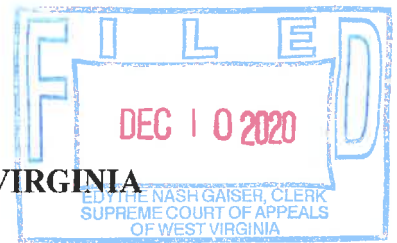


**FILE COPY**



**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**BROUN PROPERTIES, LLC,  
a West Virginia limited liability company,**

**Plaintiff,**

**v.**

**Boone County Circuit Court  
Civil Action No. 20-C-82  
Honorable William S. Thompson**

**DO NOT REMOVE  
FROM FILE**

**PENN VIRGINIA OPERATING CO., LLC,  
a Delaware limited liability company, and  
CARBON INDUSTRIES, INC., a West Virginia  
Corporation, successor to Crimson Processing  
Company and Carbon Fuels Company,**

**Defendants.**

**TO: The Honorable Chief Justice Tim Armstead**

**DEFENDANT PENN VIRGINIA OPERATING CO., LLC'S MOTION TO REFER CASE  
TO THE BUSINESS COURT DIVISION**

Defendant Penn Virginia Operating Co., LLC ("Penn Virginia"), by counsel and pursuant to Rule 29.06 of the West Virginia Trial Court Rules, respectfully requests that this civil action be referred to the Business Court Division. In support of this Motion, Penn Virginia states as follows:

**FACTUAL BACKGROUND**

1. This litigation arises out of the contractual relationships between Plaintiff Broun Properties, LLC ("Broun"); Penn Virginia; and Defendant Carbon Industries, Inc. ("Carbon"). The relationships of the parties are governed by an Agreement of Lease dated March 1, 1976, in which certain lessors leased all of the coal located on a 1,900 acre tract of property located on the waters of Joe's Creek in Boone County, West Virginia (the "Broun Tract"), of record in the Office of the Clerk of the County Commission of Boone County, West Virginia in Lease Book 14, at page 538

(the “Carbon Fuels Lease”), and a number of subsequently executed subleases, assignments, and other contracts relating to coal mining and related operations on the Broun Tract.

2. On September 30, 2020, Broun filed its Complaint in the Circuit Court of Boone County, West Virginia, asserting claims for breach of contract against Penn Virginia and Carbon (collectively, “Defendants”). *See* Compl., attached as Exhibit A. Specifically, Broun alleges that Defendants breached the Carbon Fuels Leases by: (1) “failing to fully account for and pay tonnage royalties when due . . . resulting in an underpayment of tonnage royalties” (Compl. ¶ 27) and (2) “wheeling . . . foreign coal across the Broun Tract by their sublessees, sub-subleassees and contract miners, and the collection of wheelage royalty payments for the same . . . and failing to account for and pay [Broun] for the same.” Compl. ¶ 29.

3. Penn Virginia filed its Answer and Affirmative Defenses to Complaint on November 5, 2020. *See* Def. Penn Virginia Operating Co., LLC’s Answer and Affirmative Defenses to Compl., attached as Exhibit B. On November 24, 2020, Carbon filed its Answer and Affirmative Defenses to Complaint. *See* Carbon Industries, Inc.’s Answer and Affirmative Defenses to Compl., attached as Exhibit C.

4. Resolving Broun’s claims for breach of contract will require interpretation of the Carbon Fuels Lease and the subsequently executed subleases, assignments, and other contracts as well as an understanding of the specialized and technical mining operations concerning the Broun Tract. While the Boone County Circuit Court is capable of handling this dispute, this matter presents precisely the type of commercial dispute particularly suited for the Business Court Division, as contemplated by West Virginia Trial Court Rule 29.

## LEGAL STANDARD

5. The West Virginia Business Court Division has jurisdiction to efficiently manage and resolve “litigation involving commercial issues and disputes” between parties engaged in business transactions. W. Va. T.C.R. 29.01.

6. Specifically, the Business Court Division, upon proper referral and transfer by the Chief Justice of the Supreme Court of Appeals, may properly preside over and adjudicate “Business Litigation,” which is defined as:

[O]ne or more pending actions in circuit court in which:

1. the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities; and
2. the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable; and
3. the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies, provided, however, that complex tax appeals are eligible to be referred to the Business Court Division.

W. Va. T.C.R. 29.04(a)(1)–(3).

7. A party may file a motion to refer a case to the Business Court Division “after the time to answer the complaint has expired.” W. Va. T.C.R. 29.06(a)(2).

### **ARGUMENT**

8. As evidenced by the issues raised in the attached Complaint and Answers, this civil action constitutes “Business Litigation” as defined by West Virginia Trial Court Rule 29.04 and should be appropriately resolved by the Business Court Division.

9. The Business Court Division was created to hear precisely this type of complex commercial dispute. This matter involves specialized and complex commercial issues surrounding the parties’ rights and obligations regarding coal-mining operations on the Broun Tract. Resolution of this matter will require interpreting and applying the Carbon Fuels Lease and the subsequently executed subleases, assignments, and other contracts as well as an understanding of the specialized and technical mining and related operations concerning the Broun Tract.

10. Moreover, this matter does not involve any claims excluded from the definition of “Business Litigation” by Rule 29.04(a)(3) of the West Virginia Trial Court Rules.

11. Penn Virginia states that there are no related actions currently pending.

12. As required by West Virginia Trial Court Rule 29.06(a)(1), a copy of the Complaint is attached as Exhibit A, Penn Virginia’s Answers and Affirmative Defenses to Complaint is attached as Exhibit B, Carbon’s Answer and Affirmative Defenses to Complaint is attached as Exhibit C, and the docket sheet is attached as Exhibit D.

13. Penn Virginia does not request an expedited review under West Virginia Trial Court Rule 29.06(a)(4). All affected parties may file a memorandum stating their respective positions in accordance with West Virginia Trial Court Rule 29.

14. Counsel for Carbon has indicated that Carbon joins in this Motion.

**CONCLUSION**

WHEREFORE, for the forgoing reasons, Penn Virginia respectfully requests that the Chief Justice of the West Virginia Supreme Court of Appeals refer this case to the Business Court Division.

**PENN VIRGINIA OPERATING CO., LLC**



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William M. Herlihy, Esq. (WVSB # 1688)  
Heather Heiskell Jones, Esq. (WVSB # 4913)  
Joseph A. Ford, Esq. (WVSB # 12984)  
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[jford@spilmanlaw.com](mailto:jford@spilmanlaw.com)



## West Virginia E-Filing Notice

**EXHIBIT A**

CC-03-2020-C-82

Judge: William Thompson

To: Howard Persinger  
hmp3@persingerlaw.com

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### NOTICE OF FILING

---

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA  
Broun Properties LLC v. Penn Virginia Operating Co., LLC  
CC-03-2020-C-82

The following complaint was FILED on 9/30/2020 2:45:41 PM

Notice Date: 9/30/2020 2:45:41 PM

Sue Zickefoose  
CLERK OF THE CIRCUIT  
Boone  
200 State Street, Suite 202  
MADISON, WV 25130

(304) 369-7321  
sue.zickefoose@courtswwv.gov

# COVER SHEET

E-FILED | 9/30/2020 2:45 PM  
CC-03-2020-C-82  
Boone County Circuit Clerk  
Sue Zickefoose

## GENERAL INFORMATION

IN THE CIRCUIT COURT OF BOONE COUNTY WEST VIRGINIA

**Broun Properties LLC v. Penn Virginia Operating Co., LLC**

**First Plaintiff:**

☒ Business ☐ Individual  
☐ Government ☐ Other

**First Defendant:**

☒ Business ☐ Individual  
☐ Government ☐ Other

**Judge:**

William Thompson

## COMPLAINT INFORMATION

**Case Type:** Civil

**Complaint Type:** Contract

**Origin:**

☒ Initial Filing ☐ Appeal from Municipal Court ☐ Appeal from Magistrate Court

**Jury Trial Requested:**

☒ Yes ☐ No

**Case will be ready for trial by:** 9/30/2021

**Mediation Requested:**

☐ Yes ☒ No

**Substantial Hardship Requested:** ☐ Yes ☒ No

☐ Do you or any of your clients or witnesses in this case require special accommodations due to a disability?

