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** **Hon. Kathy A. Surratt-States**
ROBIN LAND COMPANY, LLC, **Plaintiff,** **v.** **STB VENTURES, INC., *et al.*** **Defendants.**	**Adv. Pro. No. 12-04355-659** **Hearing Date:** **April 23, 2013 at 10:00 a.m.** **(prevailing Central Time)** **Hearing Location:** **Courtroom 7 North**

STB VENTURES, INC.'S OBJECTION TO ROBIN LAND COMPANY, LLC'S MOTION FOR JUDGMENT ON THE PLEADINGS, AND ROBIN LAND COMPANY'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS

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Defendant STB Ventures, Inc. ("STB") hereby submits its objection to Plaintiff Robin Land Company's ("RLC's") Motion for Judgment on the Pleadings (the "MFJP") and RLC's Motion to Dismiss Defendants' Counterclaims (the "Motion to Dismiss").

I. PRELIMINARY STATEMENT

RLC's Motion for Judgment on the Pleadings and RLC's Motion to Dismiss Counterclaims should be denied because both Motions are without merit.

In particular, RLC's Motion for Judgment on the Pleadings is without merit because the record of this proceeding has not been adequately developed to determine beyond doubt that STB cannot prevail on its counterclaims. At present, RLC asserts that the STB Override Agreement is a standalone, non-executory contract. On the other hand, STB and Arch assert that the STB Override Agreement forms part of an overarching agreement comprised of the STB Override Agreement, the Leases, and the Asset Purchase Agreement. Taking STB's assertions as true and inferring all facts in favor of STB, RLC cannot prove beyond doubt that STB has no chance of succeeding on its counterclaims. Thus, RLC's Motion for Judgment on the Pleadings should be denied.

Moreover, even assuming that there are sufficient facts on the record to prove beyond doubt that the STB Override Agreement is or is not integrated with the Leases and the Asset Purchase Agreement, the current facts would warrant a judgment on the pleadings in favor of STB – not RLC. First, the relevant facts indicate that the STB Override Agreement is integrated with the Leases because the nature and purpose of such documents is substantially similar, the consideration is identical, and the obligations of the parties are inter-related. Second, the relevant facts indicate that the STB Override Agreement is a covenant running with the Kelly-Hatfield Premises because RLC, prior to assuming a part of the Kelly-Hatfield Premises,

promised Ark KH, the owner, that it would pay the STB Override for the life of the coal reserves located on, in, and under the Kelly-Hatfield Premises. Third, the relevant facts indicate that the Leases are held in a constructive trust for the benefit of STB because RLC's failure to pay the STB Override in full (as Ark's successor-in-interest under the Asset Purchase Agreement) constitutes an unjust enrichment claim for failure of consideration. Therefore, RLC's Motion for Judgment on the Pleadings should be denied, even assuming that there are sufficient facts on the record to meet the proper standard of review.

RLC's Motion to Dismiss STB's Counterclaims is equally without merit. First and foremost, RLC's Motion to Dismiss is premature in that it would have to be converted to one for summary judgment at this stage, and STB must be afforded an opportunity to conduct discovery before responding to any such motion. Even then, the Motion is still without merit for several reasons. First, STB's Counterclaims are not similar enough to create duplicative litigation. Second, Count III of STB's Counterclaims is proper because the majority of jurisdictions, including this one, have held that creditors proceeding under § 365(d)(3) need not meet the requirements of § 503(b)(1)(A), *i.e.*, providing a benefit to the estate or be necessary to preserve the estate in order to qualify for priority treatment. Third, notwithstanding RLC's argument that the availability of legal remedies precludes the availability of equitable remedies, STB may, under West Virginia law, pursue an unjust enrichment claim against RLC in the absence or even in the presence of legal remedies. Thus, RLC's Motion to Dismiss is without merit.

Therefore, STB's Objection should be sustained, and RLC's Motion for Judgment on the Pleadings and its Motion to Dismiss should be denied.

II. STATEMENT OF FACTS

Ark's 1994 Transaction with STB

1. On October 31, 1994, Ark Land Company ("Ark") and Apogee Coal Company ("Apogee"), which until 2005 was a subsidiary of Arch, entered into an Asset Purchase Agreement (the "STB Asset Purchase Agreement")[1] with STB, Eagle Minerals Company, Guyan Mining Company, and Guyan Equipment Company (collectively, the "Sellers") whereby the Sellers sold certain assets to Ark and Apogee (the "STB Transaction"). Such assets included, among other things, the Sellers' interests in three[2] coal leases pertaining to certain premises located in Logan and Boone Counties, West Virginia, (the "Premises").[3]

2. Also on October 31, 1994, pursuant to § 2.02(b)(i) of the Asset Purchase Agreement, Ark executed and delivered the STB Override Agreement[4] as "additional consideration" for delivery of the assets, which obligated Ark and its heirs, successors and assigns to pay to STB an overriding royalty equal to 1.5% of the gross sales price on all coal mined and sold from the premises demised in such Leases (the "STB Override" or the "Override Payments").[5]

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1 The STB Asset Purchase Agreement was filed under seal as Exhibit B to RLC's Complaint in this adversary proceeding.

2 The three leases sold in connection with the STB Transaction were combined and restated into (i) the Combined, Amended and Restated Coal Lease dated October 31, 1994 (the "Lawson Heirs Lease" and the leasehold premises conveyed thereby, the "Lawson Heirs Premises") by and between Ark and Lawson Heirs, Incorporated (as lessor); and (ii) the Combined, Amended and Restated Coal Lease dated October 31, 1994 (the "Kelly-Hatfield Lease" and the leasehold premises conveyed thereby, the "Kelly-Hatfield Premises") by and between Ark (as lessee) and Kelly-Hatfield Land Co. (as lessor). True and correct copies of the Lawson Heirs Lease and the Kelly-Hatfield Lease were filed under seal by RLC as Exhibits D and E, respectively, to its Complaint.

3 *Id.* at 5-6.

4 *See* STB Override Agreement attached as Exhibit A to RLC's Complaint.

5 *See* § 2.02(b) of the STB Asset Purchase Agreement attached as Exhibit B to RLC's Complaint.

3. The STB Override Agreement expressly references and incorporates the STB Asset Purchase Agreement for the definition of terms used therein, and references and incorporates the Kelly-Hatfield and Lawson Heirs Leases for identification of the duration of the Agreement and for other purposes.[6]

4. It is clear on the face of the STB Override Agreement that it is part of the larger STB Transaction and that it is meant to be construed together with the Leases. For example, the STB Override Agreement expressly references the Kelly-Hatfield Lease and the Lawson Heirs Lease. The second "Whereas" clause of the STB Override Agreement states that the "parties contemplate that the Premises shall be demised by those two certain novation leases from (i) Lawson Heirs, Inc. to [Ark], dated October 31, 1994; and (ii) the Kelly-Hatfield Land Company, to [Ark], dated October 31, 1994…." Section 2 of the STB Override Agreement states that such agreement "shall take effect as of the Closing Date [(as defined in the STB Asset Purchase Agreement)] and shall continue for a period coextensive with the primary term, and any extension or renewal thereof, of the Leases…." And, section 3 of the STB Override Agreement provides, among other things, that the "[t]erms and conditions within the Leases shall govern as to royalty determination, late payment penalties, and all similar purposes."

