UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: **PATRIOT COAL CORPORATION, *et al.*,** **Debtors.**	**Chapter 11** **Case No. 12-51502-659** **(Jointly Administered)** **Hearing Date:** **April 23, 2013 at 10:00 a.m.** **(prevailing Central Time)** **Hearing Location:** **Courtroom 7 North**
ROBIN LAND COMPANY, LLC, **Plaintiff,** **v.** **STB VENTURES, INC.,** **Defendant,** **ARCH COAL, INC., ARK LAND COMPANY, and ARK LAND KH, INC.,** **Intervenor-Defendants.**	**Adv. Pro. No. 12-04355-659** **Re: ECF Nos. 37, 69, 72**

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

STATUTES & RULES

OTHER AUTHORITIES

Plaintiff Robin Land Company, LLC ("**Robin Land**"), one of the affiliated debtor entities in the above-captioned chapter 11 case, respectfully submits this reply memorandum of law in further support of its motion for judgment on the pleadings.[1]

PRELIMINARY STATEMENT

The Defendants' briefs confirm that the dispute here is limited solely to whether the Leases make the STB Override an executory contract.[2] To rule for the Defendants, the Court would be required to find that the STB Override is an obligation of the Leases. That conclusion is impossible as a matter of law.

The Leases do not even mention the STB Override, let alone require its payment. With respect to the Lawson Heirs Lease, the landlord – Lawson Heirs – has already agreed that Robin Land is not required to pay the STB Override if it assumes the Lawson Heirs Lease. [Chap. 11 Case ECF No. 2055.] The Kelly-Hatfield Lease is identical, in all material respects, to the Lawson Heirs Lease. The plain and unambiguous language of the contracts precludes a conclusion that the landlords can terminate the Leases if Robin Land stops paying the STB Override. For that reason, the STB Override is not an executory contract under 11 U.S.C. § 365 as a matter of law.

Faced with the unambiguous language of the Leases, the Defendants assert that the STB Override can be executory – notwithstanding the fact that it is not an obligation of the Leases – for three reasons: (1) the Leases and the STB Override were entered into contemporaneously;

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[1] Capitalized terms not defined herein have the meanings ascribed to them in Plaintiff's Memorandum of Law in Support of Its Motion for Judgment on the Pleadings and Motion to Dismiss Defendants' Counterclaims ("**Pl.'s Br.**"). [ECF No. 35.]

[2] The Defendants effectively concede that no other contract can make the STB Override executory. The 1994 Asset Purchase Agreement and the Assignments have been fully performed by STB and Ark Land, respectively. Arch has abandoned its argument that the Magnum PSA can make the STB Override executory; while it may be executory, the Magnum PSA is not a contract with Robin Land. (Arch Opp. Br. ¶ 13 n.23.)

(2) the Defendants (not the landlords) intended for the STB Override to be an obligation of the Leases; and (3) STB would not have sold the assets to Ark Land pursuant to the 1994 Asset Purchase Agreement if it had known it would not receive full payment under the STB Override.

For the reasons explained below, each of those arguments is based on fundamental errors in contract law and bankruptcy law. None of the arguments changes the dispositive fact here: if Robin Land stops paying the STB Override, the Leases cannot be terminated. Because it is clear as a matter of law that the STB Override is not an obligation of the Leases – and no discovery could possibly show otherwise – Robin Land is entitled to a declaratory judgment that the STB Override is not an executory contract for purposes of Section 365.

The Defendants' motive here is clear. STB and Arch have teamed up to make a run at trying to convert the STB Override from a general unsecured claim to an administrative expense, at the expense of Robin Land's other creditors. They are searching for a way to bootstrap the STB Override to the Leases, which they know Robin Land intends to assume, so that the STB Override must be assumed along with the Leases. STB would then get paid in full, not on par with other creditors of the same class. And Arch would avoid its obligation under a separate guaranty (see STB Opp. Br. at 6) to pay the STB Override if Robin Land is not permitted to under the Bankruptcy Code. In short, STB and Arch want to jump the line ahead of Robin Land's other creditors. For the reasons explained below, they do not have a credible argument that a breach of the STB Override would be a breach of the Leases, which would be required to make the STB Override an executory contract.

APPLICABLE STANDARD AND GOVERNING LAW

The Defendants do not dispute that federal law controls whether a contract is "executory" under Section 365. See Lewis Bros. Bakeries Inc. & Chicago Baking Co. v. Interstate Brands Co. (In re Interstate Bakeries Corp.), 690 F.3d 1069, 1074 (8th Cir. 2012). In this Circuit, a

contract is "executory" only if both parties have continuing, material obligations under the contract such that "the failure of either to complete performance would constitute a material breach excusing the performance of the other." Id. at 1073 (internal quotation marks omitted). Here, the STB Override is executory under Section 365 only if another party is performing ongoing, material obligations for Robin Land in exchange for Robin Land's payment of royalties to STB.

To determine whether any party owes ongoing contractual performance in exchange for Robin Land's payment of the STB Override, the Court looks to state law. Id. at 1074. The STB Override does not have a governing law provision, but the Court need not conduct a choice-of-law analysis because the Defendants do not identify any way in which Missouri law and West Virginia law differ. See Phillips v. Marist Soc'y of Wash. Province, 80 F.3d 274, 276 (8th Cir. 1996). Accordingly, the Court can apply Missouri or West Virginia law. Decisions based on other states' laws are also relevant authority where the state contract law is the same as that in Missouri and West Virginia.

