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 and HERITAGE COAL COMPANY, **Plaintiffs,** **-against-** **PEABODY HOLDING COMPANY, LLC and PEABODY ENERGY CORPORATION,** **Defendants.**	**Adversary Proceeding** **No. 13-04067-659**

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs Patriot Coal Corporation, as debtor-in-possession ("**Patriot**"), and Heritage Coal Company, formerly known as Peabody Coal Company, LLC ("**Heritage**"), by their undersigned counsel, hereby oppose the motion to dismiss the complaint in this adversary proceeding filed by Defendants Peabody Holding Company, LLC ("**Peabody Holding**") and

Peabody Energy Corporation ("**Peabody Energy**," and, together with Peabody Holding, "**Peabody**").

PRELIMINARY STATEMENT

In the Complaint, Patriot and Heritage presented to the Court a straightforward matter of contract interpretation: does the term "labor contract" as used in the NBCWA Liabilities Assumption Agreement[1] encompass relief obtained through the Section 1114 process? If the answer to that question is no, Patriot and Heritage can tailor their request for Section 1114 relief more narrowly and exclude the 3,100 retirees whose healthcare has been paid for by Peabody since the Spinoff, so that Peabody continues to pay for these retirees. If the answer to the question is yes, then Patriot and Heritage are left with no choice but to include these retirees in their request for Section 1114 relief, because the Debtors cannot afford to pay for the healthcare of any retirees, let alone the healthcare of thousands of individuals for which Peabody is primarily obligated.

Peabody has already announced its position on this issue, both in the press and now to this Court, and no party asserts that any discovery is required before the Court can render a decision. Peabody asks this Court to dismiss the action without prejudice because the Court has not yet ruled on the 1114 Motion, but the contours of the 1114 Motion cannot be defined unless and until the Court determines whether Peabody is still obligated to pay for these 3,100 retirees.

This matter thus presents a threshold question that must be answered in connection with the Section 1114 hearing. Patriot and Heritage cannot afford to wait until after the Section 1114 hearing concludes to find out the answer, as Peabody suggests in its motion to dismiss. If the Court's decision on the Debtors' request for Section 1114 relief does not account for these

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

retirees, then the Debtors will find themselves confronting this issue in just a few weeks, by which time Peabody will have stopped paying the bills, leaving thousands of individuals looking to Patriot to help. The existence of a controversy that requires this Court's declaration could not be plainer. This Court should deny Peabody's motion and proceed to adjudicate the merits of Plaintiffs' claims.[2]

BACKGROUND

A. The NBCWA Liabilities Assumption Agreement

For decades prior to 2007, Peabody owned a number of Appalachian and Illinois Basin mining operations that were heavily staffed with miners represented by the UMWA. (Mem. of Law in Supp. of Pls.' Mot. for Summ. J., Adv. Proc. No. 13-04067 [ECF No. 7] ("**Summ. J. Mem.**"), Ex. D, at 1-3.) Over the years of Peabody's ownership, thousands of unionized miners retired from these operations, obliging Peabody to provide substantial healthcare and pension benefits to UMWA retirees pursuant to the NBCWA and similar labor agreements. (Decl. of Bennett K. Hatfield in Supp. of the Debtors' Mot. to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 [ECF No. 3222] ("**Hatfield Decl.**") ¶ 28.)

As the benefits Peabody owed to its UMWA retirees grew, Peabody decided to divest itself of its UMWA-represented operations though the Spinoff. A number of companies included in the Spinoff—including Heritage and Eastern Associated, both of which became and are still

[2] A substantial portion of Peabody's Motion to Dismiss is devoted to previewing for the Court Peabody's defenses to potential claims for fraudulent conveyance and other causes of action related to the Spinoff. (Mot. to Dismiss ¶¶ 3-4.) Needless to say, a motion to dismiss on jurisdictional grounds is not the forum to debate these issues, which are the subject of an investigation that is being conducted by the Debtors and the Official Committee of Unsecured Creditors. (See Mot. of the Debtors and the Official Committee of Unsecured Creditors for Leave to Conduct Discovery of Peabody Energy Corporation Pursuant to Rule 2004 [ECF No. 3494].) Accordingly, this brief addresses the relevant arguments only, not these gratuitous sections of Peabody's brief.

