

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

**In re:**

**PATRIOT COAL CORPORATION, *et al.*,**

**Debtors.**

**Chapter 11**

**Case No. 12-51502-659**

**(Jointly Administered)**

**Opposition Deadline:**

**March 25, 2013 at 11:59 p.m.**

**(prevailing Central Time)**

**Reply Deadline:**

**April 8, 2013 at 11:59 p.m.**

**(prevailing Central Time)**

**Hearing Date:**

**April 23, 2013 at 10:00 a.m.**

**(prevailing Central Time)**

**Hearing Location:**

**Courtroom 7 North**

**ROBIN LAND COMPANY, LLC,**

**Plaintiff,**

**v.**

**STB VENTURES, INC.,**

**Defendant,**

**ARCH COAL, INC., ARK LAND COMPANY,  
and ARK LAND KH, INC.,**

**Intervenor-Defendants.**

**Adv. Pro. No. 12-04355-659**

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF  
ITS MOTION FOR JUDGMENT ON THE PLEADINGS  
AND MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS**

**TABLE OF CONTENTS**

---

	<u>PAGE</u>
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS .....	3
A. Origin of the STB Override .....	3
B. Ark Land Assigns the Leases and the STB Override to Robin Land .....	4
C. Procedural History .....	7
APPLICABLE STANDARD AND GOVERNING LAW .....	8
A. Rule 12(c) Standard .....	8
B. Governing Law .....	8
ARGUMENT .....	10
POINT I. THE STB OVERRIDE IS NOT AN EXECUTORY CONTRACT .....	10
POINT II. NO OTHER CONTRACT MAKES THE STB OVERRIDE EXECUTORY .....	10
A. The 1994 Asset Purchase Agreement Does Not Make the STB Override Executory .11	
B. The Lawson Heirs and Kelly-Hatfield Leases Do Not Make the STB Override Executory .....	12
C. The Assignments Do Not Make the STB Override Executory .....	16
D. The Magnum PSA Does Not Make the STB Override Executory .....	17
POINT III. THE DEFENDANTS’ COUNTERCLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED .....	19
A. Defendants’ Declaratory Judgment Claims Should Be Dismissed As Moot .....	19
B. STB’s Remaining Counterclaims Are for Amounts Due Under a Prepetition Contract .....	20
C. Arch’s Remaining Counterclaims Are for Amounts Allegedly Due Under a Prepetition Contract .....	21
CONCLUSION .....	22

**TABLE OF AUTHORITIES**

---

	<u>PAGE</u>
<u>Acorn Structures, Inc. v. Swantz,</u> 846 F.2d 923 (4th Cir. 1988) .....	21
<u>Ametex Fabrics, Inc. v. Just In Materials, Inc.,</u> 140 F.3d 101 (2d Cir. 1998).....	16
<u>Amtech Lighting Servs. Co. v. Payless Cashways, Inc. (In re Payless Cashways),</u> 203 F.3d 1081 (8th Cir. 2000) .....	9
<u>Amwest Sur. Ins. Co. v. Concord Bank,</u> No. 4:00-CV-1988 (SNL), 2003 WL 553229 (E.D. Mo. Feb. 4, 2003) .....	20
<u>In re ANC Rental Corp. Inc.,</u> 277 B.R. 226 (Bankr. D. Del. 2002) .....	17
<u>Auto-Chlor Sys. of Minn., Inc. v. JohnsonDiversey,</u> 328 F. Supp. 2d 980 (D. Minn. 2004).....	16
<u>Bellon v. TSA Stores, Inc.,</u> No. 4:06-CV-01504 (ERW), 2010 WL 2553610 (E.D. Mo. June 23, 2010).....	21
<u>Blake v. State Farm Mut. Auto. Ins. Co.,</u> 685 S.E.2d 895 (W. Va. 2009).....	9
<u>Bradbury v. Network Enters, Inc.,</u> No. 4:12-CV-575 (CEJ), 2013 WL 587884 (E.D. Mo. Feb. 13, 2013) .....	20, 21
<u>Bright v. QSP, Inc.,</u> 20 F.3d 1300 (4th Cir. 1994) .....	20, 21
<u>Cameron v. Pfaff Plumbing &amp; Heating Inc.,</u> 966 F.2d 414 (8th Cir. 1992) .....	8
<u>Citibank v. Tele/Resources, Inc.,</u> 724 F.2d 266 (2d Cir. 1983).....	16
<u>Curtis v. Union Fin. Servs. Grp., Inc. (In re Union Fin. Servs. Grp., Inc.),</u> 155 F. App'x 940 (8th Cir. 2005) .....	11, 12
<u>Elliott v. Richter,</u> 496 S.W.2d 860 (Mo. 1973) .....	13

<u>Erwin v. City of Palmyra,</u> 119 S.W.3d 582 (Mo. Ct. App. 2003).....	9
<u>Exec. Bd. of Mo. Baptist Convention v. Carnahan,</u> 170 S.W.3d 437 (Mo. Ct. App. 2005).....	9
<u>Faibisch v. Univ. of Minn.,</u> 304 F.3d 797 (8th Cir. 2002) .....	8
<u>In re Food Barn Stores, Inc.,</u> 175 B.R. 723 (Bankr. W.D. Mo. 1994).....	21
<u>Four-Three-O-Six Duncan Corp. v. Sec. Trust Co.,</u> 372 S.W.2d 16 (Mo. 1963) .....	13
<u>In re Gardinier, Inc.,</u> 831 F.2d 974 (11th Cir. 1987) .....	14, 17
<u>GMAC Commercial Credit LLC v. Springs Indus., Inc.,</u> 171 F. Supp. 2d 209 (S.D.N.Y. 2001).....	17
<u>In re Go Fig Inc.,</u> No. 08-40116-705, 2009 WL 537090 (Bankr. E.D. Mo. Feb. 5, 2009) .....	15
<u>Hardee’s Food Sys. v. Hallbeck,</u> 776 F. Supp. 2d 949 (E.D. Mo. 2011).....	19
<u>Howard v. Nicholson,</u> 556 S.W.2d 477 (Mo. Ct. App. 1977).....	12
<u>In re Integrated Health Servs., Inc.,</u> No. 00-389, 2000 WL 33712484 (Bankr. D. Del. July 7, 2000) .....	13, 14
<u>JA Apparel Corp. v. Abboud,</u> 568 F.3d 390 (2d Cir. 2009).....	9
<u>Jenson v. Cont’l Fin. Corp.,</u> 591 F.2d 477 (8th Cir. 1979) .....	1
<u>Kaler v. Craig (In re Craig),</u> 144 F.3d 593 (8th Cir. 1998) .....	9, 10, 12
<u>Keller v. Bass Pro Shops, Inc.,</u> 15 F.3d 122 (8th Cir. 1994) .....	21