The Defendants want the Court to do anything but focus on the actual language of the contracts. The plain and unambiguous language of the Leases confirms that the STB Override is a standalone, non-executory contract that Robin Land is not authorized to pay. The Defendants therefore repeatedly argue that the Court must accept their allegations "as true."[3] (Arch Opp. Br. ¶¶ 1, 22, 53; STB Opp. Br. at 1, 12-13, 26.) That is not the law. The interpretation of an unambiguous contract is a matter of law for the Court. Berkeley Cnty. Pub. Serv. Dist. v. Vitro

[3] STB also claims repeatedly that Robin Land must prove "beyond doubt" that there is "no set of facts" under which the Defendants might prevail. (STB Opp. Br. at 1, 11.) This "no set of facts" standard, however, which derives from Conley v. Gibson, 355 U.S. 41 (1957), was flatly rejected by the Supreme Court in Bell Atl. Corp. v. Twombly. See 550 U.S. 544, 563 (2007) (explaining that the Conley standard "has earned its retirement" and "is best forgotten as an incomplete, negative gloss on an accepted pleading standard"); Doe v. St. Louis Univ. Sch. of Med., No. 4:12-CV-905, WL 1305825, at *1 (E.D. Mo. Mar. 28, 2013) (same).

Corp. of Am., 162 S.E.2d 189, 200 (W. Va. 1968) (applying West Virginia law); Union Elec. Co. v. Sw. Bell Tel. L.P., 378 F.3d 781, 786 (8th Cir. 2004) (applying Missouri law). For that reason, the Court can – and should – ignore the Defendants' "legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." Wiles v. Capitol Indem. Corp., 280 F.3d 868, 870 (8th Cir. 2002). Indeed, it is well settled that a contract is not ambiguous merely because the parties advance differing interpretations of the contract. See Unigroup, Inc. v. O'Rourke Storage & Transfer Co., 980 F.2d 1217, 1222 (8th Cir. 1992) (applying Missouri law); Perrine v. E. I. du Pont de Nemours & Co., 694 S.E.2d 815, 841 (W. Va. 2010) (applying West Virginia law).[4] Put simply, the Defendants' self-serving allegations are irrelevant.

Contrary to Arch's suggestion otherwise (Arch Opp. Br. at 28-29), extrinsic evidence is not admissible to interpret the plain and unambiguous terms of the STB Override. Under West Virginia and Missouri law, "extrinsic evidence cannot be used to . . . interpret language in a written contract which is otherwise plain and unambiguous on its face." Syl. Pt. 3, Toppings v. Rainbow Homes, 490 S.E.2d 817, 818 (W. Va. 1997) (internal quotation omitted); Weitz Co. v. MH Wash., 631 F.3d 510, 524 (8th Cir. 2011). It is well established that "parol evidence is admissible to show . . . the surrounding circumstances when the writing was made" only after the Court determines that the meaning of the writing "is uncertain and ambiguous." Frederick Mgmt. Co., L.L.C. v. City Nat'l Bank of W. Va., 723 S.E.2d 277, 288 (W. Va. 2010) (quoting

[4] The sheer abundance of cases in which courts resolve contract disputes at the pleading stage alone disproves the Defendants' claim that the Court "must" accept their allegations as true. See, e.g., Syverson v. FirePond, Inc., 383 F.3d 745, 750 (8th Cir. 2004) (affirming grant of motion for judgment on pleadings on breach of contract claim involving unambiguous contracts); Lion Oil Co. v. Tosco Corp., 90 F.3d 268, 270 (8th Cir. 1996) (affirming grant of judgment on the pleadings based on interpretation of "clear, unequivocal and unambiguous" contract language). Moreover, contrary to STB's assertions (STB. Opp. Br. at 11), courts regularly decide whether separate contracts are integrated into a single, indivisible agreement as a matter of law based on the face of the contracts. See, e.g., Amtech Lighting Servs. Co. v. Payless Cashways, Inc. (In re Payless Cashways), 203 F.3d 1081, 1085 (8th Cir. 2000); McDaniel v. Kleiss, 503 S.E.2d 840, 846-47 (W. Va. 1998).

Syl. Pt. 1, Lee Enters., Inc. v. Twentieth Century-Fox Film Corp., 303 S.E.2d 702, 703 (W. Va. 1983)). Arch attempts to invoke an "exception" to this rule in West Virginia – which it fails to mention is "narrow at best" – permitting courts to consider extrinsic evidence in very limited circumstances. (See Arch Opp. Br. ¶ 53 (citing Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 468 S.E.2d 712, 718 n.8. (W. Va. 1996)).)[5] But Fraternal Order held that this "exception" may apply only where a party has offered a reasonable interpretation of the contract and may not be used "to contradict contract language." Fraternal Order, 468 S.E.2d at 718 n.8.[6] Here, the language of the Leases is not reasonably susceptible to the interpretation that breach of the STB Override would constitute a breach of the Leases, and extrinsic evidence is not admissible to prove otherwise.

ARGUMENT

POINT I.

THE STB OVERRIDE IS NOT AN EXECUTORY CONTRACT

The Defendants do not dispute that the STB Override, standing alone, is not executory under Section 365. It is a one-way payment obligation.

Accordingly, the STB Override can be executory under Section 365 only if there exists a party whose ongoing contractual performance on a separate contract would be excused if Robin Land stops paying royalties to STB. See In re Interstate Bakeries Corp., 690 F.3d at 1073 (holding that contract is "executory" only if one party's failure to perform "would constitute a

[5] The exception applies only in extraordinary circumstances because, otherwise, "courts would no longer have to find ambiguity first before resorting to extrinsic evidence." Barclays Capital Inc. v. Giddens (In re Lehman Bros. Inc.), 478 B.R. 570, 592 (S.D.N.Y. 2012).

