Reply Deadline: November 1, 2012
Hearing Date: November 15, 2012 at 10:00 a.m.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
PATRIOT COAL CORPORATION, *et al.*,	:	Case No. 12-12900 (SCC)
Debtors.	:	(Jointly Administered)
EASTERN ROYALTY LLC f/k/a EASTERN ROYALTY CORP.,	:	
Plaintiff,	:	Adv. Pro. No. 12-01786 (SCC)
v.	:	
BOONE EAST DEVELOPMENT CO., PERFORMANCE COAL CO., AND NEW RIVER ENERGY CORP.,	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

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PRELIMINARY STATEMENT

It is ERC's burden to establish conclusively from the pleadings that the parties intended that the Payment Agreement was to remain separate and independent from the Assignments, the Boone Lease, and the Settlement Agreement.[1] ERC has failed to do so and its Motion must be denied.

Quite simply, there is nothing in the record concerning the circumstances surrounding the parties' entry into the Payment Agreement, the Assignments, the Boone Lease, or the Settlement Agreement. Without an inquiry into the circumstances surrounding the various agreements, it is impossible to determine as a matter of law that the parties intended the Payment Agreement to be a standalone agreement completely independent of the Assignments, Boone Lease, and Settlement Agreement, as to which the Payment Agreement is so intimately related. See Novick v. AXA Network, LLC, 642 F.3d 304, 313 (2d Cir. 2011) (reversing grant of summary judgment where integration question "cannot be reviewed properly without consideration of the parties' intent in entering into the affiliation agreements and the circumstances surrounding those agreements"). This alone precludes the grant of ERC's Motion.

Moreover, ERC's emphasis on certain provisions of the agreements themselves in an attempt to glean "evidence" or "possible indication[s]" of the parties' intent, ERC Br. at 14, not only ignores or misconstrues provisions that show the documents to be an integrated whole, but fails entirely to address glaring gaps in the factual record that can only be established through discovery. ERC does not dispute that the Payment Agreement attaches the Assignments and the Boone Lease, requires their execution, and incorporates certain of their terms. ERC does not dispute that the Payment Agreement, Boone Lease, and Assignments all govern the same coal

[1] Initially capitalized terms not otherwise defined have the meanings ascribed to them in Plaintiff's Memorandum of Law in Support of its Motion for Judgment on the Pleadings, dated September 21, 2012 (Docket No. 17 in Case No. 12-1786, the "ERC Br.").

reserves, on the same properties, to be mined by the same party—ERC. ERC does not dispute that the Payment Agreement even provides that its obligations serve "as additional consideration for the coal reserves to be assign[ed] and leased to ERC" through the Boone Lease and Assignments.[2] Payment Agreement at 3. Hedging its bets, ERC also asserts that even if the Payment Agreement is integrated with the Assignments, the Assignments are not executory. This argument not only ignores key terms of the Assignments that impose ongoing obligations on both parties, but neglects the need for factual development as to the materiality of those obligations. Without evidence as to the extent and scope of those remaining obligations, the Court cannot *now* evaluate the executory nature of the Assignments.

Indeed, the pleadings show, if anything, that the Payment Agreement is integrated with the Settlement Agreement and each of its other exhibits. The Settlement Agreement states clearly that the Settlement Agreement, together with the Boone Lease, Assignments, and the Payment Agreement, constitute an "integrated memorial" of the parties' agreement. While ERC asks the Court to ignore this language because only its affiliate executed the Payment Agreement, this flies in the face of cases finding integration despite variance in parties, as well as doctrines of estoppel under which a beneficiary of a contract cannot avoid its terms. Nor can ERC rely on contrary language in the Boone Lease which indicates that the Boone Lease expresses all the obligations between the parties. Instead, this clear conflict between the terms of the Boone Lease and the Settlement Agreement and its exhibits underscores the need for an inquiry beyond the text of the document to divine the parties' intent.

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[2] Contrary to ERC's assertion, nowhere do Defendants "effectively concede" that the Payment Agreement is not integrated with the Assignments and/or the Boone Lease. ERC Br. at 22. To the contrary, Defendants' Answer squarely asserts that the Payment Agreement may not be treated separately from the Boone Lease and the Assignments. Answer ¶ 38, 41.

Factual development is thus required on several fronts to determine the parties' intent – the circumstances surrounding entry into the Payment Agreement, resolution of ambiguities that directly bear on the question of integration, and the materiality of the obligations the parties have undertaken. In short, it is abundantly clear that ERC has not shown "beyond doubt" that there is "no set of facts" under which Defendants would prevail. See George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 553 (2d Cir. 1977).

STATEMENT OF FACTS

A. The Settlement Agreement

On July 5, 2005, COALTRADE, LLC ("Coaltrade") and Massey Coal Sales Company, Inc. ("Massey"), entered into the Settlement Agreement, which resolved civil litigation filed by Coaltrade against Massey in the United States District Court for the Eastern District of Kentucky. See Settlement Agreement, June 30, 2005, Compl. Ex. B. Under the terms of the Settlement Agreement: (1) Massey was to pay six million dollars to Coaltrade; (2) Coaltrade and Massey were to enter into a Coal Supply Agreement; and (3) Coaltrade and Massey were to enter into, or *cause their appropriate affiliates to enter into*, a series of agreements to assign mining rights in various coal reserves in exchange for payments based on the amounts of coal mined from those reserves. Id. These agreements, which were attached as exhibits to the Settlement Agreement, included the Payment Agreement that is the subject of ERC's Complaint, as well as the Boone Lease and the Assignments.

The Settlement Agreement required that the parties "consummate all of the transactions contemplated by this Settlement Agreement *simultaneously* . . . ." Id. § 7 (emphasis added). It also provides that "[t]he Parties hereto understand, covenant and agree that the terms and conditions of this Settlement Agreement, *together with the Exhibits to this Settlement Agreement*,

constitute the full and complete understanding, agreement and arrangement of the parties, and is the integrated memorial of their agreement." Id. § 15 (emphasis added).

