

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA
STOLLINGS TRUCKING COMPANY, INC.

Plaintiff,

v.

CIVIL ACTION NO.: 17-C-55
Honorable Judge Rudolph J. Murensky, II

CONTINUUM COAL, LLC, a West Virginia
Limited Liability Corporation, GS ENERGY, LLC
a West Virginia Limited Liability Corporation,
IAN GANZER, Individually and in his capacity
as member of Continuum Coal, LLC, and
GARY GANZER, Individually and in his capacity
as member of Continuum Coal, LLC

Defendants.

DEFENDANTS' ANSWER TO COMPLAINT AND COUNTERCLAIM

The Defendants, Continuum Coal, LLC, GS Energy, LLC, Ian Ganzer, and Gary Ganzer ("Defendants"), by counsel, Thomas H. Fluharty, and Hunter B. Mullens, Mullens & Mullens, PLLC, respectfully submit this Answer and Counterclaim in response to the Complaint of Plaintiff, Stollings Trucking Company, Inc., and aver and answer as follows:

FIRST DEFENSE

Plaintiff's Complaint, in its entirety, fails to state a claim against the Defendants upon which relief may be granted.

SECOND DEFENSE

The Defendants hereby affirmatively assert estoppel and raise and preserve each and every defense set forth in Rule 8, 9 and 12 of the West Virginia Rules of Civil Procedure, and specifically include the affirmative defenses set forth in Rule 8(c) of the West Virginia Rules of Civil Procedure. The Defendants further reserve the right to raise such additional defenses that later may be developed during discovery.

RECEIVED & FILED
CIRCUIT COURT
MCDOWELL COUNTY, W.VA.
2017 JUL 12 AM 10:33

THIRD DEFENSE

Plaintiff suffered no damage or loss by any act or conduct of the Defendants.

FOURTH DEFENSE

Without waiving the aforementioned defenses, the Defendants deny all allegations not specifically admitted herein and demand strict proof of any and all allegations against them, and further state as follows in answer to Plaintiff's Complaint:

1. The Defendants admit the allegations as contained in numbered paragraphs 1, 2 and 3 of the Complaint.
2. The Defendants admit in part and deny in part the allegations as contained in numbered paragraphs 4 of the Complaint. The Defendants admit that Ian Ganzer resides in Monongalia County, West Virginia and that he is a member of Continuum Coal, LLC and GS Energy, LLC, but deny that Continuum Coal, LLC and GS Energy, LLC act as his alter ego.
3. The Defendants admit in part and deny in part the allegations as contained in numbered paragraphs 5 of the Complaint. The Defendants admit that Gary Ganzer resides in Pennsylvania and that he is a member of Continuum Coal, LLC and GS Energy, LLC, but deny that Continuum Coal, LLC and GS Energy, LLC act as his alter ego.
4. The Defendants admit the allegations as contained in numbered paragraphs 6 and 7 of the Complaint.
5. The Defendants admit in part and deny in part the allegations as contained in numbered paragraph 8 of the Complaint. The Defendants admit that the Plaintiff is a company with substantial experience in mining coal, but deny that the Plaintiff has substantial expertise in mining coal as presented in numbered paragraph 8 of the Complaint.

6. The Defendants admit the allegations as contained in numbered paragraphs 9 of the Complaint.
7. The Defendants deny the allegations as a whole as contained in numbered paragraphs 10, 11, 12, 13, 14, 15, 16, 17, and 18 of the Complaint.
8. The allegations contained in numbered paragraph 19 of the Complaint do not require a response from the Defendants; however, the Defendants demand strict proof of any and all allegations that may be referred to in said paragraph.
9. The Defendants deny the allegations as a whole as contained in numbered paragraphs 20, 21, 22, 23, and 24 of the Complaint.
10. The allegations contained in numbered paragraph 25 of the Complaint do not require a response from the Defendants; however, the Defendants demand strict proof of any and all allegations that may be referred to in said paragraph.
11. The Defendants deny the allegations as a whole as contained in numbered paragraphs 26, 27, 28, and 29 of the Complaint.
12. The allegations contained in numbered paragraph 30 of the Complaint do not require a response from the Defendants; however, the Defendants demand strict proof of any and all allegations that may be referred to in said paragraph.
13. The Defendants deny the allegations as a whole as contained in numbered paragraphs 31, 32, 33, 34, and 35 of the Complaint.
14. The allegations contained in numbered paragraph 36 of the Complaint do not require a response from the Defendants; however, the Defendants demand strict proof of any and all allegations that may be referred to in said paragraph.
15. The Defendants admit in part and deny in part the allegations as contained in numbered

paragraph 37 of the Complaint. The Defendants admit that Continuum Coal, LLC, not the Defendants, entered into a signed Contract Mining Agreement on July 20, 2013 with the Plaintiff, but deny that it was a "purported" Contract Mining Agreement.