[6] The Fraternal Order court based its conclusion on the unambiguous terms "within the four corners of the agreement" and stated in a footnote that its decision was merely "buttressed" by certain evidence produced at trial. 468 S.E.2d at 718 & n.8. The court did not rely on extrinsic evidence to show that an unambiguous contract is in fact somehow ambiguous, which is what Arch advocates in this case.

material breach excusing the performance of the other" (internal quotation marks and citation omitted)). No such party or contract exists.

POINT II.

THE LEASES DO NOT MAKE THE STB OVERRIDE EXECUTORY

The Defendants' only argument is that the STB Override is made executory by the Leases. That argument fails for a simple reason: the Leases do not require performance of the STB Override. The Leases do not even mention the STB Override, let alone require it to be paid. Each Lease provides for specific events of default, and nonpayment of the STB Override is not among them.[7] (Lawson Heirs Lease § 15; Kelly-Hatfield Lease § 15.) Indeed, Lawson Heirs has already agreed that the STB Override is not an obligation of the Lawson Heirs Lease, and that Robin Land can assume the Lease without making any payments to STB. [Chap. 11 Case ECF No. 2055.]

In short, the landlords cannot terminate the Leases if Robin Land stops paying the STB Override. Accordingly, neither Lease can make the STB Override executory. See In re Interstate Bakeries Corp., 690 F.3d at 1073.

In an attempt to avoid this result, the Defendants argue that the STB Override is still an executory contract – even if it is not an obligation of the Leases – because (i) it was executed as part of the same "transaction" as the Leases; (ii) STB and Ark Land intended for the Leases to be

[7] Arch contends that "because the STB Override Agreement is integrated with the Leases, the nonpayment of the STB Override is a default under Section 15 of the Leases." (Arch Opp. Br. ¶ 52.) Section 15 sets out the events of default under each of the Leases. (Lawson Heirs Lease § 15; Kelly-Hatfield Lease § 15.) Tellingly, Arch does not specify which event of default is supposedly triggered by nonpayment of the STB Override. In any event, Arch has it completely backward. Because nonpayment of the STB Override is not an event of default under Section 15 of either Lease, the STB Override cannot be integrated with the Leases as a matter of law. Two contracts are integrated only if breach of one is the breach of the other. See Regent Waist Co. v. O. J. Morrison Dep't Store Co., 106 S.E.2d 712, 714 (W. Va. 1921) ("A breach of one of these independent contracts does not constitute a breach of another, and a breach of one is actionable without reference to the performance of the others." (internal quotation omitted)); Elliott v. Richter, 496 S.W.2d 860, 864 (Mo. 1973) (holding that contracts are integrated into a single agreement only if "rescission of one of them would constitute rescission of both").

integrated with the STB Override, even if the landlords (Lawson Heirs and Kelly-Hatfield) did not; and (iii) the STB Override was "additional consideration" for the 1994 Asset Purchase Agreement. As demonstrated below, these arguments contravene basic principles of contract law and bankruptcy law. The Defendants' arguments confirm that the STB Override is not an executory contract under Section 365 as a matter of law.

A. Merely Because the Contracts Were Entered Into Contemporaneously Does Not Make the STB Override an Obligation of the Leases

The Defendants' principal argument is that the STB Override is integrated with the Leases solely because the contracts were entered into contemporaneously as part of the same "transaction." The Defendants argue that so long as one contract in a transaction is executory, all of the contracts are executory under Section 365.[8]

That argument fails Bankruptcy 101. A payment obligation – like the STB Override – is not executory merely because it is in the general neighborhood of other contracts – like the Leases – that are executory. A payment obligation is executory only if it is a quid pro quo – a direct exchange – for future, material performance. See In re Interstate Bakeries Corp., 690 F.3d at 1073; In re Union Fin. Servs. Grp., Inc., 325 B.R. 816, 822 (Bankr. E.D. Mo. 2004), aff'd per curiam, 155 F. App'x 940 (8th Cir. 2005); Kaler v. Craig (In re Craig), 144 F.3d 593, 596 (8th Cir. 1998).

For the same reason, the argument fails Contracts 101. STB concedes (in a footnote), as it must, that separate contracts are integrated only if "an obligation of one constitutes an obligation of the other." (STB Opp. Br. at 11 n.18); see also Regent Waist Co. v. O. J. Morrison

[8] (See, e.g., Arch Opp. Br. ¶ 24 ("As Robin Land does not and cannot dispute that the Leases are executory, there is no dispute that the entire integrated STB Transaction, including the consideration provided for the STB Transaction under the STB Override Agreement, is executory.").)

Dep't Store Co., 106 S.E.2d 712, 714 (W. Va. 1921) ("A breach of one of these independent contracts does not constitute a breach of another, and a breach of one is actionable without reference to the performance of the others."); Elliott v. Richter, 496 S.W.2d 860, 864 (Mo. 1973) (holding that contracts are integrated into a single agreement only if "rescission of one of them would constitute rescission of both").

It is well settled that merely because contracts are entered into contemporaneously as part of the same commercial transaction does not make them a single, indivisible contract, such that the breach of one is the breach of all of them. See, e.g., In re Craig, 144 F.3d at 596 (holding, under North Dakota law, that the fact that two contracts are entered into contemporaneously as part of the same commercial transaction does not make them a single, indivisible contract); Howard v. Nicholson, 556 S.W.2d 477, 480 (Mo. Ct. App. 1977) ("Even if two instruments are executed as part of the same overall transaction, it does not necessarily mean that those instruments constitute one contract or that one contract has merged with another, absent some reasonable basis for finding that such merger was the intention of the parties."); Rosen v. Mega Bloks, Inc., No. 06-CV-3474, 2007 WL 1958968, at *5 (S.D.N.Y. July 6, 2007) ("Parties are free to enter into multiple contracts as part of a single transaction without the provisions in one contract governing another contract.").

