

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE GORMAN COMPANY, LLC,
a Kentucky limited liability company,

Plaintiff,

v.

Civil Action No.: 21-C-11
(Circuit Court of Mingo County, West Virginia)

OK GENTRY, LLC, an Ohio limited
liability company; COAL-MAC, LLC,
a Kentucky limited liability company.

**DO NOT REMOVE
FROM FILE**

Defendants.

TO: THE HONORABLE CHIEF JUSTICE EVAN H. JENKINS

JOINT MOTION TO REFER CASE TO BUSINESS COURT DIVISION

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, Plaintiff, The Gorman Company, LLC (“TGC”) by counsel, and Defendants, OK Gentry, LLC (“OK Gentry”), and Coal-Mac, LLC (“Coal-Mac”), (collectively the “Parties”), by counsel, respectfully request that the above-styled civil action be referred to the Business Court Division. In support of this Joint Motion, the Parties state as follows:

NATURE OF CASE

1. On February 11, 2021, TGC filed a complaint (the “Complaint”) in the Circuit Court of Mingo County, West Virginia, requesting an accounting and asserting a breach of contract claim against OK Gentry and Coal-Mac. The Complaint arises from the Defendants’ alleged failure to account for and pay certain royalties due and owing under that certain Overriding Royalty Agreement dated August 1, 2016, as amended by Amendment to Overriding Royalty Agreement, dated April 19, 2018 (collectively, the “Royalty Agreement”).

2. On April 9, 2021, the Defendants filed an answer to the Complaint. The Defendants dispute whether Coal-Mac and OK Gentry are bound by the Royalty Agreement and generally dispute that any business agreement or relationship exists between themselves and the Plaintiff.

3. The Parties' filings illustrate the need for referral to the Business Court Division. The above-styled civil action requires specialized treatment due to inherent specialized issues associated with interpreting royalty agreements and the accounting requested to calculate the royalty owed under Royalty Agreement. Because the principal claims in this matter fall within the jurisdiction of the Business Court Division, referral is proper.

LEGAL STANDARD

4. West Virginia Code § 51-2-15 and Rule 29 of the West Virginia Trial Court Rules ("TCR") provide that civil actions which constitute "Business Litigation" are eligible for transfer to the West Virginia Business Court Division.

5. "Business Litigation" is defined by TCR 29 as a civil action 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].

TCR 29.04(a).

6. Under TCR 29, any party or judge may seek a referral of "Business Litigation" to the Business Court Division by filing a Motion to Refer with the Clerk of this Court,

after the time to answer the complaint has expired. *See* TCR 29.06(a)(1). “A copy of the complaint, answer, docket sheet and any other documents that support referral under Trial Court Rule 29.04(a) shall be attached to the motion.” *Id.*

7. As required by TCR 29.06(a), a true and accurate copy of TGC’s Complaint is attached hereto as **Exhibit A**. Second, a true and accurate copy of the Defendants’ Answer attached hereto as **Exhibit B**. Finally, a true and accurate copy of the docket sheet is attached hereto as **Exhibit C**.

ANALYSIS

8. Civil actions that satisfy the definition of “business litigation” may be properly transferred to the Business Court Division. As defined by TCR 29.06, “business litigation” encompasses cases where the principal claims involve matters of significance to the transactions, operations, or governance between business entities.

9. Here, the Parties agree that this civil action involves a dispute between business entities and requires specialized knowledge to interpret the Royalty Agreement. Moreover, it will be necessary to value the coal mined on the mining properties, which may require analysis of divergent appraisal methods. The relief sought quite clearly involves matters of significance to the interpretation of a commercial agreement between business entities and the valuation of coal mined under the Royalty Agreement, thus, is properly defined as “business litigation.”

10. “Business litigation” is further defined as a dispute that “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.” *See* TCR 29.04(a)(2). The issues likely to arise in the present litigation are complex in nature and require specialized knowledge and expertise in order to reach a fair and reasonable resolution. The Royalty Agreement requires a firm understanding of contractual and real estate issues, potential financial valuations and possibly an analysis of divergent appraisal methods. Because disposition of this matter requires specialized knowledge and familiarity, this case is properly defined as “business litigation.”

11. Further, the principal claims in this case do not involve any of the categories of claims excluded from the definition of Business Litigation listed in TCR 29.04(a)(3) – e.g., consumer litigation.

12. Therefore, in light of the commercial nature of this dispute and the need for specialized treatment due to the complex legal issues, the principal claims in this case fall within the jurisdiction of the Business Court Division.

13. As required by TCR 29.06(a)(1), Petitioner states that it is unaware of any pending or future actions related to the parties’ controversy.

WHEREFORE, Plaintiff, The Gorman Company LLC, and Defendants, OK Gentry, LLC, and Coal-Mac, LLC, pursuant to West Virginia Trial Court Rule 29.06 respectfully move the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

THE GORMAN COMPANY, LLC

By counsel,


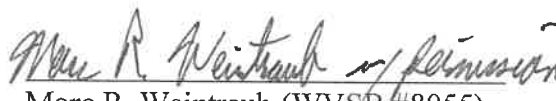


J. Mark Adkins (WVSB #7414)
Zachary J. Rosencrance (WVSB #13040)
BOWLES RICE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325
Telephone: (304) 347-1768
Facsimile: (304) 347-1746
madkins@bowlesrice.com
zrosencrance@bowlesrice.com

-and-

OK GENTRY, LLC AND
COAL-MAC, LLC

By counsel,



Marc R. Weintraub (WVSB #8055)
BAILEY & GLASSER LLP
209 Capitol Street
Charleston, West Virginia 25301
Telephone: (304) 345-6555
Facsimile: (304) 342-1110
mweintraub@baileyglasser.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE GORMAN COMPANY, LLC,
a Kentucky limited liability company,

Plaintiff,

v.

