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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.	)	**(Jointly Administered)**

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

Ohio Valley Environmental Coalition, Inc., West Virginia Highlands Conservancy, Inc., and Sierra Club (collectively, the "**Objectors**" or "**Environmental Plaintiffs**") hereby respectfully object to the September 28, 2012 motion by Patriot Coal Corporation ("**Patriot**"), Apogee Coal Company, LLC ("**Apogee**"), Catenary Coal Company, LLC ("**Catenary**"), and Hobet Mining, LLC ("**Hobet**", collectively the "**Debtor Movants**" or "**Defendants**") for the entry of an order pursuant to 11 U.S.C. § 362(d) for limited relief from the automatic stay in two civil actions pending in the United States District Court for the Southern District of West Virginia. Debtor Movants seek overly restrictive relief from the automatic stay in two civil actions—*Ohio Valley Envtl. Coal., Inc. v. Hobet Mining,* LLC, Civ. No. 3:09-cv-1167 (S.D. W. Va.), and *Ohio Valley Envtl. Coal., Inc. v. Patriot Coal Corp., et al.*, Civ. No. 3:11-cv-0115 (S.D. W. Va.) (collectively, the "**Environmental Proceedings**")—for the purpose of delaying

once more their obligations under the Federal Water Pollution Control Act (the "Clean Water Act") and the Surface Mining Control and Reclamation Act ("SMCRA"). As detailed below, the Plaintiffs in the Environmental Proceedings object that the relief sought by the Debtor Movants is too narrow and that the automatic stay in the Environmental Proceedings should be lifted in its entirety.

The Environmental Plaintiffs have been attempting to force Defendants to comply with federal environmental laws prohibiting their selenium discharges since 2006. *See OVEC v. Patriot Coal Corp.*, 2011 WL 6101921 at *1–*3; *OVEC v. Hobet Mining*, 723 F. Supp. 2d at 897–900. This motion is the latest instance of Movant Debtors repeated efforts to delay that compliance. For example, Movant Debtors were required to cease most of the illegal discharges at issue in Civil Action Number 3:11-cv-115 by April 5, 2010, failed to do so, and colluded with the state regulatory authority to gain yet another extension of time. *OVEC v. Patriot Coal Corp.*, 2011 WL 6101921 at *1–*3. Similarly, the United States District Court for the Southern District of West Virginia characterized Hobet's efforts to gain extensions to its deadline to cease the illegal discharges at issue in Civil Action Number 3:09-cv-1167 as "stalling tactics." OVEC v. Hobet Mining, 723 F. Supp. 2d at 911. The Court explained Hobet's recalcitrance this way:

> [A] review of recent facts documents Hobet's track record of failing to comply with court-ordered decrees, a practice to which the [West Virginia Department of Environmental Protection ("WVDEP")] appears to acquiesce. . . . [I]nstead of coming into compliance or even experimenting with and installing treatment technologies at the outfalls covered by the permit, when faced with the impending deadline for compliance and the imposition of penalties, Hobet moved to add WV/NPDES Permit 1022911 to the Boone County consent decree, in August 2009. In doing so, the company sought . . . to extend the deadline for the then-effective limits . . . .

Id. at 912–13 (emphasis added; internal footnote omitted).

Debtor Movants have asked this Court to lift the automatic stay in the Environmental Proceedings in a very limited way so that they can ask the United States District Court for the Southern District of West Virginia to extend the deadlines by which Debtor Movants must stop violating federal environmental law.[1] The orders against Hobet in Civil Action No. 3:09-cv-1167 were entered on September 1, 2010, and October 8, 2010, after a four-day evidentiary hearing in August 2010 on the scope of the injunctive relief that the Court should order. *OVEC v. Hobet Mining*, 2010 WL 3951534 (S.D. W. Va. Oct. 8, 2010). The order against the Movant Debtors in Civil Action No. 3:11-cv-115 was entered as a Consent Decree, following a multi-year effort by the Environmental Plaintiffs through administrative and judicial proceedings to force Movant Debtors to stop illegally discharging selenium into West Virginia's waters. *OVEC v. Patriot Coal Corp.*, 2012 WL 895939 (S.D. W. Va. Mar. 15, 2012). Notwithstanding their statement in their motion they "have made significant progress in bringing the relevant mining outfalls into compliance with the required permit conditions," Movant Debtors remain in violation of federal law. At the outfall at issue in Civil Action No. 3:09-cv-1167, Hobet still has not treated a single drop of water to remove selenium and will not do so until it completes the construction of its treatment plant—the very action that it seeks to delay. The same is true at most of the outfalls at issue in Civil Action No. 3:11-cv-115, the exception being a small number of outfalls where Movant Debtors are conducting pilot testing of treatment systems.