It is blackletter law that contracts entered into as part of the same transaction may be "construed" or "interpreted" together, but they are not treated as a single, indivisible contract unless the parties to the contracts intended for the breach of one to be the breach of another. As explained in Williston on Contracts:

> Although multiple writings that relate to the same subject and are executed at the same time should be construed together in order to ascertain the parties' intent, it does not necessarily follow that all of the writings constitute a single contract or that any one (or more) of the writings should be considered merged into or unified with another such that every provision in each becomes a part of every other.

11 Richard A. Lord, Williston on Contracts, § 30:26 (4th ed. 1990) (emphasis added). Corbin on Contracts, cited by STB (STB Opp. Br. at 21), is in accord: It states that related contracts "should be interpreted together, each one assisting in determining the meaning to be expressed by the others." 5 Arthur Linton Corbin, Corbin on Contracts § 24.21 (1998 ed.) (emphasis added). Although STB claims that the Restatement of Contracts provides that "[a] writing is interpreted as a whole, and all writings that are part of the same transaction are integrated together" (STB Opp. Br. at 21), the underscored word in the actual text of the Restatement – which STB tellingly changed – is "interpreted," not "integrated." Restatement (Second) of Contracts § 202 (1981).

Courts repeatedly caution against arguments like those advanced by the Defendants here that "confuse[] the question of whether [] two contracts . . . should be construed together with the question of whether they are merged into one contract." Elliott, 496 S.W.2d at 864; see also Cargill, Inc. v. Refco, Inc. (In re Refco, Inc.), No. 06-CV-2133 (PKC), 2006 WL 2664215, at *4 (S.D.N.Y. Sept. 13, 2006) (explaining that the "fact that the agreements are related and ought to be construed in light of one another does not necessarily make them a single contract"). Contrary to the Defendants' suggestion, there is no different rule under West Virginia law. Ashland Oil, Inc. v. Donahue, cited by the Defendants, stands for the same proposition that agreements entered into contemporaneously as part of the same overall transaction "must be construed together and must be considered as forming an integrated business relationship." 223

S.E.2d 433, 437-38 (W. Va. 1976) (emphasis added).[9] Indeed, the court in Ashland stated that contracts are construed together under West Virginia law "when the parties are the same," which they are not here. Id. at 469.

Here, Section 365 requires the Court to apply state law to determine whether Robin Land's nonpayment of the STB Override "would constitute a material breach excusing the performance of the [landlords under the Leases]." In re Interstate Bakeries Corp., 690 F.3d at 1073. The Defendants have established nothing more than that, under West Virginia law and the law of other states, the STB Override and the Leases can be interpreted together – a point that is not in dispute. The Defendants have not – and cannot – show that Lawson Heirs or Kelly-Hatfield ever intended for a breach of the STB Override to be a breach of the Leases. Indeed, Lawson Heirs has already confirmed just the opposite. [Chap. 11 Case ECF No. 2055.]

Accordingly, the mere fact that the STB Override was entered into contemporaneously with the Leases does not make it an executory contract.

B. The Defendants' Self-Serving Assertions of their "Intent" Are Legally Irrelevant and Contradicted by the Plain Language of the Agreements

Recognizing that the unambiguous language of the Leases prevents any argument that the landlords (Lawson Heirs and Kelly-Hatfield) intended for the STB Override to be an obligation of the Leases, the Defendants argue that they intended for the STB Override to be integrated with

[9] In Lawrence v. Potter, cited by STB, the court noted that even where several agreements are "so interdependent and interlaced as to make one composite transaction," "[p]erhaps it would not be technically correct, to say that the arrangement amounted to one agreement composed of many others." 113 S.E. 266, 270 (W. Va. 1922). In Lawrence, the issue before the Court was whether a particular contract was part of the offer to enter into a commercial transaction involving multiple contracts. The case concerns contract formation, not integration. The Court did not address whether the multiple contracts were integrated into a single, indivisible agreement, such that the breach of one would be the breach of all of them, and in fact suggested that such a conclusion would not be "technically correct." Id. Likewise, D.H. Pritchard, Contractor Inc. v. Nelson, cited by Arch, did not address the question of integration, but instead whether a contractual successor in interest could be held to an agreement that he did not sign. 147 F.2d 939, 942 (4th Cir. 1945).

the Leases. (Arch Opp. Br. ¶¶ 25-35; STB Opp. Br. at 13-22.) Their discussion of the factors that courts consider in determining whether multiple contracts are integrated focuses only on their supposed intent. That argument is legally irrelevant here. The only relevant question under Section 365 is whether, under state contract law, the landlords can stop performing the Leases if Robin Land stops paying the STB Override. See In re Interstate Bakeries Corp., 690 F.3d at 1073.

It is worth noting that the Defendants' argument that they intended for a breach of the STB Override to be a breach of the Leases (notwithstanding the landlords' contrary intent) is not only a legal impossibility – because the Defendants have no power to modify the contracts of third parties – but also not believable. Their far-fetched assertions concerning their supposed "intent" demonstrate why "such later-voiced, and frequently self-serving, intentions should not be used to alter the unequivocal language of the agreement." Christians v. Gage Travel (In re Hytjan), No. 4-95-1093, 1995 WL 684881, at *4 (Bankr. D. Minn. Nov. 15, 1995); see also Mylan Pharms., Inc. v. Am. Cyanamid Co., 48 F.3d 1216 (Table), at *7 (4th Cir. Mar. 3, 1995) ("Both the U.C.C. and West Virginia common law express a preference for objective, rather than subjective, manifestations of intent."); Restatement (Second) of Contracts § 212 cmt. a (1981) ("The relevant intention of a party is that manifested by him rather than any different undisclosed intention.").

