

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 (KSS)

Jointly Administered

**PAYNE-GALLATIN COMPANY INITIAL HEARING BRIEF IN
SUPPORT OF ITS OBJECTION [ECF 2056] TO DEBTORS' MOTION
FOR AUTHORIZATION TO (i) ASSUME OR (ii) REJECT UNEXPIRED
LEASES OF NONRESIDENTIAL REAL PROPERTY [ECF 1995]**

Payne-Gallatin Company, a West Virginia corporation ("PG"), respectfully files this initial hearing brief in support of its objection (the "Objection") [ECF 2056] to Debtors' Motion For Authorization To (i) Assume Or (ii) Reject Unexpired Leases Of Nonresidential Real Property (the "Motion") [ECF 1995].

I. PRELIMINARY STATEMENT

PG is lessor and Debtor Panther LLC ("Panther") is lessee under a lease of nonresidential real property dated October 15, 1976 (the "Lease") granting certain mining rights on 994 acres located on Wet Branch of Cabin Creek of Kanawha River, in Kanawha County, West Virginia (the "Lease Premises"). In its Objection, PG asserts an underpayment by Panther of wheelage royalties due on coal, which crosses the Lease Premises, mined by Panther on other property ("wheelage royalties"). In calculating the wheelage royalties, Panther improperly deducted, from the "gross sales price" of the coal, its trucking, rail, and related expenses for transporting the coal from the Lease Premises to various shipping terminals where final loading occurs and the coal is

ultimately shipped to Panther's customers. Panther's deductions are not permitted under the Lease. The underpaid wheelage royalties, with West Virginia statutory interest, must be paid for the Lease to be assumed. 11 USC § 365(b)(1).

Under the Agreed Scheduling Stipulation and Proposed Order Upon The Debtors' Motion To Assume Leases And Cure Defaults And The Objection of Payne-Gallatin Company (the "Scheduling Order") [ECF 3870], the initial hearing, on May 21, 2013, is limited to determining deductions Panther may take in calculating wheelage royalties under the meaning of the term "gross sales price" in the Lease (the "Lease Interpretation Issue"). PG and Panther have entered into a Stipulation Of Facts For Purposes Of A Hearing On Payne-Gallatin Objection [Doc 2056] To Debtors' Motion For Authorization To (i) Assume Or (ii) Reject Unexpired Leases Of Nonresidential Real Property [Doc 1995] (the "Stipulation") [ECF 3941]. PG has also filed the Declaration of Andrew A. Payne, III, the President of PG, dated May 7, 2013, and the Declaration of Patricia D. Clark, C.P.A., Suttle & Stalnaker PLLC, Charleston, West Virginia, dated May 7, 2013.

II. BACKGROUND

Originally the Lease parties were Payne-Gallatin Mining Company, a West Virginia corporation, to which PG is the successor, as lessor, and OCAMCO, a corporation, as lessee. (Stipulation ¶ 7.) In 1999 Panther became the lessee under an "Assignment, Assumption, Consent and Release Agreement" by and among PG, P-G&H Joint Venture, Panther Corporation, and Panther, made effective March 16, 1999 (the "Panther Assignment"). (Stipulation ¶ 9.)

Lease Article II (p. 10) requires Panther to pay PG a "wheelage royalty:"

Lessee shall pay to Lessor as wheelage royalty the sum of one-half of one percent (1/2%) of the gross sales price as hereinabove defined but in no event less than ten cents (10¢) per net ton of coal mined from

other lands and transported over, through, under and upon the demised premises or processed through a cleaning plant on the demised premises, payable at the same time and upon the same basis as tonnage royalties are hereinabove provided to be paid. (Stipulation ¶ 11; Exhibit (Ex.) A.)

“Gross sales price” is defined in Lease Article II (p. 8) as:

For the purpose of calculating the tonnage royalty as above provided, the term “gross sales price” as used herein shall mean the actual price paid for coal sold to a bona fide purchaser f.o.b. the loading plant **after final preparation and loading**, less any sales tax imposed thereon, but **without any deduction for selling commissions, advertising, credit losses or other expenses**, but with deductions for discounts or allowances actually allowed to arms-length wholesalers or middlemen. (Stipulation ¶ 10; Ex. A) (**emphasis added**).

