IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
Optim Energy, LLC, *et. al.*[1],	)	Case No. 14-10262-BLS
	)	Jointly Administered
	)	
Debtors.	)	**Objection Date: TBD**
	)	**Hearing Date: TBD**
	)	

WALNUT CREEK MINING COMPANY'S EMERGENCY MOTION FOR AN ORDER UNDER TEX. BUS. & COM. CODE § 2.609 AND 11 U.S.C. § 105(a) COMPELLING DEBTORS TO PROVIDE ADEQUATE ASSURANCE OF PERFORMANCE AND AUTHORIZING SUSPENSION OF PERFORMANCE UNTIL ADEQUATE ASSURANCES ARE RECEIVED

COMES NOW Walnut Creek Mining Company, a Joint Venture ("Walnut Creek"), and hereby respectfully moves this Court for an order compelling Optim Energy, LLC ("Optim") and Optim Energy Twin Oaks, LP ("Twin Oaks", together with Optim the "Debtors") to provide adequate assurance of performance to Walnut Creek under the Fuel Supply Agreement (as defined below) and authorizing suspension of performance by Walnut Creek under the Fuel Supply Agreement until such adequate assurances are received. In support of this motion (the "Motion"), Walnut Creek shows the Court as follows:

I. SUMMARY

1. Walnut Creek and Twin Oaks are parties to a long-term supply agreement under which Walnut Creek supplies Twin Oaks substantially all of the lignite that Twin Oaks requires to operate its Twin Oaks plant located in Robertson County, Texas. Although Walnut Creek is willing to continue to provide lignite to Twin Oaks on a post-petition basis, it seeks to enforce its

[1] The Debtors in these chapter 11 cases are: Optim Energy, LLC; OEM 1, LLC; Optim Energy Cedar Bayou 4, LLC; Optim Energy Altura Cogen, LLC; Optim Energy Marketing, LLC; Optim Energy Generation, LLC; Optim Energy Twin Oaks GP, LLC; Optim Energy Twin Oaks, LP. The Debtors' main corporate and mailing address for purposes of these chapter 11 cases is: c/o Competitive Power Ventures, Inc., 8403 Colesville Road, Suite 915, Silver Springs, MD 20910.

statutory state law rights by requesting adequate assurance of performance from the Debtors prior to any delivery. Specifically, Walnut Creek requests that the Debtors be required to provide an advanced cash payment to Walnut Creek in an amount sufficient to satisfy the price of lignite purchased by Twin Oaks for the average thirty-day purchase amount during 2013, or $4,600,000.00 (the "Advanced Cash Payment").

2. Shipping lignite to Twin Oaks on credit would unfairly expose Walnut Creek to significant economic harm. Twin Oaks has already failed to pay under its agreement with Walnut Creek and has admitted its insolvency in its bankruptcy filings. In addition, the Debtors have stated their intention to sell the Twin Oaks' power plant. Moreover, although Twin Oaks has obtained interim approval of debtor-in-possession financing and the use of cash collateral, the post-petition financing documents and order do not adequately protect Walnut Creek from the risk of non-payment.

3. Importantly, Walnut Creek is **not** seeking to withhold delivery of post-petition lignite in exchange for payment of pre-petition claims. Rather, it simply seeks adequate assurances that it will be paid for the lignite it delivers post-petition and requests that until such adequate assurances are given, that it be able to suspend delivery as allowed under state law. Without assurance of post-petition payment for lignite delivered post-petition, Walnut Creek would be forced to assume an extreme credit risk.

II. BACKGROUND

A. Bankruptcy Filing, Jurisdiction & Venue

4. The Debtors filed their Chapter 11 petitions on February 12, 2014 (the "Petition Date"). The Debtors continue to operate their business and manage their property as debtors-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.

5. No creditors' committee or trustee has been appointed.

6. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157(b) and 1334(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

7. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409(a).