There is no evidence in any contract before the Court that the landlords intended for the STB Override to be an obligation of the Leases. When properly applied, the factors that courts consider in determining integration require a conclusion that the STB Override is not an obligation of the Leases.

First, the Defendants ignore the entire agreement clauses in the Leases, which are dispositive here. Each Lease provides: "This Lease constitutes the entire agreement and understanding of the parties in respect of the transactions contemplated hereby." (Kelly-Hatfield Lease § 25; Lawson Heirs Lease § 25.) That provision alone defeats any argument that the STB Override is an obligation of the Lease, which is why the Defendants devote pages of their briefs making the irrelevant argument that the entire agreement clauses in the Asset Purchase Agreement and the STB Override can be reconciled. (Arch Opp. Br. ¶¶ 12, 42-45; STB Opp. Br. at 4-6, 17-21.) It is telling that Arch confines its discussion of the entire agreement clauses in the Leases to a footnote, and that STB fails to mention them at all. (See Arch Opp. Br. ¶ 42 n.27.) No amount of rhetoric and misdirection can change the fact that the unambiguous language of the Leases precludes a conclusion that they are integrated with the STB Override. See Frederick Bus. Props. Inc. v. Peoples Drug Stores, 445 S.E.2d 176, 181 (W. Va. 1994) (holding that additional obligations may not be implied into a lease where the lease provides that it "constitute[s] [the parties'] entire agreement").[10]

The Leases and the STB Override have none of the hallmarks of a single, indivisible contract:

- The contracts have different purposes. The STB Override provided a long-term payment obligation, in the form of a royalty, as additional consideration for the assets sold pursuant to the 1994 Asset Purchase Agreement. The Leases govern the landlord-tenant relationship between Ark Land (and, later, Robin Land) and the landlords. See, e.g., McDaniel v. Kleiss, 503 S.E.2d 840, 847-48 (W. Va. 1998) (holding that unambiguous contractual language established that a release and an

[10] Moreover, the entire agreement clause in the 1994 Asset Purchase Agreement does not create any ambiguity as to the meaning of the entire agreement clauses in the Leases. First, the 1994 Asset Purchase Agreement does not so much as reference the Leases. Second, as the Seventh Circuit has held with respect to a nearly identical provision, such a clause "does not incorporate other contracts by reference;" rather, it "states that the written contract is the complete expression of the parties' agreement." Rosenblum v. Travelbyus.com Ltd., 299 F.3d 657, 665 (7th Cir. 2002).

insurance policy were not integrated because they did "not address the same subject matter").

- The contracts have different consideration. The Leases set out clearly the rent owed to the landlords, and they do not include payment of the STB Override. (See Lawson Heirs Lease §§ 6-7; Kelly-Hatfield Lease §§ 6-7.) See, e.g., Koch Hydrocarbon Co. v. MDU Res. Grp., 988 F.2d 1529, 1540 (8th Cir. 1993) (holding that a contract was not integrated with a related agreement because it "has distinct consideration . . . and it does not refer to the [other] contract").

- The contracts were documented separately. As demonstrated above, the mere fact that the contracts were entered into on the same date as part of a broader transaction does not make the contracts a single agreement. See, e.g., Four-Three-O-Six Duncan Corp. v. Sec. Trust Co., 372 S.W.2d 16, 23 (Mo. 1963) (separate contracts were not intended to be integrated because "[t]he very fact that a separate . . . agreement was executed belies any such intention").

- The contracts involve separate parties. Arch's only answer to this undeniable fact is to assert that it "cannot be the case that this difference is in any way evidence that the contracting parties did not intend their agreements to be integrated." (Arch Opp. Br. ¶ 34.)

In fact, this last difference makes all the difference. It is fatal to the Defendants' argument because, as the Eleventh Circuit explained in In re Gardinier, it is "illogical" to treat agreements between separate parties – like the STB Override, on the one hand, and the Leases, on the other hand – as a single contract. Byrd v. Gardinier, Inc. (In re Gardinier, Inc.), 831 F.2d 974, 978 (11th Cir. 1987). In that case, the U.S. Court of Appeals for the Eleventh Circuit examined whether a purchase and sale agreement in which the debtor sold land to a buyer (like the Leases here) was separate from the debtor's agreement to pay a commission to its broker (like the STB Override here), where the agreement to pay the brokerage commission was also documented in the same purchase and sale agreement. The Court of Appeals looked within the four corners of the purchase and sale agreement to determine whether the debtor, the buyer, and the seller "intended to make one contract or two separate contracts." Id. at 976. In ruling that

the parties intended to create two separate contracts, the Court of Appeals noted that each agreement was supported by separate consideration, that each had a separate purpose, and that "the obligations of each party to the instrument are not interrelated." Id. The buyer and the broker (like the landlords under the Leases and STB here) had "no promises running between [them]", and "their only relation [was] that each has separate contractual rights with the seller." Id. The Court of Appeals concluded that promises between different parties that happen to be "dependent or conditioned on one another" do not constitute evidence that the parties intended to form a single contract. Id. at 977. As the Court of Appeals explained: "Contracts are often conditioned upon the completion of totally separate agreements." Id. at 977-78. The Court of Appeals ruled that it would be "illogical" to conclude that the parties intended for the separate agreements to be integrated in these circumstances, "even if, for some reason, both agreements appeared in the same instrument." Id. at 978. The reasoning of In re Gardinier applies directly here. Indeed, here the separate contracts do not even appear in the same document, as they did in In re Gardinier.[11]

The only connection between the STB Override and the Leases is that the royalty payments under the former are pegged to coal mined and sold from coal reserves covered by the latter. As demonstrated in Robin Land's moving brief, that one-way reference does not make the STB Override an obligation of the Leases.[12] (Pl.'s Br. at 13-14.) The Defendants are unable to distinguish In re Integrated Health Servs., Inc., No. 00-389, 2000 WL 33712484 (Bankr. D. Del.

