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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	Chapter 11
PEABODY ENERGY CORP., *et al.*,	)	Case No. 16-42529
	)	(Jointly Administered)
Debtors.	)	

OBJECTION TO MOTION OF REORGANIZED DEBTOR PEABODY ENERGY CORPORATION FOR ENTRY OF AN ORDER ENFORCING THE DISCHARGE AND INJUNCTION SET FORTH IN THE CONFIRMATION ORDER AND PLAN

The County of San Mateo, California ("*San Mateo*"), the City of Imperial Beach, California ("*Imperial Beach*"), and the County of Marin, California ("*Marin*"; and together with San Mateo and Imperial Beach, the "*Governmental Plaintiffs*"), hereby object to the motion (Docket No. 3362; the "*Motion*") filed by Peabody Energy Corporation ("*PEC*") seeking entry of an order enforcing the discharge and injunction contained in PEC's plan of reorganization (Docket No. 2718; the

"*Plan*") and the order confirming the Plan (Docket No. 2763; the "*Confirmation Order*"). In support of the objection the Governmental Plaintiffs respectfully state as follows:[1]

OBJECTION

1. The Governmental Plaintiffs, coastal communities in California, filed the Complaints to protect the health, safety, and well-being of their residents, and to protect their infrastructure and properties, against the ongoing and accelerating impacts of climate change (notably including, for these sea-side municipalities, increased sea levels and associated flooding).

2. The defendants, major corporate members of the fossil fuel industry, have been collectively responsible for the release of approximately 20% of global emissions of the potent greenhouse gas carbon dioxide (CO_2) between 1965 and 2015. The defendants are thus responsible for a substantial portion of committed sea level rise (sea level rise that will occur even in the absence of future emissions), and the situation is worsening as the defendants continue to engage in the conduct the Complaint seeks to address – the creation of CO_2 emissions – on a daily basis.

3. As detailed in the Complaints, the defendants have known for at least 50 years that greenhouse gas pollution from their fossil fuel products has a significant impact on the earth's climate and sea levels, and in fact long ago took steps to protect their own assets from these threats. Yet despite this knowledge, they concealed the dangers, sought to undermine public support for greenhouse gas regulation, and engaged in massive campaigns to promote the ever-increasing use of their products at ever greater volumes.

4. The negative impacts of this conduct on the Governmental Plaintiffs and their residents and taxpayers is profound and accelerating. As described in greater detail in the

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Motion.

Complaints, sea level rise is already adversely affecting the Governmental Plaintiffs' wastewater systems, beaches, parks, roads, civil infrastructure and essential public services, and communities. Groundwater aquifers, agricultural land, and other critical infrastructure that residents rely upon is increasingly at risk because the situation is rapidly worsening. For example, by 2050, flooding events will more than double in frequency on California's Pacific coast, including on the coastlines in the territory of the Governmental Plaintiffs. Flooding and storms will become more frequent and more severe, and sea levels will continue to rise.

5. All of this is harming, and will increasingly harm, the Governmental Plaintiffs and the health, safety, and well-being of their residents and taxpayers. The Governmental Plaintiffs have already spent millions of dollars to determine how best to mitigate the climactic changes that are being caused by the defendants' activities, and the costs of addressing the ongoing and future impacts will exponentially exceed the costs incurred to date. The Governmental Plaintiffs filed the Complaints in order to ensure that the Defendants, as opposed to the Governmental Plaintiffs and their residents and taxpayers, bear the costs and burdens of addressing the foreseeable harm that is being, and will increasingly be, caused by the defendants' products.

6. In its Motion, PEC (one of almost forty defendants in the Complaints)[2] seeks to enjoin the causes of action directed at it (defined as the "*PEC Causes of Action*" in the Motion) by arguing that they are brought in violation of the discharge and injunction contained in the Plan and Confirmation Order (collectively, the "*Plan Injunction*"). Unfortunately for PEC, however, this is

[2] The scope and detail of the Complaints, the number of defendants (again, PEC being one out of almost forty), and the fact that the police power actions at issue could have proceeded during PEC's bankruptcy, all belie PEC's unfounded and incorrect suggestion that the Governmental Plaintiffs "appear" to have "waited out" PEC's bankruptcy case.

not correct. For multiple reasons, the PEC Causes of Action are not barred by the Plan Injunction and as such, the Motion must be denied.