<u>Lewis Bros. Bakeries Inc. &amp; Chicago Baking Co. v. Interstate Brands Co.</u> <u>(In re Interstate Bakeries Corp.)</u> , 690 F.3d 1069 (8th Cir. 2012) .....	2, 8, 10, 19
<u>Lion Oil Co. v. Tosco Corp.</u> , 90 F.3d 268 (8th Cir. 1996) .....	8
<u>Livonia Prop. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC</u> , 717 F. Supp. 2d 724 (E.D. Mich. 2010), <u>aff'd</u> , 399 F. App'x 97 (6th Cir. 2010).....	17
<u>McIntosh v. Vail</u> , 28 S.E.2d 607 (W. Va. 1943).....	16
<u>Managed Health Care Assocs. v. Kethan</u> , 209 F.3d 923 (6th Cir. 2000) .....	17
<u>In re Manville Forest Prods. Corp.</u> , 209 F.3d 125 (2d Cir. 2000).....	21
<u>Mason v. Official Comm. of Unsecured Creditors (In re FBI Distrib. Corp.)</u> , 330 F.3d 36 (1st Cir. 2003).....	20, 21
<u>McDaniel v. Kleiss</u> , 503 S.E.2d 840 (W. Va. 1998).....	9, 13
<u>Med. Shoppe Int'l, Inc. v. J-Pral Corp.</u> , 662 S.W.2d 263 (Mo. Ct. App. 1983).....	16
<u>Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc.</u> , 247 F.3d 44 (3d Cir. 2001).....	17
<u>In re Montgomery Ward Holding Corp.</u> , 268 F.3d 205 (3d Cir. 2001).....	15
<u>In re Optical Techs., Inc.</u> , 425 F.3d 1294 (11th Cir. 2005) .....	17
<u>Phillips v. Marist Soc'y of Wash. Province</u> , 80 F.3d 274 (8th Cir. 1996) .....	9
<u>Steele v. McCargo</u> , 260 F.2d 753 (8th Cir. 1958) .....	9
<u>Stephens v. Bartlett</u> , 191 S.E. 550 (W. Va. 1937).....	9

PAGE

Stewart Foods, Inc. v. Broecker (In re Stewart Foods, Inc.),  
64 F.3d 141 (4th Cir. 1995) .....20, 21

Syverson v. FirePond, Inc.,  
383 F.3d 745 (8th Cir. 2004) .....8

In re Union Fin. Servs. Grp., Inc., 325 B.R. 816 (Bankr. E.D. Mo. 2004),  
aff'd per curiam 155 F. App'x 940 (8th Cir. 2005) .....9, 10, 11

United States ex rel. Agricultural Stabilization & Conservation Serv. v. Gerth,  
991 F.2d 1428 (8th Cir. 1993) .....20, 21

STATUTES & RULES

11 U.S.C. § 365.....1, 2, 3, 8, 10, 11, 15, 17, 18, 19, 22

11 U.S.C. § 365(d)(3) .....15

11 U.S.C. § 503(b)(1)(A).....20

Fed. R. Civ. P. 12(b)(6).....1, 19

Fed. R. Civ. P. 12(c) .....1, 8

OTHER AUTHORITIES

28 N.Y. Prac., Contract Law § 15:1 (2013).....17

58 Am. Jur. 2d Novation § 19 (2013).....3

Plaintiff Robin Land Company, LLC (“**Robin Land**”), one of the affiliated debtor entities in the above-captioned chapter 11 case, respectfully submits this memorandum of law in support of its motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) and its motion to dismiss the Defendants’ counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(6).

### **PRELIMINARY STATEMENT**

In this action, Robin Land seeks a declaration that the Overriding Royalty Agreement dated October 31, 1994 (“**STB Override**”)<sup>1</sup> is not an executory contract under 11 U.S.C. § 365. The contract requires Robin Land to pay royalties to Defendant STB Ventures, Inc. (“**STB Ventures**”) based on sales of coal mined from certain West Virginia coal reserves. STB owes no performance to Robin Land in return. There can be no dispute that the STB Override, standing alone, is not an executory contract under Section 365, because performance is not due on both sides of the contract. Accordingly, it would be unlawful for Robin Land to pay the STB Override because doing so “would not benefit the estate but 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 only dispute here is whether the STB Override is made executory by some other contract. STB argues that the STB Override is transformed into an executory contract by (i) the 1994 Asset Purchase Agreement, (ii) the Leases, (iii) the Assignments, and/or (iv) the Magnum PSA (all of which are defined below).

The argument fails for a simple reason: no party to these contracts is performing ongoing contractual obligations on the condition that Robin Land pay the STB Override. There is no

---

<sup>1</sup> The STB Override is attached to the Complaint as Exhibit A.

party that can stop performing its contract if Robin Land stops paying the STB Override. In fact, the Leases are the only contracts under which performance remains due to Robin Land, and the STB Override is not an obligation of the Leases. As a matter of law, therefore, the STB Override cannot be made executory by any other contract. See Lewis Bros. Bakeries Inc. & Chicago Baking Co. v. Interstate Brands Co. (In re Interstate Bakeries Corp.), 690 F.3d 1069, 1073 (8th Cir. 2012) (holding that a contract is “executory” under Section 365 only if one party’s failure to perform “would constitute a material breach excusing the performance of the other”).