[11] The cases cited by STB (STB Opp. Br. at 21) are not to the contrary. The only question at issue in Aspenwood Invest. Co. v. Martinez was whether the federal government can be bound by contracts that it mandates private parties to enter into for its benefit. 355 F.3d 1256, 1260 (10th Cir. 2004). And the other cases STB cites merely addressed whether separate contracts were to be "construed" or "considered together." Patterson-Ballagh Corp. v. Byron Jackson Co., 145 F.2d 786, 789 (9th Cir. 1944); Costello v. Watson, 720 P.2d 1033, 1036 (Idaho Ct. App. 1986).

[12] The Leases make no reference to the STB Override.

July 7, 2000), which concluded on similar facts that separate agreements are not transformed into a single integrated contract merely because one agreement references the other to determine a payment obligation. Id. at *3.

In re Plitt Amusement Co., 233 B.R. 837 (Bankr. C.D. Cal. 1999), is also instructive. The debtors in that case had purchased a movie theater business before filing for bankruptcy. The transaction included a purchase agreement for the business of three theaters, a promissory note to pay the purchase price over ten years (like the STB Override here), and three theater leases (like the Leases here) – all of which were executed on the same day (as here). The court ruled that the leases, the purchase agreement, and the note were all separate agreements. Id. at 845. The leases each contained their own rental and other provisions. The note had its own separate manner of payment. Each contract thus operated separately and independently. Id. So too here.

The court in Moore v. Pollock (In re Pollock), 139 B.R. 938 (B.A.P. 9th Cir. 1992), reached a similar conclusion. The debtors had purchased a campground pre-petition that included a sublease of property from the seller. The purchase price was paid partly in cash and partly pursuant to a note. The debtors moved to assume the sublease, and the seller argued – as here – that the note was integrated with the sublease. The Court rejected that argument, holding that "the Sublease and the Note are separate documents that are not expressly incorporated into each other." Id. at 941. The Court noted that the Sublease was supported by its own consideration (as here), which meant that "the Note payments are not a form of rent under the Sublease but rather the payments due for the sale of the entire operation." Id. Again, the same conclusion applies directly here.

Tellingly, STB ultimately "posits that the STB Override Agreement is integrated with the Leases regardless of whether a breach of the STB Override Agreement causes a breach under one or both Leases." (STB Opp. Br. at 20.) That concession alone requires judgment in favor of Robin Land. A contract is "executory" under Section 365 only if one party's failure to perform "would constitute a material breach excusing the performance of the other." In re Interstate Bakeries Corp., 690 F.3d at 1073 (internal quotation omitted). If a breach of the STB Override is not a breach under the Leases, then the STB Override is not an executory contract under Section 365 as a matter of law.

The Defendants' self-serving assertions of their intent cannot alter the dispositive fact here: the plain and unambiguous language of the contracts demonstrates that the STB Override is not an obligation of the Leases. The STB Override is not an executory contract.

C. Neither Arch Nor STB Provides Ongoing Performance to Robin Land in Exchange for the STB Override

Recognizing that they have no argument that the landlords provide material, continuing performance to Robin Land in exchange for the STB Override, the Defendants ultimately retreat to an argument that Robin Land "receives performance from STB and Ark Land each time Robin Land takes a piece of coal out of the ground at the Premises." (Arch Opp. Br. ¶ 46.) The Defendants argue that, because the STB Override was additional consideration for the purchase of assets acquired in the 1994 Asset Purchase Agreement, Robin Land cannot continue to use those assets without paying the STB Override in full.

Again, the argument fails Bankruptcy 101. The STB Override was "additional consideration for the sale, transfer, conveyance, assignment, and delivery of the Acquired Assets" under the 1994 Asset Purchase Agreement. (1994 Asset Purchase Agreement § 2.02(b).) STB fully performed its obligation by transferring those assets to Ark Land in 1994. It is now

waiting to be paid, in the form of royalty payments under the STB Override. By definition, that makes the STB Override a non-executory contract, and gives rise to a pre-petition claim that must be paid on par with other general unsecured claims. STB is no differently situated from any other creditor in any bankruptcy proceeding who provided assets to a debtor pre-petition and is waiting to be paid. See, e.g., Kunkel v. Sprague Nat'l Bank, 128 F.3d 636, 642 n.7 (8th Cir. 1997) (holding that purchase agreement for cattle was non-executory even though purchaser had not paid the seller because "a contract is not executory merely because it has not been fully performed by payment, if all the acts necessary to give rise to the obligation to pay have been performed").[13]

Chesapeake Fiber Packaging Corp. v. Sebro Packaging Corp., 143 B.R. 360 (D. Md. 1992), aff'd, 8 F.3d 817 (4th Cir. 1993), is on point. In that case, before filing for bankruptcy, the debtor had acquired patent rights to a product in exchange for a promise to pay royalties on future sales of the product. Id. at 362. Like STB here, there was nothing more for the seller of the patent rights to do after it conveyed title to the debtor. Accordingly, the court held that the obligation to make the royalty payments was not executory because "[a] contract is not executory

