

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:

PATRIOT COAL CORPORATION, *et al.*,

Debtors.

**Chapter 11
Case No. 12-51502-659
(Jointly Administered)**

**Hearing Date (if granted):
March 19, 2013 at 10:00 a.m.
(prevailing Central Time)**

**Hearing Location:
Courtroom 7 North**

ROBIN LAND COMPANY, LLC,

Plaintiff,

v.

STB VENTURES, INC.,

Defendant,

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

Intervenor-Defendants.

Adv. Pro. No. 12-04355-659

**PLAINTIFF'S RESPONSE TO EMERGENCY MOTION OF ARCH COAL, INC.,
ARK LAND COMPANY, AND ARK LAND KH, INC.
TO "DISMISS" PLAINTIFF'S MOTION FOR JUDGMENT ON
THE PLEADINGS AND FOR AN EXPEDITED HEARING**

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Charles Alan Wright & Arthur R. Miller,
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Plaintiff Robin Land Company, LLC (“**Robin Land**”), one of the affiliated debtor entities in the above-captioned chapter 11 case, respectfully submits this response to the “emergency motion” of Arch Coal, Inc., Ark Land Company, and Ark Land KH, Inc. (together, “**Arch**”) to “dismiss” Robin Land’s motion for judgment on the pleadings and for an expedited hearing (the “**Arch Motion**”).

PRELIMINARY STATEMENT

1. The Arch Motion is an attempt to mislead the Court and inflict unnecessary cost and burden on Robin Land, all in a desperate attempt to forestall a decision on the merits in this case. The Arch Motion should be denied immediately, without a hearing. Alternatively, the Court should direct Arch to make any procedural arguments it wishes in its response to Robin Land’s pending motion, so that the Court can consider the arguments at the April 23 hearing.

2. The Arch Motion misstates the law. It is not “blackletter law,” as Arch claims, that a motion for judgment on the pleadings must wait for all allowable pleadings to be filed in an action. A motion for judgment on the pleadings is permissible on any claim for which the pleadings are closed. In the federal courts, “it is common to apply Rule 12(c) to individual causes of action.” Strigliabotti v. Franklin Res., Inc., 398 F. Supp. 2d 1094, 1097 (N.D. Cal. 2005). Here, the pleadings are closed on Robin Land’s declaratory judgment claim, which is the only claim that is the subject of Robin Land’s Rule 12(c) motion. Arch’s position to the contrary is based on a misreading of the authorities it cites.

3. Moreover, even if Arch’s reading of Rule 12(c) were the law – which it is not – Robin Land’s motion would still be procedurally proper on a host of alternative grounds. In short, the Arch Motion never should have been made – not only because it misstates the law, but also because it would make no difference even if it were correct. Robin Land’s motion, which

presents the predicate legal issue that must be decided in this action – i.e., whether the STB Override (defined below) is a non-executory contract – could also be decided under Rule 12(b)(6) or under Rule 56 without changing a single word of the brief.

4. Arch can claim no prejudice from having to respond to that pure legal issue, which can be resolved based on the plain language of the contracts currently before the Court. Indeed, Robin Land put the defendants on notice more than two months ago that it intended to file a motion for judgment on the pleadings on its declaratory judgment claim as soon as the defendants filed their answers. Robin Land gave the defendants a two-month head start precisely so that the core legal issue in this case – whether the STB Override is a pre-petition, non-executory contract – could be decided promptly and efficiently. After having that two-month head start, and after having Robin Land’s Rule 12(c) motion in hand for two weeks, Arch springs this “emergency motion” on Robin Land requesting a hearing on one business day’s notice. The sole purported prejudice identified is that Arch will have to respond on the merits and explain how the STB Override could be an executory contract. Arch has no answer to that, which is why it filed this motion in desperation. Arch wants to delay a decision on the merits in this action as long as it possibly can, purportedly on the basis that its counterclaims have not been answered.

5. But the problem for Arch is that its counterclaims cannot proceed if the Court concludes that the STB Override is not an executory contract. The counterclaims would then fail to state a claim upon which relief can be granted. Accordingly, the very legal issue that Arch desperately wants to avoid adjudicating must be decided before Arch’s counterclaims go forward.