The Environmental Plaintiffs object to the form of the Movant Debtors' requested relief for two reasons. First, under the factors enumerated by the United States Court of Appeals for the Second Circuit in *In re Sonnax Industries, Inc.*, 907 F.2d 1280 (2d Cir. 1990), the automatic

[1] By objecting to the pending motion, and raising the possibility of the applicability of the automatic stay before Judge Chambers, the Environmental Plaintiffs do not concede that § 362 applies to the Environmental Proceedings.

stay in the Environmental Proceedings should be lifted for *all* purposes, not just the limited purposes sought by Movant Debtors. Second, any relief granted by this Court should not address the irrevocable letter of credit held by the United States District Court for the Southern District of West Virginia.

I. The Relief Sought By Movant Debtors is Inequitably Narrow

The following *Sonnax* factors cut in favor of lifting the automatic stay in the environmental proceedings for all purposes, rather than for the limited purpose proposed by Movant Debtors:

- whether relief would result in a partial or complete resolution of the issue;
- lack of any connection with or interference with the bankruptcy case;
- whether a specialized tribunal with the necessary expertise has been established to hear the cause of action;
- whether litigation in another forum would prejudice the interest of the creditors;
- the interests of judicial economy and the expeditious resolution of litigation; and
- impact of the stay on the parties and the balance of harms.

In re Sonnax, 907 F.2d at 1286.

Lifting the Stay in the Environmental Proceedings for All Purposes Would Result in Complete Resolution of the Issues. As discussed above, the Environmental Proceedings have resulted in final, binding judicial orders. Effectively, the merits of the two cases have been completely resolved. Movant Debtors seek to inject their reorganization proceedings into those two cases by requesting extensions of court-ordered deadlines. Moreover, Movant Debtors assert in their motion to this Court that, "[i]n the event that the relief requested herein is granted and the West Virginia District Court denies the Debtor Movants' request to extend the deadlines,

the Debtors and other parties in interest in these chapter 11 cases intend to evaluate all available options with respect to the Environmental Proceedings and will determine the appropriate next steps in light of the Debtors' reorganization efforts." Movant Debtors' Motion at 10 n.3 (Doc. # 824). That is, Movant Debtors have signaled their intent to take other steps—in addition to the motion to modify—to avoid their obligations in the Environmental Proceedings below. Accordingly, to ensure that all issues can be completely resolved in the Environmental Proceedings, this Court should lift the automatic stay in the Environmental Proceedings for all purposes.

The Environmental Proceedings Lack Connection With and Will Not Interfere With the Bankruptcy Case. Because the orders in the Environmental Proceedings compel the Movant Debtors to take the necessary steps to remedy ongoing violations of federal environmental law—*i.e.*, violations that have continued to occur post-petition—the obligations imposed by the orders in the Environmental Proceedings are not dischargeable in bankruptcy. *See, e.g.*, *In re Chateaugay Corp.*, 944 F.2D 997, 1008–09 (2d Cir. 1991) (holding that "any order that to any extent ends or ameliorates continued pollution" is not a dischargeable claim because "[i]t is difficult to understand how any injunction directing a property owner to remedy on-going pollution could be a dischargeable 'claim'" under Supreme Court precedent); *United States v. Hubler*, 117 B.R. 160, 163–65 (W.D. Pa. 1990) (holding cessation order requiring action to eliminate noncompliance with SMCRA not a dischargeable claim in bankruptcy); Accordingly, there is no connection between the Environmental Proceedings and the bankruptcy case and the automatic stay should be lifted in those cases for all purposes.

