**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

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| **In re:**<br><br>**PATRIOT COAL CORPORATION, *et al.*,**<br><br>**Debtors.** | **Chapter 11**<br>**Case No. 12-51502-659**<br>**(Jointly Administered)**<br><br>**Reply Deadline:**<br>**April 8, 2013 at 11:59 p.m.**<br>**(prevailing Central Time)**<br><br>**Hearing Date:**<br>**April 23, 2013 at 10:00 a.m.**<br>**(prevailing Central Time)**<br><br>**Hearing Location:**<br>**Courtroom 7 North** |
| **ROBIN LAND COMPANY, LLC,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**STB VENTURES, INC.,**<br><br>**Defendant,**<br><br>**ARCH COAL, INC., ARK LAND COMPANY, and ARK LAND KH, INC.,**<br><br>**Intervenor-Defendants.** | **Adv. Pro. No. 12-04355-659** |

**ROBIN LAND COMPANY LLC'S OBJECTION TO THE MOTION OF STB VENTURES, INC. UNDER 11 U.S.C. § 365(D)(3) TO COMPEL ROBIN LAND COMPANY TO PAY PART OR ALL OF THE POST-PETITION AMOUNTS DUE UNDER THE STB OVERRIDE AGREEMENT, AND, IN THE ALTERNATIVE, TO PROVIDE STB VENTURES ADEQUATE PROTECTION OF ITS INTERESTS UNDER THE STB OVERRIDE AGREEMENT**

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Plaintiff Robin Land Company, LLC ("**Robin Land**"), one of the affiliated debtor entities in the above-captioned chapter 11 case, respectfully submits this objection to the Motion of STB Ventures, Inc. ("**STB**"), Under 11 U.S.C. § 365(d)(3) to Compel Robin Land Company to Pay Part or All of the Post-Petition Amounts Due Under the STB Override Agreement, and, in the Alternative, to Provide STB Ventures Adequate Protection of Its Interests Under the STB Override Agreement (the "**Motion**"). [ECF No. 40.]

## PRELIMINARY STATEMENT

STB's Motion has no merit. STB is not entitled to payment of the STB Override under 11 U.S.C. § 365(d)(3). Indeed, by demonstrating that the STB Override is not an "obligation" under the Kelly-Hatfield Lease or the Lawson Heirs Lease, the Motion actually confirms that the STB Override is not an executory contract under Section 365 of the Bankruptcy Code. Robin Land is not authorized to pay the STB Override because doing so "would only convert [STB's] claim into a first priority administrative expense to the prejudice of other creditors of the estate." Jenson v. Cont'l Fin. Corp., 591 F.2d 477, 481 n.5 (8th Cir. 1979).

The Motion fails for several independent reasons:

First, STB does not have standing under Section 365(d)(3). It is well settled that Section 365(d)(3) protects landlords alone. Because STB is not a landlord, it has no standing to claim that Section 365(d)(3) requires payment of the STB Override. The Motion should be denied on this basis alone.

Second, Section 365(d)(3) does not require payment of the STB Override in any event, because the STB Override is not an "obligation[] . . . under any unexpired lease of nonresidential real property." 11 U.S.C. § 365(d)(3). Neither the Lawson Heirs Lease nor the Kelly-Hatfield Lease requires payment of the STB Override. Indeed, STB concedes, as it must, that the STB Override is not an obligation of the Lawson Heirs Lease. Lawson Heirs, the landlord, has

already made clear that the STB Override does not have to be "cured" before Robin Land assumes the Lawson Heirs Lease.[1] [Chap. 11 Case ECF No. 2055.]

STB's arguments that the STB Override is an obligation of the Kelly-Hatfield Lease are meritless. As an initial matter, STB falsely states that the Kelly-Hatfield Lease "expressly requires" payment of the STB Override. (Mot. at 15.) That is not true. The Kelly-Hatfield Lease does not so much as mention the STB Override, let alone "expressly require" that it be paid. STB ultimately resorts to an argument that the STB Override "became" an "incorporated condition" of the Kelly-Hatfield Lease when Ark Land assigned the Lease and the STB Override to Robin Land in 2005. (Mot. at 18-19.) That argument fails for numerous reasons explained below, not least of all because assignment contracts cannot modify the separate contracts they assign. In short, there is no basis to argue that the Kelly-Hatfield Lease requires payment of the STB Override. The Motion can be denied on this basis as well.

Third, STB ultimately retreats to an argument that the STB Override is "integrated" with the Lawson Heirs Lease and the Kelly-Hatfield Lease (collectively, the "**Leases**"). The argument is wholly duplicative of the issues being resolved in Robin Land's Motion for Judgment on the Pleadings and Motion to Dismiss Defendants' Counterclaims (the "**Rule 12(c) Motion**") [ECF No. 35], which Robin Land incorporates here by reference. As demonstrated below and in Robin Land's Rule 12(c) Motion, it is impossible to conclude that the STB Override and the Leases form a single, indivisible contract, such that the breach of one is the breach of the other – precisely because the STB Override is not an obligation of the Leases.

