UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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| In Re: | ) | |
| | ) | |
| PATRIOT COAL CORPORATION, *et. al.* | ) | Case No. 12-51502-659 |
| | ) | Judge Kathy A. Surratt-States |
| | ) | Chapter 11 |
| Debtors. | ) | |
| | ) | |
| EASTERN ROYALTY LLC, F/K/A EASTERN ROYALTY CORP., | ) | **Adversary No. 12-4353--659** |
| | ) | **PUBLISHED** |
| Plaintiff, | ) | |
| | ) | |
| -v- | ) | |
| | ) | |
| BOONE EAST DEVELOPMENT CO., PERFORMANCE COAL CO., AND NEW RIVER ENERGY CORP., et. al. | ) | |
| | ) | |
| Defendants. | ) | |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The matter before the Court is Plaintiff's Complaint for Declaratory Relief, Defendants' Answer, Notice of Motion for Judgment on the Pleadings, Plaintiff's Memorandum of Law in Support of Its Motion for Judgment on the Pleadings, Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Judgment on the Pleadings and Plaintiff's Reply Memorandum of Law in Further Support of Its Motion for Judgment on the Pleadings. A hearing was held on February 26, 2013, at which Plaintiff and Defendants were represented by counsel. Oral argument was presented and the matter was taken under submission. Upon consideration of the record as a whole, the Court rules as follows.

## I. FINDINGS OF FACT

On July 9, 2012, Patriot Coal Corporation (hereinafter "Patriot") and a number of its affiliates, to the inclusion of Plaintiff Eastern Royalty LLC f/k/a Eastern Royalty Corp. (hereinafter "ERC"), filed Voluntary Petitions for relief under Chapter 11 of the Bankruptcy Code. ERC brings forth this matter

against Defendants Boone East Development Co. (hereinafter "Boone"),[1] Performance Coal Company (hereinafter "Performance Coal")[2] and New River Energy Corporation (hereinafter "New River")[3] (hereinafter collectively the "Massey Entities").

Before July 5, 2005, a dispute arose been Massey Coal Sales Company, Inc. (hereinafter "Massey Coal Sales") and Coal Trade, LLC (hereinafter "Coaltrade"). Massey Coal Sales was at that time a subsidiary of Massey Energy Company (hereinafter "Massey") and is now a subsidiary of Alpha Natural Resources. Coaltrade is a subsidiary of Peabody Energy Corporation (hereinafter "Peabody"). On July 5, 2005, Massey Coal Sales and Coaltrade entered into a Settlement Agreement (hereinafter "Settlement Agreement")[4] to resolve the dispute. The Settlement Agreement became effective on July 30, 2005 and required, among other actions, for Massey Coal Sales to make a $6,000,000.00 cash payment to Coaltrade, and for Massey Coal Sales and Coaltrade to enter into, or cause their appropriate affiliated entities to enter into, several agreements. Unexecuted copies of the several agreements were attached to the Settlement Agreement as exhibits. Among the several agreements contemplated by the Settlement Agreement was a payment agreement dated August 31, 2005, four (4) partial assignments and one (1) lease,

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[1]Boone East Development Co. is now a wholly-owned subsidiary of Appalachia Coal Sales Company, Inc., which in turn is a wholly-owned subsidiary of Appalachia Holding Company, Inc., which in turn is a wholly-owned subsidiary of Alpha Natural Resources, Inc., a publicly held Delaware Corporation. Rule 7.1 Disclosure Statement.

[2]Performance Coal Company is now a wholly-owned subsidiary of Elk Run Coal Company, Inc., which in turn is a wholly-owned subsidiary of Appalachia Holding Company, Inc., which in turn is a wholly-owned subsidiary of Alpha Natural Resources, Inc., a publicly held Delaware Corporation. Rule 7.1 Disclosure Statement.

[3]New River Energy Corporation is now a wholly-owned subsidiary of Appalachia Coal Sales Company, Inc., which in turn is a wholly-owned subsidiary of Appalachia Holding Company, Inc., which in turn is a wholly-owned subsidiary of Alpha Natural Resources, Inc., a publicly held Delaware Corporation. Rule 7.1 Disclosure Statement.

[4]The Settlement Agreement was filed under seal with this Court.

all of which involve ERC and the Massey Entities, as will be discussed below in greater detail.[5]

Section 15 of the Settlement Agreement states:

> [Massey Coal Sales and Coaltrade] 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. This Settlement Agreement may not be modified or amended without the express written consent of the Parties.

Settlement Agreement, § 15, at 7.

**A. The Payment Agreement Dated August 31, 2005**

Pursuant to the Settlement Agreement, ERC as a then affiliate of Coaltrade and the Massey Entities as then affiliates of Massey Coal Sales entered into a Payment Agreement dated August 31, 2005 (hereinafter the "Payment Agreement"). The Payment Agreement begins with recitals that describe the following four (4) partial-assignments of leases and one (1) lease.

**1. Partial-Assignment of the Berwind-New River Lease**

The Payment Agreement described a lease entered into on August 15, 1995 between

[5]The other agreements contemplated by the Settlement Agreement are: (i) a new coal supply agreement (hereinafter "2005 Coal Supply Agreement") which required Massey Coal Sales to supply coal to Coaltrade; (ii) a Partial Release of Interest Agreement (hereinafter "Coaltrade Release Agreement") whereby Coaltrade released certain coal reserves to the applicable landowners in exchange for a $4,000,000.00 cash payment by Massey Coal Sales; (iii) three separate Partial Release and Surrender Agreements (hereinafter the "Peabody Affiliates Release Agreements") whereby Heritage Coal Company LLC f/k/a Peabody Coal Company, Pine Ridge Coal Company, LLC f/k/a Pine Ridge Coal Company and Eastern Associated Coal, LLC f/k/a Eastern Associated Coal Corp., (hereinafter collectively the "Peabody Affiliates") – all of which were affiliates of Peabody and are now Debtor-affiliates of Patriot– released portions of their respective leases of three specific coal reserves to the applicable landowners with the expectation that Elk Run Coal Company, Inc. (hereinafter "Elk Run"), Boone and Ceres Land Company – all of whom are affiliates of Massey – would enter into new leases with the respective landowners for those reserves; and (iv) two payment agreements: the first of which called for Elk Run to make a $4,000,000.00 cash payment and the second which required Elk Run, Boone and Ceres Land Company to make tonnage payments to the respective Peabody Affiliates (hereinafter the "Affiliate Payment Agreements"). Each referenced agreement was filed with this Court under seal.

