Hearing Date: October 11, 2012 at 10:00 a.m. (prevailing Eastern Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
PATRIOT COAL CORPORATION, *et al.*,	**Case No. 12-12900 (SCC)**
Debtors.[1]	**(Jointly Administered)**

DEBTOR MOVANTS' REPLY IN SUPPORT OF CERTAIN DEBTORS' MOTION FOR ENTRY OF AN ORDER PURSUANT TO 11 U.S.C. § 362(d) AUTHORIZING LIMITED RELIEF FROM THE AUTOMATIC STAY

Patriot Coal Corporation ("**Patriot**"), Apogee Coal Company, LLC ("**Apogee**"), Catenary Coal Company, LLC ("**Catenary**") and Hobet Mining, LLC ("**Hobet**", collectively, the "**Debtor Movants**") file this reply (the "**Reply**")[2] to the objection filed by Ohio Valley

[1] The Debtors are the entities listed on Schedule 1 attached to the Lift Stay Motion. The employer tax identification numbers and addresses for each of the Debtors are set forth in the Debtors' chapter 11 petitions.

[2] Unless otherwise defined herein, each capitalized term shall have the meaning ascribed to such term in the *Certain Debtors' Motion for Entry of an Order Pursuant to 11 U.S.C. § 362(d) Authorizing Limited Relief from the Automatic Stay* [ECF Doc. 824] (the "**Lift Stay Motion**"). Furthermore, the entirety of the Lift Stay Motion is incorporated by reference as if fully restated herein. Nothing in this Reply shall be deemed an admission by the

Environmental Coalition, Inc., West Virginia Highlands Conservancy, Inc. and Sierra Club (collectively, the "**Plaintiffs**") to Certain Debtors' Motion for Entry of an Order Pursuant to 11 U.S.C. § 362(d) Authorizing Limited Relief from the Automatic Stay (the "**Objection**").

INTRODUCTION

1. The Debtor Movants have been in discussions with the Plaintiffs in order to reach a "global" settlement that would extend the compliance deadlines and address other issues between the Litigants, balancing the needs of reorganization with progress toward continued compliance with the Debtor Movants' environmental obligations. To this end, subsequent to the Petition Date, the Debtor Movants and the Plaintiffs successfully ***jointly petitioned*** Judge Chambers, not once, but twice, to extend compliance deadlines for a short period while the Debtor Movants and the Plaintiffs explored a range of settlement options that might be considered during the Debtor Movants' reorganization, which extensions were granted. (*See* Civ. Action 3:09-1167, Doc. 167, 170). On a third occasion, the Debtor Movants requested, by written motion, and were granted, a brief extension of the deadlines to continue negotiations with the Plaintiffs, which motion the Plaintiffs reviewed and did not oppose. Seemingly, when the Plaintiffs supported extensions of the compliance deadlines, they did not view the automatic stay as an issue.

2. Absent a settlement with the Plaintiffs, the Debtor Movants determined it would be most beneficial to their estates and creditors to pursue relief under Rule 60(b)(5) and (6) of the Federal Rules of Procedure by requesting that the West Virginia District Court modify the Prepetition Orders based on a change in factual circumstances. Thus, when settlement

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Debtor Movants as to the applicability of the stay to the relief sought in the Motion to Modify or any other aspect of the Environmental Proceedings.

discussions appeared stalled, and with compliance deadlines quickly approaching, the Debtor Movants advised the West Virginia District Court at a status conference on September 12, 2012, that they intended to seek from it certain modifications to the Prepetition Orders and requested that the West Virginia District Court extend the "stay" order of August 16, 2012 (Civ. Action 3:09-1167, Doc. 167; Civ. Action 3:11-0115, Doc. 64) for a short period so that it could consider the Motion to Modify.