STB's Motion should be denied.

[1] The Debtors filed a motion to assume or reject unexpired leases of nonresidential real property on January 15, 2013. On January 22, 2013, Lawson Heirs filed a limited objection to the proposed assumption of the Lawson Heirs Lease, but Lawson Heirs did not contend that the STB Override is an obligation of the Lawson Heirs Lease that must be cured if the Lease is assumed. [Chap. 11 Case ECF No. 2055.] Lawson Heirs withdrew its objection on February 18, 2013.

## STATEMENT OF FACTS

The facts here are straightforward:[2]

1. The STB Override arose out of a transaction completed in 1994. STB and others (the "**Sellers**") entered into an Asset Purchase Agreement dated October 31, 1994 (the "**1994 Asset Purchase Agreement**") with Ark Land and others (the "**Purchasers**"), pursuant to which the Sellers agreed to sell, assign, and deliver to the Purchasers certain assets related to a tract of land located in West Virginia.

2. As consideration, the Purchasers agreed to (i) pay cash to the Sellers; (ii) assume certain liabilities; and (iii) have Ark Land execute and deliver an overriding royalty agreement (the "**STB Override**").

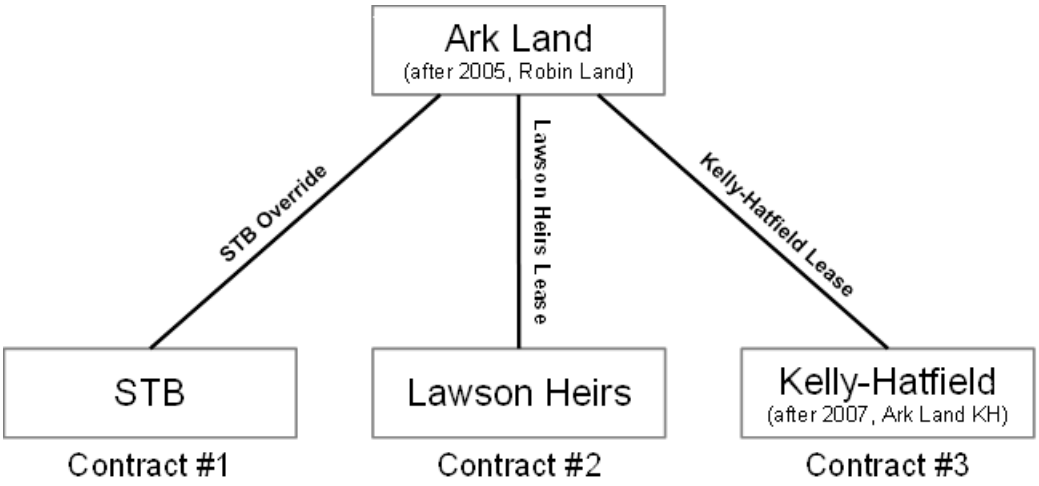
3. The assets conveyed included leasehold interests in certain coal reserves (the "**Guyan Leases**"), which the Sellers assigned to Ark Land. The landlords under the Guyan Leases were Kelly-Hatfield and Lawson Heirs.

4. The Guyan Leases were immediately novated, meaning that the Guyan Leases were extinguished and Ark Land entered into new leases that wholly replaced the Guyan Leases. The new leases are called the Lawson Heirs Lease and the Kelly-Hatfield Lease. STB has no interest in, or liability for, the Lawson Heirs Lease or the Kelly-Hatfield Lease because it is not a party to either lease.

5. The landlords under the Leases (Lawson Heirs and Kelly-Hatfield) were not parties to the STB Override. The STB Override is not mentioned in the Leases. STB has no contractual relationship with the landlords, and the landlords have no obligation to pay the STB Override.

[2] For the sake of brevity, Robin Land incorporates by reference the Statement of Facts in its Rule 12(c) Motion. Capitalized terms not defined herein have the meanings ascribed to them in the Rule 12(c) Motion.

6. As of October 31, 1994, therefore, Ark Land was a party to three separate, standalone contracts with three separate counterparties – STB, Lawson Heirs, and Kelly-Hatfield:




7. Eleven years later, on December 30, 2005, Ark Land assigned the STB Override (Contract #1) and the Lawson Heirs Lease (Contract #2) to Robin Land pursuant to the Ark Land Assignment.

8. On the same day, Ark Land assigned a portion of the Kelly-Hatfield Lease (Contract #3) to Robin Land pursuant to the Initial Partial Assignment.[3]

9. Robin Land then stood in the shoes of Ark Land for purposes of these three contracts. Just like Ark Land had, Robin Land owed separate obligations to STB, Lawson Heirs, and Kelly-Hatfield under three separate contracts.

10. In 2007, pursuant to the Amended Partial Assignment, Ark Land assigned an additional portion of the Kelly-Hatfield Lease to Robin Land. The landlord on the Kelly-

[3] The Initial Partial Assignment, dated December 31, 2005, was executed on December 30, 2005.