6. It makes no sense – as a procedural or substantive matter – to defer a decision on that core legal issue. Arch takes that position because Arch has no argument that the STB

Override is an executory contract. There is no party to any contract that is performing obligations to Robin Land in exchange for Robin Land paying the STB Override. There is simply no way to conclude that the STB Override is executory. Robin Land's motion demonstrates that conclusively, and that is why Arch is desperate not to respond on the merits on the agreed schedule.

7. Arch's motive here is clear. STB has threatened to sue Arch on a guaranty if Robin Land is not permitted under the Bankruptcy Code to pay the STB Override. For that reason, Arch's strategy is to impose maximum cost and burden on Robin Land and prevent for as long as possible a decision on the merits. That position is improper and should be rejected out of hand. The Court should deny the Arch Motion without a hearing.

RELEVANT BACKGROUND

8. Robin Land filed this action on August 10, 2012 seeking a declaratory judgment that the Overriding Royalty Agreement dated October 31, 1994 (the "**STB Override**") is not an executory contract under 11 U.S.C. § 365.

9. Three months later, on November 28, 2012, Arch moved to intervene. Arch claimed to have an interest in the action because STB contends that it can look to Arch under a separate guaranty between Arch and STB if Robin Land is not authorized to pay the STB Override.

10. In its motion to intervene, Arch acknowledged that it could be permitted to intervene under Rule 24(b) only if the intervention would not "unduly delay or prejudice the adjudication of the original parties' rights." (ECF No. 15, at p. 12 (quoting Fed. R. Civ. P. 24(b).) Arch also acknowledged that "[t]his litigation seeks a declaration with respect to Robin Land's obligations under the STB Override Agreement – at bottom, a declaration as to whether Robin

Land must continue to pay the STB Override.” (Id. (emphasis added).) Arch represented that their “defenses and claims only take issue with Robin Land’s interpretation of the STB Override Agreement and the related agreements containing Robin Land’s covenants to pay the STB Override; the Applicants do not seek to inject any ancillary issues into this action.” (Id. (emphasis added).)

11. Based on Arch’s representations in its motion to intervene that it would not seek to delay adjudication of the core legal issue in this action – i.e., whether the STB Override is a non-executory contract that Robin Land is not authorized to pay – Robin Land agreed not to object to Arch’s permissive intervention.

12. As Arch notes, the parties then negotiated the Stipulation and Agreed Order (ECF No. 27), which was entered by the Court on February 4, 2013.

13. Arch fails to mention that, in the course of negotiating the Stipulation and Agreed Order, counsel for Robin Land made unmistakably clear from the outset that Robin Land intended to file a motion for judgment on the pleadings on Robin Land’s declaratory judgment claim as soon as the defendants filed their answers, thereby closing the pleadings on that claim. On January 11, 2013, counsel for Robin Land delivered a first draft of the stipulation and agreed order to counsel for Arch and STB stating:

As discussed, attached is a draft stipulation and agreed order that allows for intervention by the Arch parties as defendants, withdraws and denies STB’s motion to dismiss as moot, and sets a schedule for remaining pleadings and a dispositive motion by RLC. **In an effort to resolve the action as expeditiously as possible, we intend to file a motion for judgment on the pleadings on RLC’s declaratory judgment claim promptly after the answers are filed.** We believe that the declaratory judgment claim can be decided by the Court as a matter of law based on the unambiguous terms of the contracts at issue; accordingly, it makes sense to stay any discovery pending a decision on that motion to avoid unnecessary burden and expense

on the parties. As you may know, we have taken this approach in a parallel adversary proceeding in this case that raises similar issues.

(E-mail dated Jan. 11, 2013, attached hereto as Exhibit A (emphasis added).) The “parallel adversary proceeding” referenced in the last line is Eastern Royalty LLC v. Boone East, et al., Adv. Pro. No. 12-04353, in which Eastern Royalty LLC, another debtor in these proceedings, filed a motion under Rule 12(c) on a declaratory judgment claim and moved to dismiss a counterclaim pursuant to Rule 12(b)(6). The same law firm that represents Arch here represents the defendants in Eastern Royalty. No procedural objections were made to the Rule 12(c) motion filed in Eastern Royalty (nor could there have been, as demonstrated below).

