IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

In re:	)	
	)	**CHAPTER 11**
XINERGY LTD., *et al*.,	)	
	)	**Case No. 15-70444**
Debtors.	)	

XINERGY LTD., *et al*.,	)	
	)	
Movants,	)	
	)	**DEBTORS' SECOND OMNIBUS**
v.	)	**OBJECTION TO CLAIMS**
	)	**(Docket No. 496)**
MERAL, INC.,	)	
	)	
Respondent.	)	

MERAL, INC.,	)	
	)	
Movant,	)	
	)	**MOTION TO LIFT THE**
v.	)	**AUTOMATIC STAY**
	)	**(Docket No. 502)**
XINERGY LTD., *et al*.,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION

This matter comes before the Court upon the Debtors' Second Omnibus Objection as to Certain Claims, with respect to Claim No. 1232 of Meral, Inc. (the "Claim Objection"), and the Motion to Lift the Automatic Stay filed by Meral, Inc. for "cause" pursuant to 11 U.S.C. § 362(d)(1) (the "Motion for Relief"), along with the responses thereto and the legal authorities and arguments submitted in support thereof. For the reasons set forth below, the Claim Objection is sustained with respect to Claim No. 1232,

and Claim No. 1232 shall be reclassified from a secured claim to an unsecured claim. Further, Meral, Inc.'s Motion for Relief is denied.

FINDINGS OF FACT[1]

On April 6, 2015, Xinergy Ltd. and related entities (collectively, the "Debtors") filed voluntary petitions under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq*. The cases were procedurally consolidated and are being jointly administered by this Court.

On November 6, 2015, the Debtors filed their Second Omnibus Objection to Claims, which included an objection to Claim No. 1232 filed by Meral, Inc. ("Meral"). Debtors' Obj. to Claim ¶ 15, Ex. 1. As noted in the Claim Objection, Claim No. 1232 is filed by Meral as a secured claim in the amount of $671,812.14.[2] The Claim Objection recites that Meral asserts this amount is secured based on an Asset Purchase Agreement between Meral and South Fork Coal Company, LLC ("South Fork")[3] dated January 31, 2011 (the "APA"). Debtors' Obj. to Claim ¶ 15. On March 17, 2014, Meral and the Debtors entered into an Amendment to the APA (the "Amendment"). *Id.* Through the APA, South Fork purchased certain property from Meral, including all of Meral's "rights,

[1] Where appropriate, findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact. *See* Fed. R. Bankr. P. 7052, 9014(c).
[2] Meral also filed Claim Nos. 1165 and 1226. The Claim Objection notes that Claim No. 1232 supersedes Claim Nos. 1165 and 1226. By Order entered December 17, 2015, the Court sustained the Debtors' Objection to Claim No. 1165 as being disallowed and expunged by agreement with Meral due to being amended and superseded by subsequently filed Claim No. 1232. The Debtors withdrew their objection to Claim No. 1226 solely to the extent that the Claim Objection seeks to disallow and expunge the claim on the basis that it has been amended and superseded, but the Debtors reserved all rights to object to Claim No. 1226 on any other grounds. *See* Order (I) Granting Debtors' Second Omnibus Objection as to Certain Claims (Reclassification and/or Reduction of Alleged Administrative, Priority, and Secured Claims; Amended and Superseded Claims; Equity Claims; Paid and Satisfied Claims), (II) Withdrawing the Debtors' Second Omnibus Objection as to Certain Claims, and (III) Continuing the Debtors' Second Omnibus Objection as to Certain Other Claims ¶¶ 1-2, 5, Ex. 1, Dec. 17, 2015.
[3] South Fork is one of the Debtors in the consolidated cases. *See* Case No. 15-70442, Docket No. 5.