Hatfield Lease was then Ark Land KH, which had succeeded Kelly-Hatfield as lessor by merger earlier in 2007. Robin Land also agreed to pay the STB Override, which Ark Land had previously assigned to Robin Land in 2005, to the extent it applied to the additional assigned portion of the Kelly-Hatfield Lease.

## ARGUMENT

### POINT I.

### STB LACKS STANDING UNDER SECTION 365(d)(3)

The Motion must be denied because STB does not have standing under Section 365(d)(3) of the Bankruptcy Code. "To have standing to invoke a statute you must be one of the persons whom the statute is intended to protect." In re James Wilson Assocs., 965 F.2d 160, 169 (7th Cir. 1992) (Posner, J.); see also Roberts v. Wamser, 883 F.2d 617, 622 (8th Cir. 1989).

It is well established that Section 365(d)(3) is intended solely to protect landlords. The statute "makes post-petition landlords differently situated from other post-petition expense holders." See In re Handy Andy Home Improvement Centers, Inc., 144 F.3d 1125, 1128 (8th Cir. 1998) ("To give relief to landlords, Congress passed § 365(d)(3), which . . . allows [landlords] during that awkward postpetition prerejection period to collect the rent fixed in the lease."); In re Go Fig Inc., No. 08-40116-705, 2009 WL 537090, at *3 (Bankr. E.D. Mo. Feb. 5, 2009) ("Section 365(d)(3) protects the landlord . . . ."); In re Worths Stores Corp., 135 B.R. 112, 114 (Bankr. E.D. Mo. 1991) ("Congress added § 365(d)(3) in order to ease the burden upon nonresidential lessors caused by the loss of rental income during the post-filing but pre-rejection

period by creating an administrative expense claim governed exclusively by the terms of the lease.").[4]

Landlords get special protection under Section 365(d)(3) because, unlike other creditors, they are forced to continue providing services (use of the property, utilities, etc.) to a debtor post-petition. See In re Worths Stores Corp., 135 B.R. at 114-15. The purpose of Section 365(d)(3) is to ensure that a landlord receives current payment, as required by the terms of the existing lease, for the post-petition services that it provides to the debtor under the lease. Id.; In re DeCicco of Montvale, Inc., 239 B.R. 475, 479 (Bankr. D.N.J. 1999) (cited by STB and noting that the purpose of Section 365(d)(3) is to "ensure that landlords receive 'current payment' for 'current services'").

STB is not a landlord. Accordingly, it has no standing under Section 365(d)(3). In re James Wilson Associates is instructive: there, a creditor (who was not a landlord) argued that a debtor had failed to assume a lease on a timely basis under Section 365(d)(4). 965 F.2d at 168-69. The actual landlord did not complain. Id. at 169. The creditor was a mortgagee bank that wanted to foreclose on the debtor's interest in the lease (a sale-leaseback), and it argued that the lease was not part of the debtor's estate because the debtor had waited too long to assume it under Section 365(d)(4). Id. at 168. There was no doubt that the bank had "a tangible stake in enforcing the rule," id. at 169, because the bank would benefit if the lease was not an asset of the estate. But that is not enough to have standing under a statutory provision. Id. Standing is conferred only on a party that will "suffer a harm of the kind that the provision was intended to head off." Id. That was not true for the bank, because Section 365(d)(4) is "intended for the

[4] See also In re Goody's Family Clothing Inc., 610 F.3d 812, 818 (3d Cir. 2010) ("The purpose of § 365(d)(3) is to protect landlords from the burdensome requirements of § 503(b)(1) in securing payment from non-occupying debtors."); In re LPM Corp., 300 F.3d 1134, 1138 (9th Cir. 2002) ("Congress added § 365(d)(3) in 1984 to protect real property lessors during the period between the date the petition is filed and the date the debtor assumes or rejects a pre-petition lease.").

protection of other people" – i.e., landlords. Id. Accordingly, the Seventh Circuit concluded that the creditor did not have standing to bring a motion under Section 365(d)(4).[5]

The same logic applies with even more force to Section 365(d)(3). Section 365(d)(3) requires a debtor in possession to "perform all the obligations of the debtor . . . under any unexpired lease of nonresidential real property, until such lease is assumed or rejected." 11 U.S.C. § 365(d)(3). An "obligation" "is something that one is legally required to perform under the terms of the lease." Centerpoint Properties v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 268 F.3d 205, 209 (3d Cir. 2001); see also In re Burival, 613 F.3d 810, 812 (8th Cir. 2010) (ruling that Section 365(d)(3) must be applied according to its plain terms). Enforcing the "obligations" of a lease under Section 365(d)(3) – like enforcing the requirements for assumption under Section 365(d)(4) – is strictly "a matter between lessor and lessee." In re James Wilson Assocs., 965 F.2d at 169. Only a landlord has standing to enforce the obligations of a lease, because it is "really no one else's business." Id.