Civil Action No.: 21-C-11
(Circuit Court of Mingo County, West Virginia)

OK GENTRY, LLC, an Ohio limited
liability company; COAL-MAC, LLC,
a Kentucky limited liability company.

Defendants.

CERTIFICATE OF SERVICE

I, J. Mark Adkins, do hereby certify that I have caused a copy of the hereto attached

“Joint Motion to Refer Case to the Business Court Division” to be served upon:

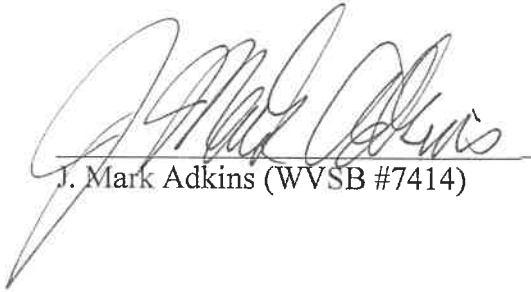
Marc R. Weintraub
BAILEY & GLASSER LLP
209 Capitol Street
Charleston, West Virginia 25301

Lonnie Hannah, Clerk
Circuit Court of Mingo County
Mingo County Courthouse
78 East Second Avenue, Room 232
Williamson, West Virginia 25661

Miki J. Thompson, Judge
Circuit Court of Mingo County
Mingo County Courthouse
78 East Second Avenue, Room 228
Williamson, West Virginia 25661

Lorri Stotler, Administrative Assistant
Business Court Division Central Office
Berkeley County Judicial Center
380 West South Street, Suite 2100
Martinsburg, West Virginia 25401

by placing the same in the regular United States Mail, postage prepaid, on this 14th day of May
2021.



J. Mark Adkins (WVSB #7414)

CIVIL CASE INFORMATION STATEMENT
(Civil Cases Other than Domestic Relations)

I. CASE STYLE:

Plaintiff(s)

The Gorman Company, LLC

Case No. 21-C-11

Judge: Miki Thompson

vs.

Defendant(s)

OK Gentry LLC. c/o Michael Cavanaugh

Name

200 Park Ave., Suite 400

Street Address

Orange Village, Ohio 44122

City, State, Zip Code

**Days to
Answer**

30

Type of Service

Secretary of State

ADMITTED TO RECORD
FEB 11 PM 4:01
CLERK OF COURT

II. TYPE OF CASE:

- | | |
|--|---|
| <input checked="" type="checkbox"/> General Civil | <input type="checkbox"/> Adoption |
| <input type="checkbox"/> Mass Litigation [As defined in T.C.R. 26.04(a)] | <input type="checkbox"/> Administrative Agency Appeal |
| <input type="checkbox"/> Asbestos | <input type="checkbox"/> Civil Appeal from Magistrate Court |
| <input type="checkbox"/> FELA Asbestos | <input type="checkbox"/> Miscellaneous Civil Petition |
| <input type="checkbox"/> Other: _____ | <input type="checkbox"/> Mental Hygiene |
| <input type="checkbox"/> Habeas Corpus/Other Extraordinary Writ | <input type="checkbox"/> Guardianship |
| <input type="checkbox"/> Other: _____ | <input type="checkbox"/> Medical Malpractice |

III. JURY DEMAND: ☐ Yes ☒ No CASE WILL BE READY FOR TRIAL BY (Month/Year): 07 / 2022

**IV. DO YOU OR ANY
OF YOUR CLIENTS
OR WITNESSES
IN THIS CASE
REQUIRE SPECIAL
ACCOMMODATIONS?**

☐ Yes ☒ No

IF YES, PLEASE SPECIFY:

- ☐ Wheelchair accessible hearing room and other facilities
☐ Reader or other auxiliary aid for the visually impaired
☐ Interpreter or other auxiliary aid for the deaf and hard of hearing
☐ Spokesperson or other auxiliary aid for the speech impaired
☐ Foreign language interpreter-specify language: _____
☐ Other: _____

Attorney Name: J. Mark Adkins (WVSB #7414)

Firm: Bowles Rice LLP

Address: 600 Quarrier Street, Charleston, West Virginia 25301

Telephone: (304) 347-1768

Representing:

- ☒ Plaintiff ☐ Defendant
☐ Cross-Defendant ☐ Cross-Complainant
☐ 3rd-Party Plaintiff ☐ 3rd-Party Defendant

☐ Proceeding Without an Attorney

Original and 3 copies of complaint enclosed/attached.

Dated: 02 / 10 / 2021

Signature: [Signature]

SCA-C-100: Civil Case Information Statement (Other than Domestic Relations)

Revision Date: 12/2015

**EXHIBIT
A**

Plaintiff: The Gorman Company, LLC, et al **Case Number:** _____
vs.
Defendant: OK Gentry LLC. c/o Michael Cavanaugh, et al

**CIVIL CASE INFORMATION STATEMENT
DEFENDANT(S) CONTINUATION PAGE**

Coal-Mac, LLC, c/o Ryan Schwartz

Defendant's Name

3228 Summit Square Place, Suite 180

Street Address

Lexington, Kentucky 40509

City, State, Zip Code

Days to Answer: 30

Type of Service: Secretary of State

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

THE GORMAN COMPANY, LLC,
a Kentucky limited liability company,

Plaintiff,

v.

Civil Action No.: 21-C-11
Judge Thompson

OK GENTRY, LLC, an Ohio limited
liability company; COAL-MAC, LLC,
a Kentucky limited liability company

Defendants.