title and interest in and to any and all real property and other assets related thereto (including, without limitation, the Leases, all mineral or surface property interests, and all mining rights)." Joint Ex. A ¶ A. Specifically, under the APA, South Fork purchased from Meral rights under a mining lease (the "WPP Coal Mining Lease") and "load-out" facility lease (collectively, the "Leases"), as well as certain records, engineering and environmental reports, and mining application permits (collectively, the "Other Assets"). *Id.* ¶ 1, Schedules 1(a) and 1(b). In addition, pursuant to the APA, South Fork assumed and became responsible for "all liabilities and obligations of [Meral] under the Leases or related to the [Other] Assets…." *Id.* ¶ 2(a).[4] The Debtors argue that neither the APA nor the Amendment provide Meral with a security interest in any assets of the Debtors, and thus, Meral's assertion of a secured claim is not supported. Debtors' Obj. to Claim ¶ 15. The Debtors further argue that even if a security interest was created, it was not perfected. *Id.*

[4] As consideration for the Sale of the Leases and the Other Assets by Meral, South Fork agreed to make the following payments: (a) $1,700,000.00 on the closing date, (b) $2,500,000.00 upon issuance of certain required permits from West Virginia for conducting mining operations on the property subject to the Leases (the "First Permitting Payment"), and (c) $1,000,000.00 on the date 18 months after First Permitting Payment (the "Second Permitting Payment"). In addition, South Fork agreed to pay Meral an overriding royalty payment equal to (a) $1.50 per ton for all coal sold by South Fork for less than or equal to a gross sales price of $150.00 per ton FOB mine or (b) $2.00 per ton, or one percent (1%) of the of the gross sales price FOB mine, whichever is greater, for all coal sold by South Fork for a gross sales price greater than $150.00 per ton FOB mine. The Amendment modified South Fork's obligation to make the Second Permitting Payment as follows: (a) $200,000.00 shall be paid on April 15, 2014, and (b) beginning on July 15, 2014, and continuing on the fifteenth (15th) day of each third month thereafter, South Fork shall make a payment of $50,000.00 with interest accruing at the rate of nine-and-a-half percent (9 ½%) per annum, until July 15, 2019, at which time all then unpaid interest and principal shall be due. Joint Ex. B ¶ 1. The Amendment further provides that the foregoing payment schedule would be modified in the event the amount of coal produced and sold from the property subject to the Leases averaged at least 40,000 tons per month for at least two calendar months at an average sales price of at least $105.00 per ton, and again at 50,000 tons per month for at least two calendar months at an average price of at least $105.00 per ton. Joint Ex. B ¶ 2(a). According to the Debtors, as of petition date, South Fork owed Meral $703,585.86 under the APA. Debtors' Obj. to Mot. for Relief ¶ 9.

On November 9, 2015, Meral filed its Motion for Relief, where Meral argued that it "assigned its interest in a leasehold agreement for the mineral rights of certain properties in Greenbrier County, WV," and that Meral "maintained a secured interest in said leasehold in the [APA]." Meral's Mot. for Relief, at 1. Meral requested that the Court lift the automatic stay of Section 362 to allow Meral to "reassume the lease and protect [its] interest in said leasehold." *Id.* On November 19, 2015, Meral filed its Response to the Claim Objection, arguing that the Court should deny the Claim Objection. Meral stated that it is the lessee of certain mineral and related rights from WPP LLC under a coal mining lease dated August 13, 2008 (the "WPP Coal Mining Lease"), and that a memorandum of this lease (the "Memorandum of Lease") is recorded in the Greenbrier County Clerk's Office in Greenbrier, West Virginia. Meral's Resp. to Claim Obj. ¶ 6. Meral also stated that it assigned those certain mineral and related rights to South Fork through the APA and later amended the payment terms through the Amendment. *Id.* ¶ 7. In addition, Meral cited the following excerpt from Section 3(a)(vii) of the APA, which Meral claimed granted it a security interest in the WPP Coal Mining Lease:

> Seller shall have the right to declare all of the rights of Purchaser in the Reserve Area created by this agreement and the Consent, Assignment and Assumption Agreements terminated and Seller shall be entitled to enter the premises of the Leases and to exclude Purchaser therefrom and to hold the same, together with all machinery, equipment, tools and other property therein and thereon which are free and clear of all liens and encumbrances, including permits (Purchaser agrees to transfer and assign all permits to Seller), so that Seller can immediately maintain operating the mines located on the premises of the Leases, if Seller so elects.