B. The Payment Agreement

As provided in and required by the Settlement Agreement, ERC entered into a Payment Agreement with Boone East Development Co. ("Boone"), Performance Coal Company ("Performance Coal"), and New River Energy Corporation ("New River") (together, the "Massey Entities"). Payment Agreement, Aug. 31, 2005, Compl. Ex. A. At the time, ERC was an affiliate of Coaltrade. ERC Br. at 2. The Payment Agreement required the simultaneous execution of the Assignments and the Boone Lease which are named in (and are attached as Exhibits to) the Payment Agreement: (a) the "Berwind-New River Partial Assignment" (Payment Agreement Ex. A); (b) the "Berwind-Performance Partial Assignment" (Payment Agreement Ex. B); (c) the "WPP-Performance Partial Assignment" (Payment Agreement Ex. C); (d) the "WPP-Boone East Partial Assignment" (Payment Agreement Ex. D); and (e) the "Boone East – Van Lease" (Payment Agreement Ex. E).

The Payment Agreement further provides that the obligations in the Payment Agreement serve "as *additional consideration* for the coal reserves to be assign [sic] and leased to ERC by the Massey Entities pursuant to this agreement." Payment Agreement at 3 (emphasis added). Those obligations include ERC's agreement to make "Tonnage Payments" to the Massey Entities based on "each ton of coal mined and sold from" the "Assigned Reserves." Id. These tonnage payments are commonly referred to in the coal industry as override payments. See Answer ¶ 20.

By clear and explicit reference, the Payment Agreement borrows the term "Assigned Reserves" from the Assignments *and* the Boone Lease to describe the properties from which any mined coal is subject to the override payments. Payment Agreement § 2, at 3-4. Furthermore,

the Payment Agreement specifically states that the coal reserves assigned pursuant to the Berwind-New River Partial Assignment are transferred "subject to" that assignment. Id.

As contemplated by the Settlement Agreement, each of the Payment Agreement, the Assignments, and the Boone Lease were executed on the same day—August 31, 2005. Compl. Exs. C-G.

PROCEDURAL HISTORY

On July 9, 2012, Patriot Coal Corporation and number of its affiliates, including ERC (collectively, the "Debtors"), filed voluntary petitions under Chapter 11 of Title 11 of the United States Code (11 U.S.C. §§ 101 et seq., the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York. See Docket No. 1 in Case No. 12-12900. On July 10, 2012, the Debtors filed a Motion for an Order (i) Confirming the Massey Payment Agreement is not an Executory Contract or, Alternatively, (ii) Approving Rejection of the Massey Payment Agreement (the "Rejection Motion"). See Docket No. 24 in Case No. 12-12900. At the request of the parties, the Court convened a telephonic chambers conference on July 26, 2012, during which the Court suggested that it would be inappropriate to resolve the issues raised by the Rejection Motion as a simple contested matter, and that an adversary proceeding may be necessary.

Accordingly, ERC filed an adversary Complaint for Declaratory Relief on August 6, 2012. See Docket No. 1 in Case No. 12-1786. That same day, the Debtors withdrew, without prejudice, the portion of their Rejection Motion seeking an order confirming that the Payment Agreement is not an executory contract for the purposes of Section 365. The remainder of the

Rejection Motion, including the Debtor's request to reject the Payment Agreement *nunc pro tunc* to the Petition Date, was adjourned *sine die*. See Docket No. 282 in Case. No. 12-12900.[3]

Defendants filed an Answer in the Adversary Proceeding on September 7, 2012. See Docket No. 14 in Case No. 12-1786. Defendants also served discovery requests on ERC and its affiliated Debtor entities, as well as third-party subpoenas on Coaltrade and Peabody Energy Corporation, on August 16, 2012. These discovery requests sought, *inter alia*, documents and information concerning the circumstances surrounding the Payment Agreement and the other agreements at issue. ERC, however, objected to commencing discovery on the grounds that the Complaint presented a pure issue of law that could be resolved without discovery. See Report of Rule 26(f) Meeting, Docket No. 11 in Case No. 12-1786.

On September 21, 2012, ERC filed its Motion seeking judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Docket No. 17 in Case No. 12-1786. Thereafter, as an accommodation to ERC, Defendants agreed to a stay of discovery until the earlier of five days following a decision by the Court on ERC's Rule 12(c) Motion, or January 7, 2013. The parties presented this agreement to the Court at their pre-trial conference on September 25, 2012. Hr'g Tr. Sept. 25, 2012 at 6:20-25. The Court set November 15, 2012 as the hearing date on ERC's Rule 12(c) Motion. Id. at 9:7-12.

APPLICABLE STANDARD AND GOVERNING LAW

To succeed on its Motion and obtain judgment on the pleadings, ERC bears the heavy burden of establishing "beyond doubt" that there is no set of facts under which Defendants' theories of integration would entitle them to relief. See Ong v. American Collections Enter.,

[3] Notably, notwithstanding ERC's dogged insistence that the Payment Agreement is not an executory contract, its schedules expressly include the Payment Agreement on Schedule G's listing of executory contracts. See Schedules of Eastern Royalty LLC (Docket No. 644 in Case No. 12-12900) at Schedule G (listing executory Payment Agreement with Boone East, New River, and Performance Coal). While ERC's schedules include reservation of rights language, the inclusion of the Payment Agreement on its list of executory contracts is certainly at odds with its position that the Payment Agreement is unambiguously non-executory.

Inc., 98 Civ. 5117 (JG), 1999 U. S. Dist. LEXIS 409, at *3 (E.D.N.Y. Jan. 15, 1999); see also Morris v. Schroder Capital Mgmt. Int'l, 445 F.3d 525, 529 (2d Cir. 2006). The critical question at this preliminary stage is thus not whether Defendants will ultimately prevail, but rather whether they are entitled to develop and offer evidence in support of their claims and defenses. See Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995). In applying this standard, all of the factual allegations in the pleadings are accepted as true, and all reasonable inferences from those facts are drawn in favor of Defendants, the non-moving parties. See L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419, 429 (2d Cir. 2011).

Although ERC asserts that its claim "presents a pure issue of law," ERC Br. at 9, the law is clear that the question of whether multiple instruments form an integrated whole is an issue of fact. Rudman v. Cowles Commc'ns, Inc., 280 N.E.2d 867, 873 (N.Y. 1972); see also All R's Consulting, Inc. v. Pilgrim's Pride Corp., No. 06 Civ. 3601, 2008 WL 852013, at *12 n.7 (S.D.N.Y. Mar. 28, 2008) ("The factors that weigh in determining whether a contract is integrated are necessarily fact based and not appropriate for determination on a motion to dismiss."). Moreover, as ERC concedes, under New York law,[4] this factual question of "[w]hether multiple writings should be construed as one agreement depends upon the intent of the parties." Commander Oil Corp. v. Advance Food Serv. Equip., 991 F.2d 49, 52-53 (2d Cir. 1993); see also TVT Records v. The Island Def Jam Music Grp., 412 F.3d 82, 89 (2d Cir. 2005); Lowell v. Twin Disc, Inc., 527 F.2d 767, 769-70 (2d Cir. 1975) ("Whether the parties intended that two agreements should be interdependent is a question of fact which turns upon the circumstances of each case.").

