**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

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| **In re:**<br><br>**PATRIOT COAL CORPORATION, *et al.*,**<br><br>**Debtors.** | **Chapter 11**<br><br>**Case No. 12-51502-659**<br><br>**(Jointly Administered)** |
| **PATRIOT COAL CORPORATION and HERITAGE COAL COMPANY,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**PEABODY HOLDING COMPANY, LLC and PEABODY ENERGY CORPORATION,**<br><br>**Defendants.** | **Adversary Proceeding No. 13-04067-659** |

**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS**

Defendants Peabody Holding Company, LLC ("PHC") and Peabody Energy Corporation ("PEC" and, together with PHC, "Peabody" or "Defendants"), respectfully submit this reply in support of Defendants' Motion to Dismiss [Doc. No. 11 in Adv. Proc. No. 13-04067] (the "Motion to Dismiss") and in response to Plaintiffs' Opposition to Defendants' Motion to Dismiss [Doc. No. 24 in Adv. Proc. 13-04067] (the "Opposition").[1]

[1] Unless otherwise defined in this reply, all capitalized terms used herein have the same defined meanings as set forth in the Motion to Dismiss.

## PRELIMINARY STATEMENT

The plaintiffs, Patriot and Heritage (together, "Plaintiffs"), assert that if the resolution of this declaratory judgment action is "delayed" until the Debtors' 1113/1114 Motion is decided, "it will be too late."[2] The truth, however, is that the Debtors have already constructed their 1114 proposal to permit its implementation now (assuming it comes to be authorized at all) without first obtaining a declaratory judgment in this action, and to permit that proposal (again, assuming it becomes authorized in the first place) to be modified on a *nunc pro tunc* basis if this Court were to award the requested declaratory relief at a later time. Thus, if and when this Court should ever acquire subject matter jurisdiction to resolve the contractual disagreement described in the Complaint, it will not be "too late" for this Court to make an effective ruling that resolves what at that point would be a dispute ripe for consideration.

The arguments and authorities advanced in the Opposition are insufficient to meet Plaintiffs' burden of establishing both that an actual controversy exists and that it is sufficiently ripe to warrant the exercise of jurisdiction to resolve it now. Accordingly, the Court should grant the Motion to Dismiss and dismiss this action without prejudice.[3]

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[2] Opposition at 12.

[3] As detailed in the Motion to Dismiss, Peabody agreed in the NBCWA Liabilities Assumption Agreement to fund Heritage's obligations under its CBA to provide healthcare benefits to a specified group of former union employees of Heritage who had permanently retired from coal mining prior to 2007, and to their eligible dependents (the "Attachment A Retirees"). Motion to Dismiss at 5 n.3. In the "Background" section of their brief, the Plaintiffs erroneously imply: (i) that "[f]or decades prior to 2007," the Attachment A Retirees worked in mines owned by either PEC or PHC; (ii) that when these miners retired PEC and PHC "owed" them and were "oblig[ated]" to provide them with healthcare benefits; and (iii) that PEC and PHC decided to "divest" themselves of their obligations to these retirees by assigning them to "a newly formed Patriot enterprise" that was spun off in 2007. Opposition at 3-4. While Peabody agrees with Plaintiffs that these suggestions are not material to the Motion to Dismiss, id. at 3 n.2, it is important to note that they are also false. As the agreement itself specifies, the Attachment A Retirees are "retirees of PCC" (now known as Heritage). NBCWA Liabilities Assumption Agreement § 1(d). Neither PEC nor PHC was a party to Heritage's CBA or any other collective bargaining agreement with the UMWA and, prior to entering into the NBCWA Liabilities Assumption Agreement, neither had any obligation to fund retiree healthcare benefits for any of the Attachment A Retirees.