3. It was at this time that the Plaintiffs suddenly objected and asserted to the West Virginia District Court for the first time that an extension by Judge Chambers of the compliance deadlines would be subject to the automatic stay under section 362 of the Bankruptcy Code. Over the Plaintiffs' objections, the West Virginia District Court granted an extension of the existing stay for an additional 14 days and entered the Briefing Schedule, requiring the Debtor Movants to file the Motion to Modify by September 17, 2012, which the Debtor Movants were fully prepared to do. However, in direct response to assertions by the Plaintiffs that the automatic stay would preclude the Debtor Movants from seeking the relief requested in the Motion to Modify, the Debtor Movants began preparing the Lift Stay Motion. Simultaneously, in order to avoid violating the Briefing Schedule, the Debtor Movants requested a status conference with Judge Chambers on September 17, the deadline to file the Motion to Modify. At this status conference, the Debtor Movants notified Judge Chambers of their intent to seek limited relief from the automatic stay through the Lift Stay Motion, and requested that the Litigants be excused from complying with the Briefing Schedule until this Court has an opportunity to consider the Lift Stay Motion. Judge Chambers granted this request and scheduled a conference for October 12, 2012 at 11:30 a.m. in order to discuss this Court's ruling

on the Lift Stay Motion and, if applicable, set forth a new briefing schedule for the Motion to Modify.

4. Despite the Debtor Movants' attempts to respond to the Plaintiffs' concerns relating to the automatic stay and the Motion to Modify through the filing of the Lift Stay Motion, the Plaintiffs now object to the limited relief they compelled the Debtor Movants to seek, and, in the process, falsely suggest that the Debtor Movants are attempting to shirk their environmental obligations. Contrary to the Plaintiffs' unsubstantiated allegations, the Debtor Movants have expended significant time and over $70 million in order to comply with the Prepetition Orders and other selenium treatment obligations, and, importantly, are currently in compliance with the Prepetition Orders. The Debtor Movants are only requesting an opportunity to seek to defer immediate and significant cash expenditures in the midst of a three-month-old chapter 11 reorganization in an effort to conserve liquidity while they focus on their reorganization to enhance the likelihood that they will emerge as viable and strong enterprises that have the ability to continue to meet their environmental obligations.

5. Furthermore, in what appears to be an attempt to circumvent the statutory and procedural requirements related to lifting the automatic stay, the Plaintiffs now improperly request that this Court lift the stay entirely as to the Environmental Proceedings, a request that is premature and fails on the merits.

6. The Plaintiffs' Objection should be overruled, and their request for relief denied. Ultimately, if the Motion to Modify is granted by Judge Chambers, the deadlines in the Prepetition Orders will be extended, which will likely enable the Litigants to avoid having to return to this Court ***or*** the West Virginia District Court for additional relief in connection with the Environmental Proceedings for some time, if at all.

ARGUMENT

I. The Plaintiffs' Request is Procedurally Improper

7. The only relevant issue that is properly before this Court is whether the automatic stay, to the extent it is applicable to the relief sought in the Lift Stay Motion, should be lifted for the sole and limited purpose of allowing the Debtor Movants to seek a modification of the compliance deadlines in the Prepetition Orders, and allowing the West Virginia District Court to determine whether to modify, and to order the modification of, such deadlines. At this time, the Plaintiffs have not properly sought to lift the automatic stay as to the Environmental Proceedings in order to enforce compliance or otherwise. The Plaintiffs' request to lift the automatic stay in its entirety is, as noted by the official committee of unsecured creditors appointed in these cases (the "**Committee**") in its statement in support of the Lift Stay Motion, essentially a cross-motion for relief from the automatic stay. Such a cross-motion is procedurally improper in several respects. Under section 362(d) of the Bankruptcy Code and Bankruptcy Rules 4001(a) and 9014, requests for relief from the automatic stay may only be brought by motion, on proper notice and with the opportunity for a hearing. Furthermore, this Court's Case Management Order requires that (i) the Plaintiffs provide at least twenty-one days' notice of a motion for relief from the automatic stay and (ii) opponents of such a motion be granted an opportunity to object until a date that is three days before the scheduled hearing (Case Management Order ¶ 24). Lastly, the Plaintiffs have not complied with this Court's filing fee requirements for motions to lift the automatic stay issued pursuant to 28 U.S.C. § 1930. In short, the Plaintiffs' cross-motion violates the Bankruptcy Code, the Bankruptcy Rules and this Court's Case Management Order, and is highly prejudicial to the Debtor Movants and all other parties in interest in these cases by not providing such parties a full and fair opportunity to respond.

