UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: **PATRIOT COAL CORPORATION, *et al.*,** **Debtors.**[1]	**Chapter 11** **Case No. 12-51502-659** **(Jointly Administered)** **Hearing Date:** **May 21, 2013 at 10:00 a.m.** **(prevailing Central Time)** **Hearing Location:** **Courtroom 7 North** **Re: ECF Nos. 1995, 2056, 3419, 3870, 3941, 3946, 3948**

PANTHER LLC'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS OPPOSITION TO THE PAYNE-GALLATIN OBJECTION TO DEBTORS' MOTION FOR AUTHORIZATION TO (i) ASSUME OR (ii) REJECT UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY WITH RESPECT TO DEBTORS' CONTRACT ID LND 323

[1] The Debtors are the entities listed on Schedule 1 to the Assumption Motion, as defined below. The employer tax identification numbers and addresses for each of the Debtors are set forth in the Debtors' chapter 11 petitions.

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Panther LLC ("**Panther**"), one of the affiliated debtor entities in the above-captioned chapter 11 cases, respectfully submits this reply memorandum of law in response to Payne-Gallatin's Initial Hearing Brief in Support of its Objection to Debtors' Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property [ECF No. 3946] (the "**PG Br.**") and in further support of denying Payne-Gallatin's Objection[2] with prejudice and granting the Debtors' Assumption Motion.

PRELIMINARY STATEMENT

Payne-Gallatin's brief makes clear why Payne-Gallatin did not include any legal argument in its Objection: its claim for additional wheelage royalties is foreclosed by the plain language of the Lease. Payne-Gallatin has concocted an unsupportable argument as a pure money grab. For Payne-Gallatin, the Objection is a no-lose proposition: if it somehow prevails, it collects a windfall of additional, undeserved royalties; if it loses, it goes home with all it was entitled to under the Lease anyway.

This kind of gamesmanship should not be countenanced. The Court can and should summarily overrule Payne-Gallatin's Objection and grant the Debtors' Assumption Motion with respect to the Lease. Payne-Gallatin's argument that the "gross sales price" used to calculate its wheelage royalty should include transloading costs incurred after the coal leaves the loading plant on the Lease Premises is baseless.

As expected, Payne-Gallatin's argument regarding the "gross sales price" of the Wheeled Coal reads the term "f.o.b. the loading plant" out of the Lease. It is blackletter law — in West Virginia and elsewhere — that "[a]n F.O.B. term in the contract means that the seller must

[2] Capitalized terms not defined herein have the meanings ascribed to them in Panther's Memorandum of Law Upon the Debtors' Motion to Assume Leases and Cure Defaults and in Opposition to the Payne-Gallatin Objection to Debtors' Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property with Respect to Debtors' Contract ID LND 323 [ECF No. 3948] ("**Panther Br.**").

assume transportation costs only to the point specified, with the buyer being responsible for transportation costs thereafter." 18 Williston on Contracts § 52:11 (4th ed. 2013) (emphasis added). The Lease is unambiguous: the "gross sales price" of the coal includes Panther's costs related to transportation up to the loading plant and no further.

The qualifier "after final preparation and loading" following "f.o.b. the loading plant" simply makes clear that the costs incurred by Panther at the Coal Clean Preparation Plant Complex — i.e., the "loading plant" — are included in the "gross sales price." Payne-Gallatin does not dispute that "final preparation" of the coal occurs at the Coal Clean Preparation Plant Complex. Nor does it dispute that "loading" occurs at the Coal Clean Preparation Plant Complex. The Lease makes clear that these costs are included in the "gross sales price," and Panther has always included them when calculating the wheelage royalties owed to Payne-Gallatin.

Payne-Gallatin's argument — made for the first time — that "after final preparation and loading" means "after [final] loading" at some point beyond the loading plant is nonsensical. As noted above, such a construction would directly conflict with the f.o.b. term in the Lease, and it is a cardinal rule of contract construction that contractual provisions must be read as a harmonious whole. Syllabus Pt. 1, Henderson Dev. Co. v. United Fuel Gas Co., 3 S.E.2d 217 (W. Va. 1939).

In short, Payne-Gallatin's Objection is nothing more than an opportunistic attempt to gain contractual concessions as the price for Panther's assumption of the Lease. Payne-Gallatin's gamesmanship should be firmly rejected, and the Debtors' Assumption Motion with respect to the Lease should be granted.