B. Fuel Supply Agreement

8. Walnut Creek is a wholly owned subsidiary of Kiewit Mining Group Inc., a Delaware corporation. Walnut Creek operates and holds interests in a mine located between Dallas and Houston, Texas where lignite is produced. Annually, Walnut Creek's captive lignite operation produces more than two million tons of lignite per year, all of which is sold and delivered to Twin Oaks pursuant to the Fuel Supply Agreement.

9. Twin Oaks operates an electric power generating facility in Robertson County, Texas. In that regard, Walnut Creek and Twin Oaks are parties to a Fuel Supply Agreement (as amended, the "Fuel Supply Agreement"), attached hereto as Exhibit A, pursuant to which Walnut Creek supplies lignite to Twin Oaks in exchange for payment. Twin Oaks then utilizes the lignite supplied by Walnut Creek in its electric power generating facility to produce power for customers.

10. The Fuel Supply Agreement has been in existence for many years. The original agreement was dated November 18, 1987 and was entered into between Texas - New Mexico Power Company and Phillips Coal Company. Thereafter, by virtue of assignment or otherwise, the parties to the agreement changed, and, eventually, Walnut Creek and Twin Oaks became the current parties thereto.

11. The Fuel Supply Agreement sets forth a number of terms and conditions which govern the relationship between Walnut Creek and Twin Oaks. In general, Walnut Creek is required to make deliveries of lignite so as to meet specified quantities and projection notices provided by Twin Oaks. Thereafter, Twin Oaks is required to pay for those deliveries at a price set pursuant to the agreement's pricing provisions. Some of the relevant terms of the Fuel Supply Agreement are summarized below:

(a) TERM. The Fuel Supply Agreement continues in existence until the first of the following occurs: (a) the delivery of and payment for or payment for 935 million Dths[2] of lignite; (b) the satisfaction or waiver of the parties' obligations under the Agreement; or (c) the termination of the Agreement in accordance with its terms. Given the Annual Lignite Quantities delineated in Amended Exhibit C to the Fuel Supply Agreement, the delivery of 935 million Dths of lignite will likely not occur until sometime after the year 2025. (*See* Amendment No. 3 at ¶ 1 and Amended Exhibit "C" attached thereto).

(b) QUANTITIES AND DELIVERY. The precise quantity of lignite to be supplied by Walnut Creek under the Fuel Supply Agreement is governed by Annual Projection Notices, as adjusted by Monthly Projection Notices, issued by Twin Oaks. However, if properly requested, Walnut Creek can be obligated to deliver to Twin Oaks up to 30 million Dths of lignite each year. Subject to the Agreement's shortfall and make-up provisions, the Agreement also guarantees Walnut Creek that Twin Oaks will take the delivery of not less than a specified Annual Quantity (which, for 2014, is 17.4 million Dths). Likewise, Twin Oaks is generally required to purchase from Walnut Creek a minimum of 92.5% of its total fuel consumption for its Robertson County, Texas facility. With respect to delivery, Walnut Creek provides Twin Oaks with consistent delivery as it is reasonably able. (*See* Fuel Supply Agreement, Article 4; Amendment No. 3 at ¶ 2)

(c) PAYMENT TERMS. Twin Oaks is invoiced for the lignite Walnut Creek has delivered two times each month, once for lignite delivered in the last half of the prior month and once for lignite delivered in the first half of the current month. Invoices are payable 10 business days following Twin Oaks' receipt thereof, and past-due payments bear interest until the date payment is sent. Walnut Creek is also entitled to collect shortfall costs from Twin Oaks in certain instances. (*See* Fuel Supply Agreement, Article 7)

(d) GOVERNING LAW. The Fuel Supply Agreement is governed by Texas Law. (*See* Fuel Supply Agreement, Article 18 at §18.01)

[2] A "Dth" is defined by the Fuel Supply Agreement to mean a dekatherm, which is equal to one million Btu's. (*See* Fuel Supply Agreement, Article 1)

12. The quantity and value of the lignite Walnut Creek supplies to Twin Oaks pursuant to the Fuel Supply Agreement is incredibly large. By way of example, in 2013, Walnut Creek supplied Twin Oaks between 1.1 to 2.5 million Dths of lignite per month. Under the Fuel Supply Agreement's pricing terms, the total value associated with the sale of this lignite was almost $55 million (Walnut Creek's sales for lignite supplied to Twin Oaks totaled between $2.6 and $5.7 million per month). Notably, only after Walnut Creek delivers the lignite does Walnut Creek receive payment from Twin Oaks pursuant to the Fuel Supply Agreement's detailed pricing mechanism.

