UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: **PATRIOT COAL CORPORATION, *et al.*,** **Debtors.**	**Chapter 11** **Case No. 12-51502-659** **(Jointly Administered)**
PATRIOT COAL CORPORATION, *et al.*, **Plaintiffs,** **-against-** **PEABODY HOLDING COMPANY, LLC and PEABODY ENERGY CORPORATION,** **Defendants.**	**Adversary Proceeding** **No. 13-04204-659** **Hearing Date (if necessary):** **September 24, 2013 at 10:00 a.m.** **(prevailing Central Time)** **Hearing Location:** **Courtroom 7, North** **Re: ECF Nos. 3, 16**

REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION PURSUANT TO 11 U.S.C. § 105(a)

The Debtors respectfully submit this reply memorandum of law in further support of their motion for a preliminary injunction pursuant to 11 U.S.C. § 105 (the "**Motion**"),[1] seeking to enjoin enforcement of Peabody's Subpoena until the effective date of a confirmed plan of reorganization.

[1] Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Motion.

PRELIMINARY STATEMENT

Having propounded a Subpoena of massive scope upon the Debtors during the most crucial phase of their reorganization—even though the Lowe action has been pending for nearly a year—Peabody attempts to deflect an injunction by claiming that it presently seeks only a limited production of documents that can be made without unduly burdening the Debtors, and that the Debtors' evidence of burden amounts to mere "allegations." But the uncontroverted declaration of Patriot's Chief Financial Officer has established that enforcement of Peabody's Subpoena would require the Debtors to expend significant resources and to divert time, energy, and resources away from the plan confirmation process. The constraints of the Debtors' DIP Financing leave little room for error in the Debtors' sprint toward confirmation of a plan, and the Subpoena poses a threat to the entire reorganization.

Peabody offers no countervailing evidence, simply denying that compliance with its massive Subpoena would be expensive, contradicting Peabody's repeated insistence that its own efforts to comply with the less burdensome Rule 2004 discovery propounded upon it have required a substantial investment of time and effort into collection and review. Thus unable to meet the Debtors' evidence, Peabody attempts to cloud straightforward application of the well-settled standard governing the Motion and casts the relief the Debtors seek as "unprecedented." But these arguments cannot obscure the myriad cases—some cited in Peabody's own brief—in which bankruptcy courts enjoin third-party litigation that threatens to divert estate resources and imperil a debtor's ability to reorganize.

While the Debtors believe that Peabody's supposed emergent need for discovery in Lowe is unfounded, they are nevertheless willing to offer a limited, voluntary production of documents to Peabody to satisfy any legitimate need for discovery until the Debtors emerge. For all of these reasons, and for all of the reasons set forth in the Motion and accompanying Memorandum of Law, this Court should enjoin enforcement of Peabody's Subpoena until after the Debtors' plans of reorganization have become effective.

ARGUMENT

THE DEBTORS HAVE SHOWN THAT AN INJUNCTION IS NECESSARY TO AVERT A SIGNIFICANT THREAT TO THEIR REORGANIZATION

This Court should enjoin enforcement of Peabody's Subpoena because (1) Patriot's reorganization is likely to be successful;[2] (2) Patriot's ability to reorganize will face imminent and irreparable harm in the absence of an injunction; (3) the imminent, irreparable harm to Patriot in the absence of an injunction outweighs any prejudice Peabody will face from a delay in enforcing its Subpoena; and (4) the public interest in Patriot's successful reorganization weighs in favor of an injunction. See, e.g. Nev. Power Co. v. Calpine Corp. (In re Calpine Corp.), 365 B.R. 401, 409 (S.D.N.Y. 2007); In re Three Seas Realty II, L.L.C., No. 10-948, 2010 WL 2857598, at *4 (Bankr. N.D. Iowa July 19, 2010) (quoting In re Calpine, 365 B.R. at 409).

Such relief is not only not "unprecedented," as Peabody incorrectly claims, but it is in fact routine, as demonstrated by the numerous precedents in which courts have enjoined entire third-party actions when they threaten the reorganization:

- Lyondell Chem. Co. v. CenterPoint Energy Gas Servs. Inc. (In re Lyondell Chem. Co.), 402 B.R. 571, 595 (Bankr. S.D.N.Y. 2009) (enjoining creditors from suing debtor's parent) (cited in Peabody's Objection at ¶ 25).
- In re Calpine, 365 B.R. at 413–14 (staying litigation against the debtor's surety when discovery in that litigation threatened the debtor's reorganization) (cited in Peabody's Objection at ¶¶ 15, 30).

