

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

-----X	:	
	:	Chapter 11
<i>In re</i>	:	
Patriot Coal Corporation, <i>et al.</i> ,	:	Case No. 12-51502-659
	:	
Debtors.	:	(Jointly Administered)
-----X	:	
	:	
Robin Land Company, LLC,	:	
	:	
Plaintiff,	:	
	:	Adv. Proc. No. 12-04355-659
v.	:	
	:	Reply Deadline:
STB Ventures, Inc.,	:	April 16, 2013
	:	
Defendant,	:	Hearing Date:
	:	April 23, 2013 at 10:00 a.m.
Arch Coal, Inc., Ark Land Company and Ark	:	(Prevailing Central Time)
Land KH, Inc.	:	
	:	Hearing Location:
Intervenor-Defendants.	:	Courtroom 7 North
-----X	:	

**ARCH'S MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF'S MOTION FOR JUDGMENT ON THE
PLEADINGS AND TO DISMISS ARCH'S COUNTERCLAIMS**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 3

 A. Ark Land’s 1994 Transaction with STB..... 3

 B. Arch Coal’s and Ark Land’s 2005 Transactions with Magnum and Robin
 Land. 7

 C. Ark Land’s and Ark KH’s 2007 Transaction with Robin Land..... 8

PROCEDURAL HISTORY 9

STANDARD OF LAW..... 10

ARGUMENT..... 11

I. The STB Override Agreement Is Part of the Integrated STB and Thus Is
Executory as It Is Clearly Integrated with the Leases and the Other STB
Transaction Agreements. 11

 A. The STB Transaction Agreements Clearly Demonstrate that Arch and
STB Intended the Obligation to Pay the STB Override to Be Integrated
with the Right to Mine the Premises..... 12

 1. There Is No Consideration for the Payment of the STB Override
 Separate from the Right to Mine the Premises Under the Leases..... 14

 2. The Subject Matter of Each of the STB Transaction Agreements Is
 the Same..... 14

 3. The Relationship Between the Various STB Transaction
 Agreements Is Clear from the Various Cross References Among
 Such Agreements. 15

 4. The Promises in the STB Transaction Agreements Were Assented
 to as a Whole..... 16

 5. The Obligations Under the STB Override Agreement Are Due
 when Royalties Are Due Under the Leases, and the Obligation to
 Pay the STB Override Ends when the Leases End. 17

 6. The Parties to the STB Transaction Agreements Are the Same. 17

 7. Each of the STB Transaction Agreements Is Dated October 31,
 1994..... 18

 B. Having Been Assigned the Executory Integrated STB Transaction, Robin
 Land Has the Same Obligation that Ark Land Did Under Such
 Transaction, Including the Obligation to Pay the STB Override in
 Consideration of the Right to Mine the Premises Under the Leases. 18

C.	There Is No Dispute that, if the STB Transaction Agreements Are Integrated, Then They Are Executory Because the Leases Are Executory.	19
II.	Robin Land’s Motion Fails to Prove as a Matter of Law that the STB Override Agreement Is Not Part of the Integrated Transaction, and Thus Is Not Executory.	20
A.	To Read the STB Override Agreement as a Standalone Instrument Would Be Contrary to the “Entire Agreement” Clause in the Asset Purchase Agreement.	21
B.	Robin Land Is Receiving Continuing Consideration Under the STB Override Agreement as It Continues to Mine Coal from the Premises.	22
C.	It Is Wholly Artificial to Attempt to Read the STB Override as a Standalone Agreement.	23
D.	If the STB Override Agreement Is a Standalone Instrument, It Is Void for Lack of Consideration.	25
E.	The STB Override Agreement Is Not a Promissory Note.	26
F.	If the STB Override Agreement Is Integrated with the Leases, Arch Has a Common Law Right to Withhold Performance Under the Leases.	27
III.	Extrinsic Evidence, as Alleged in the Pleadings, Clearly Supports the Position that the Parties to the STB Transaction Agreements Intended that the Obligation to Pay the STB Override Be Integrated with the Right to Mine Coal from the Premises Under the Leases.	28
IV.	Arch’s Counterclaims Should Not Be Dismissed.	29
	CONCLUSION.....	32

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<u>Amherst Land Co. v. United Fuel Gas Co.</u> , 84 S.E.2d 225 (W. Va. 1954).....	12
<u>Arnold v. Palmer</u> , 686 S.E.2d 725 (W. Va. 2009)	26
<u>Ashland Oil, Inc. v. Donahue</u> , 223 S.E.2d 433 (W. Va. 1976)	12, 13, 24
<u>Cairo Marine Serv. v. Homeland Ins. Co.</u> , No. 4:09CV1492CDP, 2010 WL 4614693 (E.D. Mo. Nov. 4, 2010)	30
<u>Citibank, N.A. v. Tele/Resources, Inc.</u> , 724 F.2d 266 (2d. Cir. 1983)	18
<u>Commander Oil Corp. v. Advance Food Serv. Equip.</u> , 991 F.2d 49 (2d. Cir. 1993)	12
<u>D.H. Pritchard Contractor, Inc. v. Nelson</u> , 147 F. 2d 939 (4th Cir. 1945)	12, 13, 16, 24
<u>Dan Ryan Builders, Inc. v. Nelson</u> , 737 S.E.2d 550 (W. Va. 2012)	25
<u>E.I. du Pont de Nemours & Co. v. Shell Oil Co.</u> , 498 A.2d 1108 (Del. 1985)	13
<u>Elliot v. Richter</u> , 496 S.W.2d 860 (Mo. 1973)	18
<u>Fidelity Nat’l Title Ins. Co. v. Captiva Lake Inv., LLC</u> , 788 F. Supp. 2d 970 (E.D. Mo. 2011)	30
<u>Four-Three-O-Six Duncan Corp.</u> , 372 S.W.2d 16 (Mo. 1963)	18
<u>Fraternal Order of Police, Lodge No. 69 v. City of Fairmont</u> , 468 S.E.2d 712 (W. Va. 1996)	12, 28
<u>Frederick Mgmt. Co. v. City Nat’l Bank of W. Va.</u> , 723 S.E.2d 277 (W.Va. 2010)	29
<u>Gibson v. Harl</u> , 857 S.W.2d 260 (Mo. App. 1993)	28

	Page(s)
<u>Hamon v. Akers,</u> 222 S.E.2d 822 (W. Va. 1976)	29
<u>Handi-Craft Co. v. Travelers Casualty and Surety Co.,</u> No. 4:12CV63, 2012 WL 1432566 (E.D. Mo. April 25, 2012)	30
<u>Hinerman v. Levin,</u> 310 S.E.2d 843 (W. Va. 1983)	25
<u>Howard v. Nicholson,</u> 556 S.W.2d 477 (Mo. App. 1977)	18
<u>In re Craig,</u> 144 F.3d 593 (8th Cir. 1997)	27
<u>In re FBI Distrib. Corp.,</u> 330 F.3d 36 (1st Cir. 2003)	31
<u>In re Integrated Health Servs., Inc.,</u> No. 00-389, 2000 WL 33712484 (Bankr. D. Del. July 7, 2000)	16
<u>In re Safety-Kleen Corp.,</u> 410 B.R. 164 (Bankr. D. Del 2009)	20
<u>In re Teligent, Inc.,</u> 268 B.R. 723 (Bankr. S.D.N.Y. 2001)	13
<u>In re Union Fin. Servs. Grp., Inc.,</u> 325 B.R. 816 (Bankr. E.D. Mo. 2004)	13, 27
<u>Kopf v. Lacey,</u> 540 S.E.2d 170 (W. Va. 2000)	29
<u>Liberty USA Corp. v. Buyer’s Choice Ins. Agency, LLC,</u> 386 F. Supp. 2d 421 (S.D.N.Y. 2005)	12
<u>Mills v. City of Grand Forks,</u> 614 F.3d 495 (8th Cir. 2010)	10, 11, 29
<u>Milner Hotels, Inc. v. Norfolk & Western Ry. Co.,</u> 822 F. Supp. 346 (S.D. W. Va. 1993)	27
<u>Nau v. Vulcan Rail & Constr. Co.,</u> 286 N.Y. 188 (N.Y. 1941)	12-13
<u>Porous Media Corp v. Pall Corp.,</u> 186 F. 3d 1077 (8th Cir. 1999)	11

	Page(s)
<u>This Is Me, Inc. v. Taylor</u> , 157 F.3d 139 (2d Cir. 1998)	12, 16
<u>TVT Records v. Island Def Jam Music Grp.</u> , 412 F.3d 82 (2d Cir. 2005)	12
<u>Wheelhouse Marina Real Estate, LLC v. Bommarito</u> , 284 S.W.3d 761 (Mo. App. 2009)	29
<u>Wood County Airport Auth. v. Crown Airways, Inc.</u> , 919 F. Supp. 960 (S.D. W.Va. 1996)	28
<u>Zimmerer v. Romano</u> , 679 S.E.2d 601 (W. Va. 2009)	12, 29
 <u>Rules and Statutes</u>	
11 U.S.C. § 365	20
11 U.S.C. § 365(b)	20, 30, 31
11 U.S.C. § 365(d)(3)	20, 30, 31
11 U.S.C. § 503(b)(1)(A)	31
Fed. R. Civ. P. 7(a)	11
 <u>Other Sources</u>	
Charles Alan Wright, Arthur R. Miller, et al., <u>Federal Practice & Procedure</u> (3d ed. 2012)	11

Defendants Arch Coal, Inc. (“Arch Coal”), Ark Land Company (“Ark Land”) and Ark Land KH, Inc. (“Ark KH”, collectively, “Arch”), by and through their attorneys Cleary Gottlieb Steen & Hamilton LLP and Lewis Rice & Fingersh, L.C., respectfully submit this Memorandum of Law in opposition to the Motion for Judgment on the Pleadings and to Dismiss Defendants’ Counterclaims [D.I. 36] (the “Motion”) filed by Robin Land Company, LLC (“Plaintiff” or “Robin Land”, together with its affiliated chapter 11 debtors, the “Debtors”).