Patriot subsidiaries—carried substantial liabilities attributable to their retiree healthcare obligations under the NBCWA. (See id. ¶¶ 28, 30.)

To reduce the liabilities of the newly formed Patriot enterprise, Peabody and Patriot entered into several agreements effective as of the date of the Spinoff, including the NBCWA Liabilities Assumption Agreement. That agreement states that it is the product of the parties' "desire that [Heritage] continue to provide the retiree healthcare required by Article XX of the NBCWA (or any successor [Heritage] labor contract)." (Compl. Ex. A, Recital 4.) To achieve that goal, Peabody Holding agreed to assume the liabilities (the "**Assumed Liabilities**") of Heritage for the provision of healthcare to certain Heritage retirees and their dependents. (Id. § 2(a).)

Acknowledging that benefits owed to the Assumed Retirees may change when new collective bargaining agreements are negotiated in the future, the NBCWA Liabilities Assumption Agreement provides that Peabody Holding's obligation would be adjusted to track the benefit levels reflected in future labor agreements between Heritage and the UMWA. (Id. § 1(d).) Such modifications would be reflected in the Assumed Liabilities, "*provided* that, for purposes of any successor [Heritage] labor contract," the Assumed Liabilities are to be based on any lesser benefits provided in "any future UMWA labor agreement" with Eastern Associated or "any future NBCWA labor agreement" offered to Eastern Associated. (Id.)

B. The 1114 Motion

On July 9, 2012, the Debtors filed for Chapter 11 bankruptcy. As the Court knows, the Debtors have sought to modify the healthcare benefits provided for under the collective bargaining agreements to which the Obligor Companies are party, pursuant to the process set forth in 11 U.S.C. § 1114. (Mot. to Reject Collective Bargaining Agreements and to Modify

Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 of the Bankruptcy Code [ECF No. 3214] (the "**1114 Motion**").)

In the 1114 Motion, the Debtors have proposed to transition responsibility for such benefits into a trust structured as a VEBA.[3] Despite the plain language of the NBCWA Liabilities Assumption Agreement that only an NBCWA labor contract—not relief obtained pursuant to Section 1114—may modify the Assumed Liabilities, Peabody has made clear that it intends to use the Debtors' bankruptcy proceedings to reduce or even eliminate its own obligations with respect to the Assumed Liabilities. (Compl. ¶ 24; Defs.' Mot. to Dismiss ¶¶ 15-16.) As Peabody announced to the world a few hours after Patriot filed the 1114 Motion, Peabody believes that the NBCWA Liabilities Assumption Agreement provides that,

> should Patriot's benefit obligations decrease, [Peabody's] funding would proportionately be reduced. . . . These are Patriot's obligations and, to the extent they are reduced, [Peabody] will meet [its] agreement with Patriot to fund the new lower levels.

(Summ. J. Mem., Ex. C.)

Contrary to its public statements, Peabody alone is primarily obligated for the Assumed Liabilities. (Summ. J. Mem. 12.) If Peabody is successful in shedding its own obligations, the liability for the Assumed Retirees' healthcare will not simply disappear; rather, it will become Heritage's responsibility. (Hatfield Decl. ¶ 33.) However, because the Obligor Companies can no longer afford to pay for the healthcare of the retirees for whom they are responsible—let

[3] The Debtors filed the 1114 Motion on March 14, 2013, affixing their fourth proposal to modify retiree healthcare benefits thereto. (See Decl. of Gregory B. Robertson in Supp. of the Debtors' Mot. to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 [ECF No. 3284], Ex. 2.) On April 10, 2013, the Debtors submitted a fifth revised Section 1114 proposal to the UMWA proposing, among other things, that the VEBA would be funded by an equity stake in the reorganized Debtors. (Notice of Fourth 1113 Proposal and Fifth 1114 Proposal [ECF No. 3583].) In all other respects material to this motion, it is identical to the preceding proposal. For convenience, the proposals are together referred to as the "1114 Proposal."

alone the thousands of Assumed Retirees for whom Peabody is primarily obligated—the Debtors cannot simply presume that their interpretation of the agreement will one day prevail in court.

