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Tel 850.444.6111

GULF POWER
A SOUTHERN COMPANY

February 28, 2011

Ms. Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee FL 32399-0870

Dear Ms. Cole:

Enclosed for official filing in Docket No. 110001-EI are an original and fifteen copies of the following:

1. Prepared direct testimony and exhibit of Herbert R. Ball. 01341-11
2. Prepared direct testimony and exhibit of Richard W. Dodd. 01342-11

Sincerely,

Susan D. Ritenour

Susan D. Ritenour
Secretary and Treasurer
and Regulatory Manager

vm

Enclosures

cc: Beggs & Lane
Jeffrey A. Stone, Esq.

COM 5
APA 1
ECR 16
GCL 1
RAD 1
SSC ___
ADM ___
OPC ___
CLK CT.RPR

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: **Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor**)

Docket No.: **110001-EI**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U. S. Mail this 28th day of February, 2011, on the following:

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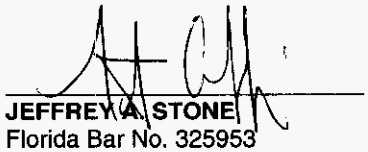

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GULF POWER COMPANY

Before the Florida Public Service Commission
Prepared Direct Testimony & Exhibit of
H. R. Ball
Docket No. 110001-EI
Date of Filing: March 1, 2011

GULF POWER COMPANY

Before the Florida Public Service Commission

Prepared Direct Testimony and Exhibits of

H. R. Ball

Docket No. 110001-EI

Date of Filing: March 1, 2011

Q. Please state your name, business address, and occupation.

A. My name is Herbert Russell Ball. My business address is One Energy Place, Pensacola, Florida 32520-0780. I am the Fuel Manager for Gulf Power Company.

Q. Please briefly describe your educational background and business experience.

A. I graduated from the University of Southern Mississippi in 1978 with a Bachelor of Science Degree (Chemistry major) and again in 1988 with a Masters of Business Administration. My employment with the Southern Company began in 1978 at Mississippi Power Company (MPC) at Plant Daniel as a Plant Chemist. In 1982, I transferred to MPC's Corporate Office and worked in the Fuel Department as a Fuel Business Analyst. In 1987 I was promoted and returned to Plant Daniel as the Supervisor of Chemistry and Regulatory Compliance. In 1998 I transferred to Southern Company Services, Inc. in Birmingham, Alabama and took the position of Supervisor of Coal Logistics. My responsibilities included administering coal supply and transportation agreements and managing the coal inventory program for the

Southern Electric System. I transferred to my current position as Fuel Manager for Gulf Power Company in 2003.

Q. What are your duties as Fuel Manager for Gulf Power Company?

A. My responsibilities include the management of the Company's fuel procurement, inventory, transportation, budgeting, contract administration, and quality assurance programs to ensure that the generating plants operated by Gulf Power are supplied with an adequate quantity of fuel in a timely manner and at the lowest practical cost. I also have responsibility for the administration of Gulf's participation in the Intercompany Interchange Contract (IIC) between Gulf and the other operating companies in the Southern Electric System (SES).

Q. What is the purpose of your testimony in this docket?

A. The purpose of my testimony is to summarize Gulf Power Company's fuel expenses, net power transaction expense, and purchased power capacity costs, and to certify that these expenses were properly incurred during the period January 1, 2010 through December 31, 2010. Also, it is my intent to be available to answer questions that may arise among the parties to this docket concerning Gulf Power Company's fuel expenses.

Q. Have you prepared an exhibit that contains information to which you will refer in your testimony?

A. Yes, I have.

Counsel: We ask that Mr. Ball's exhibit consisting of thirteen schedules be marked as Exhibit No. _____(HRB-1).

Q. During the period January 2010 through December 2010, how did Gulf Power Company's recoverable total fuel and net power transaction expenses compare with the projected expenses?

A. Gulf's recoverable total fuel cost and net power transaction expense was $639,924,986, which is $42,887,016 or 7.18% above the projected amount of $597,037,970. Actual net power transaction energy was 12,496,074,414 KWH compared to the projected net energy of 12,209,710,000 KWH or 2.35% above projections. The resulting actual average cost of 5.1210 cents per KWH was 4.73% above the projected cost of 4.8899 cents per KWH. This information is from Schedule A-1, period-to-date, for the month of December 2010 included in Appendix 1 of Witness Dodd's exhibit. The higher total fuel and net power transaction expense is attributed to a higher quantity of available energy (KWH) than projected. The actual total cost of available energy was above projections by $54,724,706, or 7.93% and the total available quantity of energy was above projections by 2,408,238,286 KWH or 16.71%. The actual cost per KWH of available energy was 4.4275 cents per KWH which is lower than the projected cost of 4.7877 cents per KWH. A combination of higher jurisdictional customer demand and 96.46% increase in

power sales drove the higher quantity of fuel and net power transaction energy for the period. The higher cost per KWH for total fuel and net power transaction expense is primarily due to lower revenue per KWH from fuel cost and gains of power sales at a higher than projected percentage of sales occurred during off peak periods when fuel reimbursement rates were lower.

Q. During the period January 2010 through December 2010, how did Gulf Power Company's recoverable fuel cost of net generation compare with the projected expenses?

A. Gulf's recoverable fuel cost of system net generation was $606,009,955 or 6.73% below the projected amount of $649,707,594. Actual generation was 12,211,483,000 KWH compared to the projected generation of 13,308,786,000 KWH, or 8.24% below projections. The resulting actual average fuel cost of 4.96 cents per KWH was 1.64% above the projected fuel cost of 4.88 cents per KWH. The lower total fuel expense is attributed to a lower quantity of fuel burned than projected for the period. The actual quantity of fuel consumed was 120,128,038 MMBTU which is 10.41% below the projected quantity of 134,092,206 MMBTU. The generation mix was more heavily weighted to natural gas fired generation than projected due to efforts to utilize available natural gas fired generation which was lower in cost. The percentage of energy generated from natural gas fired resources was 23.77%, which was 40.24% higher than the projected percentage of 16.95%. The weighted average fuel cost for natural gas was 3.84 cents per KWH, which is 6.57% below the projected cost of 4.11 cents per KWH. The weighted average fuel cost for coal, plus lighter fuel, was 5.31cents per KWH,

which is 5.36% higher than the projected cost of 5.04 cents per KWH. This information is found on Schedule A-3, period-to-date, for the month of December 2010 included in Appendix 1 of Witness Dodd's exhibit.

Q. How did the total projected cost of coal purchased compare with the actual cost?

A. The total actual cost of coal purchased was $491,262,529 (line 17 of Schedule A-5, period-to-date, for December 2010) compared to the projected cost of $569,099,182 or 13.68% below the projected amount. The lower coal cost was due to a 16.70% lower quantity of coal purchased for the period than projected. The actual weighted average price of coal purchased was $113.92 per ton which is 3.63% above the projected price of $109.93 per ton. The higher weighted average price of coal for the period was due to a change in the mix of coal purchases during the period. Gulf deferred some planned contract coal shipments to future periods and purchased no spot coal during the current period.

Q How did the total projected cost of coal burned compare to the actual cost?

A. The total cost of coal burned was $490,869,562 (line 21 of Schedule A-5, period-to-date, for December 2010). This is 11.76% lower than the projection of $556,260,106. The lower total coal cost was due to the quantity of coal burned being 14.45% below projections. This was offset somewhat by the weighted average coal burn cost being 3.15% above projections for the period.

Q. How did the total projected cost of natural gas burned compare to the actual cost?

A. The total actual cost of natural gas burned for generation was $110,792,592 (line 47 of Schedule A-5, period-to-date, for December 2010). This is 25.30% above the projection of $88,422,329. The increase can be attributed to a higher quantity of gas burned (28.78% higher) due to natural gas fired units being more economic to operate than coal fired generation on a cents per KWH basis. The actual weighted average gas burn cost was $5.36 per MMBTU, which is 2.72% lower than the projected burn cost of $5.51 per MMBTU.

Q. Did fuel procurement activity during the period in question follow Gulf Power's Risk Management Plan for Fuel Procurement?

A. Yes. Gulf Power's fuel strategy in 2010 complied with the Risk Management Plan filed on September 2, 2009.

Q. Did implementation of the Risk Management Plan for Fuel Procurement result in a reliable supply of coal being delivered to Gulf's coal-fired generating units during the period?

A. Yes. The supply of coal and associated transportation to Gulf's generating plants is generally secured through a combination of long-term contracts and spot agreements as specified in the plan. These supply and transportation agreements included a number of purchase commitments initiated prior to the beginning of the period. These early purchase commitments and the planned diversity of fuel suppliers are designed to provide a more reliable source of

coal to the generating plants. The result was that Gulf's coal-fired generating units had an adequate supply of fuel available at all times at a reasonable cost to meet the electric generation demands of its customers.

Q. For coal shipments during the period, what percentage was purchased on the spot market and what percentage was purchased using longer-term contracts?

A. Total coal shipments for the period amounted to 4,316,443 tons. Gulf purchased none of this coal on the spot market. Spot purchases are classified as coal purchase agreements with terms of one year of less. Spot coal purchases are typically needed to allow a portion of the purchase quantity commitments to be adjusted in response to changes in coal burn that may occur during the year. There were no spot coal purchases for the period due to coal burn (tons) being 14.45% lower than projected during 2010 and a carry over of contract coal tons from the previous year. Natural gas prices were lower than projected and the low cost of gas fired generation allowed Gulf to shift generation from coal fired units to natural gas fired units. Gas fired generation was 28.64% above projections and coal fired generation was 15.74% below projections for the period. Gulf shipped all of its 2010 coal purchases under longer-term contracts. Longer-term contracts provide a reliable base quantity of coal to Gulf's generating units with firm pricing terms. This limits price volatility and increases coal supply consistency over the term of the agreements. Schedule 1 of my exhibit consists of a list of contract and spot coal purchases for the period.

Q. Did implementation of the Risk Management Plan for Fuel Procurement result in stable coal prices for the period?

A. Yes. Coal cost volatility was mitigated through compliance with the Risk Management Plan. Gulf uses physical hedges to reduce price volatility in its coal procurement program. Gulf purchases coal and associated transportation at market price through the process of either issuing formal requests for proposals to market participants or occasionally for small quantity spot purchases through informal proposals. Once these confidential bids are received, they are evaluated against other similar proposals using standard contract terms and conditions. The least cost acceptable alternatives are selected and firm purchase agreements are negotiated with the successful bidders. Gulf purchased coal and coal transportation using a combination of firm price contracts and purchase orders that either fix the price for the period or escalate the price using a combination of government published economic indices. Schedule 2 of my exhibit provides a list of the contract and spot coal purchases for the period and the weighted average price of shipments under each purchase agreement in $/MMBTU. Because of the fixed price nature of longer term contract coal purchase agreements and the substantial amount of coal under firm commitments prior to the beginning of the period, there was only a small variance between the estimated purchase price of coal and the actual price for the period (3.63% as reported on line 16 of Schedule A-5, period to date, for the month of December 2010).

Q. Did implementation of the Risk Management Plan for Fuel Procurement result in a reliable supply of natural gas being delivered to Gulf's gas-fired generating units at a reasonable price during the period?

A. Yes. The supply of natural gas and associated transportation to Gulf's generating plants was secured through a combination of long-term purchase contracts and daily gas purchases as specified in the plan. These supply and transportation agreements included a number of purchase commitments initiated prior to the beginning of the period. These natural gas purchase agreements price the supply of gas at market price as defined by published market indices. Schedule 3 of my exhibit compares the actual monthly weighted average purchase price of natural gas delivered to Gulf's generating units to a market price based on the daily Florida Gas Transmission Zone 3 published market price plus an estimated gas storage and transportation rate based on the actual cost of gas storage and transportation Gulf paid during the period. The purpose of early natural gas procurement commitments, the planned diversity of natural gas suppliers, and providing gas suppliers with market pricing is to provide a more reliable source of gas to Gulf's generating units. The result was that Gulf's gas-fired generating units had an adequate supply of fuel available at all times at a reasonable price to meet the electric generation demands of its customers.

Q. Did implementation of the Risk Management Plan for Fuel Procurement result in lower volatility of natural gas prices for the period?

A. Yes. Gulf purchases physical natural gas requirements at market prices and swaps the market price on a percentage of these purchases for firm prices

using financial hedges. The objective of the financial hedging program is to reduce upside price risk to Gulf's customers in a volatile price market for natural gas. In 2010, Gulf's weighted average cost of natural gas purchases for generation was $5.33 per MMBTU. This was 3.27% lower than the projection of $5.51 per MMBTU (line 42 of Schedule A-5, period-to-date, for December 2010). Gulf was able to hold per unit fuel costs to very reasonable levels for its customers by following its Fuel Risk Management Plan. The volatility of Gulf's natural gas cost has been reduced by utilizing financial hedging as described in the Fuel Risk Management Plan. As shown on Schedule 4 of my exhibit, the volatility of Gulf's delivered cost of natural gas over the past four-year period as measured by standard deviation was 2.68. The volatility of Gulf's hedged delivered cost of natural gas over the same four-year period as measured by standard deviation was 2.17. Therefore, the financial hedging program is achieving the goal of reducing the volatility of natural gas cost to the customer.

Q. For the period in question, what volume of natural gas was actually hedged using a fixed price contract or instrument?

A. Gulf Power hedged 6,750,000 MMBTU of natural gas in 2010 using fixed-price financial hedges. This represents 42% of Gulf's 16,058,585 MMBTU of projected natural gas burn for generation during the period and 33% of Gulf's 20,679,489 MMBTU of actual gas burn for generation during the period.

Q. What types of hedging instruments were used by Gulf Power Company, and what type and volume of fuel was hedged by each type of instrument?

A. Natural gas was hedged prirnarily using financial swaps that fixed the price of gas to a certain price. The total volume of gas hedged using financial swaps was 6,750,000 MMBTU. These swaps settled against either a NYMEX Last Day price or Gas Daily price.

Q. What was the actual total cost (e.g., fees, commissions, option premiums, futures gains and losses, swap settlements) associated with each type of hedging instrument for the period January 2010 through December 2010?

A. No fees, commissions, or premiums were paid by Gulf on the financial swap hedge transactions during this period. Gulf's 2010 hedging program resulted in a net financial loss of $19,667,161 as shown on line 2 of Schedule A-1, period-to-date, for the month of December 2010 included in Appendix 1 of Witness Dodd's exhibit.

Q. Was Gulf Power prudent in commencing and continuing litigation against Coalsales II, LLC for breach of contract?

A. Yes. Gulf Power prudently initiated and pursued litigation against Coalsales II, LLC (Coalsales) to remedy Coalsales' default under its coal supply agreement with Gulf based on the reasonable expectation that this litigation would result in reduced fuel costs for Gulf's retail customers. After informal efforts to negotiate a reasonable settlement of the coal supply contract dispute with Coalsales failed, Gulf filed a complaint with the U.S. District Court for the Northern District of Florida on June 22, 2006, (Schedule 5) against Coalsales

for breach of contract. On October 30, 2008, Gulf filed a motion for partial summary judgment on the issue of liability with the court (Schedule 6). Coalsales alternately filed a motion for summary judgment on the ground that its obligations under the contract were excused by a force majeure event. On September 30, 2009, the court issued its order granting Gulf's motion for partial summary judgment and denying Coalsales' motion for summary judgment (Schedule 7). Court ordered mediation between the parties failed to result in a settlement between the parties. Gulf filed its Memorandum Opinion on Damages (Schedule 8) and Memorandum Concerning Disputed Issues of Law (Schedule 9) with the court on January 25, 2010. The issue of Gulf's damages was tried to the court without a jury from February 9, 2010, to February 17, 2010. On September 30, 2010, the court issued its order ruling in favor of Coalsales, regarding damages (Schedule 10). On October 28, 2010, Gulf Power filed a Motion to Alter or Amend Judgment, or Alternatively, for Relief from Judgment (Schedule 11). By this motion, Gulf Power has asked the Court to reconsider its September 30, 2010, order on the ground that the order is the product of errors, both in the application of the law and an in the understanding of the facts. Coalsales filed a response to Gulf's motion on November 15, 2010, (Schedule 12) and Gulf filed a reply to Coalsales' response on December 7, 2010 (Schedule 13). This motion is still pending. Consequently, the Court's September 30, 2010, order is not yet final. Gulf is continuing to evaluate its options in light of the decision.

The Commission has a long standing policy of encouraging all reasonable litigation that can reasonably be expected to result in reduced fuel costs for retail customers. See e.g., Order No. PSC-87-18136-EI, issued in

Docket No. 870001-EI on September 10, 1987; and Order No. PSC-93-0443-FOF-EI, issued in Docket No. 930001-EI on March 23, 1993. Any damage recovery against Coalsales will be credited to Gulf's retail customers through the fuel cost recovery clause and will necessarily result in reduced fuel costs for those customers. As evidenced by the filings referenced above, Gulf Power has acted reasonably and prudently in commencing litigation and continuing to litigate against Coalsales for the benefit of its retail customers.

Q. Were there any other significant developments in Gulf's fuel procurement program during the period?

A. No.

Q. During the period January 2010 through December 2010 how did Gulf Power Company's recoverable fuel cost of power sold compare with the projection?

A. Gulf's recoverable fuel cost of power sold for the period is ($104,679,690) or 12.75% above the projected amount of ($92,842,000). Total kilowatt hours of power sales were (4,321,560,872) KWH compared to estimated sales of (2,199,687,000) KWH, or 96.46% above projections. The resulting average fuel cost of power sold was 2.4223 cents per KWH or 42.61% below the projected amount of 4.2207 cents per KWH. This information is from Schedule A-1, period-to-date, for the month of December 2010 included in Appendix 1 of Witness Dodd's exhibit.

Q. What are the reasons for the difference between Gulf's actual fuel cost of power sold and the projection?

A. The lower total credit to fuel expense from power sales is attributed to the lower average fuel reimbursement rate than originally projected. Below budget prices for natural gas reduced the fuel reimbursement rate (cents per KWH) paid to Gulf for typical power sales. Also, the timing of sales occurred during off peak (lower demand) periods a greater percentage of time than projected. During off peak periods, fuel reimbursement rates for energy sales are lower than for sales during other load demand periods.

Q. During the period January 2010 through December 2010, how did Gulf Power Company's recoverable fuel cost of purchased power compare to projected cost?

A. Gulf's recoverable fuel cost of purchased power for the period was $119,483,119 or 276.03% above the estimated amount of $31,774,516. Total kilowatt hours of purchased power were 4,606,152,286 KWH compared to the estimate of 1,100,611,000 KWH or 318.51% above projections. The resulting average fuel cost of purchased power was 2.5940 cents per KWH or 10.15% below the estimated amount of 2.8870 cents per KWH. This information is from Schedule A-1, period-to-date, for the month of December 2010 included in Appendix 1 of Witness Dodd's exhibit.

Q. What are the reasons for the difference between Gulf's actual fuel cost of purchased power and the projection?

A. The higher total fuel cost of purchased power is attributed to Gulf purchasing a greater amount of KWH at attractive prices to supplement its own generation to meet load demands. This includes energy supplied to Gulf through purchase power agreements. The average fuel cost of energy purchases per KWH was lower than projected as a result of lower-cost energy being made available to Gulf for purchase during the period. In general the actual price of marginal fuel, primarily natural gas, used to generate market energy was lower than projected for the period.

Q. Should Gulf's recoverable fuel and purchased power cost for the period be accepted as reasonable and prudent?

A. Yes. Gulf's coal supply program is based on a mixture of long-term contracts and spot purchases at market prices. Coal suppliers are selected using procedures that assure reliable coal supply, consistent quality, and competitive delivered pricing. The terms and conditions of coal supply agreements have been administered appropriately. Natural gas is purchased using agreements that tie price to published market index schedules and is transported using a combination of firm and interruptible gas transportation agreements. Natural gas storage is utilized to assure that supply is available during times when gas supply is otherwise curtailed or unavailable. Gulf's lighter oil purchases were made from qualified vendors using an open bid process to assure competitive pricing and reliable supply. Gulf adhered to its Risk Management Plan for Fuel Procurement and accomplished the

objectives established by the plan. Through its participation in the integrated Southern Electric System, Gulf is able to purchase affordable energy from pool participants and other sellers of energy when needed to meet load and during times when the cost of purchased power is lower than energy that could be generated internally. Gulf is also able to sell energy to the pool when excess generation is available and return the benefits of these sales to the customer. These energy purchases and sales are governed by the IIC which is approved by the Federal Energy Regulatory Commission (FERC). Gulf also purchases power when economically attractive under the terms of several external purchase power agreements which have been reviewed and approved by the Commission.

Q. During the period January 2010 through December 2010, how did Gulf's actual net purchased power capacity cost compare with the net projected cost?

A. The actual net capacity cost for the January 2010 through December 2010 recovery period, as shown on line 4 of Schedule CCA-2 of Witness Dodd's exhibit, was $47,456,303. Gulf's total projected net purchased power capacity cost for the same period was $48,729,557, as indicated on line 4 of Schedule CCE-1 of Witness Dodd's exhibit filed October 30, 2009. The difference between the actual net capacity cost and the projected net capacity cost for the recovery period is $1,273,254 or 2.61% lower than originally projected. This lower actual cost is due to Gulf's lower IIC reserve sharing costs. Gulf's actual reserves (MW) were higher than originally projected due to less generating unit load outages on Gulf's system. Also, Gulf received

capacity payment credits during certain months of the year as a result of the economic dispatch of one of Gulf's purchase power agreements. Therefore, Gulf's reserve purchases were lower and its associated reserve sharing costs were lower than projected for the 2010 recovery period.

Q. Was Gulf's actual 2010 IIC capacity cost prudently incurred and properly allocated to Gulf?

A. Yes. Gulf's capacity costs were incurred in accordance with the reserve sharing provisions of the IIC in which Gulf has been a participant for many years. Gulf's participation in the integrated SES that is governed by the IIC has produced and continues to produce substantial benefits for Gulf's customers and has been recognized as being prudent by the Florida Public Service Commission in previous proceedings and reviews.

Per contractual agreement in the IIC, Gulf and the other SES operating companies are obligated to provide for the continued operation of their electric facilities in the most economical manner that achieves the highest possible service reliability. The coordinated planning of future SES generation resource additions that produce adequate reserve margins for the benefit of all SES operating companies' customers facilitates this "continued operation" in the most economical manner. The IIC provides for mechanisms to facilitate the equitable sharing of the costs associated with the operation of facilities that exist for the mutual benefit of all the operating companies. In 2010, Gulf's reserve sharing cost represents the equitable sharing of the costs that the SES operating companies incurred to ensure that adequate generation reserve levels are available to provide reliable electric service to

customers. This cost has been properly allocated to Gulf pursuant to the terms of the IIC.

Q. Mr. Ball, does this complete your testimony?

A. Yes.

AFFIDAVIT

STATE OF FLORIDA)
)
COUNTY OF ESCAMBIA)

Docket No. 110001-EI

BEFORE me, the undersigned authority, personally appeared Herbert R. Ball, who being first duly sworn, deposes and says that he is the Fuel Manager for Gulf Power Company, a Florida corporation, that the foregoing is true and correct to the best of his knowledge, information and belief. He is personally known to me.

Herbert R. Ball
Fuel Manager

Sworn to and subscribed before me
this 28th day of February, 2011.

Notary Public, State of Florida at Large

(SEAL)

Vickie L. Marchman
COMMISSION # DD866249
EXPIRES: JUN. 26, 2013
WWW.AARONNOTARY.com

EXHIBIT NO. HRB-1

TABLE OF CONTENTS

FUEL AND PURCHASED POWER COST RECOVERY
AND
CAPACITY COST RECOVERY

Schedule 1
Page 1 of 1

GULF POWER COMPANY COAL SUPPLIERS
January 1, 2010 – December 31, 2010

Contract Coal Suppliers	Tons Received (1)(2)	
The American Coal Company (Crist)	897,011	
Interocean Coal Sales, LDC (Crist & Smith)	1,111,626	
Patriot Coal Sales, LDC (Crist)	370,779	
Oxbow Carbon & Minerals (Crist & Smith)	308,288	
Consolidation Coal Company (Crist & Smith)	490,697	
Foresight Coal Company (Crist)	11,686	
Coalsales LLC (Plant Daniel)	14,085	
Rio Tinto (Plant Daniel	467,998	
Twentymile Coal Company Plant Daniel)	511,997	
Interocean Coal Sales, LDC (Plant Daniel)	120,033	
Oxbow Carbon & Minerals (Plant Daniel)	12,243	
TOTAL Contract Coal		4,316,443

Spot Coal Suppliers	Tons Shipped (1)(2)	
None	0	
TOTAL Spot Coal		0
GRAND TOTAL COAL PURCHASES		**4,316,443**

(1) Data from Monthly FPSC 423 Reports.
(2) Plant Daniel tons represent Gulf's 50% share of purchases.

Docket 110001-EI
HRBall Testimony Exhibit - Schedule 2
March 1, 2011

	A	B	C	D	E
1	**Gulf Contract Coal Supplies**				
2			**Received**	**Actual**	**Weighted Avg**
3	**Supplier**	**Plant**	**Quantity (tons)**	**Heating Value**	**Price $/MMBTU)**
4	American Coal Company	Crist	897,011	11845	[redacted]
5	Foresight Coal Sales	Crist	11,686	11605	
6	Interocean Coal Sales	Crist & Smith	1,111,626	11580	
7	Oxbow Carbon	Crist & Smith	308,288	12167	
8	Consolidation Coal Company	Crist & Smith	490,697	12111	
9	Patriot Coal Sales, LDC	Crist & Smith	370,779	11878	
10					
11	**Weighted Average**	**Crist & Smith**	3,190,086	11828	**$5.110**
12					
13	Coalsales LLC	Daniel (Gulf 50%)	14,085	8555	[redacted]
14	Rio Tinto	Daniel (Gulf 50%)	467,998	8830	
15	Twentymile Coal Co.	Daniel (Gulf 50%)	511,997	11170	
16	Interocean Coal Sales, LDC	Daniel (Gulf 50%)	120,033	11225	
17	Oxbow Carbon	Daniel (Gulf 50%)	12,243	12133	
18					
19	**Weighted Average**	**Daniel (Gulf 50%)**	**1,126,355**	**10181**	**$3.932**
20					
21	**Gulf Spot Coal Supplies**				
22			**Received**	**Actual**	**Weighted Avg**
23	**Supplier**	**Plant**	**Quantity (tons)**	**Heating Value**	**Price $/MMBTU)**
24	None	None	0	N/A	N/A
25					
26	**Weighted Average Price**				**$0.000**

Gulf Natural Gas Purchase Price Variance
Actual Gas Price vs. Market Gas Price

Gulf Gas Purchase data taken from Schedules A-5

	Gulf Actual Purchases MMBtu	Gas Purchases Gulf Actual Delivered Cost (Total Dollars)	Monthly Gas Hedge Settlement (Total Dollars)	Gulf Actual Gas Purchases Weighted Average Commodity $/MMBtu	Gulf Actual Gas Storage and Transportation $/MMBtu	Gulf Actual Gas Purchases Delivered Cost $/MMBtu	Gulf Actual Hedged Gas Purchases Delivered Cost $/MMBtu	FGT Zone 3 Weighted Average Market Price Commodity $/MMBtu	FGT Zone 3 Market Price + $1.00 Storage and Transportation $/MMBtu
Jan-10	77,119	$ 1,428,757	$ 1,507,491	$5.57	$12.96	$18.53	$38.07	$5.80	$6.80
Feb-10	69,998	$ 1,194,294	$ 1,717,175	$4.77	$12.29	$17.06	$41.59	$5.57	$6.57
Mar-10	1,548,359	$ 7,382,518	$ 2,299,955	$4.16	$0.61	$4.77	$6.25	$4.13	$5.13
Apr-10	2,205,462	$ 11,330,063	$ 1,433,890	$3.69	$1.45	$5.14	$5.79	$3.98	$4.98
May-10	1,741,769	$ 9,814,984	$ 1,552,418	$3.85	$1.78	$5.64	$6.53	$4.17	$5.17
Jun-10	2,088,970	$ 12,708,343	$ 1,329,364	$4.00	$2.09	$6.08	$6.72	$4.87	$5.87
Jul-10	2,053,369	$ 12,240,336	$ 1,682,814	$3.53	$2.43	$5.96	$6.78	$4.68	$5.68
Aug-10	2,155,200	$ 12,730,889	$ 1,736,538	$3.19	$2.71	$5.91	$6.71	$4.41	$5.41
Sep-10	2,123,479	$ 10,753,177	$ 1,799,170	$2.88	$2.18	$5.06	$5.91	$3.88	$4.88
Oct-10	2,401,048	$ 10,857,008	$ 1,841,460	$4.05	$0.47	$4.52	$5.29	$3.45	$4.45
Nov-10	1,722,447	$ 7,694,150	$ 1,755,968	$3.58	$0.89	$4.47	$5.49	$3.71	$4.71
Dec-10	2,514,524	$ 12,247,137	$ 1,010,918	$5.32	($0.45)	$4.87	$5.27	$4.32	$5.32
TOTAL	**20,701,744**	**$ 110,381,656**	**$ 19,667,161**	**$3.86**	**$1.47**	**$5.33**	**$6.28**	**$4.17**	**$5.17**

Schedule 4
Page 1 of 2

Natural Gas Burn Cost Variance and Hedging Effectiveness

For the Four Year Period 2007 – 2010

Hedging Settlement Cost from Schedule A-1

Gas Cost of Net Generation and Gas Generation BTU's burned from Schedule A-3

	Gas Burn for Generation MMBtu	Gas Cost for Generation Actual Cost	Gulf Hedge Settlement Total $	Gas Cost for Generation Hedged Cost	Gas Cost of Generation Actual Cost $/MMBtu	Gas Cost of Generation Hedged $/MMBtu
Jan-07	**1,454,861**	$ 11,585,254	$ 1,221,103	$ 12,806,357	$ 7.96	$ 8.80
Feb-07	**1,776,967**	$ 16,522,229	$ 887,712	$ 17,409,941	$ 9.30	$ 9.80
Mar-07	**2,007,565**	$ 16,148,663	$ 1,030,480	$ 17,179,143	$ 8.04	$ 8.56
Apr-07	**1,346,327**	$ 11,754,925	$ 103,000	$ 11,857,925	$ 8.73	$ 8.81
May-07	**836,910**	$ 8,108,427	$ 71,000	$ 8,179,427	$ 9.69	$ 9.77
Jun-07	**1,366,522**	$ 13,087,063	$ 336,800	$ 13,423,863	$ 9.58	$ 9.82
Jul-07	**1,602,414**	$ 14,212,740	$ 1,179,680	$ 15,392,420	$ 8.87	$ 9.61
Aug-07	**1,824,517**	$ 17,196,530	$ 1,299,000	$ 18,495,530	$ 9.43	$ 10.14
Sep-07	**1,328,900**	$ 11,680,358	$ 1,119,300	$ 12,799,658	$ 8.79	$ 9.63
Oct-07	**1,497,567**	$ 13,292,047	$ 441,225	$ 13,733,272	$ 8.88	$ 9.17
Nov-07	**1,330,599**	$ 11,034,120	$ 688,000	$ 11,722,120	$ 8.29	$ 8.81
Dec-07	**998,660**	$ 8,483,467	$ 820,133	$ 9,303,600	$ 8.49	$ 9.32
Jan-08	**1,760,307**	$ 16,341,336	$ 532,730	$ 16,874,066	$ 9.28	$ 9.59
Feb-08	**1,151,325**	$ 11,205,719	$ 195,041	$ 11,400,760	$ 9.73	$ 9.90
Mar-08	**1,420,931**	$ 14,588,395	$ (662,739)	$ 13,925,656	$ 10.27	$ 9.80
Apr-08	**1,399,129**	$ 16,671,636	$ (795,445)	$ 15,876,191	$ 11.92	$ 11.35
May-08	**1,490,478**	$ 19,205,110	$ (1,375,869)	$ 17,829,241	$ 12.89	$ 11.96
Jun-08	**1,434,185**	$ 20,631,490	$ (2,540,574)	$ 18,090,916	$ 14.39	$ 12.61
Jul-08	**1,655,661**	$ 22,549,890	$ (2,817,259)	$ 19,732,631	$ 13.62	$ 11.92
Aug-08	**1,586,066**	$ 18,670,066	$ 6,557	$ 18,676,623	$ 11.77	$ 11.78
Sep-08	**1,337,160**	$ 14,896,196	$ 1,044,240	$ 15,940,436	$ 11.14	$ 11.92
Oct-08	**2,378,461**	$ 20,584,433	$ 2,288,684	$ 22,873,117	$ 8.65	$ 9.62
Nov-08	**444,771**	$ 4,025,144	$ 2,536,215	$ 6,561,359	$ 9.05	$ 14.75
Dec-08	**1,331,474**	$ 10,282,072	$ 3,326,145	$ 13,608,217	$ 7.72	$ 10.22
Jan-09	**1,843,231**	$ 11,704,449	$ 3,803,955	$ 15,508,404	$ 6.35	$ 8.41
Feb-09	**2,365,719**	$ 12,858,496	$ 4,173,375	$ 17,031,871	$ 5.44	$ 7.20

Schedule 4

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Mar-09	**1,788,700**	$ 8,729,468	$ 3,233,845	$ 11,963,313	$ 4.88	$ 6.69
Apr-09	**2,612,877**	$ 12,010,860	$ 4,448,560	$ 16,459,420	$ 4.60	$ 6.30
May-09	**2,223,673**	$ 10,921,136	$ 3,920,849	$ 14,841,985	$ 4.91	$ 6.67
Jun-09	**2,362,090**	$ 11,991,560	$ 5,652,830	$ 17,644,390	$ 5.08	$ 7.47
Jul-09	**2,141,928**	$ 10,351,752	$ 6,569,231	$ 16,920,983	$ 4.83	$ 7.90
Aug-09	**2,162,658**	$ 9,803,304	$ 6,735,010	$ 16,538,314	$ 4.53	$ 7.65
Sep-09	**1,905,731**	$ 8,260,086	$ 4,513,898	$ 12,773,984	$ 4.33	$ 6.70
Oct-09	**2,309,421**	$ 11,446,021	$ 2,545,174	$ 13,991,195	$ 4.96	$ 6.06
Nov-09	**2,421,189**	$ 10,519,805	$ 3,365,798	$ 13,885,603	$ 4.34	$ 5.74
Dec-09	**2,442,330**	$ 13,340,943	$ 2,269,725	$ 15,610,668	$ 5.46	$ 6.39
Jan-10	**130,599**	$ 960,031	$ 1,507,491	$ 2,467,522	**Maintenance Outage at Plant Smith Unit 3**	
Feb-10	**56,574**	$ 601,446	$ 1,717,175	$ 2,318,621		
Mar-10	**1,583,149**	$ 9,261,100	$ 2,299,955	$ 11,561,055	$ 5.85	$ 7.30
Apr-10	**2,010,731**	$ 10,799,268	$ 1,433,890	$ 12,233,158	$ 5.37	$ 6.08
May-10	**1,660,811**	$ 9,355,136	$ 1,552,418	$ 10,907,554	$ 5.63	$ 6.57
Jun-10	**1,989,343**	$ 11,947,425	$ 1,329,364	$ 13,276,789	$ 6.01	$ 6.67
Jul-10	**2,155,792**	$ 13,045,990	$ 1,682,814	$ 14,728,804	$ 6.05	$ 6.83
Aug-10	**2,052,336**	$ 12,403,624	$ 1,736,538	$ 14,140,162	$ 6.04	$ 6.89
Sep-10	**2,061,667**	$ 11,277,642	$ 1,799,170	$ 13,076,812	$ 5.47	$ 6.34
Oct-10	**2,334,225**	$ 11,325,829	$ 1,841,460	$ 13,167,289	$ 4.85	$ 5.64
Nov-10	**1,699,793**	$ 8,004,656	$ 1,755,968	$ 9,760,624	$ 4.71	$ 5.74
Dec-10	**2,525,034**	$ 12,507,497	$ 1,010,918	$ 13,518,415	$ 4.95	$ 5.35
TOTAL	**81,601,358**	**$ 586,184,834**	**$ 81,834,570**	**$ 668,019,404**		

Weighted Average Price	**$ 7.18**	**$ 8.19**

Variance	**7.20**	**4.72**
Standard Deviation	**2.68**	**2.17**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GULF POWER COMPANY,

Plaintiff, **Case No.:_____**

vs.

COALSALES II, L.L.C.,
f/k/a PEABODY COALSALES COMPANY,

Defendant.

_____/

COMPLAINT

COMES NOW Plaintiff, Gulf Power Company ("Gulf Power"), by and through its undersigned attorneys, and sues Defendant, COALSALES II, L.L.C., f/k/a Peabody COALSALES Company, and alleges:

JURISDICTION AND VENUE

1. Gulf Power is a corporation organized under the laws of the State of Florida with its principal place of business in Pensacola, Escambia County, Florida.

2. Defendant is a limited liability company organized under the laws of the State of Delaware with its principal place of business in St. Louis, Missouri.

3. This Court has jurisdiction over the claims set forth herein pursuant to 28 USC §1332(a) in that it is a dispute between citizens of different states and the amount in controversy exceeds $75,000, exclusive of interest and costs.

4. Venue in the United States District Court for the Northern District of Florida, Pensacola Division, is proper in that the events or omissions giving rise to the claims set forth herein occurred in Escambia County, Florida.

BREACH OF CONTRACT

5. Gulf Power is an investor-owned electric utility that serves customers throughout Northwest Florida. Gulf Power utilizes coal to fuel the majority of its electric generating units.

6. Defendant is in the business of supplying coal to electric utilities nationwide. Defendant routinely supplies coal to numerous electric utilities in the State of Florida.

7. On July 1, 1994, Gulf Power and Defendant's predecessor, Peabody COALSALES Company, entered into a coal supply agreement (the "CSA") whereby Peabody COALSALES Company agreed to supply and Gulf Power agreed to purchase 1,900,000 tons of coal annually for a term expiring on December 31, 2007. True and correct copies of the CSA and all amendments and modifications thereto are attached hereto and incorporated herein as Exhibit "A."

8. On or about December 27, 2004, Peabody COALSALES Company filed documents with the Delaware Department of State, Division of Corporations, to convert to a limited liability company named COALSALES II, L.L.C. Pursuant to Section 20.01 of the CSA, COALSALES II, L.L.C was required, as successor to Peabody COALSALES Company, to assume and perform Peabody COALSALES Company's obligations under the CSA.

9. In early 2003, Defendant notified Gulf Power that it was experiencing adverse geologic conditions at the Millennium Portal of the Galatia Mine --the primary source for coal under the CSA-- and that it would not be able to meet its tonnage requirements under the CSA.

Defendant claimed that the tonnage deficiency was the result of a nonpermanent force majeure event under section 14.03 of the CSA. Under the CSA, Defendant retained the right to correct for tonnage deficiencies caused by force majeure events through the provision of "Make-Up Tonnage."

10. Defendant continued to report adverse geologic conditions at the Galatia mine and improperly and unjustifiably declared nonpermanent force majeure events on an intermittent basis throughout 2003, 2004 and 2005.

11. Between February 1, 2003 and January 31, 2006, Gulf Power experienced tonnage shortfalls under the CSA as follows:

(a) February 1, 2003 through January 31, 2004 –100,256 tons

(b) February 1, 2004 through January 31, 2005 –239,558 tons

(c) February 1, 2005 through January 31, 2006 – 687,770 tons

12. On January 23, 2006, Defendant provided Gulf Power with written notice of a permanent force majeure event at the Millennium Portal of the Galatia Mine. The written notice informed Gulf Power that, because of the purported force majeure event at the Galatia Mine, Defendant could no longer supply coal meeting the requirements of the CSA.

13. Defendant ceased all performance under the CSA in March 2006. Between February 1, 2006 and May 31, 2006, Gulf Power experienced a coal shortfall of 584,043 tons under the CSA.

14. Between June 1, 2006 and the expiration of the CSA on December 31, 2007, Gulf has experienced or will experience a coal shortfall of 3,215,957 tons under the CSA.

15. Gulf Power contests the validity of the January 23, 2006, declaration of a force majeure event, in addition to all previous declarations of force majeure events by Defendant under the CSA.

16. Pursuant to the CSA, Defendant was required to obtain suitable coal from an alternate source and continue to perform under the CSA.

17. Defendant's failure to obtain coal from an alternate source and continue to perform under the CSA constitutes a breach of the CSA.

DAMAGES

18. As a result of Defendant's failure to perform under the CSA, Gulf Power has been damaged.

19. Gulf Power has been damaged in that it has been forced to purchase environmentally acceptable coal at market prices which are substantially higher than prices under the CSA and Gulf Power will likely incur such damages throughout the remaining term of the CSA.

WHEREFORE, Gulf Power demands judgment for damages against Defendant, as well as costs, pre- and post-judgment interest, and such other relief as the Court deems just and proper.

* * *

Schedule 5
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GULF POWER COMPANY,

Plaintiff, **Case No.: 3:06 CV 270/MCR/MD**

vs.

COALSALES II, L.L.C.,
f/k/a PEABODY COALSALES COMPANY,

Defendant.

GULF POWER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM

COMES NOW, Gulf Power Company ("Gulf Power"), by and through its undersigned counsel and files, pursuant to Fed.R.Civ.P. 56, N.D. Fla. Loc. R. 7.1 and 56.1, this Motion for Partial Summary Judgment and Supporting Memorandum.

INTRODUCTION

In this motion, Gulf Power seeks partial summary judgment to resolve the liability issue of whether CoalSales breached the Coal Supply Agreement ("CSA") between the parties. A decision on Gulf Power's motion will require the legal interpretation of the unambiguous terms of the CSA and recognition of the undisputed fact that, between January 1, 2003 and December 31, 2007, CoalSales failed to supply over 3,700,000 tons of coal to Gulf Power under the CSA as a result of purported geologic problems at the Galatia mine in Illinois. Gulf Power's damages, the determination of which necessitates a factual exploration of Gulf Power's purchase of "cover" coal, are not addressed or at issue in this motion.

This dispute centers primarily on the proper interpretation of the 1994 CSA between Gulf Power and Coalsales II, L.L.C., f/k/a Peabody Coalsales Company, ("CoalSales"). The CSA obligated CoalSales to supply Gulf Power with 1.9 million tons of coal meeting the contract specifications annually, regardless of its source, for the duration of the contract term. CoalSales contends that the contract, as amended, contemplates the provision of coal from a single source, the Galatia mine in Illinois, and that, because geological conditions at the Galatia mine purportedly prevented mining activities at Galatia, CoalSales' obligations to Gulf Power under the contract were excused by an event of *force majeure*. Gulf Power asserts that CoalSales' invocation of *force majeure* was improper as the CSA was not a sole source agreement and CoalSales was required to deliver the annual contractual quantity of coal from alternative sources for the duration of the contract term.

CoalSales' entire position depends upon the false premise that the agreement between Gulf Power and CoalSales is a sole source agreement. As a matter of law, the plain language of the CSA sets forth a supply agreement in which CoalSales contracted to provide Gulf Power with a specific quantity of coal (1.9 million tons) per year during the life of the contract. CoalSales' failure to ship nearly 4 million tons of coal to Gulf Power, while other approved sources were available, constitutes breach of the CSA by CoalSales.

Gulf Power's motion for partial summary judgment should be granted for the following reasons:

- The CSA unequivocally obligated CoalSales to deliver 1,900,000 tons of coal annually to Gulf Power.
- Nowhere does the CSA, or any amendment thereto, state that the Galatia mine is the "exclusive" source, "single" source, or "sole" source of the coal to be delivered to Gulf

Power.