Preliminary Statement

1. Robin Land’s claim that as a matter of law it can meet the heavy burden of establishing that it is entitled to a judgment on the pleadings is contradicted by the unambiguous language of the integrated agreements (the “STB Transaction Agreements”) that form the October 31, 1994 transaction (the “STB Transaction”) between Ark Land and STB Ventures, Inc. (“STB”), among others. Moreover, Robin Land’s argument is belied by the clear intent of the parties to treat the STB Override Agreement¹ as part of an integrated agreement, as set forth in the Answer and Counterclaims of the actual parties to the transaction in question, Arch and STB, whose allegations the Court must take as true when considering Robin Land’s Motion. The reality is that Robin Land took an assignment of these integrated STB Transaction Agreements from Arch, and must now stand in the shoes of Arch and meet all of the obligations Arch owed under the STB Transaction Agreements, including any obligation to pay the consideration owed under the STB Override Agreement. Robin Land does not, and cannot, dispute that the Leases² that are part of the STB Transaction are executory.³ As such, given the

¹ The “STB Override Agreement” is the Overriding Royalty Agreement dated October 31, 1994 between Ark Land and STB; it is one of the STB Transaction Agreements, and establishes an obligation to pay a royalty (the “STB Override”) on coal mined and sold from certain coal fields located in Logan and Boone Counties, West Virginia (the “Premises”) that are governed by the STB Transaction Agreements.

² The “Leases” are (i) the Combined, Amended and Restated Coal Lease between Ark Land and Kelly-Hatfield Land Company (as amended, the “Kelly-Hatfield Lease” and the coal properties demised thereunder, the

integrated nature of the STB Transaction Agreements, the STB Override Agreement is also executory. In short, Robin Land may not take the benefit of the STB Transaction Agreements—the right to mine and sell coal from the land—and not pay the royalty consideration it owes under the STB Transaction Agreements for the coal it mines.

2. A review of the pleadings makes clear that Robin Land cannot establish that the STB Override Agreement is a standalone document. Both the facts alleged by STB and Arch and the plain language of the STB Transaction Agreements demonstrate that STB and Arch intended the STB Transaction Agreements to constitute one integrated agreement. All of the factors courts consider when determining if the parties to an agreement intended it to be integrated weigh in favor of integration. Moreover, here, both parties to the agreement agree that it is integrated. Similarly, the terms of the assignments between Arch and Robin Land in 2005 and 2007 only confirm this understanding. The only entity that claims the STB Transaction Agreements are not integrated is Robin Land, who first became involved with the STB Transaction 11 years after the fact.

3. With the pleaded facts contradicting its claim, and unable to find any language supporting its construction, Robin Land's Motion relies on nothing more than inapposite precedent, misleading references and improper contractual interpretation. Robin Land's only support for its proposition that the STB Override is standalone is that some of the STB Transaction Agreements have Entire Agreement Clauses. This is of no avail because the Entire Agreement Clause of the Asset Purchase Agreement specifically incorporates the other STB

"Kelly-Hatfield Premises") and (ii) the Combined, Amended and Restated Coal Lease between Ark Land and Lawson Heirs, Inc. (as amended, the "Lawson Heirs Lease" and the coal properties demised thereunder, the "Lawson Heirs Premises").

³ Robin Land has moved this Court to assume both the Kelly-Hatfield Lease and the Lawson Heirs Lease in the Debtors' chapter 11 proceedings. See Debtors' Motion For Authorization To (I) Assume Or (II) Reject Unexpired Leases Of Nonresidential Real Property [12-51502-659 D.I. 1995] (the "Assumption Motion").

Transaction Agreements, and the Entire Agreement Clause of the STB Override Agreement specifically limits itself “in respect to the Overriding Royalty.” Similarly, Robin Land’s claim that it receives no benefits and is not subject to an express cross-default provision is undone by the fact that the coal it mines under the integrated Leases is its benefit, and its failure to pay the STB Override will constitute a common law breach of the STB Transaction Agreement. Finally, as the STB Override Agreement is not a promissory note, the majority of the key case law Robin Land cites in support of its motion is inapposite.

4. The simple fact is that if—as pled and set forth in the relevant agreements—the STB Transaction Agreements are an integrated whole, Robin Land has no answer for why the STB Override Agreement is not part of the larger executory contract, including the Leases, that it is trying to assume. Having taken an assignment of the STB Transaction Agreements, Robin Land should not be allowed to now pick and choose which provisions it wants to abide by and which it wishes to ignore.

Statement of Facts

A. Ark Land’s 1994 Transaction with STB.

5. Until 1994, STB and certain other entities including Eagle Minerals Company, Guyan Mining Company, and Guyan Equipment Company (collectively with STB, the “Sellers”) held interests in the Premises—coal fields located in Logan and Boone Counties, West Virginia—including under leases from two third party lessors, the Kelly-Hatfield Land Company (“Kelly-Hatfield”) and Lawson Heirs, Inc. (“Lawson Heirs”). See Arch Answer⁴ ¶¶ 33, 35.

6. In October 1994, STB and the other Sellers reached an agreement with Ark Land and its affiliate Apogee Coal Company (“Apogee,” and together with Ark Land, the

⁴ “Arch Answer” refers to the Answer and Counterclaims of Arch Coal, Inc., Ark Land Company and Ark Land KH, Inc. [D.I. 33].

“Purchasers”) pursuant to which Ark Land would acquire the Sellers’ leasehold interests in the Premises, including their right to mine the coal fields, in exchange for, among other things, Ark Land’s agreement to pay the STB Override, an overriding royalty on coal mined and sold from the Premises. Id. ¶ 33.

7. This transaction—the STB Transaction—was memorialized in the following material agreements (the “STB Transaction Agreements”):

(i) The Asset Purchase Agreement by and among Ark Land, Apogee, STB, and the other Sellers (the “Asset Purchase Agreement”), which included a description of how the other agreements fit into the whole of the STB Transaction and detailed the consideration paid by the Purchasers for the assignment of the Sellers’ interests in the Premises;⁵

(ii) The STB Override Agreement between Ark Land and STB, requiring Ark Land to pay STB a 1.5% royalty for each ton of coal mined and sold from the Premises;⁶

(iii) The Assignment and Assumption of Leases by and among STB, Eagle Minerals Company and Ark Land (the “Guyan Lease Assignment”), assigning the Sellers’ leasehold interests and certain obligations under those leases to Ark Land;⁷

(iv) The Liabilities Undertaking Agreement by and among STB, Eagle Minerals Company, Guyan Equipment Company, Guyan Mining Company and Ark Land (the “Liabilities Undertaking Agreement”),⁸ in which Ark Land assumed obligations under the Sellers’ former leases;⁹ and

(v) Two Leases—the Kelly-Hatfield Lease¹⁰ and the Lawson Heirs Lease¹¹—which were novations of the Sellers’ previous leases with Kelly-Hatfield and Lawson Heirs that granted the right to mine the Kelly-Hatfield Premises and Lawson Heirs Premises, respectively.

⁵ The Asset Purchase Agreement was filed under seal by Robin Land as Exhibit B to the Complaint.

⁶ The STB Override Agreement was filed under seal by Robin Land as Exhibit A to the Complaint.

⁷ The Guyan Lease Assignment was filed under seal by Robin Land as Exhibit C to the Complaint.

⁸ The Liabilities Undertaking Agreement is attached to Arch’s Answer as Exhibit 1.

⁹ Apogee also executed a liabilities undertaking agreement and a letter agreement pursuant to which it assumed certain environmental and union liabilities with respect to the Premises. See Asset Purchase Agreement §§ 2.02(b)(ii), 2.02(b)(iii).

¹⁰ The Kelly-Hatfield Lease was filed under seal by Robin Land as Exhibit E to the Complaint.

¹¹ The Lawson Heirs Lease was filed under seal by Robin Land as Exhibit D to the Complaint.

Id. ¶¶ 34-36. All of these agreements had the same date—October 31, 1994—and the parties intended for these agreements to collectively form an integrated transaction. Id. ¶¶ 34-37, 53-57.

8. As the Asset Purchase Agreement describes, both STB and Ark Land provided consideration under the integrated STB Transaction. Id. ¶ 35. In exchange for STB’s assignment of leasehold interests under the Asset Purchase Agreement and the Guyan Lease Assignment, Ark Land agreed to (i) pay STB a 1.5% royalty for each ton of coal mined and sold from the Premises, as required under the executed STB Override Agreement; (ii) assume the Sellers’ liabilities under the previous leases, as required by the Liabilities Undertaking Agreement and Guyan Lease Assignment; and (iii) pay approximately \$11.5 million to the Sellers at the closing of the STB Transaction, among other consideration. See, e.g., Asset Purchase Agreement §§ 2.02(a), 2.02(b)(i), 2.02(b)(iv); STB Override Agreement § 3.