**A. The Complaint Does Not Show an "Actual Controversy"**

As detailed in the Motion to Dismiss, the contract disagreement described in the Complaint is not a cognizable "actual controversy" because it is contingent on the occurrence of at least two future events that may never occur or may not occur in the manner that underpins the theory of Plaintiffs' contractual position: (i) the Debtors might not obtain the relief they seek in the 1113/1114 Motion regarding retiree healthcare benefits; or (ii) the Debtors might obtain relief that even Plaintiffs' themselves do not consistently contend warrants a ruling in their favor in the action—such as, for example, through a process that results in the ratification of a new collective bargaining agreement between Heritage and its UMWA represented employees. See Motion to Dismiss at ¶ 24. Courts have repeatedly held that a dispute as to how parties' legal rights would be affected if one party prevails in other related but still ongoing litigation does not constitute an "actual controversy." See id. at ¶¶ 25-26, discussing Dow Jones & Co. v. Harrods, Ltd., 237 F. Supp.2d 394, 404 (S.D.N.Y. 2002) and Becker v. Country Mutual Ins. Co., No. 10-CV-286, 2011 WL 221773 (S.D. Ill. Jan. 24, 2011).

Plaintiffs' principal response is that this case is different because "Peabody has already staked out its position" as to what its legal rights would be if the Debtors obtain the 1114 relief they seek.[4] That response has no merit. Contrary to Plaintiffs' suggestion (see Opposition at 9 n.4), neither Dow Jones nor Becker was decided on the ground that declaratory relief was sought before the defendant had put the action "in issue" by expressly disagreeing with the plaintiffs' legal theory. The contingency that required dismissal in each case was ***not*** that the defendant might choose in the future not to disagree with the plaintiff. Rather, in each case the

[4] Opposition at 12 ("That fact alone ensures the ripeness of the dispute."); see also id. at 2 ("Peabody has already announced its position"), 8 ("Peabody has staked out a competing position").

contingency that required dismissal was whether a party might prevail in related litigation in the manner hypothesized by that plaintiff, thus making the position to be taken by the defendant in the declaratory judgment action consequential.

If Plaintiffs' argument were valid, the mere filing of a lawsuit, and forcing the defendant to answer or respond to an immediate motion for summary judgment, would always ripen an otherwise premature legal dispute into an "actual controversy." That is not the law. An existing disagreement between parties as to their respective legal rights does not constitute an "actual controversy" if that disagreement can become consequential only when unresolved contingencies end up working out in certain ways rather than in other ways. See Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 580-81 (1985).

Plaintiffs' reliance on Public Serv. Co. of New Hampshire v. New Hampshire (In re Public Serv. Co. of New Hampshire), 99 B.R. 506 (D.N.H. 1989) (see Opposition at 10), is misplaced. In that case, the debtor and the state disagreed as to whether it was legally permissible for the debtor to confirm a plan without seeking state regulatory approvals that were required for companies outside of bankruptcy. Although the debtor was actively working with the state to achieve a consensual resolution that would have mooted their dispute, the court found the dispute was an actual controversy.

Here, however, the contingency that prevents this dispute from being an actual controversy is not (as the movant in Public Service. contended) that Plaintiffs and Peabody might settle their disagreement. That contingency is inherent in all disputes. What is determinative here is that the dispute will never require a judicial adjudication if the Debtors do not prevail in litigation against other parties, or if their relief emerges in a particular manner (which perhaps they do not currently expect) rather than in another manner. See Thomas, 473 U.S. at 580-81.

In that regard, Bank of New York v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.), 307 B.R. 432 (Bankr. S.D.N.Y. 2004) is particularly instructive. In Adelphia, the debtors contemplated proposing a plan of reorganization under which much of the distributions to creditors would be in the form of common stock. The junior lenders had reason to believe the plan would provide that no distribution of common stock could be made to them until the senior lenders had been paid in full, despite an "X Clause" in their lending agreement preventing the subordination of their right to hold common stock. Accordingly, the junior lenders filed an adversary proceeding seeking a declaration that their lending agreement with the debtors prevented the debtors from delaying distribution of stock to the junior lenders until the senior lenders had been paid in full. The debtors then in fact filed a plan with the very provision anticipated by the adversary proceeding. Id. at 434-36.

