

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:

VOLUNTEER ENERGY SERVICES, INC.,

Debtor.¹

)
) Chapter 11
)

) Case No. 22-50804
)

) Judge C. Kathryn Preston
)

**DEBTOR’S OMNIBUS REPLY IN SUPPORT OF THE DEBTOR’S
SECOND OMNIBUS MOTION FOR ENTRY OF AN ORDER
AUTHORIZING AND APPROVING THE REJECTION OF CERTAIN
EXECUTORY CONTRACTS EFFECTIVE AS OF THE PETITION DATE
[RELATED TO DOC. NOS. 69, 168, 172, and 175]**

Volunteer Energy Services, Inc., as debtor and debtor in possession (the “Debtor”), hereby submits this omnibus reply in support of the *Debtor’s Second Omnibus Motion for Entry of an Order Authorizing and Approving the Rejection of Certain Executory Contracts Effective as of the Petition Date* [Doc. No. 69] (the “Motion”)² and respectfully states as follows:

BACKGROUND

1. On March 31, 2022, the Debtor filed the Motion requesting authorization to reject its Supply Contracts. Three parties—(1) Eco-Energy Natural Gas, LLC (“Eco-Energy”), (2) Vectren Energy Delivery of Ohio, Inc. d/b/a CenterPoint Energy Ohio (“CEOH”), and (3) Sequent Energy Management, LLC (“Sequent” and, together with Eco-Energy, the “Suppliers”)—filed limited objections (the “Objections”) to the relief sought in the Motion [Doc. Nos. 168, 172, and 175, respectively]. For the reasons discussed below, the Objections should be overruled.

¹ The last four digits of the Debtor’s federal tax identification are (2693), and the address of the Debtor’s corporate headquarters is 790 Windmill Drive, Pickerington, Ohio 43147.

² Capitalized terms used but not defined herein have the meanings ascribed to them in the Motion.

DEBTOR'S REPLY

I. CEOH Does Not Have Standing to Object to the Motion.

2. As an initial matter, CEOH is not even a party to a Supply Contract, and thus it does not have standing to raise objections or assert rights with respect to the Supply Contracts (or any other agreements to which it is not a party). *See In re Irwin Yacht Sales, Inc.*, 164 B.R. 678, 680 (Bankr. M.D. Fla. 1994) (finding that a nonparty to a lease has no standing to oppose the debtor's attempts to assume the lease, and that "[a]s long as the Debtor can show that it can satisfy the requirements set forth in § 365 for assumption of the lease, and the landlord is satisfied with the assumption, this Court has no difficulty in approving the assumption"); *In re ANC Rental Corp., Inc.*, 278 B.R. 714, 719 (Bankr. D. Del. 2002) (stating that a general creditor does not have standing to assert the rights of a counterparty to a contract being assumed); *see also In re James Wilson Assocs.*, 965 F.2d 160, 169 (7th Cir. 1992) (finding that a creditor which held mortgage and assignment of rents in a building the debtor sold and leased back from its landlord lacked standing to enforce the provision of Bankruptcy Code section 365 requiring assumption or rejection of an unexpired lease of non-residential real estate within 60 days of the bankruptcy filing).

3. Even where a party has an economic interest in a motion to assume or reject an executory contract or unexpired lease, a creditor may not intervene in a debtor's efforts to assume or reject a contract. In *ANC Rental Corp.*, the debtor was in the car rental business. 278 B.R. at 714. Two competing rental companies sought to intervene and be heard on motions to assume and reject certain executory contracts and unexpired leases filed by the debtors. *Id.* at 717. The Court declined to permit intervention, explaining that parties that are not counterparties

to a contract or lease the debtor seeks to assume or reject may not interfere with a debtor's assumption or rejection efforts to advance their own interests. In the Court's words:

While [the parties seeking to intervene] have an economic interest in the Motions, it is not the type of economic interest which the Bankruptcy Code seeks to protect. It is their interests as competitors of the Debtors which they are seeking to protect by opposing actions by the Debtors which will improve the Debtors' chances of successfully reorganizing. Those interests are not in harmony with the Debtors or creditors of these estates and there is no reason to let [the parties seeking to intervene] use this forum to advance their individual interests.

Id. at 719. Thus, parties may not use the bankruptcy forum to advance interests that are at odds with the fundamental right of a debtor under Bankruptcy Code section 365 to reject burdensome contracts or leases.