As noted above, the purpose of Section 365(d)(3) is to ensure that landlords get current payment for the current services they provide to a debtor post-petition. Section 365(d)(3) protects the landlord from having to pay out of its own pocket the amounts it passed on to the tenant under the terms of the lease – e.g., payment of taxes, utilities, and the like. Here, neither Lawson Heirs nor Kelly-Hatfield (nor Ark Land KH) had any obligation to pay the STB Override, which is precisely why it is not passed on as an obligation of the Leases. The landlords here are contractual strangers to the STB Override (as the chart above illustrates), and they could have no liability under that contract. For that reason, Lawson Heirs has already made

[5] The Seventh Circuit also concluded that Section 1109(b) did not provide the creditor standing. See In re James Wilson Assocs., 965 F.2d at 169 (finding that Section 365 "confers no legally protected interest on Metropolitan in the lease between JWP Investors and the bankrupt, and section 1109(b) therefore does not entitle Metropolitan to make an issue of the assumption of the lease").

unambiguously clear that payments due under the STB Override do not have to be "cured" before assuming the Lawson Heirs Lease.[6] [Chap. 11 Case ECF No. 2055.]

STB's own cases demonstrate that it has no standing. In each one, a landlord brought a motion to enforce an obligation to pay a third party (i) that was expressly set forth in the lease, and (ii) that the landlord otherwise would have had to pay – facts not present here. See In re Full House Foods, 279 B.R. 71, 74-79 (Bankr. S.D.N.Y. 2002) (requiring debtor, a sub-sublessee, to pay obligations of its "landlord" lessor as "rent" under its sub-sublease); In re Goody's Family Clothing, Inc., 443 B.R. 5, 12 (Bankr. D. Del. 2010) ("[E]ach of the Leases provides that the tenant is required to pay the property taxes 'when due,' directly to the relevant taxing authority."); In re Bachrach Clothing, Inc., 396 B.R. 219, 220 (N.D. Ill. 2008) ("The underlying lease required Bachrach to pay all real estate taxes assessed on the property as additional rent."); In re Garden Ridge Corp., 323 B.R. 136, 140 (Bankr. D. Del. 2005) (holding that taxes were pre-petition obligations within the meaning of Section 365(d)(3) where the lease provided that the debtor would "pay . . . all . . . taxes . . . during the Term of this lease").[7]

In short, STB is arguing here that its contract is an obligation of someone else's contract. There is no basis in law for such an argument, which is precisely the reason for the standing requirement. "[H]ere the concept of standing rather than blocking access to the merits screens out a set of inherently meritless claims." In re James Wilson Assocs., 965 F.2d at 169.

[6] STB has asserted that Arch Coal, Inc. – Ark Land KH's parent – would be liable for the STB Override under a separate guaranty if Robin Land stops paying royalties to STB, but Ark Land KH itself (like Kelly-Hatfield before it) is not liable under the STB Override. The guaranty covers Ark Land's liability under the STB Override.

[7] See also In re Valley Media, Inc., 290 B.R. 73, 77 (Bankr. D. Del. 2003) ("I see no reason why [the landlord], saddled with a tax burden that by the terms of the Lease and pursuant to § 365(d)(3) is to be borne by Debtor, should be put in a worse position than other post-petition creditors who are paid during a Chapter 11 case in the ordinary course of business."); In re Exch. Res., 214 B.R. 366, 369-70 (Bankr. D. Minn. 1997) (upholding landlord's administrative expense priority under the terms of the lease to collect attorney's fees incurred in forcing the debtor to pay post-petition rent).

STB lacks standing under Section 365(d)(3), and the Motion should be denied on that basis alone.[8]

**POINT II.**

**THE STB OVERRIDE IS NOT AN OBLIGATION OF THE LEASES**

Even if STB had standing, Section 365(d)(3) would not require Robin Land to pay the STB Override. As noted above, Section 365(d)(3) requires a debtor in possession to perform its "obligations . . . under any unexpired lease of nonresidential real property." 11 U.S.C. § 365(d)(3). An "obligation" under the statute "is something that one is legally required to perform under the terms of the lease." In re Montgomery Ward, 268 F.3d at 209.

Neither of the Leases requires payment of the STB Override. Indeed, STB concedes that when the STB Override and the Leases were executed in 1994, the STB Override was not an obligation of the Leases. (Mot. at 17-21.) STB's argument is limited to an assertion that the STB Override "became" an "incorporated" condition of the Kelly-Hatfield Lease (but not the Lawson Heirs Lease) when Ark Land assigned the Leases to Robin Land. (Id.) The argument is meritless.