Indeed, Peabody's presumed solution—wait to see if the Debtors obtain Section 1114 relief, and then wait to see if Peabody refuses to pay for the Assumed Liabilities, and only then commence an action to determine the rights of the parties—is completely unworkable. When the bills for the healthcare of the Assumed Retirees come due, the parties must know immediately who is obligated to pay them, not months later as Peabody proposes. Nor should the Debtors be required to include the Assumed Retirees in their 1114 Motion—if Peabody is obligated to pay, the parties should know that now so the 1114 Motion can exclude them. This outcome is far more favorable to the Assumed Retirees, whose healthcare would continue to be provided at current levels by a financially healthy company, as well as to the VEBA, which will devote its resources to a smaller number of retirees.

Accordingly, the Debtors have structured their 1114 Proposal to account for this issue. The 1114 Proposal includes the Assumed Retirees in the class of retirees for whom relief is sought unless this Court rules, consistent with the plain language of the relevant contracts, that Peabody's obligations with respect to the Assumed Retirees will "not be relieved or reduced in the event that benefits [of other retirees] are reduced pursuant to the 1114 process." (1114 Proposal ¶ 6.) In the event that the Court issues a ruling to that effect after deciding the 1114 Motion, "the 1114 Proposal shall be modified nunc pro tunc to the date of the [1114 Motion] and shall not apply" to the Assumed Retirees. (Id.)

PROCEDURAL HISTORY

The Complaint in this action was filed concurrently with the 1114 Motion on March 14, 2013. On April 5, 2013, Plaintiffs moved for summary judgment given the need for a resolution

of this issue at the same time the 1114 Motion is decided. Peabody moved to dismiss the action without prejudice on April 12, 2013 solely on the basis of ripeness, and Plaintiffs now oppose that motion. Simultaneous with the filing of this opposition brief, Peabody will file its response to Plaintiffs' motion for summary judgment. On April 26, 2013, Peabody will file a reply brief in further support of its motion to dismiss, and Plaintiffs will file a reply brief in further support of their motion for summary judgment.

The motion to dismiss and motion for summary judgment are both scheduled for oral argument on April 29, 2013, the first day of the Sections 1113 and 1114 hearing.

APPLICABLE STANDARD AND GOVERNING LAW

The Declaratory Judgment Act allows the Court to "declare the rights and other legal relations of any interested party seeking such declaration" when presented with an "actual controversy" within the meaning of Article III. 28 U.S.C. § 2201(a); Maytag Corp. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., 687 F.3d 1076, 1081 (8th Cir. 2012). While the question of whether a dispute amounts to such a controversy is "necessarily one of degree," in declaratory judgment actions concerning matters of contract interpretation, the Eighth Circuit looks to three factors in making this determination: (1) "whether the contractual dispute is real, in the sense that it is not factually hypothetical"; (2) "whether it can be immediately resolved by a judicial declaration of the parties' contractual rights and duties"; and (3) whether the declaration is necessary for the plaintiff "to carry on with its business." Id. at 1081-82 (internal quotation marks omitted).

In considering a request for a declaratory judgment, a court must also take into account the ripeness of the dispute, which follows from both the Article III "actual controversy" requirement "and also from prudential considerations for refusing to exercise jurisdiction." Neb.

Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1037 (8th Cir. 2000). In conducting a ripeness inquiry, courts look to the fitness of the issues presented for judicial review and any hardship that would result to the parties should the court withhold its review. Id. at 1038. While a party seeking relief must satisfy both prongs of the inquiry "to at least a minimal degree," the fitness and hardship factors operate along a sliding scale. Id. at 1039; see also Burlington N. & Santa Fe Ry. Co. v. Metzeler Auto. Profile Sys. Iowa, Inc., No. 3-01-CV-1016, 2002 U.S. Dist. LEXIS 25965, at *13-15 (S.D. Iowa Sept. 30, 2002) (concluding that an issue was ripe for review when, despite it being less fit for judicial review than other issues, hardship would result from withholding review).

ARGUMENT

A. The Complaint Asserts an "Actual Controversy"

A real and substantial controversy clearly exists between Plaintiffs and Peabody with respect to the interpretation of Peabody Holding's obligations under the NBCWA Liabilities Assumption Agreement. While repeatedly contesting Plaintiffs' interpretation of the agreement (Compl. ¶ 24; Defs.' Mot. to Dismiss ¶¶ 5, 15-16) and going so far as to declare its view in a press release issued only hours after Patriot and Heritage commenced this lawsuit (Summ. J. Mem., Ex. C), Peabody dismisses as conjecture Plaintiffs' concern that Peabody will try to use the Debtors' 1114 Motion to shirk its obligations to the Assumed Retirees (see Defs.' Mot. to Dismiss ¶ 27). Peabody cannot have it both ways.