9. The STB Override Agreement explicitly states that it was executed in consideration of the Sellers’ covenants and agreements in the Asset Purchase Agreement. STB Override Agreement, Now Therefore Clause. Standing alone, the STB Override Agreement does not provide any consideration to Ark Land (and now Robin Land) in exchange for its payment of the 1.5% royalty on coal mined and sold from the Premises to STB.

10. The integrated nature of the STB Transaction is also reflected in other provisions of the STB Transaction Agreements. Arch Answer ¶ 53. For example, the STB Override Agreement repeatedly references and incorporates the terms of the Leases. The second Whereas Clause of the STB Override Agreement states that the “parties contemplate that the Premises shall be demised by those two certain novation leases from (i) [Lawson Heirs] to [Ark Land], dated October 31, 1994; and (ii) [Kelly-Hatfield], to [Ark Land], dated October 31, 1994”

STB Override Agreement, Second Whereas Clause.¹² Section 2 of the STB Override Agreement states that such agreement “shall take effect as of the Closing Date [(as defined in the Asset Purchase Agreement)] and shall continue for a period coextensive with the primary term, and any extension or renewal thereof, of the Leases” Id. § 2. And section 3 of the STB Override Agreement provides, among other things, that the “[t]erms and conditions within the Leases shall govern as to royalty determination, late payment penalties, and all similar purposes.” Id. § 3.

11. Similarly, the STB Override Agreement expressly references and incorporates terms of the Asset Purchase Agreement. Arch Answer ¶ 54. The first Whereas Clause of the STB Override Agreement states that “pursuant to that certain Asset Purchase Agreement, of even date, by and among [Purchasers and Sellers], Sellers have sold and transferred to Purchasers the Acquired Assets” STB Override Agreement, First Whereas Clause. The STB Override Agreement states that the agreements contained in the STB Override Agreement were given “in consideration of the mutual covenants and agreements contained herein and in the Asset Purchase Agreement.” Id., Now Therefore Clause (emphasis added). The STB Override Agreement also incorporates the defined terms of the Asset Purchase Agreement. Id. § 1.

12. Finally, the Asset Purchase Agreement acknowledges the integrated nature of the STB Transaction Agreements, stating that the STB Override Agreement and each of the other STB Transaction Agreements form part of the “entire agreement” of the parties to the Asset Purchase Agreement. Arch Answer ¶ 55. Specifically, the Entire Agreement Clause of the Asset Purchase Agreement states that the Asset Purchase Agreement and “the documents referred to [t]herein . . . constitute the entire agreement of the parties [t]hereto” Asset Purchase

¹² The Leases likewise acknowledge the assignments of the Sellers’ interests in the Premises to Ark Land. See Kelly-Hatfield Lease, Fifth and Ninth Whereas Clauses; Lawson Heirs Lease, Eighteenth Whereas Clause; Asset Purchase Agreement, § 2.01(a)(ii), Disclosure Schedule Section 2.01(a)(ii).

Agreement §9.07. The STB Override Agreement is referenced in section 2.02(b)(i) of the Asset Purchase Agreement; the Guyan Lease Assignment is referenced in section 2.03(b)(iii) of the Asset Purchase Agreement; the Liabilities Undertaking Agreement is referenced in section 2.02(b)(iv) of the Asset Purchase Agreement; and the anticipated Kelly-Hatfield Lease and Lawson Heirs Lease are novation leases of the leases listed in Section 2.01(a)(ii) of the Disclosure Schedule to the Asset Purchase Agreement as to be assigned to Ark Land pursuant to the Guyan Lease Assignment.

B. Arch Coal's and Ark Land's 2005 Transactions with Magnum and Robin Land.

13. In a 2005 transaction (the “Magnum Transaction”),¹³ Arch sold and assigned various assets to Magnum Coal Company (“Magnum”), including its previously-assigned right to mine coal from the Lawson Heirs Premises and the right to mine coal from a portion of the Kelly-Hatfield Premises. Arch Answer ¶ 59. In 2005, Robin Land took unaltered assignments of the Asset Purchase Agreement, the Lawson Heirs Lease and a portion of the Kelly-Hatfield Lease pursuant to two agreements:

(i) The Assignment and Assumption Agreement dated December 30, 2005 between Ark Land and Robin Land (the “Assignment and Assumption Agreement”), pursuant to which Robin Land was assigned the Asset Purchase Agreement and the Lawson Heirs Lease in toto;¹⁴ and

(ii) the Partial Assignment and Assumption of Lease dated December 31, 2005 between Ark Land and Robin Land (the “Initial Partial Assignment”), pursuant to which Robin Land was assigned a portion of the Kelly-Hatfield Lease.¹⁵

Id. ¶¶ 47, 59-61.

¹³ The larger Magnum Transaction is memorialized in the Purchase and Sale Agreement dated as of December 31, 2005 between Arch Coal and Magnum (the “Magnum PSA”) and the ancillary document thereto. A copy of the Magnum PSA (excluding the Schedules and Exhibits thereto) is attached to Arch’s Answer as Exhibit 5. As part of the Magnum Transaction, Arch Coal sold certain of its subsidiaries, including Robin Land—then a subsidiary of Arch Coal—to Magnum.

¹⁴ The Assignment and Assumption Agreement was filed under seal by Robin Land as Exhibit F to the Complaint.

¹⁵ The Initial Partial Assignment is attached to Arch’s Answer as Exhibit 2.

14. In consideration of the right to mine coal from the Premises under the assigned Leases, Robin Land agreed (i) to fully perform the obligations under the assigned Leases, (ii) to pay the STB Override with respect to coal mined and sold from the Lawson Heirs Premises and the assigned portion of the Kelly-Hatfield Premises and (iii) to indemnify Ark Land for any failure to honor such obligations. Id. ¶¶ 59-61.

15. In particular, the Assignment and Assumption Agreement provided that, in consideration for the assignment of the Lawson Heirs Lease, Robin Land “agree[d] to assume the full and complete performance of [such Lease] with respect to the obligations of [Ark Land] thereunder from and after the date hereof,” and to pay the STB Override with respect to coal mined and sold from the Lawson Heirs Premises. See Assignment and Assumption Agreement § 2, Schedule 1 at 16 (AMA-359), 18 (AMA-337), 19 (AMA-377-1). Likewise, the Initial Partial Assignment provided that, in consideration for the assignment of such portion of the Kelly-Hatfield Lease, Robin Land “agree[d] to perform the duties and obligations of [Ark Land] contained in or arising under the [Kelly-Hatfield] Lease in accordance with the terms and conditions thereof,” and specifically agreed to pay the STB Override “to the extent that the STB Override applies to coal mined from the Assigned Lease Portion of the Premises.” See Initial Partial Assignment § 2. In both the Assignment and Assumption Agreement and the Initial Partial Assignment, Robin Land agreed to indemnify Ark Land for any failure to honor such obligations. Assignment and Assumption Agreement § 2; Initial Partial Assignment § 2.

C. Ark Land’s and Ark KH’s 2007 Transaction with Robin Land.

16. Subsequent to the Magnum Transaction, in May 2007, Ark Land assigned an additional portion of the Kelly-Hatfield Lease to Robin Land. This assignment was memorialized in the Amended and Restated Partial Assignment and Assumption of Lease dated

May 22, 2007 between Ark Land, Ark KH and Robin Land (the “Amended and Restated Partial Assignment”).¹⁶ Pursuant to the Amended and Restated Partial Assignment, in consideration for the assignment of the assigned portions of the Kelly-Hatfield Lease, Robin Land “agree[d] to perform the duties and obligations of [Ark Land] contained in or arising under the [Kelly-Hatfield] Lease in accordance with the terms and conditions thereof,” and to “assume[] the obligation to pay the ‘STB Override’ as defined and identified in [the STB Override Agreement] and as assigned to [Robin Land] by [the Assignment and Assumption Agreement] to the extent that the STB Override applies to coal mined from the Assigned Lease Portion of the Premises.” As with the assignments in 2005, Robin Land agreed to indemnify Ark Land for any failure to honor such obligations. See Amended and Restated Partial Assignment § 3; Arch Answer ¶¶ 64, 65.¹⁷

17. Since taking an assignment of the Lawson Heirs Lease and a partial assignment of the Kelly-Hatfield Lease in 2005, Robin Land has paid over \$13 million under the STB Override Agreement. See STB Answer,¹⁸ Counterclaims ¶¶ 27, 28.

Procedural History

18. On August 10, 2012, Robin Land commenced the above-captioned adversary proceeding by filing its Complaint For Declaratory Relief [D.I. 1] (the “Complaint”). The Complaint is very brief, does not highlight many of the relevant contractual provisions and

¹⁶ The Amended and Restated Partial Assignment is attached to Arch’s Answer as Exhibit 3. In addition to assigning an additional piece of the Kelly-Hatfield Premises to Robin Land, the Amended and Restated Partial Assignment acknowledged the fact that Ark KH (one of the Arch defendants here) had become the lessor with respect to the Kelly-Hatfield Premises as successor by merger of Kelly-Hatfield. Arch Answer ¶ 64.

