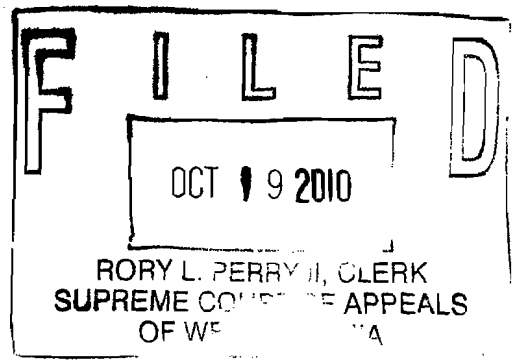
BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA



S & A PROPERTY RESEARCH, LLC, a West Virginia limited liability company,

Plaintiff/Appellee,

v.

Docket No. 35523

EURENERGY RESOURCES CORPORATION, a foreign corporation,

Defendant/Appellant.

BRIEF OF APPELLEE S & A PROPERTY RESEARCH, LLC

ANDREW C. WOOFTER, III,
ANDREW C. WOOFTER, III, PLLC,
West Virginia Bar No. 6985,
Post Office Box 265,
Parkersburg, West Virginia 26102-0265,
Telephone: (304) 834-1145,
Facsimile: (304) 834-1147.

Counsel for Plaintiff/Appellee, S & A Property Research, LLC, a West Virginia limited liability company.

BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

S & A PROPERTY RESEARCH, LLC, a West Virginia limited liability company,

Plaintiff/Appellee,

v. No. 35523

EURENERGY RESOURCES CORPORATION, a foreign corporation,

Defendant/Appellant.

BRIEF OF APPELLEE S & A PROPERTY RESEARCH, LLC

TO THE HONORABLE CHIEF JUSTICE ROBIN J. DAVIS, AND THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

Again comes the Appellee, S & A Property Research, LLC, (hereinafter referred to sometimes for convenience as "S & A"), a West Virginia limited liability company, by its counsel, **ANDREW C. WOOFTER, III**, and respectfully submits its Brief on Appeal in this matter. For any or all of the reasons set forth herein, S & A respectfully requests the Court to affirm Judge Beane's rulings below.

INTRODUCTION

This action is a basic contract action. S & A is a sole-member West Virginia limited liability company headquartered in Wood County, West Virginia. EurEnergy is a large

corporation that was incorporated in the State of Nevada, but who, upon information and belief, maintains its principal place of business in Dallas, Texas. In March, 2008, representatives of EurEnergy contacted S & A and discussed retaining the services of S & A with respect to oil and gas land and leasing services in the States of West Virginia, Maryland and Pennsylvania. **COMPLAINT**, numbered paragraph 3. Certain representatives of EurEnergy traveled to Wood County, West Virginia in March and/or April, 2008, and met with S & A's sole member, Amy M. Gough, to discuss the proposed transactions between S & A and EurEnergy. *Id.*, numbered paragraph 4.

Those talks were productive, and, in April, 2008, the parties negotiated the terms of a written agreement titled "Master Land Services Contract" (the "Contract"), which resulted in an agreement effective June 11, 2008, that is signed by representatives of both parties hereto. Record, pp. 5-9. **COMPLAINT**, numbered paragraph 5. Shortly thereafter, S & A began providing services pursuant to the Contract for the benefit of EurEnergy, and EurEnergy paid certain invoices to S & A at its offices in Wood County, West Virginia, submitted to it by S & A in accordance with the Contract. *Id.*, numbered paragraphs 6 and 7. However, EurEnergy thereafter refused to pay certain other invoices, notwithstanding having made repeated promises that it would pay S & A for the work represented by said invoices, so S & A filed suit.

EurEnergy did not answer the **COMPLAINT**, so S & A applied for and was awarded default judgment against it by order entered on January 29, 2009. On January 9, 2009, however—20 days before default judgment was entered—the very same representative who had previously met with Ms. Gough in March, 2008, came to the offices of the undersigned in Parkersburg for the express purpose of attempting to settle the parties' dispute. **ORDER** entered by the Honorable J. D. Beane, Circuit Judge of Wood County, West Virginia, on May 19, 2009,

at pages 1-2 (hereafter cited as "5/19/2009 **ORDER**"). During that settlement conference, EurEnergy extended a written offer in compromise which S & A accepted approximately five minutes after it was made. *Id* at 2. By communication dated January 12, 2009, EurEnergy attempted to rescind its written offer. EurEnergy then retained its present counsel who filed a Motion to Vacate the default judgment on or about February 17, 2009. S & A filed its Motion to Enforce the parties' settlement agreement on or about March 26, 2009, and arguments in favor of and against both motions were heard by the Honorable J. D. Beane, Circuit Judge of the Circuit Court of Wood County, West Virginia, on April 9, 2009. Judge Beane issued a written ruling on May 19, 2009, wherein he concluded that the parties had reached a binding settlement agreement on January 9, 2009, and granted S & A's motion to enforce the settlement agreement. Judge Beane's May 19, 2009, Order was carried into effect by entry of a **JUDGMENT ORDER** on July 28, 2009, from which EurEnergy now seeks relief.

APPELLANT'S OMISSIONS AND/OR INACCURACIES

In its Brief to this Court on appeal, EurEnergy misstates certain facts in its **STATEMENT OF FACTS**. First, the Appellant asserts that it *paid* S & A for all work S & A performed for it pursuant to a written work order, and cites to the transcript of the April 9, 2009 hearing as support. Appellant's Brief at 4, including fn. 8. However, a simple review of that transcript reveals only that there was at least one work order—there is absolutely no mention of *payment* from the Appellant to S & A for work performed thereunder.

Second, in one sentence, the Appellant asserts that at the parties' settlement meeting held on January 9, 2009, S & A had presented it with invoices for services rendered totaling nearly $690,000.00 for which a) there were no written work orders from the Appellant; and b) where S & A had not procured a single lease for it. Appellant's Brief at 6, including fn.

22. EurEnergy makes two misstatements here. First, assuming *arguendo* that a signed and written work order was required as between the parties pursuant to their contract, there *was* at least one such work order in existence. Second, there is absolutely no evidence of record that S & A never procured a single lease for the Appellant. That portion of the record the Appellant cites in its brief is nothing more than its counsel's *argument* at the April 9, 2009, hearing—not evidence at all.