☐ Wheelchair accessible hearing room and other facilities

☐ Interpreter or other auxiliary aid for the hearing impaired

☐ Reader or other auxiliary aid for the visually impaired

☐ Spokesperson or other auxiliary aid for the speech impaired

☐ Other: \_\_\_\_\_

☐ I am proceeding without an attorney

☒ I have an attorney: Howard Persinger, 237 Capitol St, Charleston, WV 25301

## SERVED PARTIES

**Name:** Penn Virginia Operating Co., LLC  
**Address:** 8111 Westchester Drive, Dallas TX 75225  
**Days to Answer:** N/A      **Type of Service:** No Service

**Name:** Carbon Industries, Inc.  
**Address:** 503-A Pennsylvania Avenue, Charleston WV 25302  
**Days to Answer:** N/A      **Type of Service:** No Service

**IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA**

**BROUN PROPERTIES LLC,**  
a West Virginia limited liability company,

Plaintiff,

v.

**CIVIL ACTION NO.: 20-C-\_\_\_\_\_**

**PENN VIRGINIA OPERATING CO., LLC,**  
a Delaware limited liability company, and  
**CARBON INDUSTRIES, INC.,** a West Virginia  
Corporation, successor to Crimson Processing  
Company and Carbon Fuels Company,

Defendants.

**COMPLAINT**

Now comes plaintiff, Broun Properties LLC ("Broun"), by undersigned counsel, Howard M. Persinger, III, and Persinger & Persinger, L.C., and for its Complaint, avers as follows:

**PARTIES**

-I-

At all times relevant herein, plaintiff Broun Properties, LLC ("Broun") was a limited liability company duly organized under the laws of the State of Delaware, whose principal office address was One Bridge Place, Suite 205, 10 Hale Street, Charleston, West Virginia 25301, and at least one of whose members resides in the State of West Virginia.

-II-

At all times relevant herein, defendant Penn Virginia Operating Co., LLC ("PVOC") was a limited liability company duly organized under the laws of the State of Delaware, whose principal place of business is 8111 Westchester Drive, Dallas, Texas 75225.

-III-

At all times relevant herein, defendant Carbon Industries, Inc. ("Carbon Industries") was a corporation duly organized under the laws of the State of West Virginia, whose principal place of business is 503-A Pennsylvania Avenue, Charleston, West Virginia 25302.

#### **JURISDICTION AND VENUE**

-IV-

This Court has personal and subject matter jurisdiction over the Defendants Penn Virginia and Carbon pursuant to *W.Va. Code §51-2-2* because Defendants have conducted substantial business activities in the State of West Virginia, and because the acts and conduct of Defendants giving rise to the claims asserted in this Complaint occurred in Boone County, West Virginia, and relate to real property situated therein. Venue is appropriate in this Court pursuant to *W.Va. Code §56-1-1* because it involves causes of action which arose in Boone County, West Virginia, and involving land situated therein.

## **FACTUAL BACKGROUND**

**-V-**

Plaintiff Broun's predecessors in title, E. Fontaine Broun and Rahel D. Broun, his wife, Virginia Broun Lawson and Robert W. Lawson, Jr., her husband, Kanawha Valley Bank, N.A. and W. T. O'Farrell, as Trustees under the Last Will and Testament of Thomas B. Jackson, Deceased, Kanawha Valley Bank, N.A. as Special Receiver of the Estate of Thomas L. Broun, Deceased, Louise Fontaine Powers, Single, Anne Conway Powers, Single, Anne Record Ervin and Clyde Ervin, her husband, Philip Whittemore Powers and Lois Jenks Powers, his wife, Jean J. Powers Sheild and John Sheild, her husband, and Jean J. Powers Sheild, as Executrix of the Estate of Thomas B. Powers, Jr., Deceased, Thomas Broun Powers, Jr., Single, and Stephen Jordan Powers, Single, entered into an Agreement of Lease, as Lessors, dated March 1, 1976, with Carbon Fuel Company, a West Virginia corporation ("Carbon Fuels"), conveying to lessees the exclusive right and privilege to mine and take away by any lawful methods of mining, all of the coal in all of the seams in and underlying a 1,900 acre tract of property situated on the waters of Joe's Creek in Boone County, West Virginia ("Broun Tract"), and of record in the Office of the Clerk of the County Commission of Boone County, West Virginia, in Lease Book 14, at page 538 ("Carbon Fuels Lease").

**-VI-**

Plaintiff Broun became the lessor under the Carbon Fuels Lease following the conveyance of the Broun Tract to it from the aforesaid predecessor via Quitclaim Deed dated December 1, 2009, and duly recorded in the Office of the Clerk of the County Commission of Boone County, West Virginia, in Deed Book 265, at page 577.

## **HISTORY OF CARBON FUELS LEASE AND SUBLEASES**

### **-VII-**

Shortly after its execution, on information and belief, the Carbon Fuels Lease was, on information and belief, assigned by Carbon Fuels, as lessee, to Bedcor, Inc., a West Virginia corporation ("Bedcor"), by assignment dated March 1, 1976.

### **-VIII-**

Thereafter, on information and belief, the Carbon Fuels Lease was reassigned from Bedcor back to Carbon Fuels, as lessee.

### **-IX-**

Thereafter, on information and belief, Carbon Fuels, as lessee, subleased a portion of the leased premises under the Carbon Fuels Lease consisting of the Peerless and Eagle/No. 2 Gas Seams to Crimson Processing Company, a West Virginia corporation ("Crimson"), via a written sublease ("Broun Sublease"). On information and belief, said Sublessee was, pursuant to said transaction, required to adhere to the terms and conditions of the Carbon Fuels Lease.

### **-X-**

Thereafter, on information and belief, by Sublease dated January 1, 1995, Crimson sub-subleased the aforesaid portions of the Carbon Fuels Lease to Kanawha Eagle Limited Liability Company, a West Virginia limited liability company ("KELLC") ("KE Sub-Sublease"). On information and belief, pursuant to the terms of said transaction, said Sub-Sublessee was required to adhere to the terms and conditions of the Carbon Fuels Lease, and the Broun Sublease.

-XI-

Thereafter, on information and belief, pursuant to the KE Sub-Sublease, KELLC operated the Rachel Mine, producing coal from the Peerless seam of coal, and the American Eagle Mine, producing coal from the No. 2 Gas/Eagle seam of coal, located on Broun Tract, pursuant to the Carbon Fuels Lease, Broun Sublease and KE Sub-Sublease.

-XII-

Thereafter, on information and belief, Carbon Fuels assigned its interest as lessor in the Carbon Fuels Lease to Penn Virginia Coal Company, a Virginia corporation, whose principal place of business was 6909 Duff-Patt Road, Duffield, Virginia 24244. defendant PVOC's predecessor, via written assignment dated September 1, 1999. Upon information and belief, Penn Virginia Coal Company was later merged into defendant PVOC in 2002.

-XIII-

Via separate mergers in 2002 and 2015, on information and belief, Bedcor, Carbon Fuels and Crimson were subsequently merged into defendant Carbon Industries which was the surviving entity, and which remains liable for the performance of the terms and obligations of the lessee under the Carbon Fuels Lease.