Berwind Land Company and New River,[6] thereby granting New River ownership of a leasehold estate in certain lands located in West Virginia (hereinafter the "Berwind-New River Lease"). The Payment Agreement states that New River would assign, and ERC would assume, a portion of the coal reserves covered by the Berwind-New River Lease. *See* Payment Agreement, Section A, at 1.

**2. Partial-Assignment of the Berwind-Performance Coal Lease**

The Payment Agreement described a Supplemental Agreement of Lease entered into on March 10, 1978 between Berwind Land Company and Armco Steel Corporation. By partial sublease and assignment, Performance Coal became the owner of a portion of the leasehold estate in certain lands in West Virginia (hereinafter the "Berwind-Performance Coal Lease"). The Payment Agreement states that Performance Coal would assign and ERC would assume a portion of the coal reserves covered by the Berwind-Performance Coal Lease. *See* Payment Agreement, Section B, at 1.

**3. Partial-Assignment of the WPP-Performance Coal Mining Lease**

The Payment Agreement described a Coal Mining Lease entered into on October 15, 1994, as amended by letter agreement on June 26, 1997, between Western Pocahontas Properties Limited Partnership and Performance Coal, thereby granting Performance Coal a leasehold estate in certain lands located in West Virginia (hereinafter the "WPP-Performance Coal Mining Lease"). By Deed dated October 14, 2002, Western Pocahontas Properties Limited Partnership conveyed the lands and the leasehold estate to WPP LLC. The Payment Agreement contemplates that Performance Coal would assign and ERC would assume a portion of the coal reserves covered by the WPP-Performance Coal Mining Lease. *See* Payment Agreement, Section C, at 2.

[6] At that time, New River operated under the name Federal Development Corporation. According to the Payment Agreement, Federal Development Corporation changed its name to New River effective September 29, 2000.

**4. Partial-Assignment of the WPP-Boone Lease**

The Payment Agreement describes a Coal Mining Lease entered into on January 1, 1956, between Western Pocahontas Corporation and Traux-Traer Coal Company, which was amended, supplemented, subleased and assigned. Through amendment, supplement, sublease and/or assignment, Boone owned a portion of a leasehold estate in certain lands located in West Virginia (hereinafter the "WPP-Boone Lease"). The Payment Agreement contemplates that Boone would assign and ERC would assume a portion of the coal reserves covered by the WPP-Boone Lease. *See* Payment Agreement, Section D, at 2.

**5. The Boone-ERC Lease**

The Payment Agreement states that Boone owns certain tracts or parcels of land in West Virginia, and Boone would lease to ERC certain coal and mining rights on a portion of the tracts or parcels of land by coal lease (hereinafter the "Boone-ERC Lease"). *See* Payment Agreement, Section E, at 2.

**6. Additional Consideration for the Partial-Assignments and the Boone-ERC Lease**

The Payment Agreement states that "as additional consideration for the coal reserves to be assign[ed] and leased to ERC by the Massey [E]ntities pursuant to the [Payment] [A]greement," upon execution of the Payment Agreement, ERC and the Massey Entities would enter into the Partial-Assignments, as described above, of the Berwind-New River Lease, the Berwind-Performance Coal Lease, the WPP-Performance Coal Mining Lease and the WPP-Boone Lease (hereinafter collectively the "Partially-Assigned Leases" or "Partial Assignments"), and the Boone-ERC Lease. *See* Payment Agreement § 1, at 3. Next, the Payment Agreement states that ERC would pay certain Tonnage Payments, also known as Override Payments, to the respective Massey Entity for each ton of coal mined and sold from the land described in the respective Partially-

Assigned Leases as well as the Boone-ERC Lease.[7] *See* Payment Agreement, § 2, at 3-4. Additionally, ERC agreed to pay New River an additional one-and-a-half percent (1.5%) of the gross sales price per ton, as defined in the Payment Agreement, above the Tonnage Payments for each ton of coal mined and sold from the land described in the Berwind-New River Lease. *See* Payment Agreement, § 2, at 4. Finally, Section 3 of the Payment Agreement provides that ERC shall furnish to each of the Massey Entities, certain information used to calculate the Tonnage Payments. *See* Payment Agreement, § 3, at 5.

**B. The Partial Assignments**

Each of the Partial Assignments were executed on August 31, 2005. They contain nearly identical provisions in that they each begin with recitals of the land to be partially assigned (hereinafter generally, the "Assigned Reserve") and state that ERC will have the non-exclusive right to use the surface overlying the Assigned Reserve. The Partial Assignments each further provide that ERC "expressly assumes and agrees to abide by the terms, covenants, conditions, and obligations" of the Partially-Assigned Leases. The Partial Assignments are governed by West Virginia law. *See* Partial Assignment of Berwind-New River Lease, ¶ 8; Partial Assignment of the Berwind-Performance Coal Lease, ¶ 8; Partial Assignment of the WPP-Performance Coal Mining Lease, ¶ 8; Partial Assignment of the WPP-Boone Lease, ¶ 8.

The Partial Assignments each contain an Indemnity Clause which essentially calls for either New River, Performance Coal or Boone – depending on the respective Partial Assignment – to indemnify and hold harmless ERC, its successors, assigns, parent and affiliated companies from

[7]The exact amount or calculation of the Tonnage Payments for the coal mined and sold from the lands contemplated by the Partial-Assignments is unclear in that ERC seems to suggest that the formula for this calculation is contained in Section 2 of the Payment Agreement while the Massey Entities appear to state that any calculation contained in Section 2 of the Payment Agreement pertains only to the Boone-ERC Lease. It suffices to merely mention this point of contention at this time because resolution of this divergence is immaterial to the matter before the Court particularly since all agree that Tonnage Payments are due from ERC to the respective Massey Entity for coal mined and sold from the land contemplated by the Partially-Assigned Leases.

any negligence, breach of contract or failure to comply with applicable law caused by the respective Massey Entity. *See* Partial Assignment of Berwind-New River Lease, ¶ 3; Partial Assignment of the Berwind-Performance Coal Lease, ¶ 3; Partial Assignment of the WPP-Performance Coal Mining Lease, ¶ 3; Partial Assignment of the WPP-Boone Lease, ¶ 3. Each Partial Assignment also contains an Arbitration clause. *See* Partial Assignment of Berwind-New River Lease, ¶ 6; Partial Assignment of the Berwind-Performance Coal Lease, ¶ 6; Partial Assignment of the WPP-Performance Coal Mining Lease, ¶ 6; Partial Assignment of the WPP-Boone Lease, ¶ 6. In addition to the Tonnage Payments required by the Payment Agreement, the Berwind-New River Lease, the Berwind-Performance Lease, the WPP-Performance Coal Mining Lease and the WPP-Boone Lease each require ERC to make payments to the owners of leased lands, as stated in each underlying lease of the Partial Assignments. The Partial Assignments do not reference the Payment Agreement.