The United States District Court for the Southern District of West Virginia Has the Necessary Expertise to Resolve All Post-Judgment Matters in the Environmental

Proceedings. Movant Debtors assert that this factor justifies their request for relief from the automatic stay. The Environmental Plaintiffs agree, but further contend that this factor suggests that the stay should be lifted for all purposes. As described above, and discussed in greater detail in the cited opinions, the United States District Court for the Southern District of West Virginia, and Judge Robert C. Chambers in the Huntington Division in particular, has gained tremendous expertise in matters regarding selenium through evidentiary hearings and the resolution of numerous lawsuits involved selenium pollution from coal mines in West Virginia. *See Sierra Club v. Elk Run Coal Co., Inc.*, Civ. No. 2:10-cv-673, 2010 WL 3910187 at *4 (S.D. W. Va. Oct. 1, 2010) ("It seems apparent that the judicial officer presiding in the Huntington action has both extensive experience, and significant expertise, in dealing with selenium discharge issues. It is undisputed that Judge Chambers has devoted significant time and effort to the issue in cases at various stages of development before him . . . .").

Moreover, Judge Chambers has appointed a Special Master to oversee the technical aspects of the implementation of the orders in the Environmental Proceedings. *See* Ex. B to Movant Debtors' Motion at ¶ 5; Ex. C. to Movant Debtors' Motion at ¶¶ 63–70. The Special Master has conducted numerous site visits to evaluate Movant Debtors' progress in constructing water treatment facilities, has held regular conference calls to monitor implementation of the orders in the Environmental Proceedings, and has invested tremendous resources reviewing Movant Debtors' engineering plans.

In short, Judge Chambers, through his extensive experience in selenium matters and through his Special Master, has the unique expertise to oversee the complete resolution of all post-judgment matters in the Environmental Proceedings. Accordingly, there is no reason to

restrict the lifting of the automatic stay in those proceedings in the manner requested by Movant Debtors.

Litigation in the Southern District of West Virginia Would not Prejudice Creditors. As discussed above, Movant Debtors' obligations under the orders in the Environmental Proceedings are not dischargeable claims in bankruptcy. Because Movant Debtors will have to perform those obligations, other creditors will not be prejudiced by lifting the automatic stay in the Environmental Proceedings. Moreover, creditors could be prejudiced if Movant Debtors were to default on their obligations under the orders because of potential collateral consequences under SMCRA of failing to remedy ongoing violations—consequences that could include a prohibition on Patriot or its subsidiaries obtaining new surface mining permits. Accordingly, this Court should lift the automatic stay for all purposes to ensure that the orders in the Environmental Proceedings are able to be enforced.

Lifting the Stay for All Purposes Would Serve Judicial Economy and the Expeditious Resolution of Litigation. Movant Debtors' requested relief is inequitable. They contend that they should be permitted to seek a modification of long-standing pre-petition obligations to cease their illegal activity, but that Environmental Plaintiffs should remain hamstrung by the automatic stay. As noted above, Movant Debtors have signaled that their planned motion to modify the deadlines in the Environmental Proceedings is not the only action that they will take to avoid their obligations under their orders. Movant Debtors' Motion at 10 n.3. Moreover, based on the Movant Debtors' past behavior, the Environmental Plaintiffs have cause for concern that Movant Debtors could choose to ignore their obligations under the orders in the Environmental Proceedings. For example, Movant Debtor Apogee has already been held in contempt for violating an order to eliminate selenium pollution at one of its mines (*see*

generally Ohio Valley Envtl. Coalition, Inc. v. Apogee Coal Co., LLC, 744 F. Supp. 2d 561 (S.D. W. Va. 2010)) and the United States District Court for the Southern District of West Virginia has noted Hobet's demonstrated "willingness to ignore court-ordered mandates." *OVEC v. Hobet Mining*, 723 F. Supp. 2d at 913.