-XIV-

By final order of the United States Bankruptcy Court for the Eastern United States of Virginia – Richmond Division, in Case No. 15-32450 (KLP) dated October 28, 2015, certain leases and subleases held by Patriot Coal Corporation and its subsidiaries were sold to Blackhawk Mining, LLC and its affiliates and subsidiaries, which included

Kanawha Eagle Mining, LLC ("KEMLLC") a subsidiary of Blackhawk, assumed the role of sublessee replacing Kanawha Eagle, LLC.

**-XV-**

By Contract Mining Agreement dated January 1, 2019, KEMLLC, engaged Panther Creek Mining, LLC ("Panther Creek") to conduct mining operations on its behalf under the Carbon Fuels Lease, Broun Sublease and KE Sub-Sublease in the No. 2 Gas/Eagle seam producing coal from the American Eagle Mine. Thereafter, KEMLLC and/or Panther Creek operated the Rachel Mine, producing coal from the Peerless seam under the Carbon Fuels Lease, Broun Sublease and KE Sub-Sublease.

**-XVI-**

Since becoming lessees under the Carbon Fuels Lease, Defendants have not, themselves, produced any coal from the leased premises or any adjacent or contiguous properties. Instead, all coal produced has been so produced by their respective sublessees, sub-sublessees and/or contract miners in exchange for payments made on a per ton basis, all as aforesaid, with Defendants retaining the obligation to remit royalty payments to Plaintiff under the terms of the Carbon Fuels Lease.

**RELEVANT PROVISIONS OF THE CARBON FUELS LEASE**

**-XVII-**

The Second Paragraph of the Carbon Fuels Lease provides, in relevant part:

SECOND: . . . (b) Without limiting the generality of this grant of rights incidental and auxiliary to mining and processing said coal, it is understood that subject to the rights owned by others hereinbefore mentioned, the lease herein of said coal is made together with the right to mine by any lawful method all the coal without liability for depriving the surface or any strata of the leased premises of lateral or subjacent support; the right to haul through, over and under the leased premises

coal produced by Lessee from the leased premises and from any other lands and to store refuse from any coal produced by Lessee in the workings and passageways in the leased premises; . . .

-XVIII-

The Third Paragraph of the Carbon Fuels Lease provides, in relevant part:

THIRD: Owners except and reserve to themselves, their successors and assigns, all estates and rights in and with respect to said property not specifically leased herein. Such reserved estates and rights shall be exercised in such a way as not to interfere unreasonably with the operations, rights and privileges of Lessee herein granted. Before selling or leasing any reserved right or estate, other than timber, or granting any easement thereon, Owners shall consult with Lessee in regard thereto.

-XVIX-

The Eighth Paragraph of the Carbon Fuels Lease provides, in relevant part:

EIGHTH: Lessee agrees to pay Owners as tonnage royalty for each and every ton of 2,000 pounds of coal mined and removed from, or used and converted on, the leased premises, the following:

(a) For each ton of coal mined from the No. 5 Block Seam of coal five percent (5%) of the average selling price per ton or eighty cents (80¢) per ton, whichever is greater.

(b) For each ton of coal mined from any seam or vein of coal other than the No. 5 Block Seam of coal four percent (4%) of the average selling price per ton or eighty cents (80¢) per ton, whichever is greater.

(c) The "average selling price per ton" shall be computed for each quarter on the basis of the total tonnage of coal sold in arms' length sales during such quarter and shall be ascertained as follows: The aggregate dollar amount of the gross sales of coal so made each quarter from each seam shall be computed and divided by the total number of tons of coal so sold from each such seam during such quarter and the result shall be the average selling price per ton for such coal mined from said seam; provided, however, that where coal mined and removed from a seam in the leased premises is commingled with coal from other seams and is sold as commingled or blended coal, the aggregate dollar amount of the gross sales of such commingled or blended product each quarter shall be computed and divided by the total number of tons of such product as was sold during such quarter, and the result shall be the average selling price per ton for such coal mined from such seam in the leased premises. The selling price shall be the gross price charged for coal f.o.b. mine without any deductions for production costs, transportation expenses, sales commissions or other charges whatsoever. If coal is sold by Lessee to any person, firm or corporation in any transaction which is

not at arms' length, the "average selling price per ton" of such coal shall be determined separately and shall be the higher of: (1) the average price per ton received by the Lessee for said coal; or (2) the average selling price per ton received by the Lessee in substantial arms' length sales of coal of similar quality during said quarter or, absent such sales, the price received in arms' length sales made by other commercial operators in the Kanawha and Boone County fields for coal of similar quality sold upon the terms and under the circumstances at which such coal is customarily sold, to be determined by the most accurate and reliable information available.

-XX-

Pursuant to the Eighth Paragraph of the Carbon Fuels Lease as set forth herein, at all times relevant, hereto, and while they have never actively produced coal under the Carbon Fuels Lease, Broun Sublease and/or KE Sub-Sublease, Defendants have calculated and remitted tonnage royalties to Plaintiff for coal mined from the Broun Tract by Kanawha Eagle, LLC, Kanawha Eagle Mining, LLC and Panther Creek Mining, LLC, and sold pursuant to the Carbon Fuels Lease, Broun Sublease and KE Sub-Sublease from at least 2013 to present while, on information and belief, retaining a percentage tonnage royalty for themselves pursuant to the terms of the aforesaid Broun Sublease and/or KE Sub-Sublease.

-XXI-

Pursuant to the language of the Eighth Paragraph of the Carbon Fuels Lease, Defendants are required to compute the tonnage royalty due to Plaintiff on the basis of "average selling price" which is ascertained on the basis of "the gross sales of coal so made each quarter from each seam shall be computed and divided by the total number of tons of coal sold from each such seam during such quarter." Moreover, in computing average selling price, Defendants are not permitted to deduct any "post production

costs, including, but not limited to: transportation expenses, sales commissions or other charges," in the calculation and payment of tonnage royalty due to Plaintiff.

**-XXII-**

Notwithstanding the foregoing, in their calculation and payment of tonnage royalty to Plaintiff, Defendants have consistently undercalculated and underpaid tonnage royalty owed to Plaintiff under the language of the Eighth Paragraph of the Carbon Fuels Lease, by taking improper deductions from the gross sales price received for coal produced from the Broun Tract from the American Eagle and Rachel Mines by its sublessees and contract miners as aforesaid, thereby failing to account for and pay Plaintiff tonnage royalties when due, and causing damage to Plaintiff.

**-XXIII-**

Pursuant to subsection (b) of the Second Paragraph of the Carbon Fuels Lease, the Lessee retains the right to haul through, over and under the leased premises, coal produced by the Lessee from the leased premises and from any other lands.

**-XXIV-**

On information and belief, and despite the language in subsection (b) of the Second Paragraph of the Carbon Fuels Lease, which limits the right to haul coal across the leased premises to coal produced "by the Lessee" the Defendants have nonetheless allowed their sublessees, sub-sublessees and contract miners to haul coal produced on other property across the leased premises in exchange for wheelage royalties paid directly to Defendants, and without the consent of Plaintiff.

**-XXV-**

Despite the fact that the Third Paragraph of the Carbon Fuels Lease reserves all rights not specifically granted, including, but not limited to, the right to grant the right to

wheel foreign coal produced by parties other than the lessee, and to charge for the same, the Defendants have, on information and belief, wrongfully exercised this right with respect to their sublessees, sub-sublessees and/or contract miners, and have failed to account for or to pay any wheelage royalty to plaintiff with respect to more than two million (2,000,000) tons of coal for which they have, on information and belief, wrongfully collected wheelage payments, thereby causing damage to Plaintiff.