16. The Defendants deny the allegations as a whole as contained in numbered paragraphs 38, 39 and 40 of the Complaint.
17. The allegations contained in numbered paragraph 41 of the Complaint do not require a response from the Defendants; however, the Defendants demand strict proof of any and all allegations that may be referred to in said paragraph.
18. The Defendants deny the allegations as contained in numbered paragraph 42 of the Complaint.

WHEREFORE, Defendants, Continuum Coal, LLC, GS Energy, LLC, Ian Ganzer, and Gary Ganzer, by counsel, deny that Plaintiff is entitled to the relief sought in its Complaint and requests that this Honorable Court dismiss the Complaint and award the Defendants their costs and attorney fees, with all applicable pre-judgement and post-judgement interest, and any other relief the Court deems appropriate or justice requires.

Defendants demand a jury trial on all relevant issues of fact, if any may be determined to exist.

**COUNTERCLAIM BY DEFENDANT CONTINUUM COAL, LLC AGAINST
STOLLINGS TRUCKING COMPANY, INC.**

I. Parties and Jurisdiction

1. Stollings Trucking Company, Inc. ("Plaintiff") is a West Virginia corporation doing business in the State of West Virginia and having its principal place of business located at 135B Marcum Trucking Drive, Verdunville, West Virginia 25649.

2. Continuum Coal, LLC ("Continuum") is a West Virginia limited liability company doing business in the State of West Virginia and having its principal place of business located at 304 Waitman Street, Morgantown, West Virginia 26501.
3. This Court has jurisdiction and the venue of McDowell County, West Virginia is proper.

II. Background

4. Plaintiff and Continuum signed and entered into a *Letter of Intent*, dated August 18, 2011 ("LOI"), to surface mine the Red Ash seam of coal on certain real property situate in McDowell County, West Virginia, WVDEP Permit No. S400507 ("Property").
5. Thereafter, Plaintiff started operations under said LOI.
6. Plaintiff and Continuum signed and entered into a *Contract Mining Agreement*, dated July 20, 2013 ("CMA"), to surface mine the Property (*See Exhibit No. 1 – Contract Mining Agreement*, dated July 20, 2013).
7. Thereafter, Plaintiff and Continuum commenced coal production on the Property under said CMA.
8. Plaintiff failed to fulfill its terms of the CMA and was unwilling and/or unable to fulfill the valid Purchase Orders for coal obtained by Continuum.
9. Plaintiff knowingly concealed material facts and/or otherwise made misleading representations and misled Continuum concerning Plaintiff's financial status and/or ability to mine coal.
10. Continuum put Plaintiff on notice that Plaintiff was in default of the CMA.
11. Thereafter, Plaintiff voluntarily signed, on June 6, 2015 (date according to the State of West Virginia authorized Notary Public), the West Virginia Department of

Environmental Protection's *Notice to Cease Operator Assignment*, dated April 27, 2015.

III. Count I: Breach of Contract

12. Continuum alleges and incorporates herein by reference the allegations set forth in the paragraphs above.
13. The Plaintiff and Continuum entered into a valid and binding CMA on July 20, 2013 (See Exhibit No. 1 - CMA).
14. Continuum fulfilled its obligations under the CMA and/or otherwise complied with the CMA in every way to the extent possible.
15. Plaintiff breached the CMA in a myriad of ways, including but not necessarily limited to:
 - a. Failing to "secure the greatest commercially reasonable and economically feasible recovery of merchantable and minable coal" (See Exhibit No. 1 - CMA, paragraph No. 5).
 - b. Failing to timely fulfill Purchase Orders obtained by Continuum for coal;
 - c. Failing to properly maintain its equipment;
 - d. Failing to remove its equipment in compliance with the CMA, and otherwise abandoning some of its equipment, with said abandoned equipment becoming the property of Continuum;
 - e. Failing to fulfill reclamation obligations;
 - f. Otherwise breached the CMA, and
 - g. Furthered breached the CMA as shall become evident by the discovery process.

16. Continuum has been deprived of its lawful title and right to the aforesaid abandoned equipment of Plaintiff;
17. Continuum has incurred damages in lost profits, additional costs, reclamation costs and continued reclamation requirements on the Property, as well as other damages due to Plaintiff's breach of the CMA and its obligations.

IV. Count 2: Equitable Estoppel/Detrimental Reliance

18. Continuum alleges and incorporates herein by reference the allegations set forth in the paragraphs above.
19. Plaintiff knowingly concealed material facts and/or made misleading representations and otherwise misled Continuum concerning Plaintiff's financial status and/or ability to mine coal.
20. Continuum was without the knowledge or the means of knowledge to fully know Plaintiff's financial status and/or ability to mine coal.
21. Plaintiff intended that Continuum act, or not act on, by delaying the procurement of another mine operator to mine the Property all causing damages to Continuum and allowing Plaintiff to improperly maintain and prolong an interest in the Property.
22. Continuum acted to its detriment by relying on the concealment and/or misrepresentations of Plaintiff.
23. Continuum suffered damages due to the concealment and/or misrepresentation of Plaintiff.