APPELLEE'S RESPONSE TO ALLEGED ERRORS

None of the Appellant's six assignments of error has merit. Not only do the facts clearly demonstrate that the circuit court had properly obtained personal jurisdiction over the Appellant, but they also clearly show that the Appellant 1) made an offer; 2) that S & A accepted that offer; 3) that there was a meeting of the minds between the parties; and 4) that the Appellant breached the parties' agreement. Moreover, Judge Beane's conclusion that the Appellant was liable for paying the entire settlement agreement and also awarding S & A recovery of its attorney's fees incurred since the Appellant breached the parties' settlement agreement was well founded and well within his discretion.

AUTHORITIES RELIED UPON

Cases

Messer v. Huntington Anesthesia Group, Inc., 664 S.E.2d 751 (2008).....7, 18, 24, 26, 27

Gentry v. Mangum, 195 W. Va. 512 at 520, 466 S.E.2d 171 at 179 (1995).....7

Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985).....7, 8

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129, (1969).....7

Board of Education of the County of Mercer v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994) 8, 20

In re: Isaiah A. (No. 35031, April 15, 2010).....8

In the Interest of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996).....8

Triad Energy Corp. of West Virginia v. Renner, 215 W. Va. 573, 600 S.E.2d 285 (2004).....8

Woodrum v. Johnson, 210 W. Va. 762, 771, 559 S.E.2d 908, 917 (2001).....8

Sanders v. Roselawn Memorial Gardens, 152 W. Va. 91, 159 S.E.2d 784 (1968).....8

Wright v. Davis, 132 W. Va. 722, 727, 53 S.E.2d 335, 337 (1949).....8

Janney v. Virginian Railroad Co., 119 W. Va. 249, 252, 193 S.E. 187, 188 (1937).....8

Floyd v. Watson, 163 W. Va. 65, 68, 254 S.E.2d 687, 690 (1979).....8

F.D.I.C. v. Schaffer, 731 F.2d 1134 (4th Cir. 1984).....12, 13

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).....13

Evans v. Holt, 193 W. Va. 578, 457 S.E.2d 515 (1995).....13

Leslie Equipment Co., v. Wood Resources Company, L.L.C., 687 S.E.2d 109 (2009).....13

Lozinski v. Lozinski, 185 W. Va. 558, 408 S.E.2d 310 (1991).....13

General Electric Credit Corporation v. Fields, 148 W. Va. 176, 133 S.E.2d 780 (1963).....18

O'Neal v. Peake Operating Co., 185 W. Va. 28, 404 S.E.2d 420 (1991).....22

State Road Commission v. Ferguson, 148 W. Va. 742, 137 S.E.2d 206 (1964) 22

Sally-Mike Properties v. Yokum, 179 W. Va. 48, 365 S.E.2d 246 (1986) 24

Sanson v. Brandywine Homes, Inc., 215 W. Va. 307 at 312, 599 S.E. 730 at 735 (2004) 24, 26

Horkulic v. Galloway, 222 W. Va. 450, 665 S.E.2d 284 (2008) 24, 26

Statutes

W. Va. Code § 56-3-33(c) 9, 10, 12

W. Va. Code § 56-3-33(e)(1) 11

W. Va. Code § 56-3-33(e)(2) 13

W. Va. Code § 56-3-31 12

W. Va. Code § 31D-5-504(b) 13

W. Va. Code § 31D-5-504(d) 13

ARGUMENT

This Court should affirm Judge Beane's decision below because it is plainly right. None of the six alleged errors advanced in EurEnergy's Assignments of Error has any merit, and it cannot overcome the findings or conclusions made by Judge Beane. As this Court is well aware, it applies a blended standard of review when asked to address whether a circuit court properly enforced a settlement agreement. First and foremost, it reviews the final order and the ultimate disposition of the matter under an abuse of discretion standard. Second, this Court reviews the circuit court's findings of fact under a clearly erroneous standard, while questions of law are reviewed *de novo*. Syl.pt.1 *Messer v. Huntington Anesthesia Group, Inc.*, 664 S.E.2d 751 (2008).

None of these factors is to be taken lightly on review. This Court has explained that "an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them." *Gentry v. Mangum*, 195 W. Va. 512 at 520, 466 S.E.2d 171 at 179 (1995), fn 6.

Perhaps even more stringent is the "clearly erroneous" standard. The Court has stated:

> This standard does not entitle a reviewing court to reverse the finder of fact simply because it may have decided the case differently. *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985). " 'In applying the clearly erroneous standard to the findings of a [lower tribunal] sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' " 470 U.S. at 573, 105 S.Ct. at 1571, 84 L.Ed.2d at 528, quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129, 148 (1969). Indeed, if the lower tribunal's conclusion is plausible when viewing the evidence

> in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact. 470 U.S. at 573-74, 105 S.Ct. at 1511, 84 L.Ed.2d at 528.
>
> *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568 at 570-71, 453 S.E.2d 402 at 412-13 (1994).

In Syllabus Point 1 of its recent decision *In re: Isaiah A.* (No. 35031, released April 15, 2010), this Court further instructed that:

> "A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety," *quoting* syl. pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

Furthermore, as this Court is also very well aware, it is hornbook law in West Virginia that "the law favors and encourages the resolution of controversies by contracts of compromise and settlement, rather than by litigation." *Triad Energy Corp. of West Virginia v. Renner*, 215 W. Va. 573 at 575, 600 S.E.2d 285 at 288 (2004), *citing Woodrum v. Johnson*, 210 W. Va. 762, 771, 559 S.E.2d 908, 917 (2001); syl.pt.1 *Sanders v. Roselawn Memorial Gardens*, 152 W. Va. 91, 159 S.E.2d 784 (1968); *Wright v. Davis*, 132 W. Va. 722, 727, 53 S.E.2d 335, 337 (1949); and *Janney v. Virginian Railroad Co.*, 119 W. Va. 249, 252, 193 S.E. 187, 188 (1937). Just as well established is the principle that settlement agreements must be construed just as is any other contract, *Triad Energy*, 215 W. Va. 573, 576, 600 S.E.2d 285, 288, *quoting Floyd v. Watson*, 163 W. Va. 65, 68, 254 S.E.2d 687, 690 (1979), and that a trial court will specifically enforce a settlement agreement that the parties have reached. *Roselawn, supra.* It is in this very deferential context that this Court must examine what transpired in the circuit court below.