[4] Defendants and ERC agree that construction of the relevant agreements is a matter of state law and that there is no conflict between New York and West Virginia law on the question of whether the agreements form an integrated whole. See ERC Br. at 9-10.

In its effort to avoid the scrutiny of discovery, ERC insists that the intent of the parties must be determined solely from the face of the agreements, unless they are ambiguous. ERC Br. at 13. That position ignores the direction of New York's highest court that the surrounding circumstances of the agreements be considered. In Rudman, the New York Court of Appeals held that, "[i]n determining whether contracts are separable or entire, the primary standard is the intent manifested, *viewed in the surrounding circumstances*." 280 N.E.2d at 873 (emphasis added); see also Novick, 642 F.3d at 313 (reversing grant of partial summary judgment in light of the need to consider the parties' negotiations and circumstances surrounding their agreements, finding that "the independence or interdependence of promises cannot be determined by examining one promise in isolation"); D.H. Pritchard, Contractor, Inc. v. Nelson, 147 F.2d 939, 942 (4th Cir. 1945) ("The relationship of the parties to a contract when executed is always material to its interpretation.").

Consideration of the surrounding circumstances does not constitute parol evidence where the "evidence of the negotiations and such documentation . . . are not inconsistent with, and, hence, do not vary or contradict the written agreement." Rudman, 280 N.E.2d at 872. For this reason, courts typically determine issues of contract integration only after discovery has taken place. See, e.g., Navigant Consulting, Inc. v. Kostakis, No. 07 Civ. 2302 (CPS) (JMA), 2007 WL 2907330, at *8 n.17 (E.D.N.Y. Oct. 4, 2007) (noting that "courts determining whether or not an agreement is integrated . . . do so at the summary judgment stage" (citations omitted)); see also Nat'l Union Fire Ins. Co. v. Turtur, 892 F.2d 199, 205 (2d Cir. 1989) (reversing grant of summary judgment on contract integration, where evidence on both sides did not resolve the intent of the parties and "[q]uestions of intent, we note, are usually inappropriate for disposition on summary judgment"); Resources Funding Corp. v. Congrecare, Inc., No. 91 Civ. 8163

(RWS), 1994 U.S. Dist. LEXIS 508, at *23 (S.D.N.Y. Jan. 19, 1994) (denying motion to strike counterclaim based on integration of agreements, where "assessing the Defendants' claims will require ascertaining the intent of the parties" and "issues of intent are notoriously inappropriate for summary disposal" (citation and internal quotation marks omitted)).

Although courts may thus consider evidence of the surrounding circumstances to determine contract interdependency in any event, even ERC concedes that "if the court finds that the terms, or the inferences readily drawn from the terms, are ambiguous, then the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract." British Int'l Ins. Co. v. Seguros La Republica, S.A., 342 F.3d 78, 82 (2d Cir. 2003) (applying New York law) (citations and internal quotation marks omitted). A contract is ambiguous "where the terms of a contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." Id. (citations and internal quotation marks omitted). Courts also look to extrinsic evidence to determine the parties' intent where agreements contain conflicting terms. See, e.g., Lee Enters., Inc. v. Twentieth Century-Fox Film Corp., 303 S.E.2d 702, 703-04 (W. Va. 1983) (reversing lower court's determination that contract was unambiguous because contract contained two conflicting paragraphs and therefore extrinsic evidence was required); Watson v. Buckhannon River Coal Co., 120 S.E. 390, 396 (W. Va. 1923) ("[Two clauses] of the contract are in terms contradictory, rendering the contract ambiguous.").

ARGUMENT

I. DISCOVERY IS REQUIRED TO DETERMINE THE PARTIES' INTENT

On the limited basis of the pleadings—the only materials now before the Court—ERC cannot demonstrate "beyond doubt" either:

- that there is no set of facts under which the Defendants' theories of integration will prevail; or
- that ERC's theory of non-integration is the *only* credible interpretation of the pleadings (and exhibits).

The documents, at best, are contradictory, and the record is devoid of any evidence concerning the circumstances surrounding the execution of the relevant agreements—evidence that is directly relevant to determining the key question of intent. Novick, 642 F.3d at 313 (reversing grant of summary judgment where integration question "cannot be reviewed properly without consideration of the parties' intent in entering into the Affiliation Agreements and the circumstances surrounding those Agreements").

Although ERC points to certain provisions as evidence of supposed intent to treat the agreements separately, many more, and more significant terms demonstrate an intent to integrate. In the context of a motion for judgment on the pleadings, the Court cannot balance the relative importance of the competing contractual provisions and the inferences to be drawn from them regarding the parties' intent. To the contrary, the Court must draw all such inferences in Defendants' favor. L-7 Designs, 647 F.3d at 429. If the documents and inferences are contradictory or inconclusive, Defendants "should be given the opportunity to prove at trial that the surrounding circumstances and intent of the parties were such that the [agreements] . . . comprised a single contractual transaction." Centaur, N.V. v. William Lowe, Inc., No. 82 Civ. 2429 (RLC), 1983 U.S. Dist. LEXIS 20238, at *7 (S.D.N.Y. Jan. 6, 1983) (denying motion to dismiss where non-moving party made showing sufficient to suggest that agreements were

potentially integrated); see also Bloor v. Shapiro, 32 B.R. 993, 999-1000 (S.D.N.Y. 1983) (denying summary judgment where the "the possibility that the parties intended that the contracts be read together cannot be eliminated", such that "[p]arol evidence will thus be admitted to determine whether the parties intended the agreements to be read together"); Integrated Mktg. & Promotional Solutions, Inc. v. JEC Nutrition, LLC, No. 06 Civ. 5640 (JFK), 2006 U.S. Dist. LEXIS 90114, at *13-17 (S.D.N.Y. Dec. 12, 2006) (denying Rule 12(c) motion where factors used to evaluate parties' intent were mixed, rendering it possible that non-moving party's view of intent could prevail).