A. The Governmental Plaintiffs are Exercising their Police Powers as Specifically Authorized by Section V.E.6.a.i of the Plan

7. As PEC acknowledges, the Confirmation Order contains a carve-out from the Plan Injunction for certain claims brought by governmental units (the "*Governmental Carve-Out*"), as set forth below:

> Nothing in the Plan or the Confirmation Order:
>
> i. releases, discharges, exculpates, precludes or enjoins the enforcement of:
>
> A. any liability or obligation to, or any claim or any cause of action by, a Governmental Unit (which, solely for purposes of this section, shall include federally recognized Indian Tribes) under any applicable Environmental Law to which any Reorganized Debtor is subject to the extent that it is the owner, lessee, permittee or operator of real property or a mining operation after the Effective Date (whether or not such liability, obligation, claim or cause of action is based in whole or in part on acts or omissions prior to the Effective Date, but only to the extent applicable Environmental Law imposes such claim or cause of action on such Reorganized Debtor in its capacity as the self bond guarantor, owner, lessee, permittee or operator of real property or a mining operation after the Effective Date); provided, that all of the Debtors' or Reorganized Debtors' claims, defenses or Causes of Action related thereto under applicable Environmental Law are likewise preserved;
>
> B. any claim of a Governmental Unit (which, solely for purposes of this section, shall include federally recognized Indian Tribes) under any Environmental Law, or other applicable police or regulatory law, in each case that, in accordance with the Bankruptcy Code and bankruptcy law, arises from the mining operation of any Reorganized Debtor; provided, that all of the Debtors' or Reorganized Debtors' claims, defenses or Causes of Action related thereto under any Environmental Law, or other applicable police or regulatory law, are likewise preserved . . . .

Plan at § V.E.6.a.i.

8. Among other things, the plain language of sub-section B of the foregoing Governmental Carve-Out excepts from the Plan Injunction "any claim of a Governmental Unit" under any "other applicable police or regulatory law" that "arises from the mining operation of any Reorganized Debtor." Plan at § V.E.6.a.i.B. In the present case, Governmental Units (*i.e.*, the Governmental Plaintiffs) have brought an action through the use of their police powers that arises from mining operations of the Reorganized Debtors. Thus, the Plan Injunction does not apply.

(a) Each Governmental Plaintiff Constitutes a "Governmental Unit" Within the Meaning of the Plan

9. Each of the Governmental Plaintiffs (again, two counties and one city) constitutes a "Governmental Unit" for purposes of the Plan. The Plan basically adopts the Bankruptcy Code's broad definition of "Governmental Unit" (which includes, among other things, "municipalities" and any "other…domestic government."). *See* Plan at I.A.126; 11 U.S.C. § 101(27).[3]

10. PEC does not appear to generally contend otherwise. Rather, it only argues that because Count I of each Complaint (public nuisance) is brought by the Governmental Plaintiffs on behalf of "the people of the State of California," that one count is not brought by a Governmental Unit. *See* Complaint at ¶ 43.

11. PEC's argument fails. California has a general nuisance statute (*see generally* Cal. Civ. Code §§ 3479, *et seq.* (the "*California Nuisance Statute*")). A portion of the California Nuisance Statute deals with public nuisances (*see*, *e.g.*, Cal. Civ. Code § 3480), and a related section of the California Rules of Civil Procedure empowers counsel for "any county or city" to bring civil actions "in the name of the people" to abate public nuisances:

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[3] The Plan defines a Governmental Unit as: United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government. Plan, at Art. I.A.126. Governmental Unit is defined similarly in the Bankruptcy Code.

> …A civil action *may be brought in the name of the people of the State of California* to abate a public nuisance…by the district attorney or county counsel of any county in which the nuisance exists…The district attorney, county counsel, or city attorney of any county or city in which the nuisance exists shall bring an action whenever directed by the board of supervisors of the county, or whenever directed by the legislative authority of the town or city.

Cal. Civ. Proc. Code § 731, the "*Public Nuisance Enabling Statute*")

12. Thus, per the plain language of the Public Nuisance Enabling Statute, only "any county or city" can bring a nuisance action through its counsel. Although the action is technically brought "in the name of the people," the party bringing the action – and again, *the only party authorized to bring the action* – is the city or county (here the Governmental Plaintiffs). Caselaw similarly confirms that the plaintiff in an action under the Public Nuisance Enabling Statute is the governmental plaintiff bringing the action. *California v. M & P Investments*, 213 F. Supp. 2d 1208, 1215 (E.D. Cal. 2002) (specifically addressing the issue, reviewing prior California decisions, and holding that the plaintiff in an action brought under the Public Nuisance Enabling Statute was (as relevant to the *M&P Investments* case) "the city which the city attorney represents"); *see also People v. City of Los Angeles*, 160 Cal.App.2d at 494, 325 P.2d 639 (dismissing action brought by city "in the name of the people" under the Public Nuisance Enabling Statute because the "plaintiff city of Manhattan Beach" could not enforce an order obtained by the state (since the city / plaintiff was not party to the prior action)).