Arch Coal, Inc. (“**Arch**”), Ark Land Company (“**Ark Land**”), and Ark Land KH, Inc. (“**Ark Land KH**”) intervened in this action solely because STB previously threatened to sue Arch under a Guaranty (defined below) if Robin Land stopped paying the STB Override. The Arch intervenors cannot suffer any direct harm if Robin Land stops paying the STB Override, because the payments under the contract are owed to STB alone. The Arch intervenors could face harm only if STB sues them on the Guaranty (in which case, the Arch intervenors assert that they will have claims against Robin Land under alleged prepetition contractual indemnities). Notably, STB did not assert a cross-claim against the Arch intervenors in this action. The condition required for the Arch intervenors to have any standing in this action is therefore hypothetical, if not completely moot. But putting their lack of standing aside, the Arch intervenors do not advance any arguments that can make the STB Override executory. Like STB, the Arch intervenors perform no contractual obligations for Robin Land in exchange for Robin Land paying the STB Override.

The STB Override is a one-way payment obligation. It is the classic example of a non-executory contract that has no benefit to the estate. There is no party that is doing anything for Robin Land in exchange for Robin Land’s payment of the STB Override. Not STB. Not Arch.



Not the lessors of the coal reserves subject to the STB Override. Not anyone else. The STB Override is therefore not an executory contract under Section 365 as a matter of law.

### **STATEMENT OF FACTS**

#### **A. Origin of the STB Override**

On October 31, 1994, STB and others (the “**Sellers**”) entered into an Asset Purchase Agreement (the “**1994 Asset Purchase Agreement**”)² with Ark Land and Apogee Coal Company (“**Apogee**”), both then subsidiaries of Arch. (1994 Asset Purchase Agreement, at 1.) The Sellers agreed to convey all of their assets that related to the development of certain coal reserves in West Virginia (the “**Guyan Property**”). (*Id.* at 1, § 2.01.) The assets included real property, leases, and equipment, among other things. (*Id.* § 2.01.) As consideration, Ark Land and Apogee agreed in the 1994 Asset Purchase Agreement to (i) pay a cash purchase price to the Sellers, (ii) assume certain liabilities, and (iii) “execute and deliver” four separate agreements attached as exhibits, including the STB Override. (*Id.* § 2.02.) Neither STB nor any of the other Sellers has any performance remaining under the 1994 Asset Purchase Agreement.

The STB Override required Ark Land to pay STB an “overriding royalty” on sales of coal mined from the Guyan Property. (STB Override ¶ 3.) The Sellers assigned their leases covering the Guyan Property to Ark Land with the contemplation that Ark Land would then enter into two novated leases with the respective lessors, Kelly-Hatfield Land Company (“**Kelly-Hatfield**”) and Lawson Heirs, Inc. (“**Lawson Heirs**”). (See 1994 Asset Purchase Agreement § 2.01(a)(ii); STB Override, at 1-2.) A “novated” lease wholly replaces and supersedes the one that preceded it.

58 Am. Jur. 2d Novation § 19 (2013). STB thus had no interest in – or liability for – the novated

---

<sup>2</sup> The 1994 Asset Purchase Agreement is attached to the Complaint as Exhibit B.

leases with Lawson Heirs and Kelly-Hatfield. It became a stranger to the leases. Ark Land entered into the new leases with Kelly-Hatfield and Lawson Heirs on October 31, 1994:

- The Combined, Amended and Restated Coal Lease dated October 31, 1994 between Lawson Heirs and Ark Land (the “**Lawson Heirs Lease**”);<sup>3</sup> and
- The Combined, Amended and Restated Coal Lease dated October 31, 1994 between Kelly-Hatfield and Ark Land (the “**Kelly-Hatfield Lease**”)<sup>4</sup> and, together with the Lawson Heirs Lease, the “**Leases**”).

Payment of the STB Override is not a requirement of either Lease. Each Lease specifies the rent (in the form of royalties) that must be paid to Lawson Heirs and Kelly-Hatfield, respectively, and the rent does not include payment of the STB Override. (Lawson Heirs Lease §§ 6-7; Kelly-Hatfield Lease §§ 6-7.) Indeed, neither Lease even mentions the STB Override. Not surprisingly, failure to pay the STB Override Agreement is not among the events of default enumerated in either Lease. (Lawson Heirs Lease § 15; Kelly-Hatfield Lease § 15.)

The 1994 Asset Purchase Agreement, the STB Override, and the Leases each include merger clauses that provide that each is the “entire agreement” with respect to the contract’s subject matter. (1994 Asset Purchase Agreement § 9.07; STB Override ¶ 8; Lawson Heirs Lease § 25; Kelly-Hatfield Lease § 25.)

**B. Ark Land Assigns the Leases and the STB Override to Robin Land**

On December 31, 2005, Arch entered into a Purchase and Sale Agreement (the “**Magnum PSA**”)<sup>5</sup> with Magnum Coal Company (“**Magnum**”), which was owned by affiliates of ArcLight Capital Partners, LLC, an investment firm. (See Magnum PSA, at 1.) In

---

<sup>3</sup> The Lawson Heirs Lease is attached to the Complaint as Exhibit D.

<sup>4</sup> The Kelly-Hatfield Lease is attached to the Complaint as Exhibit E.

<sup>5</sup> The Magnum PSA is attached to the Answer and Counterclaims of Arch Coal, Inc., Ark Land Company and Ark Land KH, Inc. (“**Arch Answer**”) as Exhibit 5.

conjunction with the Magnum PSA, Arch agreed to form Robin Land, contribute various assets to it, and then sell the membership interests in Robin Land to Magnum. (Id.) Arch caused its subsidiary Ark Land to assign the contracts at issue here to Robin Land as follows:

First, in an Assignment and Assumption Agreement dated December 30, 2005 (the “**Ark Land Assignment**”)<sup>6</sup>, Ark Land assigned the Lawson Heirs Lease, the STB Override, and numerous other contracts to Robin Land. (Ark Land Assignment, at 1.) The Schedule to the Ark Land Assignment lists the STB Override as a separate agreement with a unique “Contract No.” (Id. Schedule 1, at 16.) Pursuant to the Ark Land Assignment, Robin Land agreed to assume all of Ark Land’s obligations under the contracts. (Id. ¶ 2.) Robin Land also agreed to “indemnify and hold [Ark Land] harmless from any liability, expense or loss arising out of or in connection with the Leases.” (Id.) Ark Land claims that this contractual indemnity covers the STB Override. Ark Land has no performance remaining under the Ark Land Assignment.