C. Credit Risk & Need for Adequate Assurance

13. On February 4, 2014, Twin Oaks advised Walnut Creek it would not make the payment due February 5, 2014 in the amount of $2,566,471.54 for already-delivered lignite, which it never did pay. In addition, Twin Oaks would owe on February 20, 2014 an additional $2,880,107.50 for Iignite delivered between January 16, 2014 and January 31, 2014, and $40,717.58 for power adjustment for shipment in the period of January 1 through 31, 2014. Furthermore, Twin Oaks will owe for shipments from February 1 to February 11, estimated at this time to be $1,404,383. Walnut Creek has become increasingly concerned with Twin Oaks' deteriorating financial condition and its ability to pay Walnut Creek for future lignite deliveries.

14. Walnut Creek's concern is exacerbated by the Twin Oaks' bankruptcy filing and its own admission that it is insolvent. *See* Twin Oaks Petition (Fil. 1) (estimating that its liabilities exceeded its assets); Declaration of Nick Rahn in Support of Chapter 11 Petitions and First Day Pleadings ("Rahn Declaration") (Fil. 4) ¶ 33 ("the Debtors could not continue to satisfy their obligations in the ordinary course of business"); *Id.* ¶ 35 ("the Debtors concluded that cash

on hand alone would be insufficient to fund the Debtors' operations and business plan throughout the pendency of these chapter 11 cases").

15. In addition to the Debtors' admission of insolvency, Walnut Creek is concerned about receiving payment in light of the fact that Twin Oaks is positioning itself to be sold. In his declaration, Nick Rahn stated that "'[t]he Debtors intend to explore all strategic alternatives to address the Twin Oaks Plant operating losses during these chapter 11 cases, *including a potential sale pursuant to section 363 of the Bankruptcy Code*." Rahn Declaration ¶ 31 (emphasis added). The DIP Financing Agreement (defined below) adds as follows:

> Within the time periods set forth below, Borrower shall perform each action with respect to the Cases of each of the Obligors as set forth below:
>
> 1. As soon as practicable, but in any event within the 90 days immediately following the Petition Date, either (i) executing a sale agreement with a stalking horse bidder relating to the sale of, at a minimum, Twin Oaks or substantially all of Twin Oaks' assets, and filing a sale motion and bidding procedures motion relating to such sale with the Bankruptcy Court, or (ii) filing a bidding procedures motion and an auction sale motion with the Bankruptcy Court to implement bidding procedures for a sale of Twin Oaks or substantially all of Twin Oaks' assets without a stalking horse bidder; in each case acceptable to the Majority Lenders in their sole discretion;
>
> 2. Within 120 days of the Petition Date, obtain entry of a bidding procedures order from the Bankruptcy Court approving bidding procedures for a sale of Twin Oaks or substantially all of Twin Oaks' assets;
>
> 3. Within 150 days of the Petition Date, obtain Bankruptcy Court approval of a sale of Twin Oaks or substantially all of Twin Oaks' assets, to the extent a successful bidder has been selected . . . .

DIP Financing Agreement Schedule 12.1; *see also* DIP Financing Motion p. 9 "Milestones") (Fil. 16). Failure to reach such milestones results in an event of default under the DIP Financing Agreement. *See* DIP Financing Agreement § 12.1(r). With the Twin Oaks' power plant set to be sold, there is absolutely no incentive for the Debtors to be concerned about maintaining a

working relationship with Walnut Creek. To that end, there is no motivation for the Debtor to assure Walnut Creek is paid for delivered lignite, especially in the weeks leading up to Twin Oaks' ultimate liquidation. Since any payment for delivered lignite is customarily in the millions of dollars, one missed payment has a significant impact on Walnut Creek.