In the case at hand, Judge Beane determined that his court had jurisdiction, that the defendant made an offer to settle the parties' dispute, that the plaintiff accepted that offer, that the parties had a meeting of the minds, that the defendant thereafter breached the parties' agreement, that the plaintiff was entitled to the benefit of its bargain and that the plaintiff should not have to have been forced to have borne the expense of forcing the defendant to do what it had already agreed to do. Not only is each of these findings entitled to substantial deference individually, but Judge Beane's overall ruling can only be overturned if this Court determines that he abused his discretion in so doing. The record plainly shows that each finding made by the court below is on solid ground, that its ruling was proper, plausible and amply supported by the evidence and ultimately that Judge Beane did not abuse his discretion, and S & A will address each of the Appellant's six Assignments *seriatim*.

1. S & A Properly Served EurEnergy With Process.

The Circuit Court of Wood County was vested with personal jurisdiction over EurEnergy because EurEnergy was properly served with process. Not only does EurEnergy simply misunderstand the laws of the State of West Virginia and fail to appreciate the distinction between ***service of process*** and the provision of ***notice of acceptance*** of service of process, but it also, in a grasping-at-straws exercise, appears to attempt to mislead this Court by asserting that there is only one way to effect service of process which simply is not the case.

EurEnergy was properly served with process in this matter, and it has judicially admitted this fact. At the time the Complaint herein was filed, EurEnergy was not qualified to conduct business in the State of West Virginia, but, by its own admission, had entered into a contract in the State of West Virginia and was, therefore, conducting business in the State of West Virginia (a fact it does not dispute). April 9, 2009, Transcript, pp. 6-7.

As was its prerogative and choice, S & A elected to serve process on EurEnergy by way of the West Virginia Long-Arm Jurisdiction Statute, *W.Va.Code* § 56-3-33. In accordance with the provisions of § 56-3-33(c) thereof, S & A caused the original and two copies of the summons and the complaint to have been provided to the West Virginia Secretary of State, who accepted service of process on or about December 11, 2008, according to the notice filed by the Secretary of State in this matter. Thereafter, the Secretary of State transmitted, by certified mail, notice[1] of her acceptance of service of process on EurEnergy's behalf along with a copy of the summons and complaint to the address of EurEnergy that was supplied to her (the Secretary of State) by S & A. The address that S & A provided the Secretary of State was the address that EurEnergy itself provided as its address in the Contract, and is the very same address EurEnergy supplied on its Web Site[2] as its address at the time.

---

[1] As this Honorable Court is aware, *W.Va.Code* § 56-3-33(c) distinguishes between service of *process* and the provision of *notice* of the acceptance of service of process:

> Service shall be made by leaving the original and two copies of both the summons and the complaint...with the Secretary of State, or in his or her office, and such service shall be sufficient upon such nonresident: Provided, That notice of such service and a copy of the summons and complaint shall forthwith be sent by registered or certified mail, return receipt requested...by the Secretary of State to the defendant at his or her nonresident address and the defendant's return receipt signed by himself or herself or his or her duly authorized agent or the registered or certified mail so sent by the Secretary of State which is refused by the addressee and which registered or certified mail is returned to the Secretary of State, or to his or her office, showing thereon the stamp of the post-office department that delivery has been refused.

Here, the West Virginia Secretary of State accepted service of process on December 11, 2008, on behalf of the defendant, *notice* of which it thereafter provided to EurEnergy in accordance with the provisions quoted above; EurEnergy acknowledged receipt of the notice on December 29, 2008.

[2] At the time service of process was effected, including through at least the date S & A filed its Response to the Petition before this Court, EurEnergy maintained an Internet website with the address: http://www.eurenergyrecources.com. Moreover that address is the same address given by EurEnergy in its bankruptcy proceeding now pending in the United States District Court for the District of Nevada, Case No. 10-bk-18071, and filed on May 3, 2010. A recent check of the aforementioned Internet website reveals that it is no longer in use, but is "under construction."

Counsel for EurEnergy conceded at the April 9, 2009, hearing that S & A had complied with the provisions of *W.Va Code* § 56-3-33(c):

> Your Honor, with respect to the West Virginia long-arm statute, you have got the long-arm statute saying that you serve to the address of the corporation and it appears that the Plaintiff did what West Virginia Code 56-3-33 suggests, but you also have the corporation statute, which is 31D-5-504(b).
>
> Transcript of Hearing on Motion to Void or Vacate Judgment, page 37, ll. 5-10. (Emphasis supplied).

The notice that the Secretary of State transmitted to EurEnergy at the address it held itself out as having was sent by certified mail clearly addressed to EurEnergy and was signed for on December 29, 2008. In its Motion to Vacate the Default Judgment, EurEnergy attaches the Affidavit of Celeste Moomaw (Exhibit H to Appellant's Petition for Appeal). Ms. Moomaw asserts that she was not an employee of EurEnergy, but that has no bearing on this issue. Interestingly, she does assert that "[i]n the course of any given day, [she] receive[s] and sign[s] for five (5) to seven (7) Express or Certified Mail deliveries on behalf of as many as 15 to 20 different companies." Affidavit, numbered paragraph 4. That is a plain admission that Ms. Moomaw ***is*** an apparent agent of EurEnergy, and the fact that she does not believe she constituted such an agent is of no matter here.

EurEnergy appears to argue (though it does not tacitly) that Ms. Moomaw was not its "duly authorized agent", but she clearly is according to the definition the West Virginia Legislature provides for the phrase. *W.Va.Code* § 56-3-33(e)(1) provides that "[d]uly authorized agent"

> means and includes among others a person who, at the direction of or with the knowledge or acquiescence of a nonresident, engages in such act or acts and includes among others a member of the family of such nonresident or a person who, at the residence, place

> of business or post office of such nonresident, usually receives and receipts for mail addressed to such nonresident.
>
> (Emphasis supplied).