To the above-named Defendant: **COAL-MAC, LLC**
c/o Ryan Schwartz
3228 Summit Square Place, Suite 180
Lexington, Kentucky 40509

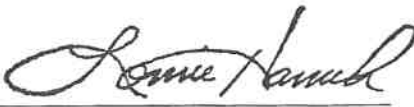
SUMMONS

IN THE NAME OF THE STATE OF WEST VIRGINIA:

You are hereby summoned and required to serve upon J. Mark Adkins, Plaintiff's attorney, whose address is 600 Quarrier Street, Post Office Box 1386, Charleston, West Virginia 25325-1386, an Answer, including any related Counterclaim you may have, to the Complaint filed against you in the above-styled civil action, a true copy of which is herewith delivered to you. You are required to serve your answer to the Complaint within thirty (30) days after service of this Summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint and you will be thereafter barred for asserting in another action any claim you may have which must be asserted by counterclaim in the above-styled civil action.

Dated: 2.11.21

Clerk


Cheryl Goodlin

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

THE GORMAN COMPANY, LLC,
a Kentucky limited liability company,

Plaintiff,

v.

Civil Action No.: 21-C11
Judge Thompson

OK GENTRY, LLC, an Ohio limited
liability company; COAL-MAC, LLC,
a Kentucky limited liability company

Defendants.

To the above-named Defendant: **OK Gentry LLC**
c/o Michael Cavanaugh
200 Park Avenue, Suite 400
Orange Village, Ohio 44122

SUMMONS

IN THE NAME OF THE STATE OF WEST VIRGINIA:

You are hereby summoned and required to serve upon J. Mark Adkins, Plaintiff's attorney, whose address is 600 Quarrier Street, Post Office Box 1386, Charleston, West Virginia 25325-1386, an Answer, including any related Counterclaim you may have, to the Complaint filed against you in the above-styled civil action, a true copy of which is herewith delivered to you. You are required to serve your answer to the Complaint within thirty (30) days after service of this Summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint and you will be thereafter barred for asserting in another action any claim you may have which must be asserted by counterclaim in the above-styled civil action.

Dated: 2.11.21


Clerk

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

THE GORMAN COMPANY, LLC,
a Kentucky limited liability company,

Plaintiff,

v.

Civil Action No.: 21-C-

OK GENTRY, LLC, an Ohio limited
liability company; COAL-MAC LLC,
a Kentucky limited liability company.

Defendants.

COMPLAINT

Plaintiff, The Gorman Company, LLC ("Gorman" or "Plaintiff"), by counsel, and
for its Complaint unto this Honorable Court states as follows:

Nature of Action

1. This is an action for an accounting and breach of contract against OK Gentry, LLC ("OK Gentry"), and Coal-Mac LLC ("Coal-Mac", collectively the "Defendants") that arises from the Defendants' failure to account for and pay certain royalties due and owing under a royalty agreement.

The Parties

2. Plaintiff, The Gorman Company, LLC, is a Kentucky limited liability company with its principal place of business at 48 South Ky Highway 15, P.O. Box 89, Hazard, Kentucky 41702-0089.

3. Defendant, OK Gentry, LLC, is an Ohio limited liability company that was formed on May 14, 2020. Defendant, OK Gentry, LLC, does not appear to be registered to do business in the State of West Virginia. Defendant, OK Gentry, LLC, does not disclose a principal

ADMITTED TO RECORD
FEB 11 PM 14:00
CLERK

place of business in the State of West Virginia or in the State of Ohio. According to the Ohio Secretary of State, the registered agent for Defendant, OK Gentry, LLC, is Michael Cavanaugh, 200 Park Ave., Suite 400, Orange Village, OH 44122.

4. Defendant, Coal-Mac LLC, is a Kentucky limited liability company with its principal place of business at 3228 Summit Square Place, Suite 180, Lexington, Kentucky 40509.

Jurisdiction and Venue

5. This Court possesses subject matter jurisdiction, personal jurisdiction and venue over the parties because all of the events at issue arose from a contract relating to mineral property in Mingo County, West Virginia, in which Defendants are active participants in the mining of this property.

6. The real property and mineral rights which are the subject of this action are situated in Mingo County, West Virginia.

Operative Facts

7. Gorman is engaged in the coal business.

8. Southeastern Land, LLC ("Southeastern"), acquired certain coal mining properties known as the Miller Creek and Fola Properties in Mingo, Logan, Clay, Braxton, Fayette, and Nicholas Counties, West Virginia (the "Mining Properties").

9. Gorman and Southeastern entered into an Overriding Royalty Agreement, dated August 1, 2016, as amended by Amendment to Overriding Royalty Agreement, dated April 19, 2018, whereby Southeastern agreed to pay Gorman a percentage of each dollar received for each ton of coal mined from the "Mining Properties" (as defined therein) and sold by Southeastern. A true and correct copy of the Royalty Agreement, as amended is attached hereto as Exhibit A (the "Royalty Agreement").

10. Gorman and Southeastern executed a Memorandum of Overriding Royalty Agreement (the "Memorandum of Royalty Agreement"), dated August 1, 2016, and recorded the Memorandum of Royalty Agreement in Mingo, Logan, Clay, Braxton, Fayette, and Nicholas Counties, West Virginia.

11. The Memorandum of Royalty Agreement was placed of record in the Mingo County Clerk's Office on August 2, 2016, and appears of record in the Mingo County Clerk's Office at Bonds, Contracts, and Leases Book 108 at page 276.

12. Gorman and Southeastern executed an Amended and Restated Memorandum of Overriding Royalty Interest, dated April 19, 2018 (the "Amended and Restated Memorandum"),

13. The Amended and Restated Memorandum was placed of record in the Mingo County Clerk's Office on April 20, 2018, and appears in the Mingo County Clerk's office at Bonds, Contracts, and Leases Book 109 at page 383.

14. The recorded Memorandum of Royalty Agreement and the Amended and Restated Memorandum provide notice of the Royalty Agreement and Gorman's rights therein and thereunder.