5. Likewise, the STB Override Agreement expressly references the STB Asset Purchase Agreement. The first "Whereas" clause of the STB Override Agreement states that "pursuant to that certain Asset Purchase Agreement, of even date, by and among [Ark, Apogee and the Sellers], Sellers have sold and transferred to [Ark and Apogee] the Acquired Assets…." The "Now, Therefore" clause of the STB Override Agreement states that the agreements contained in the STB Override Agreement were given "in consideration of the mutual covenants

[6] *See* STB Override Agreement (attached as Exhibit A to RLC's Complaint), ¶¶ 1, 2, 3 and 5.

and agreements contained herein and in the Asset Purchase Agreement") (emphasis added). And section 1 of the STB Override Agreement incorporates the defined terms of the STB Asset Purchase Agreement.

6. The express language of the STB Asset Purchase Agreement also makes clear that the STB Override Agreement is a part of the larger STB Transaction. For example, the "Entire Agreement" clause of the STB Asset Purchase Agreement includes the STB Override Agreement, the Guyan Lease Assignment, the Liabilities Undertaking Agreement, the Kelly-Hatfield Lease and the Lawson Heirs Lease as part of the "entire agreement" of the parties to the STB Asset Purchase Agreement. Specifically, the "Entire Agreement" clause of the STB Asset Purchase Agreement states that the STB Asset Purchase Agreement "(including the documents referred to [t]herein)…constitute the entire agreement of the parties [t]hereto…" *See* STB Asset Purchase Agreement §9.07. The STB Override Agreement is referenced in section 2.02(b)(i) of the STB Asset Purchase Agreement; the Guyan Lease Assignment is referenced in section 2.03(b)(iii) of the STB Asset Purchase Agreement; the Liabilities Undertaking Agreement is referenced in section 2.02(b)(iv) of the Asset Purchase Agreement; and the Kelly-Hatfield Lease and the Lawson Heirs Lease are novation leases of the leases assigned to Ark Land pursuant to the Guyan Lease Assignment, and such anticipated novation is referred to in the second whereas clause of the STB Override Agreement.

7. The language of the "Entire Agreement" clause of the STB Override Agreement is consistent with the fact that the STB Override Agreement is an integral part of the broader STB Transaction and not a standalone contract. The "Entire Agreement" clause of the STB Override Agreement specifies that the STB Override Agreement is integrated only "in respect of the Overriding Royalty specified [t]herein." It does not state that the STB Override Agreement

is a standalone integrated instrument in and of itself. *See* STB Override Agreement § 8. Also, in other places within the STB Override Agreement it expressly and repeatedly references the Asset Purchase Agreement and the Leases,[7] and incorporates various definitions, terms and conditions of those documents.

8. Also in connection with the STB Transaction, Arch Mineral Corporation, predecessor in interest to Arch Coal, Inc. ("Arch"), executed a Guaranty dated October 31, 1994 (the "Guaranty")[8] in favor of STB whereby Arch agreed to guarantee all of Ark's and Apogee's obligations under the STB Asset Purchase Agreement and all documents delivered pursuant thereto – including the STB Override Agreement. STB has asserted that Arch will be obligated under the Guaranty if RLC does not pay the STB Override.

9. RLC asserts that "Lawson Heirs did not contend – as Arch and STB did – that the STB Override is an obligation of the [Lawson Heirs Lease]" [9] in its objection to Debtors' Motion to Assume or Reject Unexpired Leases of Nonresidential Property. (RLC's Memo at 7). But Lawson Heirs had no reason to object to Debtors' Motion to Assume or Reject on grounds that the proposed assumption of the Lawson Heirs Lease did not include the obligations under STB Override Agreement, because Lawson Heirs has no direct liability for or interest in the payment of the royalties owed under the STB Override Agreement. Rather, those royalties are owed by RLC to STB, with Arch being the guarantor of the obligation.[10]

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[7] STB Override Agreement (Exhibit A to RLC's Complaint) at Whereas clause nos. 1 & 2, Now, Therefore clause, & ¶¶ 1, 2, 3 & 5.

[8] The Guaranty was filed as Exhibit 1 to Arch, et al.'s Answer in this adversary.

[9] While RLC's Memo says "STB Override," STB believes that was a typographical error and that it meant "Lawson Heirs Lease" given the context of the sentence.

[10] *See* Ark Assignment Agreement, Initial Partial Assignment, Amended and Restated Partial Assignment and Guaranty, as separately referenced in RLC's Motion (by the same short-hand names) and identified as exhibits either to Plaintiff's Complaint or Arch's Answer.

Arch and Ark's 2005 and 2007 Transactions with Magnum and RLC

10. On December 31, 2005, Arch, the then parent to Ark, entered into a Purchase and Sale Agreement (the "Magnum PSA") with Magnum Coal Company (n.k.a. Magnum Coal Company, LLC, "Magnum"), a debtor in these jointly administered Chapter 11 proceedings[11] whereby Arch sold assets, including Arch's equity interests in RLC and several other entities, each of which is now a debtor in the Debtors' jointly administered Chapter 11 cases, to Magnum (the "Magnum Transaction").

11. To facilitate the Magnum Transaction, on December 30, 2005 – one day prior to the execution of the Magnum PSA – Ark and RLC executed an Assignment and Assumption Agreement (the "Ark Assignment Agreement"), pursuant to which Ark assigned the Lawson Heirs Lease, the STB Override Agreement, and the STB Asset Purchase Agreement to RLC whereby RLC agreed to assume the obligation to pay the STB Override with respect to the Lawson Heirs Premises.[12]

12. Also in connection with the Magnum Transaction, on the same day as the execution of the Magnum PSA – December 31, 2005 – Ark and RLC executed a Partial Assignment and Assumption of Lease (the "Initial Partial Assignment")[13] whereby Ark assigned a portion of the Kelly-Hatfield Premises to RLC and RLC agreed to pay the STB Override "to the extent that the STB Override applies to coal mined from the Assigned Lease Portion of the

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[11] The Magnum PSA (excluding the Schedules and Exhibits thereto) was filed as Exhibit 5 to Arch's Answer in this adversary.

[12] *See* Ark Assignment Agreement, ¶ 2 and Schedule 1 at p. 16 attached to the Complaint as Exhibit F.

[13] *See* Initial Partial Assignment, attached to the Arch, et al. Answer as Exhibit 2.