[2] Peabody does not dispute this element. (Objection of Peabody Energy Corporation and Peabody Holding Company, LLC to the Debtors' Motion for a Preliminary Injunction Pursuant to 11 U.S.C. § 105(a) [Dkt. No. 16] (herein, "**Peabody's Objection**" or "**Obj.**"), ¶ 30.) It is therefore conclusively established and weighs in favor of an injunction.

- Haw. Structural Ironworkers Pension Trust Fund v. Calpine Corp., No. 06-5358, 2006 WL 3755175, at *1 (S.D.N.Y. Dec. 20, 2006) (staying litigation against the debtor's directors when discovery in that litigation threatened the debtor's reorganization) (cited in Peabody's Objection at ¶ 15).

- In re United Health Care Org., 210 B.R. 228, 234–35 (S.D.N.Y. 1997) (enjoining claims against debtor's officers) (cited in Peabody's Objection at ¶ 25).

- Lahman Mfg. Co. v. First Nat'l Bank of Aberdeen (In re Lahman Mfg. Co.), 33 B.R. 681, 685 (Bankr. D.S.D. 1983) (staying action against debtor's principal shareholders and officers) (cited in Peabody's Objection at ¶ 12).

- Lane v. Philadelphia Newspapers, LLC (In re Philadelphia Newspapers, LLC), 423 B.R. 98, 106 (E.D. Pa. 2010) (staying actions against the debtors' employees when discovery in those actions threatened the debtors' reorganization).

- In re Adelphia Communications Corp., 302 B.R. 439, 452, 455 (Bankr. S.D.N.Y. 2004) (staying "deposition discovery" in an action regarding the debtors' directors and officers insurance policies where testimony of debtors' senior officers could threaten the debtors' successful reorganization).

Neither the fact that the Debtors have asked for the more limited relief of staying only enforcement of a single subpoena nor Peabody's obfuscation of the well-settled standard (by offering three separate "potentially applicable standards" (Obj. ¶ 13)) provides any reason for this Court to abandon the well-settled standard applicable to section 105 injunctions.[3] The standard set out above—including consideration of the debtors' "likelihood of successful reorganization" in lieu of success on the merits of underlying litigation—is applied by district and bankruptcy courts in and out of the Eighth Circuit, has been adopted by the United States Court of Appeals for the Ninth Circuit, and is set out in the leading bankruptcy treatise. In re Three Seas, 2010 WL 2857598 at *4 (quoting In re Calpine, 365 B.R. at 409); In re Lahman

[3] The six-factor test articulated in In re Residential Capital, LLC, 480 B.R. 529, 537, 539 (Bankr. S.D.N.Y. 2012) applies when a debtor has sought a stay of discovery under the court's inherent powers rather than by means of a section 105 injunction. Nonetheless, In re Residential Capital is instructive and weighs in favor of issuing an injunction here. Contrary to Peabody's contention, In re Residential Capital did not "amount[] to an analysis of the merits of modifying or quashing" discovery requests (Obj. ¶ 29), as Judge Glenn specifically noted "the scope of the requested discovery is something that must be resolved by the district court" and imposed a stay of discovery largely due to the burden on the Debtors' reorganization. 480 B.R. at 545.