(b) The PEC Causes of Action are Asserted Via the Police Powers of the Governmental Plaintiffs

13. The term 'police power' connotes the time-tested conceptual limit of public encroachment upon private interests. *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 594 (1962). It is an "exercise of sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between

individuals." *Manigault v. Springs*, 199 U.S. 473, 480 (1905); *see also Frye v. Kansas City Missouri Police Dept.*, 375 F.3d 785, 791 (8th Cir. 2004) (it is a traditional exercise of the State's police power to protect the health and safety of their citizens). The classic statement of the rule in *Lawton v. Steele*, 152 U.S. 133, 137 (1894), is still valid today. That is, "'[t]o justify the state in * * * interposing its authority [on] behalf of the public, it must appear— [f]irst, that the interests of the public * * * require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'" *Goldblatt*, 369 U.S. at 594-595.

14. Government entities frequently assert their police powers via judicial proceedings. *See, e.g., City of Kansas City, Missouri v. Lyft, Inc.*, 2014 WL 12616795 at *2 (E.D. Mo. 2014) (complaint in which City exercised regulatory and police powers withstood motion to dismiss); *Penn Terra Ltd. V. Department of Environmental Resources, Com. Of Pa.*, 733 F.2d 267 (3d Cir. 1984) (judicial action taken to rectify harmful environmental hazards is an obvious exercise of the State's power to protect the health, safety, and welfare of the public); *In re Mateer*, 205 B.R. 915, 921 (Bankr. C.D. Ill. 1997) (same).

15. Moreover, and as directly relevant to this case, governmental entities regularly utilize tort law to exercise their police powers and to protect the lives, health, morals, comfort and general welfare of the people. For example, in *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 488 F.3d 112, 133-134 (2d Cir. 2007), the defendants argued that tort claims brought by governmental entities seeking monetary recovery for groundwater contamination fell outside the "police or regulatory powers" exception to bankruptcy removal in 28 U.S.C. § 1452. In rejecting this argument, the Second Circuit explained that the actions by governmental units:

> relate primarily to matters of public health and welfare, and the money damages sought *will not inure, strictly speaking, to the*

> *economic benefit of the states*. Instead, *the clear goal of these proceedings is to remedy and prevent environmental damage* with potentially serious consequences for public health, a significant area of state policy.

Id. at 133 (emphasis added). Other courts have similarly held that governmental entities may utilize tort law to exercise their police powers. *See, e.g., City of New York v. Beretta U.S.A. Corp.*, 401 F.Supp.2d 244, 251 (E.D.N.Y. 2005) (holding that New York City had standing to assert public nuisance tort claim against gun manufacturers based upon its police powers), *rev'd on other grounds*, 524 F.3d 384 (2d Cir. 2008); *U.S. v. Hooker Chemicals & Plastics Corp.*, 722 F.Supp. 960 (W.D.N.Y. 1989) (entering summary judgment on tort (public nuisance) claim and finding that assumption of risk doctrine did not bar liability where tort claim was being asserted by a governmental entity in an exercise of its police power with the purpose of protecting human health); *San Remo Hotel L.P. v. City And Cty. of San Francisco*, 27 Cal. 4th 643, 701 (2002) (citing to the California Public Nuisance Statute as an example of the fact that "[t]he law has long recognized, for example, that government might, in the exercise of the police power, act to proscribe a nuisance…").[4]

16. In asserting tort claims in furtherance of the exercise of their police powers, governmental entities can seek both injunctive and monetary relief. *See*, *e.g.*, *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 488 F.3d at 133 (allowing government entity to seek

[4] In fact, not only do governmental entities have the ability to advance tort claims in order to exercise their police powers, they of course also have the inherent ability to enact statutes and to otherwise delineate and regulate tortious activity as a component of their police powers. *See generally, Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 (1987) (noting that a government entity can exercise its police power to abate activity akin to a public nuisance); *U.S. v. Reserve Mining Co.*, 394 F.Supp. 233, 241 (D. Minn. 1974) (action by state to abate pollution and protect public health was proper exercise of state's police power in public interest); *U.S. v. Gregg*, 226 F.3d 253, 270 (3rd Cir. 2000) (Weis, J., dissenting) (prohibiting trespass is a typical exercise of a state's police power); *Elmore v. Smith & Nephew, Inc.*, 2013 WL 1707956 at *4 (N.D. Ill. 2013) (tort claims related to health and safety naturally fall within the states' historic police powers); *Pharmaceutical Research and Mfrs of America v. Meadows*, 304 F.3d 1197, 1207 (11th Cir. 2002) (common law tort claims are a mechanism of the police powers of the state) (internal citations omitted).

