DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Telephone: (212) 450-4000
Facsimile: (212) 607-7983
Marshall S. Huebner
Brian M. Resnick
Antonio J. Perez-Marques
Jonathan D. Martin

Counsel to Plaintiff/Debtor and Debtor in Possession

Opposition Deadline: October 18, 2012 at 11:59 pm (Eastern Time)
Reply Deadline: November 1, 2012 at 11:59 pm (Eastern Time)
Hearing Date (if necessary): TBD

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PATRIOT COAL CORPORATION, *et al.*, Debtors.	Chapter 11 Case No. 12-12900 (SCC) (Jointly Administered)
EASTERN ROYALTY LLC f/k/a EASTERN ROYALTY CORP., Plaintiff, v. BOONE EAST DEVELOPMENT CO., PERFORMANCE COAL CO., and NEW RIVER ENERGY CORP., Defendants.	Adv. Pro. No. 12-01786 (SCC)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
ITS MOTION FOR JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 3

A. The Payment Agreement 4

B. The Assignments 5

C. The Boone Lease 6

D. The Settlement Agreement 6

APPLICABLE STANDARD AND GOVERNING LAW 9

A. Rule 12(c) Standard 9

B. Governing Law 9

ARGUMENT 11

POINT I. THE PAYMENT AGREEMENT IS NOT AN EXECUTORY CONTRACT FOR PURPOSES OF SECTION 365 OF THE BANKRUPTCY CODE 11

POINT II. THE PAYMENT AGREEMENT IS NOT INTEGRATED WITH THE ASSIGNMENTS 12

A. Whether Multiple Contracts Are Integrated In A Single, Unified Agreement Is A Question Of The Parties' Intent 12

B. ERC And The Massey Entities Plainly Intended That the Payment Agreement Would Not Be Integrated With Any of the Assignments 14

C. Even If The Payment Agreement Were Integrated With the Assignments, Each Resulting Agreement Would Still Be Non-Executory 19

POINT III. THE PAYMENT AGREEMENT IS NOT INTEGRATED WITH THE BOONE LEASE 20

A. ERC And The Massey Entities Plainly Intended That The Payment Agreement Would Not Be Integrated With The Boone Lease 20

POINT IV. THE PAYMENT AGREEMENT IS NOT INTEGRATED WITH THE SETTLEMENT AGREEMENT 22

POINT V. DEFENDANTS' COUNTERCLAIM SHOULD BE DISMISSED 29

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

PAGE

In re 4Kids Entm't, Inc., 463 B.R. 610 (Bankr. S.D.N.Y. 2011).....1

In re Adelphia Bus. Solutions, Inc., 322 B.R. 51 (Bankr. S.D.N.Y. 2005).....13, 18, 27, 29

Allstate Ins. Co. v. Stolarz, 613 N.E.2d 936 (N.Y. 1993).....10

Arciniaga v. General Motors Corp., 460 F.3d 231 (2d Cir. 2006).....15

Big E. Entm't, Inc. v. Zomba Enters., Inc., 453 F. Supp. 2d 788 (S.D.N.Y. 2006).....13

In re Calpine Corp.,
No. 05-60200 (BRL), 2008 Bankr. LEXIS 2152 (Bankr. S.D.N.Y. Aug. 4, 2008).....12

Cargill, Inc. v. Refco, Inc. (*In re Refco, Inc.*),
No. 06 Civ. 2133 (PKC), 2006 WL 2664215 (S.D.N.Y. Sept. 13, 2006) 9, 17

Coleman v. Sopher, 499 S.E.2d 592 (W. Va. 1997) 27

Cont'l AFA Dispensing Co. v. AFA Polytek, B.V. (In re Indesco Int'l, Inc.),
451 B.R. 274 (Bankr. S.D.N.Y. 2011).....12, 18

In re Cornwall Hill Realty, Inc., 128 B.R. 378 (Bankr. S.D.N.Y. 1991).....29

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).....23

Finova Capital Corp. v. Larson Pharmacy Inc. (In re Optical Techs., Inc.),
425 F.3d 1294 (11th Cir. 2005) 24

Foothills Tex., Inc. v. MTGLQ Investors, L.P. (In re Foothills Tex., Inc.),
No. 09-10452, Adv. Pro. No. 10-51308 (CSS), 2012 Bankr. LEXIS 3322
(Bankr. D. Del. July 20, 2012).....12, 19

In re Gardinier, 831 F.2d 974 (11th Cir. 1987).....24, 25

Gibbons v. Tenneco, Inc., 710 F. Supp. 643 (E.D. Ky. 1988) 11, 12

Haymaker v. Gen. Tire, 420 S.E.2d 292 (W. Va. 1992).....10

IBM v. Liberty Mut. Ins. Co., 363 F.3d 137 (2d Cir. 2004) 10

Inner City Telecomms. Network v. Sheridan Broad. Network, Inc.,
260 A.D.2d 257 (N.Y. App. Div. 1999) 28

Kanawha Banking & Trust Co. v. Gilbert, 46 S.E.2d 225 (W. Va. 1947).....10

Koppers Co. v. Asher Coal Mining Co., 11 S.W.2d 114 (Ky. 1928).....29

L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419 (2d Cir. 2011).....9

Lane v. Bd. of Educ., 131 S.E.2d 165 (W. Va. 1963) 18

Mason v. Official Comm. of Unsecured Creditors (In re FBI Distrib. Corp.),
330 F.3d 36 (1st Cir. 2003).....30

McDaniel v. Kleiss, 503 S.E.2d 840 (W. Va. 1998) 12, 13, 15

Meagher v. Compania Mexicana de Aviacion,
No. 90 Civ. 7464 (LJF), 1992 WL 84543 (S.D.N.Y. Apr. 10, 1992) 9

Nat'l Union Fire Ins. Co. v. Clairmont, 231 A.D.2d 239 (N.Y. App. Div. 1997).....15, 16, 17, 28

Nat'l Union Fire Ins. Co. v. Williams, 233 A.D.2d 395 (N.Y. App. Div. 1996).....28

In re PSINet Inc., 268 B.R. 358 (Bankr. S.D.N.Y. 2001).....9

Papago Parago Partners, LLC v. Three-Five Systems, Inc.,
No. CV 06-2448-PHX-FJM, 2007 U.S. Dist. LEXIS 48041 (D. Ariz. June 29, 2007).....21, 22

In re Plitt Amusement Co. of Wash., Inc.,
233 B.R. 837 (Bankr. C.D. Cal. 1999).....13, 16, 17, 18, 27, 29

In re Pollock, 139 B.R. 938 (9th Cir. BAP 1992).....18

Rosenblum v. Travelbyus.com Ltd., 299 F.3d 657 (7th Cir. 2002) 26, 27

In re Royster Co., 137 B.R. 530 (Bankr. M.D. Fla. 1992).....16

Rudman v. Cowles Commc'ns, Inc., 280 N.E.2d 867 (N.Y. 1972).....14, 15, 28

In re Sanshoe Worldwide Corp., 139 B.R. 585 (S.D.N.Y. 1992).....29

Schonfeld v. Thompson, 243 A.D.2d 343 (N.Y. App. Div. 1997) 13

Schron v. Troutman Saunders LLP, 97 A.D.3d 87 (N.Y. App. Div. 2012).....13

In re Stein & Day Inc., 81 B.R. 263 (Bankr. S.D.N.Y. 1988) 20

Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co., 83 F.3d 735 (5th Cir. 1996).....19

Transammonia, Inc. v. Enron Capital & Trade Res. Corp.,
278 A.D.2d 152 (N.Y. App. Div. 2000) 13