After motions to dismiss and for summary judgment had been fully briefed, the court in Adelphia dismissed the action because it was not an "actual controversy":

> [T]he controversy here is too contingent and speculative to meet Article III requirements. The reorganization plan recently filed by the Debtors is, as its counsel properly described it, a proposal to its stakeholders, which they may or may not find to their liking. Assertions in recent filings with this Court suggest that many do not. . . . It is at least possible, and perhaps likely, that if the Debtors' plan exclusivity is continued, they will nevertheless amend the plan, and it is at least possible that plan amendments would change the nature of the controversy to be decided by the Court, or even make it go away. A change in plan currency—debt instead of stock—could have such an effect, as could a decision to market Adelphia, as several constituencies urge, rather than proceeding with a standalone plan. Countless other plan amendments might also cause changes in the shape of the controversy, or make it moot. It is also at least possible that if the Debtors' enterprise value turns out to be greater than the Debtors now think it is, the enterprise value would be sufficient to put Sub Debt "in the money," or partly so, once again changing the nature of the controversy, or making it moot. At this juncture, all or substantially all of the uncertainties noted at page eight above exist, and all or substantially all of them could have a material effect on the nature of the controversy, or even make it go away.

Id. at 438-39.

Here, the filing of the 1113/1114 Motion was no more a "triggering event" transforming a mere disagreement into a cognizable controversy (see Opposition at 10) than was the filing of the proposed plan in Adelphia with the provision subordinating the right of the junior lenders to the unsecured claims of the senior lenders. Here, as in Adelphia, substantial uncertainties exist that "could have a material effect on the nature of the controversy, or even make it go away." In re Adelphia, 307 B.R. at 439.

Nowhere in their opposition do the Plaintiffs even acknowledge, let alone address, the possibility that the Debtors may not obtain the relief they seek against the UMWA in the 1113/1114 Motion. And while they blandly assert that "a successor labor contract will not be negotiated until long after the relief sought here is necessary" (Opposition at 11), the realities are that the Debtors are continuing to negotiate with the UMWA in an effort to reach an agreed resolution of the 1113/1114 Motion. If such a deal is reached, it is reasonable to expect that a condition of its becoming effective would be ratification of new CBAs between the Debtors and the UMWA. That circumstance would render moot the Debtors' request for a judicial decree eliminating the Debtors' obligations to provide retiree healthcare benefits—and in turn eliminating the predicate for the contractual interpretation that Plaintiffs propose as creating a dispute needing resolution. Accordingly, as a matter of law, the Complaint simply does not reveal an "actual controversy."

### B. The Contract Dispute Is Not Sufficiently Ripe To Warrant the Exercise of Jurisdiction

#### 1. The Legal Issues Are Not "Fit" for Judicial Decision

As detailed in the Motion to Dismiss, "'[w]hether a case is "fit" [for a judicial determination under the ripeness doctrine] depends on whether it would benefit from further factual development.'" Motion to Dismiss at 13-14, quoting Public Water Supply Dist. No. 10 v.

City of Peculiar, Missouri, 345 F.3d 570, 572-73 (8th Cir. 2003). Plaintiffs' protestations that this case would not benefit from further factual development have no merit.

First, Plaintiffs assert that the Complaint presents a "pure legal issue" that "should be completely resolved without discovery . . . ."[5] That dubious assertion, however, is irrelevant to the ripeness inquiry. Civil discovery to find out who said what and when in the past cannot be used to ascertain whether, in the future, the Debtors will obtain the relief they seek in the 1113/1114 Motion, nor can it reveal whether any such future relief will be embodied, not in a judicial decree (such as could, on Plaintiffs' theory, crystallize a "controversy"), but rather in a settlement that generates new CBAs between the Debtors and the UMWA (which, on their theory, it appears would not). Only the passage of time and the normal course progression of the 1113/1114 process will reveal that.[6]

Second, Plaintiffs assert that "no future eventuality will do anything to elucidate or refine the legal query."[7] That is not so.