Id. ¶ 8 (quoting Joint Ex. A ¶ 3(a)(vii)). Meral also claimed that Section 3(a)(vii) of the APA "secures Meral[]'s interest in the reserve area and gives Meral [] the right to

reassume the leasehold if [South Fork] failed to make payments as required under the terms of the [APA]." *Id.* ¶ 9.

On November 27, 2015, the Debtors filed their Objection to the Motion for Relief, arguing that the Motion for Relief should be denied because Meral has not met its burden under Section 362 to show cause to lift the automatic stay. Debtors' Obj. to Mot. for Relief ¶ 1. The Debtors argued that Meral has not asserted any facts establishing that Meral holds a perfected security interest in any of the Debtors' assets. *Id.* ¶ 2. The Debtors also cited to Section 3(a)(vii) of the APA, including, *inter alia*, the following provision, listed in Section 3(a)(vii) below the language cited by Meral in its Motion for Relief: "This Section 3(a)(vii) shall not be constructed as (i) a lien upon any of the real, personal or mixed property of [South Fork] or its affiliates or a security interest granted by [South Fork] therein . . . ." *Id.* ¶ 7 (quoting APA ¶ 3(a)(vii)) (emphasis added). The Debtors argued that the automatic stay prohibits Meral from "exercising the equitable remedy to 'reassume'" from South Fork the rights under WPP Coal Mining Lease and a "load-out" facility lease (collectively, the "Leases") under the APA. *Id.* at 2, 5-6. The Debtors also argued that Meral has failed to establish "cause" because it does not have any interest in property of the Debtors. *Id.* at 6-8.

On December 4, 2015, the Debtors filed their Reply to Meral's Response to the Claim Objection, arguing that the Court should sustain the Claim Objection because Meral failed to file a claim that is prima facie valid by not attaching supporting documentation. Debtors' Reply to Meral's Resp. ¶ 9-10. The Debtors further argued that the only evidence Meral produced, Section 3(a)(vii) of the APA, explicitly states that the

parties did not intend for Meral to have a secured claim, and Meral has not provided any evidence that any alleged security interest is perfected. *Id.* ¶ 11-12.

On December 8, 2015, the Court held a preliminary hearing on the Claim Objection and Motion for Relief. Joint Exhibits A through F, which were admitted into evidence, include the APA, the Amendment, the WPP Coal Mining Lease, the Memorandum of Lease, a property tax billing for 2013, and a tonnage and royalty report for 2015. *See* Joint Exs. A-F. Counsel for the Debtors again argued that Meral's claim is not entitled to prima facie validity as no supporting documentation reflecting a security interest was attached, and no such security interest exists to warrant secured status. Counsel for Meral argued that, although the caption "Asset Purchase Agreement" is a "bad title" for the document, the APA was filed with Claim No. 1232 to support its claim of a security interest. In addition, Meral argued that the APA is an executory contract under Section 363 of the Bankruptcy Code, and that Section 3(a)(vii) of the APA grants Meral a "right to reassume the Leases." Meral further argued that the APA should, instead, be titled "Assignment of Lease," and that its collateral is the "right to re-enter the property."

The Debtors argued that, if the Debtors assumed the WPP Lease, but not the APA,[5] it would not have any future royalty obligations because, assuming the APA was rejected, rejection is a prepetition breach that would accelerate a claim for damages and that Meral would be entitled to file a Proof of Claim for those damages. The Debtors

[5] As of the December 8, 2015 hearing, the Debtors had not yet assumed or rejected the APA or WPP Coal Mining Lease. However, the confirmation hearing on the Debtors' Chapter 11 Plan took place on January 27, 2016. In connection with that hearing, the Confirmation Order was entered, the APA was rejected, and the WPP Coal Mining Lease was assumed. *See First Amended Joint Chapter 11 Plan of Xinergy Ltd. and Its Subsidiary Debtors and Debtors in Possession* dated October 14, 2015, at Article V, ¶ 5.1 (Docket No. 453); *Plan Supplement Relating to the Debtors' First Amended Chapter 11 Plan of Reorganization* dated January 13, 2016, Schedule D (Docket No. 628); *Findings of Fact and Conclusions of Law and Order Confirming the Debtors' Amended Joint Chapter 11 Plan* entered January 27, 2016 (Docket No. 678).