¹⁷ Ark Land retains the unassigned portion of the Kelly-Hatfield Premises to this day.

¹⁸ “STB Answer” refers to the Answer and Counterclaims of STB Ventures, Inc. [D.I. 32].

contains errors.¹⁹ Robin Land named STB as a defendant in the Complaint and served STB with the Complaint; Arch was neither named in the Complaint nor served with the Complaint.

19. Subsequent to the filing of the Complaint, this Court allowed Arch to intervene in this proceeding pursuant to the Stipulation And Agreed Order Allowing Arch Coal, Inc., Ark Land Company and Ark Land KH, Inc. to Intervene as Defendants, Withdrawing and Denying the Motion to Dismiss of STB Ventures, Inc., Scheduling Remaining Pleadings and Scheduling Plaintiff's Motion for Judgment on the Pleadings [D.I. 27] (the "Stipulation and Agreed Order").

20. As provided in the Stipulation and Agreed Order, on February 19, 2013, Arch and STB each filed their respective Answers to the Complaint and Counterclaims [D.I.s 33 and 32] (together, the "Answers").

21. On March 4, 2013, Robin Land filed the Motion, without answering the counterclaims asserted in the Answers. Following a hearing, this Court ordered Robin Land to answer such counterclaims, which Robin Land did on April 2, 2013 [D.I.s 60 and 61].

Standard of Law

22. When deciding a motion for judgment on the pleadings, the Court must accept as true all facts alleged by the nonmoving parties, here Arch and STB; must make all reasonable inferences from the pleadings in favor of the nonmoving parties; and can only grant such motion if the movant, here Robin Land, meets its heavy burden of establishing that it is entitled to judgment as a matter of law. See, e.g., Mills v. City of Grand Forks, 614 F.3d 495, 497-98 (8th Cir. 2010) ("Judgment on the pleadings is appropriate when there are no material facts to resolve and the moving party is entitled to judgment as a matter of law. The facts pleaded by the

¹⁹ For example, paragraph 17 of the Complaint states that the Kelly-Hatfield Lease was assigned to Robin Land pursuant to the Assignment and Assumption Agreement. See Complaint ¶ 17. As described above, the Kelly-Hatfield Lease was partially assigned pursuant to the Initial Partial Assignment and further partially assigned pursuant to the Amended and Restated Partial Assignment. Neither the Initial Partial Assignment nor the Amended and Restated Partial Assignment is even mentioned in the Complaint.

non-moving party must be accepted as true and all reasonable inferences from the pleadings should be taken in favor of the non-moving party.”) (citations omitted); Porous Media Corp v. Pall Corp., 186 F. 3d 1077, 1079 (8th Cir. 1999) (“Judgment on the pleadings should be granted only if the moving party clearly establishes that there are no material issues of fact and that it is entitled to judgment as a matter of law.”).

23. When deciding a motion for judgment on the pleadings, the Court should consider, among other things, all of the pleadings and all exhibits thereto. Here, such pleadings include the Complaint, the Answers, all counterclaims asserted therein and all exhibits thereto. See, e.g., Mills, 614 F.3d at 498; Fed. R. Civ. P. 7(a); 5C Charles Alan Wright, Arthur R. Miller, et al., Federal Practice & Procedure § 1367 (3d ed. 2012) (noting that counterclaims contained in answers must be answered before pleadings are closed for purposes of Fed. R. Civ. P. 12(c)).

Argument

I. The STB Override Agreement Is Part of the Integrated STB Transaction and Thus Is Executory as It Is Clearly Integrated with the Leases and the Other STB Transaction Agreements.

24. Taking the facts alleged by Arch and STB in their respective Answers, including the counterclaims asserted therein, as true, as the Court must when deciding Robin Land’s Motion, it is clear that Arch and STB—the parties to the STB Transaction—intended the rights and obligations under the STB Transaction Agreements, including the STB Override Agreement, to be integrated with the right to mine coal from the Premises under the Leases. As clearly alleged by Arch and STB, pursuant to the Assignment and Assumption Agreement, the Initial Partial Assignment and the Amended and Restated Partial Assignment, Robin Land took an assignment of that same integrated STB Transaction, including the obligation to pay the STB Override. As Robin Land does not and cannot dispute that the Leases are executory, there is no

dispute that the entire integrated STB Transaction, including the consideration provided for the STB Transaction under the STB Override Agreement, is executory.

A. The STB Transaction Agreements Clearly Demonstrate that Arch and STB Intended the Obligation to Pay the STB Override to Be Integrated with the Right to Mine the Premises.

25. Under West Virginia law,²⁰ the intent of the contracting parties governs questions of contract interpretation. See, e.g., Zimmerer v. Romano, 679 S.E.2d 601, 610 (W. Va. 2009); Fraternal Order of Police, Lodge 69 v. City of Fairmont, 468 S.E.2d 712, 716 (W. Va. 1996).

26. Similarly, whether parties to a transaction intend multiple agreements to constitute an integrated contract is also a question of the intent of the parties. See, e.g., D.H. Pritchard Contractor, Inc. v. Nelson, 147 F. 2d 939, 942-43 (4th Cir. 1945); Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433, 437-48 (W. Va. 1976). A written agreement constituting a single contract does not need to be encompassed in one instrument, but may be comprised of two or more instruments that are enforceable as a whole. Amherst Land Co. v. United Fuel Gas Co., 84 S.E.2d 225, 229 (W. Va. 1954); see also D.H. Pritchard, 147 F. 2d at 942 (“If made at the same time, in relation to the same subject matter, [separate written agreements] may be read together as one instrument.”); Ashland Oil, 223 S.E.2d at 438 (finding two agreements that, on their face, could not be read independently constituted a single integrated business relationship).²¹

²⁰ As Robin Land admits in the Motion, West Virginia law governs the Asset Purchase Agreement, the Kelly-Hatfield Lease, the Lawson Heirs Lease, the Assignment and Assumption Agreement, the Initial Partial Assignment and the Amended and Restated Partial Assignment. See Motion at 9 n.10; Asset Purchase Agreement § 9.11; Kelly-Hatfield Lease § 21; Lawson Heirs Lease § 21; Assignment and Assumption Agreement § 5; Initial Partial Assignment § 6; Amended and Restated Partial Assignment § 7. The STB Override Agreement does not have an express choice of law clause. The Magnum PSA is governed by New York law, and certain of the Magnum Transaction documents are governed by Delaware law. See Magnum PSA § 11.7. None of the various transaction documents are governed by Missouri law.

²¹ Like West Virginia law, New York law and Delaware law each look to the intent of the parties to determine whether the rights and obligations contained in multiple instruments form part of the same integrated transaction. See e.g., TVT Records v. Island Def Jam Music Grp., 412 F.3d 82, 89 (2d Cir. 2005); This Is Me, Inc. v. Taylor, 157 F.3d 139, 143 (2d Cir. 1998); Commander Oil Corp. v. Advance Food Serv. Equip., 991 F.2d 49, 52-53 (2d Cir. 1993); Liberty USA Corp. v. Buyer’s Choice Ins. Agency, LLC, 386 F. Supp. 2d 421, 425 (S.D.N.Y. 2005); Nau v.

27. When determining whether the parties intended separate instruments to be enforceable as a whole, courts look to the particular facts and circumstances of each case. See, e.g., D.H. Pritchard, 147 F. 2d at 942. Specifically, courts consider:

- Whether separate consideration was given for such promises;
- The subject matter of such instruments;
- The relationship between such instruments;
- Whether such instruments reference each other;
- Whether the various promises were assented to as a whole;
- Whether the various obligations are due at the same time to the same person;
- The parties to such instruments; and
- The dates of such instruments.

See, e.g., id.; Ashland Oil, Inc., 223 S.E.2d. at 437-38.²²

28. Here, as set forth in Arch's and STB's pleadings and as detailed below, it is clear on the face of the STB Transaction Agreements that each of these factors weighs in favor of a finding that the contracting parties intended the STB Transaction Agreements to form an integrated agreement.

Vulcan Rail & Constr. Co., 286 N.Y. 188, 197 (N.Y. 1941); In re Teligent, Inc., 268 B.R. 723, 728 (Bankr. S.D.N.Y. 2001) (construing agreements governed by Delaware law); E.I. du Pont de Nemours & Co. v. Shell Oil Co., 498 A.2d 1108, 1115 (Del. 1985).

²² Notably, the cases that Robin Land relies on recite these same factors. See, e.g., In re Union Fin. Servs. Grp., Inc., 325 B.R. 816, 823 (Bankr. E.D. Mo. 2004), aff'd 155 Fed. Appx. 940 ("The determining factor is the intention of the parties which is to be determined from the language and subject matter of the agreement. Relevant considerations include whether the subject matter is divisible, whether the consideration is entire or apportioned, whether the obligation is due at the same time to the same person, whether the contract is to take the whole or none, and whether the parties assented to all the promises as a single whole so that there would be no bargain if any promise was stricken.") (citations omitted).

1. There Is No Consideration for the Payment of the STB Override Separate from the Right to Mine the Premises Under the Leases.