8. Accordingly, the stay relief requested by the Plaintiffs should be denied. Their request is particularly inappropriate here, where the Plaintiffs were put on notice on September 17 that the Debtor Movants would be seeking only limited relief from the stay. If the Plaintiffs disagreed with this approach, they could have filed a motion to lift the stay entirely at that time, rather than waiting to request such broad relief on one-week notice through an objection. Indeed, if at any point the Plaintiffs have a legitimate reason to seek such relief, they may file a procedurally proper motion to lift the stay, and the relief requested by the Lift Stay Motion does not prejudice such rights. However, now is not that time as the Debtor Movants are in compliance with the Prepetition Orders, and, thus, enforcement is simply not an issue currently before this Court, or any other court, at this time.

II. The Plaintiffs' Objection is Riddled with Irrelevant, Misleading and Unsubstantiated Assertions

9. The Plaintiffs have gratuitously taken the opportunity in their Objection to paint a distorted picture of the Debtor Movants, with assertions that are misleading and irrelevant to the limited relief sought by the Debtor Movants. The Plaintiffs mischaracterize the Lift Stay Motion as an attempt by the Debtor Movants to evade their environmental obligations under applicable law – which is not at all the Debtor Movants' intent and inconsistent with the Debtor Movants' costly and extensive efforts over the past two years to address this issue. In fact, during this time, the Debtor Movants have emerged as leaders in the industry-wide effort to identify and develop technologies that will successfully remove selenium from mining discharges, and have devoted significant efforts to complying with their environmental obligations, demonstrating a

commitment to selenium treatment that far exceeds the efforts of many of their peers in the industry.[3]

10. As both state and federal regulators recognize, treating mine discharges for selenium is extraordinarily difficult. Indeed, in the Hobet 22 Order, Judge Chambers recognized "the novel, and difficult issues raised by selenium-related enforcement actions," including the "uncertainty surrounding treatment technology," and acknowledged that, "to date, no technology has proven successful at full scale." *OVEC v. Apogee Coal Co.*, 744 F. Supp. 2d 561, 564-65 (S.D. W. Va. 2010). As the Plaintiffs know all too well, it has not been feasible for the Debtor Movants to comply with these selenium limits in their National Pollutant Discharge Elimination System ("**NPDES**") permits because of the paucity of known technologies effective at the scale required to bring the discharges below such limits.[4] It is against this backdrop of technological

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[3] To the best of the Debtor Movants' knowledge, the treatment technology that Apogee is required to install under the Prepetition Orders, the fluidized bed reactor, a massive and extraordinarily expensive treatment technology, with the costs of construction expected to approach approximately $50 million, will be the first of its kind used to treat selenium from coal mining outfalls. The construction is expected to be completed by the March 2013 compliance deadline, and the Debtor Movants are not seeking to delay the construction of that treatment system. In addition, the Debtor Movants have identified a technology called ABMet that they believe will successfully treat selenium at Hobet's outfall 001. The West Virginia District Court approved this technology for use, and Hobet has moved forward to complete the engineering and design work and to prepare the site for full construction in advance of the May 2013 compliance deadline. The Debtor Movants have also completed a variety of pilot studies and demonstrations since 2010, including the development of iron-based technologies, such as Zero Valent Iron (ZVI) and Iron Facilitated Selenium Reduction ("**IFSeR**"), and biofilter technologies, including Gravel Bed Reactors (GBR). The study of these technologies has proven fruitful, particularly with respect to IFSeR, and the Debtor Movants have recently received formal approval from the special master appointed by the West Virginia District Court (the "**Special Master**") that IFSeR may be selected as a technology to treat a number of outfalls at the Hobet mine complex. Additional studies remain underway to identify whether these technologies will succeed at higher flows.