Two Guys from Harrison-N.Y. v SFR Realty Assocs., 472 N.E.2d 315 (N.Y. 1984) 27

W.W.W. Assocs. v. Giancontieri, 566 N.E.2d 639 (N.Y. 1990).....10

Wang v. N.Y. Transit, Inc.,
No. 91 Civ. 8695 (SAS), 1997 U.S. Dist. LEXIS 16139 (S.D.N.Y. Oct. 14, 1997) 21

Wattenberg v. Wattenberg, 277 A.D.2d 69 383 (N.Y. App. Div. 2000) 13, 16

In re Worldcom, Inc.,
No. 02-13533 (AJG), 2010 Bankr. LEXIS 1917 (Bankr. S.D.N.Y. June 11, 2010).....11

STATUTES & RULES

11 U.S.C. § 365.....1, 2, 19, 24, 31

11 U.S.C. § 365(a) 24

11 U.S.C. § 503(b)(1)(A).....30

Fed. R. Civ. P. 10(c) 9

Fed. R. Civ. P. 12(c) 1, 9

OTHER AUTHORITIES

Corbin on Contracts § 696 (1960 ed.).....15

Plaintiff Eastern Royalty LLC f/k/a Eastern Royalty Corp. ("ERC" or "Plaintiff"), one of the affiliated debtor entities in the above-captioned chapter 11 case, respectfully submits this memorandum of law in support of its motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c).

PRELIMINARY STATEMENT

In this action, ERC seeks a declaratory judgment that the Payment Agreement (defined below) is a standalone, fully integrated, non-executory contract that is not subject to assumption or rejection under 11 U.S.C. § 365. The Payment Agreement could cost ERC and its creditors as much as $80 million or more over just the next five years, with zero corresponding benefit.

As the Court is well aware, when contracts are plain and unambiguous on their face, they must be enforced according to their terms. *See In re 4Kids Entm't, Inc.*, 463 B.R. 610, 681 (Bankr. S.D.N.Y. 2011) (Chapman, J.). Extrinsic evidence is not permitted or required unless there is an ambiguity, and the mere fact that the parties advance differing interpretations of a contract does not make it ambiguous. *Id.* Here, there is no ambiguity that the Payment Agreement is a standalone, fully integrated, non-executory contract as a matter of law.

The Payment Agreement imposes an ongoing payment obligation on ERC, and requires nothing in return from the counterparties to that agreement: Boone East Development Company ("Boone"), Performance Coal Company ("Performance Coal"), and New River Energy Corporation ("New River") (collectively, the "Massey Entities" or "Defendants"). The Payment Agreement required the Massey Entities to enter into four separate Assignments and the Boone Lease (both defined below), but that performance is now complete. Accordingly, there can be no reasonable dispute that the Payment Agreement is non-executory.

Nor can there be any reasonable dispute that the Payment Agreement is not integrated with either the Assignments or the Boone Lease. Integration of separate contracts into a single, unified agreement is a question of the parties' contractual intent, and for the reasons explained in detail below, ERC and the Massey Entities made unmistakably clear on the face of the agreements that they intended for the Payment Agreement, the Assignments, and the Boone Lease to remain separate, standalone agreements. All of the agreements were documented separately; they contain independent consideration; they have different purposes and subject matter; they do not provide that the breach of one constitutes the breach of another; they each involve different combinations of the Massey Entities; and the Boone Lease has a merger clause that expressly limits the lease to its four corners.

Faced with this incontrovertible evidence on the face of the documents that ERC and the Massey Entities did not intend for the Payment Agreement to be integrated with the Assignments or the Boone Lease, the Defendants resort to an argument that each agreement was separately integrated with a Settlement Agreement (defined below) that was the genesis of these agreements and several others. They contend that the Settlement Agreement was a contractual hub that separately integrated the Payment Agreement, the Assignments, the Boone Lease, and a host of agreements involving other parties. That argument fails for the simple reason that neither ERC nor any of the Massey Entities was a party to the Settlement Agreement, which resolved unrelated litigation between their respective affiliates at the time, Massey Coal Sales and Coaltrade (each defined below).

In short, Defendants' position is that ERC must assume or reject a collection of agreements that are allegedly integrated by a hub agreement – the Settlement Agreement – that is not itself an "executory contract . . . of the debtor," 11 U.S.C. § 365, and therefore cannot be

assumed or rejected. That makes no sense. ERC cannot be prevented from shedding onerous one-way payment obligations totaling tens of millions of dollars by an agreement it never signed.[1] Moreover, as explained further below, there is no evidence that even Massey Coal Sales and Coaltrade intended for the separate agreements contemplated by their Settlement Agreement to be treated as a single, unified agreement. But their intent is irrelevant in any event, and the plain and unambiguous language of the contracts makes unavoidably clear that neither ERC nor the Massey Entities intended for the Payment Agreement to be integrated with the Assignments, the Boone Lease, the Settlement Agreement, or any other agreement.

Accordingly, ERC is entitled to judgment as a matter of law on its claim for declaratory judgment.[2]

STATEMENT OF FACTS

In 2005, ERC entered into the following agreements with some or all of the Massey Entities:

- A Payment Agreement dated August 31, 2005 by and between ERC and Boone, Performance Coal, and New River (the "Payment Agreement" or the "Agreement"). (Complaint, Ex. A.)
- A Partial Assignment and Assumption Agreement dated August 31, 2005 by and between ERC and New River (the "New River Assignment"). (Complaint, Ex. C.)
- A Partial Assignment and Assumption Agreement dated August 31, 2005 by and between ERC and Performance Coal (the "Performance I Assignment"). (Complaint, Ex. D.)

[1] Coaltrade remains to this day a subsidiary of Peabody Energy Corporation, not Patriot Coal Corporation.

[2] For all of the same reasons, as explained in Point V *infra*, the Defendants' counterclaim for breach of contract should be dismissed for failure to state a claim.

- A Partial Assignment and Assumption Agreement dated August 31, 2005 by and between ERC and Performance Coal (the "Performance II Assignment"). (Complaint, Ex. E.)

- A Partial Assignment and Assumption Agreement dated August 31, 2005 by and between ERC and Boone (the "Boone Assignment"). (Complaint, Ex. F.)

- A Coal Lease by and between ERC and Boone, effective as of August 1, 2005 (the "Boone Lease"). (Complaint, Ex. G.)

At the time, ERC was an affiliate of Peabody Energy Corporation ("Peabody"). After October 31, 2007, when Patriot Coal Corporation ("Patriot") was spun off from Peabody, ERC became a wholly owned subsidiary of Patriot. Boone, Performance Coal, and New River were at that time subsidiaries of Massey Energy Company ("Massey"), and are currently indirect subsidiaries of Alpha Natural Resources, Inc. ("Alpha"). (Answer ¶ 2.)

A. The Payment Agreement

The first agreement that ERC entered into with the Massey Entities – the Payment Agreement – has three operative provisions:

Section 1 of the Payment Agreement provides that "[u]pon execution of this Agreement," the parties "will execute" the New River Assignment, the Performance I Assignment, the Performance II Assignment, the Boone Assignment (together, the "Assignments"), and the Boone Lease. (Payment Agreement § 1, at 3.)

Section 2 of the Payment Agreement provides that ERC will pay certain "Tonnage Payments" (calculated according to a specified formula) "to the respective Massey Entities for each ton of coal mined and sold from" the coal reserves transferred pursuant to the Assignments and the Boone Lease. (*Id.* § 2, at 3-4.)

Section 3 of the Payment Agreement provides that ERC shall furnish to each of the Massey Entities certain information used to calculate the Tonnage Payments. (*Id.* § 3, at 4.)