Mfg., 33 B.R. at 684–85 ("In the bankruptcy context, the probability of success on the merits has been defined as the probability of a successful plan of reorganization." (citing In re Otero Mills, 21 B.R. 777 (Bankr. N.M. 1982)); accord Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.), 502 F.3d 1086, 1096 (9th Cir. 2007) ("In granting or denying [a section 105] injunction, a bankruptcy court must consider whether the debtor has a reasonable likelihood of a successful reorganization."); In re Philadelphia Newspapers, 423 B.R. at 106 (same); W.R. Grace & Co v. Chakarian (In re W.R. Grace & Co.), 386 B.R. 17, 33 (Bankr. D. Del. 2008) (same); see also 2 Collier on Bankruptcy (16th Ed. 2010) ¶ 105.03 (same). Peabody cites no case supporting its contention that there exists a different "Eighth Circuit Standard" for section 105 injunctions,[4] and even freely concedes that when a "debtor argues that the distraction prompted by the separate lawsuit would hurt the debtor's reorganization effort," courts apply the ordinary test for granting a preliminary injunction, "modified to replace the 'success on the merits element' with a 'likelihood of reorganization' element." (Obj. ¶ 30 (citing In re Calpine, 365 B.R. at 409).) This Court should reject Peabody's invitation to depart from these authorities and craft a new standard untethered to the purposes of a section 105 injunction.[5]

[4] The sole Eighth Circuit Court of Appeals decision Peabody cites merely recites the standards applicable to a preliminary injunction. Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981). The only other authority Peabody offers, Steaks to Go, Inc. v. Steak-Out Franchising, Inc. (In re Steaks to Go, Inc.), 226 B.R. 32 (Bankr. E.D. Mo. 1998), is inapposite here, because the debtors sought an injunction against a third party's suit for an injunction against the debtors' officers for their breach of covenants not to compete. As the debtors in that case were seeking relief that "may be available to [the officers] directly in their capacity as litigants"—i.e., opposing the injunction in the third-party litigation on the merits—inquiry into the merits of the third-party suit was logical. Id. at 34.

[5] Peabody's contention that this Court should prejudge a future, hypothetical motion to quash because "the Debtors are attempting to use the Automatic Stay effectively to quash the Subpoena" (Obj. ¶ 30) makes no sense. The Debtors are no more asking this Court to quash the Subpoena than the debtors in the numerous cases enjoining third-party proceedings were asking those courts to dismiss the third-party litigation on the merits. No case evaluating a section 105 injunction due to the burdens of discovery in third-party litigation requires the Debtors to argue the "likelihood of success" on the merits of opposing discovery rather than the likelihood of a successful reorganization.

A. The Cost and Distraction of Responding to Peabody's Subpoena Will Threaten the Reorganization.

Patriot's Chief Financial Officer, Jack Lushefski, has provided direct written testimony demonstrating that, if enforced, Peabody's Subpoena will threaten the reorganization by distracting key employees from the more pressing tasks of plan confirmation and by dissipating estate resources at a time when the estates can ill afford such an expenditure. (Lushefski Decl. ¶¶ 22–30.) Mr. Lushefski's statements are not mere lawyer's argument, but the declaration of a senior employee of the Debtors who is uniquely positioned to assess the limits of the Debtors' current operational and financial capacity. As such, the Debtors have shown that enforcement of Peabody's subpoena risks "imminent, substantial, and irreparable" threat to "the reorganization process," which even Peabody admits is the requisite standard. (See Obj. ¶ 15 (quoting In re Calpine, 365 B.R. 310).)[6]

Mr. Lushefski's testimony stands unrefuted and uncontested. Peabody does not, and cannot, counter Mr. Lushefski's statement that compliance with the Subpoena will distract the Debtors' management from the reorganization. Nor does Peabody attempt to refute that compliance with the Subpoena would "cost, at a minimum, hundreds of thousands of dollars, and cold potentially cost millions of dollars" and "require thousands of hours of labor."[7] (Lushefski

[6] The Debtors need not make this showing by "clear and convincing evidence," as Peabody contends, as the opinion reciting that standard was quoting its application to the exercise of a court's inherent equitable power "beyond these statutory powers under section 362 and section 105." See Nat'l Bank of Ark. v. Panther Mountain Dev., LLC (In re Panther Mountain Land Dev., LLC), 686 F.3d at 916, 926 (8th Cir. 2012) (quoting A.H. Robins Co. v. Piccinin, 788 F.2d at 994, 1003 (4th Cir. 1986)) (emphasis added). Whatever application such a test may have had in In re Panther Mountain—in which the debtors did not seek a section 105 injunction—the "clear and convincing" standard has no application here. Likewise, Peabody's citation to cases reciting that application of section 362 to automatically stay litigation against non-debtor requires "rare and unusual circumstances," is wholly irrelevant, as it ignores the distinction between a retrospective determination that the automatic stay applies to non-debtors—a ruling the Debtors do not seek here—with a prospective section 105 injunction. See, e.g., In re Panther Mountain, 686 F.3d at 926 (contrasting application of section 362 with a section 105 injunction subject to the "usual standards [and] procedures" for preliminary relief).