**C. The Boone-ERC Lease**

The Boone-ERC Lease states that it became effective on August 1, 2005, however, the Boone-ERC Lease was executed on August 31, 2005 before a Notary Public. The Boone-ERC Lease provides for rents to be paid by ERC to Boone. Section 7 provides for rent to be paid at least monthly in the form of Tonnage Royalties for each and every ton of coal mined and sold from the Assigned Reserve. Boone-ERC Lease, § 7, at 15-16 and Exhibit A, at 2. Section 8 of the Boone-ERC Lease provides for rent in the form of Minimum Royalties to be paid annually by ERC to Boone for every year that the Boone-ERC Lease remains in effect. *See* Boone-ERC Lease, § 8, at 16-17 and Exhibit A, at 2-4. Section 19 of the Boone-ERC Lease describes 22 separate events of default; none of the 22 events of default involve the Payment Agreement or failure of ERC to meet its obligations under the Payment Agreement. Boone-ERC Lease, § 19, at 36-44. The Boone-ERC Lease has a specified duration of five (5) years with an option to renew for additional five-year terms unless ERC gives 60 days written notice of an intent to terminate the Boone-ERC Lease.

*See* Boone-ERC Lease, Exhibit A, at 1. Boone-ERC Lease, Section 23.7 of the Boone-ERC Lease was read into the record, and states as follows:

> 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.

Boone-ERC Lease, § 23.7, at 51-52. The Boone-ERC Lease does not reference the Payment Agreement.

## II. ARGUMENTS PRESENTED

ERC argues that the Payment Agreement is not an executory contract because the Massey Entities have each fully performed and all remaining performance must be borne by ERC only. Therefore, ERC argues that the Payment Agreement is not subject to be assumed or rejected under Section 365. ERC simultaneously argues that the Payment Agreement is not integrated with or is severable from the Berwind-New River Lease, Berwind-Performance Coal Lease, WPP-Performance Coal Mining Lease, the WPP-Boone Lease and the Boone-ERC Lease. Alternatively, ERC argues that even if the Payment Agreement were integrated with each of the Partial Assignments, the resulting hypothetical integrated contracts would remain non-executory because each Partial Assignment is non-executory. ERC further argues that the Payment Agreement cannot be made executory by the Boone-ERC Lease because the terms of the Boone-ERC Lease demonstrate that the parties intended for the Boone-ERC Lease to be an independent contract. ERC notes that the Boone-ERC Lease fails to mention the Payment Agreement in that non-performance of ERC under the Payment Agreement is not included as an event of default under the Boone-ERC Lease. Moreover, ERC notes that the Boone-ERC Lease contains an integration or merger clause. Finally, ERC argues that there is no principle of law that would support the contention that by virtue of the integration or merger clause of the Settlement Agreement, the

Payment Agreement is integrated with the Partial Assignments, the Boone-ERC Lease and the other agreements caused to be entered by Massey Coal Sales and Coaltrade. Therefore, ERC requests declaratory judgment on the pleadings, that the Payment Agreement is non-executory and is not otherwise made executory.

The Massey Entities request that ERC be denied declaratory judgment at this time to permit discovery as to the parties' intent because ERC has not met its burden that judgment on the pleadings is appropriate. The Massey Entities argue that it is not beyond doubt that the parties intended the Payment Agreement, the Partial Assignments, the Boone-ERC Lease, the Settlement Agreement, or some combination thereof, to be interpreted and integrated as one single contract. The Massey Entities further argue that the Payment Agreement is ambiguous and parol evidence might be required to clarify the ambiguities. The Massey Entities point to the nature of the coal mining industry and the necessary relationship and obligations thereof, as memorialized by the various Indemnity and Arbitration clauses in the Partial Assignments, in support for its position that there are mutually flowing obligations sufficient to deem the Payment Agreement executory. The Massey Entities understand that the parties to the several agreements contemplated by the Settlement Agreement now span at least three (3) corporate families: Patriot, Alpha and Peabody, nevertheless, the Massey Entities intend to conduct less than ten (10) depositions concerning the intent behind the Payment Agreement. Finally, the Massey Entities alternatively argue that the Payment Agreement is not a contract because the right to receive royalties is a property right that runs with the land. Therefore the Massey Entities request that ERC's Motion be denied.

## III. JURISDICTION

This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 151, 157 and 1334 (2012) and Local Rule 81-9.01(B) of the United States District Court for the Eastern District of Missouri. This is a core and related proceeding under 28 U.S.C. § 157(b)(2)(A) and (B) (2012). Venue is proper in this District under 28 U.S.C. § 1409(a) (2012).

## IV. CONCLUSIONS OF LAW

The Court must determine whether the Payment Agreement is an executory contract for purposes of Section 365 and whether it is appropriate for this Court to make this determination before the Massey Entities have undertaken discovery. The Court must evaluate whether the Payment Agreement is integrated with or is severable from the Settlement Agreement, the Partial Assignments and/or the Boone-ERC Lease. The Court rules as follows.

### A. The Law

#### 1. Burden of Proof Under Rule 12(c)

Under Federal Rule of Civil Procedure 12(c), as made applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7012, a Motion for Judgement on the Pleadings may be made "[a]fter the pleadings are closed – but early enough not to delay trial." Fed. R. Civ. P. 12(c) (2012); Fed. R. Bankr. P. 7012(b) (2012). The "pleadings" contemplated by Rule 12(c) are "the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case." *Roberts v. Babkiewicz,* 582 F.3d 418, 419 (2d Cir. 2009); *L-7 Designs, Inc. v. Old Navy, LLC,* 647 F.3d 419, 422 (2d Cir. 2011). Also included in the "pleadings" under Rule 12(c) are the documents that are integral to the complaint. *Sira v. Morton,* 380 F.3d 57, 67 (2d Cir. 2004) (citations omitted).