Nothing about the parties' disagreement is "nebulous or contingent." (Id. ¶ 22.) Peabody has staked out a competing position on a matter of contract interpretation that is critical to the Debtors' ability to structure their Section 1114 relief as narrowly as possible, and no future eventuality will do anything to elucidate or refine the relevant legal query. If the Court agrees

with Plaintiffs' interpretation of the NBCWA Liabilities Assumption Agreement, Peabody's obligations with respect to the Assumed Liabilities will be unchanged. If it disagrees, the Assumed Retirees will have their benefits modified along with the other retirees in the relief sought by the Debtors. There are no other possibilities; accordingly, the Court can resolve the parties' dispute with full knowledge of "what legal issues it is deciding, [and] what effect its decision will have on the adversaries." Pub. Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 244 (1952); see Neb. Pub. Power, 234 F.3d at 1038 (declaratory relief appropriate when issues presented are "largely legal in nature, may be resolved without further factual development, or where judicial resolution will largely settle the parties' dispute").

In contrast, the current uncertainty regarding the operation of the NBCWA Liabilities Assumption Agreement is forcing the Debtors to include the 3,100 Assumed Retirees in their request for Section 1114 relief when Peabody is legally responsible for them. See Maytag, 687 F.3d at 1082. Notwithstanding Peabody's protestations (see Defs.' Mot. to Dismiss ¶ 24), the existence of a dispute simply is not contingent on the outcome of the 1114 Motion. On the contrary, a declaration is essential to the 1114 Motion's disposition because, without a ruling on this contractual issue, the Debtors simply do not know whether to include the 3,100 Assumed Retirees in their request for Section 1114 relief.

Underscoring its misapprehension of how the contractual dispute in this case relates to the 1114 Motion, Peabody attempts to analogize this case to others where the underlying dispute hinged in no way on the outcome of the declaratory judgment action.[4] (Defs.' Mot. to Dismiss

[4] Accordingly, the two cases Peabody cites, one of which is a personal injury case involving a man injured by a lawnmower, are inapposite: in neither did the parties seek a declaration after the outcome of that declaratory judgment action had been put in issue. See Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp. 2d 394, 408 (S.D.N.Y. 2002) (finding no controversy because the declaration's relevance was contingent on "the mere prospect that . . . a ruling may be rendered at some indefinite point in the future"); Becker v. Country Mut. Ins. Co., No. 10-CV-286, 2011 U.S. Dist. LEXIS 6463, at *8-9 (S.D. Ill. Jan. 24, 2011) (finding dispute premature because factual predicate underlying dispute had not occurred and might not ever occur).

¶¶ 25-26.) This action, however, is inextricably linked with the Debtors' 1114 Motion because it directly and necessarily impacts the relief that the Debtors need to seek in the 1114 Motion. To the extent the unique facts here can be analogized to any precedent, Public Service Co. of New Hampshire v. New Hampshire (In re Public Service Co. of New Hampshire), 99 B.R. 506 (D.N.H. 1989), is instructive. In that case, the debtor proposed a plan of reorganization that expressly stated that the debtor did not intend to seek state regulatory approvals that would have been required if not for the debtor's bankruptcy, and sought a declaration that the proposed plan was lawful. Id. at 507. Although the debtor was actively working to achieve a consensual reorganization that may have obviated the need for the declaration, the court found an actual controversy ripe for judicial declaration. Id. at 508. As the court held, any other result would have unfairly inhibited the debtor's ability to pursue its preferred plan of reorganization. Id. at 510.

Here, as in Public Service Co., the "triggering event has already occurred, i.e., the filing of [the Debtors' 1114 Motion]," and that fact "distinguishes this case from cases in which the issue presented was determined to be contingent and hypothetical." Id. at 509. Put simply, there can be no uncertainty or ambiguity about the concrete nature of the dispute. The Court should reject Peabody's claims to the contrary.

B. The Dispute Between Plaintiffs and Peabody Is Ripe for Review

The dispute between Plaintiffs and Peabody is ripe for adjudication. The pure legal issue presented to the Court in the Complaint can and should be completely resolved without discovery, and delay in obtaining that resolution will result in the inclusion of the Assumed Retirees in the Debtors' Section 1114 relief, not because their healthcare obligations are Heritage's responsibility, but because the Debtors cannot risk the uncertainty of not including them.