[8] On March 25, 2013, Arch Coal, Inc., Ark Land Company, and Ark Land KH, Inc. together filed a joinder in STB's motion (the "**Joinder**"). [ECF No. 54.] The Joinder does not, and cannot, cure STB's lack of standing to bring this Motion. Arch Coal, Inc. and Ark Land Company do not have standing under Section 365(d)(3). Ark Land KH, Inc., which is now the landlord under the Kelly-Hatfield Lease, would have no basis to bring its own motion under Section 365(d)(3) because the STB Override is not an obligation of the Kelly-Hatfield Lease. That is precisely why Ark Land KH, Inc. has not brought its own motion. The sole interest of the Arch defendants is to prevent Arch Coal, Inc. from having to pay the STB Override pursuant to a separate guaranty if Robin Land is not authorized to pay it under the Bankruptcy Code. But, for all of the reasons explained above in the text, that is not a harm that Section 365(d)(3) is intended to protect. Ark Land KH, Inc. will suffer no harm – none – if Robin Land stops paying the STB Override. If Ark Land KH, Inc. wants to contend otherwise, it can file its own motion. Any such motion would be baseless. In short, the Joinder does not cure the lack of standing here. The Motion is still a request for relief by a party that has no standing to request that relief, and the Court should not grant it.

**A. The STB Override Is Not An Obligation of the Lawson Heirs Lease**

As an initial matter, STB concedes that the STB Override was never an obligation of the Lawson Heirs Lease. (Mot. at 17-21.) STB must concede that point, because Lawson Heirs has made clear that the payments under the STB Override do not have to be cured before the Lease is assumed. [Chap. 11 Case ECF No. 2055.]

STB's only argument with respect to the Lawson Heirs Lease is that it is "integrated" with the STB Override (notwithstanding the contrary intent of Lawson Heirs). As demonstrated in Point III below, that argument fails for multiple reasons – not least of all, because it requires a conclusion that the STB Override is an obligation of the Lawson Heirs Lease, a point that STB concedes is wrong.

**B. The STB Override Is Not An Obligation of the Kelly-Hatfield Lease**

STB's argument that the STB Override is an obligation of the Kelly-Hatfield Lease is baseless.

STB's repeated contention that payment of the STB Override is "expressly required by the Kelly-Hatfield Lease" (Mot. at 15, 17) is demonstrably false. Far from being "expressly required" by the Kelly-Hatfield Lease, the STB Override is not even mentioned, directly or indirectly, in the Kelly-Hatfield Lease. STB provides no support for its assertion that the STB Override is "expressly required" by the Kelly-Hatfield Lease, because there is no support.

STB instead retreats to an argument that the STB Override "became" an "incorporated condition" of the Kelly-Hatfield Lease in 2005 when Ark Land partially assigned the Kelly-Hatfield Lease and the STB Override to Robin Land. In other words, STB argues that because Ark Land assigned the STB Override (Contract #1 in the chart above) and the Kelly-Hatfield

Lease (Contract #3 above) at the same time, Contract #1 became a condition of Contract #3 – even though it was never previously a condition of Contract #3.

That argument fails for two simple reasons:

First, it is well-settled that "[a]n assignment does not modify the terms of the underlying contract." Citibank v. Tele/Resources, Inc., 724 F.2d 266, 269 (2d Cir. 1983). Rather, it is merely "a separate agreement between the assignor and the assignee which merely transfers the assignor's contract rights, leaving them in full force and effect as to the party charged." Id.[9] As a matter of law, therefore, by merely assigning the STB Override and Kelly-Hatfield Lease to Robin Land at the same time, Ark Land could not change the terms of either contract.[10]

Second, and relatedly, Ark Land and Robin Land had no power to change a separate contract with Kelly-Hatfield. They had no power to "incorporate" a new obligation into the Kelly-Hatfield Lease. Indeed, as explained above, Kelly-Hatfield could not have cared less whether Ark Land or Robin Land paid the STB Override, because Kelly-Hatfield itself could never be liable under the STB Override. In short, Kelly-Hatfield would have no reason to make the STB Override an obligation of the Kelly-Hatfield Lease, and Ark Land and Robin Land could not have made it one.

STB effectively concedes the point by retreating yet again to a different argument. STB argues that the Amended Partial Assignment in 2007 caused the STB Override to begin "running with the land." (Mot. at 19-20.) STB's basis for this argument is that Ark Land KH – which had

[9] See also Med. Shoppe Int'l, Inc. v. J-Pral Corp., 662 S.W.2d 263, 272 (Mo. Ct. App. 1983) (holding that an assignee had ratified an assignment agreement "and thereby stood in the shoes" of the assignor with respect to the original contract); Ametex Fabrics, Inc. v. Just In Materials, Inc., 140 F.3d 101, 107 (2d Cir. 1998) ("[I]t is elementary that an assignment does not modify the terms of the underlying contract." (internal quotation marks and citation omitted)); Auto-Chlor Sys. of Minn., Inc. v. JohnsonDiversey, 328 F. Supp. 2d 980, 1001 (D. Minn. 2004) (same).