14. As the Court is aware, the final Stipulation and Agreed Order includes a briefing schedule on Robin Land’s motion for judgment on the pleadings on its declaratory judgment claim. Robin Land insisted on that briefing schedule – and provided full disclosure regarding its intent to file the motion – to avoid any delay in presenting the Court with the dispositive legal issue in the case.

15. On February 19, 2013, STB and Arch filed their answers. (ECF Nos. 32, 33.) STB did not assert a cross claim against Arch based on the guaranty between Arch and STB. Arch and STB each asserted counterclaims against Robin Land.

16. None of the counterclaims can be granted if the STB Override is a pre-petition, non-executory contract that Robin Land is not authorized to pay under the Bankruptcy Code.

17. On March 4, 2013, Robin Land filed a motion for judgment on the pleadings on its declaratory judgment claim – two months after Robin Land told the defendants that the motion would be filed. Robin Land also moved to dismiss the defendants’ counterclaims pursuant to Rule 12(b)(6). Under the agreed schedule, the defendants’ response to Robin Land’s motion is due on March 25, 2013, and Robin Land’s reply is due on April 8, 2013.

18. One day later, on March 5, 2013, STB filed a motion seeking to compel Robin Land to pay the STB Override pursuant to Section 365(d)(3) (the “**STB Motion**”). (ECF No. 38.) The motion claims that the STB Override is integrated with the Kelly-Hatfield Lease and the Lawson Heirs Lease (the “**Leases**”) – a theory that STB asserts in its answer and that will be resolved in the context of Robin Land’s motion. In other words, STB’s motion is wholly duplicative of Robin Land’s motion.

19. The STB Motion concedes that the integration question must be resolved based on the clear language of the STB Override and the Leases. (ECF No. 38 at pp. 3, 5, 6, 19, 22-23, 24, 25, 27.) Accordingly, while the STB Motion was plainly intended to impose additional cost and burden on Robin Land by responding to a duplicative motion, Robin Land agreed to respond on the same briefing schedule as Robin Land’s motion so that the Court could hear both motions at the same time. Counsel for STB agreed. A notice was filed on March 8, 2013. (ECF No. 43.)

20. In other words, the original parties to this action – Robin Land and STB – are prepared to litigate the core legal issue – whether the STB Override is a non-executory contract – based on the plain language of the relevant contracts on the previously agreed schedule.

21. Arch had fair warning that its position in the Arch Motion was baseless. At 7:24 p.m. (EDT) on Thursday, March 14, 2013, counsel for Arch requested that Robin Land withdraw its Rule 12(c) motion based on the cases now cited in the Arch Motion.

22. On Friday, March 15, 2013, counsel to Robin Land explained to Arch’s counsel (i) that Arch was misreading the Federal Rules of Civil Procedure and its own cases, (ii) that Robin Land’s motion would be proper even if Arch were correct in its reading of Rule 12(c) (which it is not), and (iii) that it was obvious from the timestamps on Arch’s cases that they had

been planning a last minute ambush to impose cost and burden on Robin Land. (Email dated March 15, 2013, attached hereto as Exhibit B.)

23. Notwithstanding all of that, Arch filed this motion on Friday at 3:45 p.m. (EDT), requesting an expedited hearing on Tuesday, March 19, 2013 at 10:00 a.m.

ARGUMENT

24. The Arch Motion is baseless. It is based on a misunderstanding of the Federal Rules of Civil Procedure. Robin Land's motion is procedurally proper under Rule 12(c).

25. Moreover, even if the Arch Motion had been right on the law, it still would have been baseless, because Robin Land's motion is proper under a host of independent procedural bases. The Federal Rules of Civil Procedure are not a game of gotcha, but instead must be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. That is precisely what Arch does not want here.

26. Arch has been on notice for months now that the core legal issue – whether the STB Override is executory or not – would be presented to the Court as soon as possible, and that core legal issue can be decided under Rule 12(b)(6), Rule 12(c) or Rule 56, under the exact same standard, based on the same motion papers now before the Court. Arch will suffer no conceivable prejudice from litigating that pure legal issue. The issue presented by Robin Land's motion turns on the unambiguous language of the contracts. The contracts say what they say, and the parties can make their arguments. There is no prejudice in that – especially when the parties have been discussing this very motion for two months.

