

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

SOUTHCROSS ENERGY PARTNERS, L.P.,
et al.,

Debtors.¹

Chapter 11

Case No. 19-10702 (MFW)

(Jointly Administered)

Docket Ref. No. 675 & 725

**OBJECTION TO (I) NOTICE OF REJECTED CONTRACTS AND LEASES AND
(II) CHAPTER 11 PLAN FOR SOUTHCROSS ENERGY PARTNERS L.P.
AND ITS AFFILIATED DEBTORS**

Estrella Resources, L.L.C. d/b/a Star Natural Gas, L.L.C. (“Star”), by and through its undersigned counsel, hereby objects (the “Objection”) to the (i) Debtors’ Notice of Rejected Contracts and Leases [Docket No. 725] (the “Rejection Notice”) and (ii) First Amended Chapter 11 Plan for Southcross Energy Partners L.P. and its Affiliated Debtors [Docket No. 764] (as may be amended, the “Plan”) which seek rejection of a purportedly executory contract entered into by debtor Southcross Gulf Coast Transmission Ltd. (the “Debtor”) and Star. In support of the Objection, Star states as follows:

¹ The debtors and debtors in possession in these chapter 11 cases, along with the last four digits of their respective Employer Identification Numbers, are as follows: Southcross Energy Partners, L.P. (5230); Southcross Energy Partners GP, LLC (5141); Southcross Energy Finance Corp. (2225); Southcross Energy Operating, LLC (9605); Southcross Energy GP LLC (4246); Southcross Energy LP LLC (4304); Southcross Gathering Ltd. (7233); Southcross CCNG Gathering Ltd. (9553); Southcross CCNG Transmission Ltd. (4531); Southcross Marketing Company Ltd. (3313); Southcross NGL Pipeline Ltd. (3214); Southcross Midstream Services, L.P. (5932); Southcross Mississippi Industrial Gas Sales, L.P. (7519); Southcross Mississippi Pipeline, L.P. (7499); Southcross Gulf Coast Transmission Ltd. (0546); Southcross Mississippi Gathering, L.P. (2994); Southcross Delta Pipeline LLC (6804); Southcross Alabama Pipeline LLC (7180); Southcross Nueces Pipelines LLC (7034); Southcross Processing LLC (0672); FL Rich Gas Services GP, LLC (5172); FL Rich Gas Services, LP (0219); FL Rich Gas Utility GP, LLC (3280); FL Rich Gas Utility, LP (3644); Southcross Transmission, LP (6432); T2 EF Cogeneration Holdings LLC (0613); and T2 EF Cogeneration LLC (4976). The debtors’ mailing address is 1717 Main Street, Suite 5300, Dallas, TX 75201.



Background

1. On or about July 17, 2000, CrossTex Energy Services, Inc., a predecessor of the Debtor, and Star entered into a letter agreement which was memorialized by a Throughput Fee Agreement, dated December 22, 2000 (the "Throughput"). The Throughput related to natural gas deliveries through the Pipeline System² jointly owned with Star after August 1, 2000. Specifically, it provided for a payment structure for the deliveries. The Throughput also contained

[REDACTED]

[REDACTED]

2. In April 2010, disputes arose between the Debtor (and certain of its affiliated parties) and Star during discussions related to the buyout option which resulted in litigation styled *Southcross Gulf Coast Transmission Ltd. v. Estrella Resources L.L.C.*, case number DC-10-004344-G, in the 134th Judicial District Court, Dallas Country, Texas ("Action"). In August 2011, the Debtor and Star entered into a Settlement Agreement and an Amended and Restated Throughput (the "Amended Throughput") settling the Action. A true and correct copy of the Amended Throughput is attached hereto as Exhibit A.

3. On April 1, 2019, the Debtor and its above-captioned affiliated debtors (collectively, the "Debtors") filed voluntary petitions (the "Bankruptcy Cases") in the Bankruptcy Court for the District of Delaware (the "Court").

² The "Pipeline System" shall mean the pipeline and gathering systems commonly known as (a) the Gulf Coast Pipeline; (b) the Vanderbilt Pipeline; and (c) the McCaskill System. Such term shall include, but not be limited to, all additions, enhancements, replacements, and expansions which flow additional natural gas into any portion of (a) – (c).

4. On December 2, 2019, the Debtor filed the Rejection Notice in connection with the Plan. Through the Plan, the Debtor seeks to reject the Amended Throughput³ pursuant to section 365 of 11 U.S.C. §§ 101-1532 (as amended and applicable hereto, the “Bankruptcy Code”).

5. As set forth below in more detail, the Amended Throughput requires performance by the Debtor only and is, accordingly, not executory. Put simply, the Amended Throughput requires that the Debtor pay Star a fee [REDACTED] and requires no further performance on behalf of Star.⁴

Objection

6. Bankruptcy Code section 365 authorizes a trustee or debtor-in-possession to assume or reject “executory contracts” subject to court approval. See 11 U.S.C. § 365. However, a debtor has a right to assume or reject an agreement only to the extent that it is executory. See 11 U.S.C. § 365(a) (“Except as provided in . . . subsections (b), (c), and (d) of this section, the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.”). The legislative history of section 365 states that “though there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides.” H.R.Rep. No. 95-595, 95th Cong., 1st

³ The original Throughput was terminated and/or released pursuant to the Settlement Agreement. See Settlement Agreement ¶ 7, a copy of which is attached hereto as Exhibit B. The Rejection Notice described the contract to be rejected as “Gathering, Processing and/or Purchasing Agreement – Effective Date: 08/01/2000.” Despite the reference to the effective date of August 2000, Star believes the Debtors intend to reject the Amended Throughput agreement as the original Throughput agreement and the Settlement Agreement have been fully performed. Star reserves all rights to amend this objection to the extent the Debtor is seeking to reject the fully performed original Throughput agreement and the Settlement Agreement.