- If the 1113/1114 Motion is denied, Plaintiffs' request for declaratory relief will be moot.

- If the Court denies relief under section 1113 but grants the requested relief under section 1114, the legal issues in this action (for the near

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5 Opposition at 10.

6 In addition to being irrelevant to the ripeness inquiry, Plaintiffs' assertions that the action should be resolved without any discovery taking place and that "no party asserts that any discovery is required" (see Opposition at 2, 10) are simply erroneous. As explained in Defendants' Opposition to Plaintiffs' Motion for Summary Judgment [Doc. No. 20 in Adv. Proc. No. 13-04067] (the "Summary Judgment Response"), discovery will be necessary with respect to the subjective intent of the parties, if the Court concludes the language of the NBCWA Liabilities Assumption Agreement does not unambiguously require rejection of Plaintiffs' position. The parties are apparently not of one mind on (1) the course of negotiating and drafting the agreement, (2) Peabody's and the Plaintiffs' understanding of the agreement during the course of its negotiation; and (3) the manner, if at all, in which they expressed those understandings to each other during the course of those negotiations. Id. at 17-19.

7 Opposition at 8.

term) will be directed to whether Heritage's CBA, as modified by an 1114(g) order, constitutes a "successor labor agreement" under sections 1(b) and 1(d) of the NBCWA Liabilities Assumption Agreement.[8]

- If the Court grants the requested section 1113 relief when it awards section 1114 relief, the legal issues in this action will be focused on the impact of eliminating Heritage's CBA on Peabody's funding obligation pursuant to the first sentence of section 1(d) of the NBCWA Liabilities Assumption Agreement, as well as whether incorporating the 1114 relief in a confirmed plan would constitute a successor labor agreement under sections 1(b) and 1(d) of the NBCWA Liabilities Assumption Agreement.[9]

- If the Debtors reach a settlement with the UMWA that resolves only the request for section 1114 relief pursuant to section 1114(e)(1)(B), the legal issues in this action will be focused in part on whether that settlement agreement, or any consent order approving it, constitutes a successor labor agreement under sections 1(b) and 1(d) of the NBCWA Liabilities Assumption Agreement.[10]

- If the Debtors reach a settlement with the UMWA that resolves the entire 1113/1114 Motion, it is reasonable to expect that ratification of a new or modified collective bargaining agreement would be a condition of that settlement. While Plaintiffs chose to completely ignore that critical possibility in their

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8 See Summary Judgment Response at 14.

9 Id. at 11-12, 15.

10 Id. at 15-16.

> opposition to the Motion to Dismiss, the fact remains that this outcome would either moot their request for declaratory relief (based on Plaintiffs' own theory for interpreting the NBCWA Liabilities Assumption Agreement) or refine the legal issue to focus on whether a new collective bargaining agreement entered into during the chapter 11 case constitutes a successor labor agreement under sections 1(b) and 1(d) of the NBCWA Liabilities Assumption Agreement.[11]

Plaintiffs are, to put it charitably, unclear as to their position with respect to many of these myriad possible scenarios. For example, in one sentence of their opposition, they assert: "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."[12] ***In the very next sentence***, however, they say: "The question before the Court is whether the Debtors' 1114 Motion, ***or any negotiated resolution***, will modify Peabody's obligation" under that contract.[13]

The imprecision and ambiguities in their descriptions of the declaratory relief they seek only underscore the reality that this case "would benefit from further factual development," Public Water Supply, 345 F.3d, 572-73, and that a judicial declaration at this time may not completely resolve the contingent contractual disagreement. See also Sierra Applied Scis., Inc. v. Advanced Energy Indus., Inc., 363 F.3d 1361, 1379 (Fed. Cir. 2004) ("The greater the variability of the subject of a declaratory-judgment suit . . . the greater the chance that the court's judgment

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11 Id. at 16.

