION

By: /s/ John A. Collins

Title: CEO

HARLAN COUNTY MINING, LLC

By: /s/ John A. Collins

Title: CEO

OAK HILL COAL, INC.

By: /s/ John A. Collins

Title: CEO

SANDLICK COAL COMPANY, LLC

By: /s/ John A. Collins

Title: CEO

U.S. COAL MARKETING, LLC

By: /s/ John A. Collins

Title: CEO

Respectfully submitted,

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(UNDER PENDING APPLICATION)