[10] The contracts were also assigned separately. Ark Land assigned the Kelly-Hatfield Lease to Robin Land pursuant to the Initial Partial Assignment. Ark Land separately assigned the STB Override to Robin Land pursuant to the Ark Land Assignment.

succeeded Kelly-Hatfield as the landlord following a merger – was a party to the Amended Partial Assignment as "Consenting Lessor." The argument fails because the Amended Partial Assignment did not alter the terms of the Kelly-Hatfield Lease – nor could it, as explained above. See Tele/Resources, Inc., 724 F.2d at 269. Ark Land assigned an additional portion of the Lease to Robin Land – and Ark Land KH consented to that assignment as Ark Land's landlord – but it did not change the actual terms of the Lease.

Indeed, the plain language of the Amended Partial Assignment, which STB ignores, makes clear that the Kelly-Hatfield Lease is separate and distinct from the STB Override. The Amended Partial Assignment provides, in relevant part:

> [Robin Land] hereby assumes, accepts and agrees to perform the duties and obligations of [Ark Land] contained in or arising under the Lease in accordance with the terms and conditions thereof, and [Robin Land] also assumes the obligation to pay the "STB Override" as defined and identified in that certain Overriding Royalty Agreement dated October 31, 1994 between [Ark Land] and STB Ventures, Inc. and as assigned to [Robin Land] by that certain Assignment and Assumption Agreement dated December 30, 2005 between [Ark Land] and [Robin Land] to the extent that the STB Override applies to coal mined from the Assigned Lease Portion of the Premises.

(2007 Assignment § 3 (emphasis added).) In plain English, that means: (i) Robin Land agrees to perform Ark Land's obligations under Contract #3 (in the chart above), and (ii) Robin Land also agrees to perform Ark Land's obligations under the previously assigned Contract #1 to the extent it applies. Nowhere does the Amended Partial Assignment even try to make Contract #1 an "incorporated condition" of Contract #3, nor could it.

The Court thus does not need to resolve STB's argument that the STB Override is a covenant that "runs with the land." As explained above, STB does not, and cannot, establish the necessary predicate for that argument: that the STB Override is a covenant of the Kelly-Hatfield Lease. It plainly is not, because the STB Override is not mentioned anywhere in the Kelly-

Hatfield Lease. In any event, it is clear as a matter of law that the STB Override would not "run with the land" under West Virginia law. STB's own case establishes that point. In McIntosh v. Vail, 28 S.E.2d 607 (W. Va. 1943), the West Virginia Supreme Court squarely held that an agreement granting royalties on sales of coal produced from the land – like the STB Override – does not confer an interest that "runs with the land." Id. at 610-11. The STB Override provides for a royalty based on "all sales of coal to third parties" – i.e., a claim to sales revenue – not an interest in the underlying land itself. (STB Override ¶ 3.)

Moreover, under West Virginia law, a covenant can run with the land only if the covenantor (here, Robin Land) is in a landlord-tenant relationship with the covenantee. See McIntosh, 28 S.E.2d at 613 (stating that West Virginia is "committed to the doctrine that, except as between landlord and tenant, no burden can be imposed on land by a grantor's covenant so as to bind a subsequent grantee of the covenantor"). Here, Robin Land assumed Ark Land's obligation to pay the STB Override to STB, and neither Ark Land nor STB is in a landlord-tenant relationship with Robin Land. Under West Virginia law, only a landlord – not an assignor like Ark Land – can cause a covenant to run with the land. Id.[11]

For all of these reasons, the STB Override is not an "obligation" under the Kelly-Hatfield Lease, and therefore is not payable under Section 365(d)(3). The Motion should be denied on this basis as well.

[11] For each of these reasons, STB's citation to River Place E. Hous. Corp. v. Rosenfeld (In re Rosenfeld), 23 F.3d 833 (4th Cir. 1994), is inapposite. In that case, the Declaration creating the cooperative expressly stated that the co-op dues ran with the land, the "lease expressly provide[d] that it is subject to" that Declaration, and the lease agreement was between the co-op owners and the lessee. See id. at 835, 837. Moreover, unlike here, the Declaration was "executed and recorded in the same manner as a deed." Id. at 837. Under those circumstances, the court held that the dues ran with the land under Virginia law. Id. The STB Override lacks not merely some of those features, but all of them.

**POINT III.**

**THE STB OVERRIDE IS NOT INTEGRATED WITH THE LEASES**

STB separately claims that the STB Override is "integrated" with the Leases and is therefore payable under Section 365 of the Bankruptcy Code. But two contracts are integrated into a single, indivisible contract only if the breach of one is the breach of the other. See, e.g., Elliot v. Richter, 496 S.W.2d 860, 864 (Mo. 1973) (holding that contracts are integrated into a single agreement only if "rescission of one of them would constitute rescission of both").[12] In other words, one contract has to be an obligation of the other. For the reasons just explained in Point II, the STB Override is not an obligation of the Kelly-Hatfield Lease, and STB has conceded that it is not an obligation of the Lawson Heirs Lease.