ARGUMENT

A. Under the Plain Language of the Lease, the "Gross Sales Price" Is Fixed at the Coal Clean Preparation Plant Complex

This dispute boils down to the meaning of the term "f.o.b. the loading plant after final preparation and loading." (Lease, Art. II.1.) The Parties agree that the issue is governed by West Virginia law. (PG Br. at 6.) As discussed in Panther's opening brief, an f.o.b. term "fix[es] the full price" at the f.o.b. point specified. Lewis v. Bluefield, 188 S.E. 237, 240 (W. Va. 1936). Fixing the price at the f.o.b. point specified means that "the seller must assume transportation costs only to the point specified, with the buyer being responsible for transportation costs thereafter." 18 Williston on Contracts § 52:11; see W. Va. Code § 46-2-319(1); U.C.C. § 2-319(1). Thus, to calculate the "gross sales price" under the Lease, transportation-related costs incurred by Panther, the seller, up to the "loading plant" are included in the actual sales price; but transportation-related costs incurred by Panther beyond the "loading plant" are "deducted from the actual sales price." U.S. Steel Mining Co. v. Helton, 631 S.E.2d 559, 561 (W. Va. 2005) (emphasis in original); see Conoco Inc. v. Inman Oil Co., 774 F.2d 895, 901 (8th Cir. 1985) ("Conoco began pricing its gasoline f.o.b. the terminal and its packaged lubricants f.o.b. the supply point. The price of these products was accordingly reduced to reflect the cost of transportation only as far as the f.o.b. point . . . ."); (Panther Br. at 7-8).

This is blackletter law. As the U.S. Supreme Court has held, "charges for transportation, delivery, insurance or installation" that are "incurred subsequent to the preparation of an article for shipment . . . are not included in the manufacturer's f.o.b. selling price." F.W. Fitch Co. v. United States, 323 U.S. 582, 585 (1945) (emphasis added). Payne-Gallatin does not — nor could it — contend otherwise; indeed, it concedes that the well-established definition of f.o.b. under the UCC and the West Virginia Code applies. (See PG Br. at 7 n.1.)

Nor can Payne-Gallatin dispute where the "loading plant" specified in the Lease is located. The Stipulation of Facts expressly states that the Coal Clean Preparation Plant Complex is a "Plant" that "encompasses" a "truck loading facility," at which the Wheeled Coal is "loaded onto trucks" to be hauled off the Lease Premises. (Stipulation of Facts ¶¶ 12-14.) The Coal Clean Preparation Plant Complex is thus, literally, a "loading plant," and Payne-Gallatin does not contend otherwise. Thus all of Panther's costs related to transportation up to the Coal Clean Preparation Plant Complex are included in the "gross sales price," and all of its costs related to transportation after the Coal Clean Preparation Plant Complex are not.

The words "after final preparation and loading" simply explain what needs to happen at the "loading plant" before the f.o.b. price is fixed there. As explained in the Parties' joint Stipulation of Facts, once the Wheeled Coal reaches the Coal Clean Preparation Plant Complex, it is prepared there by being "crushed, washed and dried, then moved by a belt conveyor to a clean coal stockpile." (Id. ¶¶ 12-13.) Next, it is taken to the truck loading facility at the Coal Clean Preparation Plant Complex where it is "loaded onto trucks." (Id.) The words "after final preparation and loading" make clear that the "gross sales price" is fixed after this preparation and loading process at the Coal Clean Preparation Plant Complex is complete. They are not, as Payne-Gallatin contends, meant to read the words "f.o.b. the loading plant" out of the Lease by specifying a completely different f.o.b. location. See Columbia Gas Transmission Corp. v. E.I. du Pont de Nemours & Co., 217 S.E.2d 919, 926-27 (W. Va. 1975) ("Each word in a contract is presumed to have a unique meaning. . . . [N]o word or clause in a contract is to be treated as a redundancy, if any meaning reasonable and consistent with other parts can be given to it." (internal quotation marks and citation omitted)).

The UCC is instructive on this point. UCC section 2-319(1)(c), codified in the West Virginia Code, states that where an f.o.b. term is a "vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board." W. Va. Code § 46-2-319(1)(c); U.C.C. § 2-319(1)(c). In the Lease, however, the f.o.b. term is not a "vessel, car or other vehicle," but rather a "loading plant." Accordingly, by default under the West Virginia Code, the costs of loading the Wheeled Coal at the loading plant likely would not have been incorporated into the "gross sales price" absent a provision in the Lease stating otherwise. The qualifying term "after final preparation and loading" merely makes clear that the costs of both preparation and loading at the loading plant are included in the "gross sales price," as they would have been had a vehicle been specified as the f.o.b. point, while still allowing for flexibility as to the type of vehicle that may be used for loading.