Second, in a Partial Assignment and Assumption of Lease dated December 31, 2005 (though executed on December 30, 2005), Ark Land assigned a portion of the Kelly-Hatfield Lease to Robin Land (the “**Initial Partial Assignment**”).<sup>7</sup> (Initial Partial Assignment, at 1, 3-5.) Ark Land assigned to Robin Land all of Ark Land’s rights, title, and interest under the Kelly-Hatfield Lease with respect to the assigned portion of the Lease. (Id. ¶ 1.) Robin Land agreed to assume Ark Land’s obligations under the Lease. (Id. ¶ 2.) Robin Land also assumed “the obligation to pay the ‘STB Override’ to the extent that the STB Override applies to coal mined from the Assigned Lease Portion of the Premises.” (Id.) Robin Land agreed to indemnify Ark Land for losses related to the assigned portion of the Kelly-Hatfield Lease. (Id.)

---

<sup>6</sup> The Ark Land Assignment is attached to the Complaint as Exhibit F.

<sup>7</sup> The Initial Partial Assignment is attached to the Arch Answer as Exhibit 2.

The Ark Land Assignment and the Initial Partial Assignment were both executed on December 30, 2005, when both Robin Land and Ark Land were affiliates of Arch. (Ark Land Assignment, at 4-5; Initial Partial Assignment, at 3-5.) Gregory Billhartz, a lawyer in the General Counsel's Office at Arch, signed the contracts on behalf of Robin Land. (Ark Land Assignment, at 3, 5; Initial Partial Assignment, at 3, 5.) Billhartz is identified as the Secretary of Robin Land. (Ark Land Assignment, at 3, 5; Initial Partial Assignment, at 3, 5.) The next day, Arch sold the membership interests in Robin Land to Magnum pursuant to the Magnum PSA. (Magnum PSA, at 1.) Arch owes no performance obligations to Robin Land under the Magnum PSA.

On May 22, 2007, Ark Land and Robin Land entered into an Amended and Restated Partial Assignment and Assumption of Lease (the "**Amended Partial Assignment**"<sup>8</sup> and, together with the Ark Land Assignment and the Initial Partial Assignment, the "**Assignments**") that replaced the Initial Partial Assignment. (Amended Partial Assignment, at 1-2.) Ark Land assigned its rights, title, and interest in an additional portion of the Kelly-Hatfield Lease to Robin Land. (Id.) Robin Land assumed Ark Land's obligations under the Kelly-Hatfield Lease and also agreed to pay the STB Override, which had been assigned by the Ark Land Assignment, to the extent it applied to coal mined from the assigned portion of the Kelly-Hatfield Lease. (Id. ¶ 3.) Ark Land KH, which had succeeded Kelly-Hatfield as lessor, was a party to the Amended Partial Assignment solely to evidence its consent to the assignment of the lease. (See id. at 4.) Robin Land agreed to indemnify Ark Land for losses related to the Kelly-Hatfield Lease. (Id. at ¶ 3.) Ark Land has no remaining performance obligations under the Assignments.

---

<sup>8</sup> The Amended Partial Assignment is attached to the Arch Answer as Exhibit 3.

On July 23, 2008, Patriot Coal Corporation acquired Magnum. Robin Land is now one of the affiliated debtors in this chapter 11 case.

**C. Procedural History**

Robin Land filed this action on August 10, 2012, seeking a declaratory judgment that the STB Override is not an executory contract for purposes of Section 365 and is not made executory by any other agreement. On September 17, 2012, STB filed a motion to dismiss for failure to join Ark Land and Ark Land KH as necessary parties.

On November 28, 2012, more than three months after Robin Land filed the Complaint, Arch filed a motion to intervene. Arch claimed that it had previously executed a Guaranty<sup>9</sup> that STB contends will require Arch to indemnify STB if Robin Land fails to pay the STB Override. Arch therefore claimed to have an interest in this litigation. On December 10, 2012, Robin Land filed a response stating that it did not oppose the motion to intervene, but reserved all of its rights.

On January 15, 2013, the Debtors filed a motion to assume or reject unexpired leases of nonresidential real property (the “**Real Property Motion**”). The motion sought, among other things, to assume the Lawson Heirs Lease and the Kelly-Hatfield Lease. On January 22, 2013, STB and Arch objected to the Real Property Motion on the ground that Robin Land must also assume the STB Override if it assumes the Lawson Heirs Lease and the Kelly-Hatfield Lease. On the same day, Lawson Heirs filed a limited objection to the motion as well (the “**Lawson Heirs Objection**”), but Lawson Heirs did not contend – as Arch and STB did – that the STB Override is an obligation of the STB Override. Lawson Heirs withdrew its Objection on

---

<sup>9</sup> The Guaranty is attached to the Arch Answer as Exhibit 4.

February 18, 2013. The objections asserted by Arch and STB will be resolved in this adversary proceeding.

On February 19, 2013, Arch and STB each filed an answer and counterclaims. STB did not file any cross claims against Arch under the Guaranty.

### **APPLICABLE STANDARD AND GOVERNING LAW**

#### **A. Rule 12(c) Standard**

A motion for judgment on the pleadings pursuant to Rule 12(c) may be granted “where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law.” Faibisch v. Univ. of Minn., 304 F.3d 797, 803 (8th Cir. 2002). The Court may resolve a contractual dispute on a motion for judgment on the pleadings when the contract is unambiguous. See Syverson v. FirePond, Inc., 383 F.3d 745, 750 (8th Cir. 2004) (affirming grant of motion for judgment on pleadings on breach of contract claim); Lion Oil Co. v. Tosco Corp., 90 F.3d 268, 270 (8th Cir. 1996) (affirming grant of judgment on the pleadings based on interpretation of “clear, unequivocal and unambiguous” contract language).