Ms. Moomaw's own affidavit demonstrates that she qualified as EurEnergy's "duly authorized agent" within the meaning and intendment of that statute on all fours, inasmuch as she signs for and accepts mailings on behalf of a number of entities, including EurEnergy, on a daily basis as part of her job duties. Clearly, S & A complied with the letter of the applicable provisions of the Statute in effecting service of process, and EurEnergy's argument simply misses the mark and appears grounded in the fact that EurEnergy fails to appreciate the distinction between service of process and service of notice of process.

In *F.D.I.C. v. Schaffer*, 731 F.2d 1134 (4th Cir. 1984), the Fourth Circuit Court of Appeals analyzed these very provisions of the *West Virginia Code* and concluded that service was properly made and had. The plaintiff served the defendants, who were non-residents, through the West Virginia Secretary of State, who accepted service of process. The Secretary of State then forwarded notice of his acceptance of service of process to both defendants by certified mail and evidence of receipt thereof was returned to the Secretary of State and filed with the court. *Id.*, 1135. Neither defendant answered, so the plaintiff sought and obtained default judgment. The defendants thereafter sought to challenge the entry of default judgment, and argued that the trial court lacked jurisdiction over them because they were not served with process. *Id.* The Fourth Circuit rejected the defendants' arguments and found, in applying West Virginia law, "West Virginia does not require actual notice for service of process to be valid where the statutory requirements for notification have been met." 731 F.2d 1134 at 1137 (4th Cir. 1984). The court continues:

> The Bank and the secretary of state made a good faith attempt to follow West Virginia's service procedures. The Bank served process on the secretary of state, who sent copies of the summons and complaint by certified mail to the respective homes of Schaffer and Malin. Receipts that appeared to be signed by Malin and Schaffer's agent were returned and properly filed. There were no other reasonable steps that the plaintiff or secretary of state were required to take to effect proper service. The court then acted on the reasonable assumption that service was effective and that it had acquired personal jurisdiction.
>
> *Id.*

The two tacit arguments EurEnergy does advance with respect to this issue stretch credulity. First, it argues that *W.Va.Code* § 56-3-33[3] does not apply to it because a corporation is not a "him" or "her." Not only is that a woefully feeble argument, it flirts with misrepresentation. Our Legislature went to the trouble of defining the term "nonresident" in *W.V.Code* § 56-3-33(e)(2), as follows:

> "Nonresident" means any person, other than voluntary unincorporated associations, who is not a resident of this state or a resident who has moved from this state subsequent to engaging in such act or acts, and *among others includes a nonresident firm, partnership or corporation* or a firm, partnership or corporation which has moved from this state subsequent to any of said such act or acts.
>
> (Emphasis supplied).

To argue that a corporation is not a "nonresident" as that term is defined in the very same statute pushes the envelope.

---

[3] It is interesting to note that EurEnergy does not directly challenge the constitutionality of West Virginia's Long Arm Jurisdiction Statute, though it hints at it, arguing that the statutorily-directed provision of notice to EurEnergy amounts to a "mere gesture" falling short of due process and quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and citing *Evans v. Holt*, 193 W. Va. 578, 457 S.E.2d 515 (1995). This argument, as well, is misplaced. Many times this Court has passed on the constitutionality of our Long-Arm Jurisdiction statute. *See*, for example, *Leslie Equipment Co. v. Wood Resources Company, L.L.C.*, 687 S.E.2d 109, 112-113 (2009), and *Lozinski v. Lozinski*, 185 W. Va. 558, 563, 408 S.E.2d 310, 315 (1991). Furthermore, *Evans* was a case that dealt with application of the provisions of *West Virginia Code* § 56-3-31—the non-resident motorist long-arm jurisdiction statute, which imposes different requirements from *West Virginia Code* § 56-3-33.

Second, EurEnergy argues that the provisions of *W.Va.Code* § 31D-5-504(b), *exclusively* govern service of process in this matter. That argument is just about as anemic as EurEnergy's first argument, as a simple reading of the statute demonstrates. S & A does not deny that *W.Va.Code* § 31D-5-504(b) provides that, where a corporation does not have a registered agent in the State of West Virginia, process *may* be had by certified mail, so long as that process is addressed to the corporation's secretary at its principal office. What it does deny, however, is that EurEnergy's argument is correct. EurEnergy ignores not only the word "may", but it completely ignores an entire provision of the Code: *W.Va.Code* § 31D-5-504(d), which provides:

> This section does not prescribe the only means, *or necessarily the required means*, of serving a corporation.

(Emphasis supplied).

In other words, a plaintiff has a choice of the manner in which it elects to effect service of process. This fact is confirmed by the Legislature's definition of the term "nonresident" quoted hereinabove. EurEnergy clearly falls within this definition and S & A's election to have EurEnergy served within the provisions of West Virginia's Long Arm Jurisdiction Statute is proper, just as was the manner in which service of process was effected. By conducting further proceedings in this matter and entering two orders after the Appellant has argued that the circuit court lacked personal jurisdiction over it, Judge Beane plainly determined that the court *did* have personal jurisdiction over the Appellant. That conclusion is entitled to significant deference and there are no facts of record that justify reversing it. Therefore, this Court should affirm the trial court.

2. The Parties Made a Binding Settlement Agreement.

Judge Beane correctly decided that the parties made a binding settlement agreement. EurEnergy simply cannot demonstrate that Judge Beane abused his discretion in so doing, nor can it demonstrate that he committed any error in finding that all three elements required to enforce a settlement agreement were present: offer, acceptance and meeting of the minds.

a. EurEnergy Made an Offer.