12 Opposition at 11 (emphasis added).

13 Id. at 11-12 (emphasis added).

will be purely advisory, detached from the eventual, actual content of that subject—in short, detached from eventual reality."). Consequently, the case is not yet fit for judicial resolution.[14]

**2. Plaintiffs Will Not Face Hardship If the Court Delays a Ruling**

Finally, Plaintiffs' assertions that they, or the Attachment A Retirees, will suffer hardship if this action is not heard until after the 1113/1114 Motion is resolved are insufficient to warrant the exercise of jurisdiction now under the ripeness doctrine. First, they claim the Debtors will face immediate hardship, "in just a few weeks," if the Court does not immediately decide the issues raised by the Complaint.[15] According to Plaintiffs, "without a ruling on this contractual issue, the Debtors simply do not know whether to include the [Attachment A Retirees] in their request for Section 1114 relief" and "the contours of the 1114 Motion cannot be defined unless and until the Court" decides this case.[16]

The assertions of hardship for the Debtors are both erroneous and legally insufficient to make this case ripe. They are erroneous because adjudication of this action will not affect the Debtors' obligations at all. If they obtain the relief they seek in the 1113/1114 Motion, Heritage's CBA with the UMWA would be terminated and its obligations under that CBA to maintain a retiree healthcare plan and to provide healthcare benefits to all current and future retirees, including the Attachment A Retirees, ***would be completely eliminated.*** That

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[14] The cases on which Plaintiffs rely do not require a different result. Burlington N. & Santa Fe Ry. Co. v. Metzeler Auto. Profile Sys. Iowa, Inc. did not involve issues "contingent on future events" and did not "require the Court to issue an advisory opinion based on hypothetical future occurrences." No. 3-01-cv-1016, 2002 U.S. Dist. LEXIS 25965, at *11-12 (S.D. Iowa Sept. 30, 2002). While Nebraska Pub. and Markel each did involve a contingent future event, the event was one that would either occur or not; unlike here, neither the circumstances of the event nor the manner in which it might occur would have affected the Court's analysis. Nebraska Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1039 (8th Dist. 2001) (either the plaintiff would continue operating the nuclear power plant after 2004 or it would not; "all facts necessary to the resolution of this case have already been established"); Markel Am. Ins. Co. v. Watkins Co., Civ. No. 07-06056, 2008 U.S. Dist. LEXIS 16191, at *4-5 (W.D. Ark. Mar. 3, 2008) (either the decedent's probate estate would file a wrongful death action or not).

[15] Opposition at 2-3.

[16] Opposition at 2, 9.

result would occur ***regardless*** of how and when this Court ever resolves this declaratory judgment action.[17]

The assertion that the Debtors need declaratory relief now to define "the contours" of their request for relief under section 1114 is equally incorrect. As Plaintiffs themselves acknowledge, the Debtors have already "structured their 1114 Proposal to account for this issue,"[18] and have provided in their "Fourth Section 1114 Proposal"[19] that the proposal "shall be modified *nunc pro tunc* to the date of the [1114 Motion] and shall not apply" to the Attachment A Retirees if this Court adjudicates this action after the 1113/1114 Motion is resolved and grants the declaratory judgment they seek.[20]

Besides being unnecessary, the guidance Plaintiffs insist they need from this Court is inadequate as a matter of law to constitute the type of hardship that can make an otherwise premature dispute ripe for a judicial determination. See Missouri v. Cuffley, 112 F.3d 1332, 1338 (8th Cir. 1997). In Cuffley, an organization filed an application with a state agency to participate in the Adopt-A-Highway program. Instead of denying the application, the agency sought a declaration that the First Amendment did not require the agency to approve the application. Id. at 1333. The Eighth Circuit held the action was not ripe because the case was "well on the hypothetical, advisory, not-fit-for-decision side of that line [between unripe and mature actions]":

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[17] See Third Section 1113 Proposal, attached as Exhibit 2 to Revised Summary of Exhibits to the Declaration of Gregory B. Robertson in Support of the Debtors' Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 of the Bankruptcy Code [Doc. No. 3284 in Case 12-51502] (the "Third Section 1113 Proposal") at Tab A, Art. XX at ¶¶ 1 and 5.