The parties expressly agreed that the Payment Agreement was supported by "additional consideration" that was separate from the independent consideration that supported each of the Assignments and the Boone Lease. (*Id.* at 3.) The Massey Entities no longer have any performance obligations under the Payment Agreement, but ERC remains obligated to pay the Tonnage Payments specified in Section 2. The Payment Agreement does not have a governing law provision.

B. The Assignments

As noted above, ERC and the relevant Massey Entities agreed in the Payment Agreement to enter into the four Assignments. The Assignments each have nearly identical provisions. Each provides that, "in consideration of the mutual covenants contained herein," the respective Massey Entity "grants, assigns, sells and transfers to [ERC] all of [the Massey Entity's] right, title and interest" to a particular coal reserve.[3] (Assignments at 2.) Each Assignment further provides that ERC "expressly assumes and agrees to abide by all the terms, covenants, conditions, and obligations" of the underlying lease being assigned by each Massey Entity. (*Id.* ¶ 2.) The Assignments are governed by West Virginia law. (New River Assignment ¶ 8; Performance I Assignment ¶ 8; Performance II Assignment ¶ 8; Boone Assignment ¶ 7.)

The Assignments are now fully executed; no further performance is required by either ERC or the respective Massey Entities. The Assignments do not provide that the assigned coal reserve interests will revert to the respective Massey Entity under any circumstances. In particular, the Assignments do not make the transfer of the four underlying leases contingent on

[3] The New River Assignment retained New River's right to payment from ERC under the lease assigned therein. (Complaint, Ex. C ¶ 1.)

ERC's payment of the Tonnage Payments under the separate Payment Agreement. The Assignments do not incorporate, or even mention, the Payment Agreement.

C. The Boone Lease

Upon execution of the Payment Agreement, ERC and Boone also executed the Boone Lease. The Boone Lease provides that Boone grants ERC certain mining rights on a coal reserve in West Virginia. (*Id.*) The Boone Lease further provides that, "[a]s rental for the term" of the lease, ERC must pay "tonnage royalties" at rates specified in the Boone Lease for each ton of coal mined from the leased reserves. (Boone Lease § 7.1.) The Boone Lease has a five-year term that automatically renews. (*Id.* § 10.3.)

The Boone Lease states that ERC and Boone agreed to its terms solely "for and in consideration of the mutual benefits derived and to be derived [therefrom]." (*Id.* at 1.) The Boone Lease does not incorporate or otherwise mention the Payment Agreement. Indeed, Section 19 of the Boone Lease specifies twenty-two separate events of default under the lease, and failure to pay the Tonnage Payments under the Payment Agreement is not among them. (*Id.* § 23.) The Boone Lease includes a merger clause that provides that "[t]his Lease constitutes the sole and entire existing agreement between the parties and expresses all the obligations of and restrictions imposed upon the parties." (*Id.* § 23.7.) The Boone Lease is governed by West Virginia law. (*See id.* §§ 9, 13.1, 21 (stating certain obligations of the parties will be governed by West Virginia law and that any dispute arising under the Boone Lease shall be resolved by arbitration in West Virginia).)

D. The Settlement Agreement

Defendants contend that the Payment Agreement is integrated with a settlement agreement, dated July 5, 2005, and effective June 30, 2005, between Massey Coal Sales

Company, Inc. ("Massey Coal Sales"), a Massey subsidiary, and COALTRADE, LLC ("Coaltrade"), a Peabody subsidiary and former affiliate of ERC (the "Settlement Agreement") (Complaint, Ex. B).[4] The Settlement Agreement resolved litigation regarding Massey Coal Sales's failure to deliver coal to Coaltrade pursuant to a coal supply agreement. (Settlement Agreement at 1-2.) Neither ERC nor any of the Massey Entities is a party to the Settlement Agreement. Coaltrade remains a subsidiary of Peabody and has no affiliation with ERC or any other current Patriot affiliate.

Pursuant to the Settlement Agreement, Massey Coal Sales agreed to make a $6 million cash payment to Coaltrade. (*Id.* ¶ 1, at 2.) Massey Coal Sales and Coaltrade further agreed that they or certain of their affiliates would enter into a series of separate agreements, undated and unexecuted copies of which were attached as exhibits to the Settlement Agreement. Those separate agreements included the Payment Agreement, the Assignments, and the Boone Lease. They also included the following:

- a Coal Supply Agreement between Massey Coal Sales and Coaltrade;
- a Partial Release and Surrender by and between Pine Ridge Coal Company and Berwind Land Company;
- a Partial Release and Surrender by and between Eastern Associated Coal Corp. and WPP LLC;
- a Partial Release and Surrender by and between Peabody Coal Company and Federal Coal Company, Inc.;
- a second Partial Release and Surrender by and between Peabody Coal Company and Federal Coal Company, Inc.;
- a Payment Agreement between Pine Ridge Coal Company, Eastern Associated Coal Corp., Peabody Coal Company, Elk Run Coal Company, Inc., Ceres Land Company, and Boone;

[4] The Settlement Agreement is governed by Kentucky law. (Settlement Agreement ¶ 12, at 6.)

- a Payment Agreement between Peabody Coal Company and Elk Run Coal Company, Inc.[5]

Massey Coal Sales and Coaltrade acknowledged and agreed that "all of the transactions contemplated by this Settlement Agreement" would be executed at a closing to be held on a date following execution of the Settlement Agreement. (*Id.* ¶ 7, at 4.) And it is clear from the face of the separate and variegated agreements that each contract was intended to have a life of its own going forward.

A merger clause in Paragraph 15 of the Settlement Agreement states that "[t]he Parties hereto" – i.e., Massey Coal Sales and Coaltrade – "understand, covenant and agree that the terms and conditions of this Settlement Agreement, together with the Exhibits to this Settlement Agreement, constitute the full and complete understanding, agreement and arrangement of the parties, and is the integrated memorial of their agreement; and that there are no agreements, covenants, promises or understandings other than those set forth herein." (*Id.* at 7.) The merger clause made clear that there were no *other* agreements besides those specifically enumerated in the Settlement Agreement that were part of the agreement by Massey Coal Sales and Coaltrade to resolve their litigation. The effect of the merger clause was not, as Defendants contend, to congeal the various agreements into a single, indivisible contract that would thereafter rise or fall together. Indeed, the agreements contemplated by the Settlement Agreement have not traveled together over time and now span *three* separate corporate families: Patriot, Peabody, and Alpha.

[5] Pine Ridge Coal Company, Eastern Associated Coal Corp., and Peabody Coal Company were, at the time the contracts were executed, subsidiaries or affiliates of Peabody. Elk Run Coal Company, Inc. and Ceres Land Company were subsidiaries or affiliates of Massey. Berwind Land Company, WPP LLC, and Federal Coal Company, Inc. were entities unrelated to either Peabody or Massey.

APPLICABLE STANDARD AND GOVERNING LAW

A. Rule 12(c) Standard

A motion for judgment on the pleadings pursuant to Rule 12(c) may be granted "where the material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings." *Meagher v. Compania Mexicana de Aviacion*, No. 90 Civ. 7464 (LJF), 1992 WL 84543, at *2 (S.D.N.Y. Apr. 10, 1992) (internal quotation marks omitted). The "pleadings" under Rule 12(c) include the complaint, the answer, and any written documents attached to them. *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011).

ERC's claim for declaratory judgment presents a pure issue of law: whether the Payment Agreement is a non-executory contract that is not integrated with the Assignments, the Boone Lease, or the Settlement Agreement. Each of the contracts is attached to the Complaint and is part of the pleadings. *See id.*; Fed. R. Civ. P. 10(c). Where the parties "disagree only as to the interpretation of the contract, the dispute becomes one which may be properly determined by the Court" under Rule 12(c). *Meagher*, 1992 WL 84543, at *2 (granting plaintiff's motion for declaratory judgment on the pleadings based on interpretation of contract).