#### **B. Governing Law**

Whether a contract is executory for purposes of Section 365 is a question of federal law. In re Interstate Bakeries Corp., 690 F.3d at 1074; Cameron v. Pfaff Plumbing & Heating Inc., 966 F.2d 414, 416 (8th Cir. 1992). As noted above, a contract is executory only if “the obligation of both the bankrupt and the other party to the contract are so far underperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.” In re Interstate Bakeries Corp., 690 F.3d at 1073 (internal quotation marks and citation omitted).

The Defendants claim that the STB Override is made executory because it is integrated with one or more separate contracts. State law governs whether separate contracts are integrated

such that the breach of one will be the breach of the other, thereby excusing performance. See Kaler v. Craig (In re Craig), 144 F.3d 593, 596 (8th Cir. 1998) (applying North Dakota law). Here, the Court can apply Missouri law concerning contract integration insofar as Missouri law does not conflict with the laws of West Virginia or New York, the only other state laws that might be relevant.<sup>10</sup> 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)).

Whether separate contracts are integrated into a single, indivisible agreement is a question of the intent of the parties. See Amtech Lighting Servs. Co. v. Payless Cashways, Inc. (In re Payless Cashways), 203 F.3d 1081, 1085 (8th Cir. 2000); McDaniel v. Kleiss, 503 S.E.2d 840, 846-47 (W. Va. 1998). It is a question of law to be resolved by the Court when the parties’ intent is clear and unambiguous on the face of the contracts.<sup>11</sup> See Exec. Bd. of Mo. Baptist Convention v. Carnahan, 170 S.W.3d 437, 447 n.5 (Mo. Ct. App. 2005); McDaniel, 503 S.E.2d at 846. Two contracts are integrated only if the parties intended for the breach of one to be the breach of the other. 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.

---

<sup>10</sup> With the exception of the STB Override, which has no governing law provision, and the Magnum PSA, which is governed by New York law, all of the contracts at issue are governed by West Virginia law.

<sup>11</sup> The “question of whether a contract is ambiguous and the interpretation of the contract itself are issues of law.” Exec. Bd. of Mo. Baptist Convention, 170 S.W.3d at 447; see also Steele v. McCargo, 260 F.2d 753, 758 (8th Cir. 1958); JA Apparel Corp. v. Abboud, 568 F.3d 390, 404 (2d Cir. 2009); Stephens v. Bartlett, 191 S.E. 550, 552 (W. Va. 1937). Any ambiguity “must appear from the four corners of the contract[;] extrinsic evidence cannot be used to create an ambiguity.” Erwin v. City of Palmyra, 119 S.W.3d 582, 585 (Mo. Ct. App. 2003); see also Blake v. State Farm Mut. Auto. Ins. Co., 685 S.E.2d 895, 902 (W. Va. 2009) (“[E]xtrinsic evidence only comes into play [for the interpretation of a contract] after an ambiguity is found to exist.”).

In re Union Fin. Servs. Grp, Inc., 325 B.R. 816, 823 (Bankr. E.D. Mo. 2004), aff'd per curiam  
155 F. App'x 940 (8th Cir. 2005).

## **ARGUMENT**

### **POINT I.**

#### **THE STB OVERRIDE IS NOT AN EXECUTORY CONTRACT**

The Defendants cannot dispute that the STB Override, standing alone, is not executory for purposes of Section 365. Robin Land's obligation to pay money to STB is the only performance remaining on the contract. See, e.g., In re Craig, 144 F.3d at 596 (finding contract was not executory where "the promisee . . . had already performed by turning over his ownership interest in his existing medical practice and was merely awaiting payment").

### **POINT II.**

#### **NO OTHER CONTRACT MAKES THE STB OVERRIDE EXECUTORY**

The Defendants instead argue that the STB Override is made executory by one or more of the following contracts: (i) the 1994 Asset Purchase Agreement, (ii) the Leases, (iii) the Assignments, and/or (iv) the Magnum PSA.

The argument fails, because the Defendants cannot identify any party to these contracts whose obligations to Robin Land would be excused if Robin Land stops paying the STB Override. In re Interstate Bakeries Corp., 690 F.3d at 1073 (holding that contract is "executory" only if one party's failure to perform "would constitute a material breach excusing the performance of the other" (internal quotation marks and citation omitted)). Indeed, the only parties to any of these contracts that owe ongoing contractual performance to Robin Land are the lessors under the Leases. But nothing in the Leases requires payment of the STB Override. The lessors cannot terminate the Leases if Robin Land stops paying the STB Override. It is therefore



clear as a matter of law that the STB Override is not an executory contract for purposes of Section 365.

**A. The 1994 Asset Purchase Agreement Does Not Make the STB Override Executory**

The 1994 Asset Purchase Agreement does not make the STB Override executory. The 1994 Asset Purchase Agreement has been fully performed. Therefore, even if the 1994 Asset Purchase Agreement were integrated with the STB Override – which it is not, for the reasons explained below – the resulting contract would not be executory.

In any event, the STB Override is not integrated with the 1994 Asset Purchase Agreement. The facts here are indistinguishable from those in In re Union Fin. Servs. Grp., Inc., 325 B.R. 816. In Union Financial, an asset purchase agreement provided for the sale of a business in exchange for consideration that included – just like the 1994 Asset Purchase Agreement – (i) payment of cash, (ii) the assumption of liabilities, and (iii) the issuance of a note (the “Seller Note”) payable in the future. Id. at 818-19. As here, the asset purchase agreement specifically referenced the Seller Note as additional consideration and attached a form copy as an exhibit. Applying Missouri law, Judge Schermer concluded that the Seller Note was not integrated with the asset purchase agreement (or a related employment agreement) because, among other things, the contracts involved different subject matters, had distinct consideration, owed obligations to different parties, and contained separate integration clauses. Id. at 823. Accordingly, the Seller Note – which, like the STB Override, was solely an obligation to pay money – could not be made executory by the related, but separate, transaction documents. Id. The decision was affirmed by the District Court and by the Court of Appeals for the Eighth Circuit. Curtis v. Union Fin. Servs. Grp., Inc. (In re Union Fin. Servs. Grp., Inc.), 155 F. App’x 940, 940-41 (8th Cir. 2005) (per curiam).