A motion for judgment on the pleadings is analyzed under the same standard as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) in that all reasonable inferences are viewed in favor of the non-moving party. *See Westcott v. City of Omaha,* 901 F.2d 1486, 1488 (8th Cir.1990) (citation omitted); *In re McClelland,* 456 B.R. 178, 182 (S.D.N.Y. 2011) (citing *Johnson v. Rowley,* 569 F.3d 40, 43-44 (2d Cir. 2009)). Where the "material facts are undisputed and where judgement on the merits is possible merely by considering the contents of the pleadings," judgment on the pleadings is appropriate. *United States v. Any & All Radio Station Transmission Equip.,* 207 F.3d 458, 462 (8th Cir. 2002); *Sellers v. M.C. Floor Crafters, Inc.,* 842 F.2d 639, 642 (2d Cir. 1988)

(citation omitted). Therefore, to withstand a motion for judgment on the pleadings, the non-moving party must provide sufficient facts "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007)).

**2. Conflict of Law**

Whether the Payment Agreement is integrated with the Partial Assignments, the Boone-ERC Lease or the Settlement Agreement is a question of state law. *See, e.g., Cargill, Inc. v. Refco, Inc. (In re Refco, Inc.),* 2006 WL 2664215, at *3-4 (S.D.N.Y. Sept. 13, 2006). When a contract does not have a governing law provision, the "conflict of law principles of the forum state" apply. *In re PSINet Inc.,* 268 B.R. 358, 376 (Bankr. S.D.N.Y. 2001) (citing *Bianco v. Erkins (In re Gaston & Snow),* 243 F.2d. 599, 605-607 (2d Cir. 2001)). In Missouri, there must be an actual conflict between the laws of the jurisdictions involved for a choice of law analysis to be warranted. "[If] the laws of both states relevant to the set of facts are the same, or would produce the same decision in the lawsuit, there is no real conflict of laws and the case ought to be decided under the law that is common to both states." *Colonial Presbyterian Church v. Heartland Presbytery,* 375 S.W.3d 190, 199 (Mo. App. 2012) (citing *Hartford Acci. & Indem. Co. v. Travelers Ins. Co.,* 525 S.W.2d 612, 616 (Mo. App.1975) (quoting Robert A. Leflar, American Conflicts Law, § 103 False Conflicts, p. 239 (1959 rev. ed.1968)). The analysis required of the Court would be the same whether governed by Missouri, New York or West Virginia law. This Court will proceed accordingly.

**3. Executory Contracts**

In the Eighth Circuit, an executory contract is "a contract under which 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 1069, 1073 (8th Cir. 2012) (citing *In re Craig,* 144 F.3d 593, 596 (8th Cir. 1998) (quoting *Nw. Airlines, Inc. v. Klinger (In re Knutson),* 563 F.2d 916,

917 (8th Cir. 1977)). This definition, also known as the Countryman Test which has been adopted in the majority of circuits – including the Eighth, Second and Fourth Circuits – further recognizes that a contract is non-executory where the nonbankrupt entity has fully performed, while the debtor has only partially performed, or in some instances, the debtor has not performed at all. *Id.; In re Wireless Data, Inc.,* 547 F.3d 484, 488 (2d Cir. 2008); *In re Sunterra* Corp., 361 F.3d 257, 264 (4th Cir. 2004). For an agreement to be deemed executory, there must be "at least one obligation for both [the promisee] and [promisor] that would constitute a material breach under [applicable state] law if not performed. If not, then the [Instrument] is not an *executory contract*." *Foothills Texas, Inc. v. MTGLQ Investors, L.P. (In re Foothills Texas, Inc.),* 476 B.R. 143, 152 (Bankr. D. Del. 2012) (citing *In re Exide Technologies,* 607 F.3d 957, 962 (3d Cir. 2010)(emphasis in original)).

**4. Clear and Unambiguous Contracts**

"The determination of whether a contract term is ambiguous is a threshold question of law for the court." *Walk-In Med. Ctrs., Inc. v. Breuer Capital Corp.,* 818 F.2d 260, 263 (2d Cir.1987). Under both New York and West Virginia law, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *In re Indesco Intern., Inc.,* 451 B.R. 274, 282 (Bankr. S.D.N.Y. 2011) (citing *CIBC World Markets Corp. v. TechTrader, Inc.,* 183 F.Supp.2d 605, 610-11 (S.D.N.Y. 2001)); *Haymaker v. Gen. Tire Inc.,* 420 S.E.2d 292, 293 (W. Va. 1992). When a written contract is unambiguous, it "will be deemed to express the entire and exact meaning of the parties, and every material part of the agreement will be presumed to have been expressed in it." *Kanawha Banking & Trust Co. v. Gilbert,* 46 S.E.2d 225, 236 (W. Va. 1947) (citations omitted); *British Intern. Ins. Co. Ltd. v. Seguros La Republica, S.A.,* 342 F.3d 78, 82 (2d Cir. 2003) (citations omitted). When the terms of a written contract or inferences readily drawn from the terms are "reasonably subject to differing interpretations," thereby making the contract ambiguous, evidence outside the four corners of the document may be used by the court to ascertain the intent of the parties. *Scholastic, Inc. v. Harris,* 259 F.3d 73, 82 (2d Cir.

2001); *Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's,* 136 F.3d 82, 86 (2d Cir. 1998); *Rainbow v. Swisher,* 527 N.E.2d 258, 259 (N.Y. 1988).

"Whether or not a writing is ambiguous is a question of law to be resolved by the courts." *W.W.W. Assocs., Inc. v. Giancontieri,* 566 N.E.2d 639, 642 (N.Y. 1990) (citation omitted). "An ambiguity exists 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.'" *Alexander & Alexander Servs., Inc.,* 136 F.3d at 86 (quoting *Lightfoot v. Union Carbide Corp.,* 110 F.3d 898, 906 (2d Cir.1997)(quotation omitted)); *In re Indesco Int'l, Inc.,* 451 B.R. at 283 (citing *CIBC World Markets Corp.,* 183 F.Supp.2d at 611(quotation omitted)). The Court should not itself, nor accept a party's attempt, to manufacture ambiguity of a contract, particularly when such manufacture would "strain [the] contract language beyond its reasonable and ordinary meaning." *In re Indesco Intern., Inc.,* 451 B.R. at 283. "[I]f a contract is unambiguous on its face, its proper construction is a question of law." *Id.* at 281 (citing *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.,* 906 F.2d 884, 889 (2d Cir. 1999)).