monetary relief to remedy and prevent environmental damage); *People of California v. Kinder Morgan Energy Partners, L.P.*, 569 F.Supp.2d 1073, 1093 (S.D. Cal. 2008) (governmental plaintiffs could recover punitive damages on tort claims asserted against private defendants even when such entity wielded a police power to punish and deter wrongdoers); *U.S. v. Oil Transport Co., Inc.*, 172 B.R. 834, 836 (E.D. La. 1994) (holding that police or regulatory power exception to the automatic stay applies when a government entity is seeking equitable relief, monetary damages, or both). This is consistent with the express language of the Governmental Carve-Out, which applies to "any *claim*" asserted by a Governmental Unit. Plan at § V.E.6.a.i.B. No carve-out would have been needed for Governmental Units to preserve the right to seek purely equitable relief, since that would not be a "claim" that could be discharged. *See*, *e.g.*, *United States v. Apex Oil Co.*, 579 F.3d 734 (7th Cir. 2009) (lawsuit seeking to require former chapter 11 debtor to clean up contamination was not a "claim" and thus was not discharged in bankruptcy).

17. In the present case, the PEC Causes of Action are plainly aimed at protecting the environment and the health, welfare, and safety of the residents and taxpayers of the Governmental Plaintiffs. The negative environmental impacts described in the Complaint – such as increased flooding and storm surges, stronger storms, and harm to key infrastructure and resources such as aquifers – obviously and imminently threaten the health, safety, and well-being and prosperity of the Governmental Plaintiffs' residents and taxpayers. Although the PEC Causes of Action are asserted under five general legal theories ((a) Public Nuisance (Counts I and II); (b) Strict Liability – Failure to Warn and Design Defect (Counts III and IV); (c) Private Nuisance (Count V); (d) Negligence – Generally and for Failure to Warn (Counts VI and VII); and (e) Trespass (Count VIII)), the purpose of each Count is the same: seeking to hold PEC and the other defendants responsible for, and protecting citizens against, the climactic changes that are increasingly harming

the Governmental Plaintiffs and their residents and taxpayers. Each of the PEC Causes of Action thus constitutes an exercise of the relevant Governmental Plaintiff's "police power."

(c) The PEC Causes of Action Arise from the Mining Operations of one or more of the Reorganized Debtors

18. The PEC Causes of Action arise from the mining operations of one or more of the Reorganized Debtors: the coal that caused the CO_2 emissions, and thus the climactic impacts complained of, came in significant part from mines that the Reorganized Debtors own.

19. In an effort to get around this reality, PEC argues that the language of Subsection B of the Governmental Carve-Out – referring to "any claim" that "arises from the mining operation of any Reorganized Debtor" – only applies prospectively to causes of action arising post-Effective Date. *See generally* Plan at § V.E.6.a.i.B; Motion at ¶¶ 53-57.

20. This is a tortured and wholly illogical reading of the Governmental Carve-Out. Most basically, if the Governmental Carve-Out had been intended to only apply prospectively, *it would not have been necessary*. Post-bankruptcy, nothing prevents Governmental Units (or any other parties for that matter) from asserting causes of action that arise from the post-bankruptcy operations or actions of the Reorganized Debtors.[5]

21. Obviously the EPA and other Governmental Units did not fight to obtain language allowing them to do something that they would always have had the right to do – *i.e.*, bring claims based solely on post-Effective Date conduct. Rather, everyone knew that Governmental Units had existing claims relating to the mining operations of the Debtors, largely relating to the serious environmental and health and safety dangers posed by such operations. The Governmental

[5] In fact, even if the Plan Injunction did apply to the PEC Causes of Action – which it does not for the multiple reasons discussed herein – it would still not be appropriate to enjoin the PEC Causes of Action from proceeding in their entirety because, as noted above, the conduct the Complaints seek to address is occurring every day.

Carve-Out allowed the mining operations to be transferred to the Reorganized Debtors while preserving those claims (hence the language referring to the preservation of "claims" arising from "*the mining operation* of any Reorganized Debtor" as opposed to "the post-Effective Date operations of the Reorganized Debtors" or similar language that would have limited the carve-out to only the post-Effective Date period).[6]

22. Notably, the very fact that the Governmental Carve-Out repeatedly refers to the preservation of "claims" is also wholly inconsistent with PEC's reading of the Governmental Carve-Out and again demonstrates that the true purpose was to preserve pre-existing claims. For example, the Plan Injunction only discharges the Debtors from claims "***that arose on or before the Effective Date***." Plan, at § V.E.2.a (emphasis in original). Given that only pre-petition claims were being discharged, the exception to discharge for certain claims contained in the Governmental Carve-Out would be wholly meaningless if PEC's reading was adopted. Similarly, the Plan defines "Claims" as "a claim, as defined in section 101(5) of the Bankruptcy Code, ***against a Debtor or its Estate***." Plan at I.A.46 (emphasis added). The fact that the Governmental Carve-Out repeatedly refers to the preservation of "claims" again suggests that what was being preserved was existing pre-Effective Date claims that were previously against the Debtors and/or their estates.