[4] The presence and impact of selenium in mining discharges is a relatively new environmental issue. The first effluent limits in NPDES permits for coal mining in West Virginia became effective in 2006. Before 2006, treatment for selenium was not required in water discharges from such mining operations. The types of water treatment used in coal mining in 2006 to remove common pollutants like sediment were, and are, ineffective at treating selenium. As of 2006, there were no established treatment technologies for selenium that had been applied to coal mining discharges. To this day, science surrounding selenium remains uncertain. Indeed, the U.S. Environmental Protection Agency (the "**EPA**"), the federal regulator charged with enforcing the Clean Water Act, continues to struggle to determine what the appropriate selenium standards should be. In 2004, the EPA proposed to modify existing selenium standards recognizing that the existing limits were not scientifically supportable, but the

uncertainty that the Plaintiffs initiated the Environmental Proceedings against the Debtor Movants demanding that they achieve compliance with permit limits, which resulted in the Prepetition Orders that set forth certain time periods for addressing effluent limits for selenium, designed to eventually bring the Selenium Debtors into compliance with their permit limits.[5]

11. Achieving compliance with the Prepetition Orders has been complicated, expensive and time consuming. The process requires pilot tests, full-scale demonstrations and site specific construction projects. Although the Debtor Movants have pioneered the development of a technology, IFSeR, which has proven effective at low flow outfalls, there are currently no proven effective treatment technologies for selenium that have been applied to coal mining discharges at high flow discharges, such as those that exist at the Selenium Debtors' mines, and that have consistently reduced selenium concentrations to levels compliant with permit limits. IFSeR and certain other emerging technologies the Debtor Movants are evaluating may prove to be successful, in time, at reducing selenium concentrations to levels that comply with applicable permit requirements at these high flow discharges.

12. Most importantly, under the supervision of the Special Master, the Debtor Movants are currently in compliance with the Prepetition Orders. Thus, despite the known challenges related to selenium treatment, since 2010, the Debtor Movants have moved forward diligently to identify, design and implement several new technologies, expending over $50 million on these efforts and continuing to make significant progress.

EPA has failed to act on that draft proposal for almost eight years. *See* http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/pollutants/ selenium/fs.cfm

[5] The EPA reviewed and consented to the entry of the Consent Decree, which governs forty-three outfalls at the Selenium Debtors' mining complexes.

13. The Plaintiffs also raise other irrelevant issues, such as the extent to which certain of the Debtor Movants' obligations may be non-dischargeable in bankruptcy, and inappropriately attempt to argue the merits of the underlying deadline extension request in the wrong forum – this Court, rather than before Judge Chambers. The Debtor Movants are simply seeking the right to request from Judge Chambers an extension of time to comply with certain of the deadlines set forth in his orders, and, ironically, the Plaintiffs are attempting to use the automatic stay, a fundamental debtor protection, to their own advantage. The underlying issues and factors that Judge Chambers will consider are not relevant to the narrow issue before this Court. The Plaintiffs will have their opportunity to oppose the requested extension before Judge Chambers.

III. This Court Should Grant the Proposed Narrowly Tailored Limited Relief from the Automatic Stay

14. The all-or-nothing approach urged by the Plaintiffs, in addition to being raised in a procedurally improper manner, is not appropriate in light of the facts and circumstances of these chapter 11 cases. Particularly here, where granting narrow and tailored relief would further the policy goals of the automatic stay and not cause prejudice to any party, it is squarely within this Court's authority to craft and grant such limited and tailored relief.