16. Reinforcing Walnut Creek's concern that the Debtors are not concerned about making payment to Walnut Creek a priority is the fact that there is no explicit mention of Walnut Creek in the Debtors' Critical Vendor Motion (Fil. 12). The motion is devoid of any reference to Walnut Creek, presumably one of the largest - if not the largest - suppliers to any of the Debtors, and it does not appear to fall within the scope of classes to be paid by the Debtors under the motion. To date, Walnut Creek has received no indication from the Debtors that it is to be paid as a critical vendor pursuant to such motion.

17. Although the Court has approved debtor-in-possession financing and the use of cash collateral (the "DIP Financing Agreement"[3]), on an interim basis (the "Interim DIP Order") (Fil. 36), the DIP Financing Agreement and Interim DIP Order fail to adequately protect Walnut Creek from the risk associated with Twin Oaks' non-payment. As an initial matter, neither the DIP Financing Agreement nor the Interim DIP Order require Twin Oaks to make payment to Walnut Creek for the post-petition delivery of lignite. Although the Initial Budget contains a line item for "operating expenses", there is no explanation as to what is covered by "operating expenses" and absolutely no mention of Walnut Creek. Regardless, even if Walnut Creek was included in the budget, such budget does not impose an obligation on the Debtors to actually make payment to Walnut Creek.

18. In addition, there are 23 separate conditions that could trigger an event of default under the DIP Financing Agreement, which would terminate Twin Oaks' right to the post-

[3] The DIP Financing Agreement is Exhibit C to the Debtors' DIP Financing Motion (Fil. 16).

petition financing and cash collateral. *See* DIP Financing Agreement §§ 12.1, 12.2. Neither the DIP Financing Agreement nor the Interim DIP Order provide a carve-out for amounts owed for post-petition delivered goods in the case of an event of default. As a result, Walnut Creek bears the financial risk of millions of dollars that an event of default does not occur between the date of its delivery of lignite and Twin Oaks' date of payment.

19. In light of the foregoing, and the enormous financial risk and insecurity that Walnut Creek would bear if forced to deliver lignite on credit, the Debtors should be compelled to pay Walnut Creek in advance of any delivery of lignite in the form of the Advanced Cash Payment. In addition, Walnut Creek should be authorized to suspend performance until such cash payments are received.

20. As set forth in the accompanying motion for shortened notice and expedited hearing, each delivery by Walnut Creek on credit bears an enormous financial risk. Nonetheless, in an attempt to assist Twin Oaks at the earliest stage of its bankruptcy case, and without waiving its rights, Walnut Creek will continue to ship lignite to Twin Oaks until February 20, 2014. After such date, however, Walnut Creek will immediately suspend delivery in accordance with its state law rights until the Court rules on this Motion. However, Walnut Creek will deliver lignite for one bimonthly period if Twin Oaks pay Walnut Creek cash in advance for such lignite.

III. RELIEF REQUESTED

21. By this Motion, Walnut Creek requests entry of an order compelling the Debtors to provide adequate assurance in the form of the Advanced Cash Payment as a precondition to

Walnut Creek's shipment of lignite to Twin Oaks. In addition, Walnut Creek requests an order authorizing it to suspend performance under the Fuel Supply Agreement until such adequate assurances are received.

IV. BASIS FOR RELIEF REQUESTED

A. Walnut Creek is Entitled to Adequate Assurance Under UCC 2-609

22. The Fuel Supply Agreement is a contract for the sale of goods and is thus covered by the Texas Uniform Commercial Code ("TUCC"[4]). *See* TUCC § 2-102. Under the TUCC, Walnut Creek is entitled to adequate assurance of Twin Oaks' payment obligation when, as here, there are "reasonable grounds for insecurity." *See* TUCC § 2-609 ("Section 2-609"). Section 2-609 provides that:

> A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

TUCC § 2-609.