- The CSA expressly provides that CoalSales has the right to supply the coal from "other Source(s)" subject to Gulf Power's approval "which approval shall not be unreasonably withheld." Gulf Power's approval was based on the quality characteristics of the coal. Numerous approved sources existed from which CoalSales could and should have met its contractual obligations.
- Nowhere does the CSA provide that CoalSales has the "right but not the obligation" to utilize alternative sources of coal to fulfill the annual tonnage obligation.
- CoalSales failed to deliver the annual quantity of Coal as required by the CSA. CoalSales failed to deliver 3,775,995 tons of coal to Gulf Power during the period January 1, 2003 to December 31, 2007.
- As a result of CoalSales' breach, Gulf Power was required to purchase cover coal.

APPLICABLE STANDARDS, FACTUAL BACKGROUND AND ARGUMENT

I. Applicable Standards

"Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." Mackey Bluffs Development Corp. v. Advance Construction Services, Inc., 2008 WL 109390 at *2 (N.D. Fla. Jan. 8, 2008). "The interpretation of a written contract is particularly suitable for summary judgment." In re Yates, 241 B.R. 247, 252 (M.D. Fla. 1999) (granting summary judgment in declaratory judgment action where terms of contract were clear and unambiguous); Lawyers Title Ins. Corp., v. JDC (Am.) Corp., 52 F.3d 1575, 1580 (11th Cir. 1995) (affirming summary judgment in declaratory judgment action involving interpretation of contract provisions). "Under

Florida law, the interpretation of a contract is a matter of law for the court's determination, 'so long as the terms of the contract are unambiguous.'" Mackey Bluffs Development Corp., 2008 WL 109390 at *2.

The existence of ambiguity is a question of law for the Court. Id. Where "the terms of the written instrument are disputed and reasonably susceptible to more than one construction, an issue of fact is presented as to the parties' intent which cannot properly be resolved by summary judgment." Id. Alternatively, where the claim in a lawsuit involves the construction of a written instrument and the legal effect to be drawn therefrom, there can be no question of fact unless there is an ambiguity in a contract term. In re Yates, 241 B.R. at 252. The CSA is not ambiguous and summary judgment is therefore appropriate.

Once the movant, Gulf Power, satisfies its initial burden under Rule 56(c) by demonstrating the absence of a genuine issue of material fact, the burden shifts to the nonmovant to "come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1987) (quoting Fed.R.Civ.Pro. 56(c)). However, the "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing [substantive] law." Id. Further, the non-moving party must show more than the existence of a "metaphysical doubt" regarding the material facts, and a "scintilla" of evidence or conclusory allegation is insufficient. Matsushita, 475 U.S. at 586.

Gulf Power submits that the plain terms of the CSA, when analyzed in accordance with basic rules of contract construction, clearly warrant entry of partial summary judgment in its

favor. The Supreme Court of Florida has stated that "the rule is too well established to require the citation of authorities that ordinarily the construction of a written contract is a matter of law which must be determined by the Court and is not within the province of the jury." City of Leesburg v. Hall, 117 So. 840, 841 (Fla.1928). There are several fundamental rules that the Court should consider in assessing the positions advocated by the parties. First, "the Court must consider the contract as a whole rather than viewing specific provisions in isolation, and a contract should be interpreted so that no portion of the contract is rendered meaningless." Certegy Transaction Services, Inc. v. Travelers Express Company, Inc., 2007 WL 3047142 at *3 (M.D. Fla. Oct. 18, 2007). Second,

> [t]he intent of the parties to the contract should govern the construction of the contract, and to determine the intent of the parties, a court should consider the language of the contract, the subject matter of the contract, and the object and purpose of the contract....[I]f the language of a contract is contradictory, obscure or ambiguous or where its meaning is doubtful so that it is susceptible of two constructions, one of which makes it fair, customary and such that a prudent man would naturally execute, while the other interpretation would make it inequitable, unnatural, or such as a reasonable man would not be likely to enter into, then the courts will approve the reasonable, logical and rational interpretation.

Huntington v. Lemon Tree I-Condominium, 874 So.2d 1, 4-5 (Fla. 5th DCA 2005). Third, "[i]f a party desires a provision as important as the right to unilaterally cancel a contract, such a provision must be *expressly* provided in the contract." Southern Crane Rentals, Inc. v. City of Gainesville, 429 So.2d 771, 773-74 (Fla. 1st DCA 1983) (emphasis supplied). See also, Taminco NV v. Gulf Power Co., 2008 WL 4661520 at *4 (N.D. Fla. Oct. 21, 2008) (granting summary judgment in favor of Gulf Power in a declaratory judgment action, where the plaintiff's claimed right to unilaterally terminate the contract was not expressly included in the contract terms.) "Where a contract is simply silent as to a particular matter, courts should not, under the guise of

construction, impose on the parties contractual rights and duties which they themselves omitted." Southern Crane Rentals, Inc., 429 So.2d at 774; accord, Ritchey & Associates, Inc. v. Eagle Communities, Inc., 531 So.2d 366, 367 (Fla. 1st DCA 1988).

The basic rule of contract construction gives priority to the intent of the parties. Bombardier Capital Inc. v. Progressive Mktg. Group Inc., 801 So.2d 131, 134 (Fla. 4th DCA 2001). The best evidence of the parties' intent "is the plain language of the contract." Thomas Vision I Homeowner's Assn, 980 So.2d 1, 1 (Fla. 4th DCA 2007). The intent of the parties "must be gleaned from the four corners of the contract." Ospina-Baraya v. Heiligers, 909 So.2d 465, 472 (Fla. 4th DCA 2005). Where the language of a contract is clear and unambiguous, "the court will enforce such contract according to its terms." Avatar Dev. Corp., v. DePani Constr. Inc, 834 So.2d 873, 876 n.2 (Fla. 4th DCA 2002)). The language of a contract is not ambiguous simply because parties to a contract disagree on the interpretation of such language. Smith v. Shelton, 970 So.2d 450, 451 (Fla. 4th DCA. 2007) ("[A] true ambiguity does not exist merely because a document can possibly be interpreted in more than one manner."); Corporate Fin., Inc. v. Principal Life Ins. Co., 461 F. Supp. 2d 1274, 1285 (S.D. Fla. 2006) ("Ambiguity is not present simply because the parties disagree on the meaning of a term."); Lawyers Title, 52 F.3d at 1580.

Where, as here, there is no ambiguity, the court is "not at liberty to give the contract 'any meaning beyond that expressed.'" Id. Unambiguous contract language "must be construed to mean just what the language therein implies and nothing more." Id. Such language is to be "given a realistic interpretation based on the plain everyday meaning conveyed by the words of the agreement . . . [and] construe[d] . . . in a manner that accords with reason and probability." Ospina-Baraya, 909 So.2d at 472. The court must interpret the agreement "as a whole, giving effect to all of its provisions." Id.; Waksman Enters., Inc. v. Oregon Props., Inc., 862 So.2d 35,

40 (Fla. 2nd DCA 2003). The court cannot resort to the rules of construction and use of extrinsic evidence to discern the parties' intent unless the language used in the contract is susceptible to more than one reasonable interpretation. Id.

II. Factual Background

Gulf Power Company has been supplying electricity to customers in northwest Florida for more than 80 years. During the last four decades, this has included electricity generated by coal-fired generating units owned and operated by Gulf Power Company at Crist Plant and the Lansing Smith Plant located north of Panama City, Florida. Affidavit of H.R. Ball, ¶3. Mr. Ball's affidavit is attached hereto and incorporated herein as Exhibit 1. These plants generate electricity primarily by burning coal to make steam which is used to turn a turbine which, when connected to a generator, creates electricity. Id. ¶ 3. Gulf Power purchases and burns approximately 3.9 million tons of coal annually at Smith and Crist. Id. ¶ 4. Gulf Power purchased and purchases its coal from coal brokers and directly from mine owners. Id. ¶ 4. CoalSales, in this case has, during the relevant time period, operated both as a seller and a trader of coal. Id. ¶ 5. Gulf Power has, since at least the 1970's, obtained a portion of its coal from or through the defendant, CoalSales. Id. ¶ 5.

In the early 1990's the parties were engaged in discussions regarding a potential long term agreement whereby CoalSales would supply a substantial portion of Gulf Power's annual coal needs. Id. ¶ 5. These discussions culminated in the execution, in May 1994, of the CSA between the parties. Id. ¶ 5. The annual quantity of coal required by the CSA, 1,900,000 (1.9

[12] See, January 15, 1998, Letter Agreement ("The *Primary* Source of Deliveries contemplated under this amendment will be the Kerr-McGee Coal Corporation's Galatia Mine, located in Saline County, Illinois.")(emphasis supplied); January 29, 2003, Letter Agreement ("The *Primary* Source of Deliveries contemplated under this amendment will be the American Coal Company's Galatia Mine, located in Saline County, Illinois.")(emphasis supplied).

Million) tons, would satisfy half of Gulf Power's annual coal needs through 2007. Id. ¶ 6. After execution of the CSA and around the time of a scheduled first price-reopener, CoalSales began to assert that purported *force majeure* conditions at the Galatia mine (the "primary source" of coal under the CSA) alleviated their 1.9 million tons/year quantity obligation. Id. ¶ 6. Throughout the following years, up to and including the end of the express term of the contract, December 31, 2007, CoalSales repeatedly failed to ship coal from alternative sources during periods of purported *force majeure* events at Galatia, even though alternative sources were identified in the CSA and other alternative sources were identified prior to CoalSales' breach. Id. ¶ 7. Gulf Power contends that CoalSales' refusal to ship coal on this basis constitutes breach of contract and has sued CoalSales for monetary damages.

III. Argument

By its execution of the CSA, CoalSales agreed to supply Gulf Power with 1.9 million tons of coal from approved sources annually from July 1, 1994, until December 31, 2007. The CSA explicitly named three approved sources of coal and contained provisions and procedures for the initiation and approval of "new" sources and "other" sources of coal. The parties' identification of a "primary" source of coal did not constitute an agreement to enter into a "sole" source agreement. The words "primary" and "sole" are not synonymous. CoalSales' claim that adverse mining conditions at the then "primary" source of coal excused its performance is not supported by the plain language of the CSA in its original form, or as amended.

On May 12, 1994, the parties executed the CSA, the agreement which is at the heart of this litigation. The CSA quite clearly obligated the seller to provide the buyer with 1.9 million tons of specific quality coal annually. Section 6.02 required that "the Seller shall provide to Buyer and Buyer shall purchase from Seller under the terms of this Coal Supply Agreement

1,900,000 tons of coal per Year during each Year of this Coal Supply Agreement..." with exceptions not relevant to this litigation. The CSA, with letter amendments dated December 15, 1998 and January 29, 2003, is attached hereto and incorporated herein as Exhibit 2. The first paragraph of § 6.02 is excerpted below:

> 6.01 Quantity and Source of Coal.
>
> 6.02 Annual Quantity. Except as otherwise provided, Seller shall supply to Buyer and Buyer shall purchase from Seller under the terms of this Coal Supply Agreement 1,900,000 Tons of coal per Year during each Year of this Coal Supply Agreement except that July 1, 1994 through December 31, 1994 shall be prorated. It is anticipated that the approximate Annual Quantity under this Agreement from Source A (Section 6.04) will be 1,000,000 Tons and from Source B (Section 6.04) 900,000 Tons.

The parties named three pre-approved Sources in the Coal Supply Agreement. These three Sources were identified as Source A: Paso Diablo Mine in Venezuela; Source B: the Galatia Mine in Illinois and Source C: the Wells/Harris Complex in West Virginia.

> 2.30 "Source" shall mean the following mine(s) from which the coal is produced:
>
> - Source A shall mean the Paso Diablo Mine, State of Zulia, Venezuela.
> - Source B shall mean the Galatia Mine, Saline County, State of Illinois.
> - Source C shall mean the Wells/Harris Complex, Boone County, State of West Virginia.

Since 2002, CoalSales has refused to ship Source C coal to Gulf Power even though it is expressly named a Source in the CSA and CoalSales has never claimed that Source C is not a viable, continuing source of coal. Prior to Coalsales' first shipment of Source C, the parties formally established the price of Source C coal shipped from CoalSales to Gulf Power under the CSA. See, Ltr., June 19, 1997, attached hereto and incorporated herein as Exhibit 3 and

Affidavit of H.R. Ball, ¶ 8.

Despite naming three sources of coal in the CSA, the parties expressly "anticipated" that, initially, the "primary source" for the annual quantity of 1.9 million tons of coal would be "a blend of coals from Source A and Source B." CSA, § 7.02.

> 7.02 Operational Performance of the Blended Product. It is anticipated that the primary source of coal under this Agreement shall be a blend of coals from Source A and Source B. In the event Buyer experiences

Tellingly, since the primary concern of the Agreement was for the Buyer's procurement of a predictable quantity of coal, the CSA contained express provisions whereby "Other Sources," including Source B alone (straight Galatia coal - without the blend of Source A coal) and Source C, could be used by Seller to meet its quantity obligations. For example., § 6.05 contains the following language:

> 6.05 Other Sources. Seller shall have the right to supply the coal to be delivered hereunder from the following "Other Source(s)" which are preapproved by Buyer; provided, however, Source(s) B and C shall be subject to satisfactory test burns as referenced in Section 6.02:
>
> B. Galatia Mine, Illinois
>
> C. Wells/Harris Complex, West Virginia

In addition to these expressly agreed upon "primary" and "other sources," the CSA set forth procedures for the establishment of "new sources" should it become necessary to use "new Source(s)" of coal to meet the seller's "annual quantity of coal.":

> Seller shall provide Buyer with at least ninety (90) days prior written notice of its intent to supply coal from any new Source(s), other than Sources specified in Section 6.04 (Sources) and Section 6.05 (Other Sources), where such new Source(s) will account for ten percent (10%) or more of the annual quantity of coal to be purchased hereunder in a Year. Such written notice

CSA, § 6.05, p. 22.

In light of the extensive recitation of multiple available sources in the CSA it strains credibility and logic for CoalSales to continue to argue that this CSA constitutes an agreement by which coal from the Galatia mine is the only available source.

Source C, Wells Harris Rock Lick - West Virginia, was named as a source in the original CSA. Affidavit of H.R. Ball, ¶ 8. CoalSales shipped coal from "Source C" to Gulf Power under the CSA in 1998 at a previously agreed upon price. Id. At that time, the Wells Harris mine complex was owned by Eastern Associated Coal Corporation, a company owned by Coalsales. Id. Source C is still producing coal to this day. Id. According to the plain language of the CSA, Gulf Power and CoalSales agreed that Source C was a pre-approved "other source." Source C has not been removed as a source by subsequent amendment. As such, Gulf Power was entitled to receive shipments from that source.

In spite of its contention that the CSA is a sole source agreement, CoalSales has provided coal from "other sources" pursuant to the CSA. Between 1994 and CoalSales' declaration of permanent *force majeure* in 2006, CoalSales provided coal from the following sources:

- Source A--Paso Diablo - Venezuela, SA (Blended with Galatia)
- Source B--Kerr McGee and American Coal - Galatia - Illinois
- Source C--Wells Harris Rock Lick - West Virginia
- New Source 1--Consolidated Coal Co. - Illinois
- New Source 2--Perry County Coal - Kentucky
- New Source 3--Drummond InterOcean - Colombia, SA
- New Source 4--Mount Owen - Australia
- New Source 5--West Elk Coal - Colorado (Blended with Galatia)
- New Source 6--Twentymile Coal - Colorado (Blended with Galatia).

Affidavit of H.R. Ball, ¶ 9.

Each of these sources had been shipped as an approved source under the CSA prior to the breach which is the subject of this litigation.

To be sure, CoalSales' consistent use of other/new sources to fulfill its annual quantity obligation under the CSA belies Coalsales' position in this case. Nevertheless, consideration of this history is not necessary to Gulf Power's summary judgment arguments. "While a court may rely on parol evidence to explain or clarify an ambiguity in a contract, the court will not look beyond the four corners of the document to determine the parties' intent where the essential terms of a contract are unambiguous." Taminco NV, v. Gulf Power Co., 2008 WL 4661520 at *2 (N.D. Fla. Oct. 21, 2008) (quoting Ellinger v. U.S., 470 F.3d 1325 (11th Cir. 2006)). "Under Florida law, when contract terms are clear and unambiguous, [the] court must give effect to the plain meaning of such terms." Id. at 5 (quoting National R.R. Passenger Corp. (Amtrak) v. Rountree Transport and Rigging, Inc., 422 F.3d 1275, 1284 (11th Cir. 2005)). Based on the unambiguous, explicit multiple source language in the CSA it is unequivocally clear that the CSA is not a *sole* source contract. There were *three* sources, A-B-C, listed by name in the CSA from its execution. The CSA set forth procedures for naming *new* sources should they be needed to meet the annual quantity obligation. In fact, new sources were approved and used. As a matter of law, the "unambiguous contract language" of the CSA "must be construed to mean just what the language therein implies and nothing more." Walgreen Co. v. Habitat Dev. Corp, 655 So.2d at 165. This matter is appropriate for summary judgment in favor of Gulf Power based on the plain meaning of the terms of the CSA.

A. Primary vs. Sole

CoalSales has argued in the past, and presumably must continue to argue, that the term "primary" found in the CSA at § 7.02 (excerpted in part above) and in later letter agreements between the parties[2] provides the contractual basis for its sole source argument. CoalSales' "primary-means-sole" argument fails for several reasons. First, and perhaps most obviously,

'primary' simply does not mean 'sole.' Second, CoalSales and Gulf Power are sophisticated market participants with experienced legal counsel. Had CoalSales and Gulf Power truly desired to enter into a sole source agreement, they would not have misused the word 'primary.' Instead, they would have used specific, unambiguous, well-defined terms such as "sole," "single," or "exclusive" in the CSA and later letter agreements.

CoalSales' attempt to redefine the terms of the CSA as a sole source agreement fails as a matter of law. "Under Florida contract law, where the contract terms are clear and unambiguous, a court must give effect to the plain meaning of the terms." National R.R. Passenger Corp. (Amtrak), 422 F.3d at 1284. "Courts may resort to reference materials to determine the accepted plain meaning of a particular term." Burns v. Barfield, 732 So.2d 1202, 1205 (Fla. 4th DCA 1999)(relying on dictionary definition of "third party"). In the case of the CSA and subsequent letter agreements, such inquiry reveals that "primary" is defined as "first in order of time or development"; "of first rank or importance". Merriam-Webster's Collegiate Dictionary, 11th Ed. 986 (2003). See also, Black's Law Dictionary, 1190, 6th Ed. (1990) ("Primary. First; principal; chief; leading. First in order of time, or development, or in intention."). These definitions make clear that the word *primary* means that something is the first of multiples. The United States Supreme Court, at least in the context of *statutory* interpretation, has agreed with this "ordinary, everyday" definition of *primary* in defining the term 'primarily.' See, Malat v. Riddell, 383 U.S. 569, 571-72 (1966) ("The respondent urges upon us a construction of 'primarily' as meaning that a purpose may be 'primary' if it is a 'substantial' one. . . . We hold that . . . 'primarily' means 'of first importance' or 'principally.'"). See also, Board of Governors of Federal Reserve System v. Agnew, 329 US 441, 446 (1947) (referencing Oxford English Dictionary and Webster's New International Dictionary in defining primary as meaning "first, chief, or principal . . .

substantial.").

CoalSales defeats this motion for partial summary judgment only if the word "primary" is found to be synonymous with the word "sole." 'Primary' and 'sole' have neither the same denotation nor connotation and cannot, as CoalSales falsely suggests, be used interchangeably. As shown above, two dictionaries disagree with CoalSales' attempt to redefine 'primary.' Not surprisingly, Roget's Thesaurus also rejects CoalSales' interpretation.

sole *adjective*
1. Alone in a given category : lone, one, only, particular, separate, single, singular, solitary, unique. *Idioms:* first and last, one and only. *See* INCLUDE. 2. Not divided among or shared with others : exclusive, single. *See* INCLUDE. 3. Without a spouse : fancy-free, footloose, lone, single, spouseless, unattached, unmarried, unwed. *Idiom:* footloose and fancy-free. *See* MARRIAGE.

primary *adjective*
1. Most important, influential, or significant : capital, cardinal, chief, first, foremost, key, leading, main, major, number one, paramount, premier, prime, principal, top. *See* IMPORTANT. 2. Preceding all others in time : earliest, first, initial, maiden, original, pioneer, prime, primordial. *See* START. 3. Not derived from something else : original, prime, primitive. *See* START. 4. Arising from or going to the root or source : basal, basic, foundational, fundamental, original, radical, underlying. *See* SURFACE. 5. Marked by the absence of any intervention : direct, firsthand, immediate. *See* CLEAR, NEAR.

Roget's II, The New Thesaurus, 766, 930, 3rd Ed (1995).

It is quite clear. Classifying a source as *primary* does not make that source the exclusive, sole or single source. In fact, classifying a source as 'primary' affirmatively establishes exactly the opposite; that source is only the first of *multiple* sources.

The CSA (and subsequent letter agreements) contains no explicitly limiting language that would enable this Court to conclude that the Galatia mine (Source B) was intended to be the "exclusive," "single," or "sole" source. In fact, the contractual language before this Court affirmatively recognizes that coal may be provided from different sources: A, B and C, as well as "primary," "other," and "new" sources.

As a matter of law, the parties' omission of express limiting language combined with the inclusion of alternative sourcing, requires this Court to conclude that the parties did not enter into

or transform an existing agreement into a sole source contract. See, Orion Power Midwest v. American Coal Sales Co., 2008 WL 2185008 at *2 (W.D. Pa. May 22, 2008) (order denying defendant's motion for partial summary judgment holding that, in the absence of explicitly-limiting language, "[t]he Court cannot conclude as a matter of law that the Maple Creek High Quality Mine was intended to be the 'exclusive,' 'single,' or 'sole' source of coal."). This recent opinion is instructive in that it involves the breach of a coal purchase and sale agreement between defendant coal sellers and the plaintiff, a power company. The defendants in the case claimed that they were not obligated to deliver coal to plaintiff because, they unsuccessfully alleged, the agreement was a sole source contract and their performance was excused by *force majeure* conditions at that claimed sole source. Defendants moved for partial summary judgment requesting an order that the contract at issue in the matter was a single source contract. The court found, as a matter of law, that the contract between the parties lacked the necessary "explicitly-limiting language" and contained "contractual language affirmatively recogniz[ing] that coal may be provided from a different source." See, Id. The court denied defendants' motion and refused to enter partial summary judgment or limit discovery.

Like the agreement in the now-settled Orion case, the CSA at issue here contains no explicitly-limiting language necessary to support a claim that the CSA is a sole source contract. Also, like the Orion agreement, this CSA contains extensive language setting forth the availability of other sources. Specifically, the CSA contains language expressly describing which source(s) of three explicitly named original sources would be considered primary; detailing the availability of new and other sources and outlining the process whereby those new/other sources would become approved for use by the seller in fulfilling its annual quantity obligation.

B. "Right but not the obligation"

CoalSales also relies on language contained in § 6.04 of the CSA as support for its contention that the CSA is a "sole source" contract. That language provides in relevant part as follows: "Seller shall have the *right* to supply the coal to be delivered hereunder from the Paso Diablo Mine (Source A), State of Zulia, Venezuela; the Galatia Mine, (Source B), Saline County, State of Illinois; or other Source(s) approved by Buyer, which approval shall not be unreasonably withheld." (emphasis supplied). Notwithstanding the obvious inclusion of alternative sourcing language in this section, CoalSales has asserted that this language created a *sole* source contract because it provides CoalSales the "right" to supply coal from other sources but not the "obligation" to do so. This particular sophism fails when the Court considers the CSA as a whole. Under the CSA, CoalSales is required to provide Gulf with 1.9 million tons of coal per year, irrespective of the source. The language in § 6.04 simply clarifies that Peabody can provide the required coal from pre-approved sources without seeking the repeated consent of Gulf Power. If CoalSales needs to use other sources to meet its annual obligation or simply wishes to use some other new coal from any other source, it must seek Gulf's prior approval to do so. Gulf Power's prior approval is necessary to ensure that the coal provided meets burn specifications required by law and necessary to the efficient operation of its plants. Section 6.05, excerpted earlier at page 10, uses similar language regarding seller's "right to supply" from "other sources."

Other sections of the CSA further underscore why CoalSales' *post hoc* rationalization using this strained 'right-but-no-obligation' argument is specious at best. For example, § 15.01, p. 54, contemplates the impact of government changes in "environmental related requirements" and provides guidance for the parties in the event of such requirements. If, in the face of

changed environmental regulations, Gulf Power were to elect to change the Coal Specifications of the CSA, § 15.01 expressly provides that "Seller shall have *the right, but not the obligation* to supply coal with such changed quality specifications under the same terms as this Agreement and at the same delivered cost per MBtu as provided hereunder." (emphasis supplied).

The very same language also appears in § 9.04(4), pp. 35-36 relating to adjustments for government impositions. Section 9.04(4) states as follows: "If seller selects option (4) above, Buyer shall have *the right, but not the obligation,* to terminate this CSA...." (emphasis supplied). The repeated use of this language undercuts CoalSales' position regarding the "right" vs. "obligation" issue in § 6.04 and § 6.05. If the parties had truly intended to grant CoalSales the "right" to provide coal from multiple sources, but not the "obligation" to do so, they undoubtedly would have included the "but not the obligation" language in § 6.04 and § 6.05 just as they did in §§ 15.01 and 9.04(4). CoalSales certainly knew how to use such limiting language. "[T]he use of different language in different contractual provisions strongly implies that a different meaning was intended." Fla.Jur.2d, Contracts, §156 (2007). In this case, CoalSales' use of different language, in different contractual provisions, to differentiate between rights and obligations establishes that the parties did not intend the meaning now espoused by CoalSales. See, Leisure Resorts, Inc. v. City of West Palm Beach, 864 So.2d 1163, 1166 (Fla. 4th DCA 2004) (use of phrase at issue in one portion of the contract but not in the section at issue "indicates that the contract drafter knew how to" use language to express the desired intent). See also, Kel Homes, LLC v. Burris, 933 So.2d 699 (Fla. 2D DCA 2006); BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1994) (the United States Supreme Court stated a similar rule, albeit in the case of *statutory* interpretation: "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but

omits it in another.").

Clearly, the parties knew how to convey a right without also imposing an obligation. The parties' failure to expressly disclaim the obligation in § 6.04 and § 6.05 clearly indicates their intention to require CoalSales to ship 1.9 million tons of coal annually from any approved source.

In the CSA, the parties have used the term "right" in § 6.04 and § 6.05 dealing with use of other sources. In § 6.03, the section immediately preceding "§ 6.04 Sources," language is used that, if used in the very next section of the CSA, would have also supported CoalSales' claim that the other sources were intended for its own discretionary, but not obligatory use: "Whenever there exists Deferred Tonnage, Seller shall have the right, *at its option*, to sell up to 200,000 Tons annually of such Deferred Tonnage to Buyer in the next Year(s) that the combined burn at Buyer's Plants exceeds 1,900,000 Tons." CSA, § 6.03, line 19-22 (emphasis supplied). "[W]hen parties to the same contract use such different language to address parallel issues . . . it is reasonable to infer that they intend this language to mean two different things." Taracorp, Inc. v. NL Industries, Inc., 73 F.3d 738, 744 (7th Cir. 1996). Given the clear evidence that the parties knew how to expressly grant CoalSales the "option" or to expressly disclaim the "obligation" in other sections of the CSA, their failure to use that language in § 6.04 and § 6.05 clearly indicates their intention to require CoalSales to ship 1.9 million tons of coal annually from any approved source. If the parties had wanted to limit CoalSales obligation to supply 1.9 million tons of coal annually to a sole source, they knew perfectly well how to do so. Rather than merely using the word "right," CoalSales could have insisted upon the language of "but not obligated to" or "at its option" which it had used in connection with the term "right" elsewhere in the CSA. Instead, CoalSales agreed to § 6.04 as written and cannot now disavow that choice out of economic self-

interest or otherwise.

In Taminco v. Gulf Power, Judge Smoak discussed the importance of a term's appearance in one section of a contract and its absence in another section. Such inconsistent use can be used to interpret the parties' intent. Taminco v. Gulf Power, 2008 WL 4661520 at *3 ("This provision also shows the parties' intent as to when the contract could be unilaterally terminated. Had the parties' intended to give Plaintiff the right to unilaterally terminate a term of the Agreement, this provision shows that they would have expressly stated it."). Had CoalSales desired an "optional" right or the "right, but not the obligation" to meet the quantity terms with alternative sources they should have included it in § 6.04 and § 6.05 as they did in §§ 6.03, 9.04(4) and 15.01. See also, Delta Mining Corp., v. Big Rivers Elec. Corp., 18 F.3d 1398, 1404 (7th Cir. 1994) (in finding language in one section of a coal supply agreement but not in the section at issue, the court held: "We have no doubt that if the parties intended to provide Delta with a similar contractual right to "make up" its under-shipments in Section 15, they would have so provided with equal clarity and would not have relied upon creative judicial interpretations to give effect to that intent.")

Finally, explicit language in § 7.01 of the CSA relating to coal specifications further supports the Gulf Power position. At the bottom of page twenty-seven, the CSA states as follows: "If during the term of this Agreement, Peabody is *required* to supply coal from a Source other than A, B and/or C, the minimum rejection limits for Ash and Btu will be as follows...." (emphasis supplied). Peabody would never be "required" to provide coal from Sources other than A, B, and/or C if this contract is a sole source contract. The fact is that the CSA is not a sole source agreement.

C. The Purpose of the Contract

Finally, it is important, in cases like this, to determine the intent of the parties and the object and purpose of the contract.

> [t]he intent of the parties to the contract should govern the construction of the contract, and to determine the intent of the parties, a court should consider the language of the contract, the subject matter of the contract, and the object and purpose of the contract....[I]f the language of a contract is contradictory, obscure or ambiguous or where its meaning is doubtful so that it is susceptible of two constructions, one of which makes it fair, customary and such that a prudent man would naturally execute, while the other interpretation would make it inequitable, unnatural, or such as a reasonable man would not be likely to enter into, then the courts will approve the reasonable, logical and rational interpretation.

Huntington v. Lemon Tree I-Condominium, 874 So.2d 1, 4-5 (Fla. 5th DCA 2005).

Gulf Power, in entering this CSA with CoalSales, entered into a long term agreement to buy *half* of its annual coal needs for its two primary power plants. When Gulf Power signed this CSA on May 12, 1994, it was committing itself to purchase well over twenty million tons of coal over the next dozen years. Gulf Power did not make a deal with a single mine for this quantity of coal. Gulf Power did not contract with the owners of the Paso Diablo mine in Venezuela, or the owners of the Galatia Mine in Illinois, or even with the Eastern Associated Coal Corp, the then-owner of the Wells Harris Complex. Instead, Gulf Power went to one of the largest coal brokers in the United States, and perhaps the world, and committed to buy that annual quantity of coal. In doing so, Gulf Power intended to guarantee a steady, reliable stream of coal to fulfill at least half its coal needs. In addition, this single deal, with its multiple named sources and explicit mechanism for obtaining approval of new sources, provided Gulf Power with a guarantee of flexibility; at least half of its coal needs would be met by CoalSales from a variety of mines.

The long term stability and flexibility of sources came with a risk. The risk to Gulf Power, of course, was that it was committing itself to one price (with a chance of modification at two scheduled price reopener periods) for half its coal needs for the next dozen years. If the price of coal plummeted, then Gulf Power would be paying above market price for 1.9 million tons of coal every year. In fact, during the first term of this contract this very scenario occurred. During the course of the 1994 CSA, when the market price of coal fell significantly below the CSA price of coal Gulf Power paid CoalSales a total of $22 million to temporarily suspend additional coal shipments. Affidavit of H.R. Ball, ¶ 10. Gulf Power did not walk away from its contractual obligations when market prices fell below the contract price. Id. Given the magnitude of tons at issue, the length of the contract term and the simple need to assure a reliable supply of coal in order to "keep the lights on" across Northwest Florida, it is illogical and unreasonable to assume that Gulf Power would have intended and agreed to tie itself to a supplier who had the right but not the obligation to supply coal.

D. Breach of Contract

After the 2003 price reopener, when the market price of coal began to climb, the frequency and volume of CoalSales' delivery shortfalls also increased. Affidavit of H.R. Ball, ¶ 10. CoalSales claimed, and continues to claim, that its nonperformance was excused by *force majeure*. Gulf Power asserts that CoalSales' invocations of *force majeure* based on geologic problems at the Galatia mine do not constitute a valid *force majeure* relieving it of its obligations to supply the coal required by the CSA. CoalSales failed to deliver 3,775,995 tons of coal to Gulf Power during the period January 1, 2003 to December 31, 2007. Affidavit of H.R. Ball, ¶¶ 11-16.

CoalSales was required to deliver the full complement of coal, 1.9 million tons annually, to Gulf Power from other acceptable, approved and available sources, including Source C, any of the other sources used previously in the contract or any other available source that might meet the specifications of the CSA and warrant Gulf Power's approval. In short, CoalSales' performance was not excused by adverse geologic conditions at Galatia and, therefore, CoalSales has breached the CSA.

CONCLUSION

The plain and unambiguous language of the CSA, when considered as a whole, demonstrates that the CSA is not a sole source agreement, that geological problems at one of multiple available sources does not justify CoalSales' invocation of *force majeure* and that CoalSales' failure to meet the annual quantity obligations constitutes breach of the CSA. Gulf Power is entitled to summary judgment as a matter of law.

For all the foregoing reasons, Gulf Power respectfully requests that the Court grant Gulf Power's Motion for Partial Summary Judgment.

Respectfully submitted this 30th day of October, 2008.

* * *

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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to the following counsel of record on October 30, 2008, by Electronic Filing:

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GULF POWER COMPANY,

Plaintiff,

v. **Case No. 3:06cv270/MCR/MD**

COALSALES II, L.L.C.
f/k/a/ PEABODY COALSALES COMPANY,

Defendant

_____/

ORDER

In this diversity action, Plaintiff Gulf Power Company ("Gulf Power") sues Defendant Coalsales II, LLC ("Coalsales") for breach of a contract for the purchase and sale of coal. Presently before the court are Gulf Power's motion for partial summary judgment on the issue of liability (doc. 54) and Coalsales' motion for summary judgment on the ground that its obligations under the contract were excused by a *force majeure* event (doc. 86). Each party has filed a response to the other's motion, and a reply to the other's response.[1] For the reasons given below, the court GRANTS Gulf Power's motion and DENIES Coalsales' motion.

Background

Gulf Power is a Florida corporation with its principal place of business in Pensacola, Florida. The corporation, an investor-owned electric utility serving the Northwest Florida

[1] (Docs. 62, 79, 94 and 102.)

area, burns coal to generate electricity at Crist Plant (in Escambia County, Florida) and Smith Plant (in Bay County, Florida). Coalsales is a coal supplier which has furnished coal to Gulf Power since the 1970s. Coalsales is a Delaware limited liability company with its principal place of business in St. Louis, Missouri.

On May 12, 1994, Gulf Power and Coalsales' predecessor, Peabody Coalsales Company, entered into a Coal Supply Agreement ("CSA" or "1994 CSA") pursuant to which Coalsales agreed to provide Gulf Power with 1.9 million tons of coal annually until December 31, 2007.[2] The CSA defined three sources of coal to be supplied under the contract: Source A, the Paso Diablo Mine, located in the State of Zulia, Venezuela; Source B, the Galatia Mine, located in Saline County in the State of Illinois; and Source C, the Wells/Harris Complex, located in Boone County in the State of West Virginia. The CSA contained provisions requiring "test burns" of coal from Sources B and C prior to their approval. In addition, the CSA included provisions for the approval of other sources of coal. The record reflects that Source B and C, as well as several other sources of coal, were approved by Gulf Power and shipped by Coalsales during performance of the contract.[3] However, according to the CSA, the parties anticipated that the "primary source" of coal provided by Coalsales under the contract would be a blend of coal from Source A and Source B.[4]

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[2] Throughout this order, the court refers to numbered "Sections" from this document. (See doc. 1-2). Before entering the CSA in 1994, the parties had entered into a previous Coal Supply Agreement in 1988 ("the 1988 CSA"). When the parties formed the CSA on May 12, 1994, they also agreed to terminate the 1988 CSA. Over the years Gulf Power also occasionally purchased coal from Coalsales pursuant to "spot" agreements. These agreements are not at issue in this litigation.

[3] Gulf Power claims, and Coalsales does not dispute, that Coalsales provided coal to Gulf Power from Source A (blended with Source B coal); Source B; Source C; Consolidated Coal Co., in Illinois; Perry County Coal, in Kentucky; Drummond InterOcean, in Colombia; Mount Owen, in Australia; West Elk Coal, in Colorado (blended with Source B coal); and Twentymile Coal, in Colorado (blended with Source B coal).

[4] In addition to the parties' express statements regarding the anticipated coal sources included in the CSA, some of the provisions were clearly drafted with Source A and Source B in mind; for example, a provision including specific instructions for shipping coal from Venezuela, the location of Source A. On the other hand, other provisions discuss multiple mines or sources, procedures for the approval of new sources, and abstract shipping terms which could be modified as needed to accommodate new sources. Because these provisions are hotly disputed by the parties, they are discussed in greater detail below.

On December 29, 1995, Gulf Power paid $22,000,000 to Coalsales as part of an agreement to amend the CSA to reduce the amount of coal from Source A that Gulf Power was required to purchase.[5] The parties amended the CSA again on or about January 15, 1998, and January 29, 2003. These amendments were part of a "market reopener" process, pursuant to Section 9.07 of the CSA, which gave Coalsales the right to extend the term of the contract at a renegotiated price.[6] The parties dispute whether the amended CSA established Source B, the Galatia Mine, as the sole source for coal supplied under the contract.[7] Coalsales describes the CSA, whether as initially drafted in 1994 or as amended in 1998 and 2003, as a "sole source" agreement which required Coalsales only to supply coal to Gulf Power from one - and only one - specific source, that being the Galatia Mine.[8] Gulf Power contends the CSA has never been treated as a sole source agreement and that since 1994 other sources for coal have been approved and supplied. It is undisputed that much of the coal supplied by Coalsales to Gulf Power under the CSA originated from Source B, the Galatia Mine. Beginning in 2003 Coalsales notified Gulf Power that, due to

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[5] The parties dispute the purpose of the December 29, 1995 amendment. Coalsales claims Gulf Power wanted to eliminate Source A, the Paso Diablo Mine in the State of Zulia, Venezuela, as a source under the CSA, while Gulf Power claims that the purpose of the amendment was to buy down the contract quantity due to a significant decrease in the market price of coal. According to Coalsales, the 1995 amendment terminated all arrangements between the parties associated with Venezuelan coal. According to Gulf Power, although it withheld approval of Source A as a "stand alone" source after the 1995 amendment, it continued to approve of a blend of Source A coal, from Paso Diablo Mine, Venezuela, and Source B coal, from Galatia Mine, Illinois. However, whether Source A was entirely eliminated from the CSA or remained an approved source so long as it was blended with Source B coal is immaterial. Once the Source B coal from the Galatia Mine became unavailable, a fact neither party disputes, then the Source A coal could not be used as a substitute for Source B coal under either parties' interpretation of events. It is undisputed, however, that Source C remained an approved source under the contract.

[6] The CSA provides a complex procedure for setting the new price for the extended; however, the price-setting procedure is not at issue in this case. Rather, the parties' dispute centers on the amendments made during the renegotiation process.

[7] The amendments also modified several important provisions related to pricing and composition of the coal and allocation of risk; however, these provisions are not at issue here.

[8] The CSA refers to three coal sources, anticipates that Coalsales will provide a blend of coal from two of the three sources, specifically Source A and Source B, and provides for the approval of other sources. However, Coalsales characterizes these two sources, together, as the "sole" source of coal under the 1994 CSA prior to the amendments made during the market reopener process. As mentioned, after the market reopener process, Coalsales claims the sole source of coal was Source B, the Galatia Mine.

adverse geologic conditions at the Galatia Mine resulting in nonpermanent *force majeure* events, Coalsales would not be able to fully satisfy its tonnage requirements under the CSA.[9] As a result, between February 1, 2003, and May 31, 2006, Gulf Power experienced shortfalls of coal totaling 1,611,667 tons.[10] On January 23, 2006, Coalsales gave Gulf Power written notice of a permanent *force majeure* event at the Galatia Mine requiring the mine's closure. Coalsales took the position that the CSA named Galatia Mine as the sole source of the coal to be supplied to Gulf Power; therefore, in Coalsales' view, the mine's closure excused it from further performance of the CSA under the *force majeure* provisions in Section 14. Gulf Power countered that the CSA was not a sole source agreement; therefore it was unacceptable and improper for Coalsales to declare a *force majeure* based on difficulties at only one mine. According to Gulf Power, if coal was unavailable from the Galatia Mine, Coalsales was obligated by the CSA to supply coal from previously approved alternate sources.

The parties attempted unsuccessfully to negotiate a resolution. On June 21, 2006, Coalsales filed a complaint for declaratory relief in the United States District Court for the Southern District of Illinois; the following day Gulf Power filed the instant case in this forum, alleging that Coalsales was in breach of contract for failing to supply coal as set forth in the CSA. Coalsales moved to stay this case, pending a decision in the Illinois case on the applicability of the "first-filed" rule. The court granted Coalsales' motion to stay and denied

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[9] Section 14.01 of the CSA defines "Force Majeure" as:

> Any act, event or condition which has had a material adverse effect on the mining, loading, preparation, transloading or transporting of the coal by Seller or its Contractor(s) or the receiving, accepting, unloading, burning, utilizing, transloading or transporting of the coal by Buyer or Buyer's contractor which results in a partial or total curtailment of either party's fulfillment of any obligation or compliance with any condition hereunder if such act, event or condition is beyond the reasonable control of the party relying thereon as justification for not performing an obligation or complying with any conditions required of such party under this Agreement.

[10] Gulf Power also estimates shortfalls of 3,215,957 tons between June 1, 2006, and December 31, 2007. According to its complaint, Gulf Power has been damaged by Coalsales' failure to perform by having to purchase environmentally acceptable coal at market prices substantially higher than the prices called for under the CSA.

as moot Coalsales' first motion to dismiss; denial was without prejudice to refiling at such time as the stay might be lifted. (Doc. 15.) Upon notice that the Illinois case had been dismissed, this court lifted its stay and Coalsales again moved to dismiss or, alternatively, to transfer the action.[11] The court denied Coalsales' motion. (Doc. 33.) The parties subsequently filed the pending motions.

Discussion

Both motions largely address the same issue: whether the adverse conditions at the Galatia Mine constituted a *force majeure* event under the CSA that excused Coalsales from its obligation to supply coal to Gulf Power.[12] A motion for summary judgment should be granted if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Welding Servs., Inc. v. Forman*, 509 F.3d 1351, 1356 (11th Cir. 2007). The court must avoid weighing contradictory evidence or making credibility determinations, *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 848 (11th Cir. 2000), and must draw all reasonable inferences in the nonmoving party's favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Because the essential facts are not in dispute, the court's decision rests on the interpretation of the CSA.[13] The interpretation of an unambiguous contract is a matter of law. *See Lawyer Title Ins. Corp. v. JDC (Am.) Corp.*, 52 F.3d 1575, 1580 (11th Cir. 1995). In accord with the parties' choice of law, as set forth in the CSA, the court applies Florida law, including the Uniform Commercial Code ("UCC") as codified in the Florida Statutes.