The Eighth Circuit reached the same result in In re Craig, 144 F.3d 593 (applying North Dakota law). In re Craig involved the sale of a medical practice in exchange for a package of consideration that included a promissory note. The seller argued that the note should be “taken together” with a purchase agreement and related contracts entered into in connection with the sale, and thereby “combined to form a series of interrelated executory contracts.” Id. at 596. The Eighth Circuit rejected that argument, concluding that “whether interpreted individually or in the context of the other documents, the [] promissory note was not an executory contract.” Id.

The Eighth Circuit also made clear 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. See id.; see also In re Union Financial, 155 F. App’x at 941; 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.”).

Accordingly, the 1994 Asset Purchase Agreement cannot make the STB Override executory.

**B. The Lawson Heirs and Kelly-Hatfield Leases Do Not Make the STB Override Executory**

The Lawson Heirs Lease and the Kelly-Hatfield Lease also do not make the STB Override executory. The lessors cannot claim that their performance under the Leases would be excused if Robin Land stops paying the STB Override. Indeed, Lawson Heirs did not contend in the Lawson Heirs Objection that it considers the STB Override to be a condition or obligation of its Lease.

As an initial matter, it cannot reasonably be argued that the Leases and the STB Override constitute a single contract. The contracts were documented separately, and they involve different parties, different subject matters, and independent exchanges of consideration. The STB Override and the Leases also each contain a merger clause stating that the contract reflects the parties' entire agreement on its subject matter. All of these facts make it impossible to argue that the STB Override forms a single contract with either of the Leases. See McDaniel, 503 S.E.2d at 847-48 (holding, based on "clear and unambiguous" contractual language, that a release and an insurance policy were not integrated because they did "not address the same subject matter" and had different purposes); Elliott v. Richter, 496 S.W.2d 860, 864 (Mo. 1973) (holding that two instruments, although signed on the same day, did not constitute a single contract because, among other things, "a separate consideration is provided to be paid for each parcel of land"); Four-Three-O-Six Duncan Corp. v. Sec. Trust Co., 372 S.W.2d 16, 23 (Mo. 1963) (separate contracts were not intended to be integrated because "[t]he very fact that a separate . . . agreement was executed belies any such intention").

The fact that the payments under the STB Override are determined based on sales of coal mined from reserves covered by the Leases does not make the contracts integrated. The reason is simple: the lessors are not doing anything for Robin Land in exchange for Robin Land paying the STB Override. The decision in In re Integrated Health Servs., Inc., No. 00-389, 2000 WL 33712484 (Bankr. D. Del. July 7, 2000), is instructive. The debtor there had entered into prepetition leases with three separate lessors. The lessors shared a common parent company. An executive of the common parent ("Stein") signed each of the leases as agent for the lessors. On the same day that the leases were executed, the debtor also entered into a non-competition agreement with Stein under which he agreed, among other things, not to lease premises to the

debtor's competitors for ten years. See id. at \*1. The debtor agreed to pay Stein \$50,000 per year, and the leases provided that rental payments would be reduced by the amount paid to Stein every month. Id. Stein argued that the debtor could not assume the leases without also assuming his non-competition agreement and curing any unpaid amounts. Id. at \*2 & n.3. Stein argued – as STB does here – that the four agreements were “inseparable” “because the Non-Competition Agreement covers the territory of the three Leases.” Id. at \*4. The Court rejected Stein's argument, concluding that the agreements 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. The Court expressly noted that

[t]hese separate agreements are not transformed into a single integrated contract merely because the lease agreements reference the payment obligation in the Non-Competition Agreement or because, at the same time the lease payments were reduced, the Debtors also agreed to pay Mr. Stein installment payments under the Non-Competition Agreement in an amount equal to the reduction in the lease payments.

Id. The Court rejected self-serving testimony offered by Stein because “there is no evidence from the four corners of the documents that it was the parties' intent that these agreements be one.” Id. at \*4; see also In re Gardinier, Inc., 831 F.2d 974, 976 (11th Cir. 1987) (finding that contracts between separate parties are not integrated even if one contract is conditioned on performance of the other).

Neither the Lawson Heirs Lease nor the Kelly-Hatfield Lease requires payment of the STB Override. The STB Override is not even referenced in the Leases. Accordingly, the lessors have no argument that a breach of the STB Override is a breach of the Leases.<sup>12</sup> Accordingly,

---

<sup>12</sup> The answer does not change simply because Ark Land KH succeeded Kelly-Hatfield as lessor under the Kelly-Hatfield Lease.

the Defendants' assertion that Robin Land must pay the STB Override pursuant to Section 365(d)(3) is meritless. Section 365(d)(3) applies only to obligations "under any unexpired lease of nonresidential real property." 11 U.S.C. § 365(d)(3). The STB Override is not an obligation under either of the Leases, and therefore is not covered by Section 365(d)(3), which provides protection only for landlords. See, e.g., In re Go Fig Inc., No. 08-40116-705, 2009 WL 537090, at \*3 (Bankr. E.D. Mo. Feb. 5, 2009) (explaining that Section 365(d)(3) provides special treatment to landlords); In re Montgomery Ward Holding Corp., 268 F.3d 205, 210 (3d Cir. 2001) ("Virtually all courts have agreed that [section 365(d)(3)] was intended to alleviate the [] burdens of landlords by requiring timely compliance with the terms of the lease.").