23. What constitutes "reasonable" grounds for insecurity and "adequate" assurance is defined by commercial, not legal, standards. *Brisbin v. Superior Valve Co.*, 398 F.3d 279, 286 (3d Cir. 2005) (holding that supplier's demands for adequate assurance and grounds for insecurity were reasonable, given that buyer had not yet begun full-time production on contractually obligated projects over a year after contract were signed and buyer offered supplier little to no feedback on project status). Official Comment 1 to Section 2-609 of the UCC provides:

[4] The Texas Uniform Commercial Code is found in Title 1 of the Texas Business and Commerce Code. Instead of citing Tex. Bus. & Com. Code, all citations to the Texas Uniform Commercial Code shall be to TUCC.

> The section rests on the recognition of the fact that the essential purpose of a contract between commercial men is actual performance . . . and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain. If either the willingness or the ability of a party to perform declines materially between the time of contracting and the time for performance, the other party is threatened with the loss of a substantial part of what he has bargained for. A seller needs protection not merely against having to deliver on credit to a shaky buyer, but also against having to procure and manufacture the goods, perhaps turning down other customers. Once he has been given reason to believe that the buyer's performance has become uncertain, it is an undue hardship to force him to continue his own performance.

Section 2-609, Official Comment 1.

24. Twin Oaks' failure to pay $2,566,471.54 to Walnut Creek on February 5, 2014 alone qualifies as reasonable grounds for insecurity giving rise to the seller's right to demand adequate assurance of due performance. *See Reich v. Republic of Ghana*, 2002 WL 142610, at *4 (S.D.N.Y. Jan. 31, 2002) (citing *Hornell Brewing Co., Inc. v. Spry*, 664 N.Y.S.2d. 698, 703 (N.Y. Sup. Ct. 1997) ("reasonable grounds for insecurity can arise form the sole fact that a buyer has fallen behind in his account with the seller")); *Kunian v. Dev. Corp. of America*, 334 A.2d 427, 422 (1973) (holding that seller had reasonable grounds for insecurity when seller failed to pay amounts due under outstanding invoices).

25. In addition to Twin Oaks' failure to make payment to Walnut Creek on February 5, 2014, Walnut Creek has substantial grounds for insecurity warranting adequate assurance given Twin Oaks' admitted insolvency, the Debtors' stated intent to sell Twin Oaks, and the lack of safeguards and protections provided in the DIP Financing Agreement and Interim DIP Order. *See* ¶ 14, supra. Walnut Creek has ample reasonable grounds to be concerned as to whether Twin Oaks will pay for the post-petition lignite that it will demand that Walnut Creek supply on credit.

26. As noted above, Walnut Creek is not seeking payment of its pre-petition claim, nor is Walnut Creek seeking to terminate the Fuel Supply Agreement. Walnut Creek seeks only to be adequately assured of payment for its delivery of post-petition lignite. Numerous courts have protected the supplier in similar situations by requiring cash in advance.

- The supplier in *In re Kellstrom Indus., Inc.*, 282 B.R. 787 (Bankr. D. Del. 2002) stopped delivery of good despite the fact that debtor already had legal title to goods which the debtor sought to sell pursuant to 11 U.S.C. § 363. The bankruptcy court held that passage of title as part of contract did not eliminate or impair supplier's right to stop delivery of parts under UCC §§ 2-702 and 2-507. *Id*. at 791. However, the court allowed the debtor to sell the goods provided that adequate protection was afforded the supplier. The court held that "the sale of Parts free and clear of [supplier's] right to withhold and stop delivery be ***conditioned upon full payment in cash*** for all of the Parts to be delivered under the Agreement." *Id*. at 794 (emphasis added).