I. Robin Land's Rule 12(c) Motion Is Procedurally Proper

27. Robin Land's Rule 12(c) Motion is procedurally proper, because it seeks a judgment solely on Robin Land's declaratory judgment claim. The pleadings on that claim were closed as soon as the defendants filed their answers on February 19, 2013.

28. Contrary to Arch's contention, Robin Land was not required to wait for the pleadings to be closed on all claims in the action before filing a Rule 12(c) motion targeted at its declaratory judgment claim. A 12(c) motion may properly be made as to any claim on which the pleadings are closed. See Johnson v. Dodson Pub. Sch., Dist. No. 2-A(C), 463 F. Supp. 2d 1151, 1156 (D. Mont. 2006) (finding that defendant's Rule 12(c) motion was timely even though other defendants had not yet answered where motion related "solely to Count III of Plaintiffs' First Amended Complaint and only Newby is named in Count III"); McGee v. Gerstenberg & Co., Inc., No. 84 C. 9778, 1986 WL 4183, *3 (N.D. Ill. Mar. 25, 1986) ("The defendant's motion for judgment on the pleadings for Count III is properly before this court. Although the pleadings are not closed as to the complaint as a whole, they are closed as to Count III. A motion for partial judgment on the pleadings may properly be entertained by the court.").

29. The Federal Rules of Civil Procedure expressly provide for adjudication of claims on a claim-by-claim basis. Specifically, Rule 54(b) provides that "[w]hen an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim, or third-party claim – or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties." Fed. R. Civ. P. 54(b) (emphasis added). Rule 54(b) thus contemplates that federal courts will adjudicate – and enter judgment on – fewer than all the claims that are raised by the parties, including under Rule 12(c). See, e.g., Strigliabotti, 398 F. Supp. 2d at 1097 (noting "common practice to permit 'partial judgment on the pleadings'").

30. Motions for partial judgment on the pleadings make especially good sense when – as here – one claim will resolve a contractual interpretation issue based on the unambiguous language of a contract. With that legal issue decided, other related claims can then be disposed

of under other procedural rules. Counterclaims, for example, can be dismissed pursuant to Rule 12(b)(6) based on the same contractual interpretation adjudicated in the context of the Rule 12(c) motion. That is the procedure contemplated by Robin Land's motion, and it is a procedure routinely followed in the federal courts.

31. For example, in Toshiba Corp. v. Am. Media Int'l, LLC, No. 12-CV-800 (DLC), 2012 WL 3822759 (S.D.N.Y. Sept. 4, 2012), the plaintiff moved for judgment on the pleadings based on the plain language of a royalty contract and moved simultaneously to dismiss the defendant's counterclaim for breach of the same contract. The Court granted the motions. Id. at *6-7.¹

32. Likewise, in Marathon Petroleum Co. LP v. Future Fuels of Am., LLC, No. 10-14068, 2011 WL 6217413 (E.D. Mich. Dec. 14, 2011), the plaintiff moved for judgment on the pleadings on a contract and moved simultaneously to dismiss the defendant's counterclaims for breach of contract and unjust enrichment – counterclaims just like those asserted in this action. The Court granted the motions. Id. at *3-6.

33. And in Benkovitch v. eMed Monitoring, No. 04 C 4393, 2004 WL 2980640, *1 (N.D. Ill. Dec. 17, 2004), the plaintiff moved for judgment on the pleadings based on the plain language of a promissory note and at the same time moved to dismiss defendant's counterclaim. The Court granted the motions. Id. at *1-3.

34. In short, it is not “per se improper,” as Arch contends, for Robin Land to file a motion for judgment on the pleadings on its declaratory judgment claim – which is based on the unambiguous language of the relevant contracts – and simultaneously move to dismiss the

¹ The court treated the motion as one for summary judgment under Rule 56, because the plaintiff relied on a declaration in addition to the plain language of the contract. As explained below in Point II, the fact that Robin Land's Rule 12(c) motion could be treated as a Rule 56 motion would be an alternative ground for denying the Arch Motion, even if Rule 12(c) operated in the way that Arch insists, which it does not.

defendants' counterclaims for failure to state a claim under Rule 12(b)(6). This procedure is employed routinely in cases just like this one.