B. Payne-Gallatin's Argument Is Inconsistent with the Plain Language of the Lease

Payne-Gallatin contends, counterintuitively, that despite the Lease's explicit reference to the "loading plant" — i.e., the Coal Clean Preparation Plant Complex — as the f.o.b. point, the "gross sales price" is not fixed at the "loading plant." (PG Br. at 8.) Rather, it is supposedly fixed at the last location where loading occurs en route to the customer's delivery point, which means it is fixed at various docks, piers and train stations, but never at the "loading plant." (Id.) This treats the words "f.o.b. the loading plant" as completely meaningless. See, e.g., Moore v. Johnson Serv. Co., 219 S.E.2d 315, 321 (W. Va. 1975) (holding that it is a "rule of general application that, in the construction of contracts, words or clauses are not to be treated as meaningless or discarded if any reasonable meaning consistent with the other parts of the contract can be given them").

The West Virginia Supreme Court's decision in Kanawha Eagle Coal, LLC v. Tax Commissioner, 609 S.E.2d 877 (W. Va. 2004), is instructive. There, a West Virginia statute specified that the "gross value" of coal for taxation purposes would be determined in the "immediate vicinity" of the severance site but only after "loading for shipment" was complete. See id. at 881. The Tax Commissioner argued, like Payne-Gallatin does here, that, in addition to the loading that occurred at a preparation plant on the severance site, the later reloading of coal at river docks also qualified "as a 'loading for shipment.'" Id. at 882. Kanawha Eagle Coal (one of Panther's sister-subsidiaries) argued that this confuses "loading" at the preparation plant with the "transloading" or "reloading" that occurs later on. Id. The court agreed with Kanawha Eagle Coal, holding that "loading for shipment" only had to be complete at the preparation plant. Id. at 883-84.

The Tax Commissioner's error is directly analogous to Payne-Gallatin's error here. The court explained that the Tax Commissioner erred by "focus[ing] singularly on the term 'loading for shipment,' without proper consideration of the remaining language contained in the statute." Id. at 883. Because the statute provided that "gross value" was determined "in the immediate vicinity" of where the coal was severed, "loading for shipment" referred only to "loading for shipment" that was in that immediate vicinity, not "each and every change in transportation of coal following its departure from the preparation plant." Id. The same is true here. Because the Lease provides that "gross sales price" is determined at the "loading plant," the reference to "loading" means loading at the "loading plant," not "each and every change in transportation of coal following its departure from" the loading plant. See id.

Indeed, if the Parties meant to fix the price of Wheeled Coal at any of the various destinations that Payne-Gallatin specifies — "Tom's Fork Loadout," the "Ceredo Dock,"

"DTA," "Pier IX," "Quincy Dock," and the "Kanawha River Docks" — they would have said so. The Lease could easily have been written to fix the "gross sales price" at "f.o.b. the point where title to the coal is transferred to the purchaser" or "f.o.b. destination." In fact, even more simply, the Parties could have deleted the term "f.o.b. the loading plant after final preparation and loading" entirely, leaving the "gross sales price" to mean just the "actual price paid," without reference to its value at any particular location. That would have yielded precisely the result that Payne-Gallatin now wants. But that is not what the Lease says. It requires fixing the price "f.o.b. the loading plant after final preparation and loading," which means at the Coal Clean Preparation Plant Complex, including the costs incurred there for loading and for final preparation of the coal.

Indeed, Payne-Gallatin does not even contend that any of the locations it specifies as possible f.o.b. points is a "plant." Not even Payne-Gallatin refers to them as "loading plants." (See PG Br. at 3-5.) Moreover, no "preparation" occurs at the various locations it cites. Payne-Gallatin does not argue that coal is "prepared" at the train terminals, docks or piers it lists. By contrast, the Parties have expressly stipulated that the Coal Clean Preparation Plant Complex — as its name implies — encompasses a "coal preparation plant" at which the Wheeled Coal is "crushed, washed and dried" before being sent out for delivery to Panther's customers. (Stipulation of Facts ¶¶ 12-14.) The words "final preparation and loading" thus precisely describe, and are obviously meant to refer to, what happens at the Coal Clean Preparation Plant Complex, not what happens at various docks and train terminals at which no preparation work is even done.