The record is clear as a bell that EurEnergy made a written offer to compromise the dispute between it and S & A. As Judge Beane correctly notes, Mr. Morgan, acting on behalf of EurEnergy, specifically contacted undersigned counsel for S & A and set up a meeting for the sole and only purpose of trying to negotiate a resolution:

> The parties met on January 9, 2009, in an attempt to settle this case as is evidenced by two emails to [S & A]'s counsel from Richard D. ("Dave") Morgan, Managing Director of [EurEnergy]. An email from Dave Morgan to [S & A]'s counsel dated December 19, 2008, states, in part:
>
> > We do want to resolve the issue, but as many other businesses, the credit crunch has affected us also.
> >
> > I am planning a trip to W. Va. the first week of 2009. *Would like to have a personal meeting and reach a settlement at that time*. I will have a clearer picture of the cash availability, and if nothing else work out a payment plan, *but certainly take positive action towards the settlement*. I will advise by 12/23 the date and make the appointment.
>
> A second email from Dave Morgan to [S & A]'s counsel dated January 9, 2009, states, in part:

> I am able to be in W. Va. today, Friday, Jan 9. If you would like to meet about 3:00 *to see if we can settle the SA Property matter, I can be in Parkersburg and do so.*
>
> As a result of the January 9, 2009, email, the parties met at [S & A]'s counsel's office in Parkersburg on the afternoon of January 9, 2009. [S & A] was present by its sole member, Amy M. Gough, and counsel, and [EurEnergy] was represented by Mr. Morgan who was accompanied by Doug Wight, President of New Concept Energy, Inc. ("NCE"). At the meeting after discussion, Mr. Morgan prepared a written offer of settlement (Exhibit C to [S & A]'s Motion to Enforce Settlement Agreement) with a total payment of $600,000.00 to [S & A].
>
> * * *
>
> Second, [EurEnergy] argues that it did not make an offer to [S & A]. [EurEnergy] relies on an odd reference on the written settlement offer to Rule 408 (presumably of the Rules of Evidence) to indicate that Mr. Morgan was merely making the offer "for discussion purposes only." The emails that Mr. Morgan sent to [S & A]'s counsel on December 19, 2008, and January 9, 2009, clearly indicate Mr. Morgan's desire to come to Parkersburg to "reach a settlement at that time" or "if nothing else to work out a payment plan." Unsurprisingly, the parties did meet on the afternoon of January 9, 2009, and work out a settlement that included a payment plan. Mr. Morgan clearly intended to bring the parties together to settle this matter.
>
> 5/19/2009 **ORDER**, pp. 1-4. (Emphasis supplied).

See, also, the Transcript of the April 9, 2009, Hearing before Judge Beane, where the Court aptly notes:

> THE COURT: So what Mr. Morgan did by coming here from Texas, and placing that on a piece of paper and signing it, didn't mean anything?
>
> MR. THOMAS: Well, on that day, January the 9th, he was presented with an additional $150,000.00 that was being claimed, and he had no advance notice of that being claimed. He had no ability to even evaluate whether that was a proper claim or not and couldn't do it as he sat there. And so for the purpose of trying to accomplish something, because he had come to West Virginia from Texas to do this, to talk about trying to resolve it, he said: Okay. At this point, you have presented me with what you say is

> $686,000.00 of work that has been done. For discussion purposes, let's assume that that is true, but I need to verify that. If that is true, if we offered you $600,000.00, would you take it? And so, that was the –
>
> THE COURT: It doesn't look like what you are saying on this piece of paper. It looks like $100,000 was going to be paid cash in January, and $100,000 each month, to begin on the 15th of each month following, which would start in February through June.
>
> MR. THOMAS: Well, I can't even read that from this piece of paper, Your Honor. This paper says: $100,000 – it looks like 1/15; and then $500 thousand, and I can't even read –
>
> THE COURT: It says five months, and it says the 15th under that so I would take that to mean the 15th of each month.
>
> * * *
>
> THE COURT: Well, why not agree to some and say, "but I need to check," and write that on the paper, to say: I will agree to $450,000, but this extra amount that you are claiming, we will need to discuss that further; I will need to verify.
> It is not on there, but the "408" is sure on there.
>
> Transcript of April 9, 2009, Hearing, Page 11, ll. 2-24; Page 12, ll. 1-24; Page 15, ll. 10-15.

In its brief to the Court, EurEnergy modifies its earlier argument advanced in its petition for appeal that Mr. Morgan's written offer (Exhibit C to S & A's Motion to Enforce the Settlement Agreement), was only Mr. Morgan's way of "putting his thoughts to paper" and not an offer. Petition, page 14. Rather, it now argues that Mr. Morgan's written offer was not an offer. However, the evidence of record not only belies that position, but it wholly supports Judge Beane's rational conclusion that it was what it was: an offer in compromise.

The **AFFIDAVIT OF AMY M. GOUGH**, submitted in connection with S & A's Motion to Enforce the Settlement Agreement, establishes that, after Mr. Morgan wrote the offer, he gave it to Ms. Gough and she almost immediately accepted it. Moreover, Ms. Gough and Mr.

Morgan thereafter hugged and Mr. Morgan told Ms. Gough he was glad to have the matter behind them. *Id.* Furthermore, if, in fact, Mr. Morgan had not intended for his written offer to constitute an offer, would he not have stated as much when S & A orally accepted the offer? The answer, of course, is that he would have protested at that point if he had not made an offer, but he did not, and no evidence exists to the contrary. In fact, Mr. Morgan's own affidavit, submitted in support of EurEnergy's Response to S & A's Motion to Enforce the Settlement Agreement does not contain any such averment.

EurEnergy also timidly argues that Mr. Morgan lacked authority to bind New Concept Energy. However, as the record in this case makes clear, he never communicated that apparent condition to S & A or its counsel. In fact, the first mention of that position was advanced in EurEnergy's Response to S & A's Motion to Enforce the Settlement Agreement. Where two parties meet for the overt purpose of attempting to reach resolution of a disputed claim, and both engage in negotiation without any conditions announced to either party about his or her authority, each opposing party is entitled to rely upon the apparent authority of the parties present, and the principal who later seeks to shirk the obligations attendant to the agreement reached is estopped from denying that apparent authority. "One who by his acts or conduct has permitted another to act apparently or ostensibly as his agent, to the injury of a third person who has dealt with the apparent or ostensible agent in good faith and in the exercise of reasonable prudence, is estopped to deny the agency relationship." Syl.pt.3 *Messer v. Huntington Anesthesia Group, Inc.*, 664 S.E.2d 751 (2008), *quoting* syl.pt.1 *General Electric Credit Corporation v. Fields*, 148 W. Va. 176, 133 S.E.2d 780 (1963).