Coal mined by Panther from other lands is transported by a belt conveyer system through and over the “demised premises” (as defined in the Lease) to Panther’s coal clean preparation plant complex (the “Coal Clean Plant Complex”) on the demised premises. (Stipulation ¶ 12). The Coal Clean Plant encompasses raw and clean coal stockpiles, incoming and outgoing conveyor belt systems, a coal preparation plant and a truck loading facility. (Stipulation ¶ 12).

At the Coal Clean Plant, coal is crushed, washed and dried, then moved by belt conveyer to a clean coal stockpile, then reclaimed via an underground belt conveyer system to a structure on the demised premises where it is loaded onto trucks. (Stipulation ¶ 13).

After initial loading the trucks haul the coal to various sites off the Lease Premises, for further handling and loading, including:

- (i) a railroad (“rail”) loading facility, located on Tom’s Fork of Wet Branch of Cabin Creek (“Tom’s Fork Loadout”);
- (ii) a barge loading facility, located on the Kanawha River at Chelyan, Kanawha County, West Virginia (“Chelyan Dock”);

- (iii) a barge loading facility located on the Kanawha River at Marmet, West Virginia (“Marmet Dock”);
- (iv) a barge loading facility located on the Kanawha River at Winifrede, Kanawha County, West Virginia (“Winifrede Dock”);
- (v) a barge loading facility, located on the Kanawha River at Port Amherst, Kanawha County, West Virginia (“Port Amherst”); and
- (vi) a barge and rail loading facility, located on the Kanawha River at Quincy, Kanawha County, West Virginia (“Quincy Dock”).

(Declaration of Andrew A. Payne, III, dated May 7, 2012 (“Payne Declaration”; ¶ 6); Declaration of Patricia D. Clark, C.P.A. dated May 7, 2013 (“Clark Declaration”; ¶ 7).

Chelyan Dock, Marmet Dock, Winifrede Dock, Port Amherst, and Quincy Dock are collectively referred to as the “Kanawha River Docks”.

At Tom’s Fork Loadout, the trucks unload the coal onto stockpiles. The coal is moved from the stockpiles and loaded into rail cars. (Payne Declaration ¶ 7). From Tom's Fork Loadout, the coal is transported by rail to various sites for final loading, including:

- (i) a barge and rail loading facility on the Ohio River at Ceredo, Cabell County, West Virginia (“Ceredo Dock”);
- (ii) a ship loading terminal at Newport News, Hampton Roads, Virginia, known as Dominion Terminal (“DTA”), and
- (iii) a ship loading terminal at Newport News, Hampton Roads, known as Pier IX (“Pier IX”). (Payne Declaration ¶ 8), (Clark Declaration ¶ 7).

At Ceredo Dock, the coal is unloaded from the rail cars onto stockpiles and is moved by belt conveyor from the stockpiles for final loading into a barge. The coal can

also be transferred directly from the rail car for final loading into a barge. (Payne Declaration ¶ 9).

At DTA, the coal is unloaded from the rail cars onto stockpiles. From the stockpiles the coal is moved for final loading into a ship. (Payne Declaration ¶ 10). At Pier IX, the coal is unloaded from the rail cars onto stockpiles. From the stockpiles the coal is moved for final loading into a ship. (Payne Declaration ¶ 11).

At the Kanawha River Docks, the trucks unload the coal onto stockpiles and then it is moved for final loading into a barge. At Quincy Dock, the coal can also be moved for final loading into rail cars. (Payne Declaration ¶ 12).

Unloading and transferring coal from truck or rail and loading the coal into a barge or ship is known in the coal industry as “transloading.” (Payne Declaration ¶ 13).

In calculating wheelage royalties, Panther, deducted from the “gross sales price” of the coal certain transportation related expenses described as “trucking,” “rail,” “transloading,” “government,” “fuel charges,” “put through fees,” and “freight adjustments” (the “transportation expenses”). (Clark Declaration ¶¶ 8 and 9). Panther's deductions were in violation of the Lease and taken without the knowledge or consent of PG.