29. The STB Override Agreement was delivered, and the STB Override is paid, in consideration of the right to mine the Premises under the Leases. The STB Override Agreement is expressly referred to as “additional consideration” under the Asset Purchase Agreement, and the STB Override Agreement expressly states that it is given in consideration of the covenants and agreements contained in the Asset Purchase Agreement. Asset Purchase Agreement § 2.02(b)(i); STB Override Agreement, Now Therefore Clause. As Robin Land points out, Motion at 1-2, 16, there is no separate consideration running to the payor on the face of the STB Override Agreement. The only consideration that Robin Land receives for its agreement to pay the STB Override is its right to mine coal from the Premises, a right that it continues to enjoy today. Neither Ark Land nor Robin Land received separate consideration from the right to mine the Premises for their agreements to pay the STB Override. Accordingly, the obligation to pay the STB Override cannot be severed from the right to mine the Premises and still be supported by mutual consideration.

2. The Subject Matter of Each of the STB Transaction Agreements Is the Same.

30. The STB Transaction Agreements all relate to the transfer of the right to mine coal from the Premises under the Leases and the consideration that must be paid for such right. The Asset Purchase Agreement explained the consideration that would be paid for such right, including the execution of the STB Override Agreement and the payment of the STB Override. Arch Answer ¶¶ 35, 51, 57. The existing leases of the Premises were assigned to Ark Land pursuant to the Guyan Lease Assignment, and Ark Land assumed obligations under such leases under the Guyan Lease Assignment and the Liabilities Undertaking Agreement. *Id.* ¶¶ 34, 35.

The Kelly-Hatfield Lease and the Lawson Heirs Lease provide the terms under which Ark Land would mine the Premises following the closing of the STB Transaction. See id. ¶ 35.

3. The Relationship Between the Various STB Transaction Agreements Is Clear from the Various Cross References Among Such Agreements.

31. As described in detail above, the interconnectedness of the STB Transaction Agreements is clear from the various cross-references in such documents:

- The delivery of the STB Override Agreement, the payment of the STB Override and the delivery of the Liabilities Undertaking Agreement are referred to as “additional consideration” under the Asset Purchase Agreement. Asset Purchase Agreement § 2.02(b)(i), 2.02(b)(iv).
- The STB Override Agreement states that it was given in consideration of the covenants and agreements contained in the Asset Purchase Agreement. STB Override Agreement, Now Therefore Clause.
- The delivery of the STB Override Agreement and the Liabilities Undertaking Agreement was a condition precedent to the closing of the STB Transaction. Asset Purchase Agreement §§ 2.03(c)(ii), 2.03(c)(iii), 7.01(d).
- The Entire Agreement Clause of the Asset Purchase Agreement states that the “entire agreement of the parties” is the Asset Purchase Agreement “(including the documents referred to [t]herein)”, which documents include the STB Override Agreement, the Guyan Lease Assignment and the Leases. Asset Purchase Agreement § 9.07.
- The STB Override Agreement expressly contemplated the execution of the Leases. The second Whereas Clause of the STB Override Agreement states that the “parties contemplate that the Premises shall be demised by those two certain novation leases from (i) Lawson Heirs, Inc. to [Ark Land], dated October 31, 1994; and (ii) the Kelly-Hatfield Land Company, to [Ark Land], dated October 31, 1994” STB Override Agreement, Second Whereas Clause.
- The STB Override Agreement expressly incorporates terms of the Leases. Section 2 of the STB Override Agreement states that such agreement “shall take effect as of the Closing Date [(as defined in the Asset Purchase Agreement)] and shall continue for a period coextensive with the primary term, and any extension or renewal thereof, of the Leases” And, section 3 of the STB Override Agreement provides, among other things, that the “[t]erms and conditions within the Leases shall govern as to royalty determination, late payment penalties, and all similar purposes.” STB Override Agreement §§ 2, 3.

- The STB Override Agreement references the Asset Purchase Agreement. The first Whereas Clause of the STB Override Agreement states that “pursuant to that certain Asset Purchase Agreement, of even date, by and among [the Purchasers and the Sellers], Sellers have sold and transferred to Purchasers the Acquired Assets” STB Override Agreement, First Whereas Clause.
- The STB Override Agreement incorporates the definitions in the Asset Purchase Agreement: “Any capitalized term used but not defined herein shall have the meaning assigned to it in the Asset Purchase Agreement.” STB Override Agreement § 1.
- The Leases reference the assignments of the Premises to Ark Land. Kelly-Hatfield Lease, Fifth and Ninth Whereas Clauses; Lawson Heirs Lease, Eighteenth Whereas Clause.

Robin Land offers no explanation for why these multiple cross-references do not clearly demonstrate from the four corners of the documents that the parties to the STB Transaction Agreements intended such agreements to form a single integrated contract, much less why, in the face of this evidence and the reasonable inferences the Court is instructed to make in favor of Arch, the pleadings should be understood to unambiguously state to the contrary.²³

4. The Promises in the STB Transaction Agreements Were Assented to as a Whole.

32. The promises in the STB Transaction Agreements were assented to as a whole. Arch Answer ¶ 35. Both parties to the transaction, STB and Arch, clearly allege that they viewed the STB Transaction to be a single agreement memorialized across the STB Transaction Agreements. *Id.* ¶¶ 48, 66; STB Answer, Counterclaims ¶¶ 13-17, 24. The rights granted by the transaction and the consideration paid for such rights are set forth across various agreements and can only be taken as a whole, lest certain agreements be read to provide no consideration.

Moreover, each of such documents were executed as part of the same transaction and are dated

²³ Robin Land relies on *In re Integrated Health Services, Inc.*, No. 00-389, 2000 WL 33712484 (Bankr. D. Del. July 7, 2000) to argue that the fact that the STB Override Agreement references the payment terms of the Leases does not automatically transform such instruments into an integrated whole. Motion at 13, 14. While any particular cross-reference does not necessarily compel the conclusion that two agreements are integrated, cross-references are strong evidence of integration. *See, e.g., D.H. Pritchard*, 147 F.2d at 942; *This Is Me*, 157 F.3d at 144.

October 31, 1994. Id. ¶¶ 35, 52-53. In particular, the execution of the STB Override Agreement by Ark Land was a condition to the closing of the STB Transaction. Asset Purchase Agreement §§ 2.03(c)(ii), 7.01(d).

5. The Obligations Under the STB Override Agreement Are Due when Royalties Are Due Under the Leases, and the Obligation to Pay the STB Override Ends when the Leases End.

33. The fact that the STB Override is due when royalties are due under the Leases, and the fact that the obligation to pay the STB Override terminates at the same time as the Leases, each weigh in favor of a finding of integration. STB Override Agreement §§ 2 (“This agreement shall take effect as of the Closing Date and shall continue for a period coextensive with the primary term, and any extension or renewal thereof, of the Leases, or until the exhaustion of all minable and merchantable coal (as defined under the Leases) from the Premises”), 3 (“Terms and conditions within the Leases shall govern as to royalty determination, late payment penalties, and all similar purposes.”).

6. The Parties to the STB Transaction Agreements Are the Same.

34. Ark Land and STB are parties to the Asset Purchase Agreement, the STB Override Agreement, the Guyan Lease Assignment—pursuant to which STB and the other Sellers assigned their interests in the Kelly-Hatfield Premises and the Lawson Heirs Premises to Ark Land—and the Liabilities Undertaking Agreement. Arch Answer ¶ 34. Accordingly, the documents created to memorialize the STB Transaction are all between the same parties. Robin Land points out that STB is not a named party to the Leases, Motion at 3-4, but this is inapposite. Given the nature of the transaction—the assignment of coal leases—the parties to the underlying leases pre-assignment will necessarily be different from the parties to such leases post-

assignment. It cannot be the case that this difference is in any way evidence that the contracting parties did not intend their agreements to be integrated.

7. Each of the STB Transaction Agreements Is Dated October 31, 1994.

35. The Asset Purchase Agreement, the STB Override Agreement, the Kelly-Hatfield Lease, the Lawson Heirs Lease, the Guyan Lease Assignment and the Liabilities Undertaking Agreement are all dated October 31, 1994. Id. ¶ 52.²⁴

B. Having Been Assigned the Executory Integrated STB Transaction, Robin Land Has the Same Obligation that Ark Land Did Under Such Transaction, Including the Obligation to Pay the STB Override in Consideration of the Right to Mine the Premises Under the Leases.

36. Robin Land, having taken an assignment of the integrated STB Transaction from Ark Land in 2005 and 2007, now stands in the shoes of Ark Land with respect to such transaction, as an assignment does not change the fundamental nature of the assigned contract. See Motion at 16-17; Citibank, N.A. v. Tele/Resources, Inc., 724 F.2d 266, 269 (2d. Cir. 1983). Accordingly, given that the STB Transaction is an integrated executory agreement, as shown above, Robin Land's obligations under all aspects of such transaction are identical to those of Ark Land, including its obligation to pay the STB Override in consideration of the right to mine the Premises under the Leases.