B. Governing Law

Whether the Payment Agreement is integrated with the Assignments, the Boone Lease, or the Settlement Agreement is a question of state law. *See, e.g.*, *Cargill, Inc. v. Refco, Inc.* (*In re Refco, Inc.*), No. 06 Civ. 2133 (PKC), 2006 WL 2664215, at *3-4 (S.D.N.Y. Sept. 13, 2006). The Payment Agreement does not have a governing law provision. The applicable law is therefore determined by New York's choice-of-law rules. *In re PSINet Inc.*, 268 B.R. 358, 376 (Bankr. S.D.N.Y. 2001). In New York, a choice-of-law analysis is unnecessary unless there is

"an actual conflict between the laws of the jurisdiction involved." *Allstate Ins. Co. v. Stolarz*, 613 N.E.2d 936, 937 (N.Y. 1993). Here, the only other state's law that might conceivably be applicable – West Virginia – does not conflict with New York law on the principles of contract integration. Accordingly, the Court may apply New York law, and ERC cites cases applying both states' laws below. *See IBM v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143 (2d Cir. 2004) (applying New York law where there was no substantive difference in state law on the specific question at issue).

Under both New York and West Virginia law, it is well established that "[w]here the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements of any of the parties to it made contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain its terms, in the absence of fraud, accident or mistake in its procurement." *Haymaker v. Gen. Tire*, 420 S.E.2d 292, 293 (W. Va. 1992) (internal quotation marks and citation omitted); *accord W.W.W. Assocs. v. Giancontieri*, 566 N.E.2d 639, 642 (N.Y. 1990). Thus, an unambiguous written contract "will be deemed to express the entire and exact meaning of the parties, and every material part of the agreement will be presumed to have been expressed in it." *Kanawha Banking & Trust Co. v. Gilbert*, 46 S.E.2d 225, 236 (W. Va. 1947). This rule "imparts stability to commercial transactions" and is "all the more compelling in the context of real property transactions, where commercial certainty is a paramount concern." *W.W.W. Assocs.*, 566 N.E.2d at 642.

ARGUMENT

POINT I.

THE PAYMENT AGREEMENT IS NOT AN EXECUTORY CONTRACT FOR PURPOSES OF SECTION 365 OF THE BANKRUPTCY CODE

There can be no reasonable dispute that the Payment Agreement is not executory. Under the Payment Agreement, the Massey Entities agreed to execute the Assignments and the Boone Lease. ERC agreed to make the Tonnage Payments. The Massey Entities' performance under the agreement is now complete, and all that remains is ERC's payment obligation. *See In re Worldcom, Inc.*, No. 02-13533 (AJG), 2010 Bankr. LEXIS 1917, at *14 (Bankr. S.D.N.Y. June 11, 2010) ("Under the Countryman test, [a] contract is executory if performance is still required by both parties such that failure of either party to perform would excuse the other party's performance." (internal quotation marks and citation omitted)).[6]

Courts routinely conclude that agreements that provide solely for unilateral payment obligations are not executory contracts. Indeed, in a recent case involving a contract to pay overriding royalties as a percentage of oil and gas produced, Judge Sontchi of the Bankruptcy Court for the District of Delaware held that where a counterparty's only remaining obligation was to "sit back and collect royalty payments" – as here – the contract was not executory.[7]

[6] Similarly, assumption of the Payment Agreement would bring no benefit to ERC's estate, and thus the contract fails to satisfy the "functional" test for whether a contract is executory. *See In re Worldcom*, 2010 Bankr. LEXIS 1917, at *14 (applying the alternative "functional" test, which "finds an executory contract where assumption of a contract would benefit a debtor's estate.").

[7] Defendants alternatively argue that "the Payment Agreement (and the obligations therein) are not subject to treatment as a contract or contractual rights" because they "constitute real property interests that run with the land." *See* Answer at ¶ 37. Even assuming for the sake of argument that the obligations under the Payment Agreement constitute interests that run with the land, the Payment Agreement must still be treated as a contract. In *Gibbons*, a right-of-way agreement contained a "coal clause" which granted the landowners a right to receive payments based on the amount of coal mineable from the subject land. The court ruled that "[w]hile . . . the coal clause is a covenant that runs with the land, upon the breach of a covenant, it becomes a chose in action that does not run with land. A chose in action [is] a personal right not reduced into possession, but recoverable by a suit at law." *Gibbons v. Tenneco, Inc.*, 710 F. Supp. 643, 648 (E.D. Ky. 1988) (internal quotation marks and citations omitted).

Foothills Tex., Inc. v. MTGLQ Investors, L.P. (In re Foothills Tex., Inc.), No. 09-10452, Adv. Pro. No. 10-51308 (CSS), 2012 Bankr. LEXIS 3322, at *31 (Bankr. D. Del. July 20, 2012); *see also In re Calpine Corp.*, No. 05-60200 (BRL), 2008 Bankr. LEXIS 2152, at *15 (Bankr. S.D.N.Y. Aug. 4, 2008) (holding that a loan agreement is not executory where one party has already lent another party all of the funds called for under the agreement and, therefore, has no remaining performance obligations).

As demonstrated below, there also cannot be any reasonable dispute that the Payment Agreement is not integrated with any of the Assignments (Point II, *infra*), the Boone Lease (Point III, *infra*), or the Settlement Agreement (Point IV, *infra*).

POINT II.

THE PAYMENT AGREEMENT IS NOT INTEGRATED WITH THE ASSIGNMENTS

A. Whether Multiple Contracts Are Integrated In A Single, Unified Agreement Is A Question Of The Parties' Intent

Under both New York and West Virginia law, whether multiple contracts should be integrated and treated as a single, unified agreement is a question of the intent of the parties. *See, e.g., Cont'l AFA Dispensing Co. v. AFA Polytek, B.V. (In re Indesco Int'l, Inc.)*, 451 B.R. 274, 289 (Bankr. S.D.N.Y. 2011) (holding that a court will look to the parties' intent to determine the integration of different agreements and "will not look beyond the explicit language of the Agreements [where they] are unambiguous on their face" (internal quotation marks omitted)); *McDaniel v. Kleiss*, 503 S.E.2d 840, 846 (W. Va. 1998) (analyzing integration of multiple contracts by determining parties' intent based on the language of the contracts).

Like the payment interest arising from the "coal clause" in *Gibbons*, the obligations under the Payment Agreement are not "somehow permanently attached to the unmined coal" but rather are "simply a contractual right to receive payment for the value of the coal." *Id.* at 649.

Under both New York and West Virginia law, where the parties' intent is clear and unambiguous on the face of the contracts, integration is an issue of law to be decided by the court. *See, e.g.*, *McDaniel*, 503 S.E.2d at 844, 848 (finding that two contracts were not integrated based on "clear and unambiguous" contractual language); *Schonfeld v. Thompson*, 243 A.D.2d 343, 343 (N.Y. App. Div. 1997) (holding that the trial court "correctly held that the separate written agreements involving different parties, serving different purposes and not referring to each other were not intended to be interdependent or somehow combined to form a unitary contract . . . and the alleged oral representations [to the contrary] are barred by the parol evidence rule" (citation omitted)).[8]

Courts applying New York, West Virginia and other states' laws have relied on a number of non-exclusive factors that evidence whether the parties intended for multiple contracts to be integrated,[9] including:

- whether the agreements are set out in multiple writings;
- whether the contractual parties to all of the agreements are identical;
- whether the consideration for each agreement is separate and distinct;

[8] *See also Schron v. Troutman Saunders LLP*, 97 A.D.3d 87, 93 (N.Y. App. Div. 2012) ("[T]he parol evidence rule preclude[s] the use of extrinsic evidence to show the claimed interdependence."); *Transammonia, Inc. v. Enron Capital & Trade Res. Corp.*, 278 A.D.2d 152, 153 (N.Y. App. Div. 2000) (holding parol evidence rule barred "relying on extrinsic evidence to establish" that the contract in question "was one of two interdependent components of a single contract").