**5. Integration of Contracts**

"Whether multiple writings should be construed as one agreement depends on the intent of the parties." *Commander Oil Corp. v. Advance Food Serv. Equip.,* 991 F.2d 49, 52-53 (2d Cir. 1993) (citation omitted). To decipher the intent of the parties, courts typically look first to the language and subject matter of the agreement and whether the subject matter is divisible. *See In re Union Financial Services Group, Inc.,* 325 B.R. 816, 823 (Bankr. E.D. Mo. 2004) (citing *Kansas City S. Ry. Co. v. St. Louis - San Francisco Ry. Co.,* 509 S.W.2d 457, 459 (Mo. 1974)). "[T]hat the parties entered into separate written agreements with 'separate assents' rather than a 'single assent' is influential." *Rudman v. Cowles Commc'ns, Inc.,* 280 N.E.2d 867, 873 (N.Y. 1972) (citation omitted). For purposes of contract integration, a contract entered into by a parent company and

a contract entered into by a subsidiary constitute contracts entered into by different parties unless otherwise intended. *Id.* at 874 (where employment agreement with the parent company was not integrated with the asset sale agreement entered into by the subsidiary company). A criteria of contract integration is that "the parties and subject matter be the same and the relationship between the documents be clear." *Nat'l Union Fire Ins. Co. v. Clairmont,* 231 A.D.2d 239, 241-42 (N.Y. App. Div. 1997). Contracts entered into by different parties weighs heavily against contract integration. *Id.* at 242; *cf. This Is Me, Inc. v. Taylor,* 157 F.3d 139, 143 (2d Cir. 1998) (writings that form part of a transaction that are "designed to effectuate the same purpose" may be read together); *Pritchard v. Nelson,* 147 F.2d 939, 941-42 (4th Cir. 1945) (multiple contracts may be read together when so intended).

To decipher the parties' intent, a court must "determine the extent to which the breaches of one Agreement excuse performance by the non-breaching party under the other Agreements...." *In re Indesco Int'l, Inc.,* 451 B.R. at 283. "[I]n the absence of anything to indicate the contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be read and interpreted together, it being said that they are in the eyes of the law, one instrument." *Liberty USA Corp. v. Buyer's Choice Ins. Agency LLC,* 386 F.Supp.2d 421, 425 (S.D.N.Y. 2005) (citation omitted). "[E]ven though several instruments relating to the same subject and executed at the same time should be construed together in order to ascertain the intention of the parties, it does not necessarily follow that those instruments constitute one contract or that one contract was accordingly merged in or unified with another so that every provision in one becomes a part of every other.... [It] does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties." 11 Williston on Contracts § 30:26 (4th ed.).

Presence of a merger clause in a contract catalyzes the parol evidence rule and serves to prevent the introduction of extrinsic evidence. *Jarecki v. Shung Moo Louie,* 745 N.E.2d 1006, 1009

(N.Y. 2001) ("The purpose of a merger clause is to require the full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to alter, vary or contradict the terms of the writing.") "The merger clause accomplishes this purpose by evincing the parties' intent that the agreement 'is to be considered a completely integrated writing.'" *Id.* (quoting *Matter of Primex Int'l Corp. v. Wal-Mart Stores,* 679 N.E.2d 624, 627 (N.Y. 1997) (citation omitted)).

**B. Is the Payment Agreement, Standing Alone an Executory Contract Pursuant to Section 365?**

The Court first addresses whether the Payment Agreement is an executory contract which may be assumed or rejected under Section 365. To determine whether the Payment Agreement is executory or non-executory, this Court must determine whether material bilateral obligations continue to exist between both ERC and the Massey Entities.

There can be little debate that the Payment Agreement, standing alone, does not meet the Countryman Test in that there are no continuing, material obligations due from ERC to the Massey Entities, as well as due from the Massey Entities to ERC. The Payment Agreement states that upon the execution of the Payment Agreement, the Partial Assignments and the Boone-ERC Lease will be entered into. This action was completed on August 31, 2005. The Payment Agreement further calls for Tonnage Payments to be made by ERC to the Massey Entities for each ton of coal mined and sold from the Assigned Reserves of the Partial Assignments and the Boone-ERC Lease. The Payment Agreement also provides that ERC will furnish the Massey Entities with certain information used to calculate the Tonnage Payments. After the Partial Assignments and the Boone-ERC Lease were executed, the entirety of the remaining obligations under the Payment Agreement flow from ERC to the Massey Entities. There are no independently ambiguous terms within the Payment Agreement and both ERC and the Massey Entities agree. *But see Frigaliment Importing Co. v. B.N.S. Intern. Sales Corp.,* 190 F.Supp 116 (D.C.N.Y. 1960) (where the word "chicken" was ambiguous). As such, the Court concludes that the Payment Agreement, standing

alone, is not an executory contract.[8]

**C. Is the Payment Agreement Integrated with Each Partial Assignment or With the Boone-ERC Lease Resulting in Five Executory Contracts Pursuant to Section 365?**

The next question is whether the Payment Agreement can be made executory by integration with each Partial Assignment or the Boone-ERC Lease. The Payment Agreement contains no choice of law provision. The Partial Assignments are all governed by and construed in accordance with West Virginia law. The Boone-ERC Lease does not contain a choice of law provision, however, it does contain an arbitration clause which calls for any controversy that arises under the Boone-ERC Lease to be resolved by arbitration before a single arbitrator in Charleston, West Virginia. Here, the parties agree that the analysis of the Payment Agreement and the principles of contract integration would be the same whether governed by New York or West Virginia law.[9] There being no conflict, the Court will proceed accordingly.

This Court has already determined that the Payment Agreement, standing alone, is clear and unambiguous. The Court will undertake the same analysis of the Partial Assignments and then analyze whether as a matter of law, the Payment Agreement and each Partial Assignment should be integrated. The Court will undertake the same analysis of the Boone-ERC Lease.

**1. Are the Partial Assignments Clear and Unambiguous**

Each Partial Assignment includes recitals that describe the particular Assigned Reserve.

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[8]The Massey Entities stated at paragraph 37 of the Answer to the Complaint that the "Payment Agreement (and obligations therein) are not subject to treatment as a contract or contractual rights" because they "constitute real property interests that run with the land." Ans. ¶ 37. The Court recognizes that it is possible that the Tonnage Payments or Override Payments are interests in real property and may be regarded as a covenant running with the land. This is immaterial to the matter at hand because the Payment Agreement is itself a contract and must be treated as such at least for purposes of bankruptcy law. *Cf. Gibbons v. Tenneco, Inc.,* 710 F. Supp. 643, 648-49 (E.D. Ky. 1988) (Where landowners deprived of payments due based on coal mineable from their land, as memorialized in the coal clause in a right-of-way agreement, needed to seek recompense through a "chose in action" which is an action for a personal right that is not reduced into possession but is recoverable by suit in law, despite the fact that the coal clause was a covenant that runs with the land); *cf. McIntosh v. Vail,* 28 S.E.2d 607, 609-13 (W.Va 1943).

[9]The Court further notes that the principles of contract integration under Missouri law would not materially alter this Court's analysis.