Accordingly, lifting the automatic stay in the Environmental Proceedings will serve judicial economy and lead to the expeditious resolution of litigation by eliminating the need for the parties in those actions to repeatedly come to this Court to seek piecemeal relief from the stay for one "limited purpose" after another. Because of the complex issues that could arise during the implementation of the orders in the Environmental Proceedings, this pending motion is likely not the last time a party to the Environmental Proceedings will need relief from the automatic stay. Movant Debtors have presented no compelling reason why the relief they seek should be limited in the manner that they propose, and, as discussed herein, there are numerous reasons why the relief should not be so limited. Thus, in order to eliminate the need for the parties to return to this Court to seek additional relief from the stay—relief that may be warranted based on the Movant Debtors' contemporaneous statements and past behavior—this Court should lift the automatic stay in the Environmental Proceedings for all purposes.

The Limited Relief Proposed by Movant Debtors Would Harm the Environmental Plaintiffs' Interests. By seeking to make the automatic stay a one-way street in which they could get post-judgment relief in the Environmental Proceedings but the Environmental Plaintiffs could not, Movant Debtors propose a remedy that would harm the Environmental Plaintiffs' interests. As the United States District Court for the Southern District noted when it determined that injunctive relief against Hobet was necessary in Civil Action No. 3:09-cv-1167:

> Plaintiffs have established irreparable injury. As noted, the EPA and the WVDEP acknowledge the toxic nature of selenium. The Mud River watershed has been

> identified as an area of concern with regard to selenium and a TMDL of 5 [µ]g/l has been established for the pollutant. In conformity with the TMDS, selenium limits were added to WV/NPDES Permit 1022911 on October 28, 2008. Plaintiffs have demonstrated that Hobet is in continuing violation of these effluent limits. Thus, Plaintiffs have shown that the company is contributing to the degradation of the Mud River watershed in the form of excess selenium pollution. This is sufficient to establish irreparable harm.
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> [T]he particular facts of this case warrant injunctive relief for several reasons: (1) governmental enforcement has failed to bring Hobet into compliance and a realistic prospect of continuing violations exists notwithstanding the modification of the Boone County consent order; (2) Hobet's track record of non-compliance and the WVDEP's history of acquiescing to deadline extensions and other modifications to ease permit requirements suggest compliance is not likely without intervention on the part of this Court; (3) Hobet sought WV/NPDES Permit 1022911 and surface mining permit S-5008-06 at a time when it was aware of the selenium problem in the Mud River watershed, as well as with the uncertainty concerning selenium treatment technologies (i.e., it assumed the risk); (4) Plaintiffs only agreed to settle *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers* (3:08-cv-0979) in exchange for Hobet's agreement to immediately effective selenium limits in WV/NPDES Permit 1022911 and Plaintiffs are entitled to the benefit of their bargain in that settlement; and (5) the imposition of injunctive relief directed at requiring compliance with the CWA and SMCRA is appropriate in light of the statutory objectives.

OVEC v. Hobet, 723 F. Supp. 2d at 924. In Civil Action No. 3:11-cv-115, the Court found that the Consent Decree "represents a substantial victory for the plaintiffs." *OVEC v. Patriot Coal Corp.*, 2012 WL 895939 at *3.

Permitting Movant Debtors to seek to prolong their violations of federal law, but continuing to prevent the Environmental Plaintiffs from taking any action to protect the streams at issue or their hard won victories in these matters would constitute substantial injustice. In contrast, the harm to the Movant Debtors from lifting the stay for all purposes is not cognizable under federal environmental law. Polluters must comply with water quality standards as soon as possible without regard to cost. 40 C.F.R. § 122.47(a)(1); PIRG v. Top Notch Metal Finishing Co., 1987 WL 44393, at *5 (D.N.J. 1987) (granting an injunction requiring permit compliance

and rejecting defendant's claim of economic harm, stating that "if to stay in business Top Notch must expend a large sum of money to come into immediate compliance with toxic substance limitations, this is a balance Congress has struck in favor of the environment, and I do not strike the balance differently here."). Thus, Movant Debtors' complaints that it is too expensive to obey federal law should not be countenanced. Consequently, the Court should lift the automatic stay for all purposes so that the harm to the environment and to the Environmental Plaintiffs is not unnecessarily prolonged.