[13] It is blackletter bankruptcy law that pre-petition contracts for the sale of assets are not executory where the only obligation remaining is the payment of money. See, e.g., Johnson v. Smith (In re Johnson), 501 F.3d 1163, 1174-75 (10th Cir. 2007) ("Debtors' sole obligation to tender installment payments and M & M's sole obligation to release the lien when handing over the vehicle title are insufficient to warrant classifying the Sales Contract as executory."); In re CK Liquidation Corp., No. 03-44906-HJB, 2006 WL 1302614, at *2 (Bankr. D. Mass. May 9, 2006) (holding that a contract for the sale of certain intellectual property was not executory where the only remaining performance was the debtor's payment of royalties); In re FCX, Inc., 60 B.R. 405, 411 (E.D.N.C. 1986) (holding that where grain farmers provided grain pre-petition under contracts that provided for later payment, the contracts were non-executory because "the only performance remaining is payment by the debtor to the employees and grain farmers" and neither "the employees nor the grain farmers are giving consideration to the debtor that warrants payment to them as an executory contracting party"); In re Mandrell, 246 B.R. 528, 531 (Bankr. D.S.C. 1999) (holding that contract to purchase car was not an executory contract because "[a] contract does not fall within the definition of 'executory contract' simply because a party is obligated to make payments under an agreement" and "undefined financing arrangement[s] . . . are simply alternative methods by which the Debtor can repay the amount owed under the Contract" (internal citation and quotation omitted)), holding modified on other grounds by In re Smith, 259 B.R. 561 (Bankr. D.S.C. 2000).

as to a party simply because that party is obligated to make payments of money." Id. at 375. So too here.

The STB Override is in fact directly analogous to the payment obligations addressed in In re Union Financial and In re Craig. Arch attempts to distinguish these cases (STB does not even try) on the ground that the cases involved promissory notes, which are "unconditional obligations," not royalty agreements, which require payment only after coal has been mined. (Arch Opp. Br. ¶ 51.) The distinction is meaningless. The contracts at issue in each case were non-executory because they were one-way payment obligations – like the STB Override – not because they were promissory notes.

In In re Union Financial, Judge Schermer held that the Seller Note at issue was "not an executory contract" because, as of the petition date, "the only remaining obligation under the Seller Note was [the debtor's] obligation to make payment." 325 B.R. at 822; accord In re Craig, 144 F.3d at 596 (holding that a note was "not an executory contract because the promisee . . . had already performed by turning over his ownership interest . . . and was merely awaiting payment"). Moreover, in In re Union Financial, as here, an Asset Purchase Agreement specifically referenced the Seller Note as additional consideration and attached a form copy as an exhibit. Judge Schermer concluded that the Seller Note was not integrated with the asset purchase agreement (or a related employment agreement) because, among other things, the contracts involved (1) different subject matters (purchase of an asset vs. an obligation to make payments), (2) had distinct consideration (for the same reason), (3) owed obligations to different parties, and (4) contained separate integration clauses. In re Union Financial, 325 B.R. at 823;

see also In re Craig, 144 F.3d at 596 (holding that notes were not integrated with other, related agreements that were part of the same transaction). Precisely the same is true here.[14]

Arch's last-ditch argument is that, if no party is providing material performance in exchange for the STB Override, then the contract is void for lack of consideration. (Arch Opp. Br. ¶ 50.) The argument is nonsensical. If it were correct, every non-executory contract – including those in Chesapeake Fiber, In re Union Financial, and In re Craig – would be void for lack of consideration. The reason such contracts are not void is that, under blackletter contract law, consideration is measured at the time the parties enter into their contract. See, e.g., Turner v. Sch. Dist. of Clayton, 318 S.W.3d 660, 670 (Mo. 2010) ("[C]onsideration must be measured at the time the parties enter into their contract and [ ] the diminished value of the economic benefit conferred, or even a complete lack of value, does not result in a failure of consideration." (internal quotation omitted)). Arch does not dispute that the STB Override was supported by consideration when it was first entered into. (Arch Opp. Br. ¶ 29 ("[T]he STB Override Agreement expressly states that it is given in consideration of the covenants and agreements contained in the Asset Purchase Agreement.").) The STB Override is not void for lack of consideration; it is a non-executory contract that Robin Land is prohibited by law from paying.

D. The Assignments Do Not Make the STB Override an Obligation of the Leases

Arch concedes that the Assignments did not – and could not – modify either the STB Override or the Leases. (Arch Opp. Br. ¶ 36 (citing Pl.'s Br. at 16-17).) Accordingly, the

[14] Arch's other attempted distinctions of In re Union Financial and In re Craig also fail. (Arch Opp. Br. ¶ 51 n.28.) That In re Union Financial involved a post-reorganization dispute makes no difference. The court explained that in order for the Seller Note to be an administrative claim, "the Seller Note would have to be an executory contract," and held that it was not, for precisely the same reasons that the STB Override is not executory. In re Union Financial, 325 B.R. at 822-23. That the Eighth Circuit in In re Craig dismissed arguments like the Defendants' here in "a total of one sentence" (Arch Opp. Br. ¶ 51 n.28) is not a basis for distinction; rather, it highlights the baselessness of the Defendants' arguments.

contracts could be integrated only if the original parties so intended. See Citibank v. Tele/Resources, Inc., 724 F.2d 266, 269 (2d Cir. 1983); Cook v. E. Gas & Fuel Assocs., 39 S.E.2d 321, 326 (W. Va. 1946) ("The assignee steps into the shoes of the assignor…."); Easley Coal Co. v. Brush Creek Coal Co., 112 S.E. 512, 515 (W. Va. 1922) (explaining that the assignee was "put exactly into the shoes" of the assignor with respect to a lease).