Here, the record amply supports Judge Beane's conclusion that Mr. Morgan acted as an agent for New Concept Energy. Moreover, the *President* of New Concept was *in the room*

with the parties during their settlement discussions. It is a real stretch to argue—well after the fact—that Mr. Morgan lacked authority to bind New Concept. If he had overstepped his authority, Mr. Wight was present and well-able to speak up and restrain and/or correct Mr. Morgan, but he did not. Plainly and simply, the record in this matter clearly supports Judge Beane's finding of fact that EurEnergy made an offer in compromise.

b. S & A Accepted EurEnergy's Offer.

The record is just as clear that S & A accepted EurEnergy's offer to settle their dispute, and Judge Beane's factual finding should not be disturbed.

Based upon the evidence presented and arguments made to Judge Beane, he properly concluded that S & A did accept the offer extended by EurEnergy and did not reject it by counteroffer:

> The facts indicate that Mr. Morgan's written settlement offer clearly set forth the total amount to be paid to [S & A] including the sources of those payments and at what times payments would be made. [S & A], after reviewing the offer and discussing it with counsel, orally accepted the offer on January 9, 2009, in the presence of Mr. Morgan and Mr. Wight. At that time, the parties had clearly agreed to the principal material terms of the agreement, i.e. the amount of money. Notwithstanding the agreement to the amount of money, the details as to how the money would be paid still needed to be worked out, and Mr. Morgan and [S & A]'s counsel discussed and agreed that counsel would work out those details. After the meeting had concluded, [S & A]'s counsel drafted a letter to Mr. Morgan, with copies to Mr. Wight and [EurEnergy]'s Texas counsel, proposing the details as to how the payments would be made. [EurEnergy] never proposed an alternative and apparently rescinded the offer.
>
> It is clear to the Court that when the parties concluded their meeting on January 9, 2009, there was a complete, binding, and enforceable settlement agreement in the total amount of $600,000.00. The only issue remaining to be determined and agreed upon was the method in which [EurEnergy] would make its payments to [S & A]. These are two separate issues and [EurEnergy] did not provide any proposal as to how it would fulfill its obligation to pay [S & A]. As a result, the parties did not agree

> on the method and [EurEnergy] has not paid any of the sums it agreed to pay on January 9, 2009. The Court finds that [S & A] had already accepted [EurEnergy]'s offer of $600,000.00 before the meeting concluded on January 9, 2009, and that [S & A]'s counsel's letter to Mr. Morgan does not constitute a counteroffer.
>
> 5/19/2009 **ORDER**, pp. 4-5.

Interestingly, EurEnergy never argues, and can cite no evidence of record, that S & A did not accept the offer that was made on January 9, 2009. Its only argument is that S & A's proposal regarding the mechanism to put the parties' agreement in to effect constituted a counter-offer. As the evidence clearly establishes and as Judge Beane rightly concluded, that aspect of the parties' agreement had not been cemented when Mr. Morgan left the offices of the undersigned. However, as both the evidence also establishes and as Judge Beane also correctly finds, the parties had specifically left that discussion open for further resolution. 5/19/2009 **ORDER** at 5. Regardless, there is nothing of record to support EurEnergy's position that Judge Beane's finding that S & A did accept EurEnergy's offer was clearly erroneous, and there is likewise nothing of record to support its contention that Judge Beane abused his discretion in granting S & A's Motion to Enforce the Settlement Agreement. Even if this Court on review were to think that it might have concluded differently, it is bound to uphold the trial court's conclusion if that conclusion is plausible given the evidence before it viewed as a whole. *Bd. Of Education of the County of Mercer v. Wirt, supra.* The May 19, 2009, Order sets forth just that and should be allowed to stand. Therefore, this Court should affirm Judge Beane's rulings.

c. The Parties' Minds Did Meet.

There was a meeting of the minds between the parties on January 9, 2009. Judge Beane made this finding clear in the 5/19/2009 **ORDER**:

> First, [EurEnergy] argues that there was no meeting of the minds because the parties did not have the same understanding of the

> terms of the agreement. *It is clear that both parties understood that [EurEnergy] and/or NCE would pay to [S & A] the total amount of $600,000.00 to resolve the case.* The parties even clearly understood that [EurEnergy] would pay $100,000.00 in cash on or before January 15, 2009, and that NCE would pay $100,000.00 on the 15th of each subsequent month until the total $600,000.00 had been paid. Additionally, NCE would execute a note for the $500,000.00 that it would pay to [S & A].
>
> 5/19/2009 **ORDER**, p. 3. (Emphasis supplied).

In other words, Judge Beane found that the parties had reached agreement and reduced their mutual agreement to writing with respect to the amount of the settlement and the payment terms, but they both mutually acknowledged that certain details about putting that into place had yet to be worked out. Judge Beane specifically found that the parties agreed that a note had to be prepared, that it would be prepared by either counsel for S & A or for EurEnergy and that details thereof would be worked out between counsel for S & A and EurEnergy thereafter. In order for this Court to conclude that there was no meeting of the minds, not only does it have to find that Judge Beane's factual findings were clearly erroneous, but it must also find that he abused his discretion in concluding, based upon those facts, that the parties reached a settlement agreement.

Unfortunately for EurEnergy, the record is absolutely devoid of any evidence that supports its position. In his affidavit, Mr. Morgan does not dispute that he and counsel for S & A agreed to have details such as the note and related matters resolved by future discussion, and EurEnergy presented no evidence whatsoever to contradict Ms. Gough's affidavit that affirmatively provides that the parties did, in fact, so agree. For Judge Beane to reach the conclusion that he did did not require him to discredit any testimony or evidence. All it required was for him to review the affidavits and evidence presented. In fact, Judge Beane deftly identifies that fallacy of EurEnergy's position by articulating the rhetorical question:

> Finally, if there was no meeting of the minds, then why did Mr. Morgan and Mr. Wight, President of New Concept Energy, Inc., hear Ms. Gough and/or counsel orally accept the offer and not thereafter indicate that there was no agreement at that time?
>
> 5/19/2009 **ORDER**, p. 3.