15. The term of the Royalty Agreement commenced on August 1, 2016, and "shall continue until all coal related or other products have been recovered and mined from the Mining Properties by Southeastern or its successors or assigns." Ex. A, at § 3.

16. The obligation to pay the royalty due and owing under the Royalty Agreement "attaches to and runs with the Mining Properties so that any successor, transferee or assignee of the Mining Properties shall remain liable to pay the Royalty Payments to Gorman or its successors or assigns." *Id.*

17. The Royalty Agreement requires royalty payments to Gorman “monthly, on or before the 25th day of each calendar month for all of the coal sold during the previous calendar month. Ex. A, at § 2. All payments are to be paid by check to Gorman at its address in Hazard, Perry County, Kentucky.

18. Stephen J. Golder, acting as trustee under that certain Credit Line Deed of Trust, Leasehold Deed of Trust, Security Agreement, Assignment of Rents and Leases, Financing Statement, Fixture Filing and As-Extracted Collateral Filing (West Virginia) dated December 9, 2019, executed by Southeastern Land, LLC, securing payment of up to \$50,000,000.00 to Alliance Prime Associates, Inc., scheduled a trustee’s sale on certain real property, mineral rights, leasehold interests, and contract rights for May 21, 2020 at 11:00 a.m. EST, at the front door of courthouse in Mingo County, West Virginia (the “Trustee’s Sale”).

19. The real property and mineral rights offered for sale at the Trustee’s Sale are encumbered by and subject to the grant, conveyance, terms and conditions of the Royalty Agreement.

20. Despite the Memorandum of Royalty Agreement and the Amended and Restated Memorandum, Gorman was not provided notice of the Trustee’s sale.

21. Alliance Prime Associates, Inc., purchased the real property, mineral rights, leasehold interests, and contract rights at the Trustee’s Sale for \$10,000.00.

22. Alliance Prime Associates, Inc., assigned its rights to the trustee’s deed to OK Gentry.

23. By Trustee’s Deed made on May 21, 2020, and recorded in Deed Book 494, at page 257 in the Office of the Clerk of the County Commission of Mingo County, West Virginia (“Trustee’s Deed”), the real property and minerals were conveyed to OK Gentry.

24. The Trustee's Deed was made subject to "all unpaid real estate taxes and assessments due on said land, if any, and to all other liens, encumbrances, covenants, restrictions, conditions, reservations, rights of way and easements contained of record in the aforesaid [Mingo County] Office of the Clerk."

25. After OK Gentry acquired the real property and mineral rights from the Trustee's Sale, upon information and belief, OK Gentry made an arrangement(s) for Coal-Mac to mine and develop the coal reserves in the Mining Properties purchased from the Trustee's Sale.

26. Any arrangement for Coal-Mac to mine and develop the coal reserves in the Mining Properties purchased from the Trustee's Sale are subject to the encumbrance, grant, conveyance, terms and conditions of the Royalty Agreement.

27. Upon information and belief, coal has been and is currently being mined and sold from the Mining Properties in Mingo County which was purchased from the Trustee's Sale.

28. The real property and mineral rights conveyed by the Trustee's Deed are subject to and encumbered by the grant, conveyance, terms and conditions of the Royalty Agreement.

29. OK Gentry has failed to remit the monthly royalty payments due to Gorman which are due and payable under the Royalty Agreement after the purchase of the real property and mineral rights set forth in the Trustee's Deed.

30. Coal-Mac has failed to remit monthly royalty payments due Gorman which are due and payable under the Royalty Agreement.

31. As of the date of this Complaint, Gorman is owed past-due royalty payments for the coal mined by Defendants from the property and sold during the months of May, June, July

August, September, October, November, and December 2020, and January 2021.

32. OK Gentry's failure to remit to Gorman the royalty payments for coal sold is in direct breach of OK Gentry's obligations to pay Gorman monthly royalty payments under the Royalty Agreement. *See* Ex. A, at §§2-3.

33. In addition, or in the alternative, Coal-Mac's failure to remit to Gorman the royalty payments for coal sold is in direct breach of Coal-Mac's obligations to pay Gorman monthly royalty payments under the Royalty Agreement. *See* Ex A, at §§2-3.

34. The Royalty Agreement further affords Gorman "reasonable access to the properties, books and records and contracts related to the operations conducted at the Mining Properties." Ex. A, at § 4.

35. Gorman requested information concerning the property, books and records, and contracts related to the operations at the Mining Properties.

36. The Defendants did not provide such information.

37. The failure to provide Gorman information concerning the property, books and records, and contracts related to the operations at the Mining Properties is in direct breach of the obligations under the Royalty Agreement. *See* Ex. A, § 4.

Count 1 – Failure to Account

38. Plaintiff realleges each and every allegation set out in paragraphs 1 through 37 of this Complaint as if set out fully herein.

39. The Defendants have an affirmative duty to account for and to pay to Plaintiff the true and correct royalty due by virtue of (i) the Royalty Agreement, (ii) the duty of good faith and fair dealing, and (iii) by virtue of the fiduciary duty and responsibility of a lessor/lessee who is responsible for the production, marketing and sale of coal.

40. The Defendants have no right, contractual or statutory, to refuse Plaintiff's request to account for their operations under the Royalty Agreement.

41. The Defendants intentionally violated their fiduciary responsibilities, and contractual responsibilities by failing to properly account to Plaintiff for their operations under the Royalty Agreement.

42. Plaintiff is entitled to a full, complete and truthful accounting for all operations under the Royalty Agreement.

Count 2 – Breach of Contract

43. Plaintiff realleges each and every allegation set out in paragraphs 1 through 42 of this Complaint as if set out fully herein.

44. The Royalty Agreement requires OK Gentry to make monthly payments to Gorman consisting of a percentage of each dollar Defendant(s) received for each ton of coal mined from the Mining Properties and sold by Defendant(s) in the preceding month.