37. Moreover, even if one were to focus only on the 2005 and 2007 assignments to determine the intent of the parties to such assignments—Ark Land and Robin Land—the assignments of the Lawson Heirs Lease and the Kelly-Hatfield Lease to Robin Land further demonstrate that these parties understood the obligation to pay the STB Override to be integrated

²⁴ Robin Land cites Howard v. Nicholson, 556 S.W.2d 477 (Mo. App. 1977), Elliot v. Richter, 496 S.W.2d 860 (Mo. 1973) and Four-Three-O-Six Duncan Corp., 372 S.W.2d 16 (Mo. 1963) for the unremarkable proposition that there must be some “reasonable basis” for a court to find that the parties intended separate instruments executed as part of the same transaction to be integrated before a court so holds that they are integrated. Motion at 12, 13. As articulated above, Ark and STB have alleged in detail just such a “reasonable basis” for this Court to conclude that the obligations under the STB Override Agreement are integrated with the rights under the Leases.

with the right to mine the Premises. In each of the Assignment and Assumption Agreement (pursuant to which Robin Land took an assignment of the Lawson Heirs Lease), the Initial Partial Assignment, and the Amended and Restated Partial Assignment (pursuant to which Robin Land took partial assignments of the Kelly-Hatfield Lease), Robin Land (i) agreed to perform the obligations under the Leases as assigned, (ii) agreed to pay the STB Override with respect to coal mined and sold from the assigned portions of the Premises and (iii) agreed to indemnify Ark Land for any failure to do so. See Assignment and Assumption Agreement § 2; Initial Partial Assignment § 2; Amended and Restated Partial Assignment § 3. Robin Land points to no language or facts that suggest, much less prove, that its agreement with respect to its right to mine the Premises under the Leases and the consideration that must be paid for such right, including the payment of the STB Override, was intended by Robin Land or Ark Land to be different from the integrated nature of such rights and obligations pursuant to the STB Transaction.

38. Robin Land's failure to honor its obligation to pay the STB Override with respect to coal that it mines and sells from the Premises is a breach of each of such assignments—contracts with Ark Land—and Arch is damaged by such breach.²⁵

C. There Is No Dispute that, if the STB Transaction Agreements Are Integrated, Then They Are Executory Because the Leases Are Executory.

39. Robin Land does not dispute that the Leases are executory. See Motion at 7; Assumption Motion. Because, as shown above, the obligation to pay the relevant portions of the STB Override is integrated with the right to mine coal from the Premises under the Leases,

²⁵ Despite assenting by stipulation to Arch's intervention, Robin Land attempts to ex-post argue that Arch should not be involved in this action. See Motion at 2. While the time to raise such arguments was prior to stipulating otherwise, it is of no moment as Arch has standing to participate in this action because Robin Land continues to breach such assignments; Arch's standing does not rest solely on STB's assertion that Arch Coal guarantees Robin Land's performance under the STB Override Agreement, as Robin Land suggests.

Robin Land is required to pay the STB Override under section 365(d)(3) of the Bankruptcy Code and is required to cure its defaults under the STB Override Agreement under section 365(b) of the Bankruptcy Code, if the Leases are assumed pursuant to section 365 of the Bankruptcy Code.²⁶

40. Robin Land's argument that section 365(d)(3) of the Bankruptcy Code only protects parties to the Leases does not alter this conclusion. First, Ark KH is the lessor with respect to the Kelly-Hatfield Premises. Second, because the STB Transaction Agreements are integrated, Arch is a party to the Leases.

II. Robin Land's Motion Fails to Prove as a Matter of Law that the STB Override Agreement Is Not Part of the Integrated STB Transaction, and Thus Is Not Executory.

41. Despite the clear intent of the parties to the STB Transaction that their agreements be integrated, Robin Land asserts that the STB Override Agreement is a standalone one-way payment obligation owed by Robin Land to STB for which Robin Land receives no performance in return. Motion at 2, 16. This assertion is baseless and plainly contrary to both the facts as alleged in STB's and Arch's Answers and Counterclaims and a plain reading of the STB Transaction Agreements that were assigned to Robin Land.

²⁶ In the Motion, Robin Land asserts that there are no continuing material obligations under each of the Asset Purchase Agreement, the Magnum PSA, the Assignment and Assumption Agreement, the Initial Partial Assignment and the Amended and Restated Partial Assignment. Because the STB Override Agreement is integrated with the Leases, which are executory, this Court does not need to decide whether these additional agreements are executory, nor has Robin Land sought a declaratory judgment that such agreements are not executory. Arch notes, however, that (i) in motion practice in these chapter 11 cases, the Debtors have suggested that the Magnum PSA is executory, see Debtors' Motion For Approval Of The Execution Of Certain Documents With Arch [D.I. 1631] at 7 n.4 ("Under the [Magnum PSA], Magnum has a similar obligation to post a letter of credit equal to the bonds reflected as liabilities on the books and records of Magnum. In order to escape all obligations to post a 100% letter of credit, Magnum would need to reject the [Magnum PSA] as well. The Debtors believe such a rejection would not be in their best interests as they would forfeit valuable indemnification rights contained in the Magnum PSA by rejecting that agreement."); (ii) continuing mutual indemnification obligations, like those in the Magnum PSA, can render an agreement executory, see, e.g., In re Safety-Kleen Corp., 410 B.R. 164, 167-68 (Bankr. D. Del 2009); and (iii) there are mutual continuing obligations with respect to the allocation of property taxes under the Amended and Restated Partial Assignment, see Amended and Restated Partial Assignment § 5.

A. To Read the STB Override Agreement as a Standalone Instrument Would Be Contrary to the “Entire Agreement” Clause in the Asset Purchase Agreement.

42. The only language Robin Land points to in the STB Transaction Agreements in support of its claim that the STB Override Agreement is a standalone agreement—the Entire Agreement Clauses of the STB Transaction Agreements—in fact proves the contrary. Robin Land cites the Entire Agreement Clauses in the STB Override Agreement, the Asset Purchase Agreement and the Leases as proof that such agreements are not integrated, see Motion at 4, 13, but notably does not quote the language of such clauses because to do so would show the misleading nature of this argument. Far from being incompatible with integration, the Entire Agreement Clauses of the Asset Purchase Agreement and the STB Override Agreement support integration.²⁷

43. The Entire Agreement Clause of the Asset Purchase Agreement reads in full:

This Agreement (including the documents referred to herein) and the Confidentiality Agreement constitute the entire agreement of the parties hereto with respect to the subject matter hereof and supersede all prior agreements and understandings, both written and oral.

Asset Purchase Agreement § 9.07 (emphasis added). The STB Override Agreement and the Leases are both captured by this language. The STB Override Agreement is referenced in section 2.02(b)(i) of the Asset Purchase Agreement and the Leases are novation leases of the leases assigned to Ark Land pursuant to the Guyan Lease Assignment (which is referenced in section 2.03(b)(iii) of the Asset Purchase Agreement), which leases are listed in Section 2.01(a)(ii) of the Disclosure Schedule to the Asset Purchase Agreement.

44. The Entire Agreement Clause of the STB Override Agreement reads in full:

²⁷ The Entire Agreement Clauses of the Leases are not inconsistent with the fact that the Entire Agreement Clause of the Asset Purchase Agreement captures such Leases.

This Agreement constitutes the entire agreement and understanding of the parties in respect to the Overriding Royalty specified herein and expresses all the obligations of and the restrictions imposed upon the parties with respect to the Overriding Royalty. All prior agreements, arrangements and understandings of the parties relating to the Overriding Royalty are hereby superseded, and this Agreement shall not be modified, supplemented or changed in whole or in part other than by an agreement in writing signed by all parties hereto or their respective successors or assigns.

STB Override Agreement § 8 (emphasis added). Consistent with the fact that the Entire Agreement Clause of the Asset Purchase Agreement expressly references that the STB Override Agreement as an integrated part of the larger STB Transaction, the Entire Agreement Clause of the STB Override Agreement only states that it contains the agreement of the parties “in respect to the Overriding Royalty specified herein.” As the STB Override Agreement only addresses the overriding royalty, the only way to understand the modifier “in respect to the Overriding Royalty” is with reference to the fact that there are other agreements relating to other aspects of the integrated STB Transaction.

45. Far from proving that these are separate agreements, the Entire Agreement Clause of the STB Override Agreement does not purport to exclude the Asset Purchase Agreement or the Leases, and indeed the STB Override Agreement incorporates terms of both agreements. See STB Override Agreement §§ 1, 2, 3.

B. Robin Land Is Receiving Continuing Consideration Under the STB Override Agreement as It Continues to Mine Coal from the Premises.

46. Robin Land repeatedly asserts throughout its Motion that no party is doing anything for Robin Land in exchange for Robin Land’s payment of the STB Override. See, e.g., Motion at 2-3, 18. To the contrary, Robin Land receives continuing performance under the Leases, which, as articulated above, are integrated with the STB Override Agreement. Robin

Land continues to mine coal from the Premises to this day, Arch Answer ¶¶ 82, 86, and receives performance from STB and Ark Land each time that Robin Land takes a piece of coal out of the ground at the Premises. Absent Robin Land's agreement to pay the relevant portions of the STB Override, Ark Land would not have transferred the right to mine the Premises to Robin Land; and absent Ark Land's earlier agreement to pay the STB Override, the Sellers would not have transferred the right to mine the Premises to Ark Land. *Id.* ¶¶ 57, 81; STB Answer, Counterclaims ¶¶ 17, 26, 43, 45, 51, 53. Absent these agreements, Ark Land and/or the Sellers still could be mining the Premises and enjoying the revenues generated thereby. Further, each time that Robin Land takes coal from the Premises and sells such coal, it generates revenue, revenue that is a benefit to its estate, revenue that constitutes performance from Ark Land and STB, revenue that Ark Land and/or the Sellers could be enjoying and revenue that STB is entitled to share in under the STB Override Agreement.