**COUNT I — BREACH OF CONTRACT - UNDERPAYMENT OF ROYALTIES**

**-XXVI-**

Plaintiff incorporates by reference paragraphs I through XXV above, inclusive, as if fully stated herein.

**-XXVII-**

Defendants have breached their contractual obligations to Plaintiff, including, but not limited to, under the Eighth Paragraph of the Carbon Fuels Lease, as aforesaid, by failing to fully account for and pay tonnage royalties when due, all as aforesaid, and directly resulting in an underpayment of tonnage royalties, and thereby causing damages to Plaintiff, who will continue to suffer said damages in the future.

**COUNT II — BREACH OF CONTRACT — FAILURE TO PAY WHEELAGE  
ROYALTIES TO PLAINTIFF**

**-XXVIII-**

Plaintiff incorporates by reference paragraphs I through XXVIII above, inclusive, as if fully stated herein.

**-XXIX-**

Defendants have breached their contractual obligations to Plaintiff under the Carbon Fuels Lease, including, but not limited to, the Second and Third paragraphs thereof, with respect to the wheeling of foreign coal across the Broun Tract by their sublessees, sub-sublessees and contract miners, and the collection of wheelage royalty payments for the same, as aforesaid, and failing to account for and pay Plaintiff for the same, which has caused Plaintiff to suffer monetary damages and will continue to cause such damage in the future.

**WHEREFORE**, as a result of the foregoing, plaintiff Broun requests the Court issue an order entering judgment against the Defendants, jointly and severally:

- (1) awarding Plaintiff compensatory damages on Count I in the amount to be determined by the Court;
- (2) awarding Plaintiff compensatory damages on Count II in an amount to be determined by the Court;
- (3) awarding Plaintiff pre-judgment interest at the statutory rate;
- (5) awarding Plaintiff its attorney fees, its costs of action, and such other further and general relief as the Court may deem fair and reasonable; and
- (4) enjoining defendants from engaging in the practices alleged herein to cause ongoing damage to Plaintiff.

**A TRIAL BY JURY IS DEMANDED.**

**BROUN PROPERTIES LLC**  
By Counsel,

/s/ Howard M. Persinger, III  
**HOWARD M. PERSINGER, III**  
*WV State Bar ID# 6943*  
Persinger & Persinger, L.C.  
237 Capitol Street  
Charleston, WV 25301  
304-346-9333 phone  
304-346-9337 fax  
[hmp3@persingerlaw.com](mailto:hmp3@persingerlaw.com)



## West Virginia E-Filing Notice

**EXHIBIT B**

CC-03-2020-C-82

Judge: William S. Thompson

To: Heather Jones  
hheiskell@spilmanlaw.com

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## NOTICE OF FILING

---

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA  
Broun Properties LLC v. Penn Virginia Operating Co., LLC  
CC-03-2020-C-82

The following answer was FILED on 11/5/2020 1:42:33 PM

Notice Date: 11/5/2020 1:42:33 PM

Sue Zickefoose  
CLERK OF THE CIRCUIT  
Boone  
200 State Street, Suite 202  
MADISON, WV 25130

(304) 369-7321  
sue.zickefoose@courtsww.gov

# COVER SHEET

E-FILED | 11/5/2020 1:42 PM  
CC-03-2020-C-82  
Boone County Circuit Clerk  
Sue Zickefoose

## GENERAL INFORMATION

IN THE CIRCUIT COURT OF BOONE COUNTY WEST VIRGINIA

**Broun Properties LLC v. Penn Virginia Operating Co., LLC**

**First Plaintiff:**

☒ Business ☐ Individual  
☐ Government ☐ Other

**First Defendant:**

☒ Business ☐ Individual  
☐ Government ☐ Other

**Judge:**

William S. Thompson

## COMPLAINT INFORMATION

**Case Type:** Civil

**Complaint Type:** Contract

**Origin:**

☒ Initial Filing ☐ Appeal from Municipal Court ☐ Appeal from Magistrate Court

**Jury Trial Requested:**

☐ Yes ☒ No

**Case will be ready for trial by:** \_\_\_\_\_

**Mediation Requested:**

☐ Yes ☒ No

**Substantial Hardship Requested:**

☐ Yes ☒ No

☐ Do you or any of your clients or witnesses in this case require special accommodations due to a disability?

☐ Wheelchair accessible hearing room and other facilities

☐ Interpreter or other auxiliary aid for the hearing impaired

☐ Reader or other auxiliary aid for the visually impaired

☐ Spokesperson or other auxiliary aid for the speech impaired

☐ Other: \_\_\_\_\_

☐ I am proceeding without an attorney

☒ I have an attorney: Heather Jones, 300 Kanawha Blvd E, Charleston, WV 25301

## SERVED PARTIES

**IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA**

**BROUN PROPERTIES LLC,**  
a West Virginia limited liability company,

**Plaintiff,**

**v.**

**CIVIL ACTION NO.: 03-2020-C-82**  
**Honorable William S. Thompson**

**PENN VIRGINIA OPERATING CO., LLC,**  
a Delaware limited liability company, and  
**CARBON INDUSTRIES, INC.,** a West Virginia  
Corporation, successor to Crimson Processing  
Company and Carbon Fuels Company,

**Defendants.**

**DEFENDANT PENN VIRGINIA OPERATING CO., LLC'S ANSWER AND  
AFFIRMATIVE DEFENSES TO COMPLAINT**

Defendant Penn Virginia Operating Co., LLC ("PVOC"), by counsel, hereby responds and asserts affirmative defenses to the Complaint filed by Plaintiff Broun Properties LLC ("Broun"). PVOC answers or otherwise responds to the allegations set forth in the Complaint as follows:

**PARTIES**

1. PVOC admits that Broun is a Delaware limited liability company whose principal address is One Bridge Place, Suite 205, 10 Hale Street, Charleston, West Virginia 25301. PVOC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph I of the Complaint.

2. PVOC admits the allegations of Paragraph II of the Complaint.

3. PVOC admits the allegations of Paragraph III of the Complaint.

**JURISDICTION AND VENUE**

4. PVOC denies the allegations of Paragraph IV of the Complaint.

### **FACTUAL BACKGROUND**

5. PVOC admits that Carbon Fuel Company (“Carbon Fuel”) executed an Agreement of Lease dated March 1, 1976 (“Carbon Fuel Lease”) with certain lessors named therein leasing all of the coal located on a 1,900 acre tract of property located on the waters of Joe’s Creek in Boone County, West Virginia (“Broun Tract”) that is recorded in the Office of the Clerk of the County Commission of Boone County, West Virginia in Lease Book 14, at page 538. PVOC states that the referenced Agreement of Lease speaks for itself and is the best evidence of the terms contained therein. To the extent the allegations contained in Paragraph V of the Complaint are inconsistent with the express terms and legal effect of said Agreement of Lease, such allegations are denied. PVOC does not have sufficient knowledge or information to admit or deny the remaining allegations of Paragraph V.

6. In response to the allegations contained in Paragraph VI of the Complaint, PVOC states that that the Quitclaim Deed referenced therein speaks for itself and is the best evidence of the terms contained therein. To the extent the allegations contained in Paragraph VI are inconsistent with the express terms and legal effect of said Quitclaim Deed, such allegations are denied. PVOC does not have sufficient knowledge or information to admit or deny the remaining allegations of Paragraph VI.