II. The Court Should Not Address the Irrevocable Letter of Credit In Its Order on the Pending Motion

In their pending motion, Movant Debtors inform the Court that they have provided to the United States District Court for the Southern District of West Virginia an irrevocable letter of credit to guarantee, among other things, Hobet's performance under the order in Civil Action No. 3:09-cv-1167. Movant Debtors' Motion at 5. Regarding that letter, Movant Debtors note, "[t]his letter is subject to certain requirements that must be met as a condition to its presentment. Nothing in this Motion requests authority to modify the automatic stay in any way to permit the beneficiary to present the letter of credit or to take any action to satisfy the conditions precedent to presentment." *Id.* n.2. In their proposed order on the pending motion, Movant Debtors request that this Court order "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* . . . ." Proposed Order at 3 (emphasis added) (Doc. No. 824 at 20).

The Environmental Plaintiffs object that, if this Court were to grant the limited relief sought by Movant Debtors, the order granting such relief should not comment at all on the letter

of credit. First, whether the stay applies to the letter of credit has not been properly presented by Movant Debtors' motion. Nothing in their motion presents any argument on why the automatic stay should apply in any way to the letter of credit, *i.e.*, why the letter of credit should be considered part of the debtors' estate.

Second, it is settled law that a letter of credit such as the irrevocable letter of credit at issue in this case is not part of the debtors' estate and a draw on such a letter is not subject to the automatic stay. *See, e.g.*, *New England Dairies, Inc. v. Dairy Mart Convenient Stores, Inc.*, 351 F.3d 86, 91 (2d Cir. 2003) ("It is the nature of a letter of credit (as well as its utility) that the obligation to the beneficiary . . . runs from the bank. . . . The letter of credit is an independent third party obligation, and the proceeds are not the debtor's property . . . ." (internal quotation marks omitted)); *Willis v. Celotex Corp.*, 978 F.2d 146, 148 n.3 (4th Cir. 1992) (holding that the automatic stay does not prevent draw on a letter of credit); *Credit Alliance Corp. v. Williams*, 851 F.2d 119, 121 (4th Cir. 1988) (holding that the automatic stay does not protect guarantors of Chapter 11 bankrupts); *In re Keene Corp.*, 162 B.R. 935, 942 (Bkrtcy.S.D.N.Y. 1994) ("The letter of credit is an independent third party obligation, and the proceeds are not the debtor's preoperty even if, as here, the letter of credit is secured by the debtor's property."); *In re Guy C. Long, Inc.*, 74 B.R. 939, 943–44 (Bkrtcy.E.D. Pa. 1987) (noting that "virtually all courts . . . [have] conclude[d] that payment of a letter of credit does not violate the automatic stay" and that cases to the contrary have been questioned even by their own authors); *In re Illinois-California Exp., Inc.*, 50 B.R. 232, 234–35 (Brktcy. Colo. 1985) ("[A] letter of credit and its proceeds are not property of the estate within the meaning of 11 U.S.C. § 541, and therefore the payment of a letter of credit is not a transfer of assets in violations of the automatic stay provisions . . . . (citing *In re Elegant Merhandising, Inc.*, 41 B.R. 398, 399 (Bankr.S.D.N.Y. 1984)); *In re M.J. Sales &*

Distributing Co., Inc., 25 B.R. 608, 615 (Bkrtcy.S.D.N.Y. 1982) (holding that nothing in the Bankruptcy Code would prevent payment pursuant to a letter of credit).

CONCLUSION

For the foregoing reasons, the Environmental Plaintiffs object to the form of the relief requested by Movant Debtors and respectfully request that the Court lift the automatic stay in the Environmental Proceedings for all purposes and that the Court reject Movant Debtors' invitation to comment on the applicability of the automatic stay on the irrevocable letter of credit in Civil Action No. 3:09-cv-1167.

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