35. The cases cited by Arch are not to the contrary. Each case cited by Arch involves a Rule 12(c) motion directed at claims for which the pleadings were not yet closed. That is not this case. Robin Land is not seeking a judgment on the pleadings with respect to the defendants' counterclaims, but solely with respect to Robin Land's declaratory judgment claim – for which the pleadings are closed.

36. Arch misreads State Farm Fire & Cas. Co. v. Spradling Home Inspections, LLC, No. 4:10-CV-01887NAB, 2011 WL 4056042 (E.D. Mo. Sept. 13, 2011). State Farm does not stand for the proposition that a plaintiff may never simultaneously file a Rule 12(c) motion and a motion to dismiss counterclaims. As demonstrated above, that is not the law. State Farm instead involved a Rule 12(c) motion directed at claims for which the pleadings were not yet closed. That is not this case. Robin Land is not seeking a judgment on the pleadings with respect to the defendants' counterclaims.

37. State Farm involved cross-motions for judgment on the pleadings on the very same counterclaims that were also the subject of the plaintiff's motion to dismiss. The underlying briefs in the action make that critical fact clear. See Filings for Plaintiff and Defendants, State Farm Fire & Cas. Co. v. Spradling Home Inspections, LLC, No. 4:10-CV-01887NAB (E.D. Mo. Sept. 13, 2011) (ECF Nos. 11-15). The motion practice was initiated by the defendant, which – after filing an answer with counterclaims – moved to dismiss the plaintiff's complaint or, in the alternative, for a judgment on the pleadings. See id. (ECF Nos. 11, 12). The defendant's alternative Rule 12(c) motion sought a judgment on the pleadings on

the entire case – which would include its own counterclaims, which had not yet been answered by the plaintiff.

38. The plaintiff responded by cross-moving for judgment on the pleadings, and also separately moving to dismiss the counterclaims. Like the defendant’s Rule 12(c) motion, the plaintiff’s cross-motion under Rule 12(c) covered the entire case – including the defendants’ counterclaims. In its brief, the plaintiff acknowledged that the Rule 12(c) motions – by both the plaintiff and defendant – were improper because they were directed at all claims, including the unanswered counterclaims. See id. (ECF No. 13, at 1 n.1). The court therefore ruled that because “as plaintiff acknowledges, the pleadings are not closed in this case (because Defendant filed a counterclaim and Plaintiff never answered the counterclaim), the parties’ Rule 12(c) motions were improperly filed.” State Farm, 2011 WL 4056042, at *3.

39. The court in State Farm thus untangled the four competing motions properly. The court denied the defendant’s motion to dismiss the plaintiff’s complaint, because it was filed after the defendant had answered. See id. at *1. The court denied the cross-motions for judgment on the pleadings because the motions also covered the counterclaims. See id. at *3. The court left for decision the plaintiff’s motion to dismiss the counterclaims. The Court was not presented with, and did not decide, the facts presented here – where a Rule 12(c) motion is directed only at a claim on which the pleadings are closed, and separate claims are the subject of a Rule 12(b)(6) motion to dismiss.

40. For the same reason, Arch misreads Doe v. United States, 419 F.3d 1058 (9th Cir. 2005). Doe involves the same situation as State Farm. The plaintiff there moved for judgment on the pleadings on a claim where the defendant had not yet answered – i.e., on a claim for which the pleadings were not yet closed. Id. at 1061. Again, that is not this case.

41. Arch also misreads Edelman v. Locker, 6 F.R.D. 272 (E.D. Pa. 1946). The Rule 12(c) motion in that case was not denied on the grounds that it was premature. It was denied because “allegations of the answer raise material questions of fact as to the alleged oral agreements between plaintiff and defendant.” Id. at 274.