4. Like the parties that sought to intervene in *ANC Rental Corp.*, CEOH is not a counterparty to a contract that the Debtor seeks to reject. While CEOH may have an economic interest in the Motion, such economic interests is "not the type of economic interest which the Bankruptcy Code seeks to protect," as CEOH is opposing an action that will improve the Debtor's ability to complete an orderly winddown. *ANC Rental Corp.*, 278 B.R. at 719. CEOH should not be permitted to intervene in such a way that harms the Debtor's estate and ability to maximize recoveries for creditors.

5. For this reason alone, CEOH's Objection should be overruled. In addition, however, CEOH's Objection should be overruled because the assertions it contains related to the permissibility of retroactive relief are incorrect.

II. Applicable Law Permits the Debtor to Reject the Supply Contracts Effective as of March 28, 2022.

6. Neither the Suppliers nor CEOH oppose the Debtor's rejection of the Supply Contracts. Rather, they oppose the Debtor's request for Court approval of the rejection to be effective as of the Petition Date because such retroactive relief is prohibited by applicable law

and principles of equity do not permit it. For a number of reasons, retroactive relief is not only permitted, but is also appropriate under the circumstances. Nonetheless, the Debtor is willing to consent to a March 28, 2022 effective date for the rejection of the Suppliers' Supply Contracts. On this date, the Debtor's financial advisor emailed each Supplier explaining that the Debtor was "in the process of filing a motion to reject supplier contracts under Bankruptcy Code section 365." See Emails to Suppliers, attached hereto as **Exhibit A**. On March 29, 2022, Eco-Energy acknowledged receipt of such email. See Eco-Energy Email, attached hereto as **Exhibit B**. Further, on March 27, 2022, Sequent transmitted a letter to the Debtor explaining that the Debtor's bankruptcy filing "constitutes an Event of Default" as defined in the Base Contract for Sale and Purchase of Natural Gas dated as of November 1, 2006, between Sequent and the Debtor. See Sequent Termination Letter, attached hereto as **Exhibit C** hereto. This letter provided notice to the Debtor that "effective immediately, Sequent has elected to suspend and withhold all deliveries of Gas Under the Agreements commencing on Monday, March 28, 2022." *Id.* Indeed, Sequent concedes in its Objection that it stopped supplying the Debtor with gas after March 27, 2022. See Doc. No. 175, ¶ 9.

7. The Suppliers and CEOH contend that applicable law does not permit rejection of the Supply Contracts retroactive to the Petition Date. The Suppliers assert that the appropriate effective date for rejection is the date on which this Court enters an order authorizing rejection, and CEOH argues that it would not oppose rejection effective as of April 1, 2022. The Suppliers and CEOH cite to the Supreme Court's decision in *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S.Ct. 696 (2020) in support of their position that retroactive rejection prior to the date on which the Court enters an order authorizing rejection is prohibited by applicable law. However, the *Acevedo* decision is inapplicable here. Court

decisions subsequent to *Acevedo* have repeatedly (and correctly) found that *Acevedo* should be limited to its particular facts. *See, e.g., In re Mallinckrodt plc*, No. BR 20-12522-JTD, 2022 WL 906451, at *8 (D. Del. Mar. 28, 2022) (“In short, *Acevedo* did not consider any issues of bankruptcy law or *nunc pro tunc* relief. *Acevedo*’s limited discussion of *nunc pro tunc* orders is best understood as specific to jurisdiction.”); *Player’s Poker Club*, 636 B.R. 811, 825 (Bankr. C.D. Cal. 2022) (“Viewed in the broader context of the Supreme Court’s *nunc pro tunc* jurisprudence, however, the *Acevedo Feliciano* decision does not change existing law or introduce a new limitation on the *nunc pro tunc* powers of courts. To the contrary, this *per curiam* (unsigned) opinion simply applies a longstanding limitation on that power: i.e., that it may not be used to create jurisdiction retroactively.”); *In re SS Body Armor I, Inc.*, 2021 WL 2315177, at *3 (Bankr. D. Del. June 7, 2021) (“*Acevedo* does not prohibit courts from entering *nunc pro tunc* orders where there are no jurisdictional defects.”); *In re Ramirez*, 633 B.R. 297, 307 (Bankr. W.D. Tex. 2021) (same); *In re Hunanyan*, 2021 WL 2389273, at *2 (Bankr. C.D. Cal. June 10, 2021) (same).