15. Case law in the Second Circuit is clear: bankruptcy courts have the power to modify the automatic stay "so as to fashion the appropriate scope of relief." *Eastern Refractories Co., v. Forty Eight Insulations Inc.*, 157 F.3d 169, 172 (2d Cir. 1998); *see also, In re Shared Techs. Cellular, Inc.*, 293 B.R. 89, 93 (D. Conn. 2003) ("The statutory language [of 11 U.S.C. § 362(d)] clearly grants bankruptcy courts authority to modify or condition the automatic stay, thereby empowering them to shape relief mindful of the particular circumstances of each case."); *In re Crown Ohio Invs. LLC*, No. 1-09-46767 (DEM), 2010 WL 935576, at *5 (Bankr. E.D.N.Y. Mar. 12, 2010) (bankruptcy courts have the power to modify or condition the stay "in

an effort to grant the appropriate relief or to adjust the application of the relief in the case."); *In re Pittsford Polo Club, Inc.*, 188 B.R. 339, 344-45 (Bankr. W.D.N.Y. 1995) (bankruptcy courts have "broad discretion" to "tailor relief from the automatic stay to meet [the] particular facts and circumstances of the situation"). It is this ability to shape relief from the stay to reflect the facts and circumstances of each case that promotes the policy considerations underlying the automatic stay, one of the foremost protections afforded debtors by the Bankruptcy Code. *See Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986). These considerations include providing a debtor with a much-needed breathing spell to allow it "time to organize its affairs – which includes protection from having to defend claims brought against the estate as well as continuing to pursue judicial proceedings on its own behalf," *In re Lyondell Chem. Co.*, 402 B.R. 596, 608 (Bankr. S.D.N.Y. 2009) (quoting *Teachers Ins. & Annuity Ass'n. of Am. v. Butler*, 803 F.2d 61, 65 (2d Cir. 1986)), and time to "attempt to formulate a plan of reorganization." *In re WorldCom, Inc.*, No. 02-13533 (AJG), 2003 Bankr. LEXIS 2440, at *9-10 (Bankr. S.D.N.Y. Jan. 30, 2003).

16. Here, the appropriate scope of relief is to lift the stay to allow the Debtor Movants to pursue an opportunity to preserve vital liquidity over the next 12 to 18 months for the benefit of their estates and creditors. If granted by Judge Chambers, the relief sought in the Motion to Modify would provide the Debtor Movants with a critical breathing spell by allowing them to conserve liquidity and focus on their reorganization. In contrast, if the Motion to Modify is denied, and the Debtor Movants at some point in the future fail to comply with the Prepetition Orders, the Plaintiffs may come before this Court and seek the relief they deem appropriate (without prejudice to the Debtor Movants' and other interested parties' rights to respond). Since the Debtor Movants are currently in compliance with the Prepetition Orders, and obtaining the

relief sought in the Motion to Modify would alleviate the immediate burdens of their continued compliance, the Plaintiffs' improperly requested relief is not even ripe for consideration.

IV. The Relief Requested by the Plaintiffs Should Be Denied, and the Debtor Movants' Lift Stay Motion Should Be Granted

17. The Debtor Movants submit that this Court should not consider the Plaintiffs' procedurally improper request to lift the stay. The Debtor Movants and all parties in interest in these chapter 11 cases are entitled to sufficient notice and an opportunity to be heard on the important and complex legal and factual issues that the Plaintiffs' request raises. One week is not a sufficient period of time for the Debtor Movants and all other interested parties, including the Committee, as set forth in their statement in support of the Lift Stay Motion, to adequately brief and fully respond to a motion, disguised as an objection, that requests such broad relief.

18. Although the Debtor Movants reserve their right to address the merits of a properly filed motion for stay relief, even a quick review of the arguments raised in the Objection shows why such a request – if and when properly made – should fail.[6] As set forth in the Lift Stay Motion, the following relevant *Sonnax* factors weigh in favor of narrowly modifying the automatic stay to the extent necessary to permit the Debtor Movants to seek to extend the compliance deadlines in the Prepetition Orders:

1. The impact of the stay on the parties and the balance of harms;
2. Whether litigation in another forum would prejudice the interest of the creditors;
3. The interests of judicial economy and the expeditious resolution of litigation;
4. Whether relief would result in a partial or complete resolution of the issue;
5. The lack of any connection with or interference with the bankruptcy case; and

[6] This Reply is not intended to be a complete response to the Plaintiffs' request for stay relief. The Debtor Movants reserve the right to raise additional arguments in the future to any motion to lift the stay brought by the Plaintiffs or any other party with respect to any aspect of the Environmental Proceedings.