III. ARGUMENT

A. **The Burden Of Production and Persuasion.**

Panther, the moving party, bears the burden of production and persuasion to establish the Lease can be assumed and all requirements for assumption are satisfied. In re Vitanza, 1998 Bankr. LEXIS 1497 (Bankr. E.D. Pa. Nov. 13, 1998) (citing, In re Rachels Industries, Inc., 109 B.R. 797, 802 (Bankr. W.D. Tenn. 1990)). PG, as the objecting party, bears the initial burden of showing defaults under the Lease. Vitanza (citing In re F.W. Restaurant Associates, Inc., 190

B.R. 143, 147 (Bankr. D. Conn. 1995); Georgia Ports Authority v. Diamond Manufacturing Company, Inc. (In re Diamond Manufacturing Company, Inc.), 164 B.R. 189, 199 (Bankr. S.D. Ga. 1994); Pyramid Operating Authority, Inc. v. City of Memphis (In re Pyramid Operating Authority, Inc.), 144 B.R. at 809.)

B. West Virginia Law Governs The Lease

The Lease is governed by West Virginia law. Johnson v. First Nat'l Bank, 719 F.2d 270, 274 (8th Cir. 1983) (“... in those areas where Congress has not chosen to define by statute the property rights of parties to a bankruptcy proceeding, state law is determinative”) Although the Lease does not contain a choice of law provision, West Virginia law applies because the Lease was entered into, and is to be performed in, West Virginia. American Select Insurance Co. v. Taylor, 445 F.Supp.2d 681, 684 (N.D. W.Va. 2006) (“for contract issues when the contract specifies no choice of law, West Virginia applies the law of the state where the contract was made and is to be performed.”)

C. A West Virginia Lease Which States The Parties’ Intent In Plain And Unambiguous Language Does Not Require Interpretation Or Construction But Should Be Applied According To Such Intent.

A lease “which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation, but will be applied and enforced according to such intent.” HN Corporation v. Cyprus Kanawha Corporation, 195 W.Va. 289, 294, 465 S.E.2d 391, 396 (1995) *per curium*; citing Cotiga Development Company v. United Fuel Gas Company, 147 W.Va. 484, 128 S.E.2d 626 (1962). A contract is not ambiguous “because the parties disagree as to the meaning of the language of the agreement.” Interstate Properties, Inc. v. K-Mart Corporation, 88 F.Supp.2d 609, 611 (SDWV 2000).

If construction is required, “a contract is construed according to the plain, ordinary meaning of the language used.” Fifth Third Bank v. McClure Properties, Inc., 724 F.Supp.2d

598, 603 (SDWV 2010) To aid in construction, "... in accordance with the maxim '*noscitur a sociis*' the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated. *Mylan Laboratories, Inc. v. American Motorists Insurance Co.*, 226 W.Va. 307, 317, 700 S.E.2d 518, 528 (2010), *per curium*, citing *Wolfe v. Forbes, et al.*, 159 W.Va, 34, 217 S.E.2d 899 (1975).

Holding a coal lessee could not deduct sales commissions paid to a selling agent in computing the production royalties owed to its lessor, the Supreme Court of Appeals of West Virginia (the "West Virginia Supreme Court") reasoned "[t]he lease fixes a definite, simple, and certain method of computing the royalty, based on the selling price to the consumer, without reference to loses, profits, expenses, wages, or any other element which might enter into the production. It is elementary that, when a written agreement is clear and unequivocal in its terms, its meaning must be determined by its contents alone, and the courts will not give it a meaning other than that clearly expressed." *Kohlsaet et al. v. Main Island Creek Coal Co.* 90 W.Va. 656, 665, 112 S.E. 213, 216 (1922). PG's lease with Panther is unequivocal in its terms as to the calculation of wheelage royalties.

D. The Plain Language Of The Lease Prohibits Panther From Deducting Its Transportation Costs To Calculate The Wheelage Royalty.