45. In addition, or in the alternative, any arrangement for Coal-Mac to operate, develop, mine and/or sell coal from the Mining Properties is subject to the Royalty Agreement and requires Coal-Mac to make monthly payments to Gorman consisting of a percentage of each dollar the Defendant(s) received for each ton of coal mined from the Mining Properties and sold by the Defendant(s) in the preceding month.

46. Pursuant to the Royalty Agreement, the monthly payments are due "on or before the 25th day of each calendar month for all of the coal sold during the previous calendar month." Ex. A, at § 2.

47. OK Gentry has breached the Royalty Agreement by failing to remit the

monthly royalty payments due to Gorman for the coal mined from the Mining Properties and sold by Defendants in the months of May, June, July, August, September, October, November, and December 2020, and January 2021.

48. In addition, or in the alternative, Coal-Mac breached the Royalty Agreement by failing to remit the monthly royalty payments due to Gorman for coal mined from the Mining Properties and sold by the Defendant(s) in the months of May, June, July, August, September, October, November and December 2020, and January 2021.

49. As a result of OK Gentry's breach, Gorman has been damaged in an amount to be proven at trial.

50. In the alternative, Coal-Mac's breach, Gorman has been damaged in an amount to be proven at trial.

WHEREFORE, plaintiff, The Gorman Company, LLC, prays for judgment against defendants, OK Gentry, LLC, and Coal-Mac LLC, individually, collectively, jointly and/or severally, as follows:

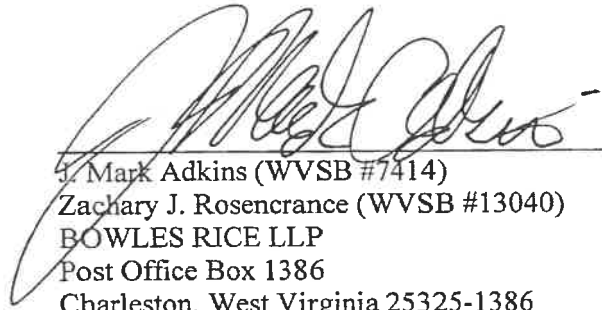
(a) For any and all damages arising from breach of the Royalty Agreement, including, compensatory, incidental and punitive damages in an amount to be determined by the trier of fact, with additional amounts for costs, expenses and attorneys' fees and pre-judgment and post-judgment interest;

(b) Equitable and injunctive relief to provide Plaintiff with a full and complete accounting for all of the Defendants' operations and production, for information regarding all coal marketed and sold by Defendants, and any and all other information relevant to a proper calculation of royalties owed under the Royalty Agreement; and

(c) Such other relief as this Court may deem just and proper.

THE GORMAN COMPANY, LLC

By Counsel

A handwritten signature in black ink, appearing to read "J. Mark Adkins", is written over a horizontal line.

J. Mark Adkins (WVSB #7414)

Zachary J. Rosencrance (WVSB #13040)

BOWLES RICE LLP

Post Office Box 1386

Charleston, West Virginia 25325-1386

(304)-347-1100

madkins@bowlesrice.com

zrosencrance@bowlesrice.com

OVERRIDING ROYALTY AGREEMENT

THIS OVERRIDING ROYALTY AGREEMENT, dated as of August 1st, 2016 (the "Agreement"), between **SOUTHEASTERN LAND, LLC**, a Kentucky limited liability company, its successors and assigns, having an address of 81 Enterprise Dr., Debord, Kentucky ("Southeastern"), and **THE GORMAN COMPANY, LLC**, a Kentucky limited liability company, having an address of P.O. Box 89, 48 South Ky. Highway 15, Hazard, Kentucky 41702 ("Gorman").

RECITALS:

WHEREAS, Southeastern is engaged in permitting, developing, and mining of coal to be sold into the market;

WHEREAS, Southeastern has acquired from Consol of Kentucky Inc., a Delaware corporation and certain of its affiliates, and Fola Coal Company, LLC, a West Virginia limited liability company, the mining properties known as the Miller Creek Properties and the Fola Properties in Mingo, Logan, Clay, Braxton, Fayette and Nicholas counties, West Virginia and legally described in Exhibit A attached hereto and incorporated herein by reference ("the Mining Properties");

WHEREAS, Gorman has forgone its opportunity to acquire the Mining Properties in favor of Southeastern and provided assistance to Southeastern in the process of acquiring the Mining Properties; and

WHEREAS, Southeastern, in lieu of direct ownership in the Mining Properties and for its assistance, agrees to grant Gorman an overriding royalty interest in the Mining Properties as provided below.

NOW THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties, intending to be legally bound, agree as follows:

1. Overriding Royalty. Southeastern grants and agrees to pay Gorman an overriding royalty (the "Overriding Royalty") on all coal mined and sold from the Mining Properties at the following percentages of the gross proceeds received ("Gross Proceeds Received");

- a) Gross Proceeds Received of \$65 or less, One Half of One Percent (0.5%);
- b) Gross Proceeds Received of \$66 or more, but less than \$86, Three Quarters of One Percent (0.75%);
- c) Gross Proceeds Received of \$86 or more, One Percent (1.0%);