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[11] In Case No. 06-cv-488-DRH, United States District Judge David R. Herndon found that the United States District Court for the Southern District of Illinois had personal jurisdiction over Gulf Power and thus he denied Gulf Power's motion to dismiss on this ground. Judge Herndon also denied Gulf Power's alternate motion to transfer to this forum, instead addressing Coalsales' motion to establish its right to proceed in Illinois. Finding that Coalsales' declaratory judgment action was obviated by the instant breach of contract action, Judge Herndon dismissed Coalsales' case.

[12] Gulf Power's motion is for partial summary judgment on the issue of liability, because factual questions remain regarding the economic damage to Gulf Power from having to purchase cover coal. *See* Fed. R. Civ. P. 56(d)(2).

[13] The parties do not contest the problems at the Galatia Mine, or that Coalsales did not supply the full amount of coal provided for under the contract.

See Fla. Stat. ch. 672.[14] Because the CSA contains a merger clause designating it as the final expression of the parties' agreement, the court is precluded from considering evidence of any prior or contemporaneous agreements that may contradict it. *See* Fla. Stat. § 672.202. Furthermore, the court determines the parties' intent from the four corners of the contract, and only considers extrinsic evidence to explain or clarify ambiguous or unclear language, none of which is present in the CSA.[15] *See Taylor v. Taylor*, 1 So. 3d 348, 350 (Fla. 1st DCA 2009); *Ospina-Baraya v. Heiligers*, 909 So. 2d 465, 472 (Fla. 4th DCA 2005). The court gives a realistic, plain-language meaning to the words of the contract, and construes the contract as a whole, giving effect to all its provisions, in a manner which accords with reason and probability. *See Taylor*, 1 So. 3d at 350, *Ospina-Baraya*, 909 So. 2d at 472. Whenever reasonable, the court construes the express terms of the contract to be consistent with any course of performance, course of dealing or usage of trade. *See* Fla. Stat. § 672.208. However, when such a construction is unreasonable, the express terms of the contract shall control. *Id.*

The 1994 CSA

Gulf Power alleges that Coalsales' breach of the contract began in February 2003, after the amendments to the CSA that occurred in 1995, 1998 and 2003.[16] However, in light of the complexity of the CSA and its subsequent amendments, and the parties' history of dealing and performance, the court first considers the CSA when it was initially drafted, in 1994.[17] *See* Fla. Stat. § 672.208. Gulf Power claims the 1994 CSA clearly obligated

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[14] *See also Weyher/Livsey Constructors, Inc., v. Int'l Chem. Co.*, 864 F.2d 130, 132 (11th Cir. 1989) (in a diversity case, applying Texas's codification of the UCC to a contract for the sale of coal); *Paul Gottlieb & Co., Inc. v. Alps So. Corp.*, 985 So. 2d 1, 5 (Fla. 2nd DCA 2007) (applying Florida's codification of the UCC).

[15] The court agrees with the parties that the CSA is unambiguous.

[16] The parties entered the latest amendment on either December 5, 2002, according to Coalsales, or January 29, 2003, according to Gulf Power, but in any event before February 1, 2003, when Gulf Power first alleged shortfalls under the CSA.

[17] The court considers the effects of the amendments below.

Coalsales to provide it with 1.9 million tons of specific quality coal annually.[18] Coalsales claims the 1994 CSA obligated it only to supply a blend of coal from Source A, the Paso Diablo Mine in Venezuela, and Source B, the Galatia Mine in Illinois. Gulf Power argues that the CSA explicitly designates three pre-approved sources of coal, and provides procedures for the establishment of other sources of coal.[19] To further bolster its position, Gulf Power argues that Section 7.01, "Coal Specifications," which states: "If during the term of this Agreement, [Coalsales] is required to supply coal from a Source other than A, B and/or C, the minimum rejection limits for Ash and Btu will be as follows. . . ." is inconsistent with a sole source agreement.

Coalsales provides a variety of counter-arguments, all of which the court rejects. First, Coalsales repeatedly refers to extrinsic and parol evidence of the parties' intent in forming the 1994 CSA, which, as noted, the court is precluded from considering.[20] *See Taylor*, 1 So. 3d at 350; *Ospina-Baraya*, 909 So. 2d at 472. Despite acknowledging that the CSA is unambiguous, Coalsales never attempts to justify its use of extrinsic evidence. Next, Coalsales claims that thirty-two provisions in the 1994 CSA dictate the protocol for shipping the blend of Source A and Source B coal, thus, according to Coalsales, interpreting the contract as anything other than a single source agreement would render

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[18] The first provision of the CSA, Section 1.01," Mutual Obligations," provides: "Seller agrees to sell and deliver to Buyer and Buyer agrees to purchase and accept from Seller coal of the quantity and quality, at the price, and subject to the applicable terms and conditions hereinafter set forth." Gulf Power also refers to Section 6.02, "Annual Quality," which provides, in part: "Except as otherwise provided, Seller shall supply to Buyer and Buyer shall purchase from Seller under the terms of this Coal Supply Agreement 1,900,000 Tons of coal per Year...."

[19] Section 2.30 defines "Source" to mean the following mines from which the coal is produced: Source A, the Paso Diablo Mine, State of Zulia, Venezuela; Source B, the Galatia Mine, Saline County, State of Illinois; and Source C, the Wells/Harris Complex, Boone County, State of West Virginia. Furthermore, Section 6.05, "Other Sources," states that Coalsales could supply "the coal to be supplied hereunder" from Source B or Source C. Thus, "the coal to be supplied" under the CSA was not restricted to the blend of Source A and Source B coal.

[20] Although Coalsales states that the CSA is unambiguous, it continuously improperly relies on extrinsic and parol evidence, in the form of depositions, declarations and letter records of contemporaneous negotiations, to support Coalsales' interpretation of the contract throughout its briefs. The parties to the CSA were sophisticated business entities, represented by counsel, with significant knowledge of the purchase and sale of coal; there can be no doubt they were capable of clearly and unambiguously stating their intentions within the contract.

these provisions meaningless.[21] Gulf Power argues the provisions are consistent with its multi-source interpretation of the contract. Contrary to Coalsales' position, many of the provisions referenced by Coalsales make no reference to Source A or Source B, and several others directly contradict Coalsales' sole source interpretation.[22] Of the thirty-two provisions referenced by Coalsales, only six seem to support Coalsales' position: Sections 2.05, 5.02, and 9.01; Section 5.08; and Sections 6.02 and 7.02. Coalsales argues that Sections 2.05, 5.02 and 9.01, describe pricing, risk of loss and transfer of title only for coal from Source A and B. According to Coalsales, because the terms of these Sections make no provision for, or reference to, alternate sources of coal, the CSA would be meaningless if it were not a single source agreement. In response, Gulf Power argues that Section 6.05, which refers to Section 9.01, established the price of other sources of coal as the price of the blend of Source A and Source B coal. However, the court need not find that the CSA provided a price for other sources of coal, as the law plainly allows parties to a contract to decide on open terms, including open pricing. *See* Fla. Stat. §§ 672.204(3), 672.305 (codifying U.C.C. §§ 2-204(3), 2-305); *see also Shukla v. BP Exploration & Oil, Inc.*, 115 F.3d 849, 854 (11th Cir. 1997); *Giacalone v. Helen Ellis Mem'l Hosp. Found., Inc.*, 8 So. 3d 1232, 1232 (Fla. 2nd DCA 2009). Coalsales also notes that Section 5.08 provides detailed shipping instructions that, based on their reference to Lake Maracaibo, Venezuela, seem to be intended for coal from Source A, the Paso Diablo Mine, also in Venezuela.

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[21] Coalsales identifies these thirty-two provisions as Sections 2.05, 2.06, 2.07, 2.10, 2.12, 2.16, 2.20, 2.22, 2.23, 2.27, 2.28, 2.30, 2.34, 5.02, 5.03, 5.08, 6.02, 6.04, 6.05, 7.01, 7.02, 8.01, 8.02, 9.01, 9.04, 9.06, 9.07, 11.01, 14.02, 14.06, 15.01, and 19.01.

[22] Of the sections Coalsales refers to, Sections 2.06, 2.07, 2.10, 2.12, 2.16, 2.20, 2.27, 2.28, 2.34, 5.03, 8.01, 8.02, 9.04, 9.06, 11.01, 14.02, 14.03, 14.06 and 19.01 do not mention Source A or Source B. Coalsales also refers to Sections 6.04, which describes Source C, and 6.05, which describes "other sources," as support for its sole source interpretation. Finally, Coalsales refers to Sections 2.22, 2.23, 2.30, 6.02, 7.01, 7.02, 9.07 and15.01, which either mention sources other than Source A and Source B directly or refer to Sections 6.04 and 6.05. As noted above, Section 7.01 raises the possibility of Coalsales being "required to supply coal from a Source other than A, B and/ or C." Furthermore, the level of abstraction of the terms of the contract support a finding that the parties intended for the contract to be flexible with regard not only to the source of the coal but to other terms, such as shipping points. For example, Section 11.01 contains a billing formula which refers to a number of terms, such as the Outbound Loading Point, which are variable rather than fixed.

Although specific to Source A, the shipping instructions in Section 5.08 do not exclude the possibility of other sources of coal. If specific shipping instructions for Source A coal excluded other sources of coal, then they would also exclude Source B coal, which Coalsales was obligated to supply even under its own interpretation of the contract. Because the parties anticipated that the coal would be supplied primarily from Sources A and B, it's reasonable to expect that the agreement would provide the most detail regarding coal from those sources. However, the presence in the contract of greater detail regarding particular sources does not preclude other sources, nor does it detract from the plain language obligating Coalsales to supply coal.

Finally, Coalsales argues Sections 6.02 and 7.02 indicate that the parties "anticipated" Coalsales would supply a blend of coal from Source A and Source B.[23] The court finds that, while this language reflects the parties' anticipation that the entire 1,900,000 tons would come from Sources A and B, it does not reflect the parties' intent to *limit* Coalsales' obligation to supply coal to only those two sources. Indeed, both sections explicitly refer to other approved sources of coal. Thus, the court rejects Coalsales' argument that the provisions of the contract would be meaningless if the CSA were not a sole source agreement.[24]

Coalsales further argues that it had the right, but not the obligation, to supply coal to Gulf Power from other approved sources. Section 6.04 provides, in relevant part: "[Coalsales] shall have the right to supply the coal to be delivered hereunder from the Paso Diablo Mine, (Source A), State of Zulia, Venezuela; the Galatia Mine, (Source B), Saline County, State of Illinois; or other Source(s) approved by Buyer, which approval shall not be unreasonably withheld." Gulf Power argues that, had the parties intended for Coalsales

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[23] Section 6.02 provides, in relevant part: "It is anticipated that the approximate Annual Quality under this Agreement from Source A (Section 6.04) will be 1,000,000 Tons and from Source B (Section 6.04) 900,000 tons." Similarly, Section 7.02 provides, in relevant part: "It is anticipated that the *primary* source of coal under this Agreement shall be a blend of coals from Source A and Source B." (emphasis added).

[24] Moreover, the court agrees with Gulf Power that it would defy common sense for a sole source agreement to contain provisions, such as Section 7.01, contemplating a party being required to supply coal from other sources. *See Ospina-Baraya*, 909 So. 2d at 472 (stating courts should interpret contracts to give effect to every provision).

to have "the right, but not the obligation," to substitute sources of coal, then the parties would have used that exact language, as the parties did in other provisions of the CSA.[25] Coalsales argues, and the court agrees, that a reference in the contract to a right, without the phrase "but not the obligation," does not necessarily confer an obligation. Neither does the word "right," without more, *negate* an obligation already existing under the contract, however. Coalsales argues further that Gulf Power cannot point to a provision in the CSA requiring Coalsales to supply coal from Source C or seek approval from other sources. However, the absence of an obligation to provide coal from a particular source is entirely consistent with Gulf Power's position that Coalsales had an obligation to supply coal, but could choose between the approved sources.[26] The right to choose between the approved sources did not give Coalsales the right to refuse to supply coal at all, when only one of the approved sources became unavailable.

Coalsales also relies on Section 6.02, which provides, in relevant part: "If Seller elects to ship Source B and/or Source C tons," and on Section 6.05, which provides Coalsales with the right to defer a test burn of Source C. Again, Coalsales' right to determine the specifics of its performance does not eliminate its obligation to perform under the contract. Thus, the court finds that under the 1994 CSA Coalsales' obligation to supply coal was not limited to a single source.

The Market Reopener Amendments

Having determined that the 1994 CSA expressly contemplated multiple sources of

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[25] For example, Sections 9.04(4) ("Buyer shall have the right, but not the obligation, to terminate this CSA. . . .") and 15.01 ("Seller shall have the right, but not the obligation" to supply coal with changed quality specifications in response to changed environmental-related requirements, which are not at issue in this case).

[26] Coalsales relies on the "common sense" distinction between a right and an obligation; according to Coalsales, its position is that "Circle [right] = Circle [right]," while Gulf Power's position is that "Circle [right] = Square [obligation]." (Doc. 62-2 at 20.) The court accepts Coalsales' invitation to apply Boolean logic to the issue at hand, specifically the "or" logical operator. The obligation to do (either A or B) is not logically equivalent to an obligation to do A, because the obligation may be satisfied by doing B. Thus, just because there is no obligation to do A does not mean there is no obligation to do (either A or B). However, if it becomes impossible to do B, then the obligation to do (either A or B) may only be met by doing A. Furthermore, under De Morgan's laws, doing (either A or B) is only impossible if doing A is impossible *and* doing B is impossible. *See* STAN GIBILISCO & NORMAN H. CROWHURST, MASTERING TECHNICAL MATHEMATICS 422 (3d ed. 2007).

coal, the court will consider whether, as Coalsales suggests, during the "market reopener" process, the parties amended the CSA to a single source agreement.[27] Section 9.07 provided a procedure for periodic price renegotiation, referred to by the parties as "market reopeners." The procedure provided that, in 1997 and 2002, at the direction of either party, Gulf Power would use a bidding process to determine the new market price of the coal to be supplied under the contract. Coalsales had the right to either allow the contract to expire or to accept the new market price; if Coalsales accepted the new price, the contract would continue. Accordingly, on November 11, 1997, and October 31, 2002, Gulf Power provided Coalsales with a new market price. On December 8, 1997, and December 5, 2002, Coalsales mailed letters which, in addition to accepting the new price, notified Gulf Power that "the entire 1.9 million tons will be supplied from [the] Galatia Mine, subject to substitution rights contained in the Agreement."[28] (*See* docs. 87-11, 87-17). Further, the letters concluded: "If the foregoing meets your approval, an appropriate amendment to the Agreement will be prepared and executed by the parties." *Id.* On January 15, 1998 and January 29, 2003, the parties both signed agreements which expressly amended the CSA. Instead of the language from the letters referring to Galatia Mine as the source for the "entire 1.9 million tons," the two agreements stated: "The Primary Source of Deliveries contemplated under this [a]mendment will be the . . . Galatia Mine."[29]

Coalsales argues that the letters had the effect of continuing the contract, which Gulf Power does not dispute, and altering the contract's terms, which Gulf Power disputes. Gulf Power states that Section 28.01 of the CSA requires any amendments to the contract to be evidenced by an agreement in writing, and notes that the parties amended the CSA by

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[27] As noted above, the parties also amended the agreement in 1995; this amendment has not been discussed by the parties so the court does not discuss it here.

[28] The court analyzes the two letters together because they contain identical language on the disputed issue, as do the two agreements.

[29] There are minor inconsequential differences between the two amendments. The omission in the quoted text reflects a change in the Galatia Mine's ownership; in 1998, it was owned by Kerr-McGee Coal Corporation, but in 2003, it was owned by American Coal Company. In addition, the 1998 amendment does not capitalize the word "amendment," but the 2003 agreement does.

agreement on January 15, 1998 and January 29, 2003.. Coalsales provides no support for its claim that the right to extend the term of a contract pursuant to Section 9.07 carried with it the right to unilaterally modify its terms without the agreement of the other party. Thus, while Coalsales' letters did not amend the contract, the 1998 and 2003 agreements did. However, Coalsales argues in the alternative that the 1998 and 2003 agreements, which designate the Galatia Mine as the "Primary Source," have the effect of naming Galatia Mine as the sole source under the contract.[30] Gulf Power argues, and the court agrees, that "primary" does not, in fact, mean "sole," particularly in light of the course of dealing and performance of the parties under the CSA, including Coalsales' supply of coal from multiple sources other than the Galatia Mine. Gulf Power also argues that, in the absence of express limiting language, the court must conclude that the parties did not enter into a sole source agreement, citing *Orion Power Midwest v. American Coal Sales Co.*, 2008 WL 2185008 at *2 (W.D. Pa. May 22, 2008) (unpublished). The court in *Orion Power Midwest* faced a facially similar breach of contract action in which the plaintiff alleged that the defendant was obligated to provide coal from an alternative source when an event of *force majeure* closed a mine. *Id.* The defendant moved for summary judgment on the ground that the coal contract was a sole source contract. *Id.* at *1. The court noted that the contract, which contained no express limiting language, contained several provisions inconsistent with a sole source interpretation of the contract. *Id.* at *2. Additionally, the contract in that case defined *force majeure* in a manner that could require the defendant to provide coal from an alternate source, despite other indications that it was a sole source contract. *Id.* at *1. Because no explicitly limiting language appeared in the contract and the parties each presented conflicting but reasonable interpretations, the court could not conclude as a matter of law that the parties intended to enter a sole source contract. *Id.* at *2 Here, the contract at issue is not susceptible to two conflicting reasonable interpretations. To the contrary, it explicitly identified three sources and made provisions

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[30] Coalsales also argues that the 1998 and 2003 agreements incorporate the terms of the letters, based on language preceding the agreement to amend stating that the parties were amending the CSA "in accordance with" the 1997 and 2002 letters. The court cannot infer from this preface the parties' intent to incorporate language into the agreements which differs from the agreements' express unambiguous terms.

for other approved sources as well. Due to the factual and postural differences, the court does not rely on *Orion Power Midwest*. However, based on the plain, unambiguous language of the CSA as amended during the market reopeners, the court finds that the CSA was not a sole source agreement.[31]

The *Force Majeure* Clause

The CSA excuses nonperformance of an obligation when it is the result of an adverse event outside of the party's control.[32] The parties agree that there were adverse conditions at the Galatia mine and that those conditions were not within the control of Coalsales. However, because other mines were approved and available to Coalsales, the court finds Coalsales failure to meet its obligations to Gulf Power was not the result of the conditions at Galatia Mine. Gulf Power has alleged, and Coalsales has not disputed, that coal was readily available to Coalsales from other approved sources, including Source C, the Wells/Harris Complex, located in West Virginia. Therefore, Coalsales' nonperformance is not excused by the *force majeure* clause.

Conclusion

The court finds that the 1994 CSA unambiguously obligated Coalsales to supply Gulf Power with coal from any of several approved sources. The 1998 and 2003 amendments the parties entered to during the "market reopener" process did not limit Coalsales obligation to providing coal to a single source. Because Coalsales obligation to provide coal was not limited to a single source, the closure of Source B, the Galatia Mine, did not

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[31] Finally, Coalsales argues that, because Gulf Power used the phrase "sole primary source of supply" to describe a mine in the parties' 1988 termination agreement, "sole" and "primary" are synonymous. *(See* doc. 87-4 at page 2). The court does not find the terms synonymous. Notwithstanding, the court notes the *absence* of the word "sole" from the CSA when the parties designated Source B as the primary source. The parties past dealings indicate that, had they desired to describe Source B as the "sole primary" source, they could have.

[32] Coalsales argues that the *force majeure* clause is rendered meaningless by a multi-source interpretation of the contract. Gulf Power argues, and the court agrees, that the *force majeure* has meaning: under the plain language of the contract, Coalsales' performance would be totally excused if *all* approved sources of coal were unavailable to Coalsales. It is undisputed that Source C was an approved source of coal available to Coalsales. Similarly, the unavailability of some portion of the approved sources would cause a partial curtailment of Coalsales' obligation, excusing Coalsales' performance for the time and to the extent it needed to make arrangements to substitute coal from the other approved sources.

constitute a *force majeure* event under the CSA which freed Coalsales of its obligations. Thus, the court finds that Coalsales breached the CSA by failing to supply the agreed upon amount of coal to Gulf Power.

Accordingly, it is ORDERED:

1. Gulf Power's Motion for Partial Summary Judgment (doc. 54) is GRANTED.

2. Coalsales' Motion for Summary Judgment (doc. 86) is DENIED.

DONE and ORDERED this 30th day of September, 2009.

s/ M. Casey Rodgers

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GULF POWER COMPANY,

Plaintiff,

vs. **Case No. 3:06-cv-00270-MCR-MD**

COALSALES II, LLC, f/k/a
PEABODY COALSALES COMPANY,

Defendant.

_____/

MEMORANDUM OPINION ON DAMAGES

In this diversity action, Plaintiff Gulf Power Company ("Gulf Power") sues Defendant Coalsales II, LLC ("Coalsales") for breach of a contract for the purchase and sale of coal. On September 30, 2009, this Court entered an Order (Doc. 112) granting Gulf Power's motion for partial summary judgment on the issue of liability (Doc. 54) and denying Coalsales' motion for summary judgment wherein it asserted that its obligations under the contract were excused by a force majeure event (Doc. 86). Coalsales filed a motion for reconsideration of this Court's Order on October 30, 2009 (Doc. 120), which motion was denied by this Court by its Order dated November 3, 2009 (Doc. 122).

The damages trial was tried as a bench trial on February 9 - ___, 2010. The parties were represented by their respective counsel. The Court heard testimony from a variety of fact and expert witnesses and has considered the documentary evidence presented by the parties.

a. Background

Gulf Power is a Florida Corporation with its principal place of business located in Pensacola, Florida. The corporation, an investor-owned electric utility serving the Northwest Florida area, burns coal to generate electricity at Crist Plant (in Escambia County, Florida) and Smith Plant (in Bay County, Florida). Coalsales is a Delaware Corporation with its principal place of business located in St. Louis, Missouri. Coalsales is a coal supplier which has furnished coal to Gulf Power since the 1970's.

On May 12, 1994, Gulf Power and Coalsales' predecessor, Peabody Coalsales Company, entered into a Coal Supply Agreement ("CSA" or "1994 CSA") pursuant to which Coalsales agreed to supply Gulf Power with 1.9 million tons of coal annually until December 31, 2007. Section 9.07 of the 1994 CSA sets forth the process by which the parties would conduct periodic "market reopeners." Gulf Power Exh. _____, 1994 CSA, § 9.07. The May 12, 1994, CSA as amended pursuant to the market reopeners, set the price[1] of CSA coal. The price of coal under the CSA during the time relevant to this dispute is memorialized by a letter agreement between the Parties dated January 29, 2003 ("Market Price Reopener Letter Agreement"), Gulf Power Exh. _____. In the Market Price Reopener Letter Agreement, the Parties agreed that the FOB Barge Alabama State Docks Market Adjusted Billing Price for 12,000 Btu coal delivered under the CSA "shall be $34.11 per ton, which when combined with the Market Adjusted Buyer's Transportation Cost of $2.36 per ton equates to a Delivered Price of $1.5197 per MMBtu."

[1] That CSA price was subject to quarterly price adjustments pursuant to the CSA as measured exclusively by the Gross Domestic Product – Implicit Price Deflator. The history and amount of these adjustments were provided by testimony of Gulf Power witnesses.

Coalsales was required to ship the agreed annual amount of coal, 1.9 million tons, over the course of each contract year at a rate of approximately 158,333 tons per month. The annual tonnage requirements under the CSA amounted to approximately one-half of Gulf Power's annual coal requirements for its Plants Smith and Crist. Under the CSA as amended, COALSALES was not entitled to a premium for delivering coal with a sulfur content that fell below 1.7 lbs SO2/MMBtu.

b. Shipment Shortfalls

From 2003 through December 31, 2007, Coalsales repeatedly failed to ship the full amount of CSA coal to Gulf Power under claims of *force majeure*. This Court has previously determined that this failure to ship constituted a breach of the CSA (Doc. 112). The parties have stipulated as to the tons of shortfall coal (the coal that was not sent to Gulf Power during the time of Coalsales' breach).

The total 2004 shipment shortfall under the CSA was 215,305 tons. The total 2005 shipment shortfall under the CSA was 578,307 tons. The total 2006 shipment shortfall under the CSA was 1,703,615 tons. The total 2007 shipment shortfall under the CSA was 1,123,889 tons. The total shipment shortfall under the CSA for the years 2004 through 2007 was 3,621,116 tons.

c. Gulf Power Cover Purchases

In order to continue to generate electricity it was necessary for Gulf Power to purchase coal to replace the shortfall tons that Coalsales did not ship. Between 2003 and December 31, 2007, Gulf Power purchased coal to replace the shortfall tons. The cover coal that Gulf Power purchased was consumed in its two power plants located in

Northwest Florida, the Crist Power Plant and the Smith Power Plant. The coal purchased by Gulf Power to replace the shortfall tons met the quality specifications of the CSA. The Interocean Colombian coal purchased by Gulf Power from 2003-2007 was, at all times relevant, an approved source of coal under the CSA. That same Colombian coal had been provided to Gulf Power by Coalsales from 2003 through 2007 both as a "Right to Match" coal under the CSA and as "cover coal" to replace an August 2003 shortfall of Galatia coal. Other sources, including an original CSA "pre-approved" and subsequently "approved" "Source" of coal, Source C of the Wells Harris Complex in West Virginia, were available to Coalsales but Coalsales did not supply these coals to Gulf Power during times of shortfall.

d. Annual Shortfalls and Cover Purchases

In 2004 Coalsales fell short of its annual obligation by 215,305 tons. Gulf Power replaced this shortfall using two spot agreements, Fuel Purchase Order ("FPO") FPO 4003 with Drummond Interocean, an approved source, and FPO 4004 with Coal Marketing Company. Gulf Power paid $3,923,302 over and above the CSA price to procure this replacement coal.

In 2005 Coalsales fell short of its annual obligation by 578,307 tons. Gulf Power replaced this shortfall using coal purchased under two spot agreements, FPO 5001 and FPO 5007 with Drummond Interocean. Gulf Power paid $12,594,394 over and above the CSA price to procure this replacement coal.

In 2006 Coalsales fell short of its annual obligation by 1,703,615 tons. Gulf Power replaced this shortfall using coal purchased under three spot agreements, FPO 6003 with Drummond Interocean, FPO 6004 with Glencore Ltd., and FPO 6005 with

Interocean Coalsales. Gulf Power paid $40,419,725 over and above the CSA price to procure this coal.

In 2007 Coalsales fell short of its annual obligation by 1,123,889 tons. Gulf Power replaced this shortfall using coal purchased under two new multi-year coal supply agreements with Drummond Interocean and American Coal Company. Gulf Power paid $20,527,789 over and above the CSA price to procure this coal.

Coalsales offered no evidence that Gulf Power's cover purchases were unreasonable. Coalsales did not identify any specific source of available, offered coal that it contended Gulf Power should have bought instead of that coal Gulf Power actually purchased as cover coal. Coalsales' expert witness has not developed an opinion as to the commercial reasonableness of the "cover" coal purchased by Gulf Power to replace the shortfall tons between 2004 and 2007. Coalsales' expert witness has not developed an opinion as to which source(s) he believes Gulf Power should have used to procure coal to replace the shortfall tons between 2004 and 2007. Coalsales' expert witness has not reached a conclusion that the purchase orders designated by Gulf Power as representing Gulf's replacement coal do not, in fact, reflect coal actually purchased by Gulf to replace shortfall tons between 2004 and 2007. Coalsales' expert witness has not developed an opinion as to what cost (in dollars) he believes Gulf Power reasonably should have incurred to purchase replacement coal following Coalsales' declarations of *force majeure* between 2004 and 2007.

Gulf Power's cover purchases were made at or below the then-current market price for coal suitable for consumption in the Smith and Crist plants operated by Gulf Power. Although these Gulf Power cover purchases were at or below the market price

for other comparable coal, the price Gulf Power paid to replace the shortfall tonnage significantly exceeded the price Gulf Power would have paid for the same tonnage had Coalsales not breached the CSA.

Jurisdiction

a. Basis of Federal Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1332(a) in that it is a dispute between citizens of different states and the amount in controversy exceeds $75,000, exclusive of interest and costs.

The Law of Cover Damages

b. The UCC in Florida

In accordance with the Parties' choice of law provision in the CSA, the CSA, and the calculation of damages stemming from Coalsales' breach of the CSA shall be governed by and construed in accordance with the substantive laws of the State of Florida. See Ex.__, 1994 CSA, § 26.01. The Federal Rules of Evidence apply to this action.

Article 2 of the Uniform Commercial Code, as codified in Florida Statutes Chapter 672, applies to Gulf Power's claim for damages. The coal to be purchased and sold pursuant to the CSA constitutes "goods" under section 672.105(1), Florida Statutes. Gulf Power has elected to pursue its damages under section 672.712, Florida Statutes, by seeking damages for the costs of its "cover" purchases.

The Florida UCC provides guidance on what is a "reasonable time": "Whether a time for taking an action required by this code is reasonable depends on the nature, purpose, and circumstances of the action." § 671.204(1), Fla. Stat.

Further, the UCC defines "good faith," in the case of a merchant, as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." § 672.103(1)(b), Fla. Stat. This entails both a subjective component ("honesty in fact") and an objective component ("reasonable commercial standards"). See, White & Summers, UNIFORM COMMERCIAL CODE, § 6.3 at p. 391 (5th ed. 2006).

While Gulf Power's damages are substantial, the legal issues in this case are not complex. This case involves a textbook application of the buyer's "cover" remedy under section 672.712, Florida Statutes. Section 672.712, provides in relevant part as follows:

> (1) After a breach . . . the buyer may 'cover' by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
>
> (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined, but less expenses saved in consequence of the seller's breach.

§ 672.712, Fla. Stat.

The Official Comments to the Uniform Commercial Code[2] provide that the definition of "cover" under subsection (1) envisages

> [g]oods not identical with those involved but commercially usable as reasonable substitutes under the circumstances of the particular case.... [T]he test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective.

[2] Section 672.712, Florida Statutes, mirrors section 2-712 of the Uniform Commercial Code.

U.C.C. §2-712, Official Comment 2.

The Official Comments also speak directly to the issue of the timing of the cover purchases:

> The requirement that the buyer must cover without 'unreasonable delay' is not intended to limit the time necessary for him to look around and decide how he may best effect cover. The test here is similar to that generally used in this Article as to reasonable time and seasonable action.

Id.

The reasonableness of a purchaser's cover actions, including the timing and effort to cover are questions of fact. Mason Distributors, Inc. v. Encapsulations, Inc., 484 So.2d 1275, 1276 (Fla. 3d DCA 1986) (citing Transammonia Export Corp. v. Conserv, Inc., 554 F.2d 719, 724 (11th Cir. 1977)). It is generally accepted that "[t]he requirements for a proper cover are not stringent." 1 Damages Under UCC, Cover Remedy § 7:6. "The requirements of good faith and commercial reasonableness are intended to allow the buyer broad latitude in making the cover purchase." Id.

According to Professors White and Summers, "[c]ourts should be slow to find a buyer's good faith acts unreasonable. The courts should not hedge the remedy with restrictions in the name of 'reasonableness' that render it useless or uncertain for the good faith buyer." See, White & Summers, UNIFORM COMMERCIAL CODE § 6-3 (5th ed. 2006). See also, 1 Damages Under UCC, Reasonable Purchase §8:13 ("[I]t is clear from the reported decisions that the buyer's cover conduct will be given broad latitude and that the presumption will be that the cover purchase was proper."). The courts' practice of affording aggrieved purchasers broad latitude in making cover decisions is consistent with the UCC's directive that "[t]he remedies provided by this code must be

liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed...." § 671.106(a), Fla. Stat.

c. Burden of proof as to reasonableness of cover purchases

Coalsales contends that Gulf Power has the burden to demonstrate the reasonableness of its cover purchases. Coalsales is mistaken as to which party bears the burden of proof. "The seller has the burden of showing that the cover was unreasonable." TVI, Inc. v. Infosoft Technologies, Inc., 2008 WL 239784 at *11 (E.D. Mo. Jan. 28, 2008); 1 Damages Under UCC, Reasonable Purchase §8:13 ("The burden is thus on the seller to prove that the cover was unreasonable."); 1 Damages Under UCC, Burden of Proof §8:25 ("Once the buyer has alleged and shown a cover purchase, the courts have consistently held that a presumption arises that the cover was proper, and the burden then shifts to the seller to raise a probable inference of impropriety."). See also, Aquila, Inc. v. C.W. Mining, 545 F.3d 1258, 1268 (10th Cir. 2008) (upholding district court's finding that utility's purchase of cover coal was reasonable where utility witnesses' testimony was "coherent and facially plausible" and not "contradicted by extrinsic evidence."). Coalsales has the burden of proving the cover purchased by Gulf Power was unreasonable. Coalsales has failed in meeting that burden and, in fact, has offered no such evidence. However, even if the burden was Gulf Power's to show that the cover purchases were reasonable, Gulf Power met that burden with ample testimony detailing the bid process used in identifying the cover coal. Gulf Power's cover purchases were reasonable and made in a timely manner.

d. Adjustment for sulfur content of cover coal

Coalsales contends that Gulf Power's cover damages should be reduced on the ground that the cover coal purchased by Gulf Power contained lower sulfur content than the coal required to be delivered under the CSA. Coalsales asserts that Gulf Power "benefited" as a result of purchasing replacement coal with lower sulfur content by avoiding the need to purchase and/or relinquish as many SO2 allowances as it otherwise would have if Coalsales delivered coal meeting the maximum sulfur specification under the CSA. Gulf Power disputes Coalsales' contention that Gulf enjoyed monetary benefits as a consequence of its purchase of lower sulfur cover coal. Moreover, even if one accepts that Gulf did enjoy a benefit, Coalsales' argument still lacks merit for two important reasons.

First, Coalsales ignores the fact that, under the CSA, Coalsales was not entitled to a price premium if it delivered coal to Gulf Power which possessed sulfur content below the contractually specified maximum. If --as the Court has already determined was Coalsales' legal obligation -- Coalsales had continued to perform under the CSA following the closure of the Millennium Portal of the Galatia Mine, Coalsales would have had to procure coal from suitable alternative sources. Given the relatively limited number of coals across the globe that met the sulfur specifications under the CSA, it is probable that Coalsales would have provided the same or similar coal to Gulf Power that Gulf Power used to cover the CSA shortfalls. In such case, Coalsales would not have been entitled to a premium due to the lower sulfur content of the coal. In fact, during a period of shortfall in August and September 2003, Coalsales supplied Gulf Power with 38,713.99 tons of coal in order to "avoid a breech [sic] of contract due [sic]

lack of performance with Gulf Power." [3] The "cover coal" purchased by Coalsales and supplied to Gulf Power was the same "Colombian coal" that Gulf Power later used as the primary source of its own cover coal purchases. In light of the foregoing, the effect of granting Coalsales' requested adjustment would be to provide Coalsales with a benefit that it did not actually enjoy when it met its contractual obligations and would not have enjoyed had it continued to perform under the CSA. Granting Coalsales the relief it seeks would reward it for breaching its contract with Gulf Power. By failing to ship this available, approved, alternative source of coal, Coalsales took from Gulf Power the very benefit it now claims Gulf Power received by buying this same coal on its own. Such a result is not in keeping with basic equitable principles. See, Transfer My Timeshare, LLC v. Selway, 2009 WL 3271326 at *4 (D.N.H. Oct. 9, 2009) ("'It is a fundamental principle of equity' in Florida and elsewhere that 'no one shall be permitted to profit from his own fraud or wrongdoing....'") (citing Yost v. Rieve Enterprises, Inc. 401 So.2d 178, 184 (Fla. 1st DCA 1984)).

Second, the subject coal was to be used for Gulf's own consumption; not for resale. Professors White and Summers provide the following guidance on the subject:

> What of the buyer who covers by purchasing goods of superior quality for use as a commercial substitute...? [I]f the aggrieved buyer will itself consume the cover goods, as for example by the use of furniture or equipment in a business, the problem is more difficult. Should the damage recovery under 2-712 be reduced because the cover machinery which the aggrieved buyer purchased is marginally more efficient? Because the waiting room furniture is slightly more attractive than that contracted for? We think the damage recovery should not be reduced unless the seller comes forward with persuasive evidence that the buyer will reap added profits because of the superior quality of the cover merchandise.

[3] See, Letter, October 29, 2003, Stephen L. Miller.

White & Summers, UNIFORM COMMERCIAL CODE § 6-3 (5th ed. 2006) (emphasis added). Gulf Power is undisputedly a consumer of the cover coal it purchased following the instances of breach by Coalsales. As such a consumer, Gulf Power is entitled, as a matter of law, to the heightened standard required of the seller as articulated by White and Summers above. Coalsales simply offers no evidence to satisfy that heightened standard.

Coalsales has not specifically identified any other suitable source for cover coal - other than the unavailable Galatia coal– which it contends Gulf Power should have purchased. Coalsales failed to provide this Court with any evidence that there was actually a 1.7 SO2 lbs per mmBtu coal available to Gulf Power to replace its shortfall tons. Coalsales further failed to provide this Court with any evidence, other than speculation and hypothetical scenarios, that Gulf Power actually received a benefit due to the purchase of lower sulfur coal. Coalsales has not provided any evidence that Gulf Power actually benefited – that it actually altered its emission allowance strategy - in anyway as a result of buying lower sulfur coal.

Gulf Power's cover purchases were reasonably made, using arms length transactions and commercially accepted industry practices by a Gulf Power Fuel Services team described by Coalsales' own stipulated 30(b)(6) witness, Stephen Miller, as a "good management team." Coalsales has not disputed the reasonableness of Gulf Power's cover purchases.

The Court concludes that Gulf Power acted in good faith and made commercially reasonable purchases of coal to replace the shortfall tonnage caused by Coalsales' breach of the CSA. Gulf Power, in replacing 3,621,116 tons of shortfall coal

appropriately spent $77,465,210.17 more than it would have spent had Coalsales performed as required by the amended CSA.

e. Calculation of prejudgment interest

Under Florida law, when a verdict liquidates damages on a plaintiff's out-of-pocket pecuniary losses the plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of such loss. Allstate Ins. Co. v. Palterovich, 2009 WL 2731338 at *15 (S.D. Fla. Aug. 26, 2009) (citing Greenberg v. Grossman, 683 So.2d 156, 157 (Fla. 3d DCA 1996)). Unlike the relatively lenient federal standards governing awards of prejudgment interest, Florida law forecloses discretion in the award of prejudgment interest as well as discretion in the rate of that interest. Id. (citing Ins. Co. of North America v. Lexow, 937. F.2d 569, 572 (11th Cir. 1991)). Where there is no contract rate establishing the appropriate interest rate, the interest rate is set annually by the Chief Financial Officer. Id. (citing §§ 687.01 and 55.03, Fla. Stat.) The applicable prejudgment interest rates for the relevant years is set forth below:

2004 – 2010 Interest Rates

YEAR	PER ANNUM	DAILY RATE
2010	6%	.0001644
2009	8%	.0002192
2008	11%	.0003014
2007	11%	.0003014
2006	9%	.0002466
2005	7%	.0001918
2004	7%	.0001918

See, Florida Dept. of Financial Services, Statutory Interest Rates, available at www.myfloridacfo.com/aadir/interest.htm (last accessed January 23, 2010).

The appropriate procedure for calculating prejudgment interest in this dispute is detailed in Allstate Ins. Co. v. Palterovich, 2009 WL 2731338 (S.D. Fla. Aug. 26, 2009). As the Court correctly recognized in Palterovich, in cases involving a series of defaults, the plaintiff is entitled to prejudgment interest beginning on the "date of each loss." Id. at *15. In the instant case, the CSA required Coalsales to deliver 1.9 million tons of coal per year in "reasonably equal monthly amounts" approximating 158,333 tons per month. CSA § 6.02, p. 17 lines 9-10. Prejudgment interest is properly calculated separately on a month-by-month basis for each month in which Gulf experienced a shortfall due to Coalsales' declarations of *force majeure*. The Court did not require expert testimony concerning the calculation of prejudgment interest. It is well settled in Florida that "[c]omputation of prejudgment interest is merely a mathematical computation. There is no 'finding of fact' needed. Thus, it is a purely ministerial duty of the trial judge or clerk of court to add the appropriate amount of interest to the principal amount of damages awarded in the verdict." Argonaut Ins. Co. v. May Plumbing Co., 474 So.2d 212, 215 (Fla. 1985). This monthly amount was calculated by taking the amount of the monthly shortfall and determining the difference between the CSA price and the price Gulf Power paid to cover that monthly shortfall amount. That difference was then multiplied by the then-current monthly rate established in Florida. In this manner pre-judgment interest was calculated to the last day of trial.

f. Calculation of postjudgment interest

The methodology for calculating postjudgment interest rates for state law claims follows the federal standard. Allstate Ins. Co. v. Palterovich, 2009 WL 2731338 at *18 (S.D. Fla. Aug. 26, 2009). 28 U.S.C. § 1961(a) governs the award of postjudgment interest in federal courts and provides that such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield as published by the Board of Governors of the Federal Reserve System for the calendar week preceding the date of the judgment. Id.

Gulf Power's cover damages associated with the 2004 through 2007 shipment shortfalls total $77,465,210.17. Prejudgment interest up to and including February 17, 2010, the date of this Court's judgment, equals $26,228,635.06. Gulf Power's damages, including prejudgment interest, total $103,693,845.23.

CONCLUSION

The greater weight of the evidence adduced at trial supports Plaintiff's claim and judgment is entered in favor of Gulf Power in the amount of $103,693,845.23 with postjudgment interest accruing at the rate of ____%.

DONE and ORDERED this ____ day of February, 2010.

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GULF POWER COMPANY, Plaintiff, vs. COALSALES II, LLC, f/k/a PEABODY COALSALES COMPANY, Defendant.	)	Case No. 3:06-cv-00270-MCR-MD

GULF POWER'S MEMORANDUM
CONCERNING DISPUTED ISSUES OF LAW

Pursuant to Section IV B. of the Court's Order for Pretrial Conference in a Civil Case (Doc. 128), Gulf Power submits its Memorandum Concerning Disputed Issues of Law. The parties' respective disputed issues of law[1] are identified in the Joint Pretrial Stipulation submitted concurrently with this memorandum. While Gulf Power's damages are substantial, the legal issues in this case are not complex. This case involves a textbook application of the buyer's "cover" remedy under section 672.712, Florida Statutes. Section 672.712, provides in relevant part as follows:

> (1) After a breach . . . the buyer may 'cover' by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
>
> (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined, but less expenses saved in consequence of the seller's breach.

[1] COASALES has identified a number of "legal" issues in the Joint Pretrial Stipulation which it believes remain to be litigated. Gulf Power views these issues as largely factual in nature and does not intend to address them in detail here.

§ 672.712, Fla. Stat.

The Official Comments to the Uniform Commercial Code[2] provide that the definition of "cover" under subsection (1) envisages

> [g]oods not identical with those involved but commercially usable as reasonable substitutes under the circumstances of the particular case.... [T]he test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective.

U.C.C. §2-712, Official Comment 2.

The Official Comments also speak directly to the issue of the timing of the cover purchases:

> The requirement that the buyer must cover without 'unreasonable delay' is not intended to limit the time necessary for him to look around and decide how he may best effect cover. The test here is similar to that generally used in this Article as to reasonable time and seasonable action.

Id.