### **HISTORY OF CARBON FUELS LEASE AND SUBLEASES**

7. PVOC admits that Carbon Fuel assigned the Carbon Fuel Lease to Bedcor, Inc. (“Bedcor”) by that certain Assignment and Agreement of Consent dated November 30, 1976, but PVOC denies the remaining allegations of Paragraph VII of the Complaint.

8. PVOC admits that Bedcor assigned the Carbon Fuel Lease back to Carbon Fuel by that certain Assignment, Agreement of Consent and Lease Amendment dated October 29, 1996, but PVOC denies the remaining allegations of Paragraph VIII of the Complaint.

9. PVOC admits that the Broun Agent, under the October 29, 1996 Assignment, Agreement of Consent and Lease Amendment by and between Carbon Fuel, Bedcor, Robert W. Lawson, III, as Agent for the Broun Parties, and One Valley Bank, N.A., as Special Receiver of the Estate of Thomas L. Broun, consented to subleasing a portion of the Carbon Fuel Lease to Crimson Processing Company (“Crimson”); consented to Carbon Industries, Inc. subleasing all or a portion of the leased premises under the Carbon Fuel Lease to other wholly owned subsidiaries; and further consented to subleasing the Carbon Fuel Lease in whole or in part to Kanawha Eagle Limited Liability Company (“Kanawha Eagle”) by Sublease dated January 1, 1995 (the “Crimson Sublease”). PVOC states that the Crimson Sublease and the Assignment, Agreement of Consent and Lease Amendment speak for themselves and are the best evidence of the terms contained therein. To the extent the allegations contained in Paragraph IX of the Complaint are inconsistent with the express terms and legal effect of the Crimson Sublease and the Assignment, Agreement of Consent and Lease Amendment, such allegations are denied. PVOC denies the remaining allegations of Paragraph IX.

10. PVOC admits that Crimson subleased the subleased premises to Kanawha Eagle via the Crimson Sublease. PVOC states that the Crimson Sublease speaks for itself and is the best evidence of the terms contained therein. To the extent the allegations contained in Paragraph X of the Complaint are inconsistent with the express terms and legal effect of said Crimson Sublease, such allegations are denied. PVOC denies the remaining allegations of Paragraph X.

11. PVOC admits that Kanawha Eagle operated the Rachel Mine producing coal from the Peerless seam of coal and the American Eagle Mine producing coal from the No. 2 Gas/Eagle seam of coal located on the Broun Tract pursuant to the Crimson Sublease, but PVOC denies the remaining allegations of Paragraph XI of the Complaint.

12. PVOC admits that Carbon Fuel assigned its interest as lessor under the Carbon Fuel Lease to Penn Virginia Coal Company whose principal place of business was 6909 Duff-Patt Road, Duffield, Virginia 24244 by that certain Confirmation Assignment and Assumption Agreement dated September 21, 1999, and Penn Virginia Coal Company was merged into PVOC during 2002.

13. PVOC admits that Bedcor, Inc. was merged into Carbon Industries, Inc. ("Carbon") during 2002, and Carbon Fuel was merged into Carbon during 2015, but PVOC denies the remaining allegations of Paragraph XIII of the Complaint.

14. PVOC admits that the United States Bankruptcy Court for the Eastern District of Virginia-Richmond Division entered an Order dated October 28, 2015 in Case No. 15-32450 (KLP) approving the sale of certain leases and subleases to Blackhawk Mining, LLC and its affiliated companies, which included Kanawha Eagle Mining, LLC ("KEMLLC"), but PVOC does not have sufficient information or knowledge to admit or deny the remaining allegations in Paragraph XIV of the Complaint.

15. PVOC admits that KEMLLC entered into a Contract Mining Contract with Panther Creek Mining, LLC to conduct mining operations in the No. 2 Gas/Eagle seam of coal in the American Eagle Mine under the Crimson Sublease. PVOC further admits that KEMLLC operated the Rachel Mine, producing coal from the Peerless seam under the Crimson Sublease. PVOC denies the remaining allegations in Paragraph XV of the Complaint.

16. PVOC admits that it has not conducted mining operations under the Carbon Fuel Lease and that PVOC's sublessees have mined coal from the subleased premises pursuant to the Crimson Sublease in exchange for payments made on a per ton basis, while PVOC has made royalty payments under the Carbon Fuel Lease to Broun. PVOC denies all of the remaining allegations in Paragraph XVI of the Complaint.

**RELEVANT PROVISIONS OF THE CARBON FUELS LEASE**

17. In response to the allegations contained in Paragraph XVII of the Complaint, PVOC states that the Carbon Fuels Lease referenced therein speaks for itself and is the best evidence of the terms contained therein. To the extent the allegations contained in Paragraph XVII are inconsistent with the express terms and legal effect of said Carbon Fuels Lease, such allegations are denied.

18. In response to the allegations contained in Paragraph XVIII of the Complaint, PVOC states that the Carbon Fuels Lease referenced therein speaks for itself and is the best evidence of the terms contained therein. To the extent the allegations contained in Paragraph XVIII are inconsistent with the express terms and legal effect of said Carbon Fuels Lease, such allegations are denied.

19. In response to the allegations contained in Paragraph XIX of the Complaint, PVOC states that the Carbon Fuels Lease referenced therein speaks for itself and is the best evidence of the terms contained therein. To the extent the allegations contained in Paragraph XIX are inconsistent with the express terms and legal effect of said Carbon Fuels Lease, such allegations are denied.

20. During the period of time that PVOC has been the lessee pursuant to the Carbon Fuel Lease, it has paid tonnage royalties to Broun for all coal mined and sold from the Broun Tract,

and PVOC has received a tonnage royalty from its sublessees pursuant to the Crimson Sublease. PVOC denies all of the remaining allegations in paragraph XX of the Complaint.

21. In response to the allegations contained in Paragraph XXI of the Complaint, PVOC states that the Carbon Fuels Lease referenced therein speaks for itself and is the best evidence of the terms contained therein. To the extent the allegations contained in Paragraph XXI are inconsistent with the express terms and legal effect of said Carbon Fuels Lease, such allegations are denied.

22. PVOC denies the allegations in Paragraph XXII of the Complaint.

23. In response to the allegations contained in Paragraph XXIII of the Complaint, PVOC states that the Carbon Fuels Lease referenced therein speaks for itself and is the best evidence of the terms contained therein. To the extent the allegations contained in Paragraph XXIII are inconsistent with the express terms and legal effect of said Carbon Fuels Lease, such allegations are denied.

24. PVOC denies the allegations in Paragraph XXIV of the Complaint.

25. In response to the allegations contained in Paragraph XXV of the Complaint, PVOC states that the Carbon Fuels Lease referenced therein speaks for itself and is the best evidence of the terms contained therein. To the extent the allegations contained in Paragraph XXV are inconsistent with the express terms and legal effect of said Carbon Fuels Lease, such allegations are denied. PVOC admits that Broun and its predecessors in interest consented to the Crimson Sublease that contain wheelage terms, but PVOC denies the remaining allegations in Paragraph XXV of the Complaint.

**COUNT I - BREACH OF CONTRACT - UNDERPAYMENT OF ROYALTIES**

26. PVOC incorporates by reference all of its responses to Paragraphs I through XXV above, inclusive, as if fully stated herein.

27. PVOC denies the allegations in Paragraph XXVII of the Complaint.

**COUNT II - BREACH OF CONTRACT - FAILURE TO PAY WHEELAGE ROYALTIES TO PLAINTIFF**

28. PVOC incorporates by reference all of its responses to Paragraphs I through XXVII above, inclusive, as if fully stated herein.