42. In short, Arch brought this “emergency motion” based on a reading of Rule 12(c) that is demonstrably wrong.

II. Robin Land’s Motion Would Be Proper Even If Arch’s Reading of Rule 12(c) Were Correct (Which It Plainly Is Not)

43. It is clear that the purpose of the Arch Motion is not to advance a good faith procedural argument, but instead to make Robin Land incur the burden and expense of responding to the motion. That is clear because counsel for Robin Land pointed out to Arch before the motion was filed that, even if its interpretation of Rule 12(c) were correct – which it is not – Robin Land’s motion would still be procedurally proper on at least two alternative grounds. (See Ex. B hereto.) In other words, the Arch Motion is a waste of time even if one assumes that Arch’s reading of Rule 12(c) is right.

44. Even if a Rule 12(c) motion could not be ruled on until all pleadings in the case are filed, here that would be accomplished by the dismissal of the defendants’ counterclaims. Robin Land has moved to dismiss the defendants’ counterclaims for failure to state a claim because they are based on a pre-petition, non-executory contract. Accordingly, the same legal question presented by Robin Land’s Rule 12(c) motion would be decided in the context of Robin Land’s Rule 12(b)(6) motion. The Court could deem the Rule 12(b)(6) motion granted first, which would close the pleadings for the entire case, and then grant the Rule 12(c) motion second.

Arch concedes that this approach would solve the fictitious problem that it imports into Rule 12(c).² (Arch Motion ¶ 14.)

45. Arch tries to escape its own logic by contending that “[u]ntil the Debtor answers Arch’s and STB’s counterclaims, or should the Debtor elect to move to dismiss the counterclaims and those claims are dismissed, thus closing the pleadings, the Debtor cannot know whether it will still believe that it has a meritorious motion for judgment on the pleadings that it will wish to file, and if it does, what that motion will say in light of the complete record.” (Id.) That makes no sense. Robin Land’s Rule 12(c) motion is based on the plain language of the STB Override and the contracts identified by the defendants – that is the “complete record,” and nothing more is necessary to decide either Robin Land’s Rule 12(c) motion or its Rule 12(b)(6) motion.

46. Alternatively, the Court could treat Robin Land’s motion as a motion for summary judgment under Rule 56 on its declaratory judgment claim. See Fed. R. Civ. P. 12(d) (allowing court to treat a Rule 12(c) motion as one for summary judgment); 10A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2713 (3d ed. 2012) (“[T]here is no question that under Rule 12(c), as amended in 1948, the label on the motion is irrelevant.”). There is no dispute that a Rule 56 motion can be brought “at any time until 30 days after the close of all discovery.” Fed. R. Civ. P. 56(b). Under Rule 56, therefore, Robin Land could have filed the current motion before the defendants even filed their answers, let alone before responding to the defendants’ counterclaims.

² Edelman, on which Arch relies, makes clear that the pleadings will be “closed” even under Arch’s incorrect view of Rule 12(c) if the Court grants Robin Land’s motion to dismiss the counterclaims. 6 F.R.D. at 274. As explained above in the text, the very same legal issue must be decided to resolve Robin Land’s motion to dismiss and its motion for judgment on the pleadings.

47. Under either of these alternatives, the Court would adjudicate the very same legal issue presented in Robin Land's Rule 12(c) motion – i.e., whether the STB Override is a non-executory contract based on the unambiguous language of the contracts before the Court. The same standards would apply under Rule 12(b)(6) or Rule 12(c) or Rule 56, so the defendants could not claim any prejudice. And under all three rules, no discovery would be permitted or admissible if the Court finds that the contracts are unambiguous on their face. See, e.g., PlaNet Prod. v. Shank, 119 F.3d 729 (8th Cir. 1997) (affirming grant of summary judgment in contract case where contract was unambiguous and introduction of extrinsic evidence was barred by the parol evidence rule).

48. None of the procedural alternatives is necessary here. For the reasons explained above, Robin Land's motion is procedurally proper. The available alternatives simply highlight that Arch is not genuinely concerned with procedural purity. Arch wants to put off an adjudication of the merits for as long as possible, because it has no answer to Robin Land's motion. There is no way to conclude that the STB Override is an executory contract. That will be clear when Arch files its response on March 25, 2013, according to the agreed schedule.³

49. The Court should deny the Arch Motion without a hearing. Alternatively, the Court should direct Arch to make its procedural arguments in its response to Robin Land's motion, so that the Court can consider the arguments at the April 23 hearing.