Beyond that, the Partial Assignments are fully performed in that there remains no performance for either ERC or the respective Massey Entity. There is no ambiguity as to the purpose or terms of the Partial Assignments. There is no dispute that the Partial Assignments are clear and unambiguous.

**2. Should the Payment Agreement and the Partial Assignments be Integrated as a Matter of Law?**

The next question is whether ERC and the Massey Entities intended that the Payment Agreement and each of the Partial Assignments be integrated into four independent agreements and therefore whether as a matter of law, the Payment Agreement and Partial Assignments should be integrated. As previously discussed, state law controls whether two or more instruments should be deemed one single contract. From the above conglomeration of cases, this Court will analyze the parties' intent based on the language, timing of execution and subject matter of the contracts, the impact of the agreements memorialized in separate writings, whether the consideration for each agreement is separate and distinct, whether there are cross-default provisions particularly whether failure to perform under one agreement causes or permits the choice not to perform under the other agreement, the presence of integration clauses and the duration of the contracts.

There is no dispute that the Payment Agreement states that the Partial Assignments will be executed upon the execution of the Payment Agreement and that the Partial Assignments have indeed been executed. This is the extent to which the language of the Payment Agreement connects the Payment Agreement to the Partial Assignments. The Partial Assignments further define the scope of the Assigned Reserves in relation to the entire parcel of land contemplated by the respective underlying lease. The Partial Assignments do not relate in any way to a right of reversion nor do they contain language that conditions the duration of the Partial Assignment on ERC's performance under the Payment Agreement. As such, there is no act that the respective Massey Entity can stop performing under the Partial Assignments if ERC stops making Tonnage Payments required by the Payment Agreement. The Payment Agreement is not in any way

incorporated by reference into the Partial Assignments, nor is it characterized in the Partial Assignments, nor is this Payment Agreement characterized as an amendment, supplement, rider, allonge, or any other document appurtenant to the Partial Assignments.

Further, there is a separate Partial Assignment for each Assigned Reserve of each underlying lease. Each Partial Assignment was executed in a separate document and thereby required separate assents. None of the Partial Assignments contemplate an assignment of multiple leases. For example, Performance Coal is the assignor and ERC is the assignee under the Partial Assignments of both the Berwind-Performance Coal Lease and the WPP-Performance Coal Mining Lease, yet still, these two Partial Assignments are expressed in separate documents. This supports the fact that each Partial Assignment concerns a different lease, and the Assigned Reserve contemplated by each Partial Assignment is different, therefore, the parties intended a separate identity for each Partial Assignment.

Further, the parties showed different and separate consideration for each Partial Assignment. In exchange for the Partial Assignments under each lease, ERC agreed to assume the respective Massey Entity's obligations and to make Tonnage Payments. This is particularly exemplified in the Berwind-New River Partial Assignment where an additional Tonnage Payment of one-and-a-half percent (1.5%) of the gross sales price per ton is due to New River from ERC for every ton of coal mined from that particular Assigned Reserve. This different and separate consideration is necessarily the result of the fact that while the Payment Agreement was entered into by ERC and the Massey Entities, each Partial Assignment was only entered into by ERC and a single Massey Entity. Thus, when each Partial Assignment is viewed in relation to the Payment Agreement, the result is two contracts entered into by different parties. This reality of separate consideration and different parties weighs in favor of contractual separability.

Pursuant to the Partial Assignments, ERC agreed to assume the respective Massey Entity's rights to the Assigned Reserves for the remainder of the underlying leases. The Payment

Agreement does not contain corollary language in that the Payment Agreement does not expire. As such, the Payment Agreement exists for an indefinite period while each Partial Assignment is tied to an underlying lease, and the underlying leases have a defined termination date. The differing durations of the contracts supports the notion that the parties intended the Payment Agreement and the Partial Assignments to remain separate.

While neither the Payment Agreement nor the Partial Assignments contain a merger or integration clause, inclusion of such a clause would be immaterial because of the narrow scope and purpose of each of those contracts are clearly and unambiguously expressed in each contract. The purpose of the Partial Assignments was for the respective Massey Entity to assign and for ERC to assume the rights and obligations of the Assigned Reserve. The purpose of the Payment Agreement was to provide the Massey Entities with a payment stream in exchange for the Massey Entities' agreement to enter into the Partial Assignments and the Boone-ERC Lease. In sum, the Court concludes that on the face of the Payment Agreement and the Partial Assignments, as exemplified by the clear and unambiguous language of those contracts, the parties intended that the Payment Agreement and each Partial Assignment be separate contracts with separate identities.

The Court does not disturb the clear fact that but for the Payment Agreement, and more specifically, the requirement of Tonnage Payments for coal mined from the respective Assigned Reserves, the respective Massey Entity might not have entered into the respective Partial Assignment. However, this fact does not integrate the Payment Agreement and each of the Partial Assignments. "[T]he requirement that the several contracts are to be 'taken together' does not mean that they are to be joined, and thereby become a single contract, but plainly means that they are to be 'taken together' for the purpose of interpreting, either the transaction to which they relate, or the several contracts themselves. It does not purport to destroy the separate identity of the several contracts, and does not do so in effect." *See In re Craig,* 144 F.3d at 596; *see also Nat'l*

*Union Fire Ins. Co. v. Clairmont,* 662 N.Y.S.2d 110, 112 (N.Y. App. Div. 1997) (citation omitted) ("Manifestly, one agreement may follow from and even have as its *raison d'être* another and yet be independently enforceable. And, indeed, in the absence of some clear indication that the parties had a contrary intention, contracts manifesting separate assents to be bound are generally presumed to be separable.")

The language of the Payment Agreement and the Partial Assignments are clear and unambiguous, and as such, in compliance with the parol evidence rule, the Court will not go beyond the four corners of these contracts. Consequently, no discovery is required. At best, the Payment Agreement and the respective Partial Assignment may be taken together. This Court concludes that the separate identity of each agreement is not destroyed. Therefore, the Payment Agreement is not integrated with the respective Partial Assignments and consequently, the Payment Agreement cannot be made executory in this regard.[10]

**3. Is the Boone-ERC Lease Clear and Unambiguous?**

The Boone-ERC Lease transfers from Boone to ERC a leasehold interest in certain lands located in West Virginia. The Boone-ERC Lease describes the coal rights to be leased to ERC, its location, the specific rights to be granted by Boone to ERC and the limitations on those granted rights. The Boone-ERC Lease further describes what the parties contemplate as rent under the Boone-ERC Lease and further describes 22 events of default. None of the 22 events of default under the Boone-ERC Lease involve the Payment Agreement or ERC's obligation to make Tonnage Payments to Boone for the coal mined from the leased land under the Boone-ERC Lease. Further, the Boone-ERC Lease contains an integration or merger clause which states that "[t]his Lease

[10] The Court does not reach ERC's alternative argument that even if the Payment Agreement and the Partial Assignment were deemed one contract, the resulting contracts would still be non-executory because the Partial Assignments are fully performed. The Court agrees with this assessment, but declines to engage in and further develop the analysis required to arrive at this conclusion because this Court's conclusion is that the contracts are separate is dispositive.