The reasonableness of a purchaser's cover actions, including the timing and effort to cover are questions of fact and will not be set aside on appeal unless clearly erroneous. Mason Distributors, Inc. v. Encapsulations, Inc., 484 So.2d 1275, 1276 (Fla. 3d DCA 1986) (citing Transammonia Export Corp. v. Conserv, Inc., 554 F.2d 719, 724 (11th Cir. 1977)). It is generally accepted that "[t]he requirements for a proper cover are not stringent." 1 Damages Under UCC, Cover Remedy § 7:6. "The requirements of good faith and commercial reasonableness are intended to allow the buyer broad latitude in making the cover purchase." Id.

According to Professors White and Summers, "[c]ourts should be slow to find a buyer's good faith acts unreasonable. The courts should not hedge the remedy with restrictions in the

[2] Section 672.712, Florida Statutes, mirrors section 2-712 of the Uniform Commercial Code.

name of 'reasonableness' that render it useless or uncertain for the good faith buyer." See, White & Summers, UNIFORM COMMERCIAL CODE § 6-3 (5th ed. 2006). See also, 1 Damages Under UCC, Reasonable Purchase §8:13 ("[I]t is clear from the reported decisions that the buyer's cover conduct will be given broad latitude and that the presumption will be that the cover purchase was proper."). The courts' practice of affording aggrieved purchasers broad latitude in making cover decisions is consistent with the UCC's directive that "[t]he remedies provided by this code must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed...." § 671.106(a), Fla. Stat.

A. Burden of proof as to reasonableness of cover purchases

COALSALES contends that Gulf Power has the burden to demonstrate the reasonableness of its cover purchases. While Gulf Power is fully prepared to demonstrate the reasonableness of its cover purchases and intends to do so at trial, COALSALES is mistaken as to which party bears the burden of proof. "The seller has the burden of showing that the cover was unreasonable." TVI, Inc. v. Infosoft Technologies, Inc., 2008 WL 239784 at *11 (E.D. Mo. Jan. 28, 2008); 1 Damages Under UCC, Reasonable Purchase §8:13 ("The burden is thus on the seller to prove that the cover was unreasonable."); 1 Damages Under UCC, Burden of Proof §8:25 ("Once the buyer has alleged and shown a cover purchase, the courts have consistently held that a presumption arises that the cover was proper, and the burden then shifts to the seller to raise a probable inference of impropriety."). See also, Aquila, Inc. v. C.W. Mining, 545 F.3d 1258, 1268 (10th Cir. 2008) (upholding district court's finding that utility's purchase of cover coal was reasonable where utility witnesses' testimony was "coherent and facially plausible" and not "contradicted by extrinsic evidence.").

B. Adjustment for sulfur content of cover coal

COALSALES contends that Gulf Power's cover damages should be reduced on the ground that the cover coal purchased by Gulf Power contained lower sulfur content than the coal required to be delivered under the CSA. COALSALES argues that Gulf Power "benefited" as a result of purchasing replacement coal with lower sulfur content by avoiding the need to purchase and/or relinquish as many SO2 allowances as it otherwise would have if COALSALES delivered coal meeting the maximum sulfur specification under the CSA. Gulf Power disputes COALSALES' contention that Gulf enjoyed monetary benefits as a consequence of its purchase of lower sulfur cover coal. Moreover, even if one accepts that Gulf did enjoy a benefit, COALSALES' argument still lacks merit for two important reasons.

First, COALSALES ignores the fact that, under the CSA, COALSALES was not entitled to a price premium if it delivered coal to Gulf Power which possessed sulfur content below the contractually specified maximum. If --as the Court has already determined was COALSALES' legal obligation-- COALSALES had continued to perform under the CSA following the closure of the Millennium Portal of the Galatia Mine, COALSALES would have had to procure coal from suitable alternative sources. Given the relatively limited number of coals across the globe that met the sulfur specifications under the CSA, it is probable that COALSALES would have provided the same or similar coal to Gulf Power that Gulf Power used to cover the CSA shortfalls. In such case, COALSALES would not have been entitled to a premium due to the lower sulfur content of the coal. In fact, during a period of shortfall in August and September 2003, COALSALES supplied Gulf Power with 38,713.99 tons of "cover" coal in order to "avoid a breech [sic] of contract due [sic] lack of performance with Gulf Power." [3] The "cover" coal purchased by COALSALES and supplied to Gulf Power, was the same "Colombian coal" that

[3] See, Letter, October 29, 2003, Stephen L. Miller attached hereto as Exhibit "A."

Gulf Power later used as the primary source of its own cover coal purchases. In light of the foregoing, the effect of granting COALSALES' requested adjustment would be to provide COALSALES with a benefit that it did not actually enjoy when it met its contractual obligations and would not have enjoyed had it continued to perform under the CSA. Stated another way, granting COALSALES the relief it seeks would reward it for breaching its contract with Gulf Power. Such a result is not in keeping with basic equitable principles. See, Transfer My Timeshare, LLC v. Selway, 2009 WL 3271326 at *4 (D.N.H. Oct. 9, 2009) ("'It is a fundamental principle of equity' in Florida and elsewhere that 'no one shall be permitted to profit from his own fraud or wrongdoing....'") (citing Yost v. Rieve Enterprises, Inc. 401 So.2d 178, 184 (Fla. 1st DCA 1984)).

Second, COALSALES' argument ignores the fact that the subject coal was to be used for Gulf's own consumption; not for resale. Professors White and Summers provide the following guidance on the subject:

> What of the buyer who covers by purchasing goods of superior quality for use as a commercial substitute...? [I]f the aggrieved buyer will itself consume the cover goods, as for example by the use of furniture or equipment in a business, the problem is more difficult. Should the damage recovery under 2-712 be reduced because the cover machinery which the aggrieved buyer purchased is marginally more efficient? Because the waiting room furniture is slightly more attractive than that contracted for? We think the damage recovery should not be reduced unless the seller comes forward with persuasive evidence that the buyer will reap added profits because of the superior quality of the cover merchandise.

White &. Summers, UNIFORM COMMERCIAL CODE § 6-3 (5th ed. 2006) (emphasis added).

Gulf Power is undisputedly a consumer of the cover coal it purchased following the instances of breach by COALSALES. As such a consumer, Gulf Power is entitled, as a matter of law, to the heightened standard required of the seller as articulated by White and Summers above.

C. Calculation of prejudgment interest

Under Florida law, when a verdict liquidates damages on a plaintiff's out-of-pocket pecuniary losses the plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of such loss. Allstate Ins. Co. v. Palterovich, 2009 WL 2731338 at *15 (S.D. Fla. Aug. 26, 2009) (citing Greenberg v. Grossman, 683 So.2d 156, 157 (Fla. 3d DCA 1996)). Unlike the relatively lenient federal standards governing awards of prejudgment interest, Florida law forecloses discretion in the award of prejudgment interest as well as discretion in the rate of that interest. Id. (citing Ins. Co. of North America v. Lexow, 937. F.2d 569, 572 (11th Cir. 1991)) Where there is no contract rate establishing the appropriate interest rate, the interest rate is set annually by the Chief Financial Officer. Id. (citing §§ 687.01 and 55.03, Fla. Stat.) The applicable prejudgment interest rates for the relevant years is set forth below:

2004 – 2010 Interest Rates

YEAR	PER ANNUM	DAILY RATE
2010	6%	.0001644
2009	8%	.0002192
2008	11%	.0003014
2007	11%	.0003014
2006	9%	.0002466
2005	7%	.0001918
2004	7%	.0001918

See, Florida Dept. of Financial Services, Statutory Interest Rates, available at www.myfloridacfo.com/aadir/interest.htm (last accessed January 23, 2010).

The appropriate procedure for calculating prejudgment interest in this dispute is detailed in Allstate Ins. Co. v. Palterovich, 2009 WL 2731338 (S.D. Fla. Aug. 26, 2009). As the Court

correctly recognized in Palterovich, in cases involving a series of defaults, the plaintiff is entitled to prejudgment interest beginning on the "date of each loss." Id. at *15. In the instant case, the CSA required COALSALES to deliver 1.9 million tons of coal per year in "reasonably equal monthly amounts" approximating 158,333 tons per month. CSA § 6.02, p. 17 lines 9-10. Prejudgment interest should be calculated separately on a month-by-month basis for each month in which Gulf experienced a shortfall due to COALSALES' declarations of force majeure.

The Court does not need to hear expert testimony concerning the calculation of prejudgment interest. It is well settled in Florida that "[c]omputation of prejudgment interest is merely a mathematical computation. There is no 'finding of fact' needed. Thus, it is a purely ministerial duty of the trial judge or clerk of court to add the appropriate amount of interest to the principal amount of damages awarded in the verdict." Argonaut Ins. Co. v. May Plumbing Co., 474 So.2d 212, 215 (Fla. 1985).

D. Calculation of postjudgment interest

The methodology for calculating postjudgment interest rates for state law claims follows the federal standard. Allstate Ins. Co. v. Palterovich, 2009 WL 2731338 at *18 (S.D. Fla. Aug. 26, 2009). 28 U.S.C. § 1961(a) governs the award of postjudgment interest in federal courts and provides that such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield as published by the Board of Governors of the Federal Reserve System for the calendar week preceding the date of the judgment. Id.

Respectfully submitted this 25th day of January, 2010.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to the following counsel of record on January 25, 2010, by electronic filing.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GULF POWER COMPANY,

Plaintiff,

v. **Case No. 3:06cv270/MCR/MD**

COALSALES II, L.L.C. f/k/a
PEABODY COALSALES COMPANY,

Defendant.
_____/

ORDER

Gulf Power Company ("Gulf Power") has sued Coalsales II, LLC ("Coalsales") for breach of a coal supply contract. On September 30, 2009, the court granted (doc. 112) Gulf Power's motion for partial summary judgment on liability (doc. 54). The issue of Gulf Power's damages was tried to the court without a jury from February 9, 2010, to February 17, 2010. Gulf Power seeks to recover costs it incurred by having to purchase substitute coal to make up for deficiencies in the amount of coal Coalsales was obligated to supply under the parties' contract. Coalsales argues that Gulf Power has failed to prove which purchases were substitute purchases; Gulf Power's alleged substitute purchases were not reasonable; and Gulf Power has failed to establish, or properly calculate, its damages. On consideration of the evidence presented, the court now renders its findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

MOTION FOR JUDGMENT ON PARTIAL FINDINGS

At trial, following the close of Gulf Power's evidence, Coalsales moved for judgment on partial findings pursuant to Federal Rule of Civil Procedure 52(c), arguing that Gulf Power had failed to prove its damages claim. Rule 52(c) permits the court, during a nonjury trial and after a party has been fully heard on an issue, to enter judgment on a claim or defense that "can be maintained or defeated only with a favorable finding on that

issue." Fed. R. Civ. P. 52(c). A judgment on partial findings must be supported by findings of fact and conclusions of law as required under Rule 52(a). *Id.* The Rule "does not require a finding on every contention raised by the parties," but does contemplate that the court will provide sufficient detail demonstrating that care was taken in ascertaining and analyzing the facts necessary to the decision. *Feazell v. Tropicana Prods., Inc.*, 819 F.2d 1036, 1042 (11th Cir. 1987). As the trier of fact, the court must weigh the evidence and make credibility determinations, treating the motion "as if it were a final adjudication at the end of trial." *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1504 (11th Cir. 1993). When ruling on a Rule 52(c) motion, the court does not view the evidence in the light most favorable to the nonmoving party; instead, it acts as a factfinder. *See United States v. $242,484.00*, 389 F.3d 1149, 1172 (11th Cir. 2004). The court retains discretion under Rule 52(c) to "decline to render any judgment until the close of the evidence." Fed. R. Civ. P. 52(c). The court exercised that discretion in this case. In accordance with the requirements of Rule 52, having heard and considered all the testimony, evidence, and arguments presented, the court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT[1]

Gulf Power is an investor-owned electric utility company serving Northwest Florida and is the second largest purchaser of coal in the United States, consuming approximately 60 to 70 million tons of coal per year.[2] Coalsales is the largest coal supplier in the United States and has furnished coal to Gulf Power since the 1970s.[3] Each year, Gulf Power creates a generation forecast for its facilities – Plant Crist, located in Escambia County; Plant Smith, located in Bay County; and Plant Schultz, located in Jackson County. Based on the expected hours of generation, Gulf Power determines the quantity of coal needed to sustain the generation activity at each of its facilities. To determine how much coal it

[1] Additional fact findings are included in the sections below.

[2] Gulf Power Company is a Florida corporation having its principal place of business in Pensacola, Florida.

[3] Coalsales is a Delaware limited liability company having its principal place of business in St. Louis, Missouri.

needs to purchase, Gulf Power first considers the amount of coal to be supplied under its existing supply contracts. Based on its requirements and current coal commitments, Gulf Power is able to determine the amount of coal remaining to be purchased in order to meet its generation needs for the year. Gulf Power's plant management teams provide quality specifications for the coal to be purchased consistent with applicable air pollution control permits. Once the quantity and quality of coal are determined, Gulf Power issues a request for proposals ("RFP") setting forth, among other things, the quantity and characteristics of the coal it is seeking to purchase over a given period of time. Upon receiving bids, Gulf Power evaluates the terms of the bids, including price, transportation rate, and any penalties or premiums associated with quality characteristics, to determine a final delivered price in dollars per million Btu.[4] According to Gulf Power, after doing an economic analysis, it accepts the "best offer" received and enters into a contract for the required tonnage. The formal bidding process typically takes at least two months, and Gulf Power seeks bids for coal to be supplied for months and even years into the future. If coal is needed on a more urgent basis, Gulf Power will make purchases from unsolicited bids or will issue solicitations for spot purchases, which result in short-term contracts. Gulf Power documents each purchase with a purchase order.

On May 12, 1994, Gulf Power entered into a Coal Supply Agreement ("CSA") with Coalsales' predecessor, Peabody Coalsales Company, pursuant to which Coalsales was obligated to supply Gulf Power with 1.9 million tons of coal annually until December 31, 2007. The coal was to be burned at Gulf Power's Crist and Smith plants and was to be delivered in roughly equal monthly shipments.[5] Coalsales was permitted under the CSA to supply coal from any approved source. The CSA identified three pre-approved sources: Source A, which was the Paso Diablo Mine in Venezuela; Source B, which was the Galatia

[4] "Btu" is an abbreviation for "British thermal unit," which refers to the amount of heat required to raise the temperature of one pound of water by one degree Fahrenheit, equivalent to approximately 1055 joules. "Btu" is used in the power industry to describe the heat value of coal.

[5] The coal purchased under the CSA was approximately one-half of the annual requirements for Plants Crist and Smith. Gulf Power purchased the remaining coal needed from various other suppliers.

Mine in Illinois; and Source C, which was the Wells Harris Complex in West Virginia. Additional sources could be approved under the contract, and a source was automatically approved if Gulf Power purchased and successfully burned 100,000 tons of coal from the source within the previous eighteen months.[6]

The parties agreed to a base contract price[7] for two of the three approved sources – $38.92 per ton for the Paso Diablo coal at the outbound loading point, which equated to $1.5821 per MMBtu for 12,300 Btu coal, and $41.04 per ton for the Galatia coal delivered in railcars to the Alabama State Docks, which equated to $1.7100 per MMBtu for 12,000 Btu coal.[8] The base price was subject to quarterly price adjustments for changes in the Gross Domestic Product-Implicit Price Deflator ("GDP deflator"), as set forth in paragraph 9.03 of the CSA,[9] as well as for changes in "government imposition" and import taxes.[10] The CSA also contained a price renegotiation provision, referred to by the parties as a "price re-opener," which allowed the parties to re-evaluate the economic viability of the CSA at two points during the life of the contract – March 1, 1997, and March 1, 2002. Pursuant

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[6] In addition to the 1.9 million tons of coal supplied under the base CSA, Coalsales had a right to supply an additional 600,000 tons of coal per year at market price. Under the right-to-supply agreement, which was entered into in 1999, Gulf Power was to provide Coalsales with a market price based on bids received in response to an RFP and identify the source from which 600,000 tons of coal could be obtained at the stated price. Coalsales would then determine whether it would match the price and supply the additional 600,000 tons of coal, either from the source identified by Gulf Power or an independent source.

[7] "Base price" is defined in the CSA as "the initial base price per Ton of coal for sources A and B."

[8] Both MMBtu and MBtu represent one thousand Btus. Although MMBtu and MBtu were used interchangeably at trial, in both testimony and exhibits, the court has used MMBtu throughout this Order.

[9] The GDP deflator is published by the Bureau of Economic Analysis, which is an agency of the United States Department of Commerce, and is essentially a measure of overall inflation in the economy.

[10] According to paragraph 9.04 of the CSA, government imposition "includes any tax or fee imposed on Seller and/or on Seller's contractor which is applicable to mines supplying coal under this Agreement by any government or government agency, or any statute, administrative regulation or ruling, state or local ordinance, or the like affecting the production, promotion, blending, loading, transporting . . . or sale of coal, including, but not limited to, any tax or imposition levied on the Btu content of coal, or reclamation hereunder, except for taxes and fees provided in Section 9.06 hereunder." Curtis Tichenor, vice-president of market analytics and contract management for Peabody Energy, Coalsales' parent company, cited the 2006 West Virginian mine disaster and the ensuing changes in law as an example of a government imposition and explained that, pursuant to paragraph 9.04 of the CSA, Coalsales was able to pass those costs on to Gulf Power, although no such taxes or fees were assessed during the term of the CSA.

to the price re-opener, either party could request a re-determination of the billing price to reflect the current market price by providing written notice to the other party. In the event one of the parties requested a price re-opener, the parties were required to negotiate in good faith to establish a new billing price. If they were unable to agree on a market adjusted billing price within ninety days, Gulf Power was free to solicit bids for coal of similar quantity and quality from other suppliers and determine the weighted average cost per MMBtu of the acceptable bids totaling 1,900,000 tons of coal delivered annually to Plant Crist.[11] The weighted average cost per MMBtu became the matching price, which Gulf Power was required to provide to Coalsales, along with its market adjusted transportation costs. Coalsales had thirty days in which to advise Gulf Power whether, when including the transportation costs, it would supply coal at a price whereby the market adjusted delivered price equated to the matching price and, if so, the mine(s) from which the coal would be supplied. If Coalsales agreed to continue providing coal under the terms established in the re-opener process, the matching price was to become the market adjusted delivered price and was to be substituted for the then-existing delivered price, the market adjusted billing price was to be substituted for the then-existing billing price, and the components of the market adjusted billing price were to be re-established by the parties on a basis comparable to the basis used to establish the initial components of the base price. If Coalsales rejected the price established through the re-opener process, the CSA would terminate.

Coalsales requested a price re-opener in 2002, after which the parties attempted to negotiate a new price. They were unsuccessful, and Gulf Power solicited bids. Based on the bids received – specifically, a bid from Drummond Interocean Company ("Drummond") for 1.9 million tons of Columbian coal, Gulf Power proposed a matching price of $1.48330 per MMBtu. Coalsales rejected the initial matching price, but, after further negotiations, the parties agreed to a delivered price of $1.5197 per MMBtu and entered into a Letter

[11] Although the CSA contemplated deliveries of coal to both Plants Crist and Smith, the price established through the re-opener process was based on delivery to Plant Crist only.

Amendment dated January 29, 2003 ("2003 Amendment"), under which Coalsales agreed to supply 1.9 million tons annually of 12,000 Btu coal through December 31, 2007, to be delivered F.O.B. Barge at a billing price of $34.11 per ton. Coalsales designated Galatia Mine as the primary source from which the coal would be provided[12] and the McDuffie Terminal at the Alabama State Docks as the delivery point.[13] Gulf Power was responsible for the costs of transportation from the Alabama State Docks to Plant Crist. The 2003 Amendment incorporated the terms of the CSA except to the extent the terms of the CSA were amended or superceded thereby.

The CSA contained certain coal specifications, including sulfur content and MMBtu.[14] Pursuant to the 2003 Amendment, Coalsales was required to supply Gulf Power with 12,000 MMBtu coal having a maximum sulfur content of 1.7 lbs. per MMBtu.[15] Under the

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[12] The majority of the coal shipped under the CSA after the 2003 Amendment came from the Millennium Portal of the Galatia Mine. A coal mine may have multiple portals which, in turn, may affect the characteristics of the coal produced. The Galatia Mine contained at least three portals. Coal from the Millennium Portal had the lowest sulfur content. Coal from the North Portal had a sulfur content of 2.3 to 2.5 lbs. per MMBtu. Coal from the Number 6 Portal had a sulfur content of approximately 4 lbs. per MMBtu.

[13] Prior to the 2003 Amendment, Coalsales delivered coal under the CSA primarily to the Cook Terminal in Illinois. However, because Gulf Power was responsible for transportation costs under the CSA, it was more economical for Gulf Power to have coal delivered to the McDuffie Terminal, which is closer to Plants Crist and Smith, and thus the delivery point in the re-opener was changed to McDuffie.

[14] Coal contains sulfur. When coal is burned, the sulfur combines with oxygen, producing sulfur dioxide ("SO2"). State environmental agencies issue permits to utility companies that limit the amount of SO2 they may emit at their generating plants. Utility companies receive a certain number of sulfur emissions allowances each year based on their allowed emissions. A utility company must have an emissions allowance for each ton of SO2 emitted. There is a market on which sulfur allowances are traded at variable – and, at least at times, very significant – prices.

If a utility company anticipates that it is going to emit more SO2 in a year than permitted under its allowable emissions, it must acquire additional allowances. Conversely, if a utility company anticipates that it will emit less SO2 in a year than allowed, it may either bank its allowances or sell them. In the alternative, a utility company may have pollution-control equipment that eliminates the need for additional sulfur allowances by reducing the amount of sulfur emissions. Lower sulfur coal is advantageous because it results in fewer sulfur emissions when burned. Sulfur content is thus a huge factor in the purchase and pricing of coal in this country.

[15] According to the air permit requirements, Plant Crist could not burn coal with a sulfur content higher than 2.4 lbs. per MMbtu and Plant Smith could not burn coal with a sulfur content higher than 2.1 lbs. per MMbtu.

CSA, there was no premium to be paid to Coalsales for delivery of coal having a sulfur content lower than 1.7 lbs. per MMBtu. Coalsales was subject to a penalty, however, if it delivered coal with a sulfur content in excess of 1.7 lbs. per MMBtu.[16]

In order to supply the required tonnage under the CSA, Coalsales entered into a subcontract with the American Coal Company ("AmCoal"), the owner of the Galatia Mine. Beginning in 2003, AmCoal encountered geologic conditions at the Millennium Portal of the Galatia Mine that rendered mining unreasonably dangerous. AmCoal thus was unable to provide Coalsales with enough coal for Coalsales to fulfill its supply obligation under the CSA. Each time there was a shortfall due to conditions at the Galatia Mine, Coalsales declared a temporary *force majeure* under the CSA.[17] On January 23, 2006, Coalsales gave Gulf Power written notice of a permanent *force majeure* and closure of the Millennium Portal of the Galatia Mine. Coalsales informed Gulf Power that it was no longer able to supply coal that met the tonnage and quality specifications in the CSA, but that it would continue to supply a blend of Galatia/Twentymile coal.[18] Coalsales also informed Gulf Power that it would continue to explore and develop with Gulf Power opportunities to supply higher sulfur coals from Galatia's North Portal and #6 Seam operations. In addition to the Galatia/Twentymile blend, Coalsales offered Gulf Power a blend of North Portal Galatian and Russian coal as well as straight North Portal coal. The North Portal Galatian coal was

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[16] If Coalsales supplied coal under the 1999 right-to-supply agreement (*see* fn.6) having a lower sulfur content than specified, Gulf Power was obligated to pay a premium.

[17] The CSA contains a *force majeure* provision, excusing Coalsales from performance in the event of certain circumstances beyond its control, including any event or condition that has had a material adverse effect on the mining of the coal by the seller or its contractor. Coalsales declared *force majeures* under the CSA in September, October, and November 2003; in June, August (twice), and December 2004; in January, September (twice), October, November, and December 2005; and in January 2006. The parties do not dispute that the geologic conditions at the Galatia Mine during the relevant time frames constitute *force majeure* events.

[18] Twentymile is a low sulfur Colorado coal that Coalsales mixed with the higher sulfur Galatian coal to produce a blend having a sulfur content of 1.7 lbs. per MMBtu. In May 2005, the parties agreed to add a Galatia/Twentymile blend as an approved source under the CSA. Coalsales had the option of supplying a maximum of 800,000 tons of this blend per year through the Cook Terminal, with adjustments to be made based on sulfur allowance values.

priced according to the CSA; Gulf Power would have to pay market price, however, for the lower sulfur Russian coal. Gulf Power rejected Coalsales' offer of the substitute coal because it exceeded the price and sulfur specification set forth in the CSA and, in the case of the higher sulfur North Portal coal, would have forced Gulf Power to incur emissions allowance costs that it otherwise would not have had to incur.[19] Coalsales thereafter ceased providing coal under the CSA.[20]

In order to continue operating its plants, Gulf Power had to procure coal from other sources. Gulf Power's damages claim is based on the substitute coal it was forced to purchase due to Coalsales' breach.[21] Gulf Power designated certain purchases as substitute purchases and computed its damages based on those designations. Coalsales challenges Gulf Power's designation of cover purchases, the reasonableness of those purchases, and the manner in which Gulf Power calculated its damages.

CONCLUSIONS OF LAW

Florida Uniform Commercial Code

The CSA is interpreted under Florida law. Because this matter pertains to the sale of goods, the Florida Uniform Commercial Code ("FUCC") applies. *See* Fla. Stat. §§ 672.105(1) and 672.102. Under the FUCC, when a seller repudiates a contract or

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[19] As noted, the North Portal coal had a sulfur content of 2.3 to 2.5 lbs. per MMBtu, which exceeded the emissions limits at both Plants Crist and Smith; as a result, if Gulf Power had burned North Portal coal, it would have been required to surrender sulfur allowances that it otherwise would not have had to surrender given that the CSA called for 1.7 lbs. per MMBtu coal. Gulf Power requested that Coalsales absorb the additional allowance costs, either through cash compensation or the provision of emissions allowances, but Coalsales declined.

[20] Coalsales took the position in this litigation that the CSA was a single source contract and that the permanent *force majeure* excused it from performance under the CSA. The court disagreed with Coalsales' position in that regard and determined at the summary judgment stage that Coalsales' failure to ship coal from other sources constituted a breach of the CSA (doc. 112).

[21] The parties stipulated before trial that Gulf Power was forced to procure substitute coal and also to the shortfall tonnage, which included 154,879 tons in 2003; 215,305 tons in 2004; 578,307 tons in 2005; 1,703,615 tons in 2006; and 1,123,889 tons in 2007, for a total shortfall of 3,775,995 tons of coal. At trial, Gulf Power presented evidence of shortfalls only between 2004 and 2007. Gulf Power omitted its 2003 cover purchases because, in that year, Gulf Power saved money as a consequence of Coalsales' breach. Coalsales objected to Gulf Power's exclusion of its 2003 purchases because the purchases resulted from Coalsales' breach and reduced Gulf Power's damages.

wrongfully fails to deliver goods, a buyer has two options – it may make in good faith and without unreasonable delay a reasonable purchase of substitute goods, referred to as "cover," or it may recover damages for non-delivery. *See* Fla. Stat. §§ 672.711(1)(a), 672.712(1), and 672.713(1). In this case, the parties agree that Gulf Power elected to sue Coalsales under a cover remedy, and thus the only issue before the court based on the pleadings and the evidence at trial is whether Gulf Power in fact "covered" with substitute coal following Coalsales' breach of the CSA and, if so, the amount of Gulf Power's damages.[22]

In the event a buyer elects to procure substitute goods, it may recover as damages the difference between the cost of cover and the contract price, together with any incidental or consequential damages but less expenses saved as a result of the seller's breach. Fla. Stat. § 672.712(2). "The test of a proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner. . . ." Fla. Stat. § 672.712, cmt. 2. The reasonableness of a buyer's cover purchases is a question of fact. *See Bigelow-Sanford, Inc. v. Gunny Corp.*, 649 F.2d 1060, 1066 (5th Cir. 1981);[23] *see also* 1 ROY RYDEN ANDERSON, DAMAGES UNDER THE UNIFORM COMMERCIAL CODE § 8:25 (2009). The purpose of § 672.712 is to enable the buyer to obtain the goods it needs. Fla. Stat. § 672.712, cmt.

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[22] In the event an aggrieved buyer chooses not to procure substitute goods, it may seek damages under Fla. Stat. § 672.713. Under § 672.713, a buyer may recover the difference between the market price at the time it learned of the breach and the contract price, together with any incidental and consequential damages but less expenses saved as a result of the breach. Fla. Stat. § 672.713. Market price is determined as of the place for tender. *Id.* The market remedy provided in § 672.713 is "completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered." Fla. Stat. § 672.713, cmt. 5. In other words, if the buyer elects cover, "the cover remedy then becomes the mandatory damage measurement, and the buyer may not subsequently choose to have damages based on the market formula . . . ." ANDERSON, *supra*, at § 7:6; *but see* Ray G. Rezner and Elyse M. Tish, *Basic UCC Skills 1990: Article 2, Buyer's and Seller's Remedies*, PRACTICING LAW INSTITUTE, Commercial Law and Practice Course Handbook Series, 540 PLI/Comm 199 (1990) (stating that a buyer whose cover is deemed unreasonable may sue for money damages under § 2-713. It is unclear, however, whether the author is referring to a buyer seeking money damages in the same lawsuit, in which case such claim should have been pled in the buyer's complaint, or a subsequent lawsuit after cover was found unreasonable.).

[23] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

1. The buyer may not use cover to put itself in a better position than it would have been in had the contract been performed. *See* Fla. Stat. § 671.106(a) (stating that contract remedies should put the aggrieved party in "as good a position as if the other party had fully performed"). For this reason, "[i]t is axiomatic that the buyer will not be allowed to cover with superior goods if identical goods were reasonably available." ANDERSON, *supra*, § 8:8. While the cover goods need not be identical to the contract goods, *see id.*, they must be a "reasonable like-kind substitute." *Martella v. Woods*, 715 F.2d 410, 413 (8th Cir. 1983). In other words, a buyer is not obligated to secure the least expensive cover available, but it should secure comparable goods if they are available. Otherwise, the buyer should not recover the full difference between the cover price and the contract price. WHITE & SUMMERS, UNIFORM COMMERCIAL CODE § 6-3 (5th ed. 2006). If the buyer is to consume the substitute goods, as opposed to resell them, the damage recovery should not be reduced unless the seller comes forward with persuasive evidence that the buyer will reap added profits because of the superior quality of the cover goods. *Id.*

Under Florida law, the burden is on the buyer to show that the purchases made after the seller's breach were, in fact, substitute purchases. *See Mason Distrib., Inc. v. Encapsulations, Inc.*, 484 So. 2d 1275, 1276 (Fla. 3d DCA 1986); 14 WILLISTON ON CONTRACTS § 40:36 (4th ed.). The seller, however, bears the burden of proving that the buyer's purchases were in bad faith or unreasonable.[24] *See TVI, Inc. v. Infosoft Techs., Inc.*, 2008 WL 239784, at *9 (E.D. Mo. Jan. 28, 2008); ANDERSON, *supra*, at § 8:25 (noting that most courts have held that a presumption arises that the cover was reasonable and that the seller bears the burden of burden of showing bad faith or unreasonableness). Only if the court finds that Gulf Power, in fact, made cover purchases and that Coalsales failed to prove that such purchases were unreasonable may it award Gulf Power damages under § 672.712(2).

Contract Price

[24] Coalsales has not alleged that Gulf Power acted in bad faith, nor was there proof of such at trial.

In order to prove damages under a cover remedy, Gulf Power was required to establish the contract price. *See* Fla. Stat. § 672.712(2). Gulf Power contends the contract price is determined based on the delivered price set forth in the CSA; Coalsales, on the other hand, urges the court to look to one of two approved sources under the CSA in determining the contract price.

The interpretation of an unambiguous contract is a matter of law. *See Lawyers Title Ins. Corp. v. JDC (Am.) Corp.*, 52 F.3d 1575, 1580 (11th Cir. 1995). As set forth above, in accord with the parties' choice of law, the court applies Florida law to this question, including the FUCC. *See* Fla. Stat. ch. 672.[25] Because the CSA contains a merger clause designating it as the final expression of the parties' agreement, the court is precluded from considering evidence of any prior or contemporaneous agreements that may contradict it. *See* Fla. Stat. § 672.202. Furthermore, the court determines the parties' intent from the four corners of the contract and only considers extrinsic evidence to explain or clarify ambiguous or unclear language. *See Taylor v. Taylor*, 1 So. 3d 348, 350 (Fla. 1st DCA 2009); *Ospina-Baraya v. Heiligers*, 909 So. 2d 465, 472 (Fla. 4th DCA 2005). The court gives a realistic, plain-language meaning to the words of the contract, and construes the contract as a whole, giving effect to all of its provisions, in a manner which accords with reason and probability. *See Taylor*, 1 So. 3d at 350, *Ospina-Baraya*, 909 So. 2d at 472. According to Fla. Stat. § 672.208(1), "[w]here the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement." Moreover, whenever reasonable, the court construes the contract's express terms in a manner consistent with the parties' course of performance, as well as course of dealing and usage of trade. See Fla. Stat. § 672.208(2). When such a construction is

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[25] *See also Weyher/Livsey Constructors, Inc., v. Int'l Chem. Co.*, 864 F.2d 130, 132 (11th Cir. 1989) (in a diversity case, applying Texas's codification of the UCC to a contract for the sale of coal); *Paul Gottlieb & Co., Inc. v. Alps S. Corp.*, 985 So. 2d 1, 5 (Fla. 2nd DCA 2007) (applying Florida's codification of the UCC).

unreasonable, the express terms of the contract control. *Id.*

In the original CSA, the parties agreed to a base price for two of three approved sources, subject to adjustments for changes in the GDP deflator, government imposition, and import taxes. In connection with the 2003 price re-opener, Gulf Power submitted to Coalsales a weighted average cost per MMBtu of $1.5197 and transportation costs for each of the approved sources. The matching price was based on those values. When Coalsales accepted the matching price, this price became the new market adjusted delivered price under the CSA, from which Coalsales extrapolated its billing price. Although Coalsales indicated it would supply the entire amount from the Galatia mine, it was not required to do so; it could supply coal from any approved source. Under Section 6.04 of the CSA, Gulf Power was not required to approve any source if the delivered price per MMBtu would exceed the delivered price per MMBtu of the coal being provided under the CSA as of the date of substitution unless Coalsales agreed to match the delivered price set forth in the CSA. Similarly, although Coalsales had the right to change the outbound or rail loading point, subject to Gulf Power's approval, Gulf Power was not obligated to approve any new loading point that would cause the new delivered price per MMBtu to exceed the delivered price per MMBtu as of the date of substitution unless Coalsales agreed to match the delivered price set forth in the CSA. The parties do not dispute that they agreed to a delivered price of $1.5197 per MMBtu in the 2003 Amendment. They strongly disagree, however, as to whether that price was to apply only to Galatia coal or to any coal supplied under the CSA. The court finds, under the plain language of the CSA, as amended by the 2003 price re-opener, that the delivered price of $1.5197 per MMBtu established the price for coal to be provided under the CSA from any source from that point forward.

Although not necessary, the courts finds alternatively that, to the extent there is any ambiguity in the CSA on this point, the evidence adduced at trial supports the same conclusion. Russell Ball, Gulf Power's fuel manager responsible for administering the CSA, testified that the $34.11 billing price for Galatia coal set forth in the 2003 Amendment was

derived from the delivered price of $1.5197 per MMBtu.[26] Coalsales' expert, Cliff Hamal, agreed.[27] Indeed, although Coalsales vehemently denies that the $1.5197 per MMBtu was intended to apply to all sources delivered under the CSA, Hamal effectively conceded at trial that the Galatian coal, Wells Harris coal, and Columbian coal, all of which were approved sources under the CSA, had billing prices derived from the delivered price of $1.5197 per MMBtu. That fact is confirmed in a March 31, 2003, email from Swindle to John Hanekamp at Peabody Energy with a subject line "Peabody Pricing 2/01/03." Swindle attached to his email a spreadsheet "depicting the starting prices for Galatia and Columbian coals under the new Agreement effective February 1, 2003." The spreadsheet shows a delivered price of $1.5188 per MMBtu for both sources, which was derived from the $1.5197 per MMBtu and differed only because of a $.02 change in the transportation rate after the 2003 Amendment was entered into.[28] Based on the $1.588 delivered price, the billing price for Galatia coal was 34.11, and the billing price for Columbian coal was $33.20. Hanekamp responded to the email the same day, agreeing with the prices for the Galatia and Columbian coals.[29] Coalsales again confirmed that the $1.5197 per MMBtu applied to all sources supplied under the CSA in an April 29, 2005, letter from Dina Ostrom, a senior contract analyst for Peabody Energy, in which Ostrom documented a "Billing Price

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[26] Russell Ball is employed by Southern Company Services ("SCS"). Both SCS and Gulf Power are subsidiaries of Southern Company. According to Ball, Southern Company provides support, including engineering and field services, for all of its subsidiaries. Ball is tasked with providing such support for Gulf Power.

[27] The court initially excluded Hamal's testimony based on counsel's representation that Hamal was to be called only to rebut the testimony of Gulf Power's expert, Ronald Jackson, whose testimony the court had already excluded. On further objection from Coalsales, however, the court revisited its ruling and permitted Hamal to testify in response to Ball's testimony.

[28] There was a decrease in the transportation rate, from $2.36 to $2.34. Because Gulf Power was responsible for transportation rates, the adjustment affected only the delivered price and had no impact on the billing price.

[29] Coalsales argues that Tris Swindle's spreadsheet and correspondence with John Hanekamp demonstrate that the parties had to agree separately to the pricing for different sources. The court disagrees. It is clear from Swindle's spreadsheet and correspondence with Hanekamp that the parties intended for the price of all sources to be derived from the $1.5197 per MMBtu set forth in the 2003 Amendment.

Revision Effective April 1, 2005" with a chart setting forth, among other things, the market adjusted price as of February 1, 2003, certain adjustments, and the current billing price for Galatia, Wells Harris, and Columbian coal.[30] According to Ostrom's chart, the parties agreed to a market adjusted price of $34.11 for Galatia coal, $31.14 for Wells Harris coal, and $33.20 for Columbian coal, all of which stemmed from the $1.5197 per MMBtu set forth in the 2003 Amendment.[31] After the necessary adjustments were made, the billing price for Galatia coal was $35.88, the billing price for Wells Harris coal was $31.44, and the billing price for Columbian coal was $34.93. Paul Brown, who offers administrative support in the fuel services division of SCS, responded to Ostrom's letter on May 3, 2005, approving the adjusted prices set forth in her letter.

The fact that the parties intended for the agreed upon delivered price to apply to all coal supplied under the CSA is further reinforced by their course of dealing. In August and September 2003, due to conditions at the Galatia mine, AmCoal was unable to provide Coalsales with enough coal for Coalsales to meet its obligations under the CSA. Coalsales thus was forced to procure substitute coal in order to meet its supply obligations to Gulf Power. To make up for the shortfall from AmCoal, Coalsales procured Columbian coal from Drummond; however, the price Coalsales paid for this coal was higher than the price Gulf Power would pay Coalsales for the same coal under the CSA. Although Coalsales was forced to pay a higher price for the coal than the CSA price, the evidence at trial showed that Coalsales still supplied the coal to Gulf Power at the price set forth in the 2003 Amendment to the CSA. In demanding reimbursement for the additional costs it had incurred in its efforts to comply with the CSA, Stephen Miller, the president of Peabody Coaltrade at the time, explained to B.J. Cornelius, a senior vice-president for AmCoal at the time, that Coalsales had paid $39.50 per ton for an 11,700 Btu product, F.O.B. barge

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[30] The chart refers to Cook Terminal coal, which was Wells Harris coal, and Substitute coal, which the parties agreed was Columbian coal.

[31] Curtis Tichenor calculated at trial the $33.20 per ton billing price for Columbian coal using the $1.5197 per MMBtu billing price and $2.36 market adjusted transportation cost set forth in the 2003 Amendment.

Mobile and that the price it received from Gulf Power under the CSA was $33.47 per ton for the equivalent coal. The evidence further showed that the $33.47 price was derived from the $1.5197 per MMBtu delivered price set forth in the 2003 Amendment. Contrary to Coalsales' argument, therefore, the evidence demonstrates not only that the parties intended for the delivered price established in the 2003 Amendment to apply to all coal supplied under the CSA, but also that they applied that price to additional sources of coal delivered thereunder.

Coalsales nevertheless takes the position that the CSA is an alternative source contract and that Gulf Power's damages should be based on the lowest price of substitute coal Coalsales could have supplied under the CSA. In support of its argument in that regard, Coalsales relies on the RESTATEMENT (FIRST) OF CONTRACTS § 344, which states that "damages for breach of an alternative contract are determined in accordance with that one of the alternatives that is chosen by the party having an election, or, in case of breach without an election, in accordance with the alternative that will result in the smallest recovery." Coalsales also recites the familiar and longstanding principle that the purpose of damages is to put the injured party in as good a position as it would have been in had the contract been performed and argues that Gulf Power's damages must be calculated based on the price of coal Coalsales would have delivered had it continued to perform under the CSA. To that end, Coalsales claims that, had it recognized its obligation to continue to supply coal under the CSA despite the *force majeure* at the Millennium Portal of the Galatia mine, it would have supplied Wells Harris coal.

Coalsales contends that, because the CSA does not set a price for Wells Harris coal and the parties did not agree on any such price at the time of the 2003 re-opener or any time thereafter, there was an open price term and the contract price, for purposes of Gulf Power's damages calculation, should be a reasonable price for Wells Harris coal at the time the coal was to be delivered under the CSA. *See* Fla. Stat. § 672.305(1). Coalsales further argues that, in determining the "reasonable price" of Wells Harris coal during the pertinent time frame, the court should look to market value, which was higher than the price of Gulf

Power's cover coal and which would thus result in zero damages to Gulf Power. The court is unpersuaded by Coalsales' argument for an open price term. As the court explained above, the $1.5197 per MMBtu delivered price was the price for all coal supplied pursuant to the CSA following the price re-opener. Moreover, Coalsales' argument that it would have chosen to supply Wells Harris coal is undermined by its own course of dealing. Indeed, as noted previously, when Coalsales was unable to supply the full amount of coal under the CSA in 2004 as a result of AmCoal's breach of its contract with Coalsales, Coalsales purchased substitute coal from Drummond and supplied that coal, which was Columbian, rather than Wells Harris coal, to Gulf Power at the contract price.[32] Coalsales' position is also weakened by the fact that, during the 13-year life of the CSA, it supplied only approximately 60,000 tons of Wells Harris coal under one limited arrangement in 1998.

In the alternative, Coalsales urges the court to consider which of Coalsales' other supply options would have resulted in the least amount of damages to Gulf Power. According to Coalsales, the Galatia/Twentymile blend, a source Coalsales had previously provided under the CSA, would have resulted in the least amount of damages to Gulf Power. As Coalsales points out, after the 2003 Amendment, it supplied the Galatia/Twentymile blend at a price higher than that set forth in the 2003 Amendment. Coalsales claims it shipped the Galatia/Twentymile blend pursuant to a May 20, 2005, Term Sheet, which it contends constituted an amendment to the CSA and set forth the contract price that should now be used for purposes of calculating Gulf Power's damages. The court disagrees. Section 28.01 of the CSA requires that any amendments to the contract be in writing. On May 20, 2005, Stephen Miller wrote to Earl Parsons, Southern Company's vice-president of fuel services, and Penny Manuel, a senior production officer for Gulf Power, attaching a *draft* of a term sheet setting forth the a basis upon which the parties could *attempt* to negotiate and execute an amendment to the CSA, which was

[32] The majority of cover coal Gulf Power purchased was Drummond Columbian coal.