- The bankruptcy court in *Ike Kempner & Bros., Inc. v. U.S. Shoe Corp. (In re Ike Kempner & Bros.)*, 4 B.R. 31, 32-33 (Bankr. E.D. Ark. 1980) ordered a supplier to continue to ship product subject to a pre-petition contract conditioned on debtor ***paying supplier prior to shipment.***

- The supplier in *Sportfame of Ohio, Inc. v. Wilson Sporting Goods, Co. (In re Sportfame of Ohio, Inc.)*, 40 B.R. 47, 48 (Bankr. N.D. Ohio 1984) had refused to ship goods pre-petition due to debtor's pre-petition arrears and continued to refuse to ship post-petition. The bankruptcy court ordered the supplier to resume shipping and "the debtor shall be ***required to pay cash*** either in advance or upon receipt of goods." *Id*. at 53 (emphasis added). Under these facts, the supplier could not show it would suffer harm if paid in cash in advance or upon receipt, as compared to significant harm to debtor's business if supplier did not resume supplying goods. *Id*.

- In *Blackwelder Furniture Co., Inc. v. Drexel-Heritage Furnishings, Inc. (In re Blackwelder Furniture Co., Inc.)*, 7 B.R. 328, 341 (Bankr. W.D.N.C. 1980), the bankruptcy court ordered pre-petition suppliers to continue shipping goods for ***cash***. The court determined that if dealings between the debtor and supplier were "***put on a cash basis***" the supplier would not suffer harm, versus the irreparable harm to debtor's business if the goods were not supplied. *Id*. at 337 (emphasis added).

27. Additionally, this Court has the authority to compel Twin Oaks to provide Walnut Creek with the appropriate adequate assurance pursuant to 11 U.S.C. § 105(a) which provides a

bankruptcy court with broad powers in the administration of a bankruptcy case. Section 105(a) provides that "[t]he court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). Section 105(a) gives the court general equitable powers, as long as such powers are applied in a manner consistent with the Bankruptcy Code. *See, e.g., In re Morristown & Erie R. Co.*, 885 F.2d 98, 100 (3d Cir. 1989).

B. Walnut Creek Is Authorized to Suspend Performance

28. Walnut Creek should be authorized to suspend delivery of lignite absent cash-in-advance as adequate assurance under at least three separate section of the TUCC - § 2-609(a), § 2-702(a), and § 2-610(3).

(i) Justified Refusal to Deliver Under Section 2-609

29. Walnut Creek is justified in refusing to deliver post-petition lignite pursuant to Section 2-609(1), which provides, in pertinent part, that "when reasonable grounds for insecurity arise with respect to performance of either party the other may in writing demand adequate assurance of due performance *and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return*." TUCC § 2-609 (emphasis added). As noted above, Walnut Creek had and continues to have sufficient grounds to demand adequate assurance.

30. Until Twin Oaks provides adequate assurance, Walnut Creek has the statutory right to suspend performance. *See Reich*, 2002 WL 142610, at *4 ("because [debtor] failed to provide the requested assurances within a reasonable amount of time, [creditor] was justified" in suspending performance); *In re Amica, Inc.*, 135 B.R. 534, 550-51, 556 (Bankr. N.D. Ill. 1992) (failure of buyer to provide adequate assurance within a reasonable time is a repudiation, which

grants seller the right to withhold performance); *Kunian*, 334 A.2d at 433 ("defendant's failure, therefore, to provide adequate assurance of due performance within a reasonable time after the request and after the action had been brought was a repudiation of the contract and the plaintiff was excused from further performance").

(ii) Justified Refusal to Deliver Under Section 2-702

31. Walnut Creek is further justified in refusing to deliver post-petition lignite pursuant to TUCC § 2-702(a) ("Section 2-702"), which provides that the seller "may refuse delivery except for cash" when it "discovers the buyer to be insolvent." TUCC § 2-702(a). As noted above, Twin Oaks has conceded insolvency in its Petition and the Declaration of Nick Rahn. *See* ¶ 14, supra.