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." Boone-ERC Lease, § 23.7, at 51-52. The Boone-ERC Lease states that it became effective the 1st day of August, 2005, but it was not executed before a Notary Public by the President of Boone and the Vice-President of ERC until August 31, 2005.

Upon this Court's evaluation of the language used in the Boone-ERC Lease, there is no ambiguity as to the parties' intent regarding the scope, rights and obligations of both Boone and ERC under the Boone-ERC Lease. Boone has obligations as lessor, ERC has obligations as lessee and those obligations are clearly and unambiguously described in the Boone-ERC Lease. There is no ambiguity here.

**4. Should the Payment Agreement and the Boone-ERC Lease be Integrated as a Matter of Law?**

The Massey Entities argue that when the Payment Agreement and the Boone-ERC Lease are construed together as one integrated contract, there are ambiguities as to the parties' intent which can only be resolved by extrinsic evidence. And, it is the Massey Entities' contention that the parties intended the Payment Agreement and the Boone-ERC Lease to be one contract. As previously discussed, whether two contacts are to be construed as one single agreement is based on the intent of the parties. Whether the contracts are unified is a question of law. The Court will therefore engage in the same analysis of the parties' intent through discussion of the language, timing of execution and subject matter of the contracts, the impact of the agreements memorialized in separate writings, whether the consideration for each agreement is separate and distinct, whether there are cross-default provisions particularly whether failure to perform under one agreement causes or permits the choice not to perform under the other, the presence of integration

clauses and the duration of the agreements.

There can be no dispute that the Payment Agreement and the Boone-ERC Lease are memorialized in separate instruments. The Payment Agreement further states that upon the execution of the Payment Agreement, the Boone-ERC Lease will also be executed. The Payment Agreement was executed by the President of Performance Coal, the Vice-President of ERC and the President of Boone and the Vice-President of New River.[11] The Boone-ERC Lease was executed by the President of Boone and the Vice-President of ERC, both of whom also signed the Payment Agreement on behalf of their respective entities. As such, separate assents were given when each document was executed and each document involved different parties in that the Massey Entities are not all parties to the Boone-ERC Lease. Both the Payment Agreement and the Boone-ERC Lease were executed on August 31, 2005.

The Boone-ERC Lease clearly describes 22 events of default, none of which involve the failure of ERC to make Tonnage Payments due pursuant to the Payment Agreement. The Payment Agreement is not mentioned in the Boone-ERC Lease. The Payment Agreement describes the Tonnage Payments due to Boone from ERC pursuant to the Payment Agreement, but makes no mention of the rent due from ERC to Boone under the Boone-ERC Lease as stated in Sections 7 and 8 of the Boone-ERC Lease. There is no dispute that the rent due under the Boone-ERC Lease is separate from the Tonnage Payments due under the Payment Agreement. Moreover, there is nothing in either agreement to indicate that if ERC fails to make the Tonnage Payments due to Boone under the Payment Agreement, there is an obligation that Boone owes to ERC under the Boone-ERC Lease that Boone can stop performing. To the contrary, the Boone-ERC Lease clearly sets out Boone's rights as lessor if ERC fails to meets its obligations under the Boone-ERC Lease only.

[11]The Court notes that the President of Boone was also the Vice-President of New River and was the signatory of both entities.

Among Boone's rights under the Boone-ERC Lease is to seek arbitration of disputes that arise under the Boone-ERC Lease. There however is no basis to conclude for example that the parties intended any failure of ERC to make Tonnage Payments due under the Payment Agreement to be arbitrable pursuant to the Section 21 Arbitration clause of the Boone-ERC Lease. *See generally Rosenblum v. Travelbyus.com Ltd.,* 299 F.3d 657 (7th Cir. 2002) (where employment agreement and the acquisition agreement, each of which contained a merger clause, were deemed separate contracts such that the arbitration clause of the employment agreement did not govern a dispute which arose only out of the acquisition agreement).

The Payment Agreement concerns payments to be made pursuant to the Partial Assignments and the Boone-ERC Lease for the anticipated coal to be mined from those Assigned Reserves and the leased premises. The Boone-ERC Lease concerns only the rights and obligations between Boone and ERC with regard to the leased premises. One such obligation includes rent, to be paid in the form of Tonnage Payments. While both the Payment Agreement and the Boone-ERC Lease involve payment from ERC to Boone, the consideration for those two contracts is different. The consideration for the Payment Agreement involves the decision to enter in the Partial-Assignments and the Boone-ERC Lease, whereas the consideration for the Boone-ERC Lease is the continued performance and integrity of the Boone-ERC Lease. If ERC fails to make the Tonnage Payments under the Payment Agreement, there is no term under the Payment Agreement that Boone can stop performing. Likewise, if ERC fails to make the Tonnage Payments under the Payment Agreement, there is no term that Boone can stop performing under the Boone-ERC Lease.

The Payment Agreement and the Boone-ERC Lease have different durations in that the Payment Agreement continues indefinitely while the Boone-ERC Lease has a specified term of five (5) years with the option to renew for additional five-year terms. Further, the Boone-ERC Lease contains a merger clause to indicate that all the terms, rights and obligations which concern the

leased premises by Boone to ERC are contained in the Boone-ERC Lease.

Both Boone and ERC have clearly manifested their intent that these two agreements maintain a separate legal identity. The Court does not dispute that at least part of the consideration to enter into the Boone-ERC Lease involved the Tonnage Payments required by the Payment Agreement, however this alone is not dispositive. As a matter of law, the Payment Agreement and the Boone-ERC Lease are two separate contracts that serve two separate purposes and as such, cannot be integrated into one single contract. Consequently, the Payment Agreement is not integrated with the Boone-ERC Lease and under no circumstances does the Boone-ERC Lease make the Payment Agreement an executory contract for purposes of Section 365.