23. The Reorganized Debtors' self-serving attempt to effectively read the Governmental Carve-Out out of the Plan should be disregarded. The PEC Causes of Action plainly

[6] To be clear, the language PEC cites may preclude claims related to mining operations that the Reorganized Debtors *no longer possess*. But PEC's argument that language negotiated into the Plan specifically to preserve governmental and environmental "claims" somehow applies only prospectively is simply illogical and inconsistent with any fair reading of the Governmental Carve-Out.

arise from mining operations that the Reorganized Debtors continue to own and operate and as such, were specifically preserved.

24. In sum, each of the PEC Causes of Action: (a) is asserted by a Governmental Unit; (b) constitutes an exercise of the police powers of such Governmental Unit; and (c) arises from mining operations of the Reorganized Debtors. As such, each of the PEC Causes of Action is squarely covered by subsection "B" of the Governmental Carve-Out. Although the Motion should be denied on that basis alone, and there should be no need for further analysis, as discussed below, the Plan Injunction is also inapplicable for several additional and independent reasons.

B. Count I of the Complaint does not Assert a "Claim" and is Therefore not Barred by the Plan Injunction

25. A separate reason that the Motion should be denied with respect to Count I is that the PEC Cause of Action asserted in Count I does not constitute a "claim" and thus was not, and could not have been, discharged by the Plan Injunction.

26. The Plan Injunction discharges "***the Debtors from all Claims or other Liabilities that arose on or before the Effective Date***." Plan, at § V.E.2.a (emphasis in original). Thus, to the extent that certain PEC Causes of Action do not constitute a "Claim" or "Liability," such counts can freely move forward without implicating the Plan Injunction. The term "claim" is defined the same in both the Bankruptcy Code and the Plan, as follows:

> (5) The term "claim" means—
>
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) ***right to an equitable remedy for breach of performance if such breach gives rise to a right to payment***, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5) (emphasis added). The Plan defines "Liability" as:

> any and all Claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action, and liabilities, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, arising in law, equity or otherwise, that are based in whole or in part on any act, event, injury, omission, transaction, agreement, employment, exposure or other occurrence taking place on or prior to the Effective Date.

Both of the foregoing definitions are focused solely on monetary – as opposed to equitable – obligations. If a PEC Cause of Action is thus purely seeking equitable relief without the possibility of any monetary relief or a "right to payment" it thus is not a "Claim" or "Liability" that was discharged under the Plan.

27. This limitation is consistent with caselaw that has interpreted the definition of "claim" and considered what types of environmental claims can and cannot be discharged in a chapter 11 plan. *See*, *e.g.*, *United States v. Apex Oil Co.*, 579 F.3d 734 (7th Cir. 2009). In *Apex*, the debtor, Apex Oil Co. ("*Apex Oil*") went through a bankruptcy and obtained a general discharge through a confirmed plan of reorganization. *Id.* at 735. Subsequently, the Environmental Protection Agency (the "*EPA*") filed a lawsuit under the Resource Conservation and Recovery Act ("*RCRA*"), seeking injunctive relief and an order requiring Apex Oil to clean up a contaminated site. *Id.* Apex Oil opposed the request on the grounds that any of its liability under the RCRA had been discharged in its prior bankruptcy, while the EPA argued that the relief it was seeking was not a "claim" under the Bankruptcy Code. *Id.* at 736. Interpreting section 101(5) of the Bankruptcy Code, the Seventh Circuit explained the statute as follows:

> [I]f the holder of an equitable claim can, in the event that the equitable remedy turns out to be unobtainable, obtain a money judgment instead, the claim is dischargeable. If for example you have a decree of specific performance (a type of injunction and

> therefore an equitable remedy) that you can't enforce because the property that the decree ordered the defendant to sell you was sold to someone else (from whom, for whatever reason, you cannot recover it), you are entitled to a money judgment for the value of the property…and your claim to that value is a claim to a right to receive payment and is dischargeable in the seller's bankruptcy

Id.

28. The Seventh Circuit examined the relevant portions of the RCRA and determined that the RCRA did not give rise to monetary relief in the event that the equitable relief being sought was impossible. *Id.* ("But the Resource Conservation and Recovery Act…does not authorize *any* form of monetary relief") (emphasis in original). Because the RCRA did not authorize monetary relief, the Seventh Circuit held that the relief sought by the EPA was not a "claim" and therefore was not discharged in Apex Oil's bankruptcy.