[9] *See generally Big E. Entm't, Inc. v. Zomba Enters., Inc.*, 453 F. Supp. 2d 788, 799 (S.D.N.Y. 2006) (holding that agreements are not part of the same transaction and are not intended to be read together where there were separate parties, different purposes to the agreements, and different dates of execution); *In re Plitt Amusement Co. of Wash., Inc.*, 233 B.R. 837, 844 (Bankr. C.D. Cal. 1999) (holding that each of three leases stands alone and functions independently because "[e]ach lease was supported by separate consideration" and each contained its own operative terms); *McDaniel*, 503 S.E.2d at 846-48 (holding that an insurance policy and a release were not integrated because the latter did not incorporate the former, they had different purposes, and they were not executed contemporaneously); *Wattenberg v. Wattenberg*, 277 A.D.2d 69 383, 383 (N.Y. App. Div. 2000) (two agreements were separate where they dealt "with different subject matters and [were] supported by independent consideration"); cf. *In re Adelphia Bus. Solutions, Inc.*, 322 B.R. 51, 55 n.10 (Bankr. S.D.N.Y. 2005) (holding that two separate, but closely related, lease agreements were severable).

- whether the subject matter and purpose of each agreement is distinct;
- whether a default under one agreement causes or requires a default under the other;
- whether there is a merger/integration clause; and
- whether the agreements are for the same term.

Every one of these factors weighs in favor of a conclusion that the Payment Agreement is not integrated with the Assignments or any other agreement.

B. ERC And The Massey Entities Plainly Intended That the Payment Agreement Would Not Be Integrated With Any Of The Assignments

There is no evidence that ERC and the Massey Entities intended for the Payment Agreement to be integrated with any of the Assignments. Indeed, the parties gave every possible indication on the face of the agreements that they clearly and unambiguously intended for the agreements to be separate.

1. The Payment Agreement And The Assignments Were Documented Separately to Evidence Separate Assents

The fact that ERC and the Massey Entities went out of their way to document the Payment Agreement in a separate, standalone contract is powerful evidence that the parties intended for it to be separate from the Assignments (or any other agreement). The Payment Agreement does not in any way characterize itself as an amendment, supplement, or rider to the Assignments. The parties documented the Payment Agreement separately from the Assignments and the Boone Lease for a reason – to make clear that it was a separate, standalone agreement. *See Rudman v. Cowles Commc'ns, Inc.*, 280 N.E.2d 867, 873 (N.Y. 1972) ("[T]hat the parties entered into separate written agreements with 'separate assents' rather than a 'single assent' is influential . . . and '*when two parties have made two separate contracts it is more likely that*

promises made in one are not conditional on performances required by the other.'" (emphasis added) (quoting *Corbin on Contracts* § 696 (1960 ed.))).

2. The Payment Agreement And The Assignments Involve Different Contractual Parties

The fact that the parties to each of the Assignments (and the Boone Lease) are only a subset of the parties to the Payment Agreement is further evidence that the parties intended for the agreements to be treated separately. While the Payment Agreement was entered into by ERC and all three Massey Entities, each Assignment was entered into by ERC and only one of the Massey Entities. The fact that the Massey Entities are affiliates does not change the analysis. *See id.* at 874 (holding that a parent and subsidiary were different parties for integration purposes and that an asset sale agreement with the subsidiary was not integrated with an employment contract with the parent).

Arciniaga v. General Motors Corp. is instructive. The Second Circuit held there that two agreements were separate, specifically relying on the fact that one agreement was between Arciniaga, GM and Bay Chevrolet while the other agreement was between GM and Bay Chevrolet alone. 460 F.3d 231, 237 (2d Cir. 2006). The fact that Arciniaga was President of Bay Chevrolet did not influence the Court's analysis. *See also McDaniel*, 503 S.E.2d at 848 (stating that "the criteria" for holding two contracts integrated is that "*the parties* and subject matter be the same and the relationship between the documents be clear" (emphasis added)); *Nat'l Union Fire Ins. Co. v. Clairmont*, 231 A.D.2d 239, 241-42 (N.Y. App. Div. 1997) (finding that contracts "made by . . . different parties" is "a circumstance weighing heavily in favor of contractual separability").

3. The Payment Agreement And The Assignments Are Each Supported By Separate Consideration

ERC and the Massey Entities also expressly and unambiguously agreed that the Payment Agreement was supported by "additional" consideration that was separate from the consideration that independently supported the Assignments. In the Payment Agreement, ERC agreed to make the Tonnage Payments in exchange for the Massey Entities' agreement to enter into the Assignments and the Boone Lease. (Payment Agreement 1-2.) The Assignments are separately supported by their own exchange of consideration: in exchange for each Massey Entity's irrevocable assignment of the underlying lease, ERC agreed to assume the Massey Entity's obligations under that lease. (Assignments at 2.)

The existence of separate and distinct consideration weighs strongly in favor of non-integration. *See In re Royster Co.*, 137 B.R. 530, 532 (Bankr. M.D. Fla. 1992) (finding that riders to certain prepetition agreements were separate contracts because they contained separate and distinct consideration); *Wattenberg*, 277 A.D.2d at 69 (two agreements were separate where they dealt "with different subject matters and [were] supported by independent consideration"); *In re Plitt*, 233 B.R. at 845 (holding that three leases, while executed simultaneously with a purchase agreement and note and contained cross references, each stood alone and functioned independently, in part because "each lease was supported by separate consideration").

The Defendants' assertion that they "would not have entered into the Assignment Agreements" absent ERC's agreement to make the Tonnage Payments (Answer ¶ 41), does not make the Payment Agreement integrated with the Assignments. *See Nat'l Union Fire Ins. Co.*, 231 A.D.2d at 241 (holding that, although one agreement "would not have been entered into but for" the parties' agreement to enter into another, this did not justify an "inference of contractual

interdependence"). In *Refco*, Judge Castel specifically affirmed Judge Drain's conclusion that two contracts were not integrated, notwithstanding the counterparty's insistence that it "would not have entered into [one contract] independently from [the other contract]." *See In re Refco, Inc.*, 2006 WL 2664215, at *5. Judge Castel ruled that "this unremarkable and undoubtedly true statement" was "clear from the face of the [agreement]" – as it is here in the Payment Agreement – but that "accepting its truth does not alter the legal analysis." *Id.* So too here.

4. The Payment Agreement And The Assignments Have Different Purposes and Subject Matters

Relatedly, the Payment Agreement and the Assignments each address different subject matters. The purpose of the Assignments was for each Massey Entity to assign, and for ERC to assume, the rights and obligations under leases covering specific coal reserves. The Payment Agreement, by contrast, was intended to provide for an ongoing payment stream to the Massey Entities in exchange for their agreement to enter into the Assignments and the Boone Lease. *See Nat'l Union Fire Ins. Co.*, 231 A.D.2d at 241 ("[O]ne agreement may follow from and even have as its *raison d'etre* another and yet be independently enforceable.").