29. PVOC denies the allegations in Paragraph XXIX of the Complaint.

30. PVOC denies all allegations not otherwise previously denied herein.

**AFFIRMATIVE DEFENSES**

Having fully responded to the Complaint, PVOC asserts the following affirmative and other defenses:

1. Broun has failed to state a cause of action upon which relief can be granted.
2. Broun's claims are barred by applicable statutes of limitations.
3. Broun's claims are barred by waiver, laches, and estoppel.
4. PVOC demands an accounting of all payments of tonnage royalties and wheelage that Broun claims should have been paid by PVOC to it.
5. Broun and its predecessors in interest consented to the Crimson Sublease, all subsequent assignments, and their respective terms and conditions.
6. Broun does not have any right to recover attorney's fees under statutory law or any of the documents referenced in the Complaint.
7. PVOC has complied with the terms and conditions of the Carbon Fuel Lease at all times relevant to this Complaint.

8. PVOC acted at all times within its lawful property rights.
9. PVOC denies that Broun is entitled to the relief it requests, and PVOC demands their fees and costs from Broun in responding to this lawsuit.
10. Broun's alleged damages are speculative and unavailable as a matter of law.
11. The alleged injuries and damages, if any, of which Broun complains were not proximately caused by acts or omissions of PVOC.
12. To the extent discovery reveals the same, PVOC asserts the defenses set forth in Rule 8(c) of the West Virginia Rules of Civil Procedure.
13. To the extent discovery and facts warrant, PVOC reserves the defenses of ratification, course of performance, course of dealings, and custom and usage.
14. To the extent discovery and facts warrant, PVOC reserve all affirmative defenses set forth in Rule 12(b) of the West Virginia Rules of Civil Procedure.
15. To the extent discovery and facts warrant, PVOC reserves the defense that Broun has failed to join all indispensable parties necessary to this action.
16. Broun has failed to plead special damages with the required particularity.
17. To the extent discovery and facts warrant, Broun has failed to mitigate its damages, if any.
18. PVOC reserves the right to assert additional defenses as they become apparent during the course of this litigation.

WHEREFORE, PVOC requests that the Complaint be dismissed with prejudice and that PVOC be awarded the costs of defending said action, including reasonable attorney's fees, as well as any other relief this Court deems they may be entitled.

**PENN VIRGINIA OPERATING CO., LLC**

**By: SPILMAN THOMAS & BATTLE, PLLC**

/s/ *Heather Heiskell Jones*

William M. Herlihy, Esq. (WVSB # 1688)

Heather Heiskell Jones, Esq. (WVSB # 4913)

Joseph A. Ford, Esq. (WVSB # 12984)

SPILMAN THOMAS & BATTLE, PLLC

300 Kanawha Blvd., East / P.O. Box 273

Charleston, WV 25321

(304) 340-3800 / (304) 340-3801 (*facsimile*)

[wherlihy@spilmanlaw.com](mailto:wherlihy@spilmanlaw.com)

[hheiskell@spilmanlaw.com](mailto:hheiskell@spilmanlaw.com)

[jford@spilmanlaw.com](mailto:jford@spilmanlaw.com)

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

BROUN PROPERTIES, LLC,  
a West Virginia limited liability company,

Plaintiff,

v.

CIVIL ACTION NO.: 03-2020-C-82  
Honorable William S. Thompson

PENN VIRGINIA OPERATING CO., LLC,  
a Delaware limited liability company, and  
CARBON INDUSTRIES, INC., a West Virginia  
Corporation, successor to Crimson Processing  
Company and Carbon Fuels Company,

Defendants.

**CERTIFICATE OF SERVICE**

I, Heather Heiskell Jones, the undersigned counsel for Defendant Penn Virginia Operating Co., LLC, hereby certify that the foregoing *Defendant Penn Virginia Operating Co., LLC's Answer and Affirmative Defenses to Complaint* has been made upon the following interested party via West Virginia E-Filing system, on this 5<sup>th</sup> day of November, 2020, which will send notification to:

Howard M. Persinger, III, Esq.  
Persinger & Persinger, L.C.  
237 Capitol Street  
Charleston, WV 25301  
*Counsel for Plaintiff*

I, also hereby certify that the foregoing *Defendant Penn Virginia Operating Co., LLC's Answer and Affirmative Defenses to Complaint* has been made upon the following interested party via U.S. Mail, postage prepaid, on this 5<sup>th</sup> day of November, 2020, as follows:

Carbon Industries, Inc.  
503-A Pennsylvania Avenue  
Charleston, WV 25302  
*Defendant*

/s/ Heather Heiskell Jones  
Heather Heiskell Jones, Esq. (WVSB # 4913)



## West Virginia E-Filing Notice

**EXHIBIT C**

CC-03-2020-C-82

Judge: William S. Thompson

To: Heather H. Jones  
hheiskell@spilmanlaw.com

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## NOTICE OF FILING

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IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA  
Broun Properties LLC v. Penn Virginia Operating Co., LLC  
CC-03-2020-C-82

The following answer was FILED on 11/24/2020 3:48:48 PM

Notice Date: 11/24/2020 3:48:48 PM

Sue Zickefoose  
CLERK OF THE CIRCUIT  
Boone  
200 State Street, Suite 202  
MADISON, WV 25130

(304) 369-7321  
sue.zickefoose@courtsww.gov

# COVER SHEET

E-FILED | 11/24/2020 3:48 PM  
CC-03-2020-C-82  
Boone County Circuit Clerk  
Sue Zickefoose

## GENERAL INFORMATION

IN THE CIRCUIT COURT OF BOONE COUNTY WEST VIRGINIA

**Broun Properties LLC v. Penn Virginia Operating Co., LLC**

**First Plaintiff:**

☒ Business ☐ Individual  
☐ Government ☐ Other

**First Defendant:**

☒ Business ☐ Individual  
☐ Government ☐ Other

**Judge:**

William S. Thompson

## COMPLAINT INFORMATION

**Case Type:** Civil

**Complaint Type:** Contract

**Origin:**

☒ Initial Filing ☐ Appeal from Municipal Court ☐ Appeal from Magistrate Court

**Jury Trial Requested:**

☐ Yes ☒ No

**Case will be ready for trial by:** \_\_\_\_\_

**Mediation Requested:**

☐ Yes ☒ No

**Substantial Hardship Requested:**

☐ Yes ☒ No

☐ Do you or any of your clients or witnesses in this case require special accommodations due to a disability?

☐ Wheelchair accessible hearing room and other facilities

☐ Interpreter or other auxiliary aid for the hearing impaired

☐ Reader or other auxiliary aid for the visually impaired

☐ Spokesperson or other auxiliary aid for the speech impaired

☐ Other: \_\_\_\_\_

☐ I am proceeding without an attorney

☒ I have an attorney: Pamela Deem, P.O. Box 2031, Charleston, WV 25327

## SERVED PARTIES

**IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA**

**BROUN PROPERTIES LLC,**  
a West Virginia limited liability company,

Plaintiff,

v.

**Civil Action No. 20-C-82**  
**Honorable William S. Thompson**

**PENN VIRGINIA OPERATING CO., LLC,**  
a Delaware limited liability company, and  
**CARBON INDUSTRIES, INC.,** a West Virginia  
Corporation, successor to Crimson Processing  
Company and Carbon Fuels Company,

Defendants.

**CARBON INDUSTRIES, INC.'S ANSWER AND**  
**AFFIRMATIVE DEFENSES TO COMPLAINT**

Comes now Defendant Carbon Industries, Inc. ("Carbon Industries"), by counsel, and for its answer and affirmative defenses to the Complaint filed by Broun Properties, LLC ("Broun"), states as follows:

**INTRODUCTORY STATEMENT**

Upon information and belief, Carbon Fuel Company was formed in 1905. In June of 1982, U.S. Steel Mining Company, Inc. leased all of Carbon Fuel Company's coal reserves and infrastructure. Further, upon information and belief, after leasing the coal reserves and infrastructure to U.S. Steel Mining Company in June of 1982, Carbon Fuel Company forwarded certain records and documents to U.S. Steel Mining Company, Inc.