29. Notably, Apex Oil argued that compliance with any injunction or clean-up order would necessarily require it to expend funds. The Seventh Circuit, noting that "every equitable decree imposes a cost on the defendant," dismissed this argument, on the grounds that any funds expended would not be payable to the EPA. *Id.* Indeed, the EPA could not clean the site itself and then recover "payment of clean-up costs." *Id.* at 736. The *Apex* decision and its refusal to enjoin a post-bankruptcy action seeking only equitable relief has been upheld in numerous cases throughout the country. *See, e.g., In re Kaiser Aluminum Corp.*, 386 F. App'x 201, 205 (3d Cir. 2010) (Remanding matter to bankruptcy court to consider each environmental cause of action and determine whether "each cause of action met the definition of a 'claim' under the [Bankruptcy] Code"); *In re Taylor*, No. 15-02730-5-SWH, 2017 WL 2407876, at *7 (Bankr. E.D.N.C. May 31, 2017) ("The absence of a right to payment leads to the conclusion that the injunctive relief sought in the [l]awsuit regarding alleged violations of the [Clean Water Act] is not a claim under the Bankruptcy Code").

30. The general rule is therefore, that "determining whether an enforcing agency has a 'right to payment' under section 101(5)(B) for an environmental injunction is to consider whether the enforcing agency has a right to cleanup and recover response costs under the statute." *In re Mark IV Indus., Inc.*, 459 B.R. 173, 186 (S.D.N.Y. 2011).

31. In the present case, the Governmental Plaintiffs assert Count I of each Complaint in the name of the people under the Public Nuisance Enabling Statute. While the California Nuisance Statute generally allows for the recovery of damages, the statute is much narrower when brought in the name of the people pursuant to the Public Nuisance Enabling Statute. Specifically, the Public Nuisance Enabling Statute provides that "[a] civil action may be brought in the name of the people of the State of California *to abate* a public nuisance, as defined in Section 3480 of the Civil Code, by the district attorney or county counsel of any county in which the nuisance exists, or by the city attorney of any town or city in which the nuisance exists." Cal. Civ. Proc. Code § 731 (emphasis added). Critically, the portion of the Public Nuisance Enabling Statute that applies to actions brought in the name of the people does not allow for the recovery of monetary damages.

32. Numerous courts in California have affirmatively held that a governmental entity cannot recover monetary damages under the California Nuisance Statute. *See, e.g., People ex rel. Gow v. Mitchell Bros.' Santa Ana Theater*, 114 Cal. App. 3d 923, 930 (Ct. App.); *City of Los Angeles v. Shpegel-Dimsey, Inc.*, 198 Cal. App. 3d 1009, 1019 (Ct. App. 1988). In *Cty. of San Luis Obispo v. Abalone All.*, 178 Cal. App. 3d 848 (Ct. App. 1986), the plaintiff (county) attempted to recover its costs for funds expended preventing a public nuisance (a blockade of a nuclear power plant by protestors). In holding that the county could not recover damages, the Court of Appeal of California noted that:

> Abatement, however, is the sole relief that section 731 authorizes the city attorney to seek. This is evident when the above quoted language is compared to the first portion of the statute. That portion allows an action to be brought by 'any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance....' Such a person is expressly authorized to seek a judgment where 'the nuisance may be enjoined or abated *as well as damages recovered therefor*.' It is clear that the Legislature intended that one type of litigant could seek abatement *and* damages, while the other type of litigant could obtain abatement only. A city attorney, in an action 'brought in the name of the people,' fits squarely and exclusively in the latter classification."

Id. at 852 (emphasis in original).

33. Because the Public Nuisance Enabling Statute does not allow for the recovery of monetary damages and does not allow the Governmental Plaintiffs to mitigate the damage themselves and recover costs from the defendants, the cause of action asserted in Count I does not constitute a "claim" under the Bankruptcy Code. As such, the Plan Injunction is inapplicable, and under *Apex* and its progeny, the equitable relief sought in Count I could not have been discharged.

C. The PEC Causes of Action are also Carved-Out from the Plan Injunction by Subsection "A" of the Governmental Carve-Out

34. As discussed above, each of the PEC Causes of Action falls squarely within Subsection "B" of the Governmental Carve-Out, which should be the end of the analysis. However, it is worth noting that the PEC Causes of Action are also separately protected by Subsection "A" of the Governmental Carve-Out, which carves-out from the discharge, among other things, "any liability or obligation to, or any claim or cause of action by a Governmental Unit" brought "under any applicable Environmental Law."