Both parties appear to agree that the issue is one of contract interpretation and that no discovery is required to aid in that process. The Eighth Circuit has indicated that issues—like

the one here—that are "largely legal in nature," that "may be resolved without further factual development," or the resolution of which would "largely settle the parties' dispute" are particularly likely to be fit for review, even where future contingencies exist that may impact the dispute. Neb. Pub. Power, 234 F.3d at 1038; see also id. at 1039-40 (finding case ripe for determination where contractual provisions at issue were not scheduled to take effect for three years); Markel Am. Ins. Co. v. Watson Co., No. 07-06056, 2008 U.S. Dist. LEXIS 16191, at *4-5 (W.D. Ark. Mar. 3, 2008) (finding declaratory judgment claim fit for review even though its relevance was contingent on an event that had not yet happened).

Peabody advances only two arguments that this action is not fit for adjudication. First, it contends that the Court might deny the relief sought in the 1114 Motion, thus arguably eliminating the need for the declaratory relief sought here. Second, it contends that "even if [the Debtors] were to obtain relief of some sort, it is by no means evident that the relief obtained would never be embodied in a successor labor contract with the UMWA." (Defs.' Mot. to Dismiss ¶ 24.) Neither argument supports a conclusion that this action is not ripe. As to the first argument, the very purpose of filing this action now is to allow the Court to consider all relevant issues at once; any suggestion that proceeding this way is not a prudential use of the Court's resources is meritless. Peabody's second argument is effectively a concession that the Assumed Liabilities can be modified only through a successor labor contract with the UMWA. Peabody urges the Court to wait to see whether the Debtors' Section 1114 relief is ever "embodied in a successor labor contract with the UMWA." But a successor labor contract will not be negotiated until long after the relief sought here is necessary. In any event, the Court is not being asked to consider the effect of any future labor contract with the UMWA on the NBCWA Liabilities Assumption Agreement. The question before the Court is whether the Debtors' 1114 Motion, or

any negotiated resolution, will modify Peabody's obligation to pay the Assumed Liabilities. There can be no reasonable dispute that resolution of that issue is pressing and ripe for review.

Moreover, Peabody has already staked out its position in the event the Debtors obtain Section 1114 relief, adopting a stance that forces the Debtors to include the Assumed Retirees in the 1114 Motion.[5] That fact alone ensures the ripeness of the dispute. See Neb. Pub. Power, 234 F.3d at 1038 (hardship includes "the heightened uncertainty and resulting behavior modification that may result from delayed resolution"); Markel, 2008 U.S. Dist. LEXIS 16191, at *5 n.1 (noting that hardship includes the "continuing harm of uncertainty and expense flowing from doubt" about the rules governing a private relationship). The healthcare of 3,100 individuals is dependent on the outcome of this action. Should resolution be delayed until, as Peabody would prefer, the 1114 Motion is decided, it will be too late. Until certainty is obtained with respect to Peabody's obligations, the Debtors simply cannot seek relief that does not include modification of the Assumed Retirees' benefits—because the Debtors just cannot afford the risk that Peabody may prevail in this action. That truth leaves Patriot, Heritage, the UMWA, and thousands of retirees and dependents insecure in their futures.

The lingering cloud of uncertainty and risk created by Peabody can be dispelled only by this Court's declaration accepting or rejecting Peabody's view that it can exploit for its own benefit the outcome of the Section 1114 process. That determination can and must be made simultaneously with the resolution of the 1114 Motion.

[5] Peabody's argument that the risk of hardship is remediated by the nunc pro tunc provision of Patriot's 1114 Proposal thus misconstrues the entire aim of the hardship inquiry.

CONCLUSION

For all of these reasons, Patriot and Heritage respectfully request that the Court deny Defendants' motion to dismiss.

Dated: New York, New York
April 22, 2013

Respectfully Submitted,

DAVIS POLK & WARDWELL LLP

By: /s/ Elliot Moskowitz

Marshall S. Huebner
Benjamin S. Kaminetzky
Elliot Moskowitz
Jonathan D. Martin

450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 607-7983

Counsel to Plaintiffs