The Lease defines the "gross sales price," on which the wheelage royalty is calculated, as: "the actual price paid for coal sold to a bona fide purchaser f.o.b. the loading plant after final preparation and loading, ... but without any deduction for selling commissions ... or other expenses,"¹ (Stipulation, Ex. A, Lease p. 8.). The Lease plainly specifies that the "gross

¹ "F.O.B." ("free on board") is a delivery term under the Uniform Commercial Code ("UCC") codified at West Virginia Code ("WVC") §46-2-319. F.O.B. can be stated as F.O.B. the place of shipment (WVC §46-2-319(1)(a)), or F.O.B. the place of destination (WVC §46-2-319(1)(b)) or

sales price” is measured only “after final preparation and loading,” and is to be calculated “without deduction for selling commissions or other expenses.” *Id.* Panther’s deduction of its transportation expenses violates both of these unambiguous Lease provisions.

1. Final loading does not occur at the Coal Clean Plant on the Lease Premises.

“Final” means “last,” or “conclusive.” (Black’s Law Dictionary, Revised Fourth Edition, 1968, citing Standard Oil Co. (New Jersey) v. U.S., Ct.Cl., 10 F.Supp. 550 (1935)). See also Black’s Law Dictionary, Fifth Edition, 1979 (“Final” [means] “last; concluding; definitive; terminated; completed.”)

Although the first loading of the coal occurs at the Coal Clean Plant on the Lease Premises, final loading does not. After loading at the Lease Premises, the coal is trucked to Tom’s Fork Loadout or to Kanawha River Docks. (Payne Declaration ¶ 6).

At Tom’s Fork Loadout, the trucks unload the coal onto stockpiles. The coal is moved from the stockpiles and loaded into railroad cars. (Payne Declaration ¶ 7). The coal is then transported by rail to Ceredo Dock, DTA, or Pier IX, where it is unloaded from the rail car and loaded into a barge (Ceredo Dock) or ship (DTA or Pier IX). (Payne Declaration ¶ 8).

At Kanawha River Docks, the trucks unload the coal onto stockpiles, and then it is moved for final loading into a barge. At Quincy Dock, the coal can also be moved for final loading into rail cars. (Payne Declaration ¶ 12).

Panther/Patriot has acknowledged it deducts its transportation expenses for this coal from the gross sales price. (Clark Declaration ¶ 9). The deductions improperly reduce the “gross sales price” from the actual price paid for the coal f.o.b. the loading plant after final preparation and

F.O.B. vessel (WVC § 46-2-319(1)(c)). “Loading plant” is not a defined term under the UCC or in the Lease.

loading to a hypothetical price before final preparation and loading. The deductions breach the plain terms of the Lease.

2. The Lease expressly prohibits Panther's deduction of its transportation costs.

Subject to two (2) stated deductions for (i) sales tax and (ii) discounts or allowances to wholesalers and middlemen, the Lease expressly prohibits deductions in determining "gross sales price" ("... but without any deduction for selling commissions, advertising, credit losses or other expenses,") (Stipulation Ex. A, Lease p. 8). Panther's transportation expenses are "other expenses," which cannot be deducted.

In disallowing a lessee's deduction of sale commissions in calculating production royalties, the Kohlsaas court reasoned "[i]t is sufficient to say that the commissions paid by defendant to its selling agent for marketing its coal is one of the expenses of the operation. Rather than expend energy, money, and time in the selling of its product it employed an agent for that purpose. It carried on a necessary part of its business in this manner, and the commissions paid its agent are as much a part of the expense in the conduct of its business as the salary of its general manager, or of its mine foreman in the operating department, so far as the contract for the payment of royalties is concerned." 90 W.Va. 656, 668, 112 S.E. 213, 217.

Like the commissions paid to the selling agent in Kohlsaas, Panther's transportation expenses cannot be deducted to calculate wheelage royalties to PG.

IV. CONCLUSION

For these reasons and upon these authorities, PG respectfully requests that the Court rule that Panther is not entitled to deduct its transportation expenses in calculating the wheelage royalties payable under the Lease.

Dated: Charleston, West Virginia
May 8, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2013, a true and correct copy of the foregoing Payne-Gallatin Company Initial Hearing Brief In Support Of Its Objection [Doc 2056] To Debtors' Motion For Authorization To (i) Assume Or (ii) Reject Unexpired Leases Of Nonresidential Real Property [Doc 1995] was served by (i) the Electronic Case Filing system for the United States Bankruptcy Court for the Eastern District of Missouri, St. Louis Division, on those parties consenting to such service in these cases, and (ii) by United States mail, first class postage prepaid, on the counsel and or parties listed below:

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