In *In re Plitt*, for example, the court held that three leases that were executed simultaneously with an umbrella purchase agreement and a note each stood alone and could be assumed or rejected independently because each lease contained its own provisions regarding rent amount, rent due date, commencement and termination dates, and location of leased property. 233 B.R. at 844 (applying Washington law). The court in *In re Plitt* found that while the purchase agreement in that case repeatedly referred to the leases that the parties simultaneously executed – as the Payment Agreement does here – each such reference treated the leases "as objects that the debtor was purchasing under the contract" and did not "refer to the

substantive provisions of the leases." Therefore, the court ruled, the purchase agreement did not incorporate the lease as one integrated agreement. *Id.* at 845.

5. The Assignments Do Not Cross-Reference The Payment Agreement And Do Not Require That Breach of One Agreement Causes Breach Of Any Other

None of the Assignments makes any reference whatsoever to the Payment Agreement, let alone provides that a breach of the Payment Agreement would result in a breach of the Assignments. Under these circumstances, "[i]f the Agreements were read as one contract . . . then, in effect, the Court would be reading cross-default provisions into the Agreements where they do not exist." *In re Indesco*, 451 B.R. at 289; *see also Lane v. Bd. of Educ.*, 131 S.E.2d 165, 170 (W. Va. 1963) (noting that contracts are interpreted using "the well established principle . . . that the express mention of one thing implies the exclusion of another").

6. The Assignments And The Payment Agreement Have Different Durations

Where one agreement is intended to outlast another, courts consider that a key indicator that the agreements are intended to be treated separately. *See In re Adelphia Bus. Solutions*, 322 B.R. at 59 (holding that parties intended two related leases to be separately enforceable where one had a term of 15 years and the other a term of 10 years); *In re Plitt*, 233 B.R. at 844 (holding that a purchase agreement, promissory note and leases are not integrated because "[m]ost importantly, the leases are designed to continue long after [performance under the purchase agreement and note are complete]"); *In re Pollock*, 139 B.R. 938 (9th Cir. BAP 1992) (holding that a promissory note and a sublease were separately enforceable where the note lasted for 17 years, while the term of the sublease was 30 years).

Here, the Assignments were fully performed upon their execution, when each Massey Entity thereby assigned and ERC assumed the rights and obligations under the respective lease.

The Payment Agreement, by contrast, continues for an indefinite period, and requires that ERC pay the Tonnage Payments on any coal mined from the subject coal reserves in the future. In this way, too, the parties manifested their clear intent to treat the Payment Agreement as a separate, standalone agreement.

For all of these reasons, ERC is entitled to a declaratory judgment that the Payment Agreement is not integrated with any of the Assignments.

C. Even If The Payment Agreement Were Integrated With the Assignments, Each Resulting Agreement Would Still Be Non-Executory

In any event, even if the Payment Agreement were integrated with the Assignments – which it is not – there would be no significance at all for purposes of Section 365. Each of the resulting agreements would still be non-executory. *See Stewart Title Guar. Co. v. Old Republic Nat. Title Ins. Co.*, 83 F.3d 735, 741-42 (5th Cir. 1996) ("[W]here a single document embraces several distinct agreements, some of which are executory and some of which are fully or substantially performed, only the executory portions of the documents are subject to rejection."). As explained above in Point II, the Payment Agreement is not an executory contract because the only performance remaining under the contract is ERC's payment of the Tonnage Payments. Each of the Assignments is fully executed – no performance remains for any party. Accordingly, even if the Payment Agreement were integrated with any of the Assignments, each resulting contract would require only that ERC make the Tonnage Payments, which would not be an executory contract.[10] *See In re Foothills Tex., Inc.*, 2012 Bankr. LEXIS 3322, at *31 (holding

[10] In the Assignments, each Massey Entity agreed to indemnify ERC for any claims arising from the Massey Entity's negligence in its prior operations on the leased premises, or arising from the Massey Entity's violation of the terms of the governing lease or applicable state and federal law. (Complaint, Exs. C-F ¶ 3.) Such an indemnity "is an obligation that is imposed by law and does not constitute a significant independent obligation

that because a counterparty's only remaining obligation was to "sit back and collect royalty payments," the contract was non-executory).

POINT III.

THE PAYMENT AGREEMENT IS NOT INTEGRATED WITH THE BOONE LEASE

A. ERC And The Massey Entities Plainly Intended That the Payment Agreement Would Not Be Integrated With The Boone Lease

The purpose of the Boone Lease is to transfer a leasehold interest to ERC in exchange for ERC's promise to make rental payments to Boone (which are distinct from the Tonnage Payments required under the Payment Agreement). For all of the reasons that the Payment Agreement is not integrated with the Assignments, it is also not integrated with the Boone Lease:

- The Payment Agreement and the Boone Lease were documented in separate agreements and evidence separate assents.
- The Payment Agreement and the Boone Lease involve different contractual parties.
- The Boone Lease is supported by its own consideration: in exchange for the leasehold interest in the subject coal reserves, ERC pays "tonnage royalties" to Boone that are separate and distinct from the Tonnage Payments under the Payment Agreement. (Boone Lease § 7.1.)
- The Payment Agreement and the Boone Lease have different purposes and subject matters.
- A breach of the Payment Agreement does not result in a breach of the Lease, or vice versa.
- The Payment Agreement and the Boone Lease have different durations. The Payment Agreement continues for an indefinite period, whereas the Boone Lease has a specified term of five years, with an option for renewal.

---

which would cause the [counterparty's] performance under the agreements to be viewed as incomplete and executory." *In re Stein & Day Inc.*, 81 B.R. 263, 266 (Bankr. S.D.N.Y. 1988).

Indeed, in addition to all of this evidence, the Boone Lease contains additional provisions that make overwhelmingly clear that the Payment Agreement was not intended to be integrated with it – or with any other agreement for that matter. The Boone Lease contains a merger clause that provides that "[t]his Lease constitutes the sole and entire existing agreement between the parties and expresses all the obligations of and restrictions imposed upon the parties." (Boone Lease § 23.7.) This clause makes unambiguously clear that the agreement reached in the Payment Agreement is *not* part of the parties' agreement under the Boone Lease. *See Wang v. N.Y. Transit, Inc.*, No. 91 Civ. 8695 (SAS), 1997 U.S. Dist. LEXIS 16139, at *8 (S.D.N.Y. Oct. 14, 1997) (although execution of employment agreement was a condition of entering into a second agreement, it was "apparent" that the employment agreement "was intended to stand on its own" because it contained its own merger clause).

That the parties intended for the Payment Agreement and the Boone Lease to be separate is further evidenced by the fact that the parties made inescapably clear that a breach of the Payment Agreement is not also a breach of the Boone Lease. Section 19 of the Boone Lease, which spans five pages, carefully lists *twenty-two* separate events of default. (Boone Lease § 19.) Failure to make the Tonnage Payments under the Payment Agreement is *not* among those events of default. Indeed, it is telling that the Defendants' counterclaim for breach of the Payment Agreement (Answer ¶¶ 40-43) – which fails to state a claim as a matter of law (Point V, *infra*) – does not also claim that ERC breached the Boone Lease. No such claim could be asserted.