Indeed, without discovery, there is no way to ensure that the entire universe of relevant agreements between the parties is even captured by the pleadings. As the procedural history here demonstrates, this is not a theoretical concern. When ERC filed the Rejection Motion, they did not even mention the Settlement Agreement—the only document that expressly speaks to the question of integration. Although ERC belatedly included the Settlement Agreement in its Complaint, without discovery, neither the parties nor the Court can be assured that the universe of relevant documents is before the Court.[5]

II. ERC CANNOT ESTABLISH THAT THE PARTIES INTENDED THE PAYMENT AGREEMENT TO BE INDEPENDENT FROM THE BOONE LEASE AND/OR THE ASSIGNMENTS

Even if the Court were not required to take the surrounding circumstances of the agreements into account, the agreements themselves do not indicate unambiguously that the parties intended the Payment Agreement to stand apart from the Boone Lease and/or the Assignments. Rather, the agreements compel the opposite result. This is of particular

[5] This issue is compounded by the material transactions undertaken by both parties since 2005—Defendants were acquired and are now subsidiaries of Alpha Natural Resources, Inc., while ERC was one of the entities spun off from Peabody Energy Corp. See ERC Br. at 3 n. 1, 8. For this reason, Defendants have served subpoenas on Peabody and its affiliates.

significance where Defendants will ultimately establish that the Assignments themselves are executory. Consequently, integration between the Payment Agreement and either the Assignments or the Boone Lease renders the resulting agreement executory.

A. The Payment Agreement Explicitly Incorporates the Assignments and the Boone Lease by Reference, Defeating ERC's Motion

ERC's opening brief struggles to avoid several simple and irrefutable facts regarding the supposedly "standalone" Payment Agreement: (1) it specifically references the Assignments and the Boone Lease[6]; (2) it attaches the Assignments and the Boone Lease as Exhibits and requires their execution; and (3) it expressly incorporates the Assignments and Boone Lease by reference for the definition of the respective "Assigned Reserves."

It is uncontroversial that parties to an agreement may refer to other documents for additional contract terms, and thus incorporate by reference those documents for the specified purpose. See 11 Richard A. Lord, Williston on Contracts § 30:25 (4th ed. 2012) ("When a writing refers to another document, that other document, or the portion to which reference is made, becomes constructively a part of the writing, and in that respect the two form a single instrument."); see also PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1201 (2d Cir. 1996) ("Under New York law, 'a paper referred to in a written instrument and sufficiently described may be made a part of the instrument as if incorporated into the body of it.'" (quoting Jones v. Cunard S.S. Co., 238 A.D. 172, 173 (N.Y. App. Div. 1933))). Far from being a "standalone" document, the Payment Agreement actually incorporates the Assignments and the Boone Lease by reference

[6] Given the Payment Agreement's express references to the Assignments, it is simply irrelevant that the Assignments do not themselves also "make[] any reference whatsoever to the Payment Agreement," ERC Br. at 18, particularly where it is the Payment Agreement that is the subject of ERC's requested declaratory judgment.

by specifically identifying those documents, attaching them, requiring their execution, and relying on them for the definition of the operative term "Assigned Reserves."[7]

B. Other Factors Support Integration, and Defeat ERC's Motion

Even if ERC were able to show as a matter of law at this point that the Assignments and the Boone Lease were not explicitly incorporated by reference into the Payment Agreement, other provisions of the agreements show an intention to integrate them. Those provisions preclude a finding at this stage in the proceedings that the parties unequivocally intended each of the Payment Agreement, Assignments, and the Boone Lease to be treated as wholly separate agreements.

ERC cannot show as a matter of law that the parties intended the Payment Agreement to be treated separately from the Assignments and the Boone Lease in light of significant factors evident from the face of the documents that indicate otherwise. First, the Payment Agreement, the Assignments, and the Boone Lease were all executed on August 31, 2005. Second, each party to each Assignment and the Boone Lease was also a party to the Payment Agreement. Third, ERC was a party to all of the agreements. It is axiomatic that "absent anything to indicate a contrary intention, written instruments executed at the same time, by the same contracting parties, for the same purpose, and in the course of the same transaction will be considered and construed together as one contract or instrument, even though they do not by their terms refer to

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[7] Furthermore, the Payment Agreement's language stating that certain Assigned Reserves are "subject to" the Berwind-New River Partial Assignment is sufficient to incorporate by reference the terms and conditions of the Berwind-New River Partial Assignment into the Payment Agreement. See, e.g., Progressive Cas. Ins. Co. v. Reaseguradora Nacional De Venezuela, 991 F.2d 42, 46 (2d Cir. 1993) (finding that the parties intended to incorporate by reference a Faculty Reinsurance Agreement where the policy at issue stated that it was "Subject to Facultative Reinsurance Agreement"); Sharma v. Oriol, No. 05 Civ. 2727 (SAS), 2005 WL 1844710, at *3 (S.D.N.Y. Aug. 3, 2005) (finding that "subject to" language in one contract incorporated the provisions referred to in another); Royal Ins. Co. of Am. v. Air Exp. Int'l, 906 F. Supp. 218, 218-19 (S.D.N.Y. 1995) (finding that a contract incorporated the provisions of the Warsaw Convention by reference when it contained language stating it was "subject to the rules relating to liability established by the Convention").

each other." Williston on Contracts § 30:26.[8] "This canon of construction applies with particular force in situations where, as here, one document requires the execution of the second to accomplish its purpose." Kurz v. United States, 156 F. Supp. 99, 104 (S.D.N.Y. 1957), aff'd, 254 F.2d 811 (2d Cir. 1958).

1. The Payment Agreement, Assignments, and Boone Lease Were Executed on the Same Date and Involved the Same Parties.

ERC's argument that the parties to the Payment Agreement are not the same as the parties to the Assignments and Boone Lease does not withstand scrutiny. As an initial matter, agreements may be construed together as part of a single transaction even when the parties are different. See, e.g., This is Me, Inc. v. Taylor, 157 F.3d 139, 143 (2d Cir. 1998) ("New York law requires that all writings which form part of a single transaction and are designed to effectuate the same purpose be read together, even though they were executed on different dates and were not all between the same parties."); Turtur, 892 F.2d at 205 ("National Union does not contend that the variation of parties between the underlying subscription agreement (between Rothschild and Turturs) and the Indemnification Agreement (between National Union and the Turturs) compels a conclusion that the contracts are not interdependent, and we see no basis in New York law for such a position."); Pritchard, 147 F.2d at 942 ("A contract may be contained in several instruments. If made at the same time, in relation to the same subject matter, they may be read together as one instrument. This rule obtains even when the parties are not the same, if the several contracts were known to all the parties.").