further argued that, if Meral had desired to be less risk averse, it could have provided for a security interest in the collateral. The Debtors further argued that Paragraph 8 of the Consent, Assignment and Assumption Agreement dated January 31, 2011, by and between Meral (Assignor), South Fork (Assignee), and WPP LLC (Lessor), entitled "Consent and Release of Assignor by Lessor," is a complete release and would not be included if the APA was a collateral assignment. The Debtors also noted that, if they decide to assume the APA, the Debtors would have to cure prepetition defaults plus post-petition payments, including royalties.

The Court continued the hearing on the Claim Objection and Motion for Relief to January 21, 2016, at 2:00 p.m., but reserved the right to rule on the matters after receiving all briefs from the Debtors and Meral. The Debtors filed their brief on December 18, 2015, Meral filed its brief on January 5, 2016, and the Debtors filed their reply brief on January 13, 2016. In addition, WPP LLC filed a response to the Motion for Relief on January 13, 2016.[6] After receiving all briefs, the Court took the pending matters under advisement.[7]

CONCLUSIONS OF LAW

This Court has jurisdiction of these matters by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on December 6, 1994, and Rule 3 of the Local Rules of the United States District Court for the Western District of Virginia. This Court further concludes that

[6] WPP LLC joins the assertions the Debtors have made that Meral has no valid, perfected security interest in any of the Debtors' property.

[7] The parties collectively requested that the Court delay ruling on the matters presently before it pending settlement negotiations, and the Court did so. Those negotiations ultimately proved unsuccessful.

these matters are "core" bankruptcy proceedings within the meaning of 28 U.S.C. § 157(b)(2)(A), (B), (G), (K).

I. Claim Objection

Resolution of the Claim Objection is inherently intertwined with resolution of the Motion for Relief. Nevertheless, the Court will decide the Claim Objection at the outset. Pursuant to the Section 502 of the Bankruptcy Code, a timely filed claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). Once a party objects, the Court, after notice and a hearing, must determine the amount and validity of the claim. 11 U.S.C. § 502(b). The Court then makes such a determination by following the burden-shifting framework established by the Fourth Circuit in *Harford Sands*. *See In re Virginia Broadband, LLC*, 521 B.R. 539, 557 (Bankr. W.D. Va. 2014), *aff'd sub nom. Virginia Broadband, LLC v. Manuel*, 538 B.R. 253 (W.D. Va. 2015) (citing *Stancill v. Harford Sands, Inc. (In re Harford Sands, Inc.)*, 372 F.3d 637 (4th Cir. 2004)).

A. Meral is Not Entitled to Prima Facie Validity of Its Claim Because the Supporting Documentation to Its Proof of Claim Is Insufficient.

Under the *Harford Sands* framework, the claimant's proper filing of a proof of claim, including the required supporting documentation, is prima facie evidence of the claim's amount and validity. *In re Hilton*, No. 12–61102, 2013 WL 6229100, at *4–5, 2013 Bankr. LEXIS 5058, at *13 (Bankr. W.D. Va. Dec. 2, 2013) (citing *Falwell v. Roundup Funding LLC (In re Falwell)*, 434 B.R. 779, 783 (Bankr. W.D. Va. 2009); Fed. R. Bankr. P. 3001(c), (f)). Except for claims based on open-end or revolving consumer credit agreements, when a claim or interest in property of the debtor securing the claim is