"subject to execution of mutually acceptable definitive agreement."[33] No such agreement was ever executed; therefore, the May 20, 2005, term sheet did not amend the CSA.

The evidence is equally clear that Coalsales supplied the Galatia/Twentymile blend under a separately negotiated agreement that served a specific, limited purpose. As Russell Ball explained, before Gulf Power entered into the 2003 Amendment, it had a contract with Ingram Barge Company ("Ingram"), pursuant to which Gulf Power was obligated to deliver at least 500,000 tons of coal per year from an "upper river source."[34] In order to meet the upper river tonnage requirement under this contract, Gulf Power relied on Coalsales' delivery of coal through the Cook Terminal pursuant to the CSA. The 2003 Amendment, however, established the McDuffie coal terminal at the Alabama State Docks as the new delivery point for coal supplied under the CSA. To avoid being in breach of the Ingram barge contract, Gulf Power approached Coalsales in June 2004 and, as an incentive for Coalsales to ship coal through the Cook Terminal, agreed to pay a higher price for this coal than was called for under the 2003 Amendment.[35] The parties entered into a letter agreement on June 8, 2004, which Coalsales terminated two weeks later.[36] Gulf

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[33] The fact that the parties considered an amendment to the CSA necessary in order for Coalsales to provide coal at a price other than specified in the CSA also supports the court's conclusion that the $1.5197 per MMBtu was intended to apply to all sources of coal supplied under the CSA.

[34] According to Ball, "upper river source" refers to a loading point on either the Ohio River or the upper portion of the Mississippi River, above Cairo, Illinois, which is where the Ohio and Mississippi Rivers converge.

[35] Coalsales suggested at trial that Gulf Power entered into the separate agreement for the Galatia/Twentymile blend to be delivered to the Cook Terminal to enable Coalsales to meet its supply obligations under the CSA. Coalsales acknowledged, however, that Gulf Power paid a higher price for this coal than that provided for under the CSA. It is only logical to conclude that Gulf Power agreed to the higher price to avoid being in breach of the Ingram barge contract.

[36] According to the June 8, 2004, letter agreement, the parties agreed to execute and negotiate a new coal supply agreement ("Twentymile CSA") and an amendment to the CSA as a result of the "potentially imminent bankruptcy filing" of AmCoal, "the primary source of supply" under the CSA. Again, the fact that the parties contemplated a new coal supply agreement and an amendment to the CSA for delivery of Galatia/Twentymile coal through the Cook Terminal indicates that the parties intended for the terms of the existing CSA to apply to any source provided thereunder. Similarly, one can infer from the fact that Gulf Power did not declare Coalsales in breach of the CSA when it terminated the June 8, 2004, letter agreement that Gulf Power did not consider the agreement part of the CSA.

reliance on the price of the Galatia/Twentymile blend is thus misplaced.[39]

Gulf Power's Cover Purchases

As set forth above, upon receiving notice of the permanent *force majeure*, Gulf Power was forced to procure substitute coal.[40] According to Russell Ball, Plant Crist burns approximately 360,00 to 380,000 tons of coal per month and attempts to maintain a 30-day full load operation on-site inventory. In addition to its on-site inventory, Gulf Power has, at any given time, approximately 150,000 tons of coal on the ground at the McDuffie Terminal. When coal is delivered to the McDuffie Terminal, Gulf Power pays for it and enters the purchase into its accounting records as inventory. The coal remains at the McDuffie Terminal until it is transferred on an as-needed basis to either Plant Crist or Plant Smith.[41] Because shipments to McDuffie are allocated as needed, there is no direct correlation between the tonnage delivered in a particular shipment and the amount transported on a particular date to a particular plant.

If a supplier fails to deliver the required tonnage under a contract, Gulf Power initially draws from its inventory to cover that loss. Whenever possible, Gulf Power purchases coal to cover the loss through its normal procurement process so that it can make a sound economic decision that can be justified to the Public Service Commission ("PSC").[42] As

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[39] Not only did Hamal wholly ignore the limitations on FPO 4005 in calculating Gulf Power's damages, but he conceded at trial that his entire damages calculation would be erroneous if the court found that FPO 4005 did not establish the contract price of coal to be delivered under the CSA.

[40] The parties do not dispute that Gulf Power was forced to procure coal in substitution for that Coalsales was to supply under the CSA. Coalsales argues, however, that Gulf Power failed to prove which of its coal purchases, in fact, were in substitution for the coal it should have received under the CSA.

[41] Gulf Power is required to provide the Federal Energy Regulatory Commission information regarding coal delivered to its plants.

[42] According to Ball, Gulf Power is required each year to file written testimony before the PSC setting forth its projected fuel costs, as well as its current contracts, including prices and quality specifications. The testimony is updated mid-year. At the end of the year, Gulf Power provides additional testimony outlining its procurement activities during the previous year, including the amount of fuel purchased, the price at which the fuel was purchased, and how the purchase price compared to the market price. The PSC may also issue interrogatories and/or requests for production of documents seeking information pertaining to purchases made in response to an RFP. The PSC monitors utilities' fuel procurement activities to ensure that they are reasonable and prudent and that the costs can justifiably be passed on to customers.

noted, if Gulf Power is not able to engage in the formal bidding process, it makes purchases from unsolicited bids or issues a solicitation for spot purchases.[43] In order to get the best price, coal typically is bought in multi-year contracts for large volumes with delivery to commence in six months to a year. According to Schwartz, it is neither feasible nor economical to purchase cover coal on a monthly basis in the precise amount of a shortfall. Rather, in order to replenish its inventory, Gulf Power adds the amount of shortfall to another purchase, whether it is a spot purchase or a purchase under a long-term contract.

Ball was responsible for designating Gulf Power's cover purchases and, in doing so, considered the date of the shortfall and the purchase order that covered the applicable time period, as reflected in Gulf Power's buy books. Ball testified that, as a result of Coalsales breach of the CSA, Gulf Power purchased 2,000,000 tons of cover coal in 2004 from Drummond under Fuel Purchase Order ("FPO") 4003 and FPO 4007 and 540,000 tons of cover coal from another Columbian supplier, Coal Marketing Company ("CMC"), under FPO 4004. In 2005, Gulf Power purchased cover coal from Drummond under FPOs 5001 and 5007, for 200,000 tons and 375,000 tons, respectively. In 2006, Gulf Power purchased 300,000 tons of cover coal from Drummond under FPO 6003; 260,00 tons from Glencore, Ltd., a Russian supplier, under FPO 6004; and 1,145,000 tons from Drummond under FPO 6005. Finally, in 2007, Gulf Power purchased 1,125,000 tons of cover coal from Drummond under FPO 7006 and 150,000 tons from AmCoal under FPO 6014.

Coalsales submits that Gulf Power's allocation of cover purchases was arbitrary, flawed, and inaccurate, and that Gulf Power, therefore, has failed to meet its burden of proving which of its purchases constituted cover purchases. As Coalsales points out, during the years in question, Gulf Power purchased millions of tons of coal at varying prices and of different quality, only a portion of which was in substitute for that which Coalsales should have delivered under the CSA. Coalsales claims that Gulf Power designated its cover purchases "after-the-fact" and in a self-serving manner to maximize its damages and

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[43] As Seth Schwartz, Gulf Power's damages expert, explained, coal is a large volume bulk commodity that takes time to produce, transport, and deliver.

thus failed to prove that the purchases were actually cover for Coalsales' breach. In support of this position, Hamal testified to certain FPOs he claims Gulf Power should have designated as cover purchases but did not.[44] In the alternative, Coalsales urges the court to adopt an averaging approach as discussed in 1 J. WHITE and R. SUMMERS, *Uniform Commercial Code* § 6-3 (5th ed. 2002), pursuant to which the court would consider all of Gulf Power's purchases during the months in question and determine an average price for purposes of damages.[45] Based on the evidence adduced at trial regarding Gulf Power's designation of cover purchases, particularly the testimony of Russell Ball and Seth Schwartz, the court finds that Gulf Power met its burden of demonstrating the cover coal it purchased in substitution for that not delivered by Coalsales under the CSA. Rather than arbitrarily designating the most expensive coal purchased during the pertinent time period as cover, as contemplated by WHITE & SUMMERS, Gulf Power designated specific coal purchased at a given time that corresponded with a coal shortfall Gulf Power experienced as a result of Coalsales' breach. Because Gulf Power was able to identify its specific cover purchases, a weighted average is neither necessary nor more accurate under the circumstances.[46]

Reasonableness of Gulf Power's Cover Purchases

Having determined that Gulf Power met its burden of proving its cover purchases,

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[44] Schwartz testified that the FPOs identified by Hamal were not for substitute coal.

[45] According to § 6-3, "where, following the seller's breach, the buyer for his own business purposes makes a number of purchases at various prices above the contract price and these exceed the quantity involved in the seller's breach, may the buyer, without more, charge off against the seller the differential between the contract price and the highest priced purchases on the theory that *these* purchases were of goods bought "in substitution" under 2-712(1)? We think not, and in the absence of special circumstances, would, in light of 2-712's good faith and reasonableness requirement limit the buyer to no more than the average costs of the purchases in the relevant time period." *See* WHITE & SUMMERS, *supra* at § 6-3.

[46] It should be noted that when Coalsales was required to procure substitute coal to provide to Gulf Power under the CSA, it designated its cover purchases in precisely the same manner as Gulf Power in order to recoup its costs from AmCoal.

the court must now decide whether Gulf Power's cover purchases were reasonable. Coalsales argues that Gulf Power's cover purchases were not reasonable because Gulf Power sought and purchased coal having a sulfur content significantly lower than that specified in the CSA in an effort to reduce the amount of sulfur allowances[47] it would be required to surrender and/or purchase.[48] Gulf Power, on the other hand, insists that it purchased what the market dictated was the lowest cost coal meeting the specifications set forth in the CSA. In support of its position, Gulf Power relies heavily on RFPs it issued seeking substitute coal for 2006 and 2007, which specified a maximum sulfur content of 2.4 lbs per MMBtu for Plant Crist and 2.1lbs. per MMBtu for Plant Smith. According to Gulf Power, the fact that it issued RFPs with the highest acceptable sulfur content demonstrates that it was willing to accept cover coal with a sulfur content in excess of that called for under the CSA. The record evidence shows otherwise, however. Indeed, it is clear from the evidence presented at trial that, although the sulfur content set forth in the RFPs was in excess of that provided for in the CSA, Gulf Power actually sought and purchased substitute coal with a sulfur content considerably lower than that provided for in the CSA and at a higher price per ton than other available alternatives.

According to Jim Vick, Gulf Power's manager of environmental affairs, Gulf Power creates an energy budget each year based on a ten-year projection for the upcoming year of load, generation time, fuel supply, Btus, and sulfur content and emissions. Gulf Power also runs models each year to determine whether, considering the applicable laws and regulations, it would be more economical to continue with its existing strategy of buying sulfur allowances or implement pollution control technology. Based on recent rules promulgated by the EPA, as well as the volatile sulfur allowance market, Gulf Power

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[47] As explained in fn.13, a utility company must have an emissions allowance for each ton of SO2 emitted as a result of its generating activity. Sulfur allowances are commodities and, like most commodities, vary in price. Although the sulfur allowance market seems highly volatile, as demonstrated below, prices can be quite significant.

[48] Coalsales argues that the substitute coal was superior in other respects as well, including ash content, ash fusion temperature, and chlorine content.

decided in 2004 to change its strategy with regard to Plant Crist and implement pollution control technology rather than continue to purchase sulfur allowances.[49] Vick explained that, in 2004, Gulf Power received a draft of what was to become the Clean Air Interstate Rule ("CAIR"), which he described as essentially the third phase of the Acid Rain Program. According to Vick, once CAIR was implemented, Gulf Power, like other utilities, would receive half the number of sulfur allowances previously allocated, ultimately resulting in depletion of its sulfur emissions allowance bank.[50] Once the number of available emissions allowances was reduced, emission allowance prices were expected to rise. In fact, a consulting firm retained by Gulf Power projected that sulfur allowance costs would reach $2250 in 2008. Gulf Power thus decided to install a wet scrubber at Plant Crist to become operational on or before January 1, 2010, the effective date of CAIR.[51] The scrubber was expected to reduce SO2 emissions by approximately 95 percent.[52] Because no additional allowances would be needed once the scrubber was operational, Gulf Power intended to rely on its existing bank and yearly allocation of allowances until the scrubber became operational, which required it to reduce the number of allowances needed through the end of 2009 to avoid having to purchase additional allowances. In order to reduce the number of emissions allowances needed, Gulf Power planned to burn low-sulfur coal. As Vick acknowledged at trial, the number of sulfur emissions allowances Gulf Power would be required to purchase prior to January 1, 2010, depended on the sulfur content of the coal it burned. To ensure that it had sufficient allowances through the end of 2009, Gulf Power made a forward swap with another utility, relinquishing allowances it would receive in 2013

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[49] There was no evidence that Gulf Power intended to install such technology at Plant Smith.

[50] The parties otherwise offered no explanation of CAIR.

[51] Vick testified that there are two types of wet scrubbers – one which gives the emissions a shower and another which gives them a bath. Gulf Power installed a Chiyoda jet bubbling reactor, which gives the emissions a bath by running the flue gas through a limestone slurry, greatly reducing SO2 emissions.

[52] According to Vick, the wet scrubber has exceeded Gulf Power's expectations and has actually reduced SO2 emissions by approximately 96 percent.

and 2014 in exchange for 2009 allowances. To the extent that any additional allowances were needed, Gulf Power intended to make spot purchases of sulfur allowances.

Gulf Power's sulfur/coal procurement strategy is set forth in a number of documents admitted at trial. In its Risk Management Plan for Fuel Procurement ("Risk Management Plan"), filed with the PSC on April 1, 2004, for example, Gulf Power acknowledged a "need to diversity with other sources, including Columbian and other import coals" and informed the PSC that one of its strategic objectives was to include import sources "as a large portion of future coal commitments." Gulf Power explained that a primary environmental concern was its continued compliance with SO2 provisions imposed by the Clean Air Act and that it expected its allowance bank to decline over the next couple of years. Gulf Power confirmed that it intended to continue using low sulfur coal and purchase any additional sulfur allowances required in order to comply with SO2 restrictions. Gulf Power represented to the PSC that its coal commitments would be structured to minimize its risk incumbent upon any change in environmental laws and regulations and that "[t]he focus for 2004 and forward [would] be to look for opportunities to reduce the amount of Peabody contract coal that is supplied to Crist and Smith from the Illinois Basin Galatia Mine."

Gulf Power's shift in strategy is further evidenced in a June 21, 2005, Update on the Emission Allowance Markets ("Update"), in which Gary Hart, Gulf Power's manager of emissions trading, explained that Gulf Power, like many other utilities, over-complied from 1995 to 1999 with regard to sulfur allowance accumulations.[53] According to Hart, Gulf Power was concerned about the availability and rising cost of sulfur emissions allowances between 2005 and 2009, the period leading up to the effective date of CAIR, during which time Gulf Power was planning to transition from its reliance on banked allowances to reliance on scrubber technology. Gulf Power considered the fact that if it were to switch to a lower sulfur coal, it would accumulate allowances, in which case it could surrender them, bank them, or sell them to a broker. If Gulf Power did not install a scrubber and was forced to purchase additional allowances in order to comply with CAIR, on the other hand,

[53] In 1998, Gulf Power sold 20,000 sulfur allowances for $190 each, or $3.8 million in total.

it anticipated spending approximately $16,000,000 in 2007, $23,000,000 in both 2008 and 2009, and $153,000,000 from 2010 to 2014, assuming allowances were valued at $1000.[54] In summarizing the SO2 market and making projections for the period leading up to the implementation of CAIR, Hart concluded that the demand for allowances was exceeding the supply, there were limited sellers, pollution control technology was not being implemented quickly enough to meet the more stringent environmental regulations, and the overall uncertainty in the allowance market was going to cause utility companies to hold on to their allowances. Those factors, according to Hart, led to a predicted rise in SO2 emissions allowance prices over the next four to five years.[55]

Consistent with its shift in strategy and submissions to the PSC, Gulf Power began purchasing lower sulfur import coal prior to Coalsales' January 23, 2006, declaration of a permanent *force majeure* in order to reduce its sulfur emissions and minimize its use of allowances. In a December 12, 2005, memorandum, Tris Swindle, a coal buyer for SCS, explained to Russell Ball that he had compiled a "delivered least cost line-up" for a bid proposal Gulf Power issued on October 24, 2005, for 300,000 tons of substitute coal to be supplied to Plants Crist and Smith in 2006 and 2007. Gulf Power's bid solicitation included two options: Proposal A for a one-year contract beginning on January 1, 2006, and Proposal B for a two-year contract beginning on the same date. Fourteen bids were received from seven suppliers from the Central Appalachian, Russian, Columbian, and

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[54] According to Vick, the value of sulfur allowances during the earlier stages of Gulf Power's analysis was between $900 and $1000, and he assumed $1000 during his trial testimony. Included in the Update were slides containing projected sulfur allowance values. The Cantor Fitzgerald sulfur allowance index, well recognized in the coal industry, projected that after a sharp rise beginning around 2004, sulfur allowances would be valued at close to $900 in 2005. Southern Company Services, along with the consulting company it retained, projected values to be between $500 and $1000 in mid-2005 and to reach as high as $2250 in 2008.

[55] Gulf Power's concern about the volatility of the sulfur allowance market is further reflected in written testimony submitted to the PSC on September 16, 2005, in which Vick explained, among other things, that due to its current consumption of more sulfur allowances than allocated by the EPA, Gulf Power expected that its bank would be depleted in 2007 and thus intended to install the scrubber at Plant Crist, particularly in light of the fact that sulfur emissions allowances had quadrupled in value over the past eighteen months. Vick also testified at trial that the availability and price of allowances was a huge concern of Gulf Power's.

Northern PRB (Montana) coal supply regions. In deciding which bids would result in the lowest cost to Gulf Power, Swindle considered applicable transportation rates and SO2 allowance values. With regard to Proposal A, Swindle determined that the lowest cost bid was submitted by Drummond Coal Sales, LDC, for coal from Russia's Kuzbass region. Gulf Power decided not to purchase and test the lowest cost coal because it had already tested Glencore coal from the same region. The next lowest offer under Proposal A was from CMC. Gulf Power declined that bid because of certain operational difficulties. The third lowest offer under Proposal A was from Drummond for Columbian coal. Gulf Power purchased the Drummond coal, which was an approved source under the CSA, for $3.32 per MMBtu, including sulfur. Swindle concluded that there were only two attractive offers submitted under Proposal B, both of which were from Glencore for Russian coal. Gulf Power purchased 300,000 tons of the Glencore Russian coal for $3.05 per MMBtu, including sulfur. Gulf Power also purchased a test vessel of Glencore's La Jagua Columbian coal for $3.33 per MMBtu, including sulfur.

On January 5, 2006, shortly after learning of the permanent *force majeure* at the Millennium Portal of the Galatia Mine, Ball emailed Swindle and other Gulf Power employees a chart setting forth Gulf Power's coal procurement options. There were three. The first was to continue under the CSA with Coalsales supplying 300,000 tons of the Galatia/Twentymile blend and Gulf Power procuring 1.6 million tons of Russian coal. The second option was to continue under the CSA with Coalsales supplying 300,000 tons of the Galatia/Twentymile blend and Gulf Power procuring 1.6 million tons of Columbian coal. The final option was to terminate the CSA and replace the entire shortfall with Columbian coal. Although the price per ton of the lower sulfur Russian and Columbian coals was significantly higher than the price of the Galatia/Twentymile blend, when sulfur content was taken into account, the import coal had a lower cost. As Ball explained in his email, even though Gulf Power may pay a higher price for the lower sulfur import coal, "once you consider the value of sulfur allowances . . . it would be essentially a break even cost to the ratepayers to terminate the Peabody contract and replace the entire 1,900,000 tons with

low sulfur import coal if [Gulf Power] can get the import coal (11,700 BTU/LB, 0.55% sulfur) delivered in the barge at McDuffie for $49 per ton." In fact, although Gulf Power would have paid $19,200,000 more for the Columbian coal and $23 million more for the Russian coal than for the Galatia/Twentymile blend on a cost per ton basis, when taking into account the $1380 per allowance Gulf Power would save in burning the lower sulfur import coal, Ball concluded that Gulf Power would be better off economically buying the Columbian or Russian coal. As reflected in an email sent the same day, Swindle agreed with Ball's calculations, adding that, even though the market price of coal was higher than Ball projected, the estimated sulfur allowance value also was higher, as a result of which Gulf Power would benefit from then-current sulfur allowance values, and a portion of the 1.9 million tons could be procured from Russia, "thereby lowering the offered sulfur content further playing into Gulf's hands." As Vick confirmed at trial, Coalsales' declaration of a permanent *force majeure* provided Gulf Power with an opportunity to implement its new sulfur/coal procurement strategy.

According to an August 31, 2006, memorandum from Swindle to Ball, Gulf Power issued a spot coal solicitation to its approved bidders on January 17, 2006, seeking coal to replace that not delivered by Coalsales under the CSA. Because the initial bids seemed to be inconsistent with market prices, Gulf Power re-bid the solicitation on February 8, 2006. As with its previous solicitations, the bids were evaluated to derive a "delivered least cost line-up" based on applicable transportation rates and SO2 allowance values. Swindle's findings with regard to the February 8, 2006, solicitation are set forth in a 2006 Spot Coal Evaluation report, which includes a chart with a column for sulfur allowance values, ranking the bids received on the basis of "delivered cost with sulfur $/mmBTU."[56] Swindle explained to Ball that the lowest offer submitted was from Constellation Energy for Russian Kuzbass coal. Because Constellation would not agree to Gulf Power's terms and

[56] All of the bids, with one exception, were for import coal, which is obviously what Gulf Power was seeking. Indeed, in response to a question regarding its January 17, 2006, RFP, Swindle advised a potential bidder that Gulf Power intended to procure only import coal.

conditions, however, Gulf Power decided not to accept its bid. The next lowest offer was from Glencore for Russian coal. Even though Glencore's bid was more economical than the next lowest bid, which was from Drummond for Columbian coal, Gulf Power decided not to purchase a large quantity from Glencore and, instead, elected to purchase the largest quantity of coal from Drummond because of its familiarity with the product. Gulf Power thus purchased 260,000 tons of the Glencore coal at a delivered price of $3.27/MMBtu, including sulfur, and 1,145,000 tons of the Drummond coal at a delivered price of $3.36 per MMBtu, including sulfur. Although at trial Gulf Power characterized the bids it accepted as being the lowest cost bids received, a review of the chart reveals that these bids in reality are lower only if sulfur content is considered.[57]

Finally, the fact that Gulf Power effected a shift in its sulfur/coal procurement strategy is reflected in a May 4, 2007, memorandum from Swindle to Ball regarding Gulf Power's "Long-Term Coal Solicitation 2007-2010." This memorandum was prepared, according to Swindle, "to document the long-term coal purchases that were made on behalf of Gulf Power Company's Plants Crist and Smith." Swindle referenced in his memorandum an April 12, 2006, bid solicitation and stated that eight offers were received from five suppliers, including two domestic offers from the Illinois Basin and Colorado coal regions and six import offers from Columbia and Russia. The eight bids "were evaluated to Plant Crist on a fully delivered, net present value basis, including the value of sulfur." In the memorandum, Swindle set forth the offers received. The lowest cost offer was for a one-year contract with Glencore for Russian coal at a delivered price of $3.254 per MMBtu, including sulfur. Gulf Power bought 300,000 tons of the Glencore Russian coal for delivery in 2007. Glencore also submitted the second lowest bid, which was for a blend of Columbian coals. Although the offer was for three years at an average price of $3.323 per MMBtu, including sulfur, because Gulf Power had not previously burned the coal, it decided to purchase 500,000 tons a year for two years instead. The third most competitive offer,

[57] According to Gulf Power's chart, there were other bids with lower prices per ton, but these bids were for coal with a higher sulfur content than that which Gulf Power was seeking.

according to Swindle, was a two year offer from CMC; however, this coal did not meet the minimum calorific requirements for either plant and thus Gulf Power declined it. The fourth lowest offer was from Drummond. Gulf Power and Drummond agreed to a two-year contract for 1.5 million tons of Columbian coal to be delivered in 2007 and 2008 at an average price of $3.428 per MMBtu, including sulfur. Swindle documented in his memorandum Gulf Power's negotiations with AmCoal regarding a bid it submitted. Swindle noted that the 1.5 percent sulfur content of the AmCoal coal was "too high to take to Crist and Smith by itself as it does not meet the SO2 emission limits." In its April 12, 2006, RFP, Gulf Power had emphasized that Plants Crist and Smith could not accept coal with a sulfur content greater than .99 percent.[58] Thus, it appears that, as of May 4, 2007, Gulf Power had altered its standards in such a way that it would no longer accept coal with a sulfur content as high as that specified in the CSA. That is consistent with Gulf Power's well-documented shift in strategy, pursuant to which it planned to purchase coal with a significantly lower sulfur content, which came at a higher price per ton than other available substitute coal. In the end, in purchasing substitute coal, Gulf Power chose to abide by its strategy rather than seek the lowest price for coal with specifications similar to those called for under the CSA.

In evaluating the reasonableness of a cover purchase, courts consider the quality of the substituted goods and decide whether they are of "like kind" to those specified in the parties' contract. For example, in *Martella v. Woods*, the Eighth Circuit reversed an award of cover damages for breach of contract because the buyer failed to purchase like-kind substitute goods. 715 F.2d at 414. The buyer in *Martella* purchased from the seller three and four month-old heifers. The buyer was to feed the heifers and allow them to breed with bulls furnished by the seller. When the heifers reached approximately 24 to 30 months of age, the buyer was to sell them back to the seller at a price determined by the weight of each heifer. When the buyer failed to resell the heifers, as agreed, the seller purchased

[58] Recognizing the value associated with lower sulfur coal, Gulf Power also advised prospective bidders in its April 12, 2006, RFP that "appropriate economic consideration must be given for sulfur."

pregnant heifers from third parties and sued the buyer for breach of contract. The Eighth Circuit found that the seller was permitted to cover only with the quality and size of heifers the buyer was obligated to sell. *Id.* at 413. The court held that the heifers purchased by the seller were not like-kind substitutes and that, through its cover purchases, the seller placed itself in a better position than it would have been in had the contract been performed. *Id.* The court thus concluded that the seller's cover was not reasonable and that its damages were limited to the difference between the market price of the heifers the seller was obligated to sell at the time the buyer learned of the breach and the contract price.[59] *Id.* at 413-14. Similarly, in *Kanzmeier v. McCoppin*, 398 N.W.2d 826, 833 (Iowa 1987), the court found that the buyer's cover was not proper because it did not consist of like-kind substitute goods. The buyer and seller in *Kanzmeier* contracted for the sale of cattle of a certain weight. When the seller failed to deliver, the buyer covered with cattle of a different weight. Although the court noted that the buyer was permitted to obtain cover goods as a result of the seller's breach, it held that the cover goods had to be like-kind substitutes and that there was no cover if the buyer purchased substantially different goods.[60] *Id.*

Like the buyers in *Martella* and *Kanzmeier*, Gulf Power did not purchase like-kind substitute goods in response to the breach of contract. The evidence plainly shows that Gulf Power sought import coal with a lower sulfur content, which came at a higher price per ton, and in doing so, rejected lower priced bids for coal having a sulfur content closer in quality to that specified in the CSA. Because Gulf Power did not cover with coal sufficiently similar to that called for under the CSA, its cover was not reasonable and Gulf Power

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[59] There was evidence of market price in the record. Because the district court did not "engage in any substantial factfinding" on the issue, however, the court remanded the case, advising that the district court could, at its discretion, hold a new hearing for additional factfinding before calculating damages. *Id.* at 414.

[60] As in *Martella*, the *Kanzmeier* court remanded the case for a re-determination of damages, calculated as the difference between the market price at the time the buyer learned of the breach and the contract price based on the existing record. *Id.* at 833.

cannot recover cover damages under § 672.712(2).[61] *See Martella*, 715 F.2d at 413-14; *Kanzmeier*, 398 N.W.2d at 833; *see also Micro Products, Inc. v. Sylvan Learning Sys., Inc.*, 1999 WL 262434, at *4 (Va. Cir. Ct. March 16, 1999) (unpublished opinion) (denying cover damages where substitute product was an upgrade).[62]

Market Remedy

Having failed to prove its claim for cover damages, at most, Gulf Power would be entitled to recover the difference between the market price at the time it learned of the breach and the contract price, together with any incidental and consequential damages but less expenses saved as a result of the breach under Fla. Stat. § 672.713. Having elected to proceed solely under § 672.712, however, Gulf Power neither pled a claim for market damages nor offered any evidence of market price at trial. As a result, it is precluded from recovering damages under § 672.713.[63] *See* Fla. Stat. § 672.713, cmt. 5 (noting that the market remedy provided in § 672.713 is "completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered"); *see also In re Sav-A-Stop, Inc. v. Mayfair Super Markets, Inc.*, 119 B.R. 317, 324 (M.D. Fla. 1990) (precluding supplier who failed to present evidence of market price at trial from recovering damages under § 672.713); *Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828, 831 (Fla. 4th DCA 1999) (reversing final judgment in favor of plaintiff and remanding for entry of judgment in favor of defendants based on a lack of proof at trial of the correct measure

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[61] Two of the leading treatises in this area support the same analysis. *See* WHITE & SUMMERS, *supra*, at § 6-3 ("Suppose, for example, that seller breaches a sales contract for four-speed food blenders. Desiring to take advantage of the Code's cover provision, buyer procures a substitute contract for more expensive eight-speed food blenders. If the comparable four-speed machines were available, it is clear that buyer should not recover the full difference between the cover price and the contract price. Although Comment 2 instructs that the substitute need not be the least expensive cover, nothing in the Code indicates that the buyer is free to pass over an identical substitute and to select his own windfall."); ANDERSON, *supra*, at § 8:8 ("If the buyer purchases superior goods when comparable goods are readily available, the cover should be found unreasonable, and the buyer should be restricted to damages based on market value under Section 2-713.").

[62] Coalsales also argues that Gulf Power's cover purchases were not timely made. Although the court disagrees, it need not address the timeliness argument in light of its findings.

[63] As the Eleventh Circuit has noted, "[t]he plaintiff is the author of his own relief." *Mann v. Pierce*, 803 F.2d 1552, 1555 (11th Cir. 1986).

of damages); *Nico Indus., Inc. v. Steel Form Contractors, Inc.*, 625 So. 2d 1252, (Fla. 4th DCA 1993) (same); ANDERSON, *supra*, at §§ 7:6, 9:10 (noting that, if the buyer elects cover, "the cover remedy then becomes the mandatory damage measurement, and the buyer may not subsequently choose to have damages based on the market formula . . . ." and that buyers may be denied a recovery under § 2-713, even under the Code's liberal standards, if they fail to present credible evidence of market price at trial).

Expenses Saved

Even if Gulf Power had pled an alternative claim for market damages and offered evidence of market price at trial, any claim for damages under § 672.713 would have failed because of insufficient evidence of expenses saved. *See* 77A CJS *Sales* § 579 (2008) (noting that expenses saved must also be proved by a party seeking a market remedy). Coalsales argued at trial that, in the event Gulf Power was entitled to damages, its damages must be reduced by the amount of expenses it saved as a result of Coalsales' breach.[64] More particularly, Coalsales argued that Gulf Power benefitted by purchasing coal with a lower sulfur content than that specified in the CSA and that the value of the sulfur allowances Gulf Power saved, or was not required to purchase, as a result of the lower sulfur coal should be deducted from Gulf Power's damages. Gulf Power disagreed, asserting that, because Coalsales was not entitled to a premium under the CSA for lower sulfur coal and would have supplied the same coal Gulf Power purchased in the event it had continued to perform under the CSA, Coalsales would profit from its breach if the sulfur allowance value was deducted from its damages. Gulf Power further claims that, because

[64] Coalsales also contends that Gulf Power failed to mitigate its damages and that any recovery should be reduced accordingly. Coalsales' argument is based on Gulf Power's rejection of North Portal coal after the declaration of the permanent *force majeure* on January 23, 2006, and subsequent purchase of the same coal at a price higher than that offered by Coalsales. As explained above, Gulf Power rejected the North Portal coal when offered by Coalsales because its sulfur content was higher than that specified in the CSA and Coalsales refused to make an adjustment for the sulfur differential, which would have required Gulf Power to relinquish and/or acquire additional sulfur emissions allowances to burn the coal. When Gulf Power later purchased the same coal, it had a blending facility, which meant that it could blend the North Portal coal with a lower sulfur coal and thus would not be required to surrender any sulfur allowances to burn the coal. The court finds Gulf Power's rejection of the North Portal coal reasonable and, therefore, that Gulf Power did not fail to mitigate its damages in refusing to accept it.

it purchased the coal for its own consumption and not for resale, its damages need not be reduced unless Coalsales presents persuasive evidence that Gulf Power will reap additional profits because of the superior quality of the cover coal.[65] In the event the court finds that expenses saved must be deducted from damages, Gulf Power argues in response that it saved considerably less than the amount proposed by Coalsales as a result of its purchase of lower sulfur coal.

It is clear from the evidence at trial that Gulf Power enjoyed a significant and appreciable benefit as a result of its purchase of lower sulfur coal.[66] It is likewise clear, under the applicable law, that the expenses Gulf Power saved in connection with its purchase of lower sulfur coal must be deducted from its damages and that Gulf Power bears the burden of establishing that amount. *See* Fla. Stat. § 672.713; *see also Milwaukee Valve Co., Inc. v. Mishawaka Brass Mfg., Inc.*, 319 N.W.2d 885, 890 (Wis. 1982) (noting that "'[t]he fundamental idea in allowing damages for breach of contract is to put the plaintiff in as good a position financially as he would have been in but for the breach" and that the a buyer whose performance is excused as a result of a seller's breach must prove,

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[65] Gulf Power's argument in this regard is based on WHITE & SUMMERS, *supra*, at § 6-3, which provides as follows:

> What of the buyer who covers by purchasing goods of superior quality for use as a commercial substitute . . .? [I]f the aggrieved buyer will itself consume the cover goods, as for example by the use of furniture or equipment in a business, the problem is more difficult. Should the damage recovery under 2-712 be reduced because the cover machinery which the aggrieved buyer purchased is marginally more efficient? Because the waiting room furniture is slightly more attractive than that contracted for? We think the damage recovery should not be reduced unless the seller comes forward with persuasive evidence that the buyer will reap added profits because of the superior quality of the cover merchandise.

[66] In addition to a $17.5 million reduction in savings due to lower sulfur content, Coalsales argues for an additional $11.5 million reduction in Gulf Power's damages based on alleged savings derived from other characteristics of the cover coal, including chlorine content, ash fusion temperature, and ash content. Hamal admitted, however, that he was unable to quantify any benefit associated with the additional characteristics and could only provide an estimate derived from penalty provisions set forth in Gulf Power's standard terms and conditions for coal that exceeded the limits for certain characteristics, from which he concluded there should be a premium for coal having certain characteristics below the limits. Based on the speculative nature of this testimony, the court excluded evidence of savings allegedly associated with other coal characteristics.

as an element of its damages, savings accrued by non-completion of the contract); ANDERSON, *supra*, at § 8:23 ("Expenses saved are a component of the calculation of the buyer's direct damages, and thus the burden of their proof is on the buyer."); Rezner and Elyse, *supra* (noting that reducing a buyer's recovery by the amount of expenses saved in consequence of the breach "is necessary to promote the desired result of placing the buyer in the position he would have been in had no breach occurred"). The issue for the court, then, is whether Gulf Power introduced sufficient evidence of the amount of expenses it saved as a result of Coalsales' breach and, if so, the amount of the savings. Presumably based on its position regarding the burden of proof, Gulf Power offered no evidence at trial of the expenses it saved as a result of its purchase of lower sulfur coal.[67] Coalsales, however, questioned Russell Ball on cross-examination about a chart he prepared for use by one of Gulf Power's expert witnesses.[68] According to this chart, Gulf Power saved $6,552,724 as a result of the sulfur differential. In arriving at that number, Ball considered the sulfur content of the cover coal it purchased, as well as that specified for coal supplied under the CSA. Ball determined that the sulfur content of the Columbian replacement coal Gulf Power purchased in 2004, 2005, and 2006 was 1.2 lbs. per MMBtu and that the sulfur content of the Columbia/Galatia blend Gulf Power procured in 2007 was the same as the 1.7 lbs. per MMBtu provided for under the CSA. Ball then calculated the SO2 emissions of coal meeting the sulfur specification under the CSA and that of the substitute coal. Ball determined the price of the cover coal taking sulfur value into account using a sulfur allowance value of $410, which he believes was the market price for sulfur allowances as of April 28, 2008, the date he prepared the chart. The difference in price when considering sulfur value, according to Ball, was $6,552.724.

Cliff Hamal took a similar approach, at least in some respects, to the computation of Gulf Power's savings. In calculating the benefit Gulf Power received, Hamal first

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[67] Gulf Power's position at trial was that Coalsales bore this burden.

[68] The chart was prepared for Ronald Jackson, whose testimony was excluded before trial (doc. 147).

identified the cover coal for each month from 2003 through 2007. If no purchases were made in a given month, Hamal based his calculations on the prior month's purchases. Because no cover coal was purchased during the first four months according to Coalsales' approach, Hamal used the price and quality of the first coal purchased. He then considered the sulfur content of the replacement coal in comparison to the sulfur content specified under the CSA to arrive at the difference.[69] Multiplying that difference by the amount of shortfall and the heat value of the replacement coal, Hamal determined the amount of reduced SO2 emissions. He multiplied that number by the applicable Cantor Fitzgerald monthly market price for sulfur allowances to arrive at Gulf Power's monthly sulfur allowance savings, which he concluded totaled $17.5 million.[70]

Although their approaches were similar, the parties' results were drastically different – and both were flawed. Gulf Power assumed a sulfur allowance value as of April 28, 2008. The evidence at trial made it abundantly clear, however, that the value of sulfur allowances fluctuates wildly and, in fact, fluctuated considerably during the period in question, ranging from $142.64 in January 2003 to $1578.11 in December 2005.[71] Although its method of valuing sulfur allowances may have been more sound, Coalsales's calculation was based on an incorrect designation of cover purchases. The court finds that, in order to calculate the savings Gulf Power realized as a result of its purchase of lower sulfur cover coal, the applicable sulfur allowance value should have been applied to the actual cover coal purchased, as designated by Gulf Power. Neither party made such a

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[69] At trial, Gulf Power cross-examined Hamal on his use of the 1.7 lb. per MMBtu sulfur content specification under the CSA as opposed to the sulfur content of the coal actually supplied thereunder before the breach. However, not only is the 1.7 lb. per MMBtu the proper value to consider, but Ball made the same assumption in performing his calculation.

[70] Gulf Power took the position that, because it surrenders sulfur allowances on an annual basis, any savings it realized through the purchase of lower sulfur coal should be calculated on the same basis, taking into account the SO2 emissions of all coal burned during a given year. As Hamal pointed out, in connection with FPO 4005 under which Gulf Power was to pay a premium for lower sulfur coal, the parties agreed to calculate the value of sulfur allowances on a monthly basis, based on a weighted average for the respective months in which shipments occurred. According to Hamal, the practice of settling on a monthly basis for deliveries made is routine in the industry.

[71] In fact, Gulf Power purchased sulfur allowances in the latter part of 2005 for $950 each.

showing. Considering that Gulf Power bore the burden of proof on the issue, its failure to offer sufficient proof of expenses saved is fatal to its damages claim.[72]

CONCLUSION

Based on the preponderance of the evidence adduced at trial, the court finds that Gulf Power proved the cover purchases it made as a result of Coalsales' breach. The court concludes, however, that Gulf Power's cover purchases were not reasonable because it did not cover the shortfall of coal with a like-kind substitute and instead covered with coal having a sulfur content considerably lower than that specified under the CSA at a higher price. Gulf Power's claim for cover damages also fails because it did not offer sufficient evidence of expenses saved as a result of Coalsales' breach. Finally, even if Gulf Power had pled and could recover market damages under Fla. Stat. § 672.713 after electing to cover, Gulf Power failed to present evidence of market price.

Accordingly, it is hereby ORDERED that final judgment be entered in favor of the defendant consistent with this order and that costs be taxed against the plaintiff.

DONE and ORDERED this 30th day of September, 2010.

M. Casey Rodgers

M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

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[72] The amount of money Gulf Power saved as a result of its cover purchases in 2003 also constitutes expenses saved. As stated, Gulf Power omitted those purchases from its damages claim and offered no evidence of its 2003 cover purchases at trial. *See* ANDERSON, *supra*, at § 8:23 ("Where the buyer makes multiple covers for the contracted goods, some in excess of the breached contract price and others at less, the amounts saved on the lesser covers should be deducted as expenses saved from the buyer's damages for the covers at amounts in excess of the breached contract price."); *see also Precision Master, Inc. v. Mold Masters Co.*, 2007 WL 2012807 (Mich. App. July 12, 2007) (unpublished opinion) (noting that the purpose of the cover provision is to allow the non-breaching party the benefit of its bargain, not a windfall, and holding that it was "disingenuous" to suggest that monies saved on cover purchases should not be included as expenses saved in consequence of the seller's breach).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GULF POWER COMPANY,

Plaintiff, **Case No.: 3:06 CV 270/MCR/MD**

vs.

COALSALES II, L.L.C.,
f/k/a PEABODY COALSALES COMPANY,

Defendant.

GULF POWER COMPANY'S MOTION TO ALTER OR AMEND JUDGMENT, OR, ALTERNATIVELY, FOR RELIEF FROM JUDGMENT AND SUPPORTING MEMORANDUM

COMES NOW, Gulf Power Company ("Gulf" or "Gulf Power"), by and through its undersigned counsel, and pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure and Rule 7.1 of the Local Rules for the Northern District of Florida, files this Motion to Alter or Amend Judgment, or, Alternatively, For Relief from Judgment and supporting memorandum.

PROCEDURAL HISTORY

On September 30, 2009, the Court granted Gulf Power's Partial Motion for Summary Judgment on Liability and found that Coalsales breached its 1994 Coal Supply Agreement ("CSA") with Gulf Power. The issue of Gulf Power's damages was tried to the Court from February 9, 2010, to February 17, 2010. On September 30, 2010, the Court entered a final order finding that Gulf Power's cover purchases were unreasonable and that Gulf was not entitled to damages. (Doc. 171) In its Order, the Court found that the price for coal from all sources under the CSA was $1.5197 per MMBtu (Doc. 171 at p. 12); Gulf's identification of its cover

purchases was reasonable (Doc. 171 at p. 21); Gulf's cover purchases were timely (Doc. 171 at p. 31, n. 62); and that there was no evidence to demonstrate that Gulf acted in bad faith in procuring cover. (Doc. 171 at p. 10, n. 24) The sole basis for the Court's determination that Gulf's cover was unreasonable --and that Gulf was therefore completely barred from recovering damages under the Florida Uniform Commercial Code's ("U.C.C.") "cover" provision, section 672.712, Florida Statutes-- was the Court's finding that the substitute coal possessed a sulfur content that was lower than the *maximum* specification of 1.7 lbs. SO2 per MMBtu called for under the CSA. (Doc. 171 at pp. 30-31)

APPLICABLE STANDARDS

Gulf Power files this motion in recognition of the fact that Rule 59(e) and 60(b) motions are granted sparingly and that such motions may not be used to relitigate old matters or present arguments or evidence that could have been introduced prior to the entry of judgment. See, e.g., United Educators Ins., v. Everest Indem. Ins. Co., 2010 WL 1434416 at *2 (11th Cir. April 12, 2010). However, the Eleventh Circuit has held that a Rule 59(e) motion may be granted where a party identifies newly-discovered evidence or manifest errors of law or fact. See, Smith v. Secretary, Florida Dept. of Corrections, 2009 WL 4893301 at *3 (11th Cir. Dec. 21, 2009). In this case, Gulf Power respectfully contends that there are manifest errors of both law and fact requiring the relief requested.