In the interests of brevity, Robin Land incorporates by reference its argument in the Rule 12(c) Motion that demonstrates that the Leases do not make the STB Override executory. (See Robin Land Br. at 12-16, [ECF No. 35].) As demonstrated there, the landlords cannot claim that their performance under the Leases would be excused if Robin Land stopped paying the STB Override – precisely because payment of the STB Override is not an obligation owed to the landlords under the Leases.

STB's only argument is that the STB Override and the Leases are integrated because they were supposedly "part of the same business transaction." (Mot. at 25.)

It is well settled, however, that just because contracts are entered into contemporaneously as part of the same commercial transaction does not make them a single, indivisible contract.

[12] The Court can apply Missouri law concerning contract integration insofar as Missouri law does not conflict with the laws of West Virginia, the only other state law that might be relevant. See Phillips v. Marist Soc'y of Wash. Province, 80 F.3d 274, 276 (8th Cir. 1996) (ruling that a court is not required to conduct a choice of law analysis unless there "actually is a difference between the relevant laws of the different states" (internal quotation marks and citation omitted)). Here, the STB Override has no governing law provision and the Leases are governed by West Virginia law.

See, e.g., Kaler v. Craig (In re Craig), 144 F.3d 593, 596 (8th Cir. 1998) (holding, under North Dakota law, that the fact that two contracts are entered into contemporaneously as part of the same commercial transaction does not make them a single, indivisible contract); Howard v. Nicholson, 556 S.W.2d 477, 480 (Mo. Ct. App. 1977) ("Even if two instruments are executed as part of the same overall transaction, it does not necessarily mean that those instruments constitute one contract or that one contract has merged with another, absent some reasonable basis for finding that such merger was the intention of the parties.").

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

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

11 Richard A. Lord, Williston on Contracts, § 30:26 (4th ed. 1990). The cases cited by STB are in accord. Ashland Oil, Inc. v. Donahue stands for the same proposition: that agreements entered into contemporaneously as part of the same overall transaction "must be construed together and must be considered as forming an integrated business relationship." 223 S.E.2d 433, 437-38 (W. Va. 1976) (emphasis added). Likewise, the court in Lawrence v. Potter noted that even where several agreements are "so interdependent and interlaced as to make one composite transaction," "[p]erhaps it would not be technically correct, to say that the arrangement amounted to one

agreement composed of many others."[13] 113 S.E. 266, 270 (W. Va. 1922). STB's cases are thus consistent with the conclusion reached repeatedly by other courts that the "fact that the agreements are related and ought to be construed in light of one another does not necessarily make them a single contract." Cargill, Inc. v. Refco, Inc., No. 06-CV-2133 (PKC), 2006 WL 2664215, at *4 (S.D.N.Y. Sept. 13, 2006).

Moreover, STB's argument that the STB Override is integrated with the Leases faces an insurmountable hurdle. Put bluntly, as the Eleventh Circuit did in In re Gardinier, it is "illogical" to treat agreements between separate parties – like the STB Override, on the one hand, and the Leases, on the other hand – as a single contract. Byrd v. Gardinier, Inc. (In re Gardinier, Inc.), 831 F.2d 974, 978 (11th Cir. 1987). In that case, the U.S. Court of Appeals for the Eleventh Circuit examined whether a purchase and sale agreement in which the debtor sold land to a buyer (like the Leases here) was separate from the debtor's agreement to pay a commission to its broker (like the STB Override here), where the agreement to pay the brokerage commission was also documented in the same purchase and sale agreement. The Court of Appeals looked within the four corners of the purchase and sale agreement to determine whether the debtor, the buyer, and the seller "intended to make one contract or two separate contracts." Id. at 976. In ruling that the parties intended to create two separate contracts, the Court of Appeals noted that each agreement was supported by separate consideration, that each had a separate purpose, and that "the obligations of each party to the instrument are not interrelated." Id. The buyer and the broker (like the landlords under the Leases and STB here) had no promises running between them, and "their only relation [was] that each has separate contractual rights with the seller." Id.

[13] In Lawrence, the issue before the Court was whether a particular contract was part of the offer to enter into a commercial transaction involving multiple contracts. The case concerns contract formation, not integration. The Court did not address whether the multiple contracts were integrated into a single, indivisible agreement, such that the breach of one would be the breach of all of them, and in fact suggested that such a conclusion would not be "technically correct." 113 S.E. at 270.

The Court of Appeals concluded that promises between different parties that happen to be "dependent or conditioned on one another" do not constitute evidence that the parties intended to form a single contract. Id. at 977. As the Court of Appeals explained: "Contracts are often conditioned upon the completion of totally separate agreements." Id. at 977-78. The Court of Appeals 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. at 978. The reasoning of In re Gardinier applies directly here. Indeed, here the separate contracts do not even appear in the same document, as they did in In re Gardinier.