based on a writing, a copy of the writing must be filed with the proof of claim.[8] Fed. R. Bankr. P. 3001(c)(1), (3). If the claimant files a prima facie valid claim, the burden shifts to the debtor (the objecting party) to "introduce evidence to rebut the claim's presumptive validity." *Harford Sands*, 372 F.3d at 640 (citing Fed. R. Bankr. P. 9017; Fed. R. Evid. 301; 4 *Collier on Bankruptcy* ¶ 501.02[3][d] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2004)). If the debtor satisfies this burden, the burden shifts back to the claimant who "has the ultimate burden of proving the amount and validity of the claim by a preponderance of the evidence." *Id.* (citing 4 *Collier* ¶ 502.02[3][f]) (footnote omitted). If the claimant cannot produce sufficient evidence to meet this burden, the claim fails, and the court should sustain the objection. *Hilton*, 2013 WL 6229100, at *5, 2013 Bankr. LEXIS 5058, at *15.

Here, although no party expressly submitted copies of Meral's proofs of claim into evidence, the Court obtained copies from the Claim's agent, which was designated as the authorized repository for all proofs of claim filed in these Chapter 11 cases by Order entered April 9, 2015. The appointment order provided that, upon request of the Clerk's Office, certified duplicates would be provided to the Clerk. Docket No. 70. Meral timely filed Proof of Claim Number 1232 on July 31, 2015,[9] and attached the Amendment as supporting documentation as purported evidence of a secured claim in the amount of $671,812.14. The actual APA, although referenced in the Amendment, was not included

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[8] Failure to provide documentation does not invalidate the proof of claim; it merely deprives the claim of prima facie validity. *Hilton*, 2013 WL 6229100, at *5, 2013 Bankr. LEXIS 5058, at *13.
[9] The bar date for non-governmental claims in the consolidated cases was July 31, 2015.

as supporting documentation to the proof of claim.[10] In *Falwell*, the Court addressed what writings or supporting documents are necessary to support a valid prima facie claim.

> The documents . . . that are required to give a proof of claim prima facie validity are those that identify the claimant and the amount of the claim, and provide information sufficient to identify the basis for the claim (such as the account number). A writing, if required, must support the existence and the amount of the claim and, if applicable, the priority or secured character of the claim.

434 B.R. at 785.

Although a lack of documentation required by Rule 3001, in and of itself, is not a basis for disallowance of a claim in the Fourth Circuit, the claimant loses the prima facie presumption of validity and amount. *In re Andrews*, 394 B.R. 384, 389 (Bankr. E.D.N.C. 2008) (citing *In re Herron*, 381 B.R. 184, 190 (Bankr. D. Md. 2008); *In re Simms*, No. 06-1206, 2007 WL 4468682, at *2, 2007 Bankr. LEXIS 4134, at *5 (Bankr. N.D. W. Va. 2007)). The claimant is then "left with the burden of proof on the validity and amount of its claim at any further hearing." *Simms*, 2007 WL 4468682, at *2, 2007 Bankr. LEXIS 4134, at *5 (citations omitted). In the instant case, even though the parties stipulated the documents filed as joint exhibits at the hearing, Meral's claim did not comply with Rule 3001(c)(1) at the outset, and thus, Meral's claim is not entitled to prima facie validity under 3001(f). The Amendment is not sufficient as prima facie evidence of the claim's validity because the alleged security interest cannot be evaluated without reviewing the APA itself, which was not attached to the proof of claim. Therefore, no presumption of

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[10] Meral filed three claims: Claim Nos. 1165, 1226, and 1232. Meral included the Amendment as supporting documentation to Claim Number 1165, but did not include the APA. No supporting documentation was enclosed with Proof of Claim Number 1226 filed by Meral. All three proofs of claim and supporting documentation, if applicable, were filed with American Legal Claim Services, Inc., the claims, noticing and balloting agent. As the proofs of claim are not otherwise in the record, they are attached as exhibits to this opinion.

validity exists, and the burden remains on Meral to prove the validity of a security interest purportedly granted by the APA by a preponderance of the evidence. *Harford Sands*, 372 F.3d at 640.

B. The APA Not Only Lacks the Clear, Unambiguous Language to Grant Meral a Security Interest, but Also Explicitly Provides that No Security Interest Exists in the Debtors' Property.