Similarly, a Rule 60(b) motion may provide relief from a judgment due to: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which could not have been discovered earlier with due diligence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) a void judgment; (5) a judgment that has been satisfied, released, discharged, reversed, or vacated; or (6) any other reason justifying relief from the

operation of the judgment." Id. at *4. Gulf Power respectfully contends that there are mistakes and other reasons inherent in the Court's judgment which entitle Gulf to relief from that judgment. These legal and factual errors,[1] in fairness to the Court and the parties, must be corrected before this case proceeds further.

DISCUSSION

Several things are clear from the record and this Court's final order. Coalsales breached its CSA with Gulf Power. Following Coalsales' breach, Gulf Power had no choice but to procure substitute coal from other sources in order to continue operating its plants. Gulf's cover purchases were appropriately designated, timely and made in good faith. While there was vigorous debate between the parties concerning the *extent* of Gulf's damages[2] --due to the differing sulfur and other characteristics of the cover coal purchased by Gulf-- there is no question that Gulf suffered *some* degree of damage as a direct consequence of Coalsales' breach. This is true even if all of Coalsales' arguments for downward adjustments in Gulf's damages are accepted in full. In fact, Coalsales' expert, Cliff Hamal, opined that Gulf's damages were no *higher* than $26.9 million. [Tr. Day 4: 118-19] In light of the foregoing and the general principle that the U.C.C. should be interpreted liberally so as to make the non-breaching buyer whole, Gulf Power respectfully submits that the Court's finding that Gulf was entitled to *no* damages in this case is an extraordinarily drastic and unnecessary result and one that is the product of errors both in the application of the law and an understanding of the facts.

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[1] Gulf's choice to raise a limited number of issues in this motion should not be construed as a waiver of Gulf's right to identify other issues if this matter is appealed to the Eleventh Circuit.

[2] Gulf Power sought damages of $77,465,211, exclusive of prejudgment interest. [Tr. Day 1: 110 (2004 damages of $3,923,302); 125 (2005 damages of $12,594,394); 149 (2006 damages of $40,419,725); and 158 (2007 damages of $20,527,789)]

A. At a minimum, Gulf Power is entitled to damages stemming from its cover purchases for 2007.

The sole basis for the Court's determination that Gulf's cover was unreasonable, and that Gulf was therefore completely barred from recovering damages pursuant to section 672.712, Florida Statutes, was the Court's conclusion that the cover coal purchased by Gulf possessed a lower sulfur content than the ***maximum*** sulfur specification permitted under the CSA of 1.7 lbs. SO2 per MMBtu. (Doc. 171 at pp. 30-31) Gulf respectfully disagrees with the Court's conclusion that the differing sulfur characteristics of cover coal alone warrant a complete bar to recovery for those lower sulfur coals under section 672.712, Florida Statutes. However, even if this conclusion is correct, Gulf is nevertheless entitled to damages under section 672.712 for its purchase of cover coal in 2007 because the sulfur content of the coal designated by Gulf as cover in 2007 *met* the CSA maximum specification of 1.7 lbs. SO2 per MMBtu.

At page 34 of its Order the Court acknowledges and accepts the testimony of Mr. Ball that "[t]he sulfur content of the Columbia/Galatia blend Gulf Power procured in 2007 was *the same* as the 1.7 lbs. per MMBtu provided for under the CSA." Yet, the Court also appears to determine that Gulf's cover purchases for 2007 were guided by a shift in strategy toward the purchase of lower sulfur coal, and are therefore unreasonable. At page 29 of its Order, the Court finds that, "[a]s of May 4, 2007, Gulf Power had altered its standards in such a way that it would no longer accept coal with a sulfur content *as high as that specified in the CSA*." (emphasis supplied) The Court based this finding on two documents. First, the Court references an excerpt from a May 4, 2007, memorandum from Tris Swindle[3] wherein Mr. Swindle notes that the "***1.5 percent sulfur*** content of the AmCoal coal was 'too high to take to Crist and Smith by itself as it

[3] This memo was introduced into evidence as Gulf Power Exhibit 204. The memo relates to Gulf's April 12, 2006 RFP which sought cover coal for 2007.

does not meet the SO2 emission limits.'" (Doc. 171 at p. 29) (emphasis supplied) Second, the Court references Gulf's April 12, 2006, RFP which the Court characterized as seeking coal with a maximum sulfur content of no greater than "***.99 percent.***"[4] (Doc. 171 at p. 29) The Court concludes that this is evidence of Gulf's "well-documented shift in strategy, pursuant to which it planned to purchase coal with a significantly lower sulfur content, which came at a higher price per ton than other available substitute coal." (Doc. 171 at p. 29) The Court's conclusion is based on a misunderstanding of the units of measure and a failure to make the necessary mathematical conversion.

There is a critical distinction to be drawn between expressing sulfur by "percentage," in "lbs. Sulfur per MMBtu," and in "lbs. SO2 per MMBtu." As explained by Mr. Ball, coal with a "***1.5 percent sulfur***" content possesses a ***SO2*** content of 2.5 lbs. SO2 per MMBtu. [Tr. Day 1: 156] Translating percent sulfur to lbs. of SO2 per MMBtu requires a mathematical conversion. This conversion is illustrated in section 7.01 of the CSA and was discussed at trial by Coalsales witness Hamal [Tr. Day 4: 100] and Gulf witness Schwartz. [Tr. Day 5: 38] As explained by witness Schwartz, "percent sulfur" and "lbs. of sulfur dioxide per MMBtu" are not an "apples to apples comparison." [Id.] The flaw with the Court's analysis is that it mistakenly assumes that the 1.5 and 0.99 sulfur figures in the Swindle Memo and April 2006 RFP are comparable to the "1.7 lbs. SO2 per MMBtu" specification in section 7.01 of the CSA. In fact, the two are completely different units of measurement. When the appropriate conversion is made, both references are to coal with a *higher* SO2 content than the maximum called for under the CSA. As explained by Mr. Ball, the AmCoal coal referenced by Mr. Swindle in the May 4, 2007, memorandum --which was same coal purchased by Gulf as one half of its cover for 2007-- had

[4] The April 12, 2006, RFP actually contains a maximum sulfur specification of "0.99 lbs. Sulfur/MMBtu." [G.P. Exhibit 227, pp. GPII2843-2844]

an SO2 content of 2.5 lbs. SO2 per MMBtu. [Tr. Day 1: 155-56] The April 2006 RFP contained a maximum specification "0.99 lbs Sulfur/MMBtu."[5] When properly converted, this specification equates to 1.98 lbs. SO2 per MMBtu. In both instances, these SO2 specifications far ***exceeded*** the CSA maximum specification. Consequently, the Court's conclusion that these documents reflect an "alteration" of Gulf's sulfur standards or "shift" in strategy is not supported by the evidence and is contrary to what Gulf actually did --namely, purchasing cover coal for 2007 that met the CSA maximum sulfur specification.

As the Court recognized at page 34 of its Order, the evidence demonstrated that "[t]he sulfur content of the Columbia/Galatia blend Gulf Power procured in 2007 was *the same* as the 1.7 lbs. per MMBtu provided for under the CSA." (emphasis supplied) At trial, Gulf's witness Ball testified that, as of January 2007, Gulf Power had obtained a blending facility located at the Alabama State Docks in Mobile, Alabama. [Tr. Day 1: 106-07, 149] Mr. Ball explained that the availability of this blending facility enabled Gulf, for the first time in making its cover purchases, to blend higher sulfur and lower sulfur coal to create a blended cover coal which met plant specifications. [Tr. Day 1: 156] Through an April 12, 2006, request for proposals ("RFP"),[6] Gulf Power solicited bids for coal to be delivered in 2007. [Tr. Day 1: 151] In response to this RFP, Gulf Power entered into a four-year contract with The American Coal Company ("TACC") under which TACC was to provide 1,200,000 tons of coal per year from the Galatia mine. [See, G.P. Exhibit 227, p. GPII2829, and Tr. Day 1: 152] This coal originated from the North Portal of the Galatia mine and possessed a maximum sulfur content of 1.5 percent which, when converted to lbs. of SO2 per MMBtu, equals ***2.5 lbs SO2 per MMBtu.*** [Tr.

[5] This specification was discussed by witness Schwartz. [Tr. Day 5: pp. 38 - 39]

[6] See, G.P. Exhibit 227, pp. GPII2842-2845.

Day 1: 155-156] In response to the April 2006 RFP, Gulf also entered into a multi-year contract with Interocean CoalSales pursuant to which the seller was to deliver 1,125,000 tons of coal in 2007 from Drummond Coal Company's Mina Pribbenow mine in Colombia, South America. [See, FPO 7006, G.P. Exhibit 203] This coal possessed a maximum sulfur content of 1.22 lbs. SO2 per MMBtu. [Id. at p. GPII2820]

Coalsales failed to deliver a total of 1,123,889 tons under the CSA in 2007. [Tr. Day 1: 158] In order to cover this shortfall, Gulf blended equal amounts of the higher sulfur Galatia North Portal coal and the lower sulfur Drummond Colombian coal. [Def. Exhibit 53 at p. 5] The Galatia North Portal coal and Interocean Colombian coals were purchased pursuant to FPO 6014 and FPO 7006, respectively. [Tr. Day 1: 154-55, 153] At page 20 of its Order, the Court finds that Gulf purchased only ***150,000 tons*** of the higher sulfur Galatia coal as cover under FPO 6014. This finding is in error. As explained by Mr. Ball, FPO 6014 initially provided for a test burn of 150,000 tons of the Galatia North Portal coal, but FPO 6014 was subsequently "converted" to allow for delivery of the full tonnage in accordance with the contract between Gulf Power and TACC. [See, Tr. Day 1: 154-55; G.P. Exhibit 196, p. GPIII02711; and G. P. Exhibit 227 p. GPII2822]

As a result of Gulf's blending the Galatia North Portal and Drummond Interocean coals in equal quantities, the coal designated by Gulf Power as cover for 2007 possessed a sulfur content which met the CSA maximum specification of 1.7 lbs. SO2 per MMBtu. This fact is confirmed by Gulf Power's initial disclosures which, in addressing the 2007 cover coal, state that "[t]he Interocean Colombian coal source was to be blended with the American Galatia coal at the McDuffie Coal Terminal in Mobile, AL to produce a coal source that met the coal quality specifications consistent with the CSA." [Def. Exhibit 296, p. 10] This fact is also confirmed at

page 5 of Defendant's Exhibit 53 which reflects a sulfur calculation performed by Gulf witness Ball. Page 5 clearly reflects the fact that the sulfur emissions from Gulf's 2007 cover purchases were *equal* to the sulfur emissions that would have existed if Gulf had burned coal with a sulfur content equal to the maximum specification permitted under the CSA – "22,927" tons. The second "note" on the bottom of page 5 further states as follows: "S02 content of the replacement tons in 2007 (50% Colombian 50% Galatia) *is the same as the CSA guarantee.*"

Regardless of the precise blend of Galatia North Portal and Colombian coal, however, the uncontroverted evidence is that Gulf's SO2 emissions for 2007 were the same as what they would have been with coal meeting the CSA maximum specification for SO2. In light of the fact that Gulf's 2007 cover *met* the maximum sulfur specification under the CSA, Gulf must, at a minimum, be awarded damages for its 2007 cover purchases.[7] There is no other factor found by the Court to render the 2007 cover unreasonable. Mr. Ball testified that Gulf purchased a total of 1,123,889 tons to replace 2007 shortfalls under the CSA and that Gulf's damages associated with the increased cost associated with those purchases equal to $20,527,789, exclusive of interest. [Tr. Day 1: 158]

B. The Court failed to properly apply section 672.712, Florida Statutes.

Section 672.712, Florida Statutes, governs "cover" purchases and provides in relevant part as follows:

[7] This is true even if the Court maintains its finding that Gulf's cover purchases in 2004 through 2006 were unreasonable. Comment 2 to the Uniform Commercial Code section 2-712 recognizes that "[c]over need not be made by a single purchase. The Code envisages a series of contracts or sales as well as a single contract or sale." 67A Am. Jur. 2d Sales §1042 at 2. Analogy can be made to the livestock decisions relied upon by the Court in this case. Assume for example, a buyer who contracts to purchase cows of a specified quality. Assume further that the seller breaches and the buyer enters into two separate transactions to purchase cows to "cover" the breach. In the first transaction, the buyer purchases cows of superior quality. In the second transaction, the buyer purchases cows of the same quality called for under the contract. Even if a court were to determine that the first cover purchase was unreasonable, there would be no basis to deny recovery for the second transaction which met the contract standards.

> (1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
>
> (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (s. 672.715), but less expenses saved in consequence of the seller's breach.

§ 672.712, Fla. Stat. (emphasis supplied)

The Court's sole basis for determining that Gulf's 2004 through 2007 cover purchases were unreasonable --and that Gulf was therefore *completely* barred from recovering damages under section 672.712, Florida Statutes-- was the Court's finding that the substitute coal possessed a sulfur content which was lower than the ***maximum*** sulfur specification under the CSA and was therefore not a "like-kind" substitute. (Doc. 171 at pp. 30-31) The Court found that Gulf Power experienced "expenses saved" by purchasing lower sulfur cover coal and that these expenses were quantifiable (Doc. 171 at pp. 33-35), yet the Court failed to address "expenses saved" in its analysis of section 672.712, Florida Statutes.[8] Instead, the Court simply concluded that the cover coal was not a like-kind substitute and was therefore not reasonable cover.[9]

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[8] The Court analyzed "expenses saved" in the context of its discussion of a "market remedy" pursuant to section 672.713, Florida Statutes. (Doc. 171 at p. 32) However, under section 672.713, there would be no need to consider "expenses saved" in analyzing the reasonableness or quality of the cover. The Court found that the only expenses saved relating to Gulf's 2004-2007cover were associated with Gulf's purchase of lower sulfur coal. The relevant "market price" under 672.713 would equal the market price for coal *meeting* the CSA sulfur specifications at the time Gulf Power learned of the breach. Consequently, there would be no need to make an adjustment for sulfur. In the context of a market price analysis made under section 627.713, expenses are matters such as transportation costs, labor, etc. The quality of cover, and thus its reasonableness, is taken into account in determining the market price, not in an expense analysis.

[9] The Court based this conclusion on the opinions in Martella v. Woods, 715 F.2d 410 (8th Cir. 1983) and Kanzmeier v. McCoppin, 398 N.W.2d 826 (Iowa 1987). (order at pp. 29-30) In these cases, the appellate courts remanded the cases to the trial court for determination of damages under U.C.C. section 713 after finding that the buyers' cover purchases were not like-kind substitutes –and therefore not "cover." However, in each of the foregoing cases, the "market remedy" under U.C.C. section 713 was the only mechanism available for ensuring that the plaintiffs were made whole, but not unjustly enriched at the defendants' expense. There was no evidence of "expenses saved" in

This analysis ignores and renders meaningless the requirement in section 672.712(2), Florida Statutes, that "expenses saved in consequence of the seller's breach" be deducted from the aggrieved buyer's damages. Based on its conclusion that Gulf, in fact, saved expenses related to sulfur,[10] and that these expenses were quantifiable, -- regardless of who had the burden of proof on the issue of "expenses saved"-- Gulf respectfully submits that the statutorily appropriate and equitable course of action is for the Court to adjust Gulf Power's damages calculation downward based on the evidence in the record --not to bar the claim entirely. Given the Court's view that sulfur was the distinguishing factor between the CSA and the cover coal, making this simple adjustment would have placed the cover coal on an equal footing with the CSA coal and accomplished the intent of the U.C.C. which is to put the aggrieved party put in as good a position as if the other party had performed. See, § 671.106(1), Fla. Stat. Adjusting for the quality of coal is necessary in a section 672.712 analysis to ensure that the cover is comparable to the coal called for under the CSA. Such a quality of coal "expense" adjustment is not necessary under a section 672.713 analysis, as quality is necessarily a factor in determining market price.

The evidence by which the Court can make a "quality of coal" expense reduction is in the record. Alternatively, the Court may direct Gulf to make the actual calculation from the record

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Martella and Kanzmeier, and it was therefore unnecessary for the courts to engage in that analysis. In the present case, however, the Court found that (1) the only relevant distinction between the contract goods and the substitute goods was sulfur; (2) the sulfur differential resulted in "expenses saved" by Gulf Power; and (3) those savings were quantifiable. Moreover, as discussed fully below, there is ample record evidence in this case to calculate the "expenses saved" in accordance with the Court's suggested methodology. In light of the foregoing, Martella and Kanzmeir are not only distinguishable, they counsel in favor of an award for Gulf Power-- the underlying premise of both cases being that the courts should be slow to deny an aggrieved buyer of a remedy under the U.C.C., especially where there is record evidence sufficient to tailor a damage award so as to restore both parties to their rightful positions. Unlike in the cited cases, there was ample evidence in this record for the Court to calculate an adjustment for "expenses saved" under section 672.712(2), Florida Statutes, which would allow an "apples to apples" comparison of the coals and which would place the parties in their rightful positions.

[10] Gulf maintains its position that no expenses were saved in light the fact that, had Coalsales continued to supply coal under the CSA --as the Court determined it had an obligation to do-- it would have gone to the market in the same manner as Gulf and procured the same coal that Gulf procured for cover.

evidence. Additional evidence is not necessary as all of the evidence necessary for the calculation is in the record. However, even if additional evidence was needed, the Court has the authority to direct the plaintiff to present the necessary evidence. See, for example, Hettinger v. Kleinman, 2010 WL 3260075 (S.D.N.Y. Aug. 17, 2010) wherein the district court, in a case applying Florida law, held as follows:

> Plaintiffs have presented insufficient evidence to determine the measure of damages due in connection with their claims for breach of the Independent Contractor Agreement and unjust enrichment. Plaintiffs have, however, produce [sic] sufficient evidence to convince me that these damages are substantial. The parties are, therefore, directed to submit additional evidence with respect to the proper measure of Hettinger's actual loss based on the Kleinmans' breach of the implied warranty of authority and the reasonable value of Hettinger's services to the Kleinmans under an unjust enrichment theory. *See Shred-It USA, Inc. v. Mobile Data Shred, Inc.*, 228 F.Supp.2d 455, 462-63 (S.D.N.Y.2002) (Marrero, D.J.), *aff'd* 92 F. App'x 812 (2d Cir.2004) (ordering parties to present additional evidence where plaintiff did not prove the amount of damages by a preponderance of the evidence); *see also Nat'l Papaya Co. v. Domain Indus., Inc.*, 592 F.2d 813, 826 (5th Cir.1979) (where it was evident that plaintiff suffered substantial damage, but proof of such damage at trial was deficient, a proper course would have been to allow plaintiff to present additional evidence); *cf. Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir.1998) (denial of motion to re-open the record was improper "where the district court adopted, after trial, a contractual interpretation advocated and anticipated by neither party that, in turn, directed that the calculation of actual damages incorporate a financial element as to which no evidence had been introduced at trial").[11]

Id. at *24.

[11] The law's reluctance to countenance "no-damage" awards under circumstances where it is clear that a plaintiff has suffered some damage is also reflected in a related line of cases involving jury trials. See, e.g., Short v. Ehrler, 510 So.2d 1110 (Fla. 4th DCA 1987) (reversing jury award of zero damages where defendant's expert witness testified that the plaintiff "could" have suffered a "small degree" of damage); Meyer v. Meyer, 25 So.3d 39 (Fla. 2d DCA 2009) ("Where a jury awards zero damages despite uncontradicted evidence establishing more than nominal damages, the award is inadequate and must be reversed."); Surety Mortgage Inc. v. Equitable Mortgage Resources, Inc., 534 So.2d 80 (Fla. 2d DCA 1988) (new trial on issue of damages was required in breach of contract action after jury found that contract was breached but awarded no damages despite uncontradicted evidence establishing more than nominal damages); Molanari v. Florida Key Electronic Coop., 545 So.2d 322 (Fla. 3d DCA 1989) (error to deny new trial motion where jury awarded zero damages despite finding that appellant's injuries were caused, in part, by appellee's negligence).

Tellingly, Coalsales never asked the Court to bar Gulf's claim on the ground that Gulf's cover possessed a lower sulfur content and was, therefore, not a like-kind substitute. It simply argued for a $17.5 million downward adjustment to Gulf's damages figures. [Tr. Day 4: 93] This is consistent with the literature on the subject. See, e.g., 1 J. White & R. Summers, Uniform Commercial Code § 6-3 (5th ed. 2002) at 5 (if an aggrieved buyer purchases superior goods and comparable replacements were available, the buyer should not be entitled to the "*full difference* between the cover price and the contract price") (emphasis supplied); White & Summers, *supra*, §6-3 at 5 ("[T]he damage recovery should not be *reduced* unless the seller comes forward with persuasive evidence that the buyer will reap added profits because of the superior quality of the cover merchandise.") (emphasis supplied); 12 Am. Jur. Proof of Facts 2d 145 §10 (if a buyer purchases goods of a different quality than goods called for in the contract "[a] just result may best be reached by making an *adjustment* in favor of the seller if the substitute is of superior quality or in the favor of the buyer if the quality is inferior.") (emphasis supplied); 12 Am. Jur. Proof of Facts 2d 179 §26 ("A question as yet unresolved in this respect is whether a buyer who purchases what may be, in the particular case, a reasonable substitute but a more expensive one on which he will make an additional profit, should recover the full cost of the substitute and thus make a windfall profit. In this situation it would appear that the general provision limiting damages to such as will put the buyer in the same position as performance would have done would contemplate an *adjustment* in which *only part* of the cost of the substitute could be chargeable as damages.") (emphasis supplied). While the literature recognizes that downward adjustments may be appropriate in certain circumstances, there is no suggestion that the buyer should be precluded from recovering any damages at all.

Both parties calculated expenses saved associated with sulfur. The Court concluded that Gulf's figure of $6,552,724 was inadequate because it was based on SO2 allowance values as of April 28, 2008. (Doc. 171 at p. 34) Coalsales calculated Gulf's sulfur savings on a monthly basis using the published Cantor Fitzgerald monthly SO2 allowance values, but the Court rejected this analysis as inadequate because it was based on "an incorrect designation of cover purchases." (Doc. 171 at p. 35) The Court then opined that the correct method for calculating expenses saved would have been to apply the applicable sulfur allowance values to the actual cover coal purchased, as designated by Gulf Power and that "neither party made such a showing." (Doc. 171 at pp. 35-36) While it is true that neither party provided the Court with the precise calculation that the Court determined should have been made, it is equally true that the calculation is basic in nature and that all of the information necessary to make the calculation is readily available in the record. In order to calculate "expenses saved" in the manner specified by the Court, the following information is required:

- Coalsales' CSA shipment shortfall or over shipment by month.
- The conversion of these monthly shortfall tons to MMBTU by multiplying the tons times the guaranteed heating value of the CSA (12,000 BTU/LB or 24 MMBTU/TON).
- The guaranteed maximum SO2 per MMBTU of the CSA (1.7 LBS SO2 per MMBTU) less the guaranteed maximum SO2 per MMBTU of Gulf's various cover purchases.
- The difference between the maximum tons of SO2 emissions using the CSA guarantee and the maximum tons of SO2 emissions using the cover purchases. This is calculated by taking the difference in the SO2 guarantees in LBS SO2 per MMBTU and multiplying by the CSA shortfall in MMBTU. This yields pounds of SO2 emissions which is converted to tons by dividing by 2000 lbs/ton.
- The monthly market price of SO2 emission allowances.
- The total dollars of expenses saved or additional expenses by month is calculated by multiplying the tons of SO2 emission increases or decreases for each month by the monthly market allowance price in $/ton of SO2.

The Cantor Fitzgerald/Air Daily monthly SO2 allowance values for years 2003 through 2007 were introduced into evidence as Defendant's Exhibit 317. Gulf's cover purchases for 2004 through 2007 were identified by month by Gulf Witness Ball during his direct testimony. [Tr. Day 1: 110-158] This information, and the same information for Gulf's cover purchases in 2003,[12] was also provided to the Court in a more condensed and detailed format at page 2 of Exhibit 4 and pages 1-3 of Exhibit 7 to the expert report of Coalsales' expert witness Hamal. [Def. Exhibit 313] In fact, the methodology set forth above was discussed by Mr. Hamal during his direct testimony and recounted by the Court at pages 34 and 35 of the Order. [Tr. Day 4: 105-106] The only change to that methodology is to substitute Gulf's designated cover for that used by Mr. Hamal as the Court has determined that Gulf's designation of cover was reasonable and objected only to the date used in valuing the SO2 allowances. As shown in Exhibit "A," to the affidavit of H. R. Ball attached hereto, based on the record evidence, calculating expenses saved by Gulf Power in the manner suggested by the Court, inclusive of year 2003, would result in a downward adjustment in the amount of $16,007,992. This would reduce Gulf's overall damage figure to $61,457,219, exclusive of interest and exclusive of any adjustment for 2003 cover costs. [See, fn. 2, page 3 above and Exhibit "B" to the affidavit of H. R. Ball]

[12] In footnote 72 of its Order, the Court found that savings resulting from Gulf's purchase of lower cost coal in 2003 should have been accounted for in the damages analysis. This information is also readily available in the record. The Court found that the 2003 shortfall equaled 154,879 tons. (Doc. 171 p. 8, n. 21) The Court found that the delivered price of coal for all sources under the CSA pursuant to the 2003 price re-opener was $1.5197 per MMBtu. (Doc. 171 at p. 12) Gulf Power's 2003 cover purchases were made under FPO3003. [Tr. Day 1: 235-36; Def. Exhibit 313, Exhibit 4, p. 2] FPO3003 was admitted into evidence as Defendant's Exhibit 59. Pricing under FPO3003 was $33.25 per ton for 11,700 BTU/LB coal which, when converted to the CSA guaranteed hearing value of 12,000 BTU/LB yielded a price of $34.10 per ton. [Def. Exhibits 59 and 313, exhibit 5, p. 1] Based on the foregoing, in 2003, Gulf expended $27,206.00 less for cover than it would have for coal under the CSA. [See, Exhibit "C" to the affidavit of H. R. Ball]

C. *The Court erred in determining that Gulf bore the burden of establishing expenses saved as a consequence of Coalsales' breach.*

In the context of its discussion of the "market remedy" under section 672.713, Florida Statutes, the Court found that Gulf had the burden to establish the expenses it saved in connection with purchasing lower sulfur coal. (Doc. 171 at p. 33) As support for its finding, the Court cited to section 672.713, Florida Statutes; Milwaukee Valve Co., Inc. v. Mishawaka Brass Mfg., Inc. 319 N.W.2d 885 (Wis. 1982); 1 Roy Ryden Anderson, Damages Under the Uniform Commercial Code §8:23 (2009); and Ray G. Rezner and Elyse M. Tish, Basic UCC Skills 1990: Article 2, Buyer's and Seller's Remedies, Practicing Law Institute, Commercial Law and Practice Course Handbook Series, 540 PLI/Comm 199 (1990). (Doc. 171 at pp. 33-34)

As previously noted, analysis of "expenses saved" in the context of section 672.713, Florida Statutes is unnecessary in this case because section 672.712 controls and because there would be no quality of coal "expenses saved" under a market remedy even if section 672.713 applied. Regardless, section 672.713,[13] like section 672.712 says nothing about who bears the burden to demonstrate expenses saved. Similarly, while the cited publication by Rezner & Elyse states that the "buyer's recovery under [the cover remedy] must be reduced by 'expenses saved in consequence of the seller's breach,'" it also says nothing about which party bears the burden of proof in that regard. The conclusion reached by Prof. Anderson regarding the burden of proof in section 8:23 of his treatise is based on Milwaukee Valve Co., Inc. v. Mishawaka Brass Mfg., Inc. 319 N.W.2d 885 (Wis. 1982). While Milwaukee Valve Co., does support Prof. Anderson's conclusion, the opinion lacks thoughtful analysis and appears to be the only case in the country which directly holds that the aggrieved *buyer* has the burden of proof to demonstrate expenses saved under the cover provisions of the U.C.C. Notably, in section 8:25 of his treatise,

[13] The editorial comments to UCC 713 state that the buyer has the burden of demonstrating expenses saved under section 713. Notably, no such commentary appears in the comments for UCC 712.

Prof. Anderson reiterates his opinion that the buyer has the burden of proving expenses saved by the seller's breach. In support of this conclusion, he again cites the Milwaukee Valve holding and the holding in Laredo Hides Company Inc. v. H&H Meat Products Company, Inc. 513 S.W.2d 210 (Tex. App. 1974). However, the Laredo Hides court actually concluded that the defendant *seller* bore the burden to prove that the plaintiff's cover was unreasonable, including the burden to demonstrate expenses saved as a result of the seller's breach. The court held as follows: "Where the buyer [Laredo] complies with the requirements of s. 2.712, his purchase is presumed proper and the burden of proof is on the seller to show that 'cover' was not properly obtained. There was no evidence offered by H&H [the defendant seller] to negate this presumption *or to 'establish expenses saved in consequence of the seller's breach,'* as permitted by s.2.712." Id. at 221. (emphasis supplied).

Coalsales should be well-aware of the true import of the Laredo holding in light of the fact that its affiliate, Peabody Coaltrade, Inc., has used the Laredo Hides case as support for the assertion that the burden is with the seller. In Native Energy, Inc. v. Peabody Coaltrade, Inc., Case No. 7:04cv00308, Peabody, filed a Reply Memorandum in Further Support of its Motion for Summary Judgment. See, Native Energy, Inc. v. Peabody Coaltrade, Inc., 2006 WL 5245260 (E.D. Ky. Jan. 30, 2006) (reply memorandum). Peabody Coaltrade Inc., the defendant, was, in that case, a coal buyer who had been sued by a seller, Native Energy, Inc., who, apparently in anticipation of its breach, filed a declaratory judgment action. In its Reply Memo, Peabody addressed three cases cited by Native Energy, one of which was the Laredo Hides case. Id. at *3. "Plaintiff cites three cases from other states for the proposition that Peabody has the burden of showing its coal purchases were "substitutions" for the coal Native Energy admits it failed to

deliver. The First case, [Laredo Hides] actually says that "the burden of proof is on the *seller* to show that 'cover' was not properly obtained." Id. (emphasis supplied)

The Laredo Hides decision is consistent with the weight of authority on the issue of proving expenses saved and mitigation of damages in general. See, e.g., Terex Corporation v. Ingalls Shipbuilding, Inc., 671 So.2d 1316 (Miss. 1996) (awarding remittitur in the amount of $96,074 as "expenses saved" by the aggrieved buyer in consequence of seller's breach where seller introduced evidence of same and buyer did not); Apex Mining Co., v. Chicago Copper and Chemical, Co., 306 F.2d 725, 731 (8th Cir. 1962) (in cover action by buyer of copper ore, it was held that "[s]o far as the contention of Apex [seller] that the judgment should be reversed and no damages awarded the plaintiff because the plaintiff enhanced rather than mitigated the damages attributable to the breach of contract in suit, is concerned, we think the contention is without merit....[A]pex had the burden of proving that the plaintiff did not use reasonable diligence in procuring substitute ore at a fair price."); S.J.Groves & Sons Co., v. Warner Co., 576 F.2d 524, 528-29 (3d Cir. 1978) ("Essentially the cover rules are an expression of the general duty to mitigate damages and usually the same principles apply. The burden of proving that losses could have been avoided by reasonable effort and expense must be borne by the party who has broken the contract."); A.T. Klemens & Son v. Reber Plumbing and Heating Co., 360 P.2d 1005, 1010 (Mont. 1961) ("The defendant then urges that this case should be reversed since the plaintiff offered no evidence concerning a deduction which should have been made from damages because of the saving of time and the release from care, trouble and responsibility which was given the plaintiff because of his relief from performing the contract. This argument is erroneous. This is a matter of mitigation of damages which is properly considered a defense. The burden of pleading and proving matter in mitigation of damages falls upon the defendant

and the defendant has not carried the burden in the instant case since he introduced no evidence on the subject."); White & Summers, *supra*, §6-3 at 5 ("[T]he damage recovery should not be reduced unless *the seller* comes forward with persuasive evidence that the buyer will reap added profits because of the superior quality of the cover merchandise.") (emphasis supplied). Cf, Carnation Co. v. Olivet Egg Ranch, 189 Cal. App3d 809, 817-18 (Cal. 1st Dist. Ct. App 1986) ("Placing on the party who breaches the burden of showing that consequential losses could have been avoided is intuitively attractive, since proof that there has been a failure to mitigate adequately will *reduce the damages award*, and therefore, *seems more in the nature of a defense than an element of plaintiff's affirmative case.* In this sense, proof of failure to mitigate is analogous to evidence showing comparative negligence in tort law, which must be alleged and proved by the defendant. Moreover, *it is sensible to require the defendant to prove those items which will go to reduce the plaintiff's recovery as plaintiffs would have little incentive to do so.*"). (emphasis supplied)

Although the Terex Corporation v. Ingalls Shipbuilding Inc. opinion cited above strongly suggests that the burden rests with the defendant seller, the issue of which party bears the burden of proof to demonstrate expenses saved under section 712 of the U.C.C. appears to be one of first impression in the Eleventh Circuit --and other jurisdictions, for that matter. In view of the authority identified above, the directive of section 671.106(1), Florida Statutes, that "[t]he remedies provided in this code must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had performed," and the fact that a buyer's purchases are presumed reasonable and the seller "bears the burden of proving that the buyer's purchases were in bad faith or unreasonable" (Doc. 171 at p. 10), Gulf Power respectfully submits that the Court erred as a matter of law in finding that Gulf bore the burden of proof to

demonstrate "quality of coal" expenses saved. However, even if Gulf did bear this burden, the evidence necessary to make the calculation is in the record.

D. Did Gulf pass over available lower-cost, higher-sulfur sources of coal?

The Court concluded that Gulf purchased lower sulfur coal at higher prices rather than purchasing other available, lower priced coal which met the maximum CSA sulfur specifications. (Doc. 171 at pp. 22, 29) The Court rejected Gulf's position that it selected the lowest cost coal from among the bids it received on the ground that "[t]hese bids are in reality lower only if sulfur content is considered." (Doc. 171 at p. 28)

Coalsales introduced no evidence to support the conclusion that Gulf passed over available higher sulfur, lower cost coals. With the exception of the Galatia/Twentymile blend,[14] no Coalsales' witness identified any such source. In fact, Mr. Hamal, after questioning by the Court, openly conceded that identification of other available sources was not part of his analysis.

> The Court: Do you know of any source other than the Galatia blend, which Coalsales declared a force majeure, and other than Millennium Portal Galatia, which Coalsales declared a force majeure on, do you know of any source of coal that was available to Gulf Power after January '06 which would have provided them with 1.7 pound sulfur coal?
>
> Mr. Hamal: [I] didn't look at other sources. It wasn't necessary to critique him [Mr. Ball]. We had a fundamental change in the last week, and I, frankly, haven't had a chance over the weekend to look at all the possible options. But I am aware of that memo, and that might be helpful, that there were bids that were provided to Gulf that would have included a variety of sources.
>
> The Court: Mr. Hamal, I have to ask a question now based on your last statement. That's an analysis that you could have done prior to Mr. Ball's testimony last week; is that correct? In terms of determining

[14] Coalsales shipped the Galatia/Twentymile blend to Gulf at various times under the CSA. In November 2006, Coalsales declared *force majeure* on the Galatia/Twentymile blend. As recognized by the Court in its order, "[t]here is no evidence that Coalsales could have shipped any quantity of the Galatia/Twentymile Blend after it declared *force majeure* in November 2006." (Doc. 171 at p. 18) Any suggestion that this source was available to Gulf Power as a source for cover is therefore without merit.

> whether there was 1.7—there was a source of 1.7 coal available to Gulf Power. That's not based on any testimony that was given on –that's not new evidence that was given last week.
>
> Mr. Hamal: No. That's not new data. But my job and what I was hired to do was to look at the damage claim. The damage claim is what was included in the Rule 26 and then extended and put in Mr. Jackson's analysis.

[Tr. Day 4, pp 171-172]

During closing argument, the Court again inquired of Coalsales' counsel whether there was any evidence that Gulf was offered coal possessing a S02 content between 1.2 and 1.7 lbs. SO2 per MMBtu.

> Counsel: They solicited coals –and they told us that a number of times—and they are right. They solicited coals of up to 2.4 and 2.1. [lbs. SO2 per MMBtu]. But look at what they actually purchased, Your Honor, as opposed to what they solicited.
>
> The Court: Was anything offered between 1.2 and 1.7 [lbs. SO2 per MMBtu]?
>
> Counsel: I don't know, but I can tell you they didn't buy anything –and many times there are unsolicited offers that come in. I don't know what they offered.
>
> The Court: I'm asking you about the evidence in the case. Is there something that shows they made an offer that they [Gulf] rejected for coal with that sulfur content?
>
> Counsel: I don't believe there is any rejection that I'm aware of.

[Tr. Day 5, pp. 110-111]

Coalsales' failure to identify any other available, lower cost sources of coal meeting the CSA specifications is significant. In Carl Beasley Ford, Inc. v. Burroughs Corporation, the plaintiff sought damages for breach of contract under the U.C.C. after it purchased and then rejected defective electronic accounting equipment and related programming from the defendant

seller. 361 F.Supp. 325, 327 (E.D. Penn. 1973). The buyer sought the return of the purchase price for the equipment and programming plus consequential damages. Id. Following a jury verdict for the plaintiff awarding a return of the purchase price, the seller filed a motion for a new trial in which it contended, among other things, that "[t]he true measure of damages is the cost of securing proper programming of the machine." Id. at 335. The court responded as follows:

> I have no dispute with that statement of law. The disagreement really arises as to who has the burden of proof in matters relating to mitigation of damages. Plaintiff's evidence established that the equipment was worthless without the proper programming; that Borroughs, the manufacturer of the equipment (and presumably 'the expert' in the programming of its own equipment) was unable to program it to function properly. Under the circumstances, *I believe that it was Burroughs' burden to establish that there were available sources of programming known, or which should have been known, to plaintiff to furnish that which Burroughs had failed to produce. Burroughs produced no such evidence.*

Id. at 334. (emphasis supplied)

Like the defendant seller in Carl Beasley Ford, Coalsales had the burden to demonstrate the existence of other available, lower cost sources coal which met the CSA specifications. Clearly, Coalsales produced no evidence and failed to satisfy that burden.

Given that Coalsales did not identify any available sources of coal which would have allowed Gulf to purchase lower cost, higher sulfur coal, the Court's finding that Gulf passed over such sources can only be based on the Court's evaluation of the bids received by Gulf and Gulf's purchase decisions relative to such bids. The Court found that the bids accepted by Gulf were the lowest cost bids received *only* if sulfur content is considered. (Doc. 171 at p. 28) However, a review of Gulf's purchase decisions reveals that, with one nominal exception, Gulf Power purchased the lowest cost coal offered to it, even if sulfur content is *not* considered. The

exception is found in the 2006 Spot Coal Evaluation report referenced by the Court at page 27 of its Order. See, G.P. Exhibit 226, p. GPII2506. As documented in an August 31, 2006, memorandum from Tris Swindle to Rusty Ball, on January 17, 2006, Gulf Power issued a spot coal solicitation for approximately 1,500,000 tons of coal to replace a portion of the tons lost due to Coalsales' nonperformance under the CSA. [G.P. Exhibit 191, p. GPIII02510] In response to the solicitation, Gulf received twelve offers from seven different suppliers. [G.P. Exhibit 226, p. GPII2506] The bids from Constellation were not accepted because Constellation would not agree to Gulf's spot coal terms and conditions. [G.P. Exhibit 191 p. GPIII02511] The bids from MacEachern Russian and CMC Colombian were not accepted because they possessed a heating content of 11,300 Btu/lb which was substantially lower than the minimum Btu specification contained in the January 17, 2006 solicitation of 11,700 Btu/lb. [G.P. Exhibit 226, p. GPII2506 and G.P. Exhibit 226, p. GPII2495] This left seven bids to consider. [G.P. Exhibit 226, p. GPII2506] All of these bids had a lower sulfur guarantee in lbs. SO2 per MMBtu than the CSA. [Id.] A review of the column titled "Del'd Cost $/mmBtu" demonstrates the least cost coal, *excluding* consideration of sulfur, was the Glencore La Jagua coal at $2.65 per mm/Btu. [Id.] Rather than purchasing the La Jagua coal, Gulf ultimately purchased 260,000 tons pursuant to the Glencore Russian bid at $2.81 per mm/Btu (excluding sulfur) and 1,145,000 tons pursuant to the Interocean Colombian bid at 2.72 per mm/Btu (excluding sulfur). [G.P. Exhibit 191, p. GPIII02511] While the Interocean Colombian and Glencore Russian bids were the lowest cost qualifying bids when all costs, including sulfur, were considered, [G.P. Exhibit 226, p. GPII2506] the Court has suggested that this evaluation was inappropriate. If Gulf had purchased the entire 1,405,000 tons pursuant to the La Jagua bid, Gulf would have paid $2,625,939 less for the coal. However, because the La Jagua coal possessed a ***higher*** sulfur content (0.72%) [G.P.

Exhibit 226, p. GPII2506] than the Interocean Colombian (0.48%) [Id.] and Glencore Russian (0.35%) [Id.] the "expenses saved" figure of $16,007,992 calculated in section B above, would be reduced by $4,366,374. The net effect is that Gulf paid $1,740,435 less for the cover that it actually purchased than it would have had Gulf purchased the La Jagua coal as cover. [See, Exhibit "D" to the affidavit of H. R. Ball]

CONCLUSION

In light of the foregoing, Gulf Power respectfully contends that, at a minimum, Gulf Power is entitled to judgment in the amount of $56,937,422 representing Gulf's cover damages for 2004-2006 [Tr. Day 1: 110, 125, 149], minus $27,206 representing the lower cost of cover in 2003 [See, p. 14 n. 12, above and Exhibit "C" to the affidavit of H. R., Ball] and minus $16,007,992 representing the sulfur "expenses saved" adjustment for 2003-2006 [See, page 14 above and Exhibit "A" to the affidavit of H. R. Ball], plus $20,527,789 representing Gulf's damages for 2007 [Tr. Day 1: 158] for a total of $61,430,013, exclusive of prejudgment interest. [See, Exhibit "E" to the affidavit of H. R. Ball] As noted, all of the information necessary to calculate the foregoing adjustments is in the record. Based on the Court's finding that Gulf experienced "expenses saved" by purchasing lower sulfur coal, making this simple adjustment places the cover coal on an equal footing with the CSA coal, gives meaning to the "expenses saved" provision in section 672.712, Florida Statutes and accomplishes the intent of the U.C.C. which is to put the aggrieved party put in as good a position as if the other party had performed. See, § 671.106(1), Fla. Stat.

Gulf Power respectfully submits that it is also entitled to prejudgment interest on the above-referenced amount. The law governing prejudgment interest and the methodology for calculating the same is discussed in detail in Gulf's Memorandum Concerning Disputed Issues of

Law. (Doc. 136, pp. 6-7) Gulf Power has calculated prejudgment interest using the "adjusted" damages figure referenced above and is prepared to provide the Court with the detailed calculations upon request.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(D), Gulf Power respectfully requests oral argument on this motion. Gulf Power estimates that oral argument will last no more than two hours.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(B)

Pursuant to Local Rule 7.1 (B), on October 27, 2010, counsel for Gulf Power, J. Nixon Daniel, III unsuccessfully conferred with counsel for Defendant in a good faith attempt to resolve this matter without court action.