⁴ The Amended Throughput also required [REDACTED]

Sess. 347 (1977), reprinted in, 1978 U.S. Code Cong. & Admin. News 5787, 5963, 6303. An executory contract has been defined as:

a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other.

Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439, 460 (1973); see also In re LG Philips Displays USA, Inc., No. 06-10245 (BLS), 2006 WL 1748671, at *3 (Bankr. D. Del. June 21, 2006) (“In construing the term executory contract, the overwhelming majority of courts—including the United States Court of Appeals for the Third Circuit—has adopted the Countryman Definition, formulated by Professor Vern Countryman in a seminal 1973 law review article.”) (internal citation omitted).

7. The Third Circuit has adopted this definition, finding that a “contract is executory if, the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.” Columbia Gas Sys. Inc., 50 F.3d at 239, 244 (finding that settlement agreement was nonexecutory); see also LG Philips Displays USA, 2006 WL 1748671, at *6 (applying Columbia Gas and finding settlement agreement to be non-executory). Essentially, in order for a contract to be considered executory, there must be significant performance remaining on both sides.

8. As an initial matter, the “party seeking to reject a contract bears the burden of demonstrating that it is executory. And ‘[t]he time for testing whether there are material unperformed obligations on both sides is when the bankruptcy petition is filed.’” In re Exide Techs., 607 F.3d 957, 962 (3d Cir. 2010) (quoting Enter. Energy Corp. v. United States (In re Columbia Gas Sys. Inc.), 50 F.3d 233, 239, 244 (3d Cir. 1995)).

9. The Amended Throughput provides Star with certain rights (i.e. [REDACTED]), however, there are no further obligations on the part of Star that would render the agreement executory. The Amended Throughput requires only that Star maintain confidentiality. This Court has held definitively that a boiler plate confidentiality provision is not sufficient alone to “rise to the level of material further performance. . . .” LG Philips Displays USA, 2006 WL 1748671, at *5. This Court has further noted that “to conclude that the parties’ ongoing confidentiality commitments automatically give rise to an executory contract, would vitiate the Countryman Definition: any contract with routine confidentiality provisions would be forever executory.” Id. (internal citations omitted). On this basis alone, the Amended Throughput is not executory as there remains no obligations on the part of Star.

10. On the Petition Date, the Amended Throughput required performance only from the Debtor. It required the Debtor to [REDACTED]

[REDACTED] It is well settled in the Third Circuit that payment of money due pursuant to a contract alone is not enough to render a contract executory. See In re Waste Sys. Int’l, Inc., 280 B.R. 824, 827 (Bankr. D. Del. 2002) (stating that “a contract is not executory if the only remaining obligation is the payment of money”); see also In re W/B Associates, 227 B.R. 635, 637 (Bankr. W.D. Pa. 1998) (“When the only performance remaining under a contract is the payment of money, the contract is not executory.”); In re Coal Stripping, Inc., 215 B.R. 500, 502 (Bankr. W.D. Pa. 1997) (holding where the only remaining obligation was to pay premiums,

contract was not executory); In re U.S. Metalsource Corp., 163 B.R. 260, 269 (Bankr. W.D. Pa. 1993) (finding that a contract to make severance payments was not executory because payment of funds alone is not enough to render a contract executory). Accordingly, the payment of the fees by the Debtor alone does not render the Amended Throughput executory.

11. However, combined with [REDACTED] [REDACTED] the Debtor's obligations are significant and failure to perform would render it in breach. Substantial performance due from the Debtor is not dispositive however because there remain no obligations on the part of Star pursuant to the Amended Throughput. See In re Stein & Day Inc., 81 B.R. 263, 267 (Bankr. S.D.N.Y. Jan. 15, 1988) (holding a publishing contract could not be rejected because only the Debtors' performance remained to pay royalties and provide accountings). Accordingly, the Amended Throughput is not executory because there is no significant performance remaining on **both** sides. Therefore, the Rejection should be denied and the Debtor ordered to continue payment of the fees in the Amended Throughput for use of the Pipeline System.

Reservation of Rights

12. Star reserves its rights to assert other and further objections to the relief requested in the Rejection Notice and the Plan, including but not limited to, the right to elaborate on this Objection in Court or in writing, as well as file further objections with respect to the relief requested by the Debtor(s). Further, Star reserves its right to seek discovery related to the Rejection Notice and the Plan, as well as other aspects of the Bankruptcy Cases, and use such discovery at any hearings on the Rejection Notice and the Plan, in any other hearing, or further objection or pleading.

WHEREFORE, for the foregoing reasons, Star respectfully requests that the Court (i) deny the relief requested in the Rejection Notice and the Plan and (ii) grant Star any such further relief as this Court deems just and proper.

Dated: January 21, 2020
Wilmington, Delaware

Respectfully submitted,

/s/ Morgan L. Patterson

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EXHIBIT A

FILED UNDER SEAL /
REDACTED IN ITS ENTIRETY

EXHIBIT B

FILED UNDER SEAL /
REDACTED IN ITS ENTIRETY

CERTIFICATE OF SERVICE

I, Christopher A. Lewis, certify that I am not less than 18 years of age, and that on January 27, 2020, a copy of the foregoing document was electronically filed by CM/ECF, and I caused copies to be served upon the following persons in the manner indicated:

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Under penalty of perjury, I declare that the foregoing is true and correct.

Dated: January 27, 2020

/s/ Christopher A. Lewis
Christopher A. Lewis