Gross Proceeds Received shall be the total amount receivable for each ton of coal, directly or indirectly, in an arms' length transaction, by Southeastern or the last party controlled by or under common ownership or control with Southeastern upon sale of such coal: (i) for

washed coal, determined as if the sale were made free on board (F.O.B.) the point at which any washing, preparation, or processing of such coal is completed by any party controlled by or under common ownership or control with Southeastern and the coal has been loaded for delivery to the purchaser thereof, and (ii) for coal sold as a run of mine product, determined at the point where the coal has been loaded for delivery to the purchaser thereof; and *provided further, that* it is understood and agreed that a portion of such coal may be sold at some point other than F.O.B. railroad car or truck for delivery to the purchaser thereof ("Delivered Coal") under various delivery terms, and that the actual arms' length costs of all truck, rail, barge and sea transportation expenses (including without limitation freight, transloading, storage, and vessel loading fees and insurance, where applicable) (the "Out-of-Pocket Costs") attributable to Delivered Coal may be required to be advanced or otherwise paid by Southeastern or the last party controlled by or under common ownership or control with Southeastern, for delivery to the ultimate consumer. Therefore, it is understood and agreed that such Out-of-Pocket Costs shall not be included in the Gross Proceeds Received of Delivered Coal, and shall be deducted from the amount received from the ultimate consumer for purposes of calculating that Gross Proceeds Received; *provided further, that* otherwise the Gross Proceeds Received shall be determined without deductions or offsets whatsoever.

2. Payment Terms. The Overriding Royalty shall be paid monthly, on or before the 25th day of each calendar month for all of the coal sold during the previous calendar month. All amounts shall be payable to Gorman by check and delivered to Gorman's address set forth in the preamble of this Agreement. Southeastern shall deliver, together with all payments as provided herein, a complete and correct statement showing the applicable tonnages sold and Gross Proceeds Received during the said calendar month.

3. Term of Agreement and Recording. The term of this Agreement shall commence on the date first above written and shall continue until all coal related or other products have been recovered and mined from the the Mining Properties by Southeastern or its successors or assigns. It is the intention of the parties to this Agreement that the obligation to pay the Overriding Royalty attaches to and runs with the Mining Properties so that any successor, transferee or assignee of the Mining Properties shall remain liable to pay the Royalty Payments to Gorman or its successors or assigns. A memorandum of this Agreement may be recorded, but it shall state that it is not intended to be recorded on any lease or sublease that expressly prohibits the recording of such instrument, and further any such recording that is prohibited under the terms of any lease or sublease shall be of no effect as it relates to that lease or sublease.

4. Access and Reports. Southeastern shall upon reasonable notice afford Gorman reasonable access to the properties, books and records and contracts related to the operations conducted at the Mining Properties.

5. Successors and Assigns. All covenants, agreements, and conditions herein set forth to be performed by or on behalf of Southeastern or Gorman shall bind their respective successors and permitted assigns, and shall inure to the benefit of Southeastern and Gorman and their respective successors and permitted assigns.

6. Frost Brown Todd Acting as Scrivener. Southeastern and Gorman agree that Frost Brown Todd has acted solely as a scrivener in drafting this Overriding Royalty Agreement. Frost Brown Todd has not been retained by either party, nor has it agreed to provide any legal services or advice concerning any aspect of this Agreement. The parties negotiated the terms of this Agreement, and represent that they have or will review the terms of this Agreement with separate counsel. Each party acknowledges that Frost Brown Todd has performed and still performs legal services to each party unrelated to this Agreement and waives any conflict that exists or is perceived to exist as a result of Frost Brown Todd acting a scrivener for this Agreement.

7. Miscellaneous. This Overriding Royalty Agreement may be executed in any number of counterparts (including via facsimile or e-mail), each of which shall be an original, but all of which together shall constitute one and the same instrument. This Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the Commonwealth of Kentucky, without regard to conflicts of law principles.

IN WITNESS WHEREOF, the parties have executed and delivered this Agreement as of the date first above written.

SOUTHEASTERN LAND, LLC

By: James H. Booth
James H. Booth, President

THE GORMAN COMPANY, LLC

By: L. D. Gorman
L. D. Gorman, Manager

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

**THE GORMAN COMPANY, LLC,
a Kentucky limited liability company,**

Plaintiff,

v.

**Civil Action No. 21-C-11
The Honorable Miki Thompson**

**OK GENTRY, LLC, an Ohio limited
liability company, and COAL-MAC, LLC,
a Kentucky limited liability company,**

Defendants.

**DEFENDANTS OK GENTRY, LLC AND COAL-MAC, LLC'S ANSWER
TO PLAINTIFF'S COMPLAINT**

Come now Defendants OK Gentry, LLC ("OK Gentry") and COAL-MAC, LLC ("COAL-MAC"), by counsel, Marc R. Weintraub, and the law firm of Bailey & Glasser, LLP for its Answer to Plaintiff's Complaint (the "Complaint") state as follows:

Nature of Action

1. Defendants assert that the allegations in paragraph 1 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 1 of the Complaint.

The Parties

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2 of the Complaint, and therefore deny the same.

3. Defendants admit only that OK Gentry is an Ohio limited liability company. Any remaining allegations in paragraph 3 are denied.

4. Defendants admit the allegations contained in Paragraph 4 of the Complaint.

**EXHIBIT
B**

Jurisdiction and Venue

5. Defendants assert that the allegations in paragraph 5 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 5 of the Complaint.

6. Defendants deny the allegations in paragraph 6 of the Complaint.

Operative Facts

7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 7 of the Complaint, and therefore deny the same.

8. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 8 of the Complaint, and therefore deny the same.

9. Regarding paragraph 9, Defendants respond that the documents referred to therein speak for themselves and deny all allegations inconsistent therewith or unsubstantiated thereby.

10. Regarding paragraph 10, Defendants respond that the documents referred to therein speak for themselves and deny all allegations inconsistent therewith or unsubstantiated thereby.

11. Regarding paragraph 11, Defendants respond that the documents referred to therein speak for themselves and deny all allegations inconsistent therewith or unsubstantiated thereby.

12. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 12 of the Complaint, and therefore deny the same. Additionally, Defendants respond that the documents referred to therein speak for themselves and deny all allegations inconsistent therewith or unsubstantiated thereby. To the

extent an answer is required, Defendants deny the allegations contained in paragraph 12 of the Complaint.