35. As discussed above, the Governmental Plaintiffs are certainly "Governmental Units" for purposes of the Plan. Hence the only real question is whether the PEC Causes of Action fall within the Plan definition of "Environmental Law," which is as follows:

> ***all federal, state and local statutes, regulations and ordinances concerning pollution or protection of the environment, or environmental impacts on human health and safety***, including the Atomic Energy Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Clean Water Act; the Emergency Planning and Community Right to Know Act; the Federal Insecticide, Fungicide, and Rodenticide Act; the Resource Conservation and Recovery Act; the Safe Drinking Water Act; the Surface Mining Control and Reclamation Act; the Toxic Substances Control Act; ***and any state or local equivalents of the foregoing***.

Plan at § I.A.92 (emphasis added). Although the definition contains examples, they were by the express language not intended to limit the otherwise broad definition, as the word "including," is specifically defined in the Plan to mean "including without limitation." Plan at § I.B.1(h) ("the words 'include' and 'including,' and variations thereof, shall not be deemed to be terms of limitation, and shall be deemed to be followed by the words 'without limitation'"). Rather, the definition starts by referring to *all* statutes, regulations, or ordinances "*concerning*" pollution or protection of the environment, or environmental impacts on human health and safety – and the term "concerning" is itself defined broadly as meaning "relating to." *Black's Law Dictionary* 289 (6th ed. 1990). Accordingly, as long as each PEC Cause of Action is brought under a "state or local equivalent" of any federal, state, or local statute, regulation, or ordinance that "concerns" or "relates to" pollution, protection of the environment, or environmental impacts on human health and safety, it is exempted from discharge.

36. In the present case, Counts I, II, and V are all brought under the California Nuisance Statute, the express purpose of which is to eliminate public and private nuisances and to thereby protect human health and safety. *See, e.g., San Remo Hotel L.P.*, 27 Cal. 4th at 701 (Citing to the Public Nuisance Enabling Statute and noting that "[t]he law has long recognized, for example, that government might, *in the exercise of the police power*, act to proscribe a nuisance…") (emphasis

added). As the California Public Nuisance Statute is a "state statute" that "concerns" or "relates to" "pollution or protection of the environment, or environmental impacts on human health and safety," Counts I, II, and V are carved out from the Plan Injunction for yet another reason.

37. PEC only attempts to avoid this obvious conclusion by asserting that "nuisance is a federal common law tort" (*see* Motion at ¶ 48). Although PEC's assertion may in and of itself be correct – *i.e.*, there may be a federal common law tort for nuisance – this argument is wholly irrelevant and a red herring. Counts I, II, and V *are in no way reliant or based on federal common law, but are instead based on a specific California statute – i.e., the California Nuisance Statute* (and in the case of Count I, also the related Public Nuisance Enabling Statute). The only relevant question, as discussed above, is whether the California Nuisance Statute "concerns" or "relates to" "pollution or protection of the environment, or environmental impacts on human health and safety," which it plainly does.

38. With respect to Counts III, IV, and VI-VIII, PEC argues that they are not covered by Subsection A of the Governmental Carve-Out because such counts are based on common law (*i.e.*, not on a specific statute like Counts I, II, and V). *See* Motion at ¶ 47. This, however, ignores the broad definition of "Environmental Law" which as set forth above includes "*any state or local equivalents*" of any "federal, state, and local statutes, regulations, and ordinances" that "concerns" or "relates to" "pollution or protection of the environment, or environmental impacts on human health and safety."

39. PEC's argument disregards the common meaning of "equivalent" which means "equal in force, amount, or value" or "like in signification or import." "Equivalent." Merriam-Webster Online Dictionary. 2017. https://www.merriam-webster.com/dictionary/equivalent (20 Sept. 2017); *see also Blacks's Law Dictionary* 581 (8th ed. 2004). Particular legal doctrines

frequently exist in both statutory and common law form – often because a common law doctrine was codified – but remain "equivalent" or "like in significance or import." In fact, courts frequently find that common law doctrines are the "common law equivalents" of statutory schemes. *See*, *e.g.*, *Goldline v. Regal Assets, LLC*, 2015 WL 1809301, at *3 (C.D. Ca. Apr. 21, 2015) ("The Lanham Act, as well as its *common law equivalent*, prohibit a person from using in commerce any trademark or false designation of origin that is likely to cause confusion as to the affiliation or origin of that person's product or service"); *In re Panos*, No. 13-58441, 2017 WL 2688235, at *6 (Bankr. S.D. Ohio May 26, 2017) ("This Court has recognized that the elements of common law fraud under Ohio law are the same as those applied by bankruptcy courts when applying § 523(a)(2)(A)"); *Quibodeaux v. Nautilus Ins. Co.*, No. 1:10-CV-739, 2015 WL 1406375, at *8 (E.D. Tex. Mar. 25, 2015), *aff'd,* 655 F. App'x 984 (5th Cir. 2016) ("[U]nder Texas law, extra-contractual tort claims brought under the Texas Insurance Code and the DTPA require the same predicate for recovery as a common law claim for bad faith"); *Gonzalez-Cifuentes v. U.S. Dep't of Homeland Sec.*, No. 04-04855 WHW, 2006 WL 2023192, at *3 (D.N.J. July 13, 2006) ("*Bivens* relief is a common law equivalent to the relief available under § 1983").