Papago Parago Partners, LLC v. Three-Five Systems, Inc., No. CV 06-2448-PHX-FJM, 2007 U.S. Dist. LEXIS 48041, at *10-11 (D. Ariz. June 29, 2007), which applies Arizona law, is on point. In *Papago*, the debtor-defendant sold its interest in a commercial building to the

plaintiff in exchange for a promissory note secured by a deed of trust. *Id.* at *1. On the same date, the parties also entered into a five-year lease through which the plaintiff leased the property back to the debtor. *Id*. at *2. The plaintiff argued that the note and the lease, executed on the same date, were integrated because (1) the note was not payable until the termination date of the lease and (2) the note provided that uncured note defaults excused payment under the lease, making plaintiff's performance under the note contingent on the debtor's compliance with the terms of the lease. *Id*. at *8-9. The court disagreed. In finding that the note and the lease were not integrated, the court noted that the lease made no mention of the note, either in its list of events of default or otherwise, and that it also contained an unambiguous integration clause. *Id*. at *10. This reasoning is even more persuasive under the facts of this case. Like the lease in *Papago*, the Boone Lease includes an unambiguous merger clause and fails to list breach of the Payment Agreement among its list of events of default. However, unlike the note in *Papago*, the Payment Agreement does not state that the parties' obligations are in any way contingent on performance under the Boone Lease.

For all of these reasons, ERC is entitled to a declaratory judgment that the Payment Agreement is not integrated with the Boone Lease.

POINT IV.

THE PAYMENT AGREEMENT IS NOT INTEGRATED WITH THE SETTLEMENT AGREEMENT

Defendants effectively concede that there is no evidence on the face of the documents that either ERC or the Massey Entities intended that the Payment Agreement would be directly, or "horizontally," integrated with either the Assignments or the Boone Lease. (Answer ¶ 38). As demonstrated in Points II and III, any such argument must fail because it is flatly contradicted

by the plain and unambiguous language of the agreements. Defendants instead argue that the Payment Agreement, the Assignments, and the Boone Lease are each independently and *vertically* integrated with the Settlement Agreement between Massey Coal Sales and Coaltrade, and thereby indirectly integrated with each other. (Answer ¶ 38.) In Defendants' view, the Settlement Agreement acts as a hub that separately integrates thirteen separate contractual spokes – including the Payment Agreement, the Assignments, and the Boone Lease – into a single, unified agreement that must be assumed or rejected together under section 365.

Defendants' argument fails for the simple reason that neither ERC nor any of the Massey Entities was a party to the Settlement Agreement. Defendants argue that Massey Coal Sales and Coaltrade intended for the Settlement Agreement and all of its exhibits to form a single, unified agreement. Even putting aside the utter lack of support for that view (as demonstrated below), the intent of Massey Coal Sales and Coaltrade is not relevant. The question here is whether *ERC and the Massey Entities* – each an independent legal entity – intended for the various agreements that they entered into to be integrated into a single whole. As explained above, there is absolutely no evidence of such an intent. Defendants' argument that the Payment Agreement, the Assignments, and Boone Lease were somehow vicariously integrated anyway by Massey Coal Sales and Coaltrade in the Settlement Agreement is wrong as a matter of law. "It goes without saying that a contract cannot bind a nonparty." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). The integration question here can be resolved only by looking at the contractual intent of ERC and the Massey Entities, as reflected in the plain language of the agreements they actually signed, not the supposed intent of some other parties in a separate agreement.

In addition to its fatal deficiencies under basic contract law, the Defendants' argument also makes no sense as a matter of bankruptcy law. Defendants argue that ERC must assume or reject the entire collection of agreements allegedly integrated by the Settlement Agreement. But ERC is not a party to the Settlement Agreement, or to most of the agreements allegedly integrated by it, and therefore *cannot* assume or reject those contracts. A debtor may only "assume or reject any executory contract or unexpired lease *of the debtor*." 11 U.S.C. § 365(a) (emphasis added); *Finova Capital Corp. v. Larson Pharmacy Inc. (In re Optical Techs., Inc.)*, 425 F.3d 1294, 1303 n.10 (11th Cir. 2005) (noting that "section 365 does not, by its terms," govern contracts between non-debtor parties).

In *In re Gardinier*, the Eleventh Circuit explained that it defies logic to conclude that contracts between different parties are integrated, even where the two contracts are conditioned on each other, and even where the two contracts are memorialized in the same document. Specifically, the court of appeals examined whether a purchase and sale agreement in which the debtor sold land to a buyer was separate from the debtor's agreement to pay a commission to its broker, where the agreement to pay the brokerage commission was also documented in the same purchase and sale agreement. 831 F.2d 974, 974 (11th Cir. 1987) (applying Florida law). The court of appeals looked at 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 had no promises running between them, and "their only relation is that each has separate contractual rights with the seller." *Id.* The court of

appeals further emphasized that "[n]either the courts below nor either party cites any case suggesting that if promises between different parties are dependent and conditioned on one another, it is evidence that the parties intended the agreements to actually form one contract." *Id.* at 977 (emphasis added). The court of appeals then added: "Moreover, none offers any convincing reason why this should be so. Contracts are often conditioned upon the completion of totally separate agreements." *Id.* at 977-78. The court of appeals concluded 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.*

The reasoning of *In re Gardinier* applies with even more force to the Settlement Agreement and its exhibits. The Payment Agreement, the Assignments, and the Boone Lease were all documented in separate instruments and none of the parties was also a party to the Settlement Agreement. Even if the Settlement Agreement was conditioned on execution of the Payment Agreement, the Assignments, and the Boone Lease, that condition resulted from a promise running between two parties – Massey Coal Sales and Coaltrade – that were strangers to the agreements between ERC and the Massey Entities. In those circumstances, "it would be illogical to argue that the parties intended the agreements to form only one contract." *Id.* at 978.

Moreover, Defendants' argument that Massey Coal Sales and Coaltrade intended for the Settlement Agreement and all of its exhibits to be a single, unified contract – even assuming that their intent were somehow relevant – is itself wholly unsupportable. Defendants appear to rely almost exclusively on section 15 of the Settlement Agreement, which provides that "[t]he Parties hereto," i.e., Massey Coal Sales and Coaltrade:

> understand, covenant and agree that the terms and conditions of this Settlement Agreement, together with the Exhibits to this Settlement Agreement, constitute the full and complete understanding, agreement and arrangement of the parties, and is the integrated memorial of their agreement; and that there are no other agreements, covenants, promises or understandings other than those set forth herein.

Apparently on the basis of this clause, Defendants contend in their Answer that the Payment Agreement is "an exhibit to" and therefore "incorporated into the Settlement Agreement." (Answer ¶ 38.)

The problem for Defendants is that section 15 does not "incorporate" the exhibits into the Settlement Agreement to form a single, unified agreement, but instead precludes any argument through extrinsic evidence that *other* agreements were made to resolve the litigation. Applying Illinois law, the Seventh Circuit construed a nearly identical provision in *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657 (7th Cir. 2002), and concluded that it was "not an incorporation clause at all; rather it is a merger clause." *Id.* at 665. The merger clause provided, like the merger clause in the Settlement Agreement, that "[t]his Agreement together with the other agreements and documents to be delivered pursuant to this Agreement constitute the entire Agreement between the Parties. . . ." *Id.* The Seventh Circuit explained that such a clause "does not incorporate other contracts by reference, rather, a merger clause negates the impact of earlier negotiations and contract drafts, and states that the written contract is the complete expression of the parties' agreement." *Id.* It merely "assures the parties that their entire agreement is memorialized in the written contract, and permits either party to invoke the parol evidence rule to exclude evidence of additional contractual terms not included in the written agreement." *Id.* The reference to the other agreements "simply assures the continued vitality of those documents" and prevents them from being extinguished (and merged into) the agreement – here, the Settlement

Agreement – that contains the merger clause. *Id.* The reference to the other agreements does *not* incorporate them all into a single, indivisible contract. *Id.*; *see also In re Plitt*, 233 B.R. at 845 ("The purpose of an integration clause of this type is to prevent the introduction of parol evidence of other agreements not contained in a particular instrument. This is a wholly separate issue from whether the various instruments constitute a single agreement for the purposes of assumption or rejection.").