More to the point, ERC *was* a party to each of the Assignments and to the Boone Lease, and each counterparty to each Assignment and the Boone Lease also executed the Payment Agreement. The Payment Agreement specifically requires each of the parties to execute the

[8] Both New York and West Virginia courts adhere to this principle. See, e.g., TVT Records, 412 F.3d at 89; Ashland Oil, Inc. v. Donahue, 223 S.E.2d 433, 437 (W. Va. 1976).

Assignments and the Boone Lease. See, e.g., Payment Agreement § 1, at 3. ("Upon execution of this Agreement . . . Boone East and ERC will execute the Boone East-Van Lease, attached as Exhibit E."). Accordingly, there can be no argument that any party to the Payment Agreement, any of the Assignments, or the Boone Lease, was in any way unaware or caught off guard by any other agreement. Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48, 54 (1953) (reading two documents together and finding that "[w]here each of the separate writings has been subscribed by the party to be charged, little if any difficulty is encountered")

2. The Payment Agreements, Assignments, and Boone Lease Involve the Same Subject Matter.

The Payment Agreement, Assignments, and Boone Lease were executed to facilitate the transfer of mining rights in several tracts of land owned or controlled by the Massey Entities to ERC in exchange for Tonnage Payments from the coal mined on those tracts of land. Far from giving rise to an inference that the parties intended contractual separability, the structure of the agreements in this case gives rise to the even stronger inference that the Payment Agreement, Assignments, and the Boone Lease were intended to be part and parcel of the same commercial transaction.

Arguing that the Payment Agreement, the Assignments, and the Boone Lease each constitute separate commercial transactions, ERC relies on In re Plitt, 233 B.R. 837 (Bankr. C.D. Ca. 1999) (applying Washington law), which stands for the uncontroversial proposition that a debtor who has leased several different premises from a lessor, even if structured as one transaction, may typically assume or reject lease obligations for each premise individually. Id. at 848. Here, in stark contrast, ERC is not attempting to reject one particular Assignment and its attendant Tonnage Payment obligations while assuming the remaining Assignments and the Boone Lease. Instead, ERC is attempting to sever the *benefits* to it of a single economic

transaction, namely the rights to mine on the land conveyed and to be indemnified by the Assignors and Lessors, from certain of its *costs*, namely, the override Tonnage Payments required by the Payment Agreement.

Commander Oil is instructive on this point. In that case, the parties executed an Asset Purchase Agreement and a Lease. Holding that the district court was correct on summary judgment to construe the two documents as one agreement, the Second Circuit found that "the two transactions were intertwined. They were component parts of a single business transaction whereby PSI would purchase Slater's business and lease the premises from Slater on which to operate it. Each depended on the other; neither stood alone." Commander Oil, 991 F.2d at 53. Similarly, in this case, ERC obtained the right to mine coal from the Assigned Reserves in exchange for the Payment Agreement, which by its explicit terms provides "additional consideration" for the Assignments and the Boone Lease. As ERC concedes, the Payment Agreement was entered into "in exchange for [defendants] agreement to enter into the Assignments and the Boone Lease." ERC Br. at 17. The Payment Agreement simply could not exist without the rights conveyed by the Assignments and the Boone Lease, and in return, the Payment Agreement was consideration for those documents. ERC simply cannot show as a matter of law that those obligations were unambiguously separate and severable.[9]

3. The Payment Agreement Is "Additional Consideration" for the Assignments and Boone Lease, Making the Documents Interdependent.

The Payment Agreement explicitly states that its obligations serve as "additional consideration" for the Assignments and the Boone Lease, belying ERC's contention that the

[9] ERC separately relies on Foothills Texas, Inc. v. MTGLQ Investors, L.P., No. 09-10452, 2012 Bankr. LEXIS 3322 (Bankr. D. Del. July 20, 2012), for its argument that the Payment Agreement is not an executory contract. See ERC Br. at 11-12. That case, however, is irrelevant because it never considered whether the obligations in several agreements were integrated, and thereby executory.

Assignments and Boone Lease were "not conditional" on the obligations set forth in the Payment Agreement. See ERC Br. at 15. ERC's attempt to use the "additional consideration" clause to its benefit turns that language on its head. Id. at 16. The Payment Agreement not only requires execution of the Assignments and the Boone Lease, but indeed could not exist without those documents. Without the Assignments and the Boone Lease, ERC would not have had the right to mine the coal located on the Assigned Reserves and the Boone Lease premises for which the Tonnage Payments were to be made. See, e.g., TVT Records, 412 F.3d at 90 (interpreting two contracts together where one agreement "would not, and could not, have proceeded" without the execution of another); Kurz, 156 F. Supp. at 104 (explaining that integration "applies with particular force in situations where, as here, one document requires the execution of the second to accomplish its purpose"). For this reason, ERC's focus on the absence of any cross-default language between the Payment Agreement, the Assignments, and the Boone Lease is misplaced. The Second Circuit rejected precisely that argument in TVT, where appellant based its argument that two contracts were independent on the fact that "the breach of one did not undo obligations imposed by the other." 412 F.3d at 90. The TVT court found that "[i]t is of no moment that the HOA also contained certain obligations (e.g. the performers' obligation to indemnify . . .) that were not affected by the SLA. The test is whether the documents were intended as a single agreement, not whether they imposed congruent obligations." Id.

Moreover, because the Payment Agreement's obligations serve as "additional consideration" for the Boone Lease and the Assignments, those agreements should be construed together. See Preston v. Metro. Lincoln-Mercury, Inc., 53 B.R. 589, 591 n.4 (Bankr. M.D. Tenn. 1985) (rejecting the trustee's contention that documents should be construed separately because where one promise was made "as further consideration" for another, "[b]oth promises are part of

the overall transaction and should not be construed as independent agreements"). Indeed, while ERC relies on the fact that the Boone Lease itself does not refer to or require payment of the override royalties set out in the Payment Agreement and purports to represent "all the obligations of and restrictions imposed upon the parties," ERC Br. at 20-21, this reveals yet another conflict with the Payment Agreement, which provides that its terms serve as "additional consideration" for the Boone Lease. This conflict can only be resolved through extrinsic evidence to definitively determine the parties' intent.