Respectfully submitted this 28th day of October, 2010.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to the following counsel of record on October 28, 2010, by electronic filing.

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Schedule 11

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GULF POWER COMPANY,

Plaintiff,

vs. Case No. 3:06cv-00270-MCR-MD

COALSALES II, LLC, f/k/a
PEABODY COALSALES COMPANY,

Defendant.

AFFIDAVIT OF H.R. BALL

STATE OF FLORIDA

COUNTY OF ESCAMBIA

BEFORE ME, the undersigned notary public in and for the State of Florida at large, personally came and appeared H. R. Ball, who, being by me first duly sworn, deposes and says as follows:

1. I am employed by Southern Company Services, Inc. as the Fuel Manager for Gulf Power Company. I have previously testified in the litigation in which this affidavit is offered.

2. I have reviewed Gulf Power Company's Motion to Alter or Amend Judgment, or, Alternatively, for Relief from Judgment and Supporting Memorandum to which this affidavit is attached. I have also reviewed the Trial Transcript and exhibits relevant to the calculations made and described in exhibits A through E.

3. The calculations and methodology described in exhibits A through E are based upon data and methodology included in the record.

4. Exhibit A quantifies the value of the SO2 allowances saved for the period 2003 through 2006. These savings total $16,007,992.00 as described on page 3 of exhibit A.

5. Exhibit B describes the calculation of total damages adjusted for the savings described in exhibit A. The net total damages are $61,457,219.00, exclusive of interest. This calculation does not include any other adjustment for cover costs as described in footnote 12 of Gulf Power's motion.

6. Exhibit C calculates the cover costs saved by Gulf Power in 2003 described in footnote 12 at page 14 of Gulf's motion and memorandum, exclusive of any adjustment for SO2 allowances.

7. Exhibit D describes the calculation of cover costs saved, inclusive of SO2 allowances, for 2006 assuming that the lowest cost coal without sulfur had been purchased as described at pages 21 – 23 of Gulf's motion and memorandum.

8. Exhibit E summarizes Gulf's total damage claim inclusive of adjustments for 2003 (see exhibit C); adjustments for SO2 allowances saved for 2003 – 2006 (see exhibit A) and the inclusion of Gulf's cover costs for 2007. The total damages, exclusive of interest, are $61,430,013.

FURTHER AFFIANT SAYETH NOT.

H.R. Ball

The foregoing instrument was acknowledged before me this 27th day of October, 2010 by H.R. Ball who:

(✓) is personally known to me, or

( ) has produced Florida Driver's License _____ as identification and who did take an oath.

Inge Lise Dittmer
Notary Public-State of Florida
Comm. Exp. July 5, 2013
Comm. No. DD 882438

NOTARY PUBLIC

Type or print name
Commission Expires:_____

EXHIBIT A

Sulfur Emission Allowance Savings Using Monthly Market Allowance Values

	(a) CSA Shortfall (Tons)	(b) CSA Shortfall (MMBTU) = a x 24 MMBTU/Ton	(c) CSA SO2 Maximum (Lbs SO2/MMBTU)	(d) Cover SO2 Maximum (Lbs SO2/MMBTU)	(e) SO2 Emissions Reduction/(Increase) (Tons) = ((c-d) x b)/2000 lbs/ton	(f) SO2 Market Allowance Price ($/Ton) Cantor Fitzgerald	(g) Expenses Saved SO2 Allowance Market Value = e x f
Jan-03	56,144	1,347,456	1.7000	1.0256	454.33	$142.64	$ 64,806
Feb-03	25,951	622,832	1.7000	1.0256	210.01	$158.45	$ 33,275
Mar-03	(21,129)	(507,088)	1.7000	1.0256	(170.98)	$161.53	$ (27,618)
Apr-03	(43,977)	(1,055,440)	1.7000	1.0256	(355.87)	$162.18	$ (57,715)
May-03	(9,413)	(225,904)	1.7000	1.0256	(76.17)	$166.25	$ (12,663)
Jun-03	1,009	24,224	1.7000	1.0256	8.17	$166.21	$ 1,358
Jul-03	18,603	446,480	1.7000	1.0256	150.54	$178.58	$ 26,884
Aug-03	131,532	3,156,776	1.7000	1.0256	1,064.40	$180.89	$ 192,539
Sep-03	32,950	790,808	1.7000	1.0256	266.64	$183.59	$ 48,953
Oct-03	(64,429)	(1,546,288)	1.7000	1.0256	(521.38)	$188.89	$ (98,483)
Nov-03	20,762	498,296	1.7000	1.0256	168.02	$204.62	$ 34,379
Dec-03	6,872	164,936	1.7000	1.0256	55.61	$216.50	$ 12,040
2003 Total	154,879	3,717,087			1,253.33	$173.74	$ 217,756
Jan-04	1,521	36,512	1.7000	1.1864	9.38	$259.90	$ 2,437
Feb-04	39,133	939,200	1.7000	1.1864	241.17	$268.70	$ 64,802
Mar-04	10,827	259,856	1.7000	1.1864	66.73	$274.76	$ 18,334
Apr-04	(6,950)	(166,792)	1.7000	1.1864	(42.83)	$281.02	$ (12,036)
May-04	51,908	1,245,800	1.7000	1.1864	319.90	$361.11	$ 115,518
Jun-04	64,988	1,559,720	1.7000	1.1966	392.60	$401.82	$ 157,753
Jul-04	6,133	147,200	1.7000	1.1966	37.05	$529.10	$ 19,604
Aug-04	30,666	735,992	1.7000	1.1966	185.26	$453.33	$ 83,982
Sep-04	9,496	227,912	1.7000	1.1966	57.37	$502.80	$ 28,844
Oct-04	(2,020)	(48,472)	1.7000	1.1966	(12.20)	$566.80	$ (6,915)
Nov-04	10,814	259,544	1.7000	1.1966	65.33	$693.23	$ 45,288
Dec-04	(1,215)	(29,152)	1.7000	1.1966	(7.34)	$706.43	$ (5,184)
2004 Total	215,305	5,167,319			1,312.40	$390.45	$ 512,427

EXHIBIT A

Sulfur Emission Allowance Savings Using Monthly Market Allowance Values

	(a) CSA Shortfall (Tons)	(b) CSA Shortfall (MMBTU) = a x 24 MMBTU/Ton	(c) CSA SO2 Maximum (Lbs SO2/MMBTU)	(d) Cover SO2 Maximum (Lbs SO2/MMBTU)	(e) SO2 Emissions Reduction/(Increase) (Tons) = ((c-d) x b)/2000 lbs/ton	(f) SO2 Market Allowance Price ($/Ton) Cantor Fitzgerald	(g) Expenses Saved SO2 Allowance Market Value = e x f
Jan-05	25,774	618,584	1.7000	1.3675	102.83	$700.13	$ 71,996
Feb-05	39,876	957,032	1.7000	1.3675	159.10	$657.04	$ 104,533
Mar-05	(47,438)	(1,138,504)	1.7000	1.3675	(189.26)	$696.00	$ (131,728)
Apr-05	3,391	81,392	1.7000	1.3675	13.53	$830.92	$ 11,243
May-05	(22,267)	(534,400)	1.7000	1.3675	(88.84)	$795.00	$ (70,626)
Jun-05	(8,732)	(209,560)	1.7000	1.3675	(34.84)	$752.70	$ (26,222)
Jul-05	54,141	1,299,392	1.7000	1.3675	216.01	$840.86	$ 181,634
Aug-05	69,187	1,660,496	1.7000	1.3675	276.04	$851.33	$ 235,001
Sep-05	131,835	3,164,048	1.7000	1.3675	525.99	$875.20	$ 460,346
Oct-05	109,946	2,638,712	1.7000	1.2800	554.13	$983.71	$ 545,103
Nov-05	134,380	3,225,128	1.7000	1.2800	677.28	$1,327.18	$ 898,868
Dec-05	88,210	2,117,048	1.7000	1.2800	444.58	$1,578.11	$ 701,596
2005 Total	578,307	13,879,367			2,656.55	$1,122.41	$ 2,981,744
Jan-06	135,237	3,245,696	1.7000	0.8738	1,340.72	$1,477.95	$ 1,981,523
Feb-06	133,434	3,202,424	1.7000	0.8738	1,322.85	$1,042.50	$ 1,379,071
Mar-06	133,943	3,214,640	1.7000	0.8738	1,327.90	$902.62	$ 1,198,585
Apr-06	158,333	3,800,000	1.7000	0.8738	1,569.69	$753.30	$ 1,182,451
May-06	158,333	3,800,000	1.7000	0.8738	1,569.69	$613.33	$ 962,741
Jun-06	158,333	3,800,000	1.7000	0.8738	1,569.69	$608.17	$ 954,641
Jul-06	133,829	3,211,904	1.7000	0.8738	1,326.77	$630.92	$ 837,083
Aug-06	133,184	3,196,424	1.7000	0.8738	1,320.37	$685.41	$ 904,995
Sep-06	158,333	3,800,000	1.7000	0.8738	1,569.69	$550.57	$ 864,227
Oct-06	133,873	3,212,960	1.7000	0.8738	1,327.20	$552.40	$ 733,146
Nov-06	133,293	3,199,040	1.7000	0.8738	1,321.45	$496.10	$ 655,572
Dec-06	133,486	3,203,672	1.7000	0.8738	1,323.36	$485.15	$ 642,031
2006 Total	1,703,615	40,886,759			16,889.40	$728.03	$ 12,296,066

EXHIBIT A

Sulfur Emission Allowance Savings Using Monthly Market Allowance Values

	(a) CSA Shortfall (Tons)	(b) CSA Shortfall (MMBTU) = a x 24 MMBTU/Ton	(c) CSA SO2 Maximum (Lbs SO2/MMBTU)	(d) Cover SO2 Maximum (Lbs SO2/MMBTU)	(e) SO2 Emissions Reduction/(Increase) (Tons) = ((c-d) x b)/2000 lbs/ton	(f) SO2 Market Allowance Price ($/Ton) Cantor Fitzgerald	(g) Expenses Saved SO2 Allowance Market Value = e x f
2003 Total	154879	3717087			1253.33	$173.74	$ 217,756
2004 Total	215305	5167319			1312.40	$390.45	$ 512,427
2005 Total	578307	13879367			2656.55	$1,122.41	$ 2,981,744
2006 Total	1703615	40886759			16889.40	$728.03	$ 12,296,066
TOTAL OF ALL YEARS					**22,111.67**	**$723.96**	**$ 16,007,992**

Schedule 11

EXHIBIT B

Composite Damage Calculations
Less Expenses Saved from Lower SO2 Emissions

2004 Cover Coal Cost/(Credit)	=	$3,923,302
2005 Cover Coal Cost/(Credit)	=	$12,594,394
2006 Cover Coal Cost/(Credit)	=	$40,419,725
2007 Cover Coal Cost/(Credit)	=	$20,527,789
TOTAL DAMAGES	=	$77,465,211
Value of Lower SO2 Emissions	=	($16,007,992)
Composite Damages	=	$61,457,219

EXHIBIT C
2003 Damage Calculations

	Contract Commitment	Contract Purchase Orders					Total Shipments	Shortfall
		C02007 01	C02007 01B	C04007 01	C98000701	C98000701 M		
January-03	158333	0	0	0	102189	0	102189	56144
February-03	158333	66548	0	0	14403	51431	132382	25951
March-03	158333	72852	0	0	0	106610	179462	-21129
April-03	158333	0	0	0	0	202310	202310	-43977
May-03	158333	0	0	0	0	167746	167746	-9413
June-03	158333	0	0	0	0	157324	157324	1009
July-03	158333	11133	61180	0	0	67417	139730	18603
August-03	158333	0	0	0	0	26801	26801	131532
September-03	158333	32341	0	0	0	93042	125383	32950
October-03	158333	72441	0	0	0	150321	222762	-64429
November-03	158333	0	0	0	0	137571	137571	20762
December-03	158333	0	0	24510	0	126951	151461	6872
TOTAL	1900000	255315	61180	24510	116592	1287524	1745121	-154879

	Contract Coal		Market Price fob McDuffie	Difference	CSA Shortfall Tons	Shortfall Replacement Fuel Cost
	12000 BTU/LB fob McDuffie					
January-03	$34.11		$34.10	-$0.01	56144	-$561
February-03	$34.11		$34.10	-$0.01	25951	-$193
March-03	$34.11		$34.10	-$0.01	-21129	$157
April-03	$34.25		$34.10	-$0.15	-43977	$6,484
May-03	$34.25		$34.10	-$0.15	-9413	$1,388
June-03	$34.25		$34.10	-$0.15	1009	-$149
July-03	$34.38		$34.10	-$0.28	18603	-$5,161
August-03	$34.38		$34.10	-$0.28	131532	-$36,492
September-03	$34.38		$34.10	-$0.28	32950	-$9,142
October-03	$34.55		$34.10	-$0.45	-64429	$28,828
November-03	$34.55		$34.10	-$0.45	20762	-$9,290
December-03	$34.55		$34.10	-$0.45	6872	-$3,075
TOTAL 2003					98735	-$27,206

EXHIBIT D
2006 Cover – Economic Evaluation of FPO6004 and FPO6005 Selection from the January 17,2006 RFP Bid Lineup

Offer	PO	Supplier	Tonnage	Btu/lb	%S	#SO2	Delivered $/mmBtu	Delivered mmBtu
Actual purchases								
1C	FP6004	Glencore Russian	260,000	11,700	0.35%	0.60	$2.809	6,084,000
5A	FP6005	Interocean Colombian	1,145,000	11,500	0.48%	0.83	$2.717	26,335,000
			1,405,000	**11,537**	**0.46%**	**0.79**	$2.734	32,419,000
Lowest-cost Offer (excluding SO2) not purchased								
2C		Glencore La Jagua	1,307,218	12,400	0.72%	1.16	$2.653	32,419,000

Difference in the delivered price ($/MMBTU) excluding the SO2 value:
$2.734 per MMBTU - $2.653 per MMBTU = $0.081 per MMBTU

Higher cost of actual cover excluding the value of sulfur:
$0.081 per MMBTU x 32,419,000 MMBTU = **$2,625,939**

Since the Glencore La Jagua coal had higher percent sulfur content than the two coals selected in the bid evaluation the value of SO2 emission allowances would need to be considered in the SO2 emission allowance expenses saved calculation.
The weighted average emission allowance value in 2006 was $728.03 per ton.
The calculation of increased SO2 emission allowance costs that Gulf would have incurred if it had selected the Glencore Lagua coal is as follows:

Difference in SO2:
1.16 Lbs SO2/MMBTU (La Jagua) – 0.79 (actual) = 0.37 Lbs SO2/MMBTU
0.37 Lbs SO2/MMBTU x 32,419,000 MMBTU = 11,995,030 Lbs SO2
11,995,030 Lbs SO2 / 2000 Lbs per ton = 5997.52 tons of SO2

Value of increased SO2 emssions:
5997.52 tons of SO2 x $728.03 per ton = **$4,366,374**

Net savings from selection of the actual cover of FPO6004 and FPO6005:

$4,366,374 - $2,625,939 = $1,740,435

EXHIBIT E

Composite Damage Calculations
Less Expenses Saved from Lower SO2 Emissions
Including Credit for 2003 Cover Purchases

2003 Cover Coal Cost/(Credit)	=	($27,206)
2004 Cover Coal Cost/(Credit)	=	$3,923,302
2005 Cover Coal Cost/(Credit)	=	$12,594,394
2006 Cover Coal Cost/(Credit)	=	$40,419,725
2007 Cover Coal Cost/(Credit)	=	$20,527,789
TOTAL DAMAGES	=	$77,438,005
Value of Lower SO2 Emissions	=	($16,007,992)
Composite Damages	=	$61,430,013

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GULF POWER COMPANY, Plaintiff, vs. COALSALES II, LLC, f/k/a PEABODY COALSALES COMPANY, Defendant.	)	Case # 3:06-cv-00270-MCR-MD

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT, OR, ALTERNATIVELY, FOR RELIEF FROM JUDGMENT

COMES NOW Defendant COALSALES II, LLC, f/k/a Peabody COALSALES Company ("COALSALES"), and for its Response to Plaintiff Gulf Power Company's ("Gulf" or "Gulf Power") Motion to Alter or Amend Judgment, or Alternatively, For Relief from Judgment ("Motion"), states as follows:

INTRODUCTION

As Gulf Power acknowledges, Rule 59(e) and 60(b) motions "are **granted sparingly**, and such motions **may not be used to relitigate old matters or present arguments or evidence that could have been introduced prior to the entry of judgment**." Motion, p. 2 (citing *United Educators Ins. v. Everest Indem. Ins. Co.*, 372 F. App'x 928, 930 (11th Cir. 2010)) (emphasis added). Gulf Power's Motion should be denied because that is precisely what Gulf Power is attempting to do – relitigate matters that have already been correctly decided and present new, after-the-fact arguments and evidence. After stubbornly clinging to its cover strategy of purchasing premium coal and its litigation strategy of not offering any evidence of expenses saved, Gulf Power now asks the court to rescue it from these strategic choices that later turned

out to be improvident by accepting both new evidence and regurgitated legal arguments. Gulf Power's attempt to change the outcome fails because relief under Rule 59(e) and 60(b) motions is precluded under such circumstances.

Gulf Power alleges several legal and factual errors, yet it fails to meet the heavy burden to establish any of them to warrant exercise of the "extraordinary remedy" of Rule 59(e) and 60(b) relief. Specifically, Gulf Power fails to establish that the Court misapplied Section Fla. Stat. § 672.712; fails to establish that the Court erred in determining that Gulf Power bore the burden of establishing "expenses saved;" fails to establish that Gulf Power is entitled to damages for 2007; and fails to establish that the Court erred in determining the availability of higher sulfur, lower cost coals. Gulf Power's new amount of claimed damages – $56,937,422 – is premised on arguments and evidence which could, and should, have been offered before the judgment was issued. The Court's conclusions in COALSALES' favor were well-reasoned and fully supported by the Court's thorough review of the evidence in the record. Accordingly, Gulf Power's Motion should be denied.

ARGUMENT

I. Applicable Standard

Reconsideration of a judgment after its entry is "an extraordinary remedy which should be used sparingly." *Saridakis v. S. Broward Hosp. Dist.*, No. 08-62005-CIV, 2010 WL 2274955, at *5 (S.D. Fla. June 7, 2010). This extraordinary remedy should be employed sparingly in order to protect "the interests of finality and conservation of scarce judicial resources." *Wendy's Int'l, Inc. v. Nu-Cape Constr., Inc.*, 169 F.R.D. 680, 685 (M.D. Fla. 1996); *see also Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994); *Fackelman v. Bell,* 564 F.2d 734, 735-36 (11th Cir. 1977).

As stated above, Rule 59(e) and 60(b) motions may not be used to relitigate old matters. *United Educators*, 372 F. App'x 928 at 930; *see also Hardy v. Wood*, 342 F. App'x 441, 446 (11th Cir. 2009); *Lesley v. David*, 186 F. App'x 926, 929 (11th Cir. 2006); *Michael Linet, Inc. v. Village of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005); *Altadis USA, Inc. v. NPR, Inc.*, 344 F. Supp. 2d 1349, 1358 (M.D. Fla. 2004); *Wendy's Int'l*, 169 F.R.D. at 685.

Moreover, Rule 59(e) and 60(b) motions may not be used to present arguments or evidence that could have been introduced prior to the entry of judgment. *United Educators*, 372 F. App'x 928 at 930; *see also Case v. Eslinger*, 555 F.3d 1317, 1329 (11th Cir. 2009); *Hardy*, 342 F. App'x at 446; *Altadis USA*, 344 F. Supp. 2d at 1358; *Stone v. Wall*, 135 F.3d 1438, 1442 (11th Cir. 1998); *United States v. Battle*, 272 F. Supp. 2d 1354, 1358-9 (N.D. Ga. 2003).

A. Rule 59(e)

Gulf Power moves alternatively under Rules 59(e) and 60(b). Motions under Rule 59(e) are to be used "***only*** when a court has made a manifest error of fact or law." *Altadis USA*, 344 F. Supp. 2d at 1358 (emphasis added). This standard for obtaining relief under Rule 59(e) is "difficult for plaintiffs to meet." *Johnson v. Diamond State Port Corp.*, 50 F. App'x 554, 559 (3d Cir. 2002). An error is not "clear and obvious" if the issues are "at least arguable." *Battle*, 272 F. Supp. 2d at 1358; *see also Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993).

B. Rule 60(b)

"Generally, Rule 60(b) relief is an *extraordinary* remedy and is granted only in *exceptional circumstances*." James Wm. Moore et al., Moore's Federal Practice ¶ 59.05[7][b] (emphasis in original). Arguing that the Court misapplied the law or misunderstood the parties' positions does not justify relief under 60(b). *Id.* The purpose of a Rule 60(b) motion is to allow a court to correct obvious error or injustice, but it is not intended to be a substitute for appeal.

Fackelman, 564 F.2d at 735-36 (noting Rule 60(b) has been most liberally applied to default judgments).

Gulf Power premises its 60(b) motion on 1) mistake (60(b)(1)) and 2) "other reasons" justifying relief (60(b)(6)). Rule 60(b)(1) requires "facially obvious" errors. *See, e.g., Wendy's Int'l*, 169 F.R.D. at 687; *Fackelman*, 564 F.2d at 736. "The orderly process of appeal usually is far more appropriate to deal with [non-facially obvious errors of law]." *Id.*

Relief under Rule 60(b)(6) requires "extraordinary circumstances." *Rease v. AT&T Corp.*, 239 F. App'x 481, 483 (11th Cir. 2007); *Wendy's Int'l*, 169 F.R.D. at 687. "Extraordinary circumstances" usually means a lack of fault by movant. James Wm. Moore et al., Moore's Federal Practice ¶ 60.48[3][b]. In other words, Rule 60(b)(6) "**may not be employed simply to rescue a litigant from strategic choices that later turn out to be improvident.**" *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007) (emphasis added; citation omitted). The *Kramer* court summarized this stringent burden as follows:

> In short, plaintiffs must clear a very high bar to obtain relief under Rule 60(b)(6). Here, plaintiffs' 1999 complaint sought only "appointment," not "employment," despite an array of cases drawing a critical distinction between the two. Plaintiffs have failed to identify any reason why they could not have requested "employment" at the outset. Although the failure to request an order of "employment" here may not have been strategic in the strictest sense of the term, **it was clearly a litigation choice that "turn[ed] out to be improvident" and one from which we cannot rescue the plaintiffs. The case law makes clear that *Rule 60(b)(6) is not an opportunity for unsuccessful litigants to take a mulligan*.**

Id. (emphasis added).[1]

[1] It is unlikely that Gulf Power would be able to prevail under Rule 60(b)(6) under any circumstances given its failure to articulate any distinct reasons for relief pursuant to subsection (b)(6). *See, e.g., Battle*, 272 F. Supp. at 1364 (denying relief because "Rules 60(b)(1)and (b)(6) are mutually exclusive and 'a court cannot grant relief under (b)(6) for any reason which the court could consider under (b)(1).' Defendant presents no argument as to what exceptional circumstances warrant relief under 60(b)(6) and his arguments relating to mistake or error have been addressed under Rule 59(e) and Rule 60(b)(1).").

Gulf Power devotes its Motion to an endeavor that the above authorities dictate is futile – namely, relitigating old matters and raising arguments which could, and should, have been made before the judgment was issued. Under these stringent standards, Gulf Power's Motion should be denied.[2]

II. The Court properly applied Fla. Stat. § 672.712 in determining that Gulf Power's cover purchases were unreasonable and thereby granting judgment in favor of COALSALES.

Throughout this litigation, Gulf Power has consistently and adamantly maintained that there were no "expenses saved." *See, e.g.*, Gulf Power's Memorandum Concerning Disputed Issues of Law [Doc 136], p. 4 ("Gulf Power disputes COALSALES' contention that Gulf enjoyed monetary benefits as a consequence of its purchase of lower sulfur coal."); Gulf Power's Proposed Opinion on Damages [Doc 135], p. 10 (same); Tr. Day 2, p. 239:13-14. Incredibly, faced with a judgment awarding no damages, Gulf Power now argues that the Court misapplied Fla. Stat. § 672.712 because it *failed to take into account expenses saved.* Specifically, Gulf Power now claims that the Court's analysis "ignores and renders meaningless the requirement in section 672.712(2), Florida Statutes, that 'expenses saved in consequence of the seller's breach' be deducted from the aggrieved buyer's damages." Motion, p. 10. Gulf Power further argues that the "statutorily appropriate and equitable course of action is for the Court to adjust Gulf Power's damages calculation downward based on the evidence in the record – not to bar the claim entirely." *Id.*

Gulf Power's new argument is precisely the type that the standards governing Rule 59(e) and Rule 60(b) motions were intended to prevent. Indeed, this is a prime example of an

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Here, all of Gulf Power's arguments are premised on mistake or error, and Gulf Power fails to articulate any exceptional circumstances.

[2] Indeed, as demonstrated below, Gulf Power's Motion should be denied under *any* standard.

argument that "could, and should, have been made before the judgment was issued." *See Case*, 555 F.3d at 1329; *Stone*, 135 F.3d at 1442; *Kramer*, 481 F.3d at 792 ("Rule 60(b)(6) is not an opportunity for unsuccessful litigants to take a mulligan."); *et al.*, *supra.* Moreover, as noted above, arguing that the Court misapplied the law does not justify relief under either 59(e) or (60)(b). *See, e.g.*, *Hutchinson*, 994 F.2d at 1082; *Wendy's Int'l*, 169 F.R.D. at 687; Moore's Federal Practice ¶ 59.05[7][b].

Gulf Power makes two alternative arguments: 1) the evidence by which the Court can make a "quality of coal" expense reduction is in the record; and 2) even if additional evidence is needed, the Court has the authority to direct the plaintiff to present the necessary evidence. Motion, pp. 10-11. Each is unpersuasive.

A. Gulf Power cannot rely on calculations it previously failed to provide.

Gulf Power offered no evidence at trial as to expenses saved and cannot, in an after-the-fact strategy change, twist evidence submitted by COALSALES – not Gulf Power – to support newly-created formulas and calculations not previously presented or argued to the court. As the Court notes in its Order, "Presumably based on its position regarding the burden of proof, Gulf Power offered no evidence at trial of the expenses it saved as a result of its purchase of lower sulfur coal." Order, p. 34 (emphasis added). Thus, Gulf Power's assertion that "[b]oth parties calculated expenses saved associated with sulfur" is grossly misleading. Motion, p. 13. Gulf Power implies that it introduced a "figure of $6,552,724." *Id.* In fact, this figure was only in the record because it was in an exhibit introduced by *COALSALES* during the cross-examination of Mr. Ball, *after* he had denied any expenses saved. *See* Order, p. 34 (referring to DX053). Indeed, Gulf Power consistently maintained that it had not achieved any benefit by virtue of its

purchase of lower sulfur coal. *See* Tr. Day 2, p. 239:13-14 ("[W]e've also shown – if it is our burden, and I don't think it is – there is no benefit that we derived.").

Thus, the formula prescribed by Gulf at pp. 13-14 of its Motion, and the calculations performed by Ball in a newly-submitted affidavit, are insufficient to overcome the fatal flaws in Gulf Power's proof at trial – namely, its failure to reasonably cover by purchasing like-kind coal and its failure to meet its burden of proving expenses saved. Gulf cannot rely on after-the-fact arguments and evidence that it did not introduce at trial to rectify its flawed litigation strategies.[3] Indeed, Gulf relies on no fewer than four *defense* exhibits in comprising its formula and calculations. *Id.* (citing DX053, DX317, DX313, and DX059). These were not components of Gulf's offered proof at trial, and, thus, Gulf Power should not be able to rely on them now. As Gulf admits, it did not previously provide the calculation that the Court determined should have been made. Motion, p. 13.[4]

B. The authorities cited by Gulf Power do not compel the relief sought.

Alternatively, Gulf argues that the Court has the authority to direct the plaintiff to present additional evidence if necessary. However, declining to exercise any such authority is not a "manifest error of law or fact" requiring alteration of the judgment, or "extraordinary circumstances" or mistake which would entitle Gulf Power to relief from the judgment. As the

[3] *See Arthur v. King*, 500 F.3d 1335, 1342-44 (11th Cir. 2007) (affirming denial of Rule 59(e) motion because new affidavit was filed only as "a last-minute effort" and was not newly discovered evidence); *see also Watts v. Jeffrey Urdangen Ltd.*, 58 F. App'x 230, 233 (7th Cir. 2002) (rejecting calculation presented for first time in 59(e) motion because it represented a "fundamentally different claim" than the one originally brought); *In re Burlington N., Inc. Employment Practices Litig.*, 810 F.2d 601, 610 (7th Cir. 1986) (affirming denial of Rule 59(e) motion because failure to present calculations counter to those offered by opposing party at the appropriate time was a "fatal error").

[4] Gulf Power's new calculation involves no fewer than six steps and requires new witness testimony in the form of Mr. Ball's affidavit. COALSALES retained an expert to perform a similar calculation at trial. It strains credibility to suggest that this calculation is "basic in nature." Regardless, COALSALES has been given no opportunity to cross-examine Mr. Ball with respect to his new calculations. It is precisely for these reasons that the law precludes these types of new arguments and evidence in post-trial motions.

Eleventh Circuit noted, a movant "cannot prevail simply because the district court properly *could* have vacated its order. Instead, [movant] must demonstrate a justification *so compelling* that the court was *required* to vacate its order." *Rease*, 239 F. App'x at 483 (emphasis added).

Absent a requirement that the Court must allow such evidence, the Court's ruling is not in error. None of the cases cited by Gulf Power require such a ruling. In fact, none of the cases cited by Gulf Power even involve claims for damages under the UCC.[5]

Here, the Court applied the UCC's specific requirements for the proof of damages and found that Gulf Power failed to meet its burden as a matter of law. The authorities cited by the Court support such a ruling and do not require any such remedial opportunity. *See Micro Products*, *Sav-A-Stop*, *Teca*, and *Nico*; *see also* 1 Roy Ryden Anderson, Damages Under the UCC §§ 67:6, 9:10 (noting that "buyers may be denied a recovery under 2-713, even under the Code's liberal standards, if they fail to present credible evidence of market price at trial").[6] While citing non-UCC cases and treatises, Gulf Power ignores additional authority supporting the Court's finding of no damages. For instance, one of the authorities cited by Gulf Power, White & Summers § 6-3, cites *Valley Die Cast Corp. v. A.C.W. Inc.*, 181 N.W.2d 303, 310-11 (Mich. Ct. App. 1970) (holding that trial court's ruling that defendant had not "covered" pursuant to 2-711 and 2-712 of the UCC was not an abuse of discretion but was proper under the facts

[5] As Gulf Power acknowledges, its cases, at best, stand for the proposition "that downward adjustments *may be* appropriate in certain circumstances." Motion, p. 12 (emphasis added); *see, e.g.*, 12 Am. Jur. Proof of Facts 2d 145 § 10 ("*may* best be reached"); 12 Am. Jur. Proof of Facts 2d 179 § 26 (presumes a buyer has purchased a "reasonable substitute;" the Court found otherwise here). In addition, Gulf Power continues to rely on recycled arguments and authorities. For example, Gulf Power re-cites the very same page of White & Summers 6-3. *See* Order, p. 33 n.65 (citing Gulf Power's argument and quoting the very same passage Gulf Power again cites in the present motion). As established in Section I, *supra*, Rule 59(e) and 60(b) motions may not be used to reassert arguments previously raised.

[6] *Martella* and *Kanzmeier* do not "counsel in favor of an award for Gulf Power" either. Motion, p. 9 n.9. As the Court relied on these cases, it was certainly aware of its *discretion* to remand for further findings or to tailor a damage award. Indeed, the Court expressly noted the remand decisions in its Order. *See* Order p. 30 n.59-60. It chose not to exercise such discretion. Regardless, neither case mandates such a result as a matter of law and, thus, Gulf Power's Motion must fail in this regard.

where buyer purchased entirely different type of goods; affirming jury verdict that included no amount for cover damages). *See* White & Summers § 6-3 at n.26. Thus, Gulf Power's assertion that "there is no suggestion that the buyer should be precluded from recovering any damages at all" (Motion, p. 12) is an inaccurate assessment of the true state of the law.[7]

C. Contrary to Gulf Power's assertions, COALSALES repeatedly requested the relief ultimately granted by the Court – a judgment in COALSALES' favor.

In support for its belated request for a downward adjustment instead of a complete bar, Gulf Power incorrectly claims that "Coalsales never asked the Court to bar Gulf's claim on the ground that Gulf's cover possessed a lower sulfur content and was, therefore, not a like-kind substitute. It simply argued for a $17.5 million downward adjustment to Gulf's damages figures." Motion, p. 12.[8] The Court has already recognized otherwise. *See* Order, p. 32 ("Coalsales argued at trial that, *in the event Gulf Power was entitled to damages*, its damages must be reduced by the amount of expenses it saved as a result of Coalsales' breach.") (emphasis added).

Indeed, the record is teeming with evidence of COALSALES' position that Gulf Power's damages model was fundamentally flawed and, thus, should result in zero damages.[9] Moreover,

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[7] At best, Gulf Power presents competing legal authorities. This is still insufficient to succeed on the present Motion. *See Battle*, 272 F. Supp. 2d at 1358; *Wendy's Int'l*, 169 F.R.D. at 687 (holding absence of facially obvious legal errors precludes relief).

[8] Gulf Power's sole support for this absurd claim is one page of the Day 4 Trial Transcript – p. 93. This was a piece of the testimony of COALSALES' expert, Mr. Hamal. Mr. Hamal, however, was specifically retained to analyze the reports of Gulf Power's experts. Tr. Day 4, p. 10:18-24. He was not retained to proffer legal opinions.

[9] *See* Defendant's Trial Brief [Doc 138], at p. 2 ("[P]resumably driven by the fact that Gulf Power was not, in fact, damaged, **Gulf Power fails to comply with Florida law in calculating cover damages. Consequently, Gulf Power does not have a submissible case. The evidence will show the following: ... 2) Gulf Power did not effect reasonable cover under Florida law; and, 3) Gulf Power's damages methodology is fundamentally flawed and inadmissible. As such, Gulf Power's damages methodology must be rejected and COALSALES is entitled to judgment as a matter of law.**") (emphasis added); *id.* at 4, 6 ("Gulf Power's purchases of replacement coal do not qualify as proper cover

COALSALES has repeatedly and emphatically asked for judgment as a matter of law in its favor because of Gulf Power's failures.[10]

Indeed, the Court recognized as much on the very first page of its Order: "At trial, following the close of Gulf Power's evidence, Coalsales moved for judgment on partial findings pursuant to Federal Rule of Civil Procedure 52(c), arguing that Gulf Power had failed to prove its damages claim." The Court ultimately agreed with this conclusion, relying on the very cases cited by COALSALES in its Trial Brief -- *Martella*, *Kanzmeier*, and *Micro Products*. *See* Order,

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because Gulf Power did not act reasonably to purchase substitute coal.... Gulf Power's consistent and intentional purchase of higher-quality coal was not a reasonable substitute – and thus does not qualify as proper 'cover.'"); *id.* at 11-15 (Section III.A. "Gulf Power's Alleged Cover Purchases Were Not Reasonable Substitutes Because They Were of a Superior Quality Than the Coal Purchased Under The CSA" and discussion contained therein"); *id.* at 14, n.11 ("*If* Gulf Power is allowed to cover with higher quality coal, *then* its cost of cover must include the amount it saved in sulfur credits." (emphasis added); *see also* Defendant's Proposed Findings of Fact and Conclusions of Law [Doc 139], at pp. 17-19 (Section V.B. "Gulf Power's Purchases Were Not Reasonable Cover Because They Were Not a Reasonable Substitute For the Coal Under the CSA" and discussion contained therein); *see also* Joint Pretrial Stipulation [Doc 137], "COALSALES' Statement," at pp. 3-4 ("[T]he remaining issues for trial relate to *whether* Gulf Power has been damaged, including...the reliability of Gulf Power's damages methodology .... COALSALES contests Gulf Power's claim for damages on several grounds: A. Gulf Power suffered no damages. B. Gulf Power's damages methodology is fundamentally flawed. . . . E. Gulf Power's damages methodology ignores the savings Gulf Power enjoyed from replacing CSA coal with lower sulfur coal. F. Gulf Power's damages methodology ignores benefits from purchasing higher quality coal. I. Gulf Power's purchases of coal to "cover" the shortfalls attendant to the mining conditions at Galatia were inappropriate in that the "cover" coal was not reasonably similar to the coal quality specifications delineated in the CSA. In particular, the "cover coal had substantially lower sulfur content and chlorine content than the CSA coal – resulting in a much higher price while also yielding to Gulf Power a variety of economic benefits that its damage calculations fail to address. . . . Put simply, Gulf Power has suffered no damages. . . . COALSALES will establish at trial that Gulf Power has not been damaged and is not entitled to any damages.") (emphasis added); *id.* at p. 26-27, 29.

[10] *See* Defendant's Proposed Findings of Fact and Conclusions of Law [Doc 130], at ¶ 50 ("Because Gulf Power has failed to present sufficient evidence to prove each element of its damage claim, COALSALES is entitled to judgment as a matter of law."); ¶ 78 ("Gulf Power did not offer any evidence to establish the amount of money that Gulf Power admittedly saved as a result of the sulfur credits or any other expenses saved. Because Gulf Power wholly fails to produce any evidence to establish this key component of its damages, it has failed to establish its damages, as a matter of law."); ¶ 83 ("Accordingly, Gulf Power is not entitled to any damages, and COALSALES is entitled to judgment as a matter of law on Gulf Power's claim for damages."); *see also* Tr. Day 1: 38:13-19 ("**I'm going to review for you in this opening the choices that Plaintiff made that lead to these complexities. I'm going to review the business background that I believe drove those choices and the features that will, I believe, as a matter of law and as a matter of fact, lead this Court to find that Plaintiff has failed in its proof and enter a judgment for Defendant.**") (emphasis added).

p. 31; Defendant's Trial Brief [Doc 138], p. 12. Thus, Gulf Power's claim that COALSALES simply argued for a downward adjustment is indisputably incorrect.

Gulf Power has failed to demonstrate "a manifest error of fact or law" or "extraordinary circumstances" in the Court's application of § 672.712 that would warrant alteration of the judgment or relief from it. Gulf Power should not be "rescued" from its "culpability" in choosing a litigation strategy that backfired. *See Kramer*, 481 F.3d at 792.

III. The Court was correct in determining that Gulf Power bore the burden of establishing expenses saved.

Gulf Power's argument that the Court erred in finding that Gulf Power had the burden to establish expenses saved is, again, an argument precluded by the standards governing Rule 59(e) and Rule 60(b) motions. This is yet another example of Gulf Power attempting "to relitigate old matters" and/or "present arguments or evidence that could have been introduced prior to the entry of judgment." *See, e.g., Wendy's Int'l*, 169 F.R.D. at 685 (Rule 59(e) "is not a vehicle for rehashing arguments already rejected by the court or for refuting the court's prior decision"). As set forth above, unless the alleged legal error is "facially obvious," the requested relief must be precluded. *Id.* at 687. Gulf Power wholly fails to meet this burden.

The issue of burden of proof regarding expenses saved has been well-litigated in the present action. The Court recognized as much in its ruling. *See* Order, p. 34 ("Presumably based on its position regarding the burden of proof, Gulf Power offered no evidence at trial of the expenses it saved as a result of its purchase of lower sulfur coal."); n.67 ("Gulf Power's position at trial was that Coalsales bore this burden."). The record supports the Court's characterization of Gulf Power's position.[11]

[11] *See, e.g.*, Tr. Day 2, p. 239:13-14 ("[W]e've also shown – if it is our burden, and I don't think it is – there is no benefit that we derived."); *see also* Joint Pretrial Stipulation [Doc 137], at p. 27 ("If the Court agrees with COALSALES' contention that the replacement coal purchased by Gulf Power for its own

COALSALES expressly litigated this issue as well. *See* Defendant's Trial Brief [Doc 138], at pp. 19-20 (Section IV.A.1 "Gulf Power Bears the Burden of Proving the Expenses That It Saved As a Result of the Breach" and discussed contained therein). Indeed, the Court based its conclusion on the very authorities cited by COALSALES in its Trial Brief -- § 672.713, *Milwaukee Valve* and Anderson § 8:23. *See* Order, pp. 33-34.

While rehashing old arguments, Gulf fails in its attempt to distinguish the Court's authorities. Gulf Power disingenuously asserts that "section 672.713, like section 672.712 says nothing about who bears the burden to demonstrate expenses saved." Motion, p. 15. However, *in the middle of the very same sentence*, Gulf Power drops a footnote that recognizes that "[t]he editorial comments to UCC 713 state that the buyer has the burden of demonstrating expenses saved under section 713." *Id.* at n.13. Gulf Power dismisses this comment as irrelevant because "no such commentary appears in the comments for UCC 712." *Id.* at p. 15, n.13. Gulf Power already made this argument at trial.[12] However, Gulf Power again ignores the express language of Comment 4, which explains: "This section ***carries forward the standard rule*** that the buyer must deduct from his damages any expenses saved as a result of the breach." *See* UCC Comment, ¶ 4 (emphasis added); *see also In re Sav-A-Stop, Inc.*, 119 B.R. 317, 324 (M.D. Fla. 2004) ("[B]oth of these remedies [§672.712 and § 672.713] ***involve the same computation***....") (emphasis added).

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consumption was of a superior quality than the coal required to be delivered under the CSA, Gulf Power's damage recovery should not be reduced *unless COALSALES comes forward* with persuasive evidence that Gulf Power reaped added profits because of the superior quality of the cover merchandise.") (citing White & Summers, § 6-3) (emphasis added).

[12] *See, e.g.*, Tr. Day 2, p. 238:2-10 ("The requirement with respect to deduction of expenses, we respectfully disagree with the Defendants. In fact, one of the citations that they made to you from a treatise was, and I'm looking specifically at page 10 of their motion, they said that 672 requires that the seller – excuse me, that the buyer carry the burden of deducting the damages – or deducting from damages any expenses saved as a result of the breach. And they cite to the commentary there. In fact, the commentary is to 713, not to 712, on that quote. And that's an important distinction here ....").

Gulf Power also dismisses the applicability of the Rezner & Elyse treatise because "it also says nothing about which party bears the burden of proof in that regard." Motion, p. 15. Again, this is misleading. In the discussion regarding the "expenses saved" component of 2-712, it cites the very case this Court relied upon in determining that Gulf Power bears the burden – *Milwaukee Valve*. Ray G. Rezner and Elyse M. Tish, Basic UCC Skills 1990: Article 2, Buyer's and Seller's Remedies, Practicing Law Institute, Commercial Law and Practice Course Handbook Series, 540 PLI/Comm 199 (1990), at p. 15.

Gulf Power attacks the Court's opinion regarding the burden (and summarily dismisses Professor Anderson's treatise) by attempting to minimize the value of *Milwaukee Valve*. Gulf Power claims that *Milwaukee Valve* "appears to be the only case in the country which directly holds that the aggrieved *buyer* has the burden of proof to demonstrate expenses saved under the cover provisions of the U.C.C." Motion, p. 15. Whether or not that is true is immaterial. *Milwaukee Valve* is widely considered the leading authority on the burden of proof issue – hence its citation by Anderson, Rezner & Elyse, and a multitude of additional treatises and articles. Indeed, Gulf Power itself has cited Anderson as an authority on burden of proof issues and the requirements for proper cover. *See* Gulf Power's Memorandum Concerning Disputed Issues of Law [Doc 136], at p. 3 (citing § 8:25); Gulf Power's Proposed Opinion on Damages [Doc 135], at pp. 8-9 (citing §§ 7:6, 8:13, and 8:25). It should not be allowed to now argue against Anderson's conclusions regarding burden of proof when such conclusions are less convenient.