The Defendants' final argument that the STB Override "runs with the leased coal properties" fails for multiple reasons. (STB Answer at ¶ 38; see also Arch Answer at ¶ 77.) First, the STB Override did not "run[] with the leased coal properties" or thereby become an "incorporated condition[] of the Kelly-Hatfield Lease and the Lawson Heirs Lease" (STB Answer at ¶ 38), for precisely the same reason: the plain language of the Leases demonstrates unambiguously that paying the STB Override is not an obligation or an "incorporated condition" of the Leases. Indeed, failure to pay the STB Override is not among the events of default in either Lease. (Lawson Heirs Lease § 15; Kelly-Hatfield Lease § 15.) And Lawson Heirs has made clear in its objection to the Real Property Motion (ECF No. 2055) that it does not care whether Robin Land pays the STB Override.<sup>13</sup> Nor could STB unilaterally impose any conditions or obligations on the Leases. It is a stranger to the Leases, which were novated in order to remove STB as a party altogether. Finally, even putting aside the plain language of the Leases, the STB Override would not "run[] with the leased coal properties" as a matter of law.

---

<sup>13</sup> Ark Land KH takes a different position here solely because its parent – Arch – may be sued by STB if Robin Land does not pay the STB Override.

See McIntosh v. Vail, 28 S.E.2d 607, 609-13 (W. Va. 1943) (holding that a royalty on sales of extracted minerals does not run with the land). In short, there is no way for the Defendants to use the Leases to make the STB Override executory. The STB Override is a one-way, non-executory payment obligation that Robin Land is not authorized to pay under the Bankruptcy Code and for which STB can be compensated in money damages.

**C. The Assignments Do Not Make the STB Override Executory**

The Assignments also cannot make the STB Override executory. It is well settled that “[a]n assignment does not modify the terms of the underlying contract,” so the Assignments could not transform the previously separate agreements – *i.e.*, the STB Override and the Leases – into a single contract. Citibank v. Tele/Resources, Inc., 724 F.2d 266, 269 (2d Cir. 1983). As assignee, Robin Land stood in the shoes of Ark Land with respect to the original contracts, and Ark Land owed separate obligations to STB under the STB Override and to the lessors under the Leases. See id. (explaining that an assignment “is 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”); 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).

For precisely the same reason, the STB Override is not integrated with the Assignments themselves. Assignments cannot modify the contracts that they convey precisely because they

are separate contracts, entered into for different purposes, for a separate exchange of consideration, and involving different parties. See, e.g., Livonia Prop. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC, 717 F. Supp. 2d 724, 748 (E.D. Mich. 2010) (“[A]ny purported breaches in those [underlying] contracts would not render the assignments themselves (which are separate contracts) void.”), aff’d, 399 F. App’x 97, 102 (6th Cir. 2010).<sup>14</sup>

In any event, even if the Assignments and the STB Override formed a single contract, Arch has fully performed under the Assignments. Upon execution, Arch completed the transfer of the contracts contemplated in the Assignments and has no further performance due. Accordingly, the Assignments cannot make Robin Land’s obligation to pay the STB Override an executory contract.

**D. The Magnum PSA Does Not Make the STB Override Executory**

Finally, the Magnum PSA also cannot make the STB Override executory. Robin Land is not even a party to the Magnum PSA, so it cannot make the STB Override executory. See 11 U.S.C. § 365(a) (referring to an “executory contract ... of the debtor”); In re Optical Techs., Inc., 425 F.3d 1294, 1303 n.10 (11th Cir. 2005) (noting that “section 365 does not, by its terms, govern” contracts between non-debtor parties); In re Gardinier, 831 F.3d at 978 (noting that it would be “illogical” to treat agreements between separate parties as a single contract). The only parties to the Magnum PSA are Arch and Magnum, neither of which is a party to the STB

---

<sup>14</sup> Accord Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc., 247 F.3d 44, 60 (3d Cir. 2001) (holding that an assignment is a separate contract and does not modify or expand the assigned contract); Managed Health Care Assocs. v. Kethan, 209 F.3d 923, 927 (6th Cir. 2000) (holding that an assignment does not modify the terms of the underlying contract and is a separate agreement between the assignor and the assignee); In re ANC Rental Corp., Inc., 277 B.R. 226, 239 (Bankr. D. Del. 2002) (same); GMAC Commercial Credit LLC v. Springs Indus., Inc., 171 F. Supp. 2d 209, 216 (S.D.N.Y. 2001) (“Plainly, an assignment cannot alter a contract’s bargained-for remedial measures, for then the assignment would change the very nature of the rights assigned.”); 28 N.Y. Prac., Contract Law § 15:1 (2013) (“An assignment is not a modification of the contract and does not in any manner impair or otherwise alter the force and effect of the contract. It does not change the terms of the underlying contract.”).

Override. The Magnum PSA was also entered into eleven years after the STB Override. There can be no reasonable argument that the Magnum PSA and the STB Override form a single agreement.

In any event, there is no way that the Magnum PSA could make the STB Override executory. Arch does not owe any performance obligations to Robin Land under the contract. There is nothing that Arch could be excused from performing for Robin Land under the Magnum PSA if Robin Land stops paying the STB Override. Accordingly, the Magnum PSA cannot render the STB Override executory for purposes of Section 365.

\* \* \*

In sum, none of the contracts identified by the Defendants, whether alone or in combination, can make the STB Override an executory contract:

- STB does not owe any performance under the 1994 Asset Purchase Agreement that would be excused if Robin Land stops paying the STB Override.
- The lessors' ongoing performance under the Leases will not be excused if Robin Land stops paying the STB Override.
- Arch does not owe any performance to Robin Land under the Assignments that would be excused if Robin Land stops paying the STB Override.
- Arch does not owe any performance to Robin Land under the Magnum PSA that would be excused if Robin Land stops paying the STB Override.

Put simply, there is no party that is performing any contractual obligation for Robin Land in exchange for Robin Land's payment of the STB Override. Accordingly, Robin Land is entitled to a declaratory judgment that the STB Override is not an executory contract for



purposes of Section 365, and it is not made executory by any other contract. In re Interstate Bakeries Corp., 690 F.3d at 1073-74.

### POINT III.

#### **THE DEFENDANTS' COUNTERCLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

The counterclaims asserted by Arch and STB should be dismissed for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

#### **A. Defendants' Declaratory Judgment Claims Should Be Dismissed As Moot**

The declaratory judgment counterclaims asserted by Arch and STB should be dismissed as moot because they are redundant of Robin Land's declaratory judgment claim.