That concession defeats STB's argument – here and in its separate Motion to Compel [ECF No. 40] – that the STB Override "became" an "incorporated condition" of the Kelly-Hatfield Lease following the 2007 Amended Partial Assignment.[15] Moreover, as demonstrated in Robin Land's opening brief (Pl.'s Br. at 15-16), and in its objection to STB's Motion to Compel [ECF No. 55 at 12-13], the STB Override does not "run with the land" as a matter of law under West Virginia law.

STB's reliance on Easley Coal Co. v. Brush Creek Coal Co., 112 S.E.512 (W. Va. 1922), is entirely misplaced. (See STB Opp. Mot. at 24.) Easley involved the assignment of separate contracts – including a lease and a prior assignment agreement providing for royalty payments to a previous lessee – to a subsequent assignee. 112 S.E. at 515. The assignment in Easley did not – and could not – modify the underlying lease. Indeed, the court in Easley expressly stated that the assignee was "put exactly into the shoes" of the assignor with respect to a lease. Id.; see also Cook v. E. Gas & Fuel Assocs., 39 S.E.2d 321, 326 (W. Va. 1946) ("The assignee steps into the shoes of the assignor . . . .").

[15] Moreover, the Kelly-Hatfield Lease expressly provides that it "shall not be modified, supplemented or changed in whole or in part other than by an agreement in writing signed by all parties hereto or their respective successors or assigns." (Kelly-Hatfield Lease § 25.) The Amended Partial Assignment assigns the Kelly-Hatfield Lease, but it does not in any respect purport to modify the Lease in the way STB contends. Any such modification must be expressly set forth in writing.

POINT III.

THE DEFENDANTS' COUNTERCLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The counterclaims asserted by Arch and STB should be dismissed for failure to state a claim upon which relief can be granted.[16] Each of the counterclaims fails since, as demonstrated above, the STB Override is not an executory contract under Section 365.[17]

Defendants' counterclaims for unjust enrichment fail for two additional reasons. First, they are not cognizable because both STB and Ark Land are in a contractual relationship with Robin Land. Bright v. QSP, Inc., 20 F.3d 1300, 1306 (4th Cir. 1994) (applying West Virginia law); Howard v. Turnbull, 316 S.W.3d 431, 436 (Mo. Ct. App. 2010). Neither STB nor Arch cites a single case to the contrary. Indeed, Arch effectively concedes the point by asserting that it could bring an unjust enrichment claim only if the STB Override were void for lack of consideration. (See Arch Opp. Br. ¶ 55 n.31.)

Second, Robin Land is not unjustly enriched by not paying the STB Override; instead, Robin Land is prohibited by law from paying it because it is not an executory contract. Moreover, a constructive trust is an extraordinary remedy granted in only the "most egregious of circumstances" because it serves to elevate the claims of one creditor above those of similarly situated claimants. Shubert v. Jeter (In re Jeter), 171 B.R. 1015, 1020 (Bankr. W.D. Mo. 1994). Here, STB's "loss is not materially different from that of any creditor who may have extended

[16] STB's argument that Robin Land's motion to dismiss must be converted to a motion for summary judgment is wrong. (See STB Opp. Br. at 27.) The Court may treat Robin Land's motion to dismiss as a Rule 12(c) motion for judgment on the pleadings. See Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1233 n.3 (8th Cir. 2010) (explaining that a motion under Rule 12(c) is determined by the same standards that are applied to a motion to dismiss under Rule 12(b)(6)).

[17] For the sake of brevity, Robin Land incorporates by reference its arguments in its objection to STB's Motion to Compel that further demonstrate that the Defendants' counterclaims fail as a matter of law. [ECF No. 55.]

goods, services, or funds to the debtor before bankruptcy, and subsequently is barred from collecting the resulting just debt." Bush v. Taylor, 893 F.2d 962, 966 (8th Cir. 1990) (a court should not "permit the too-free use of the label 'constructive trust' to circumvent" the Bankruptcy Code).[18]

Indeed, the Defendants' claims for unjust enrichment and constructive trust highlight just what they are attempting to do here: jump the line at the expense of all of Robin Land's other general unsecured creditors. The Court should dismiss their counterclaims with prejudice and enter judgment for Robin Land, declaring that the STB Override is not an executory contract for purposes of Section 365.

[18] STB and Arch also fail to allege that Robin Land took part in any wrongdoing, an express requirement for a constructive trust. To determine whether a constructive trust is appropriate, a court sitting in bankruptcy looks to the state law underlying the action giving rise to the claim. See, e.g., In re Brook Valley VII, Joint Venture, 496 F.3d 892, 901-02 (8th Cir. 2007). Assuming West Virginia law applied, in order to impose a constructive trust, a creditor "must show *some* form of wrongdoing—fraud, concealment, or some other similar wrongful act." Gariety v. Vorono, 261 F. App'x 456, 461 (4th Cir. 2008) (emphasis in the original). The cases cited by STB (see STB Opp. Br. at 25) are not to the contrary. See Dwyer v. First Nat'l Bank (In re O'Brien), 414 B.R. 92, 98-100 (S.D. W. Va. 2009) (implementing a constructive trust for the benefit of the creditor because of, inter alia, fraud, civil conspiracy, and aiding and abetting a wrongful act); see also In re Herlan, No. 2:10-CV-16, 2010 WL 2024674, at *3-4 (N.D. W. Va. May 17, 2010) (finding a constructive trust necessary due to misappropriation and breach of fiduciary duty).

CONCLUSION

For the foregoing reasons, Robin Land respectfully requests that the Court dismiss the Defendants' Counterclaims with prejudice and enter an order that (a) the STB Override is not an executory contract for purposes of Section 365 of the Bankruptcy Code, and (b) the STB Override is not integrated with or is severable from any other agreement.

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Respectfully Submitted,

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