³ Arch's suggestion that a different briefing schedule would apply if the Court treated Robin Land's motion on alternative procedural grounds is a non-sequitur. The motion is identical no matter what procedural label is applied. And the legal issue – whether the STB Override is a non-executory contract – is the same one that the parties have been on notice of for over two months. Arch's position reveals its true colors – it wants delay for the sake of delay, not an adjudication on the merits.

CONCLUSION

For the foregoing reasons, Robin Land respectfully requests that the Court deny the Arch Motion immediately, without a hearing.

Dated: New York, New York
March 18, 2013

Respectfully Submitted,

DAVIS POLK & WARDWELL LLP

By: /s/ Jonathan D. Martin

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

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

Counsel to Plaintiff/Debtor and Debtor in Possession

Exhibit A

Martin, Jonathan D.

From: Martin, Jonathan D.
Sent: Friday, January 11, 2013 2:06 PM
To: 'James Croft'; 'Trad, Joseph J.'; 'Joseph Bunn (JGBunn@efjones.com)'; 'Moedritzer, Mark (SHB) (MMOEDRITZER@shb.com)'
Cc: Resnick, Brian M.; Zhu, Bernard Chen
Subject: Robin Land Company v. STB Ventures
Attachments: RLC v. STB Stipulation and Agreed Order.doc

All,

As discussed, attached is a draft stipulation and agreed order that allows for intervention by the Arch parties as defendants, withdraws and denies STB's motion to dismiss as moot, and sets a schedule for remaining pleadings and a dispositive motion by RLC. In an effort to resolve the action as expeditiously as possible, we intend to file a motion for judgment on the pleadings on RLC's declaratory judgment claim promptly after the answers are filed. We believe that the declaratory judgment claim can be decided by the Court as a matter of law based on the unambiguous terms of the contracts at issue; accordingly, it makes sense to stay any discovery pending a decision on that motion to avoid unnecessary burden and expense on the parties. As you may know, we have taken this approach in a parallel adversary proceeding in this case that raises similar issues.

Please let me know if you have any comments or would like to discuss. If we are in agreement, we'll submit the stipulation to the Court.

Regards,

Jonathan

Jonathan D. Martin

Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017

212 450 4530 tel
212 701 5530 fax
jonathan.martin@davispolk.com

DavisPolk

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Exhibit B

Martin, Jonathan D.

From: Martin, Jonathan D.
Sent: Friday, March 15, 2013 10:19 AM
To: 'James Croft'
Cc: 'Avi E Luft'; 'Daniel D Queen'; 'John Hall'; Moody, Jr., Gerald M.
Subject: RE: Availability for a call tomorrow morning

James,

We are not withdrawing our motion.

First, our 12(c) motion is procedurally proper. You are misreading the cases you sent. The Rules permit a 12(c) motion on a claim for which the pleadings are closed, even when counterclaims are subject to 12(b) motions. Numerous cases reflect that.

As you know, we filed an identical motion in *Eastern Royalty v. Boone East, et al.*, and your firm agreed that it was proper.

Second, your position here, apart from being wrong on the law, would make no difference as a practical matter. Even on your incorrect view, our 12(c) motion could be treated as a Rule 56 motion. Moreover, even if our 12(c) motion were withdrawn as you request, our 12(b)(6) motion would still be pending. All of the same issues would get litigated in the context of that motion. We moved to dismiss your counterclaims on the basis that the STB Override is, on its face, a pre-petition, non-executory contract. You will have to respond to those arguments on March 25 anyway. If you have procedural arguments to make against our 12(c) motion, you can make them then. That is the proper way to respond to a motion.

The notion that you need emergency relief is baseless. Your position is plain gamesmanship. The time stamps on your cases (March 8, 2013 at 10:15 a.m. and 2:03 p.m.) show that you were sitting on them for a week in order to attempt an ambush. I suggest you not waste the Court's or the parties' time. You can respond to our motion on the agreed schedule and make whatever arguments you wish.