Premises," and agreed to indemnify Ark for any failure to perform its obligations, including its obligation to pay the relevant portion of the STB Override.[14]

13. Two years later, after Ark Land KH, Inc. ("Ark KH") had purchased the Kelly-Hatfield Premises, Ark, Ark KH and RLC executed the Amended and Restated Partial Assignment and Assumption of Lease dated May 22, 2007 (the "Amended and Restated Partial Assignment")[15] pursuant to which Ark assigned an additional portion of the Kelly-Hatfield Premises to RLC. In that document, RLC agreed to pay the STB Override with respect to the original *and* supplemental portions of the Kelly-Hatfield Premises assigned to RLC, and agreed to indemnify Ark and Ark KH for any failure to perform their obligations under the Kelly-Hatfield Lease, including the obligation to pay the relevant portion of the STB Override.[16]

14. The Ark Assignment Agreement, the Initial Partial Assignment and the Amended and Restated Partial Assignment are hereinafter collectively referred to as the "Lease Assignment Agreements." The covenants by RLC to assume the duties and obligations under the Lawson Heirs Lease, the Kelly-Hatfield Lease, the STB Override Agreement, and the Lease Assignment Agreements constituted a material portion of the consideration given by RLC under the Lease Assignment Agreements, and Ark would not have entered into such Lease Assignment Agreements or the other documents entered into in connection therewith without such covenants by RLC.[17]

15. Since entering the Lease Assignment Agreements and up until the filing of the Petition, RLC performed its obligations under the Lawson Heirs Lease, the Kelly-Hatfield Lease,

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[14] *See id.* at ¶ 2.

[15] *See* Amended and Restated Partial Assignment, attached to the Arch, et al. Answer as Exhibit 3.

[16] *See id.* at ¶ 3.

[17] *See* Answer and Counterclaims of Arch Coal, Inc., et al., Doc. 30, at p. 22, ¶ 81.

the STB Override Agreement, and the Lease Assignment Agreements, including paying $13,667,879.86 in overriding royalty payments pursuant to the terms of the STB Override Agreement.

16. In particular, RLC paid the STB Override Payments in the following amounts per year:

Year	Royalty	
2006	$	1,786,202.00
2007	$	1,691,529.00
2008	$	2,183,686.00
2009	$	2,257,159.00
2010	$	2,398,657.00
2011	$	2,538,061.00
2012 (Pre-Petition)	$	812,585.86
Total	**$**	**13,667,879.86**

17. Since filing the Petition in July 2012, RLC has continued to pay on the Leases assigned to it under the Lease Assignment Agreements, but has not paid STB any of the STB Override on coal mined and sold from the leased premises.

18. The exact amount owed to STB under the STB Override Agreement since the filing of the Petition is currently unknown because it will depend on the amount of coal mined and sold from the leased premises. However, based on historic practices, the amount owed would average approximately $180,000 per month, such that the total owed for the ten months since the filing of the Petition would be approximately $1.8 million.

19. On February 19, 2013, STB filed its Answer and Counterclaims to RLC's Complaint alleging that the STB Override Agreement is integrated with the Kelly-Hatfield Lease, the Lawson Heirs Lease and the Asset Purchase Agreement, among other agreements, and accordingly that Debtors could not assume the Leases without also assuming the obligations

imposed by the STB Override Agreement. (*See, e.g.*, STB Answer at ¶ 30 and Counterclaims at ¶¶ 13-17, 24, 26, 32, 36, 38, 40, 43-45).

20. On the same date, following entry of a stipulation allowing Arch, Ark and Ark KH to intervene as defendants, these Defendants also filed an Answer and Counterclaim to RLC's Complaint asserting that the STB Override Agreement is integrated with the Kelly-Hatfield Lease, the Lawson Heirs Lease and the Asset Purchase Agreement, and accordingly that Debtors could not assume the Leases without also assuming the obligations imposed by the STB Override Agreement. (*See, e.g.*, Arch Defendants' Answer and Counterclaims at ¶¶ 30, 35, 37, 39, 53, 75).

21. On March 5, 2013, STB filed its Motion Under Bankruptcy Code § 365(d)(3) to Compel RLC to Pay Part or All of the Post-Petition Amounts Due Under the STB Override Agreement, or, In the Alternative, Under Bankruptcy Code § 363 for Adequate Protection. [Doc. 40]. On March 25, 2013, Arch, Ark and Ark KH joined STB's Motion to Compel. [Doc. 54].

22. By agreement of the parties, both Plaintiff's Motion for Judgment on the Pleadings and STB's Motion to Compel are set for oral argument on April 23, 2013. The Defendants' objections to the Debtors' proposed assumption of the two Leases without the attendant agreements that Defendants argue are integrated with the Leases will also be taken up at the same time.

III. ARGUMENTS AND AUTHORITIES REGARDING MOTION FOR JUDGMENT ON THE PLEADINGS

RLC's Motion for Judgment on the Pleadings should be denied because there are not enough facts currently on the record to render a Judgment on the Pleadings and, even assuming that the record is sufficiently developed, the facts currently on the record favor STB.

A. Standard of Review

Judgment on the pleadings should be granted only if the moving party clearly establishes beyond doubt that there is no set of facts under which the non-moving party could prevail. *See St. Paul Ramsey Cnty. Med. Ctr. v. Pennington Cnty., S.D.*, 857 F.2d 1185, 1187-88 (8th Cir. 1988). The facts pleaded by the non-moving party must be accepted as true and all reasonable inferences from the pleadings should be taken in favor of the non-moving party. *Mills v. Grand Forks*, 614 F.3d 495, 498 (8th Cir. 2010) (internal citations omitted). The court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record. *Id.*

In particular, a motion to dismiss or motion for judgment on the pleadings involving contract integration is necessarily fact-based and not appropriate for determination on a motion to dismiss or motion for judgment on the pleadings. *See Jack Henry & Assoc., Inc. v. BSC, Inc.*, No. 08-292, 2010 WL 1688757, at *3 (E.D. Ky. Apr. 23, 2010) (under Missouri law, whether parties intended agreements to be integrated is a fact question for the jury and not appropriate for resolution on summary judgment); *All R's Consulting, Inc. v. Pilgrims Pride Corp.*, No. 06 Civ. 3601, 2008 WL 852013, at *12, n. 7 (S.D.N.Y. Mar. 28, 2008). Consequently, courts typically determine issues of contract integration only after discovery has taken place. *Id.*

B. The Motion for Judgment on the Pleadings Should be Denied Because The Pleadings Filed in This Case Fail to Establish Intent of the Parties.

Under West Virginia law,[18] the intent of the parties is paramount in interpreting contracts. *See Perrine v. E.I. DuPont de Nemours & Co.*, 694 S.E.2d 815, 841 (W. Va. 2010). The

[18] RLC asserts that whether a contract is executory for purposes of § 365 is a question of federal law, and that standing alone, the STB Override Agreement cannot be considered an executory contract. That analysis is misplaced because the STB Override Agreement was never intended to stand alone; rather the STB Override Agreement was intended to be integrated with other executory contracts. State law governs whether separate contracts are integrated such that an obligation of one constitutes an obligation of the other. *See also In re Adelphia Business Solution, Inc.*, 322 B.R. 51, 54 (S.D.N.Y.2005) (holding that

determination of whether multiple contracts are integrated includes consideration of such factors as (i) whether the agreements relate to the same subject matter, (ii) whether the separate agreements were considered part of one overarching transaction, and (iii) whether the parties would have entered into one or more of the agreements without the aspects provided in each of the agreements. *See Ashland Oil, Inc. v. Donahue*, 223 S.E.2d 433, 437 (W. Va. 1976); *Amherst Land Co. v. United Fuel Gas Co.*, 84 S.E.2d 225, 229 (W. Va. 1954); *Lawrence v. Potter*, 113 S.E. 266, Syl. Pt. 7 (W. Va. 1922).

