UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re	)	Chapter 11
	)	
	)	Case No. 18-50757
FIRSTENERGY SOLUTIONS CORP., *et al.*,[1]	)	
	)	Jointly Administered
	)	
Debtors.	)	Hon. Judge Alan M. Koschik
	)	

OBJECTION OF CONSOLIDATION COAL COMPANY AND McELROY COAL COMPANY TO MOTION OF THE DEBTORS AUTHORIZING FIRST ENERGY GENERATION, LLC TO REJECT A CERTAIN COAL SUPPLY CONTRACT

Murray Energy Corporation's subsidiaries, Consolidation Coal Company ("Consolidation") and McElroy Coal Company ("McElroy," together with Consolidation, "Murray") hereby file this objection and memorandum of law in response to the *Motion of the Debtors for Entry of an Order Authorizing FirstEnergy Generation, LLC to Reject a Certain Coal Supply Executory Contract* (the "Rejection Motion;" Docket. No 837), submit the supporting declarations of Robert D. Moore and James R. Turner, Jr. and respectfully state as follows[2]:

Preliminary Statement

Murray has contracts with FirstEnergy Generation, LLC ("FG") that require Murray both to sell coal to FG to operate the Bruce Mansfield Plant (the "Plant") and to remove and dispose

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: FE Aircraft Leasing Corp. (9245), case no. 18-50759; FirstEnergy Generation, LLC (0561), case no. 18-50762; FirstEnergy Generation Mansfield Unit 1 Corp. (5914), case no. 18-50763; FirstEnergy Nuclear Generation, LLC (6394), case no. 18-50760; FirstEnergy Nuclear Operating Company (1483), case no. 18-50761; FirstEnergy Solutions Corp. (0186), Norton Energy Storage L.L.C. (6928), case no. 18-50764. The Debtors' address is 341 White Pond Dr., Akron, OH 44320.

[2] To the extent any factual matter herein is disputed by any party, Murray reserves the right to seek an evidentiary hearing.

of coal combustion residuals generated at that plant from that coal. The parties' mutual obligations under this arrangement are laid out in two interrelated documents: the Coal Sales Agreement (as defined below) and the CCR Agreement (as defined below). FG now seeks authority to reject the Coal Sales Agreement while maintaining Murray's obligations under the CCR Agreement. These two related contracts should be viewed as a single indivisible agreement for purposes of assumption and rejection.

The parties' intent is the primary factor in determining whether multiple agreements should be considered a single contract for rejection purposes. Here, the parties have unequivocally expressed their intent to "link" their two contracts. The CCR Agreement contemplates that Murray will dispose of CCR generated at the Plant at a below-market rate. Murray agreed to this non-competitive rate because FG had committed to purchase a significant amount of coal from Murray for a period of nearly twenty-years. It was Murray's understanding and intent that it would be disposing of CCR generated by its own coal for one of its customers. Consistent with this intent, when the parties executed the CCR Agreement, they simultaneously executed an amendment to the Coal Sales Agreement ("Amendment No. 9") which amended the Coal Sales Agreement in multiple ways "**to evidence the link between the Coal Sales Agreement and the [CCR Agreement] operationally and economically**." See Amendment No. 9, p.1 (emphasis added). Consistent with their stated intent, the parties linked their contracts by amending the Coal Sales Agreement with provisions designed to create operational and economic integration with the CCR Agreement. This was achieved by (a) adding a provision in the Coal Sales Agreement obligating FG to pay Murray a $1,080,000 annual fee for services rendered under the CCR Agreement, (b) adding a cross-termination provision allowing FG to terminate the Coal Sale Agreement if Murray terminated the CCR Agreement, and (c) adding a

provision allowing the parties to set-off claims and obligations arising under one contract against the claims and obligations arising under the other contract. Understanding the complete agreement between Murray and FG for the regular provision and removal of coal requires interpretation of both contracts. FG cannot now re-write the contracts to ignore the parties' plainly worded intent to "link" them "operationally and economically." For these reasons, and as further explained below, the two contracts constitute one single agreement that must be simultaneously rejected (or assumed) in its entirety under Section 365 of the Bankruptcy Code.[3]