As demonstrated in Robin Land's Rule 12(c) Motion (at 13-14 [ECF No. 35]), In re Integrated Health Services, Inc. is directly on point. No. 00-389 (MFW), 2000 WL 33712484 (Bankr. D. Del. July 7, 2000). The Bankruptcy Court there concluded that a payment obligation that was related to three leases was not integrated with the leases. The Bankruptcy Court concluded that the payment agreement and the leases were separate as a matter of law because they "are supported by separate consideration, cover different subject matter, involve different parties and, taken together, the object of the agreements is different." Id. at *3. Although STB asserts that the factors the Bankruptcy Court relied on in Integrated are "not present here" (Mot. at 22), that assertion is wrong. Here, as in Integrated, (i) the STB Override and the Leases are indisputably supported by separate consideration; (ii) the contracts have different purposes and subject matter (one provides for a one-way payment obligation, while the other two govern landlord-tenant relationships); and (iii) the contracts involve different and non-overlapping parties (with the exception of Robin Land).

Accordingly, there is no basis to conclude that the STB Override is integrated with the Leases, and the Motion should be denied on this basis as well.

**POINT IV.**

**ROBIN LAND IS NOT REQUIRED TO PAY THE STB OVERRIDE PENDING RESOLUTION OF THIS MOTION**

STB's assertion that Robin Land must pay the STB Override until the Court decides this Motion is baseless. (Mot. at 12.) STB mischaracterizes the cases it cites. In the cases cited by STB in support of that request, the courts concluded that a debtor should comply with its obligations under documents "unambiguously titled as leases" pending a ruling on the debtor's motion that the documents are not "true leases." See In re Mirant Corp., No. 03-46590, 2004 WL 5643668, at *3 (Bankr. N.D. Tex. Sept. 15, 2004) (holding that the debtor could not "avoid compliance" with Section 365(d)(3) "pending resolution of the 'true lease' issue" because "[t]he documents [were] labeled as leases" (emphasis added)); In re Elder-Beerman Stores Corp., 201 B.R. 759, 764 (Bankr. S.D. Ohio 1996) (finding that "in the limited circumstances" where agreements are "unambiguously titled as 'leases,' the debtor may not circumvent the requirements of § 365(d)(10) while challenging the nature of the agreements" (emphasis added)).[14] In other words, under these cases, when a debtor argues that an agreement titled "Lease" is not in fact a "true lease" for purposes of Section 365, the debtor has the burden of rebutting the presumption that the agreement is what it purports to be – i.e., a lease.

This case is the exact opposite. The STB Override is not titled a "Lease." There is no presumption that it is a lease. And for the reasons explained above, STB does not even come

[14] Other courts have held that as a prerequisite to requiring that a debtor make payments pursuant to Section 365, it is necessary "to determine first whether the agreement denominated as a lease is indeed a true lease." Wells Fargo Equip. Fin., Inc. v. Circuit-Wise, Inc. (In re Circuit-Wise, Inc.), 277 B.R. 460, 464 (Bankr. D. Conn. 2002) (emphasis omitted).

close to showing that the STB Override is an obligation of the Leases. In these circumstances, the rule in Elder-Beerman Stores and Mirant does not apply.[15]

In footnotes, without citation to any authority, STB asserts that it is entitled to adequate protection pursuant to Section 363 of the Bankruptcy Code. (Mot. at 3 n.1, 27 n.32.) The assertion is wrong. Section 363 "expressly provides . . . the entity asserting an interest in the property has the burden of proof on the issue of the validity, priority and extent of such interest." 3 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 363.05 [5] (16th ed. 2012); see also 11 U.S.C. § 363(p)(2); In re R.J. Dooley Realty, Inc., No. 09-36777, 2010 WL 2076959, at *8 (Bankr. S.D.N.Y. May 21, 2010) (holding that a tenant under a long-term lease had "failed to meet its burden that is required [by Section 363(p)(2)] for it to demand adequate protection" pursuant to Section 363); In re TWL Corp., No. 08-42773-BTR-11, 2008 WL 5246069, at *5 (Bankr. E.D. Tex. Dec. 15, 2008) (holding that a party "failed to sustain its burden of proof as required by Section 363(p)(2) as to the existence, validity, priority, and extent of the interest entitled to such protection, and, accordingly, no adequate protection by the Debtors or the Buyer shall be required"). STB has not proven – and cannot prove – that it has an interest in any property that entitles it to adequate protection under Section 363.

[15] For the same reasons, STB cannot require Robin Land to pay amounts due under the STB Override into an escrow account pending this Court's decision on whether the STB Override is integrated with the Leases. In Elder-Beerman Stores, the court required the debtor to put lease payments into an escrow account pending a decision on whether the lease was a "true lease." 201 B.R. at 764-65. STB seeks a similar result. (Mot. at 14.) However, as noted above, the STB Override – unlike the document in Elder-Beerman Stores – is not titled a "Lease," and STB has not come close to showing that the STB Override is an obligation of the Leases.

## CONCLUSION

For the foregoing reasons, Robin Land respectfully requests that the Court deny the Motion.

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Respectfully Submitted,

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