[18] Opposition at 6.

[19] Exhibit 1 to Revised Summary of Exhibits to the Declaration of Gregory B. Robertson in Support of the Debtors' Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §§ 1113, 1114 of the Bankruptcy Code [Doc. No. 3284 in Case 12-51502].

[20] Opposition at 6 (alteration in original).

> A federal court is neither required nor empowered to wade through a quagmire of what-ifs like the one the State placed before the District Court in this case. Until the State acts on the [organization's] application and creates a concrete record for judicial consideration, this dispute is simply not ripe for review. If the State is unsure how to handle the [organization's] application, it should seek the advice of its legal staff, not the advice of a federal judge.

Id. at 1338. Thus, even if the Debtors "would benefit greatly by having guidance as to the potential legal ramifications of their decisions[, f]urnishing such guidance prior to the making of the decision, however, is the role of counsel, not of the courts." Hendrix v. Poonai, 662 F.2d 719, 722 (11th Cir. 1981). As Bankruptcy Judge Gerber explained in Adelphia:

> The Court understands, and is sympathetic to, the points made by the Sub Debt holders that an early ruling might facilitate their negotiations; that they would know better what litigation positions they might wish to take if they knew what the outcome would be in this controversy; and that efforts on the part of the Debtors to confirm what would turn out to be an unconfirmable plan would be time consuming and costly. ***But these points do not confer subject matter jurisdiction where it is lacking, and in any event prove too much. Because as the Creditors' Committee fairly argues, "[w]ere such an argument to carry the day, bankruptcy courts would be beset with requests for numerous advisory opinions, many of which ultimately would have no practical application***."

In re Adelphia, 307 B.R. at 440-41 (emphasis added).

Finally, Plaintiffs imply that the Attachment A Retirees will suffer hardship if this action is not adjudicated until after the 1113/1114 Motion is resolved. However, Plaintiffs' current 1114 proposal does not become effective by its own terms until July 1, 2013 at the earliest and contemplates the possible delay of its effectiveness by an additional six months, until January 1, 2014.[21] Thus, the 1113/1114 Motion, which is scheduled to be heard next week, is likely to be resolved far in advance of the effectiveness of any changes to Heritage's liabilities for healthcare benefits provided to the Attachment A Retirees under its current CBA. And should

[21] See Fifth Section 1114 Proposal at ¶¶ 2-3. Notice of Fourth 1113 Proposal and Fifth 1114 Proposal [Doc. No. 3583] (filed 04/11/2013), posted at www.patriotcaseinfo.com.

the Debtors prevail on their 1113/1114 Motion and should the effective date of the VEBA occur before a final ruling in this declaratory judgment action, the Attachment A Retirees would be moved to the VEBA and would receive healthcare benefits from the VEBA, pursuant to the existing terms of the Debtors' current 1114 proposal. There is nothing that would prevent those same retirees from being removed from the VEBA at a later time should the Court ultimately rule in Plaintiffs' favor in this action at a later date.

Accordingly, the Court does not have subject matter jurisdiction to adjudicate this action now because the Complaint does not constitute an "actual controversy." Moreover, to the extent the Court does have jurisdiction over this action now, it should use its discretion not to exercise that jurisdiction because this action is not yet ripe for judicial determination.

## CONCLUSION

For the foregoing reasons and the reasons stated in the Motion to Dismiss, this Court should grant the motion and dismiss the Complaint without prejudice.

Dated: April 26, 2013

Respectfully submitted,

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