The answer, of course, is that they did not object or otherwise protest the agreement because the parties accomplished the task they had mutually set out to do: "*...have a personal meeting and reach a settlement at that time.*" *Id.*, at p. 2. Therefore, because there is no evidence upon which to rest a claim that Judge Beane made any clearly erroneous findings of fact, nor any evidence upon which to rest a claim that his conclusion constituted an abuse of his discretion, juxtaposed with the fact that the evidence affirmatively supports those findings and ultimate conclusion, this Court should affirm the circuit court and allow its rulings to stand.

3. The Final Judgment Order is Correct.

The circuit court's **JUDGMENT ORDER** is correct. It simply carries into effect the circuit court's action in granting S & A's Motion to Enforce the Settlement Agreement against the defendant, EurEnergy. However, this Court should not even consider EurEnergy's argument with respect to this issue because it never raised this particular issue below and has now waived review thereof. "Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal." Syl.pt.3, *O'Neal v. Peake Operating Co.*, 185 W. Va. 28, 404 S.E.2d 420 (1991), *quoting* syl.pt.1 *State Road Commission v. Ferguson*, 148 W. Va. 742, 137 S.E.2d 206 (1964).

Nowhere in its Response to S & A's Motion for Entry of Judgment Order or in the transcript of the hearing on July 16, 2009, does EurEnergy ever argue that the circuit court should not have awarded judgment for the full settlement amount against it. In fact, counsel for

EurEnergy admits "[t]he dispute is whether the record would support entry of a judgment order that awards attorney fees." Transcript of July 16, 2009, Hearing, Page 2, ll. 7-9. The record herein reflects that EurEnergy never filed a motion pursuant to Rule 59 of the West Virginia Rules of Civil Procedure to alter or amend the judgment order. Therefore, the Court should disregard this portion of EurEnergy's argument that the **JUDGMENT ORDER** is erroneous because it awards judgment against it for the full settlement amount.

Even if the Court were to consider the Appellant's argument on this point—a proposition S & A opposes, the facts and evidence mandate the conclusion that Judge Beane's decision should stand. As is outlined above, Mr. Morgan came to the parties' settlement conference with the intent and full apparent authority to reach an agreement. Not only was he present, but so was the President of New Concept Energy. Neither Mr. Morgan nor Mr. Wight *ever* indicated that Mr. Morgan lacked the authority to make the proposal he did, and Mr. Wight never objected to anything that transpired at that meeting, including reaching an agreement. 5/19/2009 **ORDER**, pp. 3-4. EurEnergy, the party to the contract, sent its agent to try to settle its dispute with S&A. Its agent did so and thereby bound it to the agreement reached. To later try to shirk its obligation by hiding behind a shell game among related corporations with common agents is both troubling and telling.

4. The Court's Award of Attorney's Fees is Proper.

The Court's award of attorney's fees in favor of S & A is proper as well. Where a circuit court is presented with a motion to enforce a settlement agreement, it is well within its discretion to award the non-breaching party attorney's fees and costs as the result of the breach. "There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs' ...when the losing party has acted in bad faith, vexatiously, wantonly or for

oppressive reasons." Syl.pt.4 *Messer v. Huntington Anesthesia Group, Inc.*, 664 S.E.2d 751 (2008), *quoting* syl.pt.3 *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986).

When this Court has been presented with cases where one party to a settlement agreement breaches that agreement, it has awarded to the non-breaching party its attorney's fees and costs based upon the equitable principle that a non-breaching party "should not have to bear the financial burden caused by the defendant's attempt to rescind a valid and enforceable settlement agreement. *Sanson v. Brandywine Homes, Inc.*, 215 W. Va. 307 at 312, 599 S.E. 730 at 735 (2004). That is exactly what happened in the case at hand.

EurEnergy's discussion of *Sanson* and *Horkulic v. Galloway*, 222 W. Va. 450, 665 S.E.2d 284 (2008) is misplaced. While EurEnergy's characterization of the *Sanson* opinion is accurate, in that the Court there concluded that the parties' dispute was relatively simple and straightforward, such that an award of attorney's fees to the non-breaching party was an easy decision, its assertion that this case is just as complex as the scenario in *Horkulic* is a stretch.

The underlying cause of action in *Horkulic* was attorney malpractice, but blossomed into a bad-faith insurance case, where the plaintiffs amended their complaint to assert claims against their former lawyer's insurance carrier (and the lawyer also apparently advanced claims against his carrier, too). The primary issue involved in the case was whether the circuit court's order specifically enforcing the parties' settlement agreement could be used against the defendant's insurance carrier in the bad faith litigation:

> The primary issue in the case presently before this Court is whether the findings of fact and conclusions of law contained in the lower court's August 25, 2006, order will be deemed binding upon TIG [the insurer] in the subsequent bad faith action. 222 W. Va. 450 at ___, 665 S.E.2d 284 at 293.

Among other things, those findings of fact and conclusions of law gave TIG the right

> to object to the admissibility into evidence of the confessed judgment portion of the settlement during the Unfair Claims Settlement Practices Act claim...which and [*sic*] been previously stayed and bifurcated.
>
> 222 W. Va. 450 at ____, 665 S.E.2d 284 at 292.

It was by separate order that the circuit court awarded the plaintiffs attorneys' fees and costs on the following basis: 101.5 hours at a rate of S500.00 per hour, plus costs of $54.00, for a total of $50,804.00 (!). *Id.*, 222 W. Va. 450, ____, 665 S.E.2dn 284, 297, fn. 10.

As a simple reading of the opinion reveals, there were numerous issues at hand regarding whether either or both of the lawyer-defendant's counsel (one appointed by his insurance carrier, and one personally retained) had authority to speak on his behalf. Regardless, this Court affirmed the circuit court's conclusion that the parties had reached a binding settlement agreement. *Id.*, 222 W. Va. 450, ____, 665 S.E.2d 284, 299.

