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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BROUN PROPERTIES LLC,
a West Virginia limited liability company,

Plaintiff,

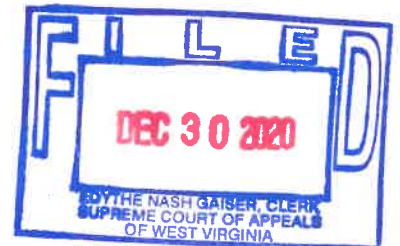
v.

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.

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**Boone County Circuit Court
CIVIL ACTION NO.: 20-C-82
Honorable William S. Thompson**



TO: The Honorable Chief Justice Tim Armstead

**PLANTIFF BROUN PROPERTIES LLC'S MEMORANDUM IN OPPOSITION
TO DEFENDANT PENN VIRGINIA OPERATING CO., LLC'S
MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**

Now comes plaintiff, Broun Properties LLC ("Broun"), by undersigned counsel, Howard M. Persinger, III, and Persinger & Persinger, L.C., and in response to the above Motion, avers as follows:

1. This case involves a straightforward dispute over calculation and payment of royalties for coal which has been extracted from a 1,900 acre tract of property situated on the waters of Joe's Creek in Sherman District, Boone County, West Virginia, and which is owned by the Plaintiff, Broun Properties LLC ("Broun").

2. This extraction occurs pursuant to a coal lease dated March 1, 1976 to which Broun is lessor ("Carbon Fuels Lease"). Over several years and through a series

of assignments, Defendant Penn Virginia Operating Co., LLC ("PVOC") became the assignee lessor under the aforesaid lease.¹

3. The computation and payment of tonnage royalties due to Broun on coal produced and sold from the property is governed by the EIGHTH Paragraph of the Carbon Fuels Lease, which provides that Broun is to be paid royalty of four percent (4%) of the "Average Selling Price" realized from the sale of the coal. "Average Selling Price" is defined in the lease as

The aggregate dollar amount of the gross sales of coal so made each quarter from each seam . . . computed and divided by the total number of tons of coal so sold from each such seam during such quarter . . . 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.

4. Similarly, the rights of lessee with respect to the "wheelage" or transportation of coal mined from neighboring tracts across the Broun Property is governed by languages in the SECOND and THIRD Paragraphs of the Carbon Fuels Lease.

5. On September 30, 2020, plaintiff filed the present action in the Circuit Court of Boone County, West Virginia, alleging two (2) claims for Breach of Contract by (1) undercalculation and payment of tonnage royalties owed to plaintiff by defendants and

¹ Defendant Carbon remains responsible for its obligations thereunder as successor assignor.

(2) failure to account for and pay wheelage royalties to plaintiff. Although the lease history described in the Complaint contains references to several assignments, consents to assignments, subleases and contract mining agreements, the undeniable fact is that the core contractual obligations on which the claims are contained in the Carbon Fuels lease and specifically, three (3) paragraphs thereof, the SECOND, THIRD and EIGHTH, all of which are quoted verbatim in the twelve (12) page Complaint.

6. Accordingly, this case involves very straightforward issues involving routine application of principle contract interpretation and general principles of law which can neither be fairly characterized as "complex" or presenting "commercial" and/or "technology" issues in which "specialized treatment" is needed.

7. Moreover, to the extent that "specialized knowledge" of the coal industry practices would arguably be beneficial to a "fair and reasonable resolution of the disputes" involved in this case, plaintiff respectfully notes that, given the singular presence of the coal industry in Boone County, West Virginia, the Circuit Court of Boone County routinely handles similar matters and the plethora of such cases that are handled by said Court is widely known to possess such specialized knowledge. *See e.g. Hanover Resources, LLC v. LML Properties, LLC*, 242 W.Va. 9, 828 S.E.2d 829 (W.Va. 2019).

8. Finally, it must also be noted that discovery is already progressing in this matter,² and given the procedural difficulties already occasioned by the pandemic, there is simply no reason to compound these difficulties by granting the requested transfer.³

² A status conference and hearing on a Motion to Compel has been set for January 21, 2021.

³ It should also be noted that, despite its clear right to do so, co-defendant Carbon Industries, Inc. has not joined in Defendant PVOC's Motion to Transfer.

9. Accordingly, this Motion should be denied.

WHEREFORE, Plaintiff respectfully requests that the defendant PVOC's Motion to Transfer this Action to the Business Court Division be Denied.

BROUN PROPERTIES LLC
By Counsel,



HOWARD M. PERSINGER, III

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CERTIFICATE OF SERVICE

I, Howard M. Persinger, III, hereby certify that on the 30th day of December, 2020, the foregoing, "**PLANTIFF BROUN PROPERTIES LLC'S MEMORANDUM IN OPPOSITION TO DEFENDANT PENN VIRGINIA OPERATING CO., LLC'S MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION**" was electronically filed with the Clerk of the Court using the West Virginia e-filing system which will send notification of such filing and also by depositing a true copy thereof in the United States mail, first class, postage prepaid addressed as follows:

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A handwritten signature in blue ink, appearing to read 'H. Persinger', is positioned above a horizontal line.

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