Background

A. Coal Sales Agreement

FG and Murray[4] are parties to the Coal Sales Agreement, dated June 27, 2006, (as amended from time to time, the "Coal Sales Agreement"). Pursuant to the Coal Sales Agreement, FG purchases coal from Murray to operate one of its fossil fuel generation plants—the Plant. Mellody Decl. at ¶7.[5] Under the contract, FG is required to purchase a minimum volume of 6.5 million tons of coal per year through 2028. Id. at ¶8. Murray estimates that if the Coal Sales Agreement is rejected it will have a rejection damages claim of approximately $3 billion on an undiscounted basis, making Murray the single largest unsecured creditor in these Chapter 11 cases.

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[3] Out of an abundance of caution and as an alternative form of relief, Murray has separately moved for relief from the automatic stay to terminate the CCR Agreement based on FG's post-petition breaches of such contract.

[4] Technically, the Murray parties are actually its affiliates, Consolidation and McElroy. We use Murray for the sake of convenience.

[5] Mellody Decl. refers to the declaration of James G. Mellody filed in support of the Rejection Motion (Docket No. 838)

B. **CCR Agreement**

FG and Murray[6] are also parties to the CCR Disposal Agreement, dated April 14, 2016 (as amended, the "CCR Agreement"). In the process of burning coal to generate power at the Plant, FG generates coal combustion residuals, which include fly ash, bottom ash and stabilized FGD material (collectively, "CCR"). The CCR generated at the Plant is directly attributable to the coal sold by Murray to FG under the Coal Sales Agreement. See CCR Agreement, p. 1. Pursuant to the CCR Agreement, Murray agreed to accept, transport, and dispose of CCR produced at the Plant in accordance with the terms of the contract through 2028 (a period co-terminus with the Coal Sales Agreement). See CCR Agreement ¶1.1.

C. **Parties "Link" Their Agreements**

The CCR Agreement between Murray and FG would not exist without the Coal Sales Agreement. See Declaration of Robert D. Moore in Support of the Objection of Consolidation Coal Company and McElroy Coal Company to Motion of the Debtors Authorizing FirstEnergy Generation, LLC to Reject a Certain Coal Supply Contract ("Moore Decl.") at ¶¶ 10-15; see also Declaration of James R. Turner, Jr. in Support of the Objection of Consolidation Coal Company and McElroy Coal Company to Motion of the Debtors Authorizing FirstEnergy Generation, LLC to Reject a Certain Coal Supply Contract ("Turner Decl.") at ¶¶ 10-11. Murray agreed to dispose of CCR generated at the Plant at a below-market rate only because FG was also purchasing coal for the Plant from Murray, and was committed to purchasing coal from Murray through 2028. See Moore Decl. at ¶¶ 12-14. Further, FG was concerned that it would have to shut down the Plant or significantly reduce its coal consumption (which was being supplied by Murray) if the parties could not find an economic solution to dispose of the CCR. See Moore Decl. at ¶ 13;

[6] Murray subsidiaries Consolidation and McElroy are technically the counter-parties to the contract.

Turner Decl. at ¶ 13. Thus, Murray was willing to provide the services contemplated by the CCR Agreement so that FG could keep the Plant operating and continue accepting coal under the Coal Sales Agreement. See Moore Decl. at 14-15.

Accordingly, Murray and FG understood and intended their contracts to be linked in numerous respects. For example, the CCR Agreement recites the inter-relatedness of the two agreements and acknowledges that it "is appropriate for the continuation or termination of this [CCR] Agreement and the Coals Sales Agreement to be linked as provided herein and in the Coal Sales Agreement." See CCR Agreement, p. 1. There is a reciprocal acknowledgement of the parties' intent in Amendment No. 9 to the Coal Sales Agreement as well. See Amendment No. 9, p. 1. The parties amended the Coal Sales Agreement at the same time they executed the CCR Agreement for the purposes of "**evidenc[ing] the link between the Coal Sales Agreement and the [CCR Agreement] operationally and economically.**" See Amendment No. 9, p.1 (emphasis added). The parties successfully linked their contracts by amending the Coal Sales Agreement with three provisions designed to create operational and economic integration with the CCR Agreement.