C. Transportation-Related Costs Excluded by the F.O.B. Term Are Not "Other Expenses"

Nor are costs that are excluded by the f.o.b. term "other expenses" that may not be deducted. (See PG Br. at 9.) This argument fails for the same reason: it reads the words "other expenses" to delete the unambiguous f.o.b. term in the Lease. The argument violates elementary principles of contractual interpretation, which require contractual terms to be read harmoniously. See, e.g. Syllabus Pt. 1, Henderson Dev. Co., 3 S.E.2d 217 ("Th[e] intention [of the parties] must be gathered from an examination of the whole instrument, which should be so construed, if possible as to give meaning to every word, phrase and clause and also render all its provisions consistent and harmonious.").

As discussed at length already, the "gross sales price" is defined in the Lease to be calculated using the price of Wheeled Coal at the "loading plant," which price is therefore necessarily exclusive of any later transportation-related costs. (See Panther Br. at 7-9; supra at 3-7.) The Lease then requires that Panther deduct from this f.o.b. price "any sales tax imposed thereon, but without any deduction for selling commissions, advertising, credit losses or other expenses." (Lease, Art.II.1.) The reference to "other expenses" thus speaks to permissible deductions after the f.o.b. price is calculated; it does not supplant the f.o.b. price. If it did the latter, as Payne-Gallatin argues, it would render the f.o.b. term meaningless. See, e.g., Moore, 219 S.E.2d at 321; Columbia Gas, 217 S.E.2d at 926-27.

Indeed, it is well settled that the words "other expenses" in the phrase "selling commissions, advertising, credit losses, and other expenses" can refer only to other expenses that are like "selling commissions, advertising, [and] credit losses," i.e., other selling or marketing expenses. Transportation-related costs are not selling or marketing expenses, as the Eighth Circuit Court of Appeals has explained:

> It seems clear to us that the words "or other charge" must be taken and understood to mean "or other like charge." This is because of the familiar rule of ejusdem generis. We do not regard the expense of advertising and selling an article as being substantially similar to a charge for the transportation, delivery, insurance, or installation of the article sold.

United States v. F.W. Fitch Co., 141 F.2d 380, 381 (8th Cir. 1944) (citation omitted), aff'd, 323 U.S. 582.[3]

Indeed, in affirming the Eighth Circuit's decision in F.W. Fitch, the U.S. Supreme Court emphasized that transportation-related costs are not like selling and advertising expenses in the specific context of an f.o.b. price: "[A]dvertising and selling expenses are obviously not comparable to the specified charges for transportation, delivery, insurance or installation — all of which are incurred subsequent to the preparation of an article for shipment and are not included in the manufacturer's f. o. b. selling price." F.W. Fitch, 323 U.S. at 585 (emphasis added).

The lone case cited by Payne-Gallatin, Kohlsaat v. Main Island Creek Coal Co., 112 S.E. 213 (W. Va. 1922), is inapposite. It involved whether "deduction of selling commissions" from a lease that did not mention such deductions was improper. Id. at 214. Panther has not deducted any selling commissions, nor does Payne-Gallatin contend otherwise. Nowhere does Kohlsaat suggest that transportation-related costs excluded by an f.o.b. provision are "other expenses" that may not be deducted.

In short, the clear error in both of Payne-Gallatin's arguments is that they directly conflict with the words "f.o.b. the loading plant after final preparation and loading." Payne-Gallatin has no explanation whatsoever for the meaning of "f.o.b. the loading plant" and simply ignores it.

[3] See generally 11 Williston on Contracts § 32:10 (explaining rule that where specific words are followed by a more general word relating to the same subject matter, the general word is "interpreted as meaning things of the same kind as the specific matters"); see, e.g., Ohio Cellular RSA Ltd. P'ship v. Bd. Of Pub. Works, 481 S.E.2d 722, 727-30 (W. Va. 1996) (applying ejusdem generis canon).

Because contractual terms are "not to be treated as meaningless or discarded," Payne-Gallatin's arguments fail. Moore, 219 S.E.2d at 321.

CONCLUSION

For the foregoing reasons, Panther respectfully requests that the Court deny Payne-Gallatin's Objection with prejudice and grant the Debtors' Assumption Motion with respect to the Lease.

Dated: New York, New York
May 14, 2013

Respectfully Submitted,

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