13. Regarding paragraph 13, Defendants respond that the documents referred to therein speak for themselves and deny all allegations inconsistent therewith or unsubstantiated thereby.

14. Defendants deny the allegations in paragraph 14 of the Complaint.

15. Regarding paragraph 15, Defendants respond that the documents referred to therein speak for themselves and deny all allegations inconsistent therewith or unsubstantiated thereby.

16. Defendants assert that the allegations in paragraph 16 of the Complaint are legal conclusions to which no response is necessary. Additionally, Defendants respond that the documents referred to therein speak for themselves and deny all allegations inconsistent therewith or unsubstantiated thereby. To the extent an answer is required, Defendants deny the allegations contained in paragraph 16 of the Complaint.

17. Regarding paragraph 17 of the Complaint, Defendants respond that the document referred to therein speaks for itself and deny all allegations inconsistent therewith or unsubstantiated thereby including, but not limited to, any allegation or inference that the Royalty Agreement requires payments from anyone outside the named parties.

18. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 18 of the Complaint, and therefore deny the same.

19. Defendants assert that the allegations in paragraph 19 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 19 of the Complaint.

20. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 20 of the Complaint, and therefore deny the same.

21. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 21 of the Complaint, and therefore deny the same.

22. Defendants admits the allegations contained in paragraph 22 of the Complaint.

23. Regarding paragraph 23, Defendants respond that the documents referred to therein speak for themselves and deny all allegations inconsistent therewith or unsubstantiated thereby.

24. Regarding paragraph 24, Defendants respond that the documents referred to therein speak for themselves and deny all allegations inconsistent therewith or unsubstantiated thereby.

25. Defendants deny the allegations in paragraph 25 of the Complaint.

26. Defendants assert that the allegations in paragraph 26 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 26 of the Complaint.

27. Defendants admits the allegations contained in paragraph 27 of the Complaint.

28. Defendants assert that the allegations in paragraph 28 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 28 of the Complaint.

29. Defendants deny the allegations in paragraph 29 of the Complaint.

30. Defendants deny the allegations in paragraph 30 of the Complaint.

31. Defendants deny the allegations in paragraph 31 of the Complaint.

32. Defendants deny the allegations in paragraph 32 of the Complaint.

33. Defendants deny the allegations in paragraph 33 of the Complaint.

34. Regarding paragraph 34, Defendants respond that the documents referred to therein speak for themselves and deny all allegations inconsistent therewith or unsubstantiated thereby.

35. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 35 of the Complaint, and therefore deny the same.

36. Defendants deny the allegations in paragraph 36 of the Complaint.

37. Defendants assert that the allegations in paragraph 37 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 37 of the Complaint.

Count 1 – Failure to Account

38. Defendant herein incorporates by reference its responses to allegations from all preceding paragraphs, as though the same were fully set forth.

39. Defendants assert that the allegations in paragraph 39 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 39 of the Complaint.

40. Defendants assert that the allegations in paragraph 40 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 40 of the Complaint.

41. Defendants assert that the allegations in paragraph 41 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 41 of the Complaint.

42. Defendants assert that the allegations in paragraph 42 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 42 of the Complaint.

Count 2 – Breach of Contract

43. Defendant herein incorporates by reference its responses to allegations from all preceding paragraphs, as though the same were fully set forth.

44. Defendants assert that the allegations in paragraph 44 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 44 of the Complaint.

45. Defendants assert that the allegations in paragraph 45 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 45 of the Complaint.

46. Defendants assert that the allegations in paragraph 46 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 46 of the Complaint.

47. Defendants assert that the allegations in paragraph 47 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 47 of the Complaint.

48. Defendants assert that the allegations in paragraph 48 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 48 of the Complaint.

49. Defendants assert that the allegations in paragraph 49 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 49 of the Complaint.

50. Defendants assert that the allegations in paragraph 50 of the Complaint are legal conclusions to which no response is necessary. To the extent an answer is required, Defendants deny the allegations contained in paragraph 50 of the Complaint. As to Plaintiff's prayer for relief, Defendants deny that Plaintiff is entitled to the relief therein sought.

AFFIRMATIVE DEFENSES

Having fully answered the allegations in the Complaint, Defendants now assert the following Affirmative Defenses in further response thereto:

FIRST DEFENSE

Plaintiff's allegations and Complaint fail to state a claim upon which relief may be granted.

SECOND DEFENSE

The Complaint may be barred, in whole or in part, by the applicable statute of limitations and/or repose.

THIRD DEFENSE

Plaintiff's claims are barred, in whole or in part, under doctrines of assumption of risk, res judicata, collateral estoppel, unclean hands, and/or laches.

FOURTH DEFENSE

The injuries and damages alleged in the Complaint, if any exist, were caused by the Plaintiff's own actions, so that the principles of comparative fault, and or assumption of the risk apply.

FIFTH DEFENSE

The Plaintiff's damages were brought about as a direct and proximate result of a superseding and intervening cause, including but not limited to the negligence and/or actions of a third party over which Defendants had no control or responsibility.

SIXTH DEFENSE

Plaintiff's right to recover is barred in whole or part by contractual agreements and limitations.

SEVENTH DEFENSE

To the amounts, if any, due and owing the Plaintiff, the Defendant is entitled to a set-off of any amounts the Plaintiff currently owes the Defendants.

EIGHTH DEFENSE

The claims asserted are barred, in whole or in part, by the Plaintiff's failure to mitigate damages.

NINTH DEFENSE

At all times pertinent to this action Defendants acted in good faith and in conformity with all applicable standards, laws and regulations applicable to their conduct.

TENTH DEFENSE

The document(s) attached as exhibits to the Complaint are not the most current operative agreements entered into between the parties.