The parties amended the Coal Sales Agreement to provide that FG would pay a service fee to Murray for services Murray rendered under the CCR Agreement. See Amendment No. 9 ¶1. The fee relates to CCR disposal, but intentionally was added to the linked Coal Sales Agreement. Specifically, the Coal Sales Agreement was amended on April 14, 2106 to provide for the payment of a service fee in the amount of $1,080,000 per year payable in equal monthly installments of $90,000 each, which obligation could terminate upon the termination of the CCR Agreement. Id. In addition, the parties linked their contracts by including a "cross-termination" provision pursuant to which FG was granted the right to terminate the Coal Sales Agreement if

Murray terminated the CCR Agreement. Id. at ¶2. The parties also linked their contracts with a cross set-off provision permitting each party to offset amounts owed to it against amounts it owed under the other agreement, thereby treating them as a single, unitary contract. Id. at ¶3.

Contemporaneous communications – both internal to and between the parties – also indicate an intent to link the performance of the CCR Agreement to the existence and performance of the Coal Sales Agreement. For example, a proposal by Murray to remove CCR generated by FG states that the disposal was necessary "to ensure the continued operation of the [Plant]" and acknowledged that Murray had a "vested interest" in providing CCR disposal services because its interests and FG's were "aligned on this project. " See Turner Decl. at ¶ 12.

OBJECTION

A. **Applicable Standard Under Section 365(a)**

Section 365(a) of the Bankruptcy Code states that a debtor, "subject to the court's approval, may assume or reject any executory contract … of the debtor. " 11 U.S.C. § 365(a). It is well established that a debtor "takes the contracts of the debtor subject to their terms and conditions." Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 141 (U.S. 1946); (Rockland Ctr. Assoc. v. TSW Stores of Nanuet, Inc.) In re TSW Stores of Nanuet, Inc., 34 B.R. 299, 304 (Bankr. S.D.N.Y. 1983) ("The debtor . . . is not free to retain the favorable features of the contract and reject only the unfavorable ones . . . The contract must be rejected in its entirety, or not at all.") (quoting 8 Collier on Bankruptcy ¶ 3.15[7] at 205–06 (J. Moore 14th ed. 1978). A single agreement may contain multiple contracts for section 365 assumption-rejection purposes. In that context, a debtor may assume parts of a severable agreement while rejecting other parts. E.g., Contract Research Sols., Inc., 2013 WL 1910286, at *1-2 (Bankr. D. Del. May 1, 2013); In re Buffets Holdings, Inc., 387 B.R. 115, 120 (Bankr. D. Del. 2008). Correspondingly, multiple agreements may be considered a single indivisible contract for purposes of assumption and

rejection. E.g., In re Trinity Coal, 514 B.R. 526, 532 (Bankr. E.D. Ky. 2014) (finding that a disposal agreement and an easement agreement were part of an indivisible property exchange transaction between two coal mining operators and could not be rejected individually); In re Hawker Beechcraft, Inc., 2013 WL 2663193, *3 (Bankr. S.D.N.Y. June 13, 2013) ("A debtor may not assume parts of a single, indivisible agreement while rejecting other parts."); KFC Corp. v. Wagstaff Minn., Inc. (In re Wagstaff Minn., Inc.), 2012 WL 10623, *3 (D. Minn. Jan. 3, 2012) (reversing bankruptcy court and holding that "[t]wo or more contracts that are 'essentially inseparable' should be viewed as a single indivisible agreement and assumed or rejected in their entirety."); McComber v. Arts Diary, LLC (In re Arts Diary, LLC), 417 B.R. 495, 502 (Bankr. N.D. Ohio 2009) ("[D]ifferent obligations, contained in separately executed documents, can still be construed as a single contract for purposes of assumption or rejection under § 365."); In re Exide Techs., 340 B.R. 222, 228 (Bankr. D. Del. 2006), vacated on other grounds, 607 F.3d 957 (3d Cir. 2016) ("[A]ll of the contracts that comprise an integrated agreement must either be assumed or rejected since they all make up one contract. "); Philip Servs. Corp. v. Luntz Philip Servs., Inc. (In re (Philip Servs., Inc.), 284 B.R. 541, 546-47 (Bankr. D. Del. 2002) (separately executed promissory note and merger agreement were "inseparable" and constituted a single agreement for purposes of assumption and rejection).