4. The Durations of the Boone Lease, Assignments, and Payment Agreement Do Not Require That They Be Read Separately

ERC's suggestion that the agreements should be treated separately because of their varying terms ignores both key contractual provisions and practical reality. Although the Payment Agreement itself contains no express term, ERC's rights to mine the coal for which it owes Tonnage Payments derive solely from the Assignments and the Boone Lease. ERC obviously cannot lawfully mine coal, and therefore would owe no further Tonnage Payments under the Payment Agreement, once its rights to a particular parcel under an Assignment or the Boone Lease expired.

In practice, the terms of the parties' obligations under the Payment Agreement are thus perfectly coextensive with the terms of the Boone Lease. Moreover, ERC ignores Section 17 of the Boone Lease, which contemplates termination of the lease when ERC has completed its mining operations and removed all of the mineable leased coal—the same coal that would trigger tonnage payments under the Payment Agreement. See Boone Lease § 17. This is simply not a case, as ERC claims, where "one agreement is intended to outlast another." ERC Br. at 18.

The record is also devoid of the required evidence to determine the actual duration of the leasehold interests assigned pursuant to the Assignments. The assignment of each of those

leasehold interests is plainly subject to "all the terms, covenants, conditions, and obligations" of the relevant base land lease being assigned. See Assignments § 2. None of those base leases, or any amendments or agreements between ERC and the base landlords, are part of the record on ERC's Motion. There is thus no factual basis on which to even fully evaluate or compare the durations of the parties' obligations.

C. Both the Assignments and the Boone Lease Are Executory

ERC concedes, as it must, that the Boone Lease is executory. However, it suggests that integration of the Payment Agreement with the Assignments alone would not suffice to make the Assignments executory. ERC Br. at 19-20. This argument not only overlooks ongoing obligations that the parties to the Assignments undertook, which render them executory, but it also fails to address the additional evidence that the Court would require to make an ultimate determination.

As part of the Assignments, ERC undertook ongoing, continual obligations to "abide by all the terms, covenants, conditions and obligations" of the relevant base leases governing the assigned coal reserves. See Assignments § 2. In turn, each of the Assignments contains ongoing, mutual indemnification obligations for, among other things, losses that result from failure to abide by the terms of those base leases. Specifically, ERC has undertaken ongoing obligations to indemnify and hold harmless each of the Defendants and their affiliates:

> from and against any [and] all claims, losses, damages (including personal injury or death), causes of actions, fines, penalties, violations, costs and expenses, including reasonable attorneys fees, arising out of or related to [ERC's], its employees', agents' or contractors' negligence in the conduct of operations on the Assigned Reserves . . . , failure to comply with any provision of the [relevant base] Lease (except for those provisions pertaining to payment of minimum royalties)[10] or the terms of this Partial Assignment, or failure to comply with any

[10] This reference to "minimum royalties" underscores the importance of the base leases to the Court's decision. The Assignments suggest that the base leases required the lessee to pay a minimum royalty in addition to a tonnage royalty, and that ERC did not undertake that minimum royalty obligation. Rather, the indemnification

> applicable federal or state law or regulation allocable to the period on and after the date hereof.

Assignments § 3. Defendants have undertaken parallel obligations in turn back to ERC. Id. To determine whether these obligations render the Assignments executory, the Court must evaluate whether failure to perform these obligations to indemnify and to continue to abide by the terms of the base leases would render the Assignments so underperformed that they constitute a material breach. Regen Capital I, Inc. v. Halperin (In re U.S. Wireless Data, Inc.), 547 F.3d 484, 488 n.1 (2d Cir. 2008).

Nothing in the pleadings or in ERC's Motion addresses the materiality of these obligations to permit the Court to decide this issue of fact at this stage. Indeed, the base leases, and the ongoing obligations that they impose on ERC, are not even part of the record that is before the Court. Defendants intend to demonstrate, through a record developed in discovery, that ERC's acceptance of certain base lease obligations, as well as its agreement to broad rights of indemnification, were material inducements absent which Defendants would not have agreed to enter into the Assignments. See Lipsky v. Com. United Corp., 551 F.2d 887, 895 (2d Cir. 1976) (defining materiality as an inquiry into whether "the innocent party [would] have agreed to enter the contract without inclusion of the disputed clause"). Only with such a record can the Court adequately address the materiality of the base leases and mutual indemnification obligations that the Assignments impose. See, e.g., Bear, Stearns Funding, Inc. v. Interface Group Nevada, Inc., 361 F. Supp. 2d 283, 296 (S.D.N.Y. 2005) (denying summary judgment where materiality of contractual obligations is "primarily a question of fact, best resolved by the jury" after full presentation of evidence).

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language suggests that the relevant Massey Entity undertook to pay those royalties over to the lessor and to pay the minimum royalties to keep the lease in effect for ERC's benefit.

The only argument ERC offers to short-circuit this inquiry is its suggestion that the terms of the Assignments' indemnification clauses are coextensive with existing legal obligations, thus making the indemnity obligations insignificant. See ERC Br. at 19 n.10 (citing In re Stein & Day Inc., 81 B.R. 263, 266 (Bankr. S.D.N.Y. 1988)). As an initial matter, this entirely ignores the obligation that ERC undertook in the Assignments to abide by the terms of the relevant base leases—an obligation that ERC elsewhere points to as a source of consideration. See ERC Br. at 16. As to the indemnification obligations, nothing in the pleadings or in ERC's brief demonstrates that the indemnity obligations duplicate the parties' rights and obligations under environmental statutes or common law, nor could they. At minimum, the indemnities provide a right to be reimbursed for attorney's fees, something unavailable either in a common law negligence or contribution action or under federal environmental statutes.[11] The Assignments' mutual indemnities also protect the parties' "parent and affiliated companies," who are not parties to the Assignments and would not have direct contractual claims for losses based on ERC's failure to comply with the terms of the Assignments.[12] Indeed, the weight of authority recognizes that mutual indemnities such as those in the Assignments will themselves render an agreement executory. See, e.g., In re Safety-Kleen Corp., 410 B.R. 164, 169-70 (Bankr. D. Del. 2009) (finding that mutual environmental indemnities rendered contract executory, and rejecting

[11] See, e.g., Keytronic Corp. v. United States, 511 U.S. 809, 819 (1994) (concluding that CERCLA does not provide for the award of private litigants' attorney's fees associated with bringing a cost recovery action against responsible polluters); In re John T., 695 S.E.2d 868, 872-73 (W. Va. 2010) (reiterating that West Virginia follows the American Rule, under which each litigant bears his or her own attorney's fees).