ELEVENTH DEFENSE

The Defendant disputes the amounts Plaintiff claims are owed and demands an accounting.

TWELFTH DEFENSE

Plaintiff's right to recover is barred because its damages, if any, were the result of unrelated, pre-existing or subsequent conditions unrelated to Defendant's conduct.

THIRTEETH DEFENSE

Defendants are not, nor ever have been, a party to the contractual agreements upon which Plaintiff bases its claims.

FOURTEENTH DEFENSE

Defendants are not, nor ever have been, bound as successors to the contractual agreements upon which Plaintiff bases its claims as a matter of law because the agreement does not run with the land.

FIFTEENTH DEFENSE

Defendants reserve the right to assert any and all remaining affirmative defenses which discovery may reveal to be appropriate.

WHEREFORE, Defendants request that this Court dismiss, with prejudice in its entirety, Plaintiff's Complaint and that Defendants be awarded its costs, including expert fees, and attorneys' fees pursuant to applicable law, as well as such other and further relief as this Court deems just and proper.

This the 9th day of April 2021.

Respectfully submitted,

**OK GENTRY, LLC AND
COAL-MAC, LLC**

By Counsel



Marc R. Weintraub, Esquire (WVSB #8055)

BAILEY & GLASSER LLP

209 Capitol Street

Charleston, West Virginia 25301

T: (304) 345-6555

F: (304) 342-1110

mweintraub@baileyglasser.com

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

THE GORMAN COMPANY, LLC,
a Kentucky limited liability company,

Plaintiff,

v.

Civil Action No. 21-C-11
The Honorable Miki Thompson

OK GENTRY, LLC, an Ohio limited
liability company, and COAL-MAC, LLC,
a Kentucky limited liability company,

Defendants.

CERTIFICATE OF SERVICE

I, Marc R. Weintraub, counsel for Defendants, do hereby certify that I have served a true and accurate copy of the foregoing *Defendants OK Gentry, LLL and COAL-MAC, LLC's Answer to Plaintiff's Complaint* on the following counsel of record, on this 9th day of April 2021, via U.S. Mail, postage prepaid, in envelopes addressed as follows:

J. Mark Adkins, Esquire
Zachary J. Rosencrance, Esquire
BOWLES RICE, LLC
Post Office Box 1386
Charleston, West Virginia 25325



Marc R. Weintraub, Esquire (WVSB #8055)
BAILEY & GLASSER LLP
209 Capitol Street
Charleston, West Virginia 25301
T: (304) 345-6555
F: (304) 342-1110
mweintraub@baileyglasser.com

CIVIL CASE INFORMATION STATEMENT

CIVIL CASES

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

THE GORMAN COMPANY, LLC,
a Kentucky limited liability company,

Plaintiff,

v.

Civil Action No. 21-C-11
The Honorable Miki Thompson

OK GENTRY, LLC, an Ohio limited
liability company, and COAL-MAC, LLC,
a Kentucky limited liability company,

Defendants.

II. TYPE OF CASE:

TORTS	OTHER CIVIL	
<input type="checkbox"/> Asbestos	<input type="checkbox"/> Adoption	<input type="checkbox"/> Appeal from Magistrate Court
<input type="checkbox"/> Professional Malpractice	<input checked="" type="checkbox"/> Contract	<input type="checkbox"/> Petition for Modification of Magistrate Sentence
<input type="checkbox"/> Personal Injury	<input type="checkbox"/> Real Property	<input type="checkbox"/> Miscellaneous Civil
<input type="checkbox"/> Product Liability	<input type="checkbox"/> Mental Health	<input type="checkbox"/> Medical Malpractice
<input type="checkbox"/> Other Tort	<input type="checkbox"/> Appeal of Administrative Agency	

III. JURY DEMAND: ☒ Yes ☐ No
CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR): June 2022

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE?

YES ☐ NO ☒

IF YES, PLEASE SPECIFY:

- ☐ 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:

Attorney Name: Marc R. Weintraub (WVSB #8055)
Firm Address: Bailey & Glasser LLP
209 Capitol Street
Charleston, WV 25301
Telephone: 304.345.6555
Facsimile: 304.342.1110

Representing:

- ☐ Plaintiff
☒ Defendant
☐ Third-Party Defendant

Dated: April 9, 2020



Signature

FUNCTION - CHANGE

Case number : 21-C-11

CASE SCREEN 4

THE GORMAN COMPANY,, LLC vs. OK GENTRY, LLC C/O MICHAEL CAV
Action Log
Action / Results

Line	Date	Action / Results
1	02/11/21	COMPLAINT, CIVIL CASE INFO & COPIES OF SUMMONS- FILED;
2	02/11/21	SENT TO SOS FOR SERVICE;
3	03/03/21	ACCEPTED SERVICE OF PROCESS SOS ON BEHALF OF COAL-MAC LLC FILED;
4	03/03/21	ACCEPTED SERVICE OF PROCESS SOS ON BEHALF OF OK GENTRY LLC FILED
5	03/09/21	2 SUMMONS WITH COMPLAINT MAILED CERTIFIED AND COPIES MAILED TO
6		ATTORNEY FOR PERSONAL SERVICE FILED;
7	03/17/21	RETURN CERTIFIED MAIL CARD COAL-MAC LLC SIGNED BY (LESLEY ??)
8		FILED;
9	03/18/21	RETURN CERTIFIED MAIL CARD COAL-MAC LLC SIGNED BY (B 925 C19)
10		03-15-21 FILED;
11	03/31/21	STIPULATION, CERTIFICATE OF SERVICE FILED;
12	04/12/21	DEFENDANTS OK GENTRY, LLC AND COAL-MAC, LLC'S ANSWER TO PLTR'S
13		COMPLAINT, CERTIFICATE OF SERVICE, CIVIL CASE FILED;

EXHIBIT

C