B. **Applicable Standard Under Ohio Law**

State law governs whether several documents form a single contract and whether a single contract is divisible. See In re Buffets Holdings, 387 B.R. at 124 ("[T]he determination of whether a specific contract or lease is an indivisible agreement . . . depends on the application of state law."); In re Arts Dairy, LLC, 417 B.R. at 503 (looking to Ohio law to determine whether agreements were divisible or indivisible); In re Ritchey, 84 B.R. 474, 476 (Bankr. N.D. Ohio 1988) ("In deciding whether a contract is divisible or indivisible, the Bankruptcy Court should

look to state law."). The Coal Sales Agreement and CCR Agreement are both expressly governed by Ohio state law. See Coal Sales Agreement §21(a) and CCR Agreement §13. Ohio courts have endorsed the well-settled principle that several documents can form a single contract and that a single contract may be divisible and severed into separate agreements. In both contexts, Ohio courts generally look to the parties' intent. Material Contractors, Inc. v. Donahue, 235 N.E.2d 525, 585 (Ohio 1968) (citing Huntington & Finke v. Lake Erie Lumber & Supply Co., 143 N.E. 132, 135 (Ohio 1924)).

In Freeman Indus. Products, LLC .v Armor Metal Group Acquisitions, Inc. ("Freeman"), an Ohio Court of Appeals considered when multiple agreements form a single contract. See 952 N.E. 2d 543 (Ohio Ct. App. 2011). In Freeman, two sellers ("Sellers") sold their business pursuant to an asset purchase agreement to a buyer ("Buyer") and, as part of the sale, (a) agreed not to operate a competing business or solicit employees and (b) personally guaranteed certain lease obligations. Id. at 546. Buyer's business subsequently failed and Buyer defaulted under the lease, which exposed the Sellers to millions of dollars of liability to the landlord under the lease guaranty. Id. Buyer's assets were liquidated and sold at an auction where a third company, Armor, purchased Buyer's intellectual property and the restrictive covenants against Seller. Id. at 546-47. Sellers breached the restrictive covenants by soliciting employees to operate a competing business. Armor subsequently sought and obtained an injunction to stop them. Id. at 548. Sellers appealed the injunction arguing that the Buyer's breach of the lease freed them from the restrictive covenant because the lease and non-solicitation agreements, while admittedly separate documents, constituted a single indivisible agreement. Id. at 550. The appellate court agreed with the Sellers and reversed the trial court. The Ohio Appellate court (citing Ohio Supreme Court precedent) described the applicable legal standard as follows:

> The primary criteria in determining whether a contract is entire or divisible is the intention of the parties as determined by a fair consideration of the terms and provision of the contract itself, by the subject matter to which it has reference, and by the circumstances of the particular transaction giving rise to the question. A factor in determining whether a contract is entire or severable is whether the parties reached an agreement regarding the various items as a whole or whether the agreement was reached by regarding each item as a unit. Id. (*citation and internal quotation marks omitted*).