Upon further information and belief, on September 21, 1999, Penn Virginia Coal Company purchased or otherwise acquired substantially all of the assets of Carbon Fuel Company, including Carbon Fuel's interest in the 1976 Carbon Fuel Lease at issue in this action. Upon information and belief, Carbon Fuel Company forwarded Penn Virginia Coal Company certain records and documents upon Penn Virginia Coal Company's purchase or acquisition of said assets, including but not necessarily limited to, records relating to the leases at issue.

In 2015 Carbon Fuel Company merged into Carbon Industries, Inc. and it is unknown what happened to any records of Carbon Fuel Company that may be related to the leases in this action. Defendant Carbon Industries is in the process of searching its records to locate any relevant Carbon Fuel documents and is also in the process of attempting to locate any individual with information pertaining to the matters at issue in this action. This Answer is based upon information currently available to Carbon Industries and will be amended if further information is located.

### **PARTIES**

1. Upon information and belief, Carbon Industries admits that Broun is a Delaware limited liability company whose principal address is One Bridge Place, Suite 205, 10 Hale Street, Charleston, West Virginia 25301. Carbon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph I of the Complaint.

2. Upon information and belief, Carbon Industries admits the allegations in Paragraph II of the Complaint.

3. Carbon Industries admits the allegations in Paragraph III of the Complaint.

## **JURISDICTION AND VENUE**

4. The allegations in Paragraph IV of the Complaint constitute legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

5. Carbon Industries admits that Carbon Fuel executed a lease dated March 1, 1976 ("Carbon Fuel Lease") with certain lessors named therein and that such Lease is recorded in the Office of the Clerk of the County Commission of Boone County in Coal Lease Book 14 at page 538. Further answering, Carbon Industries states that the Carbon Fuel Lease speaks for itself. To the extent the allegations in Paragraph V are inconsistent with the terms of the Lease, they are denied.

6. Carbon Industries is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph VI of the Complaint. *See* Introductory Statement. Further answering, the Quitclaim Deed in Paragraph VI speaks for itself.

## **HISTORY OF CARBON FUELS LEASE AND SUBLEASES**

7. Carbon Industries is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph VII of the Complaint. *See* Introductory Statement.

8. Carbon Industries is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph VIII of the Complaint. *See* Introductory Statement.

9. Carbon Industries is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph IX of the Complaint. *See* Introductory Statement.

10. Carbon Industries is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph X of the Complaint. *See* Introductory Statement.

11. Carbon Industries is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph XI of the Complaint. *See* Introductory Statement.

12. Upon information and belief, Carbon Industries admits that Carbon Fuel assigned its interest under the Carbon Fuel Lease to Penn Virginia Coal Company in 1999. Carbon Industries is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph XII of the Complaint. *See* Introductory Statement.

13. Carbon Industries admits that Bedcor, Inc was merged into Carbon Industries, Inc. in 2002 and Carbon Fuel was merged into Carbon Industries in 2015. Carbon Industries denies the remaining allegations of Paragraph XIII.

14. Carbon Industries is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph XIV of the Complaint. *See* Introductory Statement.

15. Carbon Industries is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph XV of the Complaint. *See* Introductory Statement.

16. Carbon Industries denies the allegations in Paragraph XVI of the Complaint. *See* Introductory Statement.

#### **RELEVANT PROVISIONS OF THE CARBON FUELS LEASE**

17. In response to the allegations in Paragraph XVII of the Complaint, Carbon Industries states that the Carbon Fuel Lease referenced therein speaks for itself. To the extent the allegations in Paragraph XVII are inconsistent with the terms of the Lease, they are denied.

18. In response to the allegations in Paragraph XVIII of the Complaint, Carbon Industries states that the Carbon Fuel Lease referenced therein speaks for itself. To the extent the allegations in Paragraph XVIII are inconsistent with the terms of the Lease, they are denied.

19. In response to the allegations in Paragraph XXIX of the Complaint, Carbon Industries states that the Carbon Fuel Lease referenced therein speaks for itself. To the extent the allegations in Paragraph XXIX are inconsistent with the terms of the Lease, they are denied.

20. Carbon Industries denies the allegations in Paragraph XX of the Complaint.

21. Carbon Industries denies the allegations in Paragraph XXI of the Complaint.

22. Carbon Industries denies the allegations in Paragraph XXII of the Complaint.

23. In response to the allegations in Paragraph XXIII of the Complaint, Carbon Industries states that the Carbon Fuel Lease speaks for itself. To the extent the allegations in Paragraph XXIII are inconsistent with the terms of the Lease, they are denied.

24. Carbon Industries denies the allegations in Paragraph XXIV of the Complaint.

25. In response to the allegations in Paragraph XXV of the Complaint, Carbon Industries states that the Carbon Fuel Lease speaks for itself. To the extent the allegations in Paragraph XXV are inconsistent with the terms of the Lease, they are denied. Further answering, the remaining allegations of Paragraph XXV are denied.

#### **COUNT I – BREACH OF CONTRACT – UNDERPAYMENT OF ROYALTIES**

26. Carbon Industries restates its answers to Paragraphs I through XXV above, as if fully stated herein.

27. Carbon Industries denies the allegations in Paragraph XXVII of the Complaint.

**COUNT II – BREACH OF CONTRACT – FAILURE TO PAY WHEELAGE  
ROYALTIES TO PLAINTIFF**

28. Carbon Industries restates its answers to Paragraphs I through XXVII above, as if fully stated herein.

29. Carbon Industries denies the allegations in Paragraph XXIX of the Complaint.

30. Carbon Industries denies each and every allegation in the Complaint not specifically admitted herein.

Having fully answered the Complaint, Carbon Industries asserts the following affirmative defenses:

**AFFIRMATIVE DEFENSES**

1. The Complaint fails to state any claim against Carbon Industries upon which relief can be granted.

2. Broun's claims are barred by the applicable statute of limitations.

3. Broun is not entitled to recovery of attorney's fees.

4. Carbon Industries is not responsible for any alleged damages claimed by Broun.

5. Carbon Fuel Company sold substantially all of its assets and assigned all rights under the Carbon Fuel Lease to Penn Virginia Coal Company in 1999.

6. Carbon Industries has complied with its obligations, if any, that it may have had under the Carbon Fuel Lease.

7. Any alleged damages of which Broun complains were not proximately caused by acts or omissions of Carbon Industries.

8. Carbon Industries reserves the affirmative defenses of laches, estoppel, and any and all other matters constituting affirmative defenses under Rule 8(c) of the West Virginia Rules of Civil Procedure as may be shown during the course of discovery to be available.

9. Carbon Industries reserves all affirmative defenses set forth in Rule 12(b) of the West Virginia Rules of Civil Procedure as may be shown during the course of discovery to be available.

10. Carbon Industries reserves the right to amend its answer to assert any and all additional affirmative defenses as may be shown during the course of discovery to be available.

WHEREFORE, Defendant Carbon Industries, Inc. requests that the Complaint be dismissed with prejudice and that the Defendant be awarded its fees and costs incurred in defending such Complaint, and for such other and further relief as the Court deems appropriate.

CARBON INDUSTRIES, INC.