(iii) Justified Refusal to Deliver Under Section 2-610

32. Walnut Creek is justified in refusing to deliver post-petition lignite pursuant to TUCC § 2-610 ("Section 2-610"), which provides that "[w]hen either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may . . . suspend his own performance . . . ." *See* TUCC § 2-610(3). The commencement of the bankruptcy cases by Twin Oaks constituted an anticipatory repudiation of the Fuel Supply Agreement. *See Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U.S. 581, 592 (1916) ("proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement.").

33. This central tenant of *Central Trust* has never been overturned, and, indeed, has been widely cited. *See City Bank farmers Trust Co. v. Irving Trust Co.*, 299 U.S. 433, 440

(1937) citing *Central Trust* ("[b]ankruptcy of the obligor is an anticipatory breach of an executory contract"); *Heyward v. Goldsmith*, 269 F. 946, 949 (3d Cir. 1921) ("bankruptcy proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement"); *In re Palace Quality Servs. Indus.*, 283 B.R. 868, 904 at n. 37 (Bankr. E.D. Mich. 2002) ("if the purchaser under the contract filed for bankruptcy, the seller would have the right to cease providing the goods or services under that contract because of the debtor/purchaser's anticipatory breach").

(iv) State Law Rights Survive Bankruptcy Filing

34. The commencement of the bankruptcy case does not vitiate Walnut Creek's state law rights under the TUCC. In fact, bankruptcy courts have specifically upheld a seller's post-petition right to refuse delivery to a debtor under Section 2-702. *See In re Trico Steel Co., LLC, Inc.*, 302 B.R. 489 (D. De. 2003) (bankruptcy court and district court affirmed supplier's right to stop shipment of goods in transit under UCC §§ 2-702(1) and 2-705(2) upon learning of debtor's insolvency); *In re Kellstrom Indus., Inc.*, 282 B.R. 787 (Bank. D. Del. 2002) (after bankruptcy filing, supplier stopped shipment under UCC § 2-702; court held that proper adequate protection required the debtor to pay the supplier in full in cash for all of the parts to be delivered under the contract); *Morrison Indus., L.P. v. Hiross, Inc. (In re Morrison Indus., L.P.)*, 175 B.R. 5 (Bank. W.D.N.Y 1994) (supplier refused to ship under UCC §2-702 and debtor brought an action to compel turnover of goods; court dismissed the complaint on its merits, holding that supplier had the right to stop delivery under UCC §2-702); *National Sugar Refining Co. v. Czarnikow, Inc. (In re Nat'l Sugar Refining Co.)*, 27 B.R. 565 (S.D.N.Y. 1983) (seller was not required to seek relief from the automatic stay prior to exercising right to stop shipment under UCC § 2-702).

WHEREFORE, Walnut Creek requests that the Court (i) enter an order compelling the Debtors to provide adequate assurance to Walnut Creek in the form of the Advanced Cash Payment; (ii) enter an order excusing Walnut Creek from performance until such adequate assurance is provided; and (iii) grant such other and further relief that is just and proper.

DATED this 17th day of February, 2014.

Respectfully submitted,

By:/s/ Ronald S. Gellert

Ronald S. Gellert (DE 4259)
Brya M. Keilson (DE 4643)
Gellert Scali Busenkell & Brown, LLC
913 Market Street, 10th Floor
Wilmington, DE 19801
Telephone: (302) 425-5800
Facsimile: (302) 425-5814
rgellert@gsbblaw.com
bkeilson@gsbblaw.com

-and-

Robert J. Bothe
James G. Powers
Robert P. Diederich
McGrath North Mullin & Kratz, PC LLO
Suite 3700, First National Tower
1601 Dodge Street
Omaha, Nebraska 68102-1627
Telephone: 402-341-3070
Facsimile: (402) 341-0216
rbothe@mcgrathnorth.com
jpowers@mcgrathnorth.com
rdiederich@mcgrathnorth.com

ATTORNEYS FOR WALNUT CREEK MINING COMPANY