The Bankruptcy Court in this District in In re Ritchey addressed the divisibility of an asset purchase agreement where the debtor sought to reject certain of the land contracts and retain others under section 365(a). 84 B.R. at 475. In concluding the contract was indivisible, the Court analyzed the relevant Ohio cases (including the cases relied upon in Freeman), and concluded that "the most important factor in determining whether a contract is 'entire' or 'divisible' is the intent of the parties. This is also the modern rule. No formula has been devised which furnishes a test for determining in all cases what contracts are severable and what are entire. The primary criterion for determining the question is the intention of the parties. Id. at 477-78.

This Court has also stated that the "considerations helpful in ascertaining the parties' intent, include: (1) the nature and purposes of the agreements, including whether the agreements are contained in a single or multiple instruments; (2) whether the same consideration was paid for each of the agreements or whether the consideration was separate and distinct; and (3) whether the agreements are interrelated or independent." In re Arts Diary, LLC, 417 B.R. at 503 (citing DePugh v. Mead Corp., 607, N.E. 867, 873 (Ohio 1992); In re Apache Prods. Co., 293 B.R. 545, 547 (Bankr. M.D. Fla 2003)).

C. **Coal Sales Agreement and CCR Agreement Constitute a Single Agreement**

Applying these standards, the Coal Sales Agreement and CCR Agreement constitute a single agreement for purposes of assumption and rejection under section 365(a) of the

Bankruptcy Code because the parties expressly intended their contracts to be "linked" both "operationally and economically" and expressly structured these contracts consistent with their stated intent.

(1) Parties' Own Words

The plain language of the Coal Sales Agreement and the CCR Agreement clearly indicate that the parties intended for them to be construed as a single, integrated contract. The parties expressly described their unequivocal intent to "link" the "Coal Sales Agreement and the [CCR Agreement] operationally and economically." See Amendment No. 9, p. 1 and CCR Agreement, p. 1. They further acknowledged that linking the agreements was "necessary and appropriate for the continuation or termination of the Coal Sales Agreement and the [CCR Agreement]. " See Amendment No. 9, p. 1 and CCR Agreement, p. 1. Communications between the parties during the negotiation of the CCR Agreement also evidence that intent. Prior to the CCR being signed, FG informed Murray that the parties' efforts "to work together [were] clearly beneficial to achieve a better economic future for [the Bruce] Mansfield [Plant]" and that "[b]oth the disposal and fuel [coal] costs provide significant drivers to help make the [Bruce Mansfield] Plant successful." See Turner Decl. at ¶ 14.

(2) Cross-Service Fee

The parties amended the Coal Sales Agreement on the same day they entered into the CCR Agreement to provide that FG would pay an annual service fee of $1,080,000 to Murray for services under the CCR Agreement. The fee relates to CCR disposal, but was intentionally added to the Coal Sales Agreement for the stated purpose of creating economic and operational integration between the two contracts.

(3) Cross-Termination Right

The parties also evidenced their intent to link their contracts with the "cross-termination" provision pursuant to which FG had the right to terminate the Coal Sales Agreement if Murray terminated the CCR Agreement. A reciprocal provision is included in the CCR Agreement.

(4) Cross Set-Off Rights

The parties further linked their contracts with a cross set-off provision. As a result, each of the contracts permitted each party to offset amounts owed to it against amounts it owed under the other agreement, thereby treating them as a single, unitary contract.

(5) Same Parties and Related Subject Matter

The parties to both contracts are identical and the agreements relate to the same subject matter and have the same 2028 termination date. Murray delivered coal to FG under the Coal Sales Agreement, and removed the CCR generated from the eventual combustion of that same coal at the Plant. In fact, the CCR Agreement expressly provides that "[FG] may only include CCR generated at the [Plant]. [FG] shall not be permitted to deliver or include any waste generated from any other source without the prior written approval of [Murray]." See CCR Agreement ¶8 (emphasis in original). Thus, the parties clearly viewed the two contracts as being unitary. See Trinity Coal Corp., 514 B.R. at 530 ("It is also appropriate for 'courts considering the divisibility of a contract [to] look at the objects to be attained and the common sense of the situation.'") (quoting In re Wagstaff Minn., Inc., 2012 WL 10623, at *3).