[7] Peabody's argument that "litigation expenses alone" may not merit an injunction (see Obj. ¶ 15 n.21 (citing E.E.O.C. v. Rath Packing Co., 787 F.2d 318, 325 (8th Cir. 1986))) is beside the point. Where the monetary
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Decl. ¶ 27.) Indeed, Peabody cannot assert that compliance with the Subpoena would not impose a massive burden upon the Debtors, given that Peabody has exhaustively argued that compliance with the narrower Rule 2004 subpoena served upon it is a time-consuming and costly "monumental process" (Hr'g Tr. 78:14, Aug. 20, 2013 (Mr. Newman)). Instead, Peabody argues that a different subpoena, narrow in scope and targeted to limited, already-produced materials would not impose such a heavy burden on the Debtors. (See Obj. ¶ 16.) But that hypothetical narrowed subpoena is not the one Peabody served, and not the one that the Debtors face if Peabody is not enjoined. The Federal Rules of Civil Procedure require that Peabody "take reasonable steps to avoid imposing undue burden or expense" upon the Debtors (see Fed. R. Civ. P. 45(c)(1)), not that the Debtors divine what exactly Peabody meant to request by its unduly burdensome Subpoena.

Had Peabody sought only responsive data from the Debtors' electronic data room and certain other collections of documents already produced in connection with other aspects of this case, this Motion would not have been necessary. Accordingly, the Debtors will agree to: (i) furnish an index of the data room, from which Peabody may request production of responsive, non-privileged material;[8] (ii) produce approximately 120,000 pages of documents already reviewed and produced to third parties; (iii) produce the minutes of the Debtors' Board of Directors and its committees. In exchange, the Debtors ask that Peabody agree to accept these

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burdens of third-party litigation are coupled with diverting efforts of the debtors' senior management away from reorganization towards third-party litigation, courts regularly issue an injunction. See, e.g., In re Calpine, 365 B.R. at 410, 412 (enjoining a suit against the debtor because the suit would impose "a significant burden and distraction of key employees" that would cause both "the restructuring and . . . the business . . . [to] . . . suffer" (citation omitted)).

[8] The Debtors cannot agree to provide Peabody blanket access to the data room because the data room contains documents with individually identifiable health information protected by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (see 42 U.S.C. § 1320d et seq.) and other regulations. Moreover, such documents are irrelevant to the litigation between Peabody and the UMWA.

materials in satisfaction of the Subpoena. Make no mistake: even this limited production will require an investment of time by the Debtors' management and an expenditure of estate resources for vendors and outside counsel and advisors, as it will require a review for responsiveness and privilege. But these burdens pose a lesser threat to the reorganization, in contrast to the imminent, irreparable harm to the Debtors that enforcement of the Subpoena would bring.

B. The Harm to the Debtors' Ability to Reorganize Merits an Injunction.

The magnitude of the harm from allowing Peabody to enforce its Subpoena is apparent. By contrast, if enjoined from enforcing it, Peabody will only be delayed from forcing the Debtors to bear the Subpoena's burdens during the next few months, the most critical phase of the Debtors' reorganization. The question is not close: the harm to the Debtors outweighs any prejudice to Peabody.

As a makeweight, Peabody contends that the Debtors seek "to deny completely Peabody's access to documents necessary to its defense in Lowe" (Obj. ¶ 9) and mischaracterize the relief the Debtors request as staying "any compliance" with the Subpoena (Obj. ¶ 10). Debtors seek only that Peabody be enjoined from enforcing its Subpoena until they have reorganized. That relief does not prevent Peabody from examining its own documents, which are entirely duplicative of those of Patriot's documents from the pre-Spinoff era. Peabody's own documents are the only ones that pertain to whether "Peabody's actions at the time of the October 31, 2007 spinoff" (Debtor's Memorandum of Law, Ex. E, at 10) were undertaken for the specific purpose of "prevent[ing] participants from attaining ERISA rights"[9] (Defs.' Mem. of Law in Supp. of Mots. to Dismiss Pls.' Second Am. Compl., ECF No. 47 in 12-cv-06925 (S.D.