8. Further, Courts have authorized retroactive rejection on numerous occasions, including after *Acevedo*. *See, e.g., In re Extraction Oil & Gas*, 622 B.R. 608, 631 (Bankr. D. Del. 2020) (authorizing retroactive rejection of certain contracts where the Debtors otherwise could have been “forced to incur unnecessary administrative charges and contractual obligations in connection with the [contracts] that d[id] not provide an equivalent benefit to the Debtors’ estates”); *In re Player’s Poker Club, Inc.*, 636 B.R. at 830 (authorizing retroactive rejection of an unexpired lease and finding that retroactive rejection “enables the bankruptcy court, under circumstances where the moving party has acted diligently and equitably, to ameliorate the delay

caused by the judicial approval process”). The suggestion that retroactive relief for rejection motions (or any other motion) is now prohibited because of *Acevedo* is quite simply wrong.

9. The court in *Extraction Oil & Gas* granted retroactive relief under similar circumstances to those present here: the debtors presented evidence determining certain transport service agreements were no longer beneficial to their estates; the debtors sought relief as soon as they determined that rejection of the transportation service agreements was in the best interests of their estates; and the debtors risked incurring unnecessary expenses and contractual obligations in connection with the transportation service agreements if they were not granted retroactive rejection. 622 B.R. at 631. Under these circumstances, the court found that retroactive rejection of the agreements was warranted. *Id.*

10. Rejection of the Suppliers’ Supply Contracts effective as of March 28, 2022 is appropriate here. As noted above, on March 28, 2022, the Debtor’s financial advisor emailed each Supplier explaining that the Debtor was “in the process of filing a motion to reject supplier contracts under Bankruptcy Code section 365,” and Eco-Energy acknowledged receipt of this email the very next day. Further, as discussed above, on March 27, 2022, Sequent transmitted a letter to the Debtor providing notice to the Debtor that Sequent had elected to suspend and withhold all gas deliveries commencing on March 28, 2022 and acknowledged in its Objection that it only supplied gas to the Debtor through March 27, 2022. Because (a) retroactive rejection is permitted under applicable law, (b) the Debtor notified the Suppliers and CEOH on March 28, 2022 of its intention to reject the Supply Contracts, and (c) Sequent acknowledged in its March 27, 2022 letter and in its Objection suspended and withheld all gas deliveries commencing on March 28, 2022, rejection of the Supply Contracts effective as of March 28, 2022 is appropriate.

III. Equitable Principles Support the Retroactive Rejection of the Supply Contracts to March 28, 2022.

11. The Suppliers and CEOH also contend that principles of equity do not support the retroactive rejection of the Supply Contracts to the Petition Date. The Suppliers argue that granting retroactive relief would preclude them from pursuing administrative expense claims, and CEOH asserts that retroactive rejection may or may not create legal liabilities for CEOH for gas delivered through March 31, 2022.

12. “[C]ourts have held that bankruptcy courts may exercise their equitable powers in granting such a retroactive order when doing so promotes the purposes of Section 365(a).” *In re Extraction Oil & Gas*, 622 B.R. 608, 630 (Bankr. D. Del. 2020) (quoting *In re Rupari Holding Corp.*, 2017 WL 5903498, at *6 (Bankr. D. Del. 2017)). “Courts have further held that the retroactive rejection of executory contracts and unexpired leases may be approved ‘after balancing the equities’ of a case and concluding that such equities weigh in favor of the debtor.” *Id.*; see also *In re Chi-Chi’s, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004) (“[T]he court’s power to grant retroactive relief is derived from the bankruptcy court’s equitable powers so long as it promotes the purposes of § 365(a).”) (citing *Thinking Machs. v. Mellon Fin. Servs. Corp. (In re Thinking Machs. Corp.)*, 67 F.3d 1021, 1028 (1st Cir. 1995)).