Robin Land's complaint requests a declaratory judgment that the STB Override is not an executory contract for purposes of Section 365 and is not made executory by any other contract. (Complaint at ¶ 21.) Arch and STB each seek declaratory judgments that are the mirror image of that sought by Robin Land – i.e., that the STB Override is an executory contract that is integrated with various agreements. (Arch Answer at ¶ 75; STB Answer at ¶ 36.) The second declaratory judgment claims asserted by Arch and STB repackage the contention that the STB Override is integrated with the Leases, by contending that the STB Override “runs with the leased coal properties” and thereby “became incorporated conditions of the Kelly-Hatfield Lease and the Lawson Heirs Lease.” (STB Answer at ¶ 38; see also Arch Answer at ¶ 78.)

A decision granting Robin Land's request for a declaratory judgment that the STB Override is not an executory contract would result in the denial of the Defendants' declaratory judgment counterclaims. Accordingly, the claims should be dismissed as redundant and moot. See Hardee's Food Sys. v. Hallbeck, 776 F. Supp. 2d 949, 954 (E.D. Mo. 2011) (“With regard to the remainder of [defendant's counterclaim], which essentially seeks a declaratory judgment that

the [defendant's] position on [plaintiff's] claims is right, the Court agrees . . . that it is redundant and should be dismissed as such.”); Amwest Sur. Ins. Co. v. Concord Bank, No. 4:00-CV-1988 (SNL), 2003 WL 553229, at \*4 (E.D. Mo. Feb. 4, 2003) (“When it is clear that a complete identity of factual and legal issues exist between the complaint (and answer thereto) and counterclaim, and a decision on the merits of the plaintiff’s claim(s) will render the request for declaratory relief moot, then the counterclaim should be dismissed as redundant.”).

**B. STB’s Remaining Counterclaims Are for Amounts Due Under a Prepetition Contract**

The STB Override is a non-executory, prepetition agreement that cannot give rise to a claim for post-petition breach. It is well settled that non-executory contracts entered into prepetition create only prepetition obligations – even when payments become due after the petition is filed. See Stewart Foods, Inc. v. Broecker (In re Stewart Foods, Inc.), 64 F.3d 141, 144-45 (4th Cir. 1995) (finding that payments due post-petition on a non-executory contract were prepetition obligations); Mason v. Official Comm. of Unsecured Creditors (In re FBI Distrib. Corp.), 330 F.3d 36, 48 (1st Cir. 2003); see also United States ex rel. Agricultural Stabilization & Conservation Serv. v. Gerth, 991 F.2d 1428, 1433 (8th Cir. 1993).

STB provided no consideration to Robin Land “after the commencement of the case,” and its counterclaim for breach of contract is not allowable as an administrative expense under the Bankruptcy Code. See 11 U.S.C. § 503(b)(1)(A). Accordingly, STB’s counterclaim for post-petition breach of contract should be dismissed.

STB’s final counterclaim alleging unjust enrichment also fails to state a claim. A claim for unjust enrichment “cannot be maintained where a contract governs the relationship between the parties.” See Bradbury v. Network Enters, Inc., No. 4:12-CV-575 (CEJ), 2013 WL 587884, at \*5 (E.D. Mo. Feb. 13, 2013) (quotation omitted); see also Bright v. QSP, Inc., 20 F.3d 1300,

1306 (4th Cir. 1994) (holding that, under West Virginia law, “[b]ecause an ‘action for unjust enrichment is quasi[-]contractual in nature[, it] may not be brought in the face of an express contract’” (quoting Acorn Structures, Inc. v. Swantz, 846 F.2d 923, 926 (4th Cir. 1988))).

**C. Arch’s Remaining Counterclaims Are for Amounts Allegedly Due Under a Prepetition Contract**

Arch’s counterclaim for post-petition breach of the Assignments should be dismissed for failure to state a claim upon which relief can be granted. The Assignments were fully executed and performed before Robin Land filed for bankruptcy. Keller v. Bass Pro Shops, Inc., 15 F.3d 122, 124-25 (8th Cir. 1994) (finding assignment agreements to be “irrevocable once the instrument is signed and delivered”). It follows that those agreements are prepetition, non-executory contracts that give rise only to prepetition claims. See In re Stewart Foods, Inc., 64 F.3d at 144-45; In re FBI Distrib. Corp., 330 F.3d at 48; see also Gerth, 991 F.2d at 1433.

The same is true for any claims based on alleged prepetition indemnities. See In re Manville Forest Prods. Corp., 209 F.3d 125, 128-29 (2d Cir. 2000) (finding that contractual indemnity claim was a contingent prepetition claim); Bellon v. TSA Stores, Inc., No. 4:06-CV-01504 (ERW), 2010 WL 2553610, at \*1 (E.D. Mo. June 23, 2010) (same); In re Food Barn Stores, Inc., 175 B.R. 723, 730 (Bankr. W.D. Mo. 1994) (same).

The contractual relationship between Robin Land and the Arch intervenors also precludes Arch’s separate claim for unjust enrichment and requires its dismissal. See Bradbury, 2013 WL 587884, at \*5 (quotation marks omitted); see also Bright, 20 F.3d at 1306.

**CONCLUSION**

For the foregoing reasons, Robin Land respectfully requests that the Court dismiss the Defendants' Counterclaims with prejudice and enter an order that (a) the STB Override is a not an executory contract for purposes of Section 365 of the Bankruptcy Code, and (b) the STB Override is not integrated with or is severable from any other agreement.

Dated: New York, New York  
March 4, 2013

Respectfully Submitted,

DAVIS POLK & WARDWELL LLP

By: /s/ Jonathan D. Martin

Marshall S. Huebner  
Benjamin S. Kaminetzky  
Brian M. Resnick  
Jonathan D. Martin

450 Lexington Avenue  
New York, New York 10017  
Telephone: (212) 450-4000  
Facsimile: (212) 607-7983  
jonathan.martin@davispolk.com

*Counsel to Plaintiff/Debtor and Debtor in Possession*