40. Here, each of the claims asserted in Counts III, IV, and VI-VIII is a state common law equivalent of a state or federal statute that "concerns" or "relates to" "pollution or protection of the environment, or environmental impacts on human health and safety." Specifically:

- **Strict Liability – Failure to Warn and Design Defect – Counts III and IV**. To give just one example of many, Connecticut has a statutory product liability scheme (*i.e.*, a "state statute") that is designed to protect citizens from defective products and that preempts other forms of product liability claims. *See* Conn. Gen. Stats. § 52-572m *et seq*. Quite plainly, this statute, and others like it, "concerns" or "relates to" "environmental impacts on human health and safety" (notably, "environment" is commonly understood to mean "the circumstances, *objects, or conditions* by which one is surrounded" (*see* "Environment." Merriam-Webster Online Dictionary. 2017. https://www.merriam-webster.com/dictionary/equivalent (20 Sept.

2017)). California has an "equivalent" common law products liability doctrine that also has developed to protect consumers from harmful products. *See*, *e.g.*, *Luque v. McLean*, 8 Cal.3d 136, 145 (1972) (purpose of the California strict liability product liability regime is to protect injured consumers who are otherwise "powerless to protect themselves" against large manufacturers).

- **Negligence – Generally and for Failure to Warn – Counts VI and VII.** In the same way, California enacted a statutory negligence scheme codified as Section 1714 of the California Civil Code. Section 1714, in pertinent part, states that "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property of person . . . ." Cal. Civ. Code § 1714. Notwithstanding the enactment of Section 1714, California also has an "equivalent" common law negligence doctrine. *See, e.g., Romar ex rel. Romar v. Fresno Community Hosp. and Medical Center*, 583 F.Supp.2d 1179, 1187 (E.D. Cal. 2008) ("Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do") (internal citations omitted). California's common law negligence doctrine, which provides that negligence is conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm (*see Barbaria v. Independent Elevator Co.*, 139 Cal.App.2d 474 (Cal.Ct.App. 1956)), is the common law "equivalent" to Section 1714. Both the statutory and common law doctrines certainly "concerns" or "relates to" "environmental impacts on human health and safety."

- **Trespass – Count VIII**. Finally, the same concept applies to Count VIII for trespass. As an example, Wisconsin's legislature implemented a statutory trespass scheme aimed at protecting against and preventing the unauthorized entry onto an individual's property. *See* Wis. Stat. Ann. § 943.13. California established an equivalent common law trespass doctrine with the same goal in mind – to protect individuals from the harm caused by the intentional and unauthorized use of their property. *See, e.g., U.S. v. Imperial Irr. Dist*, 799 F.Supp. 1052, 1059 (S.D. Cal. 1992) (trespass is the intentional use of the property of another without authorization and without privilege); *see also In re Burbank Environmental Litigation*, 42 F.Supp.2d 976, 984 (C.D. Cal. 1998) (trespass entitles the plaintiff to nominal damages as well as compensatory damages in an amount that will compensate for all detriment proximately caused). Again, it goes without saying that the trespass doctrine, whether in statutory or common law form, relates to and concerns environmental impacts on human health and safety.[7]

[7] Notably, while the nuisance counts – Counts I, II, and V – are based on the California Nuisance Statute (so as discussed above, there is no need to consider the "state or local equivalent" language with respect to such counts,

41. As each of the PEC Causes of Action falls within the language of Subsection "A" of the Governmental Carve-Out, for a second independent reason (or in the case of Count I, a third independent reason), they are not precluded or impacted by the Plan Injunction.

42. For all of the foregoing reasons, the Motion should be denied.

Dated: September 26, 2017

Respectfully submitted,

County of San Mateo, City of Imperial Beach, and County of Marin

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California does have a common law nuisance doctrine. *See, e.g., City of San Jose v. Monsanto Co.*, No. 39, 2016 WL 4427492, at *3 (N.D. Cal. Aug. 22, 2016) (discussing state common law nuisance doctrine). So even if Counts I, II, and V had been brought under the common law doctrine, they would be exempted from the Plan Injunction as being brought under a state common law equivalent of the California Nuisance Statute.

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2017, a copy of the foregoing was served by: (1) electronic mail; and (2) the Court's CM/ECF system on the Master Service List and each entity requesting service under Fed. R. Bankr. P. 2002, which has been posted on the Debtors' Case Information Website as of August 25, 2017.

/s/ Matthew E. McClintock