6. Whether a specialized tribunal with the necessary expertise has been established to hear the cause of action.

Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.), 907 F.2d 1280, 1286 (2d Cir. 1990).

These same factors do not mandate, or even favor, the wholesale relief from the stay that has been improperly sought by the Plaintiffs

A. The Balance of Harms and Interests of Justice Favor Only Limited Relief from the Automatic Stay

19. The limited relief sought in the Lift Stay Motion will not prejudice the interests of any party and is consistent with the purposes of the automatic stay. Contrary to the Plaintiffs' arguments, granting the relief sought in the Lift Stay Motion would not prejudice the interests of the Plaintiffs. First, the Plaintiffs' contention that narrowly tailored relief from the stay creates an inequitable "one-way street" indicates a fundamental misunderstanding of the function of the automatic stay. As discussed above, courts routinely craft modified forms of relief from the automatic stay, as necessary and appropriate, in response to specific circumstances.

20. Second, the Plaintiffs will have a full and fair opportunity to be heard by the West Virginia District Court regarding the substantive issue of extending the deadlines set forth in the Prepetition Orders. The Debtor Movants are, of course, not seeking to lift the stay to provide that only they can file pleadings in the West Virginia District Court, which relief could fairly be characterized as creating a "one-way street." Rather, the Debtor Movants are seeking stay relief with respect to the Motion to Modify as to all Litigants. The Plaintiffs will be permitted to file opposition briefing in accordance with Judge Chambers' briefing schedule, and, if a hearing is conducted by Judge Chambers, advocate fully for their position at such hearing.

21. Third, and lastly, the Debtor Movants are not seeking to modify the stay in order to pursue affirmative claims against the Plaintiffs. The Environmental Proceedings were initiated by the Plaintiffs, and the Plaintiffs have been on notice for at least a month that the Debtor Movants intend to seek modifications to the Prepetition Orders. Had Judge Chambers not excused the Litigants' compliance with the Briefing Schedule, the Plaintiffs would have had to file their response to the Motion to Modify by September 21, 2012. The Plaintiffs have not identified a single action they want to take that they cannot take if the limited stay relief the Debtor Movants request is granted. Thus, there will be no cognizable harm imposed on the Plaintiffs if the limited relief sought by the Debtor Movants is granted.

22. In contrast, denying the limited relief from the stay may harm the Debtor Movants by depriving them of the opportunity to seek a breathing spell from the Prepetition Orders in order to conserve cash and maintain liquidity during their reorganization efforts.

23. The Plaintiffs' proposed relief is not in the interests of justice. The intersection of the automatic stay and the Environmental Proceedings raises complex legal and factual issues that are not yet known and are not in the record or in briefing before this Court. In the absence of an understanding of the contours of these issues, it would not be appropriate, and is not necessary, to predetermine these complicated issues at this time.

B. The Proposed Limited Relief from the Automatic Stay Protects the Interests of all Creditors and Does Not Prejudice Any Creditors

24. To best protect the interests of all creditors, the stay should be lifted only to the limited extent sought by the Debtor Movants. This approach is, in fact, supported by the key parties in interest in these cases. Specifically, both the Committee and the creditor holding the largest liquidated unsecured claim in these cases, Wilmington Trust Company, in its capacity as

indenture trustee for $250 million principal amount of 8.25% Senior Notes due 2018 issued by Patriot Coal and guaranteed by certain of the other Debtors, support the limited relief requested. Denying the Lift Stay Motion would be prejudicial to the Debtor Movants' creditors who will be deprived of the benefits to the Debtor Movants that would accrue as a result of their ability to conserve valuable resources during these chapter 11 cases. The Plaintiffs have not put forth a persuasive reason why the limited modification to the stay requested by the Debtor Movants would be prejudicial to any creditor or party in interest.