The Debtors first object to Claim Number 1232 on the basis that the APA does not provide Meral with any security interest in the Debtors' property. As a preliminary matter, West Virginia law governs the interpretation of the APA. Joint Ex. A ¶ 12(d). Article 9 of the Uniform Commercial Code ("UCC")[11] governs any alleged security interest in personal property, including the Other Assets, but not interests in real property, such as the Leases. *See* W. Va. Code § 46-9-109(a)(1), (d)(11). The West Virginia Code includes separate recordation requirements applicable to creation and perfection of a lien on interests in real property, such as the Leases. *See* W. Va. Code § 40-1-9 (listing the requirements for perfection of an interest in real property).

As both the Debtors and Meral have noted, it is a requirement of a valid security interest that the security agreement or other document intended to establish a security interest contain a "written expression by the debtor granting a security interest." *In re Modafferi*, 45 B.R. 370, 373 (S.D.N.Y. 1985). Further, where a document lacks "'granting' language," it fails to sufficiently "demonstrate a present intent to pledge collateral." *Id.*; *see also Transp. Equip. Co. v. Guaranty State Bank*, 518 F.2d 377, 380

[11] The West Virginia Commercial Code was adopted from the Uniform Commercial Code. When the Court cites to opinions from other states interpreting that state's commercial code, it does so with the understanding that the other state has adopted the same subsections from the Uniform Commercial Code as West Virginia. *In re Weir-Penn, Inc.*, 344 B.R. 791, 794 (Bankr. N.D.W. Va. 2006).

(10th Cir. 1975) (finding that courts "almost uniformly come to the conclusion that in order for a security agreement to be effective it must contain language which specifically creates or grants a security interest in the collateral described."). In finding that the financing statement in *Modafferi* did not grant a security interest in the underlying collateral, the court noted that "[a]t a minimum, the 'terms' must recite the obligation secured." 45 B.R. at 374 (citation omitted) (finding that the financing statement did not qualify as a security agreement under Art. 9 of the UCC). Further, "[w]hile there are no magic words which create a security interest there must be language in the instrument which 'leads to the logical conclusion that it was the intention of the parties that a security interest be created.'" *Mitchell v. Shepherd Mall State Bank*, 458 F.2d 700, 703 (10th Cir. 1972) (quoting *Evans v. Everett*, 279 183 S.E.2d 109, 113 (N.C. 1971)).

First, Meral argues that APA ¶ 3(a)(vii) contains language that grants Meral a security interest where that section provides that Meral "shall be entitled to enter the premises of the Leases and to exclude [the Debtors] therefrom and . . . immediately maintain operating the mines located on the premises of the Leases . . . ." The Debtors respond that, in arguing for this "right of reentry" language, Meral confuses a contractual right with the grant of a security interest in collateral. However, the Court need not distinguish between the equitable right of reentry and a retained property interest because APA ¶ 3(a)(vii) specifically denies that such a security interest is conveyed with respect to that paragraph. APA ¶ 3(a)(vii) expressly states, "This section 3(a)(vii) shall not be constructed as (i) a lien upon any of the real, personal or mixed property of [South Fork] or its affiliates or a security interest granted by [South Fork] therein . . . ." Thus, it appears that the clear intent of South Fork and Meral was specifically *not* to create any

type of security interest as a result of this paragraph, so Meral's right of reentry argument is misguided. Thus, the "right of reentry" language listed above this clause cannot grant Meral a security interest because the clear and unambiguous language states otherwise.

Under West Virginia law, which governs the interpretation of the APA, "there can be no doubt that it is for a trial court to determine whether the terms of an integrated agreement are unambiguous and, if so, to construe the contract according to its plain meaning." *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 468 S.E.2d 712, 715 (W. Va. 1996). The Court's task is "not to rewrite the terms of contact [sic] between the parties; instead, [the Court is] to enforce it as written." *Id.* at 716. Moreover, "[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." *Id.* at 717-18 (internal quotation marks omitted) (quoting *Int'l Nickel Co. v. Commonwealth Gas Corp.*, 163 S.E.2d 677, 680 (W. Va. 1968)). In this case, the language in Paragraph 3(a)(vii) of the APA is clear that no security interest was granted by that section, and the Court will not attempt to rewrite the APA to grant Meral a security interest that does not exist by the terms of the agreement.