C. It Is Wholly Artificial to Attempt to Read the STB Override as a Standalone Agreement.

47. From its false premise that no party is performing any obligations for Robin Land in exchange for its agreement to pay the STB Override, Robin Land argues that Arch and STB therefore need one of the other transaction documents to “make” the STB Override Agreement executory. Robin Land then proceeds to review the various transaction agreements for an express cross-default provision addressing the failure to pay the STB Override. Finding none, Robin Land argues that none of the other transaction documents can “make” the STB Override Agreement executory. *See* Motion at 1, 10, 11, 12, 16, 17.

48. This reasoning fails for several reasons. First and foremost, it is wholly artificial to read the STB Override Agreement separately from the other transaction documents and then to argue from such a strained reading that the STB Override Agreement is in fact a standalone

instrument. When Courts decide whether two or more instruments form an integrated whole, they read the relevant instruments together, noting their relationship and analyzing the factors cited in part I.A. above, and then decide whether the parties intended such agreements to be enforceable as a whole; they do not start with the presupposition that one instrument is in fact severable from the others and then ask whether a reading of the other instruments necessarily compels a finding of integration. See, e.g., D.H. Pritchard Contractor, Inc. v. Nelson, 147 F. 2d 939, 942 (4th Cir. 1945); Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433, 438 (W. Va. 1976). Robin Land has not cited a single case supporting their method of contractual construction. In each of the integration cases cited in part I.A. above, the courts read the agreements together, noting their interconnectedness before deciding whether they were integrated. And, even in the integration cases that Robin Land cites, the courts fairly noted the relationships among the various instruments before concluding that they were not integrated. A fair reading of the STB Transaction Agreements is particularly appropriate here, where, on a motion for judgment on the pleadings, the Court should consider the documents as pled by the non-movants, Arch and STB, and draw all inferences in their favor.

49. It is also wholly artificial to attempt to read the STB Override Agreement as a standalone instrument because it incorporates terms of the Asset Purchase Agreement and the Leases on its face. See STB Override Agreement §§ 1 (incorporating defined terms from the Asset Purchase Agreement), 2 (agreement to continue for the term of the Leases), 3 (“Terms and conditions of the Leases shall govern as to royalty determination, late payment penalties, and all similar purposes.”). Further, Robin Land only agreed to pay the STB Override with respect to coal mined and sold from the Premises under the Leases in connection with its assumption of obligations under the Leases; Robin Land did not agree to make these payments out of the

goodness of its heart. Indeed, in the Initial Partial Assignment and the Amended and Restated Partial Assignment, pursuant to which Robin Land assumed obligations under the Kelly-Hatfield Lease, Robin Land expressly agreed to pay the STB Override with respect to coal mined and sold from the assigned portions of the Kelly-Hatfield Premises in the same sentence as it agreed to assume the obligations under the assigned portions of such Lease. See Initial Partial Assignment § 2; Amended and Restated Partial Assignment § 3.

D. If the STB Override Agreement Is a Standalone Instrument, It Is Void for Lack of Consideration.

50. Robin Land also cannot seriously contend that the STB Override Agreement is a standalone agreement because, if it is construed as a standalone agreement, it would be void for lack of mutual consideration and it is hornbook law that a contract should not be interpreted to make it unenforceable. Enforceable contracts require mutual consideration, see, e.g., Dan Ryan Builders, Inc. v. Nelson, 737 S.E.2d 550, 556 (W. Va. 2012) (collecting cases), and courts should not construe contracts in a manner that would make them unenforceable, see, e.g., Hinerman v. Levin, 310 S.E.2d 843, 851 (W. Va. 1983). If the STB Override Agreement is a standalone instrument—separate from the Leases, the Asset Purchase Agreement and the other STB Transaction Agreements—Robin Land has never received any consideration for its agreement to pay the STB Override, much less continuing consideration, a ludicrous assertion given that it has already paid over \$13,000,000 under the STB Override Agreement. See STB Answer, Counterclaims ¶¶ 27, 28. Taking Robin Land's assertion that the STB Override Agreement is a standalone instrument to its logical conclusion would require this Court to construe the STB Override Agreement in a manner that would make it unenforceable for a lack of mutual consideration. As acknowledged on the face of the STB Override Agreement, it was given in consideration of the Asset Purchase Agreement—the continuing right to mine coal from the

Premises under the Leases, a right that Robin Land enjoys on a continuing basis today. See STB Override Agreement, Now Therefore Clause (acknowledging that the STB Override Agreement was given in consideration of the mutual covenants and agreements in the Asset Purchase Agreement).

E. The STB Override Agreement Is Not a Promissory Note.

51. Robin Land's repeated attempts to analogize the STB Override Agreement to a promissory note also fail. See Motion at 11-12. Promissory notes are unconditional obligations that, by definition, bind the obligor regardless of whether the obligor continues to benefit from the transaction. See, e.g., Arnold v. Palmer, 686 S.E.2d 725, 732 (W. Va. 2009) ("A promissory note is an unconditional written promise, signed by the maker, to pay absolutely and in any event a certain sum of money either to, or to the order of, the bearer or a designated person.") (citations omitted). Here, as discussed above, Robin Land is receiving consideration from Arch and STB on a continuous basis. Each time that Robin Land sells a piece of coal mined from the Premises, it generates revenue—a benefit to it. Additionally, the STB Override Agreement is not an unconditional burden on Robin Land; arguably, the STB Override Agreement does not have to burden Robin Land at all. The STB Override is a royalty on coal mined and sold from the Premises; the STB Override Agreement does not impose any obligation on Robin Land to mine the Premises. See STB Override Agreement §§ 3, 5. Robin Land is only burdened by the STB Override Agreement if it chooses to mine the Premises and actually sells the coal that it mines from the Premises. The obligation to pay the STB Override is not an absolute obligation like the obligation under a promissory note. See Arnold, 686 S.E.2d at 732. Moreover, because Robin Land chooses to mine the Premises, it has presumably determined that it is profitable for it to do so, notwithstanding its obligation to pay the STB Override. Because the STB Override

Agreement is not a promissory note, Robin Land's reliance on In re Union Financial Services Group, Inc., 325 B.R. 816 (Bankr. E.D. Mo. 2004), aff'd 155 Fed. Appx. 940 and In re Craig, 144 F.3d 593 (8th Cir. 1997), cases involving the integration of promissory notes, cannot support its arguments.²⁸

F. If the STB Override Agreement Is Integrated with the Leases, Arch Has a Common Law Right to Withhold Performance Under the Leases.

52. Finally, Robin Land attempts to manufacture evidence of a lack of intent to integrate by arguing that because there are no express cross-default provisions referencing the STB Override Agreement in the various transaction documents, failure to pay the STB Override cannot result in a default. However, not only is this not the test for integration, but Robin Land's argument ignores the fact that, because the STB Transaction Agreements are integrated, there is a common law right to withhold performance under the Leases if Robin Land breaches the STB Override Agreement. See, e.g., Milner Hotels, Inc. v. Norfolk & Western Ry. Co., 822 F. Supp. 346, 347 (S.D. W. Va. 1993), aff'd 19 F.3d 1429 (finding that the material breach by one party to

²⁸ Moreover, the facts of both Union and Craig are distinguishable from the facts of the present case. In Union, a creditor argued that a promissory note was integrated with an asset purchase agreement and/or an employment agreement that were deemed assumed under a confirmed chapter 11 plan such that the debtor would be required to cure the defaults under the note as an administrative expense of the debtor's estate. Judge Schermer disagreed on facts that are clearly distinguishable from our case. The note in Union expressly anticipated the bankruptcy filing and was expressly subordinated to all claims against the debtor, whether arising before or after the bankruptcy filing. Union, 325 B.R. at 818-19. Moreover, the claim with respect to such note was expressly deemed a general unsecured claim under the debtor's confirmed chapter 11 plan, which plan the claimant did not object to. Id. at 820. Judge Schermer found that "the language of the Plan could not be more clear" and that "[t]he Claim is specifically defined in the Plan and is expressly included in Class 5A as a general unsecured claim." Id. at 821. Judge Schermer ultimately concluded that the claimant got "the benefit of the bargain he made . . . an unsecured claim subordinated to all other obligations of [the debtor]." Id. at 824. The claimant in Union had attempted to argue integration to get around the express language of a confirmed chapter 11 plan and to give himself an administrative claim on a note that he had expressly agreed to subordinate to all other claims against the debtor.