**D. Does the Settlement Agreement Integrate the Payment Agreement, Partial Assignments and the Boone Lease, in Addition to the Other Agreements Attached to the Settlement Agreement, Into One Mega Contract Thereby Making the Payment Agreement an Executory Contract?**

The Massey Entities next argue that the Settlement Agreement acts as a hub which connects all of the agreements entered into upon the execution of the Settlement Agreement, to the inclusion of the Payment Agreement, the Partial Assignments and the Boone-ERC Lease. Consequently, all of these agreements referenced in the Settlement Agreement are in effect one mega contract, and together with the Settlement Agreement, they must all rise and fall together. The Massey Entities look to Section 15 of the Settlement Agreement, the merger clause, in support of this argument. The effect of this supposition therefore would be for this Court to determine that all of the agreements, taken together as one mega contract is executory and therefore must be assumed or rejected by ERC.

ERC was at no point involved in the private negotiations between Massey Coal Sales and Coaltrade, nor did it lend any consideration to the settlement of their dispute. Rather, ERC's involvement, like that of the Massey Entities, is limited to the agreements that involved their interest. ERC, Boone, Performance and New River each negotiated and ultimately agreed to terms that were

mutually agreed upon as related to their respective contracts. Suffice it to say that ERC cannot assume or reject contracts to which it is not a party.

Moreover, this mega contract arguments fails the foundational principles of contract law in that a contract cannot bind a non-party. *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (2002). Neither ERC nor the Massey Entities were parties to the Settlement Agreement. In the matter before this Court, it is the intent of ERC and the Massey Entities that is relevant, and their intent cannot influence agreements to which they are not a party; ERC and the Massey Entities' intent only controls the contracts to which they are signatories.[12] In any event, even if the starting point of this analysis assumed the existence of this mega contract, the Settlement Agreement would be severable from the attached exhibits, among which are the Partial Assignments and the Boone-ERC Lease, because among other things, the subject matter of each agreement is severable, the contracts involve different parties, each contract has separate consideration, different parcels of land are involved in many of the contracts, each contract serves a different purpose, each contract requires a different payment amount and the performance of one agreement can occur without the performance of another agreement. *See In re Gardiner,* 831 F.2d 974, 976-78 (11th Cir. 1987); *see also In re Union Financial Services Group, Inc.,* 325 B.R. 816, 823-24 (Bankr. E.D. Mo. 2004) (citations omitted) ("A divisible contract consists of independent agreements about different subjects made at the same time...If performance and acceptance of one portion of the contract can occur without performance of another portion of the contract, the contract is divisible.")

Further, the merger clause of the Settlement Agreement does not serve to integrate the several agreements. As explained in the above discussion about the Boone-ERC lease, a merger

[12] The intent of Massey Coal Sales and Coaltrade is not relevant. There is no dispute that a major component of the Settlement Agreement was to effect a massive reorganization of rights to coal reserves. Nonetheless, each Massey Entity that was caused to enter into the Partial Assignments and the Boone-ERC Lease, as well as ERC, was required to independently assent to the various agreements that involved their interest.

clause "does not incorporate other contracts by reference, rather, a merger clause negates the impact of earlier negotiations and contract drafts, and states that the written contract is the complete expression of the parties' agreement." *Rosenblum v. Travelbyus.com Ltd.* 299 F.3d at 665. Therefore, the merger clause of Section 15 of the Settlement Agreement serves only to express that the entirety of the settlement between Massey Coal Sales and Coaltrade is contained in the Settlement Agreement, and the settlement is not in any way affected, nor can it be affected, by any other agreement that is not included or explicitly referenced therein. Section 15 does not, as asserted by the Massey Entities, serve to actually merge the several agreements into one mega contract. Further, the agreements themselves do not support the mega contract argument because each agreement was signed separately with separate consideration and is contained in a separate document. Further, none of the agreements mention the Settlement Agreement, each agreement serves a different purpose and there are no cross-default provisions among the agreements. Finally, the Settlement Agreement is governed by Kentucky Law while many of the other agreements are governed by West Virginia law. In sum, the Payment Agreement is not made executory by the Settlement Agreement because under no cognizable legal theory would the Settlement Agreement be taken as one contract with the several other agreements.

**E. The Counter-Claim is Dismissed**

The Massey Entities have asserted a counter-claim for post-petition breach of the Payment Agreement. The Massey Entities assert that ERC has not made a Tonnage Payment under the Payment Agreement since May 23, 2012, but on information and belief, ERC continues to mine on the land described in the Boone-ERC Lease. Because this post-petition mining benefits ERC's bankruptcy estate, the Massey Entities assert that Boone is entitled to an administrative expense pursuant to Section 503(b).

To enable reorganizations under Chapter 11, it is essential that the value of the distressed entity be preserved, and to this end, Section 507(a)(1) grants first priority to holders of administra-

tive expenses as described in Section 503(b). *See* 11 U.S.C. §§ 503(b), 507(a)(1) (2012). A claim for an administrative expense under Section 503(b)(1) must: (1) derive from a post-petition transaction with the debtor-in-possession or the trustee, and (2) "the consideration supporting the claim must have benefitted the estate in some demonstrable way." *Mason v. Official Comm. of Unsecured Creditors (In re FBI Distribution Corp.),* 330 F.3d 36, 42 (1st Cir. 2003) (citation omitted). If the creditor has a claim for a non-executory contract, and the consideration for the underlying contract from which that claim derives was supplied pre-petition, the creditor will have a pre-petition claim, even if "the right to payment arose after the petition date." *Id.* at 48.

Because this Court has concluded that the Payment Agreement is non-executory, it follows that the Payment Agreement cannot be assumed or rejected by ERC. As such, the Massey Entities generally, and Boone specifically cannot be entitled to an administrative expense claim based on an argument that ERC has assumed the Payment Agreement. As such, the Massey Entities have failed to state a claim upon which relief can be granted. Any claim of the Massey Entities for ERC's nonperformance or underperformance of the Payment Agreement is a prepetition claim.

There are no material facts in dispute in that the parties disagree merely on the interpretation of the Payment Agreement which this Court has determined is not an executory contract, is not integrated with the Partial Assignments, is not integrated with the Boone-ERC Lease and is not intended to be integrated with any other contract contemplated by the Settlement Agreement. The parties disagree only as to the interpretation of the Payment Agreement and the Partial Assignments, the Boone-ERC Lease and the Settlement Agreement and therefore it is

appropriate for this matter to be resolved under Rule 12(c). By separate Order, ERC's Motion for Judgment on the Pleadings will be granted.

Kathy A. Surratt-States

KATHY A. SURRATT-STATES
Chief United States Bankruptcy Judge

DATED: November 13, 2013
St. Louis, Missouri

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