Here, RLC disputes the agreements are integrated even though the STB Override Agreement, the Leases and the STB Asset Purchase Agreement were all entered into years before RLC was even formed.[19] Conversely, STB and Arch – the original parties to the STB Override Agreement, the Leases and the STB Asset Purchase Agreement - argue that such instruments constitute a single, unified contract under various theories.

Due to the divergence of opinion between STB and RLC regarding the intent of the original parties, it is impossible to determine, as a matter of law, whether or not the original parties intended for the STB Override Agreement to be a standalone agreement. Until then, the

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whether the rights and obligations under multiple instruments are deemed a single contract for purposes of § 365 of the Bankruptcy Code turns on the state law that governs such instruments). The Kelly-Hatfield Lease, the Lawson Heirs Lease and the Asset Purchase Agreement all contain express choice of law provisions stating that West Virginia laws governs such instruments. Asset Purchase Agreement at ¶ 9.11; Kelly-Hatfield Lease at ¶ 21; Lawson Heirs Lease at ¶ 21. The STB Override Agreement does not have a choice of law clause, but does pertain to realty contained within the boundaries of West Virginia. Thus, West Virginia controls with regard to the integration of the STB Override Agreement and the Leases. RLC does not dispute that West Virginia law applies (Pl's Memo at 9), but concludes without discussion that Missouri law is the same as West Virginia law on the issue of integration, and therefore the Court can apply Missouri law. RLC then proceeds to cite Missouri cases only on the elements of integration. (Pl's Memo at 9-10). In fact, however, as explained in detail later herein, both Missouri law and West Virginia law are materially different on the elements of integration than RLC's rendering based on its citation to one Missouri case, and West Virginia law in particular supports Defendants' position that the STB Override Agreement is integrated with the Kelly-Hatfield and Lawson Heirs Leases, and the Asset Purchase Agreement.

[19] In 2005, RLC, which had been a subsidiary of Arch, as sold by Arch to Magnum. Arch Defs' Answer and Counterclaims at ¶ 59.

Court must accept as true the facts as pled in STB's Counterclaims, including the integration of the operative agreements. Thus, RLC's Motion for Judgment on the Pleadings must be denied.

Even assuming that there is sufficient evidence on the record indicating whether the STB Override Agreement is or is not a standalone agreement, the facts currently on the record would support a judgment on the pleadings in favor of STB.

C. Even Assuming That the Pleadings Provide Sufficient Evidence to Justify a Motion for Judgment on the Pleadings, the Facts Currently on the Record Would Support a Judgment on the Pleadings in Favor of STB.

The facts that currently form the record of this proceeding would support a judgment on the pleadings in favor of STB because the relevant facts indicate that (1) the STB Override Agreement is integrated with the Leases and the STB Asset Purchase Agreement, (2) the STB Override Agreement is a covenant running with the land encompassed by the Leases, and (3) a constructive trust holds title to the Leases until the payments required under the STB Override Agreement are satisfied in full. Each of these issues is addressed in detail below.

1. The Relevant Facts of this Proceeding Indicate That the STB Override Agreement is Integrated with the Leases and the Asset Purchase Agreement.

In determining whether two or more contracts are integrated, West Virginia courts have focused on (1) whether the relationship between the instruments is clear, (2) whether the several instruments were part of one overarching transaction, and (3) whether the parties to and the subject matter of the agreements are substantially the same. *See Ashland Oil, Inc.*, 223 S.E.2d at 437; *Amherst Land Co.* 84 S.E.2d at 229 (W. Va. 1954); *Lawrence*, 113 S.E. 266, Syl. Pt. 7.

In a case involving the determination of whether an assignment to a corporation of oil and gas leases could be severed from the contemporaneous associated transactional documents, the Supreme Court of Appeals of West Virginia held as follows:

> One of several agreements, each of which is an integral part of an entire transaction, involving transfers of a number of separate and distinct rights and interests and incurrence of new obligations by some of the parties, cannot be treated by one of the parties thereto, as a disconnected agreement or a mere revocable offer, while claiming and acquiring a right belonging to the other, by consummation of other parts of the entire transaction.

Lawrence, 113 S.E. at 266, Syl. Pt. 7.

Similarly, in *Amherst Land Co.*, 84 S.E.2d at 229, the Supreme Court of Appeals of West Virginia held that "a written agreement constituting a single contract need not be encompassed in one instrument as between contracting parties. It may be comprised of two or more instruments and be enforceable as a whole, if the relationship between the several papers is clearly established." (emphasis added).

In a later case involving a determination of whether a service station lease and dealer contract should be considered as forming an integrated transaction, the Supreme Court of Appeals of West Virginia held that "even though writings may be separate, they will be construed together and considered to constitute one transaction when the parties are the same, the subject matter is the same and the relationship between the documents is clearly apparent…. A fair reading of the documents discloses that they are so interrelated on their face that either, standing alone, would be meaningless without the other and that neither [party] would have entered into either the lease agreement or the dealer contract separately." *Ashland Oil, Inc.*, 223 S.E.2d at 437. In finding the lease agreement and the dealer contract were integrated contracts, the court noted that they involved the same parties, they both dealt generally with the operation of a gas station at the identified premises, they provided for the same initial term and automatic extensions from year to year, and the terms of the lease were tied directly to aspects of the dealer contract.

Here, the facts indicate that the STB Override Agreement and the other STB Transaction documents are integrated. First, the nature and purpose of the STB Override Agreement and the Leases are substantially similar. Ark (RLC's predecessor-in-interest) obtained possession of the Leases by entering into the STB Asset Purchase Agreement. One of the conditions precedent to the STB Asset Purchase Agreement was Ark's execution and delivery of, and performance under the STB Override Agreement. Therefore, the nature and purpose of the STB Override Agreement is to grant Ark (and now RLC as Ark's partial successor-in-interest) the right to mine coal on the leased premises.

The Leases serve the same purpose. Paragraph 1 of the Kelly-Hatfield Lease states "[s]ubject to the reservations, exceptions and other terms and conditions contained herein, Lessor does ***hereby let, lease and demise*** exclusively unto Lessee, its successors and assigns, ***all of Lessor's right, title and interest in and to all of the mineable and merchantable coal***, together with all appurtenant mining rights, owned by Lessor and encompassed by the [Kelly-Hatfield Lease Premises]" Paragraph 1 of the Lawson Heirs Lease states "Lessor does ***hereby let, lease and demise*** exclusively unto Lessee, its successors and assigns, ***all of Lessor's right, title and interest in and to all of the coal***, located in and underlying approximately 1,627.563 acres located in Logan County, West Virginia as more particularly described in Exhibit A, attached hereto and made a part hereof, together with any reversionary rights or after acquired rights therein."