[12] Because a parent company may under certain circumstances be liable for the environmental obligations incurred at a subsidiary-owned site, see United States v. Bestfoods, 524 U.S. 51, 64-65 (1998); New York v. Solvent Chem. Co., 453 F. App'x 42, 47 (2d Cir. 2011), these concerns are especially important in an indemnity covering potential environmental liabilities arising from coal mining operations.

argument that indemnified obligations were duplicative of CERCLA); Preston, 53 B.R. at 591 (continuing promise to indemnify rendered contract executory).[13]

III. ERC HAS FAILED TO ESTABLISH AS A MATTER OF LAW THAT THE PARTIES DID NOT INTEND THE PAYMENT AGREEMENT, ASSIGNMENTS, AND BOONE LEASE TO BE INTEGRATED WITH THE SETTLEMENT AGREEMENT

Section 15 of the Settlement Agreement expressly provides that Settlement Agreement and its exhibits—including the Payment Agreement, the Assignments, and the Boone Lease—represent the "integrated memorial" of the parties' agreement:

> The Parties hereto understand, covenant and agree that the terms and conditions of this Settlement Agreement, together with the Exhibits to this Settlement Agreement, *constitute the full and complete understanding*, agreement and arrangement of the parties and *is the integrated memorial of their agreement*; and that there are no agreements, covenants, promises or understandings other than those set forth herein.

Settlement Agreement § 15 (emphasis added). In contrast to the inferences and factors on which ERC relies to divine the parties' intent, this language directly states that the Boone Lease, Payment Agreement, and Assignments—all of which are exhibits to the Settlement Agreement—form an "integrated memorial." The Settlement Agreement similarly provides that "the Parties will consummate all of the transactions contemplated by this Settlement Agreement simultaneously." Settlement Agreement § 7.

ERC makes a three-pronged effort to dodge the effect of this key language, but none of its arguments carry the day. First, ERC cannot ignore this language simply because it was not a signatory to the Settlement Agreement, where the Settlement Agreement—executed by its affiliate—required the execution of the Boone Lease, Payment Agreement, and Assignments for

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[13] While In re Chateaugay Corp., 102 B.R. 335, 349 (Bankr. S.D.N.Y. 1989) found an indemnity insufficient to render a contract executory, the agreement at issue was "for the one-time sale of tax benefits, and therefore there is no continual use of property, either tangible or intangible." This reasoning is entirely distinguishable where ERC has ongoing rights of use and access to the properties—coal mines that carry with them substantial risks for liability arising out of improper operation.

its benefit. Second, there is nothing in the Bankruptcy Code that somehow requires severance of the Settlement Agreement from its Exhibits. Certainly ERC may reject its obligations under the integrated agreement. However, ERC may not cherry pick portions of that agreement to reject for its convenience and benefit. Third, ERC cannot recast the integration clause in the Settlement Agreement as a mere "merger clause." Indeed, ERC's argument is made possible only by ignoring altogether the key language of the clause which expressly directs that all of the agreements together form an "integrated memorial."

A. ERC Cannot Ignore the Integration Clause of the Settlement Agreement

ERC's suggestion that the Court may ignore the Settlement Agreement "for the simple reason that neither ERC nor any of the Massey Entities was a party to the Settlement Agreement," ERC Br. at 23, ignores the contextual relationship between the Settlement Agreement and the ERC-signed Payment Agreement and Boone Lease. Far from being a stranger to the Settlement Agreement, ERC was an affiliate of Coaltrade, such that Coaltrade agreed to cause "appropriate affiliated entities" (i.e., ERC) to enter into the Payment Agreement, the Assignments, and the Boone Lease. See Settlement Agreement § 4. ERC then executed the Payment Agreement, Assignments, and the Boone Lease in fulfillment of the Settlement Agreement's terms. In this context, ERC simply cannot shield itself from the effect of the Settlement Agreement's plain text.

First, as noted above, courts often find agreements with different parties to be integrated, and they consider the terms of those agreements in determining the parties' intent, regardless of the signatory. The Second Circuit's decision in TVT is instructive. There, defendant IDJ was a party to a one agreement with plaintiff TVT, but was not a party to a second agreement that involved TVT and other parties. 412 F.3d at 89-90. The Court nonetheless considered and reviewed the terms of the second agreement to which IDJ was not a party in order to reach the

conclusion that the parties intended the two agreements to form an integrated whole. Id.; see also Kurz, 156 F. Supp. at 104 (construing a marital separation agreement between a husband and wife together with a trust agreement between the husband and a trustee, where "by construing the instruments together, the intent of the parties can be perceived and enforced . . . even though some of the documents are executed by parties who have no part in executing the others); Pritchard, 147 F.2d at 942 (reading the parties' agreements as an integrated whole and binding a non-signatory successor to the terms of a contract with the predecessor company); Rhythm & Hues, Inc. v. Terminal Marketing Co., No. 01 Civ. 4697 (AGS), 2002 WL 1343759, at *3-4 (S.D.N.Y. June 19, 2002) (construing instruments together as part of a single transaction even though they involved different signatories).[14]

Second, "traditional principles of state law allow a contract to be enforced by or against nonparties", including under the theory of estoppel. Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009). Specifically, a non-party will be bound to contractual terms where it knowingly accepted the benefits of the agreement. Courts have found this satisfied where an affiliate that is not party to a broader agreement, such as the Settlement Agreement, executes another agreement, such as the Boone Lease, pursuant to its terms, and benefits from the agreement. See, e.g., Life Techs. Corp. v. AB Sciex Pte. Ltd, 803 F. Supp. 2d 270, 276-79 (S.D.N.Y. 2011) (where purchase agreement required that the signatory's affiliate enter into a license agreement, and the affiliate entered into and benefited from such license agreement, the purchase agreement's arbitration clause bound non-signatory affiliate); In re HBLS, L.P., 01 Civ. 2025 (JGK), 2001 WL 1490696, at *1, *29 (S.D.N.Y. Nov. 21, 2001) (a shareholder of the party to a settlement

[14] See also Concerning Application for Water Rights v. Northern Colorado, 677 P.2d 320, 327 (Colo. 1984) ("[S]eparate instruments that pertain to the same transaction should be read together even though they do not expressly refer to each other, and even though they are not executed by the same parties. In this way each document can provide assistance in determining the meaning intended to be expressed by the others.")

agreement containing an arbitration provision was estopped from avoiding arbitration on ground that he himself was not party to settlement agreement because he "knowingly obtained the expected benefits that a person interested in the financial status of the [settling company] would obtain from a settlement"); Caperton v. A.T. Massey Coal Co., 225 W.Va. 128, 154 (2009) (binding non-party to forum selection clause where it was foreseeable that non-party would benefit from it). To the extent there are any factual issues concerning whether ERC benefited from the Boone Lease and/or the Assignments, those issues only further underscore the inability to resolve ERC's Motion on the current record.