Even if the Court were to look past the explicit language in APA ¶ 3(a)(vii) specifically not providing for any lien or security interest in the Debtors' property, the "right of reentry" language in that paragraph does not convey a property right because Meral fails to satisfy the statutory requirement under the West Virginia Code for a "right of reentry" property interest. West Virginia courts have held that, to enforce a "right to reenter," as a property interest, and exclude a party in possession of the property, the asserting party must have *legal title* to the property and must be entitled to *immediate*

possession of that property. *See, e.g.*, *Marthens v. B & O Railroad Co.*, 289 S.E.2d 706, 712 n.2 (W. Va. 1982) ("Ejectment is an action for the protection of one with good legal title to the land who is entitled to immediate possession."); *Sands v. Holbert*, 117 S.E. 896, 897 (W. Va. 1923) (citations omitted) ("It is well established that unless plaintiff has the legal title he cannot maintain an action of ejectment."); *see also Stewart v. Workman*, 102 S.E. 474, 475 (W. Va. 1920) (finding that the right to reenter can only be reserved by a grantor holding title to the property).

In this case, Meral does not hold legal title to the property that is subject to the Leases, and thus, cannot meet its burden of establishing an enforceable right to reenter. Meral is also not entitled to immediate possession of the property that is subject to the Leases. Prior to exercising any alleged right to reenter, APA ¶ 3(a)(vii) requires Meral to first obtain the consent of WPP LLC. Meral has introduced no evidence that this consent was given. Thus, Meral is not entitled to immediate possession, and fails to meet its burden of proving a security interest in the Debtors' property exists.

C. Even if the Purported Security Interest Did Exist, Meral Has Not Perfected the Security Interest as Required by Rule 3001(d).

Meral also argues that the previous recorded Memorandum of Leases, which references the Leases found in the APA, should lead the Court to determine that Meral has a valid security interest. Meral cites *In re 1550 Wilson Boulevard, L.P.* for the proposition that a lease assignment can create a valid, perfected security interest. 206 B.R. 812 (E.D. Va. 1996). In *1550 Wilson Boulevard*, in the cash collateral context, the court held, under Virginia law, that a lender's security interest under an assignment of leases and rents is perfected when the assignment of rents is recorded in the appropriate

land records along with a leasehold deed of trust. *Id.* at 816 (citing Va. Code § 55-220.1). As the Debtors aptly note, *1550 Wilson Boulevard* actually supports a finding that Meral has not properly created or perfected its interest in the Leases by not entering into or filing a leasehold mortgage, assignment of rents and leases, collateral assignment of lease, or some other analogous document evidencing a security interest. In order to have a valid security interest, the claimant must have perfected that interest. *See First Nat'l Bank of Mercer County v. Rankin (In re Rankin)*, 102 B.R. 439, 443 (Bankr. W.D. Pa. 1989).

A security interest in leases must be recorded pursuant to applicable state law property recordation requirements, in this case, West Virginia's requirements, to achieve perfection. *See, e.g.*, *In re DBSI, Inc.*, 432 B.R. 126, 132 (Bankr. D. Del. 2010). Under West Virginia law, to perfect an interest in real property, including an interest in leases, the holder of the security interest must record documentation evidencing its interest in the leases "in the county wherein the property embraced in such contract, deed, deed of trust or memorandum of deed of trust or mortgage" is located. W. Va. Code § 40-1-9. The record contains no evidence that Meral made a filing evidencing a security interest. Further, a recorded memorandum of lease, in and of itself, does not create a perfected security interest where no security interest exists to begin with. *See DBSI*, 432 B.R. at 133. Thus, Meral does not have any perfected security interest in the assets of the Debtors. Accordingly, the Claim Objection is sustained.