This interpretation of section 15 of the Settlement Agreement is the only interpretation that allows it to be construed harmoniously with the Boone Lease, which provides that "[t]his Lease constitutes the sole and entire existing agreement between the parties." (Boone Lease § 23.7 (emphasis added)). It is well established that agreements must "be construed, if possible, as to give meaning to every word, phrase and clause and also render all [their] provisions consistent and harmonious." *Coleman v. Sopher*, 499 S.E.2d 592, 602 n.12 (W. Va. 1997); *accord Two Guys from Harrison-N.Y. v. SFR Realty Assoc.*, 472 N.E.2d 315, 318 (N.Y. 1984) (courts must "avoid an interpretation that would leave contractual clauses meaningless"). Indeed, "the existence of integration clauses in *both* [contracts] here is a strong indication that the documents memorialize the parties' final intent to create distinct contracts." *In re Adelphia Bus. Solutions*, 322 B.R. at 60.

In short, section 15 of the Settlement Agreement provides only that Massey Coal Sales and Coaltrade resolved their litigation by agreeing that they or their affiliates would enter into the separate contracts attached as exhibits, and no other contracts. There is no evidence on the face of the documents that Massey Coal Sales and Coaltrade contemplated that the series of contracts would function going forward as a single, unified agreement that would rise or fall

together. Just the opposite. The agreements give every indication that they were intended to have separate lives of their own:

- Each of the purportedly integrated agreements was separately signed and assented to in a separate document at a separate time. *See Rudman*, 280 N.E.2d at 873 ("[T]hat the parties entered into separate written agreements with 'separate assents' rather than a 'single assent' is influential" in showing lack of integration).

- Not one of the agreements that Defendants seek to integrate with the Settlement Agreement even mentions that agreement.

- The purposes of the Settlement Agreement and the other purportedly integrated agreements are very different. The Settlement Agreement – as its name indicates – was intended to resolve a past litigation in Kentucky regarding Massey Coal Sales' failure to deliver coal to Coaltrade. By contrast, the other agreements were intended to govern a number of unrelated subjects going forward between various affiliates of Massey Coal Sales and Coaltrade, involving disparate West Virginia properties entirely unrelated to the issue in dispute in the Kentucky litigation.

- The exhibits to the Settlement Agreement involve thirteen separate legal entities that were not parties to the Settlement Agreement itself. *See Nat'l Union Fire Ins. Co.*, 231 A.D.2d at 242 ("While it is true that the indemnification agreement was one of a number of [agreements] executed almost contemporaneously . . . and that the indemnification agreement would not have been entered into but for defendants' decision to purchase the investment[,] . . . . [t]he contracts defendants would now have deemed unitary were in fact made by them with different parties – a circumstance weighing heavily in favor of contractual separability – and for different purposes.").

- Neither the Settlement Agreement nor any of its exhibits provides that a breach of that contract will constitute the breach of another. *See Inner City Telecomms. Network v. Sheridan Broad. Network, Inc.*, 260 A.D.2d 257, 257 (N.Y. App. Div. 1999) (holding that the separability of two agreements executed together as part of a settlement was "apparent" when "look[ing] at the documents themselves," where agreements did not "indicate that the obligations imposed by one were to be contingent upon the performance of obligations imposed by the other").

- The Settlement Agreement is governed by Kentucky law, yet various of its exhibits are governed by West Virginia law. *Nat'l Union Fire Ins. Co. v. Williams*, 233 A.D.2d 395, 396-97 (N.Y. App. Div. 1996) ("The choice of different law to be applied to each contract . . . indicate[s] that the respective agreements are intended to be separate.")

- Each of the purportedly integrated agreements expressly provides that it involves an exchange of consideration that is entirely independent of the Settlement Agreement.

It is clear as a matter of law, therefore, that even Massey Coal Sales and Coaltrade intended for the separate contracts contemplated by the Settlement Agreement to be standalone agreements.[11]

For all of these reasons, ERC is entitled to a declaratory judgment that the Payment Agreement is not integrated with the Settlement Agreement or any of its exhibits.

POINT V.

DEFENDANTS' COUNTERCLAIM SHOULD BE DISMISSED

Defendants' counterclaim for post-petition breach of the Payment Agreement (Answer ¶ 42) should be dismissed for failure to state claim upon which relief can be granted. The counterclaim fails because, as demonstrated above, the Payment Agreement is a standalone, non-executory contract that was entered into before ERC filed its bankruptcy petition. It provides no basis for a post-petition, administrative expense claim by Defendants.

A non-executory contract is "nonassumable" by the debtor and therefore a counterparty may "not claim that the contract was an assumed post-petition contract with respect to which it is

[11] The factors demonstrating that the Payment Agreement is not integrated with the Settlement Agreement or any other agreement would likewise show that, alternatively, even assuming they are somehow integrated, the Payment Agreement is severable from every other agreement. In particular, section 14 of the Settlement Agreement specifically contains a severability clause, providing that "[i]f any . . . section of this Settlement Agreement is deemed to be unlawful, invalid or unenforceable, the remainder of this Settlement Agreement shall remain in full force and effect. . . ." "Many courts, including courts in the Southern District of New York, allow a single contract to be separately assumed and rejected if the contract is 'divisible' or 'severable' under state law." *In re Adelphia Bus. Solutions*, 322 B.R. at 55 n.10 (collecting cases); *see, e.g.*, *In re Plitt*, 233 B.R. at 845-46 (holding that even if a purchase agreement, note, security agreement and three leases could be regarded as integrated, they are severable pursuant to a severability clause in the purchase agreement); *In re Sanshoe Worldwide Corp.*, 139 B.R. 585, 596-97 n.7 (S.D.N.Y. 1992) (severing two leases, each for separate floors of an office building, and permitting the debtor-lessee to assume the lease for one floor while rejecting the lease for other floors); *Koppers Co. v. Asher Coal Mining Co.*, 11 S.W.2d 114, 115 (Ky. 1928) (holding contract to "fix a minimum income . . . from each separate tract of land" was severable).

entitled to an administrative expense claim." *In re Cornwall Hill Realty, Inc.*, 128 B.R. 378, 382 (Bankr. S.D.N.Y. 1991). As the First Circuit has explained, a claim on a non-executory contract for which "[t]he consideration supporting the [agreement]" was supplied pre-petition "is a prepetition claim," even if "the right to payment arose after the petition date." *Mason v. Official Comm. of Unsecured Creditors (In re FBI Distrib. Corp.)*, 330 F.3d 36, 48 (1st Cir. 2003). That is precisely the case here. Because "the nondebtor provides no consideration '*after* the commencement of the case,' [it] is not entitled to priority." *Id.* (quoting 11 U.S.C. § 503(b)(1)(A)). Accordingly, Defendants' counterclaim is not allowable as a post-petition administrative expense and should be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court dismiss Defendants' Counterclaim with prejudice and enter an order that (a) the Payment Agreement is a non-executory contract for purposes of section 365 of the Bankruptcy Code, and (b) the Payment Agreement is not integrated with or is severable from the Assignments, the Boone Lease, the Settlement Agreement, or any other agreement.

Dated: New York, New York
September 21, 2012

Respectfully Submitted,

DAVIS POLK & WARDWELL LLP

By: /s/ Jonathan D. Martin

Marshall S. Huebner
Brian M. Resnick
Antonio J. Perez-Marques
Jonathan D. Martin
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 607-7983
marshall.huebner@davispolk.com

Counsel to Plaintiff/Debtor and Debtor in Possession