The new cases cited by Gulf Power in support of its old argument are unpersuasive. Indeed, their introduction is improper in this context. *See Altadis USA*, 344 F. Supp. 2d at 1358 ("A motion for reconsideration is not a vehicle to present authorities available at the time of the court's first decision ....").

Notwithstanding the impropriety of introducing new authorities, Gulf's characterization of *Laredo Hides* is also misleading. Gulf is correct that the *Laredo Hides* court held that the defendant seller bore the burden to prove that the plaintiff's cover was unreasonable.[13] This Court already reached the same conclusion (and ultimately held that COALSALES sustained its burden). *See* Order, p. 10. However, the *Laredo Hides* court did not hold that such burden to prove unreasonableness "include[es] the burden to demonstrate expenses saved," as urged by Gulf Power. Gulf Power cites the following language from *Laredo Hides*:

> Where the buyer complies with the requirements of s 2.712, his purchase is presumed proper and the burden of proof is on the seller to show that 'cover' was not properly obtained. There was no evidence offered by [the seller] to negate this presumption or to 'establish expenses saved in consequence of the seller's breach,' as permitted by s 2.712.

Id. at 221 (citation omitted). On its face, this language does not compel Gulf's conclusion. Instead, it is consistent with Professor Anderson's conclusion (as adopted by this Court). A failure to offer evidence is not the same thing as a failure to meet a burden of proof. Anderson explains the difference:

> The Code does not specifically address the allocation of the burden of proof, but relies instead on the prevailing external law. "Burden of proof" in its broadest sense designates the party who must ultimately establish by a preponderance of evidence the truth of the basic proposition. In a narrower sense, "burden of proof" refers to the obligation of a party to rebut his opponent's initial or prima facie proof. The reference is often to the burden of going forward with the evidence. The key distinction is that, in its broadest sense, the burden of proof always rests on the same party. The burden of going forward with the evidence, in contrast, may change from party to party throughout the trial.

§ 8:25. In support, Anderson cites Section 301 of the Federal Rules of Evidence:

> In all civil actions...a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of

[13] Peabody's brief in *Native Energy, Inc. v. Peabody Coaltrade, Inc.*, No. 04-308-GFT, 2006 WL 5245260, at *5 (E.D. Ky. Jan. 30, 2006) simply recognizes this same principle. It contains no discussion whatsoever of the burden of proof regarding expenses saved.

> the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally case.

In *Laredo Hides*, the seller failed to introduce *any evidence* to establish expenses saved. Thus, at best, *Laredo Hides* stands for the proposition that COALSALES would not have been entitled to judgment if it had failed to offer any evidence of the expenses saved.[14] Such is clearly not the case here.[15] It is undisputed that Gulf Power has the ultimate burden of establishing its entitlement to damages by a preponderance of the evidence. As the clear authority cited by the Court holds, it is this burden that includes the burden to demonstrate expenses saved.

None of the remaining cases cited by Gulf Power compels a different result. *Terex Corp. v. Ingalls Shipbuilding, Inc.*, 671 So.2d 1316 (Miss. 1996), does not, as Gulf Power claims, "strongly suggest" that the burden of proof to demonstrate expenses saved rests with the defendant seller. It does not address the burden of proof regarding expenses saved whatsoever. The defendant seller in *Terex* never claimed that plaintiff's proof was insufficient as a matter of law due to its failure to meet its burden to prove expenses saved. Instead, defendant merely argued that the jury overlooked defendant's evidence of expenses saved and requested remittitur in the amount of the expenses saved. *Id.* at 1320-22. The court granted defendant's request on

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[14] Even to the extent the Court were to find that *Laredo Hides* holds that seller has the burden of proof to demonstrate expenses saved, *Laredo Hides* has been distinguished from the law in Florida. 67A Am. Jur. Sales § 1045 notes: "In some jurisdictions there is a rebuttable presumption that the buyer's purchase was proper cover, and the seller has the burden of proving otherwise [citing *Laredo Hides*]. In others the buyer has the burden of proving that the other purchases that were made were made as cover." It is undisputed that Florida falls within the latter category. *See* Order, p. 10 ("Under Florida law, the burden is on the buyer to show that the purchases made after the seller's breach were, in fact substitute purchases.") (citing *Mason Distrib., Inc. v. Encapsulations, Inc.*, 484 So. 2d 1275, 1275 (Fla. Dist. Ct. App. 1986)).

[15] Indeed, Gulf Party is the party who failed to offer any evidence of expenses saved at trial. *See* Order, p. 34 ("Gulf Power offered no evidence at trial of the expenses it saved as a result of its purchase of lower sulfur coal."); *see also* Defendant's Proposed Findings of Fact and Conclusions of Law [Doc 139], at ¶ 78 ("Gulf Power did not offer any evidence to establish the amount of money that Gulf Power admittedly saved as a result of the sulfur credits or any other expenses saved. Because Gulf Power wholly fails to produce any evidence to establish this key component of its damages, it has failed to establish its damages, as a matter of law.").

appeal because "the jury overlooked the fact that Ingalls actually saved a substantial amount from the breach." *Id.* at 1321. Here, the Court, acting as fact-finder, did not overlook the fact of expenses saved or the law regarding who bore the burden to prove such savings.

Moreover, *Apex Mining*, *S.J. Groves & Sons*, and *A.T. Klemens & Son* do not contain *any* discussion of expenses saved under 2-712. Instead, these cases deal with the general principle of mitigation of damages. Mitigation of damages is an entirely different concept than expenses saved under 2-712 and carries a different burden of proof. *See, e.g.*, *S.J. Groves & Sons Co. v. Warner Co.*, 576 F.2d 524, 528-29 n.5 (3d Cir. 1978) (equating burden regarding mitigation of damages to a "reasonableness" test).[16]

Indeed, COALSALES' mitigation argument was a separately delineated theory that was ultimately rejected by the Court. *See* Order, p. 32 n.64 (Coalsales' mitigation argument "is based

[16] To the extent the Court is willing to consider non-UCC authorities not previously submitted by the parties, *Benfield v. H.K. Porter Co.*, 137 N.W.2d 273 (Mich. Ct. App. 1965) contains a helpful explanation of this distinction between proving mitigation of damages and proving expenses saved:

> It has long been the general rule of Michigan that in an action for breach of contract the burden is upon the plaintiff to show damages and upon the defendant in such an action to show mitigation of damages claimed. The question of proving profits in the instant case, namely commissions less expenses not incurred, was confused by the trial court with the principle of law governing the mitigation of damages. It is true...that the burden of proof as to mitigation of damages lies with the defendant. However, the question of profits does not fall within this category. The question of proving profits is an essential element of plaintiff's claim of damages, and thus it is the burden of the plaintiff to show not only the average monthly commissions earned, but also to show the expenses saved by not performing the contract, or to affirmatively prove that there were no expenses saved by the termination of the sales agency contract.

Id. at 274. This case also presents additional authority for the principle that a plaintiff is precluded from recovering damages if it fails to meet its burden of proof at trial:

> **In the present case the measure of damages is commissions less expenses not incurred. The burden of proving damages is upon the plaintiff-appellee. Yet plaintiff offered only the average monthly commissions .... Only by cross-examination did the defendant elicit from plaintiff that the expenses were reduced .... We find that there was not sufficient testimony on the record at the close of plaintiff's proofs to warrant submission of plaintiff's case to a trier of the facts.**

Id. (also holding that the trial court erred in reopening proofs for the cross-examination of the plaintiff as to the matter of reduced expenses because "**the effect of the trial court's action was to require the defendant to prove the plaintiff's case**") (emphasis added). The court reversed the trial court's denial of defendant's motion for a directed verdict (which resulted in a jury finding of monetary damages against defendant) and ordered the trial court to enter a directed verdict of no cause of action. *Id.* at 275.

on Gulf Power's rejection of North Portal coal;" "The court finds Gulf Power's rejection of the North Portal coal reasonable and, therefore, that Gulf Power did not fail to mitigate its damages in refusing to accept it."); *see also* Defendant's Trial Brief [Doc 138], at pp. 25-26; Defendant's Proposed Findings of Fact and Conclusions of Law [Doc 139], at pp. 29-30; Order [Doc 171] at p. 32, n.64.

Gulf Power fails to cite even one case that contradicts the holding in *Milwaukee Valve*. Tellingly, Gulf Power admits that "the issue of which party bears the burden of proof to demonstrate expenses saved under section 712 of the U.C.C. appears to be one of first impression in the Eleventh Circuit – and other jurisdictions, for that matter." Motion, p. 18. Such a "close call" falls outside the purview of Rule 59(e) and 60(b) motions. *See Sussman*, 153 F.R.D. at 694 (M.D. Fla. 1994) (cautioning against calling upon courts and litigants "to backtrack through the paths of litigation which are often laced with close questions"); *Battle*, 272 F. Supp. 2d at 1358; *Wendy's Int'l*, 169 F.R.D. at 687. Thus, the Court's reliance on *Milwaukee Valve*, leading treatises on the issue, and UCC commentary was entirely proper. For purposes of the present motion, such reliance cannot be considered a "manifest error of law" or "exceptional circumstances" necessary for the relief requested.

IV. The Court was correct in determining that Gulf Power is not entitled to damages for 2007.

In light of the fact that Gulf Power has failed to establish *any* legal error, let alone *manifest* error, with respect to the previous two findings of the Court, Gulf Power's next argument – that Gulf Power is entitled to damages for 2007 – is nothing more than a red herring. Gulf Power premises its argument on the allegation that the Court 1) misunderstood the units of measure and failed to make a necessary mathematical conversion, and 2) erred in finding that Gulf purchased only 150,000 tons of the higher sulfur Galatia coal in 2007.

Gulf Power's argument must fail because neither alleged error would produce a different outcome if it were to be corrected. The Court concluded that Gulf Power's cover was not reasonable because it did not purchase like-kind substitute goods. Order, p. 30. It based this ruling on Gulf Power's "well-documented shift in strategy" to purchase coal "with a significantly lower sulfur content." *Id.* at 29. The Court explained its reasoning: "The evidence plainly shows that Gulf Power sought import coal with a lower sulfur content, which came at a higher price per ton, and in doing so, rejected lower priced bids for coal having a sulfur content closer in quantity to that specified in the CSA." *Id.* at 30. This conclusion followed *over 10 pages* of analysis of the evidence demonstrating Gulf Power's shift in strategy, covering a period from 2004 through 2007. *Id.* at 21-32. This *included* evidence of the Court's understanding that not *every* purchase was, or was intended to be, of lower sulfur coal. *See, e.g.*, Order, p. 20 (noting that Gulf Power purchased 150,000 tons of cover coal from AmCoal under FPO6014 for 2007)[17]; *id.* at 24 (Gulf Power "informed the PSC [in 2004] that one of its strategic objectives was to include import sources 'as a large ***portion*** of future coal commitments.'") (emphasis added).

Indeed, as Gulf ironically acknowledges on p. 4 of its Motion, the Court was well aware of a certain exhibit claiming that the 2007 Colombia/Galatia blend was the same as the 1.7 lbs. per MMBtu provided for under the CSA.. *See* Order, p. 34. It is illogical to assert that the

[17] The Court was certainly aware of the sulfur content of the AmCoal Galatia coal. *See* Order, p. 8 n.19 ("As noted, the North Portal coal had a sulfur content of 2.3 to 2.5 lbs. per MMBtu, which exceeded the emissions limits at both Plants Crist and Smith"); p. 32 n.64 ("As explained above, Gulf Power rejected the North Portal coal when offered by Coalsales because its sulfur content was higher than that specified in the CSA .... *When Gulf Power later purchased the same coal*, it had a blending facility, which meant that it could blend the North Portal coal with a lower sulfur coal ....") (emphasis added).

Court's ruling on page 30 was in error because it did not account for evidence that the Court referred to a mere four pages later.[18]

As the Court already implicitly ruled, it is improper to segregate out a particular purchase/month/year in determining whether cover purchases are reasonable as a whole. As set forth above, the Court's ruling already took into account the fact that one of Gulf Power's cover purchases was for higher sulfur coal from AmCoal that was blended with another one of Gulf Power's cover purchases for lower sulfur Colombian coal. This fact did not impact the Court's overall conclusion of unreasonableness, and Gulf Power makes no argument that it should. Instead, Gulf simply argues that the Court erred in finding that the volume of this cover purchase was 150,000 tons rather than 1,200,000 tons, as Gulf Power now claims. For the same reason that the Court did not award Gulf Power damages for one particular purchase of 150,000 tons of higher sulfur cover coal that was blended with lower sulfur cover coal, the Court should not award Gulf Power damages simply because Gulf argues the purchase was actually for a larger volume.

This is consistent with the Court's express ruling that it was improper for Gulf Power to exclude evidence of its 2003 cover purchases and associated savings because the cover purchases must be looked at as a whole. *See* Order, p. 36 n.72 (citing Anderson, § 8:23 ("Where the buyer makes multiple covers for the contracted goods, some in excess of the breached contract price and others at less, the amounts saved on the lesser covers should be deducted as expenses saved from the buyer's damages for the covers at amounts in excess of the breached contract price.") and *Precision Master, Inc. v. Mold Masters Co.*, 2007 WL 2012807 (Mich. App. July 12, 2007) (noting that the purpose of the cover provision is to allow the non-breaching party the benefit of

[18] For the same reasons, it is illogical to assert that the Court's ruling was in error due to any misstatement with respect to ".99 percent" or "1.5 sulfur." The Court's ruling did not hinge on one particular RFP or one particular memo. Instead, it was based on Gulf's "well-documented" strategy.

its bargain, not a windfall, and holding that it was "disingenuous" to suggest that monies saved on cover purchases should not be included as expenses saved in consequence of the seller's breach)). Under the same logic, it would be improper for Gulf Power to receive its full alleged damages for one year based on its allegedly reasonable 2007 cover purchase, yet also retain the benefits associated with three years of unreasonable cover purchases. Gulf Power should not be allowed to pick and choose its allegedly "reasonable" cover purchases in such a manner. Gulf offers no legal authority in support of this proposition that one year can be segregated out and instead just speculates as to the conclusion that should be reached.[19]

Moreover, Gulf Power's claim continues to fail as a matter of law because Gulf Power failed to meet its burden to establish whether any expenses were saved. Unreasonableness was only the first prong of the Court's analysis. *See* Order, p. 34 ("Gulf Power's claim for cover damages ***also fails*** because it did not offer sufficient evidence of expenses saved as a result of Coalsales' breach.") (emphasis added); *id.* at 33 ("It is likewise clear, under the applicable law, that the expenses Gulf Power saved in connection with its purchase of lower sulfur coal ***must be deducted from its damages*** and that Gulf Power bears the burden of establishing that amount.") (emphasis added); *id.* at 36 ("Considering that Gulf Power bore the burden of proof on the issue, ***its failure to offer sufficient proof of expenses saved is fatal to its damages claim***.") (emphasis added). Thus, a finding of reasonableness with respect to one year cannot cure the overall defect in failing to account for expenses saved over the entire cover period. *See, e.g.*, discussion of 2003 cover purchases, *supra*.

[19] Gulf Power attempts to analogize to *Martella* and *Kanzmeier*. *See* Motion, p. 8 n.7. However, these cases do not provide any authority in support of Gulf Power's argument.

Indeed, Gulf Power continues to fail with respect to this element for 2007. It is Gulf Power's burden to establish it did not save any expenses in 2007.[20] As set forth *infra*, it has not sufficiently met its burden. It cannot rely on conclusory statements disclaiming any benefits but, instead, must perform the calculations necessary to establish that no expenses were saved. It has not done so.[21] To allow Gulf to recover damages for 2007 without meeting this burden would be patently unfair. As the court noted, "[t]he fundamental idea in allowing damages for breach of contract is to put the plaintiff in as good a position financially as he would have been but for the breach" (citing *Milwaukee Valve*), not better off. Order, p. 33; *see also id.* at p. 10 ("The buyer may not use cover to put itself in a better position than it would have been in had the contract been performed.").

Finally, the bulk of Gulf Power's flawed argument is premised on its assertion that Gulf "blended equal amounts of the higher sulfur Galatia North Portal coal and the lower sulfur Drummond Colombian coal" in 2007. Motion, p. 7. However, Gulf Power made no attempt to establish this at trial. The only alleged evidence Gulf points to in support of this conclusion is contained in exhibits *offered by COALSALES*. *Id.* (citing DX 053 and DX 296). Gulf Power never offered evidence to demonstrate this "equal" blend and, thus, failed in its burden of

[20] This includes a burden to quantify the benefits associated with chlorine content, ash content and ash fusion temperature. While the Court rejected Mr. Hamal's calculations with respect to these elements, the Court's ruling stands that it is *Gulf Power's* burden to perform such calculations with respect to all expenses saved. It is undisputed that there are benefits associated with these coal characteristics that can be quantified. *See, e.g.*, COALSALES' Deposition Designations, Swindle deposition, pp. 158:12-159:31; 197:12-198:14 ("There is a way to express what the cost differential, say, would be ...."), 208:21-209:23, 210:18-211:12, 212:6-25; Oaks deposition, pp. 83:23-86:18, 150:1-151:12.

[21] It is undisputed that a significant portion of Gulf's 2007 cover purchases was low-sulfur Colombian coal. Gulf Power set forth no calculations with respect to the sulfur benefits associated with this coal. Instead, it simply summarily concludes, after the fact, that such benefits were effectively balanced out by the purchase of higher sulfur coal. Indeed, Gulf's new calculations of expenses saved (in Exhibit A to Mr. Ball's new affidavit) include no calculations with respect to 2007.

proof.[22] It should not be allowed to twist exhibits which were submitted by COALSALES for a different purpose. Recognizing the failure of proof, Gulf Power hedges its bets by claiming, "*Regardless of the precise blend* of Galatia North Portal and Colombian coal, however, the uncontroverted evidence is that Gulf's SO2 emissions for 2007 were the same as what they would have been with coal meeting the CSA maximum specification for SO2." Motion, p. 8 (emphasis added). This argument is flawed due to the same insufficiency of proof. Gulf Power should not be allowed to remedy a defect in its proof after trial has concluded. *See United Educators*, 372 F. App'x 928 at 930; *see also Powell v. Carey Int'l, Inc.*, 483 F. Supp. 2d 1168, 1185-86 (S.D. Fla. 2007) (court is not required to "scour the record" looking for evidence to support movant's arguments).

V. The Court was correct in determining that lower priced coal was available.

Finally, Gulf challenges the Court's conclusion that Gulf purchased lower sulfur coal at higher prices rather than purchasing other available, lower priced coal. Motion, pp. 19-23. It claims COALSALES failed to meet its burden of proof to establish that Gulf passed over available higher sulfur, lower cost coals. In support, Gulf Power again relies solely on new calculations and new arguments to support an argument it already raised that was rejected. Such arguments are prohibited in the context of a Rule 59(e) or Rule 60(b) motion. Regardless, this argument must also fail after even a cursory review of the evidence. *See* Order, p. 30 ("The

[22] Gulf Power's evidence with respect to the blend was consistently vague and never established the proportion of the blend. *See, e.g.*, Gulf Power's Proposed Opinion on Damages [Doc 135], at p. 5 ("In 2007 Coalsales fell short of its annual obligation by 1,123,889 tons. Gulf Power replaced this shortfall using coal purchased under two new multi-year coal supply agreements with Drummond Interocean and American Coal Company.") (emphasis in original); Ball's Testimony, Tr. Day 1: 154-55 ("This purchase order [FPO 6014] was *eventually* converted over to the long-term contract.") (emphasis added). Indeed, out of all of the trial testimony cited on pp. 6-7 of its Motion, Gulf Power fails to cite any testimony that purports to offer the percentages of coal contained in the blended product or any evidence of the resulting SO2 content or emissions.

evidence ***plainly shows*** that Gulf Power sought import coal with a lower sulfur content, which came at a higher price per ton, and in doing so, rejected lower priced bids for coal having a sulfur content closer in quality to that specified in the CSA.") (emphasis added). Gulf Power offers only one example, based entirely on a new calculation, to refute the Court's finding. This is hardly evidence of a "clear and obvious" or "facially obvious" error "compelling" relief.

Indeed, there is more than sufficient evidence in the record to support the Court's finding. Gulf Power's claim that COALSALES "introduced no evidence to support the conclusion that Gulf passed over available higher sulfur, lower cost coals" is disingenuous. First, Gulf mischaracterizes Mr. Hamal's expert testimony. He never testified that higher sulfur, lower cost coals were not available to Gulf Power. Indeed, the passage of his testimony cited by Gulf reveals his testimony that the bid memos would be an example of where that information would be located. Tr. Day 4, p. 172:4-7.[23]

In addition, despite assertions to the contrary, Mr. Hamal testified with respect to a specific solicitation where lower cost coals were not selected because of sulfur. He walked through the analysis of the coals in DX-249, page 73, and concluded that Gulf's choices were based on the consideration of sulfur content. Tr. Day 4, pp. 97:11-99:19.[24] Hamal concluded that the table of bids clearly showed the availability of lower cost coals when sulfur was not considered. Tr. Day 4, p. 99:14-19.[25] Mr. Hamal further testified that Gulf clearly wanted lower

[23] Gulf omitted the middle portion of the cited passage that reflects his initial response to the question regarding alternate available source: "[F]or example, we looked at an exhibit earlier today that showed them evaluating coals, that would be on the list." Tr. Day 4 at 171:12-22.

[24] This appears to be the "exhibit" referenced in Mr. Hamal's testimony cited above.

[25] It would appear that this testimony is what the Court relied on in reaching its conclusions on page 28 of the Order concerning what the "2006 Spot Coal Evaluation." "G.P Exhibit 226," referenced by Gulf Power in its Motion, was never an admitted exhibit, so it is unclear to what document Gulf Power is referring. The numbers appear to match up with DX249.

sulfur coal and solicited coal on that basis, such that its bid analysis would inherently be limited to certain coals. Tr. Day 4, p. 119:15-18. Mr. Hamal later discussed how sellers consider the likelihood of winning a solicitation before going through the bidding process. *Id.* at p. 210:23-25.

COALSALES also offered into evidence DX 202, an exhibit relied upon by the Court in recognizing the inherent limitations in Gulf's bid results. Order, p. 27 n.56 ("All of the bids, with one exception, were for import coal, which is obviously what Gulf Power was seeking. Indeed, in response to a question regarding its January 17, 2006, RFP, Swindle advised a potential bidder that Gulf Power intended to procure **only import coal**.") (emphasis added). Throughout trial, multiple other available options were discussed that Gulf Power never pursued.

Gulf Power's new calculations regarding the bid evaluations are an improper basis for the relief requested. As discussed in detail above, Gulf Power chose not to offer evidence of "expenses saved" at trial. It cannot do so now. Gulf Power also previously raised many of the same arguments it rehashes here regarding COALSALES' alleged failure to establish the availability of alternate coal.[26] These arguments were part of the record and, thus, already rejected by the Court in its findings and cannot be reconsidered here. *See, e.g.*, *Altadis USA*, 344 F. Supp. 2d at 1358 ("A motion for reconsideration is not a vehicle ...to simply reiterate arguments previously made.... Here, the Plaintiffs' current Motion simply reiterates and

[26] *See* Gulf Power's Proposed Opinion on Damages [Doc 135], at p. 5 ("**Coalsales did not identify any specific source of available, offered coal that it contended Gulf Power should have bought instead of that coal Gulf Power actually purchased as cover coal.... Coalsales' expert witness has not developed an opinion as to which source(s) he believes Gulf Power should have used** to procure coal to replace the shortfall tons between 2004 and 2007.... Coalsales' expert witness has not developed an opinion as to what cost (in dollars) he believes Gulf Power reasonably should have incurred to purchase replacement coal following Coalsales' declarations of *force majeure* between 2004 and 2007.") (emphasis added); *id.* at p. 12 ("Coalsales has not specifically identified any other suitable source for cover coal – other than the unavailable Galatia coal – which it contends Gulf Power should have purchased. **Coalsales failed to provide this Court with any evidence that there was actually a 1.7 SO2 lbs per MMBtu coal available to Gulf Power to replace its shortfall tons**.") (emphasis added).

reargues the same issues they previously discussed ..., including arguments made at oral argument before the Court and therefore considered by the Court prior to making its ruling in [defendant's] favor.")

Gulf Power's attempt to revisit old arguments and introduce new evidence must also fail at a fundamental level because it cannot alter the ultimate result. Any arguments relating to the availability of alternate coal are directed at the Court's ruling regarding the unreasonableness of Gulf Power's cover purchases. Such arguments have no effect whatsoever on the Court's ruling that Gulf Power's claim for cover damages also fails because Gulf Power did not offer sufficient evidence of expenses saved.

As a result, Gulf Power has failed to meet its burden to justify the requested relief.

CONCLUSION

After more than three years of litigation and a full trial, the Court correctly ruled in COALSALES' favor that Gulf Power failed to establish its damages as a matter of law. Unhappy with the result, Gulf Power now asks for a second chance. For all of the aforementioned reasons, Gulf Power's Motion is clearly without merit and should be denied without oral argument unless the Court has questions or needs additional information from the parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed electronically with the Clerk of Court and served by operation of the Court's electronic filing system to all attorneys of record as indicated, this 15th day of November, 2010.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GULF POWER COMPANY,

Plaintiff, **Case No.: 3:06 CV 270/MCR/MD**

vs.

COALSALES II, L.L.C.,
f/k/a PEABODY COALSALES COMPANY,

Defendant.

_____/

GULF POWER'S REPLY TO DEFENDANT'S RESPONSE TO GULF POWER'S MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW, Gulf Power Company ("Gulf" or "Gulf Power"), by and through its undersigned counsel, and pursuant to the Court's order dated November 22, 2010 (Doc. 186), files this Reply to Defendant's Response to Gulf Power's Motion to Alter or Amend Judgment, or Alternatively, for Relief from Judgment.

INTRODUCTION

Gulf Power remains mindful that the relief sought in its Motion to Alter or Amend Judgment, or Alternatively, for Relief from Judgment (Doc. 177) is extraordinary in nature. As is evident from Gulf's motion and Defendant's response thereto, this is an extraordinary circumstance. While Defendant acknowledges that the resolution of these essential legal and factual issues involves "close call[s]" and "competing legal authorities" (Doc. 182 at p. 9. n.7 and p. 17), Defendant nevertheless contends that it would be error for the Court to grant Gulf Power's motion. Gulf disagrees. In response to Gulf's motion, the Court has the opportunity

and the discretion[1] to avoid a manifest injustice and tailor a resolution which honors the Court's previous conclusion that Gulf Power experienced "expenses saved" through its purchase of lower sulfur coal, while at the same compensating Gulf Power and its customers for millions of dollars in extra fuel costs which were unquestionably incurred as a direct result of Defendant's breach of contract.

Predictably, Defendant's response is replete with suggestion that Gulf Power is merely attempting to rehash old arguments and introduce new evidence. Boilerplate aside, Defendant's response is telling in several respects. Defendant does not dispute that the Court's Order contains erroneous factual conclusions --it simply attempts to dismiss the errors as harmless. (Doc. 182 at pp. 17-18) Gulf respectfully submits that this is not the case. Defendant does not credibly dispute that all of the evidence supporting Gulf's proposed "quality of coal" adjustment --including formulas and calculations-- is in the record. The record speaks for itself --the evidence is there. Instead, Defendant attempts to avoid this issue by suggesting that it was Defendant --not Gulf Power-- that introduced such evidence. (Doc. 182 at pp. 6-7) With respect to some of the evidence, that is true. However, for reasons discussed below, this is a distinction without a difference from an evidentiary standpoint. The fact remains that all of the evidence necessary to make the adjustment is in the record and, as the trier of fact, the Court has the ability to utilize that evidence to render a damages award which is consistent with its previous factual and legal determinations and in keeping with the purpose of the Uniform Commercial Code.

Defendant's arguments regarding Gulf's 2007 cover purchases are equally unpersuasive. The record establishes that Gulf's 2007 cover purchases met the CSA specifications.

[1] "The district courts are necessarily afforded substantial discretion in ruling on motions for reconsideration." Sussman v. Salem, Saxon & Nielson, P.A., 153 F.R.D. 689, 694 (M.D. Fla. 2004).

Defendant's suggestion that this is a new argument or that the record is somehow unclear in this regard is plainly without merit. In recognition of this fact, Defendant resorts to a new, secondary, argument regarding segregation and the need to assess cover as a "whole." (Doc. 182 at p. 19) As discussed more fully below, Defendant's segregation theory not only fails on the facts of this case; it undermines the purposes of the U.C.C. and leads to absurd and illogical results.

ANALYSIS

A. Gulf Power has not altered its litigation strategy.

Defendant contends that Gulf, having failed to introduce "***any*** evidence of expenses saved" from the purchase of lower sulfur coal, is now seeking to introduce new argument as a means to avoid the results of an "improvident" litigation strategy. (Doc. 182 at pp. 1-2, 6-7) (emphasis supplied) This is a patent mischaracterization. Gulf Power did not ignore the issue of expenses saved. As Defendant acknowledges, the issue was "well-litigated" in the present action. (Doc. 182 at p. 11) At trial, Gulf introduced evidence that it did not experience any monetary savings as a result of its purchase of lower sulfur coal. Gulf's witness Vick testified that Coalsales' failure to deliver had no impact on Gulf's SO2 strategy and that because Gulf's scrubber came on line in 2009, it had no need to purchase allowances. [Tr. Day 2, pp. 168-170] Gulf witness Ball testified that Gulf was not any better off from an SO2 perspective by purchasing cover coal than it would have been if Coalsales had performed under the CSA. [Tr. Day 1, p. 160] Gulf witness Schwartz testified that import market prices do not take SO2 into account [Tr. Day 5, pp. 40, 64-67] and that all of Gulf's purchases were made at or below market prices [Id. at p. 73]. Gulf contended that, had Defendant continued to perform under the CSA, Defendant, as a rational business entity, would have gone to the market and delivered to Gulf the

same coal that Gulf purchased as cover. Consequently, there would have been no expenses saved attributable to sulfur. [Tr. Day 5, pp. 100-101, 104-105] Alternatively, if the Court determined that a reduction should be made to Gulf's damages figure because of expenses saved, Gulf argued that the Court should utilize the $6,552,724 figure calculated by Mr. Ball and identified in Defendant's Exhibit 53. [Tr. Day 5, p. 108]

The Court rejected Gulf's arguments regarding expenses saved. However, that does not, as Defendant suggests, equate to a failure on Gulf's part to introduce ***any*** evidence of expenses saved, or a strategic decision to ignore the issue entirely. Milwaukee Valve Co., Inc. v. Mishawaka Brass Mfg., Inc. 319 N.W.2d 885 (Wis. Ct. App. 1982), a case which Defendant has characterized as "the leading authority on the burden of proof issue" (Doc. 182 at p. 13) is instructive in this regard.[2] Although the court in Milwaukee Valve found that the aggrieved buyer bore the burden of proof to demonstrate expenses saved as a consequence of the seller's breach, the court proceeded to find in favor of the buyer noting that the buyer "[p]roduced sufficient evidence to prove that *no expenses were saved* by Mishawaka's breach." Id. at 890. (emphasis supplied) Like the buyer in Milwaukee Valve, Gulf introduced evidence that it saved no expenses. The Court disagreed with Gulf's evidence. Defendant also introduced evidence of expenses saved which the Court rejected. However, the fact that the Court disagreed with both parties' evidence does not justify a complete rejection of Gulf Power's claim. Gulf's claim is not an "all or nothing" proposition. Suppose, for example, that instead of introducing evidence of no expenses saved --or its alternative suggestion of $6,552,724-- Gulf had calculated expenses saved using the methodology suggested by the Court at page 35 of its Order (Doc. 171). Suppose further that Gulf's calculation missed the mark by several hundred thousand dollars due

[2] In its motion, Gulf noted that Milwaukee Valve "[a]ppears to be the only case in the country which directly holds that the aggrieved *buyer* has the burden of proof to demonstrate expenses saved under the cover provisions of the U.C.C." (Doc. 177 at p. 15) Defendant effectively concedes this point in its response. (Doc. 182 at p. 13)

to a rounding error. In such a case, it clearly would not have been proper for the Court to reject Gulf's claim entirely. Instead, the Court, as the trier-of-fact, would have calculated what it considered to be the correct reduction, based on the evidence in the record. That is precisely what Gulf Power is requesting the Court do here. This is not a new argument, new evidence or a shift in strategy. It is simply a recognition that the Court disagreed with the evidence submitted by both parties and a request that the Court calculate what it considers to be the correct reduction based on evidence in the record. Even if the Court is not inclined to calculate the reduction itself, it has ample discretion to go a step further and re-open the record for the limited purpose of allowing the parties to do so. See e.g., Hettinger v. Kleinman, 2010 WL 3260075 at *24 (S.D.N.Y. Aug. 17, 2010) (reopening record to allow additional evidence on issue of plaintiff's damages where plaintiff clearly had suffered some damage); Texas A&M Research Foundation v. Magna Transporation, Inc., 338 F.3d 394, 400-01 (5th Cir. 2003) (upholding district court's grant of plaintiff's Rule 59(e) motion to allow additional evidence of damages where district court had established defendant's liability and district court's judgment left plaintiff "without any recovery.")

B. Gulf is, at a minimum, entitled to damages for its 2007 cover purchases.

Even if the Court rejects Gulf's request for a re-calculation of the sulfur reduction, the record evidence establishes that Gulf, at a minimum, is entitled to compensation for 2007 cover purchases which met the CSA specifications. Defendant suggests that the evidence concerning Gulf's 2007 cover purchases was "consistently vague" and that Gulf failed to cite "any testimony that purports to offer the percentages of coal contained in the blended product or any evidence of the resulting SO2 content or emissions." (Doc. 182 at p. 22 n.22) The trial testimony and trial

exhibits cited at pages 6-8 of Gulf's motion[3] clearly demonstrate that the blended product utilized as cover in 2007 met the CSA specifications. However, any doubt in this regard is dispelled by Defendant's Proposed Findings of Fact and Conclusions of Law. (Doc. 139) In paragraphs 47 and 48 on page 11, Defendant proposes the following findings of fact:

> On October 11, 2006, more than ten months after learning of the permanent force majeure, Gulf Power purchased 1,350,000 tons of coal from AMCOAL under Purchase Order FPO6014 for $49.77/ton. Gulf Power purchased precisely the same North Portal Coal from AMCOAL on October 11, 2006 that it had access to at much earlier points in time—when the same coal was significantly less expensive.

Later, in paragraph 30 at page 19 of its Conclusions of Law, Defendant states as follows: "Because Gulf Power chose to replace COALSALES' coal with coal of a superior quality, the replacement does not qualify as reasonable 'cover'." In footnote 2 following paragraph 30, Defendant added the following qualifier:

> The only ***exception*** to this finding is the coal that Gulf Power purchased from AMCOAL, from its Millennium [sic] Portal, on October 11, 2006, ***which had a sulfur content of 2.5 lbs. of SO2 per MBtu.*** However this coal was not reasonable cover because Gulf Power: (i) turned down an offer to receive the same coal at a much lower price and (ii) unreasonably delayed ten months after COALSALES' declaration of a permanent force majeure before making this purchase.

(emphasis supplied)

In footnote 2, Defendant correctly acknowledged that the Galatia North Portal coal purchased under FPO6014 was not of a "superior quality" than the CSA coal. Instead, Defendant contended that this purchase did not constitute "reasonable cover" because of Gulf's failure to purchase the coal sooner, thereby mitigating its damages. The Court rejected the latter argument

[3] See also, Ball rebuttal testimony Tr. Day 4, p. 227 (Q: And in fact in early 2007 the cover that was designated in your direct testimony included a blend of two different coals; is that correct? A: The cover coal in 2007 was a blend of the Galatia North Portal coal with a Columbian coal.")

outright. (Doc. 171 p. 32 n. 64)[4] In light of the record citations in Gulf's motion, Defendant's admissions, and the Court's own findings, there can be no doubt that Gulf's 2007 cover purchases met the CSA specifications and were reasonable.

In recognition of the foregoing, Defendant now submits that it is "improper to segregate out a particular purchase/month/year in determining whether cover purchases are reasonable as a whole." (Doc. 182 at p. 19) Defendant further states that "it would be improper for Gulf Power to receive its full alleged damages for one year based on its allegedly reasonable 2007 cover purchases, yet also retain the benefits associated with three years of unreasonable cover purchases." Id. at 20. Defendant misses the point. If the Court awards Gulf Power damages for its 2007 cover purchases alone, Gulf Power is still "out" $40,902,224.[5] To suggest that Gulf would be "benefitted" or receive a "windfall" from an award of its 2007 cover damages alone ignores the obvious --Gulf would receive absolutely no damages for its 2004-2006 purchases. The "windfall" would actually belong to Defendant. Similarly, if the Court were to adopt Gulf's primary proposal and award Gulf its damages for 2004-2007, inclusive of the proposed downward adjustments for sulfur in 2003-2006 ($16,007,992) and 2003 cover savings ($27,206), there would be no "benefit" to Gulf. Under either approach, Defendant's segregation theory fails.

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[4] Specifically, the Court held as follows: "Coalsales also contends that Gulf Power failed to mitigate its damages and that any recovery should be reduced accordingly. Coalsales' argument is based on Gulf Power's rejection of North Portal coal after the declaration of permanent *force majeure* on January 23, 2006, and subsequent purchase of the same coal at a price higher than that offered by Coalsales. As explained above, Gulf Power rejected the North Portal coal when offered by Coalsales because its sulfur content was higher than that specified in the CSA and Coalsales refused to make an adjustment for the sulfur differential, which would have required Gulf Power to relinquish and/or acquire additional sulfur emissions allowances to burn the coal. When Gulf Power later purchased the same coal, it had a blending facility, which meant that it could blend the North Portal Coal with a lower sulfur coal and thus would not be required to surrender any sulfur allowances to burn the coal. The court finds Gulf Power's rejection of the North Portal coal reasonable and, therefore, that Gulf Power did not fail to mitigate its damages in refusing to accept it. (Doc. 171 at p. 32 n. 64)

[5] This figure is derived from the figures identified at page 23 of Gulf's motion (Doc. 177): $56,937,422 (cover damages for 2004-2006) minus $27,206 (lower cost of cover in 2003) minus $16,007,992 (sulfur adjustment for 2003-2006) equals $40,902,224.

Defendant's segregation theory also fails for a more fundamental reason. Suppose, for example, that Gulf's cover purchases for 2005, 2006 and 2007 all met the exact specifications of the CSA, but that Gulf's cover purchase for 2004 did not. Defendant could not credibly argue that Gulf Power's cover was therefore unreasonable "as a whole" and that Gulf should receive no damages. Alternatively, suppose that the only "non-compliant" purchase occurred in the first month or week of 2004. Under Defendant's logic, this too would render all of Gulf's cover unreasonable. Such punitive outcomes fly in the face of the general principle that the U.C.C. should be interpreted liberally so as to make the non-breaching party whole. Defendant appears to overlook the fact that it was Defendant, not Gulf Power, that breached its contract obligations in this case.

Cognizant of the limitations of its segregation theory, Defendant resorts to a tertiary argument –that Gulf Power's claim for 2007 cover damages continues to fail because of Gulf's failure to establish whether any expenses were saved in 2007 as a result of sulfur, chlorine, ash content or ash fusion temperature. (Doc. 182 at p. 21) The evidence is uncontroverted that the sulfur content of the blended cover product in 2007 met the CSA specifications. See, Def. Exhibit 296, p.10 ("[t]he Interocean Colombian coal source was to be blended with the American Galatia coal at the McDuffie Coal Terminal in Mobile, AL to produce a coal source that met the coal quality specifications consistent with the CSA.") and Def. Exhibit 53, p. 5 (reflecting no incremental SO2 emissions associated with the 2007 cover coal and noting that the "SO2 content of the replacement tons in 2007 (50% Colombian 50% Galatia) is the same as the CSA guarantee.") Consequently, there were no expenses saved associated with sulfur. Moreover, Gulf witness Ball testified that moisture, ash, and ash fusion temperature characteristics were not factors in the pricing of coal. [Tr. Day 2, 114-116] In designated deposition testimony, Gulf

witness Oaks testified that there is no way to economically quantify or analyze coal characteristics such as ash, ash fusion, and chlorine. See, Gulf Power's Counter Designations to COALSALES' Deposition Designations (Doc. 137) [Oaks deposition at pp. 151:13 to 152:18] Assuming, for the sake of argument, that Gulf did have the burden to demonstrate expenses saved associated with these other minor coal characteristics, the burden then shifted to Defendant to rebut Gulf Power's testimony. As noted on page 33, footnote 5 of the Court's Order (Doc. 171), Defendant's evidence on these issues was "speculative" in nature and therefore rejected by the Court.

C. *The formula and calculation supporting Gulf's "quality of coal" adjustment do not constitute "new evidence."*

In light of the Court's finding that Gulf Power experienced "expenses saved" associated with the purchase of lower sulfur coal, Gulf Power provided the Court with a step-by-step calculation of expenses saved using the methodology identified by the Court at pages 35-36 of its Order. (Doc. 177 at pp. 13-14) Defendant half-heartedly submits that the calculation and formula are "newly-created" and require "new testimony" in the form of Mr. Ball's affidavit. (Doc. 182 at p. 6) This is absolutely false. As detailed at pages 13-14 of Gulf's motion and in Mr. Ball's affidavit, the inputs for the calculation and the methodology for the calculation are all in the record. Gulf Power simply applied Mr. Hamal's methodology --which was discussed at length by Mr. Hamal during trial and the Court in its Order-- to Gulf's cover designations which were also in the record. This is not an attempt by Gulf introduce new evidence of damages or to effect a change in litigation strategy. It is an effort on Gulf Power's part to alert the Court to evidence in the record which will enable the Court to fashion a damages award which is in keeping with the Court's previous factual and legal determinations and which will avoid a patently inequitable result.

Unable to sincerely dispute the fact that all of the information necessary to calculate Gulf Power's damages is readily available in the record, Defendant makes the fantastic suggestion that such evidence must be ignored because it was "submitted by Coalsales - not Gulf Power." (Doc. 182 at p. 6) Defendant provides no legal authority in support of this position --and for good reason. Nothing in the Federal Rules of Evidence permits the Court to ignore evidence on such a basis. Nothing in the trial record suggests that such evidence was submitted for some limited purpose under Fed. R. Evid. 105. Indeed, the right of the trier of fact to consider all of the evidence submitted --regardless of which party submitted that evidence-- is embodied in the pattern jury instructions adopted by the United States Court of Appeals for the Eleventh Circuit. See, Eleventh Circuit Pattern Jury Instruction 6.1 Burden of Proof ("In deciding whether any fact has been proved by a preponderance of the evidence you may consider the testimony of ***all the witnesses, regardless of who may have called them***, and ***all of the exhibits received in evidence, regardless of who may have produced them***.") (emphasis supplied)

CONCLUSION

For all of the foregoing reasons, and the reasons articulated in Gulf's initial motion, Gulf Power respectfully requests that the Court exercise its discretionary authority and grant the limited relief requested. Gulf Power reiterates its request for oral argument on this matter.

Respectfully submitted this 7th day of December, 2010.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to the following counsel of record on December 7, 2010, by electronic filing.

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