Second, the obligations of the parties under the STB Override Agreement and the Leases are inter-related. As already mentioned, Ark (and RLC as Ark's partial successor-in-interest) is obligated to pay to STB an overriding royalty on all sales of coal from the Leased Premises equal to one and one-half percent of Gross Sales Price. This obligation continues for a period

coextensive with the primary term, and any extension or renewal thereof, of the Leases, or until the exhaustion of all mineable and merchantable coal. Similarly, Ark (and RLC as Ark's partial successor-in-interest) is obligated to pay royalties to the lessor under the Kelly-Hatfield Lease for the term of the Kelly-Hatfield Lease, or until exhaustion of all mineable and merchantable coal. Ark (and RLC as Ark's total successor-in-interest) is also obligated to pay royalties to the lessor under the Lawson Heirs Lease for the term of the Lawson Heirs Lease, or until exhaustion of all mineable and merchantable coal. For the foregoing reasons, it is apparent that the obligations of Ark (and RLC as Ark's partial or total successor-in-interest) to the lessors of the Leases are inter-related with the obligations of Ark (and RLC as Ark's partial or total successor-in-interest) to STB under the STB Override Agreement.

In fact, the consideration given for the STB Override Agreement and the Leases are substantially similar, if not the same. All three agreements were executed and delivered in connection with the STB Asset Purchase Agreement. Ark (RLC's partial predecessor-in-interest) executed and delivered the STB Override Agreement as "additional consideration" for STB's agreement to assign the Leases. The Leases were assigned by STB to Ark as consideration for Ark's delivery of a certain lump sum payment, execution and delivery of the STB Override Agreement, and the assumption by Ark of certain liabilities. Accordingly, without the existence of the STB Asset Purchase Agreement, the STB Override Agreement and the Leases would not have come into being. Therefore, the consideration for all three documents is inter-related, if not identical.

Third, the parties to the STB Override Agreement and the other agreements are substantially similar. Because the Leases were novation leases, the parties to the Kelly-Hatfield Lease were Ark and Kelly-Hatfield and the parties to the Lawson Heirs Leases were Ark and

Lawson Heirs, but STB had been the lessee under both leases prior to the novation, as referenced in the Leases themselves.[20]

Fourth, there is substantial evidence that the STB Override Agreement and the other agreements were part of one overarching transaction. The subject matter of the STB Asset Purchase Agreement was the transfer of certain assets from STB and other Sellers to Ark and one of its subsidiaries, which was to be accomplished through a series of agreements specifically referenced in the STB Asset Purchase Agreement, including the Kelly-Hatfield and Lawson Heirs Leases and the STB Override Agreement. The form of the STB Override Agreement is the first exhibit to the STB Asset Purchase Agreement, and all four agreements were entered the same day. The effective date of the Leases was October 31, 1994 through December 31, 2004, with an option to extend the Leases on the same terms and conditions for an additional ten year period upon 90 days advance notice.[21] The STB Override Agreement provides that it "shall take effect as of the Closing Date [October 31, 1994] and shall continue for a period coextensive with the primary term, and any extension or renewal thereof, of the Leases….", thus it was to run for a term concurrent with the Leases.[22] Thus, the terms of the Lease and the STB Override Agreement are identical.

Finally, as demonstrated in the examples enumerated below, there is extensive cross-referencing between the Asset Purchase Agreement, the Leases and the STB Override Agreement.

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[20] Kelly-Hatfield Lease at 1-2,25; Lawson Heirs Lease at 3, 24.

[21] Kelly-Hatfield Lease at ¶ 5; Lawson Heirs Lease at ¶ 5.

[22] STB Override Agreement at ¶ 2.

(b) (a) Under the STB Asset Purchase Agreement, delivery of the STB Override Agreement by Ark was "additional consideration" for the transfer of the Acquired Assets (as defined in the Asset Purchase Agreement), which assets included the Kelly-Hatfield Lease and the Lawson Heirs Lease. *See* Asset Purchase Agreement § 2.02(b)(i).

(c) The "Entire Agreement" clause of the STB Asset Purchase Agreement refers to the STB Asset Purchase Agreement and "the documents referred to herein"—which documents include the STB Override Agreement, the Kelly-Hatfield Lease and the Lawson Heirs Lease—as the "entire agreement" of the parties. *See* Asset Purchase Agreement § 9.07.

(d) The "Entire Agreement" clause in the STB Override Agreement specifies that the STB Override Agreement is only integrated "in respect of the Overriding Royalty specified [t]herein", not that the STB Override Agreement is a standalone integrated instrument in and of itself. *See* STB Override Agreement § 8.

(e) The STB Override Agreement expressly references the STB Asset Purchase Agreement, the Kelly-Hatfield Lease and the Lawson Heirs Lease, noting that it was anticipated that the Premises would be demised to Ark by two novation leases from Kelly-Hatfield and Lawson Heirs dated the same day as the STB Asset Purchase Agreement. *See* STB Override Agreement First and Second Whereas Clauses. The Kelly-Hatfield Lease and the Lawson Heirs Lease are such novation leases.

(f) The STB Override Agreement incorporates the terms of the STB Asset Purchase Agreement ("Any capitalized term used but not defined herein shall have the meaning assigned to it in the Assert Purchase Agreement"), and also incorporates as its term the term of the Leases ("This Agreement . . . shall continue for a period coextensive with the primary term, and any extension or renewal thereof, of the Leases . . . "). *See* STB Override Agreement at ¶¶ 1, 2.

Thus, the STB Override Agreement cannot be performed as a stand-alone agreement, as it is reliant on the STB Asset Purchase Agreement and the Leases for essential terms.

(g) The "Now, Therefore" clause of the STB Override Agreement expressly states that the STB Override Agreement is provided in consideration of the mutual covenants and agreements contained in the STB Override Agreement and the STB Asset Purchase Agreement. *See* STB Override Agreement "Now, Therefore" clause.

(h) The STB Override Agreement incorporates terms of the Kelly-Hatfield Lease and the Lawson Heirs Lease by reference. The STB Override is a royalty assessed on coal mined and sold from the Kelly-Hatfield Premises and the Lawson Heirs Premises and the STB Override Agreement states that the "[t]erms and conditions within the [Kelly-Hatfield and Lawson Heirs] Leases shall govern as to royalty determination, late payment penalties, and all similar purposes." *See* STB Override Agreement § 3.

(i) Both the Kelly-Hatfield Lease and the Lawson Heirs Lease reference the STB Asset Purchase Agreement. *See, e.g.*, Kelly-Hatfield Lease fifth and ninth "Whereas" clauses; Lawson Heirs Lease eighteenth "Whereas" clause.

Notwithstanding the clarity of this issue, RLC asserts strained legal interpretations in an effort to avoid its legal duty.

First, RLC acknowledges the importance of the intent of the contracting parties on the issue of integration,[23] but then glosses over it, citing only the language from the contracts that is most favorable to its position of non-integration. Plaintiff argues, citing Missouri authority, that "two contracts are integrated if the parties intended for the breach of one to be the breach of the

[23] RLC's Memo at 9.

other," and then goes on to quote Missouri authority related to a number of factors to be considered. (Pl's Memo at 9).