13. Here, principles of equity support the rejection of the Suppliers’ Supply Contracts effective as of March 28, 2022. The Debtor, in its sound business judgment, has determined that rejection of the Supply Contracts is in the best interests of the estate, as the Supply Contracts are no longer necessary for the Debtor’s business and create unnecessary and burdensome expenses for the Debtor’s estate. Accordingly, on March 28, 2022, the Debtor notified all Suppliers that it was in the process of seeking to reject the Supplier Contracts. On March 27, 2022, Sequent notified the Debtor that it would be suspending and withholding all gas deliveries commencing on March 28, 2022 and conceded that it only supplied gas through March 27, 2022 in its

Objection. Thus, equitable considerations require rejection to be effective as of the March 28, 2022.

14. Further, principles of equity favor rejection of the Suppliers' Supply Contracts effective as of March 28, 2022 because the Suppliers themselves caused the unnecessary delay in the rejection process. With respect to Eco-Energy, despite the Debtor having notified the Suppliers on March 28, 2022 that the Debtor would be seeking to reject the Supply Contracts under Bankruptcy Code section 365, Eco-Energy continued to deliver gas to the Debtor after that date. Under Eco-Energy's logic, no matter how onerous and burdensome the Supply Contracts were to the Debtor and its estate, the Suppliers should have been allowed to continue supplying gas for days or weeks even though the Debtor made clear that it would be seeking to reject the Supply Contracts. In other words, the Suppliers could unilaterally compel the Debtor to accept a later rejection date. This course of action by Eco-Energy is nonsensical and flies in the face of a fundamental purpose of Bankruptcy Code section 365—permitting debtors to be excused from future performance under burdensome contracts or leases. Indeed, when a creditor itself causes a delay in the rejection process, a retroactive rejection order is appropriate. *See In re Jamesway Corp.*, 179 B.R. 33, 39 (Bankr. S.D.N.Y. 1995) (“While it is unsettled whether a bankruptcy court can authorize retroactive rejection without a strong reason, it can do so to avoid penalizing the debtor for an unnecessary delay caused by the creditor.”).

15. Sequent, for its part, concedes in its Objection that it only continued to provide gas to the Debtor through March 27, 2022, but it nevertheless (and without explanation) requests that the Court deem any rejection to be effective as of the date of the Court's order approving the rejection of its Supply Contracts. Principles of equity require the retroactive rejection of the Suppliers' Supply Contracts to March 28, 2022.

CONCLUSION

WHEREFORE, for the reasons discussed herein, the Objections should be overruled, and the Motion should be granted, with the rejection as to the Suppliers' Supply Contracts to be effective as of March 28, 2022.

Dated: April 20, 2022
Columbus, Ohio

Respectfully submitted,

/s/ Philip K. Stovall

David M. Whittaker (0019307)

Philip K. Stovall (0090916)

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- and -

Darren Azman (admitted *pro hac vice*)

Natalie Rowles (admitted *pro hac vice*)

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Fax: (212) 547-5444

Email: dazman@mwe.com

nrowles@mwe.com

Proposed Counsel to the Debtor

Exhibit A

Emails to Suppliers

From: Tom Buck
Sent: Monday, March 28, 2022 1:49 PM
To: Heather Paxton; Paul Woolard
Cc: Darren Azman (dazman@mwe.com); Jeff Horsley; David Warner (dwarner@volunteerenergy.com)
Subject: Volunteer Energy Notice

Dear Supplier,

On March 25, 2022, Volunteer Energy Services, Inc. filed a voluntary petition in the United States Bankruptcy Court for the Southern District of Ohio seeking relief under chapter 11 of title 11 of the United States Bankruptcy Code.

We are in the process of filing a motion to reject supplier contracts under Bankruptcy Code section 365.

You can obtain information regarding the Chapter 11 Case at the below website:
<https://dm.epiq11.com/case/volunteerenergy/info>

Your counsel may contact Volunteer's counsel with any questions:

Darren Azman
dazman@mwe.com
McDermott Will & Emery LLP
One Vanderbilt Avenue
New York, NY 10017-3852

From: Tom Buck
Sent: Monday, March 28, 2022 1:54 PM
To: cstallin@sequentenergy.com
Cc: David Warner (dwarner@volunteerenergy.com); Jeff Horsley
Subject: Volunteer Notice

Dear Supplier,

On March 25, 2022, Volunteer Energy Services, Inc. filed a voluntary petition in the United States Bankruptcy Court for the Southern District of Ohio seeking relief under chapter 11 of title 11 of the United States Bankruptcy Code.

We are in the process of filing a motion to reject supplier contracts under Bankruptcy Code section 365.