25. In support of the Plaintiffs' broad approach, which includes seeking to remove any aspect of the enforcement of the relief they seek in the Environmental Proceedings from the purview of these cases, and which is not supported by any creditor, the Plaintiffs assert that creditors would not be affected because the Debtor Movants' obligations under the Prepetition Orders are not dischargeable. This is an unsubstantiated assertion that the Plaintiffs fail to establish as a matter of law and an issue that is not before the Court at this time.

C. The Proposed Limited Relief from the Automatic Stay Best Serves Judicial Economy and the Expeditious and Economical Resolution of Litigation

26. As discussed in the Lift Stay Motion, the interests of judicial economy are promoted by granting the Debtor Movants' request. The automatic stay should be lifted only to the extent that such relief would further the resolution of litigation. Here, the limited relief from the stay requested by the Debtor Movants adequately provides an opportunity for the effective resolution of the discrete issue of whether the compliance deadlines should be extended, which issue is ripe for adjudication as evidenced by the Briefing Schedule, the status conference scheduled for October 12 and the upcoming compliance deadlines in the Prepetition Orders.

27. The Plaintiffs assert that complete relief from the stay is necessary to avoid parties having to continuously return to this Court to seek "piecemeal relief." The Plaintiffs provide no examples of such "piecemeal relief" that may be sought – matters which the Debtor Movants and their creditors are entitled to evaluate in order to provide a proper reply. As the Debtor Movants are currently in compliance with the Prepetition Orders, the Plaintiffs' requested relief is not necessary or ripe for consideration. More importantly, if the Motion to Modify is granted by Judge Chambers, the deadlines in the Prepetition Orders will be extended, which will likely avoid the Litigants having to return ***either*** to this Court or to the West Virginia District Court for additional relief in connection with the Environmental Proceedings for some time, if at all.

D. The Proposed Limited Relief from the Automatic Stay Would Result in Complete Resolution of the Only Ripe Issue

28. Granting the Debtor Movants' requested relief would result in a complete resolution of the narrow issue of whether, and the extent to which, the deadlines in the Prepetition Orders should be modified. The Plaintiffs assert that the "merits of the two cases have been completely resolved." However, whether to modify the Prepetition Orders is an unresolved issue, as evidenced by the Briefing Schedule, which has been postponed by Judge Chambers only until October 12. Appropriately, the Debtor Movants' request for stay relief is carefully and specifically tailored to sufficiently allow the West Virginia District Court to fully resolve the only issue that is ripe for consideration.

29. The Plaintiffs object on the basis that the Debtor Movants may at some point in the future fail to comply with the Prepetition Orders. In support of their all-or-nothing approach, the Plaintiffs cite only to a hypothetical future failure of the Debtor Movants to comply with the

Prepetition Orders. Such contingent possibilities do not warrant preemptive relief from the stay. As discussed above, the Debtor Movants are in full compliance with the Prepetition Orders, and the only unresolved issue is whether the compliance deadlines under the Prepetition Orders should be extended. Simply, if the Motion to Modify is resolved in favor of the Debtor Movants, this Court may never have to hear a request for stay relief by the Plaintiffs.

E. The Proposed Limited Relief from the Automatic Stay Would Not Interfere with these Chapter 11 Cases

30. The Debtor Movants' narrow request would not authorize the West Virginia District Court to decide any issue under bankruptcy law; rather, the only issue before the West Virginia District Court, if this limited relief is granted, will be whether the Debtor Movants' changed circumstances justify modifications to the Prepetition Orders. Allowing the West Virginia District Court to decide whether to alter its own Prepetition Orders in such a limited manner does not interfere with these chapter 11 cases moving forward in this Court.