The parties' contemporaneous understanding of the nature of their relationship also indicates an intent to link the CCR Agreement and the Coal Sales Agreement: FG could not continue to burn coal and produce power if it could not dispose of the waste that process produced. If FG could not continue to burn coal, Murray could not continue to sell coal to FG.

The CCR and Coal Sales Agreements formed a complete, and united bargain between FG and Murray: a bargain made to "ensure the continued operation of the Bruce Mansfield Power Generating Station" in which both parties had a "vested interest." See Turner Decl. at ¶ 12. See also In re United Air Lines, Inc., 453 F.3d 463, 470 (7th Cir. 2006) ("an agreement for a lease holder coupled with a bond arrangement to improve that leasehold . . . [should be viewed] 'as a single whole' because 'there would have been no bargain whatever, if the [lease-related] promises were struck out.'").

These undisputed facts convincingly demonstrate that the Coal Sales Agreement and CCR Agreement are, and were intended to be, a unitary, inextricably linked contract. As a consequence, FG cannot reject the Coal Sales Agreement without also rejecting the CCR Agreement. [7]

D. **Rejection Should Not Be *Nunc Pro Tunc* to Filing Date**

FG has requested that the Filing Date (*i.e.*, June 27, 2018) be deemed the effective date of rejection of the Coal Sales Agreement. If the Court decides to enter an Order authorizing the rejection of the Coal Sales Agreement and the CCR Agreement, that rejection should be deemed effective as of the date this Court enters its Order, and should not apply retroactively. The equities do not favor retroactive rejection of the contracts for at least three reasons.

[7] While the Coal Sales Agreement and the CCR Agreement both contain standard integration clauses, that does not preclude finding a single integrated contract. See In re Wagstaff Minn., Inc., 2012 WL 10623, at *3 (reversing the bankruptcy court, which found that a franchise agreement and a reinstatement agreement that each had an integration clause were two separate agreements); Pieco, Inc. v. Atlantic Computer Sys., Inc. (In re Atlantic Computer Sys., Inc., 173 B.R. 844, 850 (S.D.N.Y. 1994) (the presence of integration clauses in a master lease and flex lease did not alter the "unitary nature" of the transaction for purposes of assumption and rejection) Neville v. Scott, 127 A.2d 755, 757 (Pa. Super. C. 1956) (where two agreements are made as part of one transaction they will be read together to express the essential elements of the parties' undertaking, notwithstanding the presence of an integration clause in the second agreement); see also Huron Consulting Servs., LLC v. Physiotherapy Holdings, Inc. (In re Physiotherapy Holdings, Inc.), 538 B.R. 225, 235 (Bankr. D. Del. 2015) ("Separate agreements can still form a single contract even if certain provisions between them conflict.").

First, retroactive rejection could impair Murray's right to pursue a post-petition breach of contract claim against FG as a result of FG's breach of its contractual obligations, including the minimum volume commitment. FG's decision to delay rejection of the Coal Sales Agreement exposed its estate to potential post-petition liability and the Court should not permit retroactive rejection to eliminate that risk and provide an inequitable windfall to FG's estate at Murray's expense. Retroactive rejection could destroy such a claim by converting it into an unsecured claim under 11 U.S.C. §502(g)(1).

Second, retroactive rejection is inequitable because FG controlled the timing of the decision to file the Rejection Motion. The circumstances allegedly supporting FG's business judgment were known well before the bankruptcy cases were filed. FG alleges that its decision to reject the Coal Sales Agreement is based on the fact that its coal supply needs are vastly lower than its minimum purchase obligations under contract. See Rejection Motion at ¶¶8, 11. FG was well aware, however, of its supply needs and its minimum volume obligations long before June 27, 2018, or even the Petition Date. Nevertheless, it delayed filing the Rejection Motion for nearly four months after the Petition Date despite prior communications with Murray that FG intended to promptly reject the contract. Upon rejection, Murray has calculated that it will have an unsecured claim of approximately $3 billion, making it the single largest unsecured creditor in these Chapter 11 cases. Murray suspects that the delay in filing was part of a broader strategic maneuver to keep Murray off the Creditors' Committee.[8] FG's statement that it has "requested relief early on in in the Chapter 11 Cases" and the request for retroactive rejection is not "due to delay on the Debtors' part" is simply untrue.