[9] Accordingly, Peabody's claim that it must "effectively [counter] the designed-to-fail assertion" in Lowe (Obj. ¶ 7) is not only inconsistent with its own position in that litigation, but is mistaken.

W. Va.), at 8). Yet, at least as of September 3, 2013, Peabody and the UMWA had not exchanged a single document, which documents Peabody admits are at the heart of the Lowe matter. (Obj., Ex. G, at 3.) Moreover, the parties in Lowe have already sought another extension of the discovery deadline (see Obj. ¶ 5), noting in their joint filing that "additional time [would] be necessary to properly review all of the produced materials and prepare for and conduct necessary depositions" (Obj., Ex. G, at 3). Finally, the injunction sought by the Debtors only limits Peabody's ability to force the Debtors to bear the massive burden of the Subpoena now, when the Debtors simply cannot afford the distraction and cost.[10] Peabody faces no permanent injury—unlike the Debtors, their thousands of employees, and the vast body of creditors.[11]

C. An Injunction Is Required to Protect the Public Interest in the Debtors' Successful Reorganization.

The public interest weighs heavily in favor of an injunction. Unless enjoined, the imminent, irreparable harm that enforcement of the Subpoena would pose to the Debtors' ability to reorganize imperils the many months of work, hard-fought compromises, and shared sacrifices made to see the Debtors through to this final act in their reorganization. Thus, the public interest in reorganization weighs in favor of an injunction. E.g., Am. Film Techs., Inc. v. Taritero (In re Am. Film Techs., Inc.), 175 B.R. 847, 849 (Bankr. D. Del. 1994); see also Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 453 (1999). To be clear, the Debtors have never argued that all third-party discovery propounded upon a debtor merits an injunction. An injunction serves the public interest where, as here, third-party discovery poses

[10] The Debtors deny Peabody's irrelevant assertion that "Patriot is obligated to indemnify Peabody for any costs, expenses and losses in connection with or arising out of Lowe." (Obj. ¶ 2 n.2.)

[11] Moreover, Peabody will suffer little, if any, prejudice if it is enjoined from enforcing the Subpoena because the Subpoena is facially overbroad. Peabody's own objections to identical requests served under Rule 2004—which Peabody admits has a scope exceeding that of a subpoena subject to Fed. R. Civ. P. 26—prove that Peabody knowingly shirked its obligation to "take reasonable steps to avoid imposing undue burden or expense" upon the Debtors. Fed. R. Civ. P. 45(c)(1).

such a great burden upon the Debtors' employees and operations that it threatens the Debtors' ability to reorganize. It is no surprise, then, that section 105 injunctions remain available as a safeguard against destructive discovery even though ordinary-course discovery is not stayed by section 362.

It is no response to argue, as Peabody does, that the public interest also favors discovery. Be that as it may, the question before the Court is whether the generic public interest in favor of discovery outweighs the more pressing and specific public interest in favor of protecting the Debtors' ability to reorganize now, and allowing Peabody to enforce its Subpoena later. The public interest undoubtedly favors enforcement of contracts, preservation of property interests in debts, and availability of litigation to timely vindicate rights. But the Bankruptcy Code subordinates all of these interests, for a time, to the more pressing societal interest in fostering reorganization. Peabody offers no argument that the public interest in discovery is any different. In a brief in which Peabody argues that a court issued a section 105 injunction because "the 'future economic vitality' of an entire small town in South Dakota and its residents depended on the debtor's successful reorganization" (Obj. ¶ 12), it is puzzling that Peabody fails to even mention the public interest in the continued employment of the Debtors' 4,200 employees, the Debtors' provision for benefits to thousands of families, and the essential role the Debtors play in the "economic vitality" of Appalachia and the Illinois Basin. The Debtors' employees, their families, and neighbors are certainly as worthy of protection.

CONCLUSION

For all of these reasons, and for all of the reasons set forth in the Memorandum of Law, Patriot respectfully requests that the Court grant its motion for a preliminary injunction.

Dated: New York, New York
September 22, 2013

Respectfully Submitted,

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