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Your counsel may contact Volunteer's counsel with any questions:

Darren Azman
dazman@mwe.com
McDermott Will & Emery LLP
One Vanderbilt Avenue
New York, NY 10017-3852

Exhibit B

Eco-Energy Email

From: Heather Paxton <HeatherP@eco-energy.com>
Sent: Tuesday, March 29, 2022 9:22 AM
To: Tom Buck; Paul Woolard
Cc: Darren Azman (dazman@mwe.com); Jeff Horsley; David Warner (dwarner@volunteerenergy.com)
Subject: RE: Volunteer Energy Notice

[EXTERNAL]

Can you please advise if this motion has been filed and if so the associated docket number?

Heather Paxton
Credit Manager

6100 Tower Circle, Suite 500
Franklin, TN 37067
(P) 615-645-4540
(F) 615-549-0584

From: Tom Buck <tbuck@brileyfin.com>
Sent: Monday, March 28, 2022 12:49 PM
To: Heather Paxton <HeatherP@eco-energy.com>; Paul Woolard <PaulW@eco-energy.com>
Cc: Darren Azman (dazman@mwe.com) <dazman@mwe.com>; Jeff Horsley <JHorsley@volunteerenergy.com>; David Warner (dwarner@volunteerenergy.com) <dwarner@volunteerenergy.com>
Subject: Volunteer Energy Notice

CAUTION - Externally Received Email - DO NOT Click Links Or Open Attachments - Confirm the sender before taking any action.
Dear Supplier,

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We are in the process of filing a motion to reject supplier contracts under Bankruptcy Code section 365.

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<https://dm.epiq11.com/case/volunteerenergy/info>

Your counsel may contact Volunteer's counsel with any questions:
Darren Azman
dazman@mwe.com
McDermott Will & Emery LLP
One Vanderbilt Avenue
New York, NY 10017-3852

Exhibit C

Sequent Termination Letter



**Sequent Energy
Management**

A WILLIAMS COMPANY

1200 Smith Street, Ste 900
Houston, TX 77002

VIA FACSIMILE @ 614-856-3301

March 27, 2022

Volunteer Energy Services, Inc.
800 Cross Pointe Rd., Suite D
Gahanna, OH 43230
Facsimile: 614-856-3301
Attention: Richard A. Curnutte Sr.
Clark Runck
Jeffrey Horsley

Volunteer Energy Services, Inc.
790 Windmiller Dr.
Pickerington, OH 43147
Facsimile: 614-856-3301
Attention: Richard A. Curnutte Sr.
Clark Runck
Jeffrey Horsley

Re: (i) Natural Gas Asset Management Agreement dated as of March 25, 2021, by and between Volunteer Energy Services, Inc. ("Volunteer") and Sequent Energy Management LLC ("Sequent"), as successor to Sequent Energy Management, L.P. (the "AMA") and (ii) Base Contract for Sale and Purchase of Natural Gas dated as of November 1, 2006, between Sequent and Volunteer (the "NAESB Base Contract"), together with the Special Provisions dated November 1, 2006 relating thereto and all transaction confirmations, schedules, exhibits, attachments and/or annexes attached thereto or with respect thereto (the "NAESB Contract"; and together with the AMA, the "Agreements")

Gentlemen:

Reference is hereby made to the above-referenced Agreements. All capitalized terms used herein and not otherwise defined herein shall have the meanings given such terms in the NAESB Contract and, if not defined in the NAESB Contract, then under the AMA.

On Friday, March 25, 2022, Volunteer filed a voluntary petition for chapter 11 protection under the Bankruptcy Code in the Bankruptcy Court for the Southern District of Ohio. Such filing constitutes an Event of Default as defined in Section 10.2 of the NAESB Base Contract. Pursuant to the terms of the Agreements including, without limitation, Sections 9 and 10.2 of the NAESB Base Contract, the undersigned hereby provides Notice

to Volunteer that effective immediately, Sequent has elected to suspend and withhold all deliveries of Gas under the Agreements commencing on Monday, March 28, 2022.

Sincerely,

SEQUENT ENERGY MANAGEMENT LLC

DocuSigned by:
Peter S Burgess
By: _____
Name: Pete Burgess
Title: VP Treasury and Insurance

cc: John Melko, Foley and Lardner LLP
Vu Hoang Quan, Foley and Lardner LLP