The Craig court's analysis of the integration of the promissory note at issue with the other transaction documents in that case spans a total of one sentence: "Nothing in any of the documents suggests that the validity of the . . . note was contingent upon the performance of [the debtor's] duties under the other contracts." In re Craig, 144 F.3d at 596. Here, the various transaction documents clearly demonstrate that Robin Land's right to mine coal from the Premises is contingent on its obligation to pay the STB Override with respect to such coal. Among other things, the delivery and execution of the STB Override Agreement was a condition to the closing of the STB Transaction. See Asset Purchase Agreement §§ 2.03(c)(ii), 7.01(d).

a contract excused the performance of the other party prior to the termination of such contract). Moreover, because the STB Override Agreement is integrated with the Leases, the nonpayment of the STB Override is a default under section 15 of the Leases. Because the nonpayment of the STB Override constitutes a default of the Kelly-Hatfield Lease under section 15 of such lease, Ark KH—the lessor with respect to the Kelly-Hatfield Premises and one of the defendants here—is entitled to enforce remedies against Robin Land under the Kelly-Hatfield Lease. See Kelly-Hatfield Lease § 15.

III. Extrinsic Evidence, as Alleged in the Pleadings, Clearly Supports the Position that the Parties to the STB Transaction Agreements Intended that the Obligation to Pay the STB Override Be Integrated with the Right to Mine Coal from the Premises Under the Leases.

53. As demonstrated above, the language of the various transaction documents clearly supports Arch’s contention that Robin Land’s obligation to pay the relevant portions of the STB Override is integrated with its rights under the Leases. Arch notes, however, that extrinsic evidence is admissible to interpret the relevant transaction documents even if this Court finds such documents to be unambiguous, a decision which the Court is entitled to make in light of the surrounding circumstances. See Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 468 S.E.2d 712, 716, 718 n.8 (W. Va. 1996) (relying on extrinsic evidence to support the Court’s interpretation of an unambiguous contract and stating that “[a] contract is ambiguous when is it reasonably susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction) (emphasis added) (citations omitted); Wood County Airport Auth. v. Crown Airways, Inc., 919 F. Supp. 960, 967 (S.D. W.Va. 1996) (relying on extrinsic evidence to determine that a contract was unambiguous).²⁹ Here, Arch and STB

²⁹ See also Gibson v. Harl, 857 S.W.2d 260, 269-70 (Mo. App. 1993) (“The parol evidence rule as a principle of substantive law prohibits the contradiction of integrated contracts. It simply does not apply to parol testimony

have clearly pled (i) that the parties to the STB Transaction intended such transaction to be an integrated whole such that the obligation to pay the STB Override is integrated with the right to mine the Premises under the Leases and (ii) that Ark Land and Robin Land likewise understood the obligation to pay the STB Override to be integrated with the right to mine coal from the Premises under the Leases when Robin Land was assigned such Leases. See, e.g., Arch Answer ¶¶ 48, 62, 66. In addition to being required to take the allegations pled by Arch and STB as true when deciding Robin Land's Motion, see, e.g., Mills v. City of Grand Forks, 614 F.3d 495, 497-98 (8th Cir. 2010), doing so is consistent with these general principles of contract law.³⁰

IV. Arch's Counterclaims Should Not Be Dismissed.

54. There is no basis for Robin Land's motion to dismiss Arch's counterclaims. First, Robin Land argues that this Court should dismiss Arch's counterclaims as redundant of Robin Land's claims. But, as an initial matter, such dismissal is discretionary; and where, as here, the court is faced with a motion for judgment on the pleadings and the moving party has filed incomplete and inaccurate pleadings, it would be particularly inappropriate to dismiss the counterclaims and deny the Court relevant information. Moreover, courts only consider dismissing declaratory judgment counterclaims when there is a complete identity of the issues raised in the plaintiff's claims and the defendant's claims such that a decision on the plaintiff's

that does not contradict the certain terms of an integrated agreement.") (citations omitted); Wheelhouse Marina Real Estate, LLC v. Bommarito, 284 S.W.3d 761, 770-71 (Mo. App. 2009) (same).

³⁰ To the extent that Robin Land's novel construction of the STB Override Agreement uncovers a latent ambiguity in such contracts, further development of a detailed record through discovery is necessary. See, e.g., Zimmerer v. Romano, 679 S.E.2d 601, 611 (W. Va. 2009); Kopf v. Lacey, 540 S.E.2d 170, 175 (W. Va. 2000) ("A latent ambiguity, which does not appear upon the face of the document, however, may be created by intrinsic facts or extraneous evidence. To resolve a latent ambiguity, parol evidence may be admitted."). Additionally, extrinsic evidence is always admissible to determine whether a valid contract exists in the first instance. See, e.g., Hamon v. Akers, 222 S.E.2d 822, 825 (W. Va. 1976). As articulated above, Robin Land's construction of the STB Override Agreement suggests that the STB Override Agreement is not a valid contract for lack of mutual consideration. Extrinsic evidence is admissible to show whether the STB Override Agreement is in fact a valid contract and in support of Arch's unjust enrichment and constructive trust counterclaims. In any event, if this Court finds any ambiguity in the contracts, extrinsic evidence of the parties' intent with respect to such contracts clearly will be admissible. See, e.g., Frederick Mgmt. Co. v. City Nat'l Bank of W. Va., 723 S.E.2d 277, 288 (W. Va. 2010).

claim will necessarily render the defendant's claim moot. See Handi-Craft Co. v. Travelers Casualty and Surety Co., No. 4:12CV63, 2012 WL 1432566, at *3 (E.D. Mo. April 25, 2012); Fidelity Nat'l Title Ins. Co. v. Captiva Lake Inv., LLC, 788 F. Supp. 2d 970, 973 (E.D. Mo. 2011) (“[T]he safer course for the court to follow is to deny a request to dismiss a counterclaim for declaratory relief unless there is no doubt that it will be rendered moot by the adjudication of the main action.”); Cairo Marine Serv. v. Homeland Ins. Co., No. 4:09CV1492CDP, 2010 WL 4614693, *1 (E.D. Mo. Nov. 4, 2010).

55. Here, there is no such complete identity of Robin Land's and Arch's claims. Among other things, (i) as set forth above, Arch's counterclaims clarify material omissions in the Complaint; (ii) Arch's counterclaims seek an express finding that the obligations under the STB Override Agreement are integrated with the rights under the Leases such that Robin Land is required to honor its obligations to pay the relevant portions of the STB Override under section 365(d)(3) of the Bankruptcy Code pending assumption or rejection of the Leases or to cure its defaults under the STB Override Agreement under section 365(b) of the Bankruptcy Code, if such Leases are assumed by Robin Land; and (iii) Arch's counterclaims that the obligation to pay the STB Override Agreement runs with the land and that Robin Land is unjustly enriched if it is able to continue to mine the Premises without paying the relevant portions of the STB Override, such that the relevant revenues are held in constructive trust for the benefit of STB and Arch, are equitable remedies and accordingly are not redundant of Robin Land's legal declaratory judgment claim.³¹

³¹ Additionally, as described above, Robin Land's implausible construction of the STB Override Agreement suggests that it is not a valid contract because of a failure of mutual consideration. If this Court were to accept such construction—which it should not—any argument by Robin Land that the doctrine of unjust enrichment and the remedy of constructive trust are precluded by the express contracts between the parties must fail. Moreover, if the STB Override Agreement is integrated with the Leases, as Arch has alleged that it is, any argument that the obligation to pay the STB Override cannot run with the land because it is not an obligation of a lease must also fail.

56. Finally, Arch's Third Counterclaim for Post-Petition Breach of Robin Land's obligation to pay the STB Override should not be dismissed. If, as alleged by Arch, Robin Land's agreement to pay the STB Override is integrated with its rights under the Leases, Robin Land is required to pay the STB Override under section 365(d)(3) of the Bankruptcy Code pending assumption or rejection of the Leases and, if the Leases are assumed, to cure its defaults under the STB Override Agreement under section 365(b) of the Bankruptcy Code and to perform under the STB Override Agreement in the ordinary course of business following such assumption. Moreover, because Robin Land continues to benefit from the mining of the Premises—which mining is occurring post-petition—any claim for the breach of the obligation to pay the STB Override with respect to coal mined and sold post-petition is a necessary cost of preserving Robin Land's estate under section 503(b)(1)(A) of the Bankruptcy Code. Robin Land's assertion that claims under prepetition non-executory contracts are prepetition claims is simply irrelevant to these arguments, and ignores the fact that this Court may ultimately hold that such agreements are executory, through integration with the Leases or otherwise. As Robin Land's own cases point out, claims arising under executory contracts in the post-petition, pre-assumption period may be entitled to administrative priority if the debtor, as here, benefits from such contract. See, e.g., In re FBI Distrib. Corp., 330 F.3d 36, 42-43, 43-44 (1st Cir. 2003).

[Remainder of Page Intentionally Left Blank]

Conclusion

WHEREFORE, Arch respectfully requests that the Court deny Robin Land's Motion and grant such other relief as the Court deems just and proper.

Dated: New York, New York
April 9, 2013

Respectfully submitted,

CLEARY GOTTlieb STEEN & HAMILTON LLP

By /s/Avram E. Luft

Sean A. O'Neal
Avram E. Luft
One Liberty Plaza
New York, New York 10006
Telephone: (212) 225-2000
Facsimile: (212) 225-3999

LEWIS, RICE & FINGERSH, L.C.
Joseph J. Trad, #32540MO
John J. Hall, #41419MO
600 Washington Avenue, Suite 2500
St. Louis, Missouri 63101
Telephone: (314) 444-7600
Facsimile: (314) 612-7635

*Counsel for Arch Coal, Inc., Ark Land Company
and Ark Land KH, Inc.*