During settlement negotiations conducted by the defendant-lawyer's insurance company-appointed counsel and counsel for the plaintiffs, but during which TIG's claims analyst was involved, the parties discussed the following settlement scenario: TIG would pay the plaintiffs the policy limits of $500,000.00, less costs; the defendant-lawyer would confess judgment in the plaintiffs' favor in the amount of $1.5 million; TIG would consent to the judgment order and confessed judgment; the plaintiffs would not execute on their judgment against their former lawyer and would not record an abstract thereof; a dismissal order in favor of the defendant-lawyer would be entered; and the plaintiffs would receive 1/3 of any recovery the defendant-lawyer obtained against TIG with respect to his claim against it. *Id.* TIG's claims analyst would not agree to the proposed consent and confessed judgment, but did agree to pay the plaintiffs $500,000.00. Both counsel for the plaintiffs and TIG-appointed counsel for the defendant-lawyer assert that the parties had reached a settlement agreement, at least with respect

to the payment of the $500,000.00. *Id.*, 222 W. Va. 450, ____, 665 S.E.2d 284, 291. In short, the opinion reveals conflicting testimony and matters of record, including the position of the defendant-lawyer's personally retained counsel that his client had not consented to the settlement agreement, as well as which lawyer could speak for the defendant-lawyer. *Id.*, fn. 4—complicated factors simply not present in the case at hand, despite EurEnergy's assertions to the contrary.

This case really is quite simple: the parties met for the specific purpose of trying to settle their mutual dispute; a written offer was made at that meeting with representatives of all parties present; the offer was accepted and that acceptance was communicated immediately to the offeror; and EurEnergy thereafter breached the agreement.

As for EurEnergy's assertion that the amount of fees claimed is excessive, S & A maintains that none of the fees claimed and detailed would have been expended if EurEnergy had simply lived up to its side of the bargain. S & A proceeded with its application for default judgment only after EurEnergy had communicated its breach of the parties' agreement[4]. Had EurEnergy simply performed, S & A would not have proceeded, and none of the wranglings that EurEnergy presented to the circuit court or this Court would have been necessary. S & A simply "should not have to bear the financial burden caused by EurEnergy's attempt to rescind a valid and enforceable settlement agreement." *Sanson v. Brandywine Homes, Inc.*, 215 W. Va. 307 at 312, 599 S.E. 730 at 735 (2004). *See* also *Messer v. Huntington Anesthesia Group, Inc.*, 664 S.E.2d 751, 761 (2008), a case reported before *Horkulic* [which was

[4] Although not part of the record below, as early as February 12, 2009, counsel for S & A advised present counsel for EurEnergy that S & A believed that the parties had reached a binding settlement, and counsel for S & A forwarded to counsel for EurEnergy copies of the e-mails quoted by Judge Beane in the May 19, 2009, **ORDER**, as well as the written offer.

decided February 19, 2008], but decided ***after*** it [*Messer* was decided June 26, 2008], which means this Court was well familiar with its principles.

Judge Beane carefully considered all that was presented him in connection with this matter and concluded that S & A should not have to have borne the further financial burden EurEnergy has caused it by failing to honor its agreement. Therefore, the Court should affirm this portion of Judge Beane's ruling as well.

CONCLUSION

This Court should affirm Judge Beane's orders in their entirety. The record demonstrates, as counsel concedes, that the Circuit Court of Wood County had personal jurisdiction over EurEnergy inasmuch as S & A properly effected service of process on it in accordance with the letter of West Virginia Long-Arm Jurisdiction statute. Moreover, the record supports each and every fact Judge Beane determined in considering this matter: EurEnergy met with S & A for the specific purpose of engaging in settlement negotiations; during those negotiations, EurEnergy made a written settlement proposal without condition and tendered it to S & A; and S & A accepted that offer. The record likewise supports each and every conclusion Judge Beane made, too: the parties entered into a binding settlement agreement as to the amount to be paid, EurEnergy breached that agreement and it is the party responsible for payment of its agreed-upon obligation. Taken as a whole, it is really beyond question whether Judge Beane was well within his discretion to conclude that the S & A and EurEnergy entered into a binding settlement agreement, that EurEnergy breached that agreement, and that EurEnergy is liable for the entire amount it agreed to pay (any argument to the contrary having been waived) and should have to reimburse S & A for the attorney's fees and expenses incurred in connection with that

breach. Therefore, S & A respectfully urges this Court to reject EurEnergy's arguments and to affirm Judge Beane's orders below.

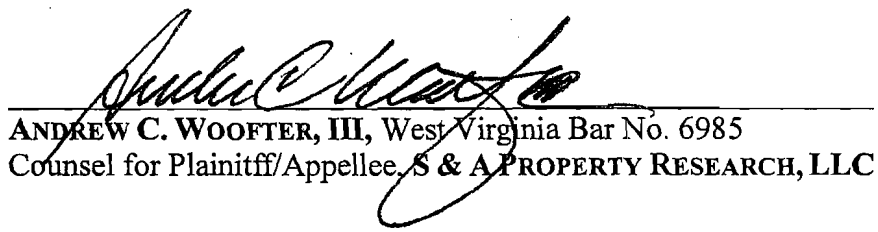
Respectfully submitted,

ANDREW C. WOOFTER, III, West Virginia Bar No. 6985
ANDREW C. WOOFTER, III, PLLC
Counsel for Plaintiff/Appellee, S & A Property Research, LLC
Address: 429 Market Street, Suite 201,
Post Office Box 265
Parkersburg, West Virginia 26102-0265
Telephone: [304] 834-1145,
Facsimile: [304] 834-1147.

CERTIFICATE OF SERVICE

Pursuant of the provisions of Rule 15 of the West Virginia Rules of Appellate Procedure, undersigned counsel for the Plaintiff/Appellee hereby certifies that on the 19th day of October, 2010, he served the foregoing and hereto-appended **BRIEF OF APPELLEE S & A PROPERTY RESEARCH, LLC**, upon the Defendant/Appellant hereto by depositing a true copy thereof in the facilities of the United States Postal Service, postage prepaid, in an envelope addressed as follows, the address of said counsel last known to the undersigned:

Steven L. Thomas, Esquire,
KAY CASTO & CHANEY PLLC,
Post Office Box 2031,
Charleston, West Virginia 25327.



ANDREW C. WOOFTER, III, West Virginia Bar No. 6985
Counsel for Plainitff/Appellee, **S & A PROPERTY RESEARCH, LLC**