31. The Plaintiffs, on the other hand, do not explain how their requested relief will not impact the Debtor Movants' bankruptcy proceedings. Instead, the Plaintiffs baldly assert that the Environmental Proceedings have no connection to the bankruptcy cases because the obligations imposed by the Prepetition Orders may not be discharged in bankruptcy. Such issues of dischargeability are complex questions of fact and law, and are inherently core issues very much related to these bankruptcy cases, but are just not properly before the Court at this time. Furthermore, even assuming, *arguendo*, that the obligations at issue would be non-dischargeable, the Plaintiffs fail to establish that this results in there being no connection between the Environmental Proceedings and the bankruptcy case such that the Debtor Movants should be deprived of the fundamental protection afforded by the automatic stay.

F. The West Virginia District Court is Well-Positioned to Resolve the Discrete Issue Related to the Proposed Limited Relief from the Automatic Stay

32. The Debtor Movants and the Plaintiffs agree that the West Virginia District Court is best equipped to decide whether to modify the Prepetition Orders. The Plaintiffs take this point one step further, however, and argue that Judge Chambers' expertise in resolving pollution cases and the appointment of a Special Master in the Environmental Proceedings dictate indiscriminate relief from the stay. These facts alone certainly do not justify lifting the stay entirely, particularly where the limited relief requested by the Debtor Movants adequately allows the appropriate forum, the West Virginia District Court, to effectively determine the only matter ripe for consideration at this time.

33. In sum, each of the relevant *Sonnax* factors weighs against broadly lifting the stay and in favor of granting limited relief from the automatic stay for the sole purpose of resolving whether the Prepetition Orders should be modified. This limited relief would allow the West Virginia District Court to fully resolve the only litigation matter currently at issue in the Environmental Proceedings while affording all interested parties the opportunity to fully represent and protect their interests.

V. Whether the Automatic Stay Applies to the Letter of Credit Is Not at Issue

33. The Debtor Movants agree with the Plaintiffs' assertion that the issue of whether the automatic stay applies to the letter of credit supporting certain of the obligations under the Hobet 22 Order has not been properly presented by the Lift Stay Motion, and that nothing in the Lift Stay Motion presents any argument on why the automatic stay should or should not apply to the letter of credit. This is because, consistent with the Debtor Movants' limited Lift Stay Motion, the Debtor Movants have requested that this Court refrain from issuing any

determination regarding the applicability of the automatic stay to the letter of credit at this time. The Proposed Order provides for narrowly tailored relief and makes clear that the status quo is preserved with respect to every other aspect of the Environmental Proceedings, including the letter of credit. *See Proposed Order* at 3 ("ORDERED that, except as set forth herein, the automatic stay under section 362 remains in full force and effect *to the extent it otherwise applies* to any aspect of the Environmental Proceedings, including, without limitation, to any draw on the letter of credit required to be maintained by the Hobet 22 Order or any action taken to satisfy any of the conditions precedent thereto.") (emphasis added). Such language in no way affects, let alone prejudices, the Plaintiffs', or any other party's, existing rights to argue that the stay does or does not apply to the letter of credit and/or to seek relief from the stay with respect to the letter of credit.

34. As with their procedurally improper request for the automatic stay to be lifted in its entirety, the Plaintiffs have disguised a substantive argument regarding the applicability of the automatic stay as an objection to the Lift Stay Motion. If, through their Objection, the Plaintiffs are implicitly requesting relief from the stay with respect to the letter of credit or a finding from this Court as to the inapplicability of section 362 of the Bankruptcy Code to the letter of credit, such requests must be properly presented in the form of a motion, on notice, with an opportunity for the parties to consider and brief the legal issues.

CONCLUSION

34. WHEREFORE, the Debtor Movants respectfully request that the Court enter an order denying the Objection and granting the relief requested in the Lift Stay Motion.

Dated: New York, New York
October 9, 2012

By: /s/ Brian M. Resnick

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