By Counsel

/s/ Brandy D. Bell

Brandy D. Bell (WVSB No. 9633)

Kay Casto & Chaney, PLLC

150 Clay Street, Suite 100

Morgantown, WV 26501

(304)225-0970

[bbell@kaycasto.com](mailto:bbell@kaycasto.com)

And

/s/ Pamela C. Deem

Pamela C. Deem (WVSB No. 976)

Kay Casto & Chaney, PLLC

P.O. Box 2031

Charleston, WV 25327

(304)345-8900

[pdeem@kaycasto.com](mailto:pdeem@kaycasto.com)

**IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA**

**BROUN PROPERTIES LLC,**  
a West Virginia limited liability company,

Plaintiff,

v.

**Civil Action No. 20-C-82**  
**Judge Thompson**

**PENN VIRGINIA OPERATING CO., LLC,**  
a Delaware limited liability company, and  
**CARBON INDUSTRIES, INC.,** a West Virginia  
Corporation, successor to Crimson Processing  
Company and Carbon Fuels Company,

Defendants.

**CERTIFICATE OF SERVICE**

The undersigned, counsel for Defendant Carbon Industries, Inc., does hereby certify that on this 24<sup>th</sup> day of November, 2020, the foregoing ***“Carbon Industries, Inc’s Answer and Affirmative Defenses to Complaint”*** has been made upon the following counsel of record via the West Virginia E-Filing System which will send notification to:

Howard M. Persinger, III, Esq.  
PERSINGER & PERSINGER, L.C.  
237 Capitol Street  
Charleston, WV 25301  
***Counsel for Plaintiff***

William M. Herlihy, Esq.  
Heather Heiskell Jones, Esq.  
Joseph A. Ford, Esq.  
SPILMAN THOMAS & BATTLE, PLLC  
300 Kanawha Blvd., East/P.O. Box 273  
Charleston, WV 25321  
***Counsel for Defendant Penn Virginia Operating Co., LLC***

/s/ Pamela C. Deem  
Pamela C. Deem (WVSB#976)

Court:  
Judge:  
Case Type:  
Style:

Circuit  
William S. Thompson  
Civil  
Broun Properties LLC v. Penn Virginia Operating Co., LLC

County:  
Created Date:  
Case Sub-Type:

03 - Boone  
9/30/2020  
Contract  
Case Number:  
Status:  
Security Level:

CC-03-2020-C-82

Open

Public

EXHIBIT D

Document ID	Document Type	Document Origin	Document Description	Filing Date
1-1	Civil Case Information Statement	E-file	Complaint	9/30/2020
1-2	Complaint	E-file	Complaint	9/30/2020
1-3	Supporting Document	E-file	Complaint COS for First Set of Interrogatories and Requests for Production of Documents to Defendant Carbon Industries, Inc.	9/30/2020
1-4	Supporting Document	E-file	Complaint COS for First Set of Interrogatories and Requests for Production of Documents to Defendant Penn Virginia Operating Co., LLC	9/30/2020
1-5	Transmittal	E-file	Complaint	9/30/2020
9-1	Supporting Document	E-file	Supporting Documents - SUMMONS REC'D FROM HOWARD M. PERSINGER, III FOR SERVICE ON DEFS	10/1/2020
9-2	Transmittal	E-file	Supporting Documents - SUMMONS REC'D FROM HOWARD M. PERSINGER, III FOR SERVICE ON DEFS	10/1/2020
10-1	Service Return	E-file	Service Return - SERVICE RTN OF SUMMONS, COMPLAINT, 1ST INTERROGATORIES & 1ST REQUEST FOR PROD SVD ON CARBON INDUSTRIES, INC BY WVSOS ON 10/6/2020	10/13/2020
10-2	Service Return	E-file	Service Return - SERVICE RTN OF SUMMONS, COMPLAINT, 1ST INTERROGATORIES & 1ST REQUEST FOR PROD SVD ON CARBON INDUSTRIES, INC BY WVSOS ON 10/6/2020	10/13/2020
10-3	Transmittal	E-file	Service Return - SERVICE RTN OF SUMMONS, COMPLAINT, 1ST INTERROGATORIES & 1ST REQUEST FOR PROD SVD ON CARBON INDUSTRIES, INC BY WVSOS ON 10/6/2020	10/13/2020
11-1	Civil Case Information Statement	E-file	Answer - Complaint Denied	11/5/2020
11-2	Answer	E-file	Answer - Complaint Denied	11/5/2020
11-3	Transmittal	E-file	Answer - Complaint Denied	11/5/2020
13-1	Supporting Document	E-file	Supporting Documents - Stipulation	11/5/2020
13-2	Transmittal	E-file	Supporting Documents - Stipulation	11/5/2020
17-1	Certificate of Service	E-file	Certificate of Service - Certificate of Service for Defendant Penn Virginia Operating Co., LLC's Answers and Responses to Plaintiff Broun Properties LLC's First Set of Interrogatories and Requests for Production of Documents to Defendant Penn Virginia Operating Co., LLC	11/20/2020

Document ID	Document Type	Document Origin	Document Description	Document Disposition	Filing Date
17-2	Transmittal	E-file	Certificate of Service - Certificate of Service for Defendant Penn Virginia Operating Co., LLC's Answers and Responses to Plaintiff Broun Properties LLC's First Set of Interrogatories and Requests for Production of Documents to Defendant Penn Virginia Operating Co., LLC		11/20/2020
19-1	Certificate of Service	E-file	Certificate of Service - Certificate of Service for Defendant Carbon Industries, Inc.'s Responses to Plaintiff Broun Properties, LLC's First Set of Interrogatories and Requests for Production of Documents	Certificate of Service for Defendant Carbon Industries, Inc.'s Responses to Plaintiff Broun Properties, LLC's First Set of Interrogatories and Requests for Production of Documents	11/24/2020
19-2	Transmittal	E-file	Certificate of Service - Certificate of Service for Defendant Carbon Industries, Inc.'s Responses to Plaintiff Broun Properties, LLC's First Set of Interrogatories and Requests for Production of Documents		11/24/2020
21-1	Civil Case Information Statement	E-file	Answer - Complaint Denied		11/24/2020
21-2	Answer	E-file	Answer - Complaint Denied	Carbon Industries, Inc.' Answer and Affirmative Defenses to Complaint	11/24/2020
21-3	Transmittal	E-file	Answer - Complaint Denied		11/24/2020

A COPY ATTEST

*See Ann Zickel*

CIRCUIT COURT

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BROUN PROPERTIES, LLC,**  
a West Virginia limited liability company,

Plaintiff,

v.

**Boone County Circuit Court**  
**Civil Action No. 20-C-82**  
**Honorable William S. Thompson**

**PENN VIRGINIA OPERATING CO., LLC,**  
a Delaware limited liability company, and  
**CARBON INDUSTRIES, INC.,** a West Virginia  
Corporation, successor to Crimson Processing  
Company and Carbon Fuels Company,

Defendants.

**TO: The Honorable Chief Justice Tim Armstead**

**CERTIFICATE OF SERVICE**

I, Joseph A. Ford, the undersigned counsel for Defendant Penn Virginia Operating Co., LLC, hereby certify that the foregoing ***Defendant Penn Virginia Operating Co., LLC's Motion to Refer Case to the Business Court Division*** has been made upon the following interested parties via U.S. Mail, postage prepaid, on this 10<sup>th</sup> day of December, 2020, addressed as follows:

Howard M. Persinger, III, Esq.  
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Honorable William S. Thompson  
Boone County Circuit Court  
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Sue Ann Zickefoose, Clerk  
Boone County Circuit Court  
200 State Street  
Madison, WV 25130

WV Business Court Division  
Berkeley County Judicial Center  
Business Court Division - Suite 2100  
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Joseph A. Ford (WV Bar # 12984)