II. Motion for Relief

Once a debtor files a bankruptcy petition, the automatic stay of 11 U.S.C. § 362(a) stays most legal proceedings against the debtor. *See* 11 U.S.C. § 362(a). Nevertheless, the Bankruptcy Code also grants discretion to the bankruptcy courts to lift the stay "for cause." *See* 11 U.S.C. § 362(d)(1). The Code does not define what constitutes "cause," so "courts must determine when discretionary relief is appropriate on a case-by-case basis." *See, e.g.*, *Robbins v. Robbins (In re Robbins)*, 964 F.2d 342, 345 (4th Cir. 1992) (citations omitted). Deciding whether to lift the stay is within the discretion of the bankruptcy court. *In re Robbins*, 964 F.2d at 345 (citing *In re Boomgarden*, 780 F.2d 657, 660 (7th Cir. 1985)); *In re Joyner*, 416 B.R. 190, 191 (Bankr. M.D.N.C. 2009).

In determining whether to grant relief from the automatic stay, courts "must balance potential prejudice to the bankruptcy debtor's estate against the hardships that will be incurred by the person seeking relief from the automatic stay if relief is denied." *In re Robbins*, 964 F.2d at 345 (citing *Peterson v. Cundy (In re Peterson)*, 116 B.R. 247, 249 (D. Colo. 1990)). "While Congress intended the automatic stay to have broad application, the legislative history to [S]ection 362 clearly indicates Congress' recognition that the stay should be lifted in appropriate circumstances." *In re Robbins*, 964 F.2d at 345.

The initial burden rests on the movant, Meral, to establish a prima facie case to show that "cause" exists in the first instance. *Unnamed Citizens A Thru E and Certain Minor Children v. White (In re White)*, 410 B.R. 195, 201 (Bankr. W.D. Va. 2008). If Meral meets its burden of establishing a prima facie case, the burden shifts to the Debtors to show that "cause" does not exist to lift the stay. *Id.* (explaining that the movants have

the "initial burden of demonstrating an appropriate basis for relief," but "[o]nce that has been accomplished . . . the ultimate burden of proof rests upon the [d]ebtor to show a lack of cause to grant the . . . [m]otion for [r]elief").[12]

Pursuant to the Motion for Relief, Meral moves for relief from the automatic stay under Section 362(d)(1) "for cause, including the lack of adequate protection of an interest in property of such party in interest" so that Meral may "reassume the lease and protect their interest in said leasehold." Meral's Mot. for Relief, at 1 (quoting 11 U.S.C. § 362(d)(1)). The act of reassuming the WPP Coal Mining Lease would constitute an "act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3).

As the party seeking relief from stay, Meral "has the burden of showing the existence, the validity, and the perfection of its secured claim against the [p]roperty." *In re Keen*, No. 13-71705, 2014 WL 6871867, at *6, 2014 Bankr. LEXIS 4896, at *19 (Bankr. W.D. Va. Dec. 3, 2014) (quoting *In re Palham Enters., Inc.*, 376 B.R. 684, 689 (Bankr. N.D. Ill. 2007)). However, as noted above, Meral does not have a security interest in the Leases or the Other Assets, and absent such, has provided no other basis for entitlement to adequate protection. *See* Part I, *infra*. Meral is an unsecured creditor of the Debtors, and has established no alternative grounds for relief under 11 U.S.C. § 362(d).

[12] Under 11 U.S.C. § 362(g), "while the party seeking relief from the stay has the initial burden of production or going forward with the evidence to establish a prima facie case for relief, the burden of proof, i.e., the burden of persuasion, rests on the party opposing relief on all issues except the existence of equity." *In re Joyner*, 416 B.R. at 192 n.1 (citations omitted).

CONCLUSION

For the foregoing reasons, the Court will sustain the Debtors' Objection to Claim with respect to Proof of Claim Number 1232, disallow Claim No. 1232 as a secured claim, and allow it as an unsecured claim. Further, the Court will deny Meral's Motion to Lift the Automatic Stay. An Order to such effect will be entered contemporaneously herewith.

Decided this 3rd day of February, 2016.

UNITED STATES BANKRUPTCY JUDGE