Under West Virginia law, the existence of cross-default provisions is not in any way determinative of whether two or more contracts are integrated. Rather, the determination of whether two separate contracts are integrated into a single unified agreement is a question of the contracting parties' intent as expressed in the language and subject matter of the agreement. *See Amherst Land Co.*, 85 S.E.2d at 229. For example, "even though writings may be separate, they will be construed together and considered to constitute one transaction when the parties are the same, the subject matter is the same and the relationship between the documents is clearly apparent." *Ashland Oil, Inc.*, 223 S.E.2d at 437. Unlike the cross-default principle of law established by *Elliot, Amherst* and its progeny utilize a much more flexible rule based on the totality of the circumstances. Indeed, the totality of the circumstances of this case indicate that the STB Override is integrated with the Leases. For those reasons, STB posits that the STB Override Agreement is integrated with the Leases regardless of whether a breach of the STB Override Agreement causes a breach under one or both of the Leases.[24]

Second, RLC argues that the STB Override Agreement is not integrated with the Leases because a piecemeal comparison of the STB Override Agreement separately with each of the relevant agreements allegedly shows that the STB Override is not integrated with any of them. Where the issue is whether a contract is integrated with two or more other contracts, the

[24] Also in support of its argument that Defendants cannot identify any party to the agreements whose obligation would be excused if RLC stops paying the STB Override, RLC cites to *In re Interstate Bakeries Corp*., 690 F.3d 1069, 1073 (8th Cir. 2012) for the proposition a contract is executory only if one party's failure to perform would constitute a material breach excusing the performance of the other. Reliance on that principle here is misplaced. That principle would apply where the court is examining a single contract (as the Court was doing in *Interstate Bakeries Corp*.) to determine whether a breach by one party to that contract would excuse the performance of the other party to that contract. The principle does not apply where, as in this case, the court is examining several contracts which are alleged to be integrated.

appropriate comparison is all writings that are purportedly part of the same transaction together. The authorities that discuss integration state that it is appropriate to look at all of the documents that are part of the same transaction together, rather than performing a one-to-one comparison. *See, e.g.*, Corbin on Contracts:

> The terms of agreement may be expressed in two or more separate documents, some of these containing promises and statements as to consideration, and others, such as deeds, mortgages and trust indentures, embodying performances agreed upon rather than a statement of terms to be performed. In every such case, these documents should be interpreted together, each one assisting in determining the meaning to be expressed by the others.

5 Corbin on Contracts § 24.21 (1998) (emphasis added).

Similarly, the Restatement of Contracts provides "A writing is interpreted as a whole, and all writings that are part of the same transaction are integrated together." Restatement (Second) of Contracts § 202(2) (emphasis added). *See also Aspenwood Inv. Co. v. Martinez*, 355 F.3d 1256, 1260 (10th Cir. 2004) (a mortgage, note and HUD regulation were part of a "single, overarching agreement" between the parties, and "the meaning of each element can be understood only in the context of all the other elements," such that the documents had to be considered together in determining the owner's rights); *Patterson-Ballagh Corp. v. Byron Jackson Co.*, 145 F.2d 786, 788-89 (9th Cir. 1944) (four contracts, including one related to royalty payments, that were entered at the same time and part of the same overarching agreement must be considered together, resulting in enforcement of royalty obligation); *Costello v. Watson*, 720 P.2d 1033, 1036-37 (Idaho Ct. App. 1986) (four inter-related contracts dealing with the same subject matter had to be viewed together in determining parties' intentions and rights under same). Here, when examining the contracts collectively, the obvious conclusion is that the agreement are integrated. Thus, the STB Override Agreement is integrated with the other documents notwithstanding RLC's flawed piecemeal examination.

Finally, RLC argues that the STB Override Agreement is not integrated with the Leases because the STB Override Agreement, the STB Asset Purchase Agreement and the Leases do not involve identical parties. Once again, RLC is attempting to apply a "bright line" rule instead of evaluating the intent of the parties. Courts have routinely held contracts to be integrated where they did not involve identical parties. *See, e.g., Aspenwood Inv. Co.*, 355 F.3d at 1260 (where 3 documents were integrated, HUD was bound by terms of promissory note, even though not a party to it); *Patterson-Ballagh Corp.*, 145 F.2d at 787-789 (4 contracts entered at same time and part of same transaction had to be considered together, although only two were signed by the appellant and appellee). Based on the analysis above, the facts of this case support a conclusion similar to the conclusion reached in *Aspenwood* and *Patterson-Ballagh*. Thus, RLC's argument that the instant agreements are not integrated because they involve different parties is without merit.

2. The Revelant Facts of this Proceeding Indicate That the STB Override Agreement is a Covenant Running with the Land Encompassed by the Leases.

Under West Virginia law a non-landlord assignor may impose additional conditions upon an assignee in connection with an assignment of real property, provided that the landlord consents to such additional burden. This rule stems from the bedrock principle that a covenant runs with the land when (1) there is a privity of estate between the owner and possessor, (2) the benefit and burden of said covenant "touches and concerns" the respective estates of the owner and the possessor, and (3) the intent of the parties was for the covenant to run with the land. *See McIntosh v. Vail*, 28 S.E.2d 607, 609-10 (W. Va. 1943). West Virginia is "committed to the doctrine that, except as between landlord and tenant, no burden can be imposed on land by a grantor's covenant so as to bind a subsequent grantee of the covenantor." *See McIntosh*, 28 S.E.2d at 613.

Here, the Amended and Restated Partial Assignment dated May 22, 2007 was not just an ordinary assignment. It was executed by (i) RLC, as the assignee, (ii) Ark, as the assignor, and, most importantly, (iii) Ark KH, as the landlord. When RLC joined in the execution of the 2007 Amended and Restated Partial Assignment, RLC acknowledged that Ark KH was the owner of the Kelly-Hatfield Premises and covenanted to Ark KH that it would assume the obligations of the Kelly-Hatfield Lease and pay the STB Override insofar as those obligations applied to the portions of the Kelly-Hatfield Premises assigned by Ark to RLC in 2005 and 2007. Thus, a privity of estate existed between the owner of the property, Ark KH, and the assignee, RLC.

The benefit and burden of RLC's covenant to pay the STB Override also "touches and concerns" the respective estates of Ark KH and RLC because RLC's liability under the STB Override is not triggered until RLC mines coal on, in, and/or under the Kelly-Hatfield Premises.

Finally, the parties intended for the covenant to run with the Kelly-Hatfield Lease for several reasons. First, the only consideration given by RLC for the aforementioned assignment was the assumption of liability under the Kelly-Hatfield Lease and under the STB Override Agreement insofar as they applied to the portions assigned by the 2007 Amended and Restated Partial Assignment and the 2005 Initial Partial Assignment. Second, Ark KH only consented to the 2007 Amended and Restated Partial Assignment "as provided [subject to the conditions] herein." Third, Ark only made the 2007 Amended and Restated Partial Assignment subject to RLC's agreement to pay the STB Override for its term. Thus, the intent of the parties was for the covenant to run with the land.

Therefore, the 2007 Amended and Restated Partial Assignment created a covenant running with the Kelly-Hatfield Lease and, accordingly, payment of the STB Override is an

incorporated condition of the Kelly-Hatfield Lease that must be assumed *cum onere* with the Kelly-Hatfield Lease, or rejected with the Kelly-Hatfield Lease *in toto*.