B. Nothing in the Bankruptcy Code Requires Severance of the Settlement Agreement from its Integrated Exhibits

The Court need not seriously consider ERC's suggestion that integration between the Settlement Agreement and its exhibits "makes no sense as a matter of federal bankruptcy law", because the Settlement Agreement is itself not subject to rejection or assumption. ERC Br. at 24. ERC's argument turns the law on its head. As ERC elsewhere concedes, it is state law, not the Bankruptcy Code, that determines the scope and integration of contracts. ERC Br. at 9. Indeed, courts have specifically rejected any notion that the Bankruptcy Code reflects any "federal policy which requires severance of a lease condition solely because it makes a debtor's reorganization more feasible." In re Buffets Holdings, Inc., 387 B.R. 115, 124 (Bankr. D. Del. 2008). Instead, once the scope of the agreement is determined as matter of state law, ERC may exercise its rights to assume or reject its obligations under that agreement. Id. The fact that certain obligations in that integrated agreement are owed by non-debtor parties (e.g., the obligations owed by Peabody Coaltrade LLC in the Settlement Agreement) does nothing to affect this analysis.

C. The Settlement Agreement Contains an Integration Clause that Expressly Integrates the Boone Lease, Assignments, and Payment Agreement

In its final effort to avoid the impact of Section 15 of the Settlement Agreement, ERC strains to re-characterize that provision as only a "merger" clause, rather than an integration clause. This effort is made possible only by avoiding entirely the key language providing that the Settlement Agreement, together with the Boone Lease, Payment Agreement, and Assignments that are attached as exhibits, "is the *integrated memorial* of their agreement." Settlement Agreement § 15 (emphasis added). The plain meaning of this language would require the Boone Lease, Payment Agreement, and Assignments to be treated as "integrated."

No such language appears in the contracts at issue in ERC's authorities. ERC primarily relies on Rosenblum v. Travelbyus.com Ltd., 299 F.3d 657 (7th Cir. 2002), a case decided under Illinois law.[15] While ERC argues that Rosenblum construes "a nearly identical provision" to Section 15 of the Settlement Agreement, ERC Br. at 26, the provision at issue in Rosenblum contained no language addressing integration or incorporation whatsoever.[16] Indeed, the Rosenblum court expressly noted that "a merger clause does not incorporate other contracts by reference," id. at 655, precisely what Section 15 of the Settlement Agreement does. ERC acknowledges as much, referring to the "existence of integration clauses in both contracts"—the Settlement Agreement and the Boone Lease. ERC Br. at 27. Although ERC elsewhere

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[15] Not only is Illinois law inapplicable to the contracts at issue, but the Second Circuit has observed that New York courts "use the terms 'merger clause' and 'integration clause' interchangeably." Wall v. CSX Transp., Inc., 471 F.3d 410, 415 n. 4 (2d Cir. 2006).

[16] The text of the contractual provision considered by the Rosenblum court, which ERC scrupulously avoids citing, reads as follows: "This Agreement constitutes and expresses the whole agreement of the parties hereto with respect to the employment of the Executive by the Company and with respect to any matter or things herein provided for or hereinbefore discussed or mentioned with reference to such employment. All promises, representations, collateral agreements and understandings relative thereto not incorporated herein are hereby superseded and cancelled by this Agreement." Rosenblum, 299 F.3d at 660.

characterizes the relevant provision of the Boone Lease (Section 23.7) as a merger rather than an integration clause, ERC Br. at 2, 21, neither outcome can salvage ERC's Motion.

First, if both Section 23.7 of the Boone Lease and Section 15 of the Settlement Agreement are integration clauses, their terms directly conflict with the terms of the Settlement Agreement, requiring parol evidence to resolve the conflict. Specifically, Section 23.7 of the Boone Lease provides:

> This Lease constitutes the sole and entire existing agreement between the parties and expresses all the obligations of and restrictions imposed upon the parties. All prior agreements and commitments, whether oral or written, between the parties are either superseded by specific sections of this Lease, or in the absence of such coverage, specifically withdrawn.

As an initial matter, this language is at odds with the mere existence of the Payment Agreement: it provides without qualification that the Boone Lease is the "sole and entire existing agreement between the parties", when both Boone and ERC are also parties to the Payment Agreement. This conflict alone renders the agreements ambiguous and requires extrinsic evidence. Moreover, the scope of Section 23.7 of the Boone Lease is directly at odds with Section 15 of the Settlement Agreement. While Section 23.7 directs that the Boone Lease is the "entire existing agreement between the parties," Section 15 of the Settlement Agreement directs that the Settlement Agreement and all of its exhibits (including the Boone Lease) form the "full and complete understanding, agreement and arrangement of the parties." To reconcile these conflicting provisions and determine the parties' intent, the Court requires extrinsic evidence. Lee Enters., 303 S.E.2d at 703-04; Watson, 120 S.E. at 396.

Second, and alternatively, if the Boone Lease contains only a merger clause, while Section 15 of the Settlement Agreement is an integration clause, then the terms of the Settlement

Agreement control. By ERC's own reasoning, a merger clause does not operate "to form a single, unified agreement", and instead only "negates the impact of earlier negotiations and contract drafts". ERC Br. at 26. Under this view, Section 23.7 of the Boone Lease would simply not speak to the question of incorporation, and the terms of Section 15 of the Settlement Agreement—that speak directly to the scope of the parties' "integrated memorial"—would govern.[17]

[17] While ERC separately seeks dismissal of Defendants' mandatory counterclaims for post-petition royalties owed under the Payment Agreement, ERC's argument turns on the same position that the Payment Agreement is a stand-alone, non-executory contract. ERC Br. at 29-30. For the same reasons that ERC's Motion for judgment on its declaratory judgment claim must be denied, Defendants' counterclaim must stand.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny ERC's Motion and grant such other and further relief as the Court determines is just and proper.

Dated: New York, New York
October 18, 2012

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