[8] Consolidation and McElroy sought to join the Creditors' Committee, submitted a questionnaire to the U.S. Trustee's Office and attended the formation meeting. The U.S. Trustee declined to appoint Consolidation and McElory to the Creditors' Committee. As a result of the Rejection Motion, Consolidation and McElroy have asked the U.S. Trustee's office to consider adding them to the Creditors' Committee.

Lastly, since the Rejection Motion was filed, FG and Murray reached an agreement that was memorialized in an email dated July 2, 2018 (the "Confirmatory Email"), attached hereto as **Exhibit A**. The Confirmatory Email states "that with respect to any coal delivered to [FG] under the terms of the Coal Sales Agreement . . . between April 1, 2018 and the date of the entry by [this Court] of an order granting FG's request to reject the Coal Sales Agreement (the "Rejection Order Entry Date"), FG will pay [Murray] the contract price ($36.90) under the Coal Sales Agreement and will pay [Murray] on the terms provided in the Coal Sales Agreement for all coal deliveries received through the Rejection Order Entry Date." The Debtors state that retroactive rejection is justified because Murray "may attempt to perform at unfavorable prices to the estate and subsequently assert administrative expense priority for such performance, notwithstanding that the Debtors have cheaper alternative sources available." See Rejection Motion at ¶ 18. The Confirmatory Email negates the need for such concern. It would be grossly inequitable for a Chapter 11 debtor to use the concept of retroactive rejection to deprive a creditor of payment for post-petition goods requested by, delivered to, and accepted by an administratively solvent Chapter 11 debtor. In fact, when the cases were originally filed, the Debtors and their counsel assured Murray that they had the financial wherewithal to timely honor their post-petition obligations to Murray. As such, any Order this Court enters granting the Rejection Objection should preserve Murray's right to payment as set forth in the Confirmatory Email. For these reasons, the Court should deny the request for retroactive rejection.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Murray respectfully requests that the Court (i) find that the Coal Sales Agreement and the CCR Agreement constitutes a single contract for purposes of rejection; (ii) modify the proposed order rejecting the Coal Sales

Agreement to include simultaneous rejection of the CCR Agreement, (iii) deny the request for retroactive rejection, and (iv) grant such other and further relief as the Court deems necessary and appropriate.

Dated: July 11, 2018
New York, New York

SCHULTE ROTH & ZABEL LLP

By: */s/ David M. Hillman*

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Counsel to Consolidation Coal Company and McElroy Coal Company

Exhibit A

Confirmatory Email

Gange, Caroline

From: Beckerman, Lisa <lbeckerman@AkinGump.com>
Sent: Monday, July 2, 2018 3:19 PM
To: Gange, Caroline
Cc: Hillman, David
Subject: RE: Coal Shipments Under the Coal Sales Agreement-Confirmatory Email

Caroline,

This email is to confirm that with respect to any coal delivered to FirstEnergy Generation, LLC ("FG") under the terms of the Coal Sales Agreement between FG and McElroy Coal Company and Consolidation Coal Company (collectively, the "Supplier") dated June 27, 2006, as amended from time to time (the "Coal Sales Agreement") between April 1, 2018 and the date of the entry by the United States Bankruptcy Court for the Northern District of Ohio (Eastern Division) (the "Bankruptcy Court") of an order granting FG's request to reject the Coal Sales Agreement (the "Rejection Order Entry Date"), FG will pay the Supplier the contract price ($36.90) under the Coal Sales Agreement and will pay the Supplier on the terms provided in the Coal Sales Agreement for all coal deliveries received through the Rejection Order Entry Date.

All of FG's and the Supplier's other rights are fully preserved.

Lisa