RLC argues in its Motion that assignment of the Leases cannot modify the terms of the underlying agreements, (Pl's Memo at 16), and, even assuming that an assignment can modify the terms of its underlying agreement, that an agreement granting overriding royalties can never be a covenant running with the land. (Pl's Memo at 15-16). However, this argument is without merit under applicable West Virginia law.

In *Easley Coal Co. v. Brush Creek Coal Co.*, 112 S.E. 512, 515 (W. Va. 1922), the court approved an additional royalty created in an assignment by someone other than the fee holder, provided the fee holder consented. There, Coal River Mining Company leased the premises to Dalton and Butts, provided that they pay a royalty of 9 cents per ton. *Id.* at 513. Dalton and Butts later assigned the lease to Brush Creek Coal and reserved to themselves an additional 3 cents royalty per ton. *Id.* Coal River Mining consented to the assignment and the additional royalty. *Id.* Brush Creek Coal then assigned the lease to Easley subject to the 12 cents per ton royalty obligation. *Id.* at 514. While the case pertained to a different legal issue, the court held *in dicta* that Easley owed 9 cents in royalty to Coal River Mining and 3 cents in royalty to Dalton and Butts. Thus, the assignment from Dalton and Butts to Brush Creek Coal did modify the terms of the underlying coal lease and such modification became a covenant running with the land. Accordingly, RLC's arguments are without merit.

3. The Revelant Facts of this Proceeding Indicate That a Constructive Trust Holds Title to the Leases until the Payments Owed under the STB Override Agreement are Satisfied in Full.

Under West Virginia law, a court will find an unjust enrichment claim to be valid "whenever the legal title to property . . . has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's

weaknesses or necessities, or through any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest." *Gariety v. Vorono,* 261 F. App'x. 456, 460 (4th Cir. 2008); *Annon v. Lucas*, 155 W. Va. 368, 185 S.E.2d 343, 352 (W. Va. 1971); *see also Patterson v. Patterson*, 277 S.E.2d 709, 715 (W. Va. 1981) (overruled on other grounds); *Thompson v. Merchants' & Mechanics' Bank of Wheeling*, 3 W. Va. 651 (W. Va. 1869).[25]

One remedy available to a court addressing a claim for unjust enrichment is a constructive trust. *See In re Obrien*, 414 B.R. 92, 99 (S. D. W. Va. 2009)(quoting *Timberlake v. Heflin*, 379 S.E.2d 149, 155 (W. Va. 1989)). In instances where the imposition of a constructive trust is proper, if a constructive trustee sells the trust property, the grantee, if he has notice of the trust, or the facts giving rise to the trust, becomes a constructive trustee and holds the legal title subject to the rights of the beneficiaries. *See Newman v. Newman*, 55 S.E. 377 (W. Va. 1906); *Pan Coal Co. v. Garland Pocahontas Coal Co.*, 125 S.E. 226 (W. Va. 1924). Significantly, "the availability of a constructive trust as a mode of relief against unjust enrichment is not, in general, affected by the fact that the plaintiff has a cause of action at law, as distinguished from equity, for damages or other relief." *Annon*, 185 S.E.2d at 352.

Here, as previously mentioned, Ark gained possession of the Kelly-Hatfield Lease and the Lawson Heirs Lease by agreeing to pay STB the STB Override as "additional consideration" pursuant to the terms of the STB Asset Purchase Agreement. Ark then assigned all of its interests in the Lawson Heirs Leasehold, a significant part of the Kelly-Hatfield Leasehold, the STB Asset Purchase Agreement, and the STB Override Agreement, to RLC in 2005. During the

[25] One example of a circumstance where it would be unconscientious for the holder of the legal title to retain and enjoy the beneficial interest would be a breach of a land sales contract for failure of consideration. *See* Andrew Burrows, The Law of Restitution 21 (1993).

negotiations of those transactions, RLC was notified that some obligations under the STB Asset Purchase Agreement had not yet been satisfied, i.e., payment of the STB Override as additional consideration. That fact is corroborated by the 2005 Initial Partial Assignment where the STB Override Agreement is expressly acknowledged and assumed by RLC. Moreover, RLC subsequently ratified the STB Override Agreement's incorporation into the Kelly-Hatfield Leasehold when it represented and warranted to Ark KH that it would pay the STB Override under the 2007 Amended and Restated Partial Assignment. Thus, RLC had notice of the pending obligations owed to STB under the STB Asset Purchase Agreement and the STB Override Agreement. As such, RLC is a resulting constructive trustee (post-assignment from Ark) of the constructive trust holding title of the Kelly-Hatfield Leasehold and the Lawson Heirs Leasehold for the benefit of STB.

IV. ARGUMENTS AND AUTHORITIES REGARDING RLC'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS

RLC's Motion to Dismiss Defendants' Counterclaims fail initially because RLC has now answered STB's Counterclaims, and even if the Court were to convert the Motion to Dismiss to one for summary judgment, STB would be entitled to discovery before responding. Otherwise, for the reasons referenced below, the Motion to Dismiss fails because RLC has not met its burden of proving that, taking all facts pled by STB as true, there is no set of facts that would allow STB to prevail.

A. Standard of Review

In reviewing a motion to dismiss, the court should take all facts pled by the non-moving party as true, and must construe allegations in the pleadings and reasonable inferences arising therefrom favorably to the non-moving party. *Knapp v. Hanson*, 183 F.3d 786, 788 (8th Cir.

1999). A court should grant a motion to dismiss only where the moving party can prove that there is no set of facts that would allow the non-moving party to prevail. *Id.*

B. RLC's Motion to Dismiss Should be Denied as Premature.

RLC has now answered STB's Counterclaims, and even if the Court were to convert the Motion to Dismiss to one for summary judgment, STB would be entitled to discovery before responding. *Iverson v. Johnson Gas Appliance Co.*, 172 F.3d 524, 530 (8th Cir. 1999) (reversing trial court's grant of summary judgment for defendant, after having converted defendant's motion to dismiss to one for summary judgment, where plaintiff had sought and was denied opportunity to conduct discovery before responding to motion). Thus, the Motion is premature.

C. RLC's Motion to Dismiss Should be Denied Because RLC Has Failed to Satisfy Its Burden.

The Motion to Dismiss STB's Counterclaims, which is governed by the same standard governing RLC's Motion for Judgment on the Pleadings, should be denied on the merits for the reasons stated below.