Jonathan

From: James Croft [mailto:jcroft@cgsh.com]
Sent: Thursday, March 14, 2013 7:24 PM
To: Martin, Jonathan D.
Cc: 'Avi E Luft'; 'Daniel D Queen'; 'John Hall'
Subject: RE: Availability for a call tomorrow morning

Hi Jonathan,

Thanks for getting on the call with us. As discussed, here are cases holding (i) that the pleadings are not closed for purposes of Rule 12(c) until counterclaims are answered and (ii) that a Rule 12(b) motion is not a pleading.

Please let us know by tomorrow morning whether you will withdraw your motion, as we have the pending deadline to respond to your motion on March 25th and intend to move the Court to dismiss your motion on an expedited basis.

Regards,
James

James Croft
Cleary Gottlieb Steen & Hamilton LLP
Assistant: asears@cgsh.com
One Liberty Plaza, New York NY 10006

t: +1 212 225 2662 | f: +1 212 225 3999
www.clearygottlieb.com | jcroft@cgsh.com

From: "Martin, Jonathan D." <jonathan.martin@davispolk.com>
To: "James Croft" <jcroft@cgsh.com>
Cc: "Avi E Luft" <aluft@cgsh.com>, "Daniel D Queen" <dqueen@cgsh.com>, "John Hall" <jhall@lewisrice.com>
Date: 03/14/2013 06:41 PM
Subject: RE: Availability for a call tomorrow morning

Yes, 212-450-4530.

From: James Croft [mailto:jcroft@cgsh.com]
Sent: Thursday, March 14, 2013 6:39 PM
To: Martin, Jonathan D.
Cc: 'Avi E Luft'; 'Daniel D Queen'; 'John Hall'
Subject: RE: Availability for a call tomorrow morning

Thanks. Are you at your desk? We'll give you a call.

James Croft
Cleary Gottlieb Steen & Hamilton LLP
Assistant: asears@cgsh.com
One Liberty Plaza, New York NY 10006
t: +1 212 225 2662 | f: +1 212 225 3999
www.clearygottlieb.com | jcroft@cgsh.com

From: "Martin, Jonathan D." <jonathan.martin@davispolk.com>
To: "James Croft" <jcroft@cgsh.com>
Cc: "Avi E Luft" <aluft@cgsh.com>, "Daniel D Queen" <dqueen@cgsh.com>, "John Hall" <jhall@lewisrice.com>
Date: 03/14/2013 06:37 PM
Subject: RE: Availability for a call tomorrow morning

Sure.

From: James Croft [mailto:jcroft@cgsh.com]
Sent: Thursday, March 14, 2013 6:37 PM
To: Martin, Jonathan D.
Cc: 'Avi E Luft'; 'Daniel D Queen'; 'John Hall'
Subject: RE: Availability for a call tomorrow morning

Are you available to talk now?

James Croft
Cleary Gottlieb Steen & Hamilton LLP
Assistant: asears@cgsh.com
One Liberty Plaza, New York NY 10006
t: +1 212 225 2662 | f: +1 212 225 3999

From: "Martin, Jonathan D." <jonathan.martin@davispolk.com>
To: "James Croft" <jcroft@cgsh.com>
Cc: "John Hall" <jhall@lewisrice.com>, "Avi E Luft" <aluft@cgsh.com>, "Daniel D Queen" <dqueen@cgsh.com>
Date: 03/14/2013 06:29 PM
Subject: RE: Availability for a call tomorrow morning

James,

I have a hearing in Delaware tomorrow morning. I could do something later in the afternoon – maybe 4:00 p.m. Eastern. Does that work?

Jonathan

From: James Croft [<mailto:jcroft@cgsh.com>]
Sent: Thursday, March 14, 2013 6:23 PM
To: Martin, Jonathan D.
Cc: John Hall; Avi E Luft; Daniel D Queen
Subject: Availability for a call tomorrow morning

Hi Jonathan,

Do you have some availability for a quick call tomorrow morning about the STB adversary proceeding? We are available at 10:00 Eastern/ 9:00 Central.

Regards,
James

James Croft
Cleary Gottlieb Steen & Hamilton LLP
Assistant: asears@cgsh.com
One Liberty Plaza, New York NY 10006
t: +1 212 225 2662 | f: +1 212 225 3999
www.clearygottlieb.com | jcroft@cgsh.com

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