As to Counts I and II of STB's Counterclaims for declaratory judgment, RLC argues those should be dismissed as redundant mirror-images of RLC's declaratory judgment claim. However, a comparison of STB's declaratory judgment claims with those of RLC reveals that they are not redundant. Count I of STB's Counterclaim seeks a declaration that RLC's obligation to pay relevant portions of the STB Override is integrated with various other enumerated agreements, some of which are executory, and that RLC's obligation to pay the STB Override is therefore executory, and that RLC is obligated to pay relevant portions of the STB Override under § 365(d)(3) pending assumption or rejection of the Kelly-Hatfield and Lawson Heirs Leases, and/or, if such leases are assumed under § 365, that RLC must cure its default under the STB Override Agreement. The Counterclaim goes well beyond the declaratory relief

sought in RLC's Complaint, which merely seeks a declaration that "the STB Override Agreement is a non-executory contract for purposes of section 365 of the Bankruptcy Code; and [ ] that the STB Override Agreement is not integrated with, or is severable from, any other agreement." (RLC's Complt., ¶ 20). RLC's Complaint does not enumerate the other agreements that STB alleges the STB Override Agreement is integrated with, nor does it speak to the interim or ultimate relief STB seeks under § 365(d)(3) of the Bankruptcy Code. "If it cannot be determined early in the litigation if the counterclaim is identical to the complaint, 'the safer course for the court to follow is to deny a request to dismiss a counterclaim for declaratory relief unless there is no doubt that it will be rendered moot by the adjudication of the main action.'" *Fid. Nat'l Title Ins. Co. v. Captiva Lake Invs., LLC*, 788 F. Supp. 2d 970, 973 (E.D. Mo. 2011) (quoting Charles Alan Wright, et al., Federal Practice and Procedure § 1406 (3d ed. 1998)).

Count II of STB's Counterclaims seeks a declaration that RLC is obligated to pay the STB Override because the obligation runs with the leased coal properties on which the STB Override Agreement is based, and because payment of the STB Override is an incorporated condition of the Kelly-Hatfield and Lawson Heirs Leases, and seeking a declaration that RLC is obligated to pay relevant portions of the STB Override under § 365(d)(3) of the Bankruptcy Code pending assumption or rejection of the Leases on such grounds, and if the Leases are assumed, to cure the defaults under the STB Override Agreement. RLC's Complaint does not touch on any of these theories, nor does it ask for declaratory relief related to any of these theories, and therefore Count II of STB's Counterclaim is not redundant of RLC's Complaint, and accordingly should not be dismissed on such grounds.

As to Count III of STB's Counterclaims alleging breach of contract, RLC argues it should be dismissed on the basis that it is allegedly for amounts due under a prepetition contract

and as such can only give rise to prepetition claims. (RLC's Memo at 20-21). That argument is without merit.

For the reasons argued in STB's Motion Under § 365(d)(3) to Compel RLC to Pay Part or All of the Post-Petition Amounts Due Under the STB Override Agreement, the STB Override Agreement is an obligation RLC is required to pay under two unexpired nonresidential real property leases, and therefore it is entitled to priority treatment as an administrative expense under § 365(d)(3) of the Bankruptcy Code. The majority of jurisdictions having addressed the issue, including this Court, have held that creditors, like STB, proceeding under § 365(d)(3) need not meet the requirements of § 503(b)(1)(A) that the administrative expense provide a benefit to the estate or be necessary to preserve the estate in order to be entitled to priority treatment. *See, e.g., In re Go Fig, Inc.*, No. 08-40116-705, 2009 WL 537090, at * 2-3 (Bankr. E.D. Mo. Feb. 5, 2009); *In re Worth Stores Corp.*, 135 B.R. 112 (Bankr. E.D. Mo. 1991. Also, even if STB were required to show a benefit to the estate from the STB Override Agreement in order to be entitled to priority treatment as an administrative expense, that benefit can come from an inter-related agreement, such as the Leases. *See, e.g., In re Indep. Am. Real Estate, Inc.*, 146 B.R. 546, 552 (Bankr. N.D. Tex. 1992).

As to Count IV of STB's Counterclaims alleging unjust enrichment/constructive trust, RLC asserts that a claim for unjust enrichment "cannot be maintained where a contract governs the relationship between the parties." This argument is without merit because under West Virginia law a claimant may pursue equitable remedies in the absence of or even in the presence of legal remedies.

RLC asks this Court to find the STB Override Agreement severable and independent from the STB Asset Purchase Agreement, so that it may reject the STB Override Agreement, and

retain the Kelly-Hatfield Leasehold and the Lawson Heirs Leasehold without the additional cost of the STB Override. The result would in effect be a nullification of the STB Override Agreement and a corresponding absence of a legal remedy. In that event the creditors of RLC would receive the benefit of RLC owning the Kelly-Hatfield Leasehold and the Lawson Heirs Leasehold without RLC (as Ark's successor-in-interest) rendering full payment for the Leases pursuant to the STB Asset Purchase Agreement.

As indicated above, under West Virginia law, a court will find an unjust enrichment claim to be valid "whenever the legal title to property . . . has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weaknesses or necessities, or through any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest." *See Gariety*, 261 F. App'x. at 460.

One remedy available to a court addressing a claim for unjust enrichment claim is a constructive trust. *See In re Obrien*, 414 B.R. at 99 (quoting *Timberlake v. Heflin*, 379 S.E.2d at 155). In instances where the imposition of a constructive trust is proper, if a constructive trustee sells the trust property, the grantee, if he has notice of the trust, or the facts giving rise to the trust, becomes a constructive trustee and holds the legal title subject to the rights of the beneficiaries. *See Newman*, 55 S.E. 377; *Pan Coal Co.*, 125 S.E. 226. Also, and significantly, "the availability of a constructive trust as a mode of relief against unjust enrichment is not, in general, affected by the fact that the plaintiff has a cause of action at law, as distinguished from equity, for damages or other relief." *Annon*, 185 S.E.2d at 352.

Here, as previously mentioned, Ark gained possession of the Kelly-Hatfield Lease and the Lawson Heirs Lease by agreeing to pay STB the STB Override as "additional consideration"

pursuant to the terms of the STB Asset Purchase Agreement. Ark then assigned all of its interests in the Lawson Heirs Leasehold, a significant part of the Kelly-Hatfield Leasehold, the STB Asset Purchase Agreement, and the STB Override Agreement, to RLC in 2005. During the negotiations of those transactions, RLC was notified that some obligations under the STB Asset Purchase Agreement had not yet been satisfied, *i.e.*, payment of the STB Override as additional consideration. That fact is corroborated by the fact that the 2005 Initial Partial Assignment expressly references the STB Override Agreement and RLC expressly assumed the STB Override Agreement by the same Agreement. Moreover, RLC subsequently ratified the STB Override Agreement's incorporation into the Kelly-Hatfield Leasehold when it expressly agreed to pay the STB Override under the 2007 Amended and Restated Partial Assignment. Thus, RLC had notice of the pending obligations owed to STB under the STB Asset Purchase Agreement and the STB Override Agreement. As such, RLC is a resulting constructive trustee (post-assignment from Ark) of the constructive trust holding title of the Kelly-Hatfield Leasehold and the Lawson Heirs Leasehold for the benefit of STB.

For all of these reasons, the Court should deny RLC's Motion to Dismiss STB's Counterclaims for failure to state a claim.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, STB Ventures, Inc. respectfully requests this Court to enter an Order denying RLC's Motion for Judgment on the Pleadings and Motion to Dismiss Defendants' Counterclaims, and for such other relief as the Court deems appropriate.

SHOOK, HARDY & BACON L.L.P.

Dated: April 9, 2013

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of April, 2013, a true and correct copy of the above and foregoing was served via CM/ECF notification on all parties receiving such notification.

/s/ Mark Moedritzer