V. Count 3: Request for Specific Performance

24. Continuum alleges and incorporates herein by reference the allegations set forth in the paragraphs above.

25. As specifically set forth in numbered paragraph 31 (states in part) of the CMA:

Upon termination of this Agreement for any reason, Contractor shall remove its vehicles, equipment, tools, trade fixtures, supplies, movable structures, and improvements (collectively the "Contractor's Materials") from the premises within 90 days after termination. If Contractor fails to remove any of the Contractor's Materials from the premises within the 90 day period set forth above, all Contractor's Materials left thereafter on the premises, as well as all permanent fixtures placed by Contractor upon the premises, shall become the property of Owner.
(See Exhibit No. 1 – CMA, paragraph No. 31).

26. Plaintiff (Contractor) left and otherwise abandoned equipment and Contractor's

Materials after the aforesaid 90 day period and all such equipment and Contractor's

Materials are the property of Continuum (Owner).

27. Specifically, Plaintiff abandoned the following equipment and Contractor's Materials:

- a. Caterpillar Loader: VIN Number: 992C-208-49z2051;
- b. Caterpillar Dozer: VIN Number: D11-312-7pz968;
- c. Caterpillar Rock Truck: VIN Number: 777-509-4xj1048;
- d. Caterpillar Rock Truck: VIN Number: 777-516-4xj247;
- e. John Deere 850 Dozer; and
- f. Other equipment and Contractor's Materials that shall become evident by the discovery process.

28. The aforesaid abandoned equipment and Contractor's Materials are the sole property of Continuum.


29. Continuum requests this Honorable Court find and declare that the equipment and Contractor's Materials set forth in numbered paragraph 27 herein has been abandoned by Plaintiff and that said equipment and Contractor's Materials are the sole property of Continuum.

WHEREFORE, Defendant, Continuum Coal, LLC, respectfully requests that this Honorable Court enter a judgment against the Plaintiff for actual damages, punitive damages, plus pre-judgment and post-judgment interest, and to further order the payment of Defendant's attorney fees and costs in the prosecution of this matter, with all applicable pre-judgment and post-judgment interest; and further, that this Honorable Court specifically find and declare that the equipment and Contractor's Materials set forth in numbered paragraph 27 herein has been abandoned by the Plaintiff and is the sole property of Continuum and further take all action necessary to procure proper title in the name of Continuum, and any other relief the Court deems appropriate or justice requires.

Defendant, Continuum Coal, LLC, demands a jury trial on all relevant issues of fact, if any may be determined to exist.

Respectfully Submitted,

Continuum Coal, LLC,
GS Energy, LLC,
Ian Ganzer, and
Gary Ganzer,
Defendants,
By Counsel:



Hunter B. Mullens, Esq.
W. Va. State Bar #7620
Mullens & Mullens, PLLC
P.O. Box 95
Philippi, WV 26416
(304) 457-9000
(304) 457-9002 (facsimile)

Thomas H. Fluharty, Esq.
W. Va. State Bar #1231
Law Office of Thomas H. Fluharty
408 Lee Ave.
Clarksburg, WV 26301
(304) 624-7832
(304) 622-7649 (facsimile)

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA
STOLLINGS TRUCKING COMPANY, INC.

Plaintiff,

v.

CIVIL ACTION NO.: 17-C-55
Honorable Judge Rudolph J. Murensky, II

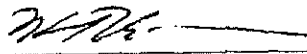
CONTINUUM COAL, LLC, a West Virginia
Limited Liability Corporation, GS ENERGY, LLC
a West Virginia Limited Liability Corporation,
IAN GANZER, Individually and in his capacity
As member of Continuum Coal, LLC, and
GARY GANZER, Individually and in his capacity
as member of Continuum Coal, LLC

Defendants.

CERTIFICATE OF SERVICE

I, Hunter B. Mullens, undersigned co-counsel for the Defendants, Continuum Coal, LLC, GS Energy, LLC, Ian Ganzer, and Gary Ganzer, certify that the foregoing *Defendants' Answer to Complaint and Counterclaim* was served upon the following counsel of record via U.S. mail, postage prepaid, via facsimile, and via electronic mail, as indicated below, on the 10th day of July, 2017, as follows:

Scott H. Kaminski, Esq.
Kaminski Law, PLLC
P.O. Box 3548
Charleston, WV 25335-3548
Counsel for Plaintiff



Hunter B. Mullens, Esq.
W. Va. State Bar #7620
Mullens & Mullens, PLLC
P.O. Box 95
Philippi, WV 26416
(304) 457-9000
(304) 457-9002 (facsimile)

Thomas H. Fluharty, Esq.
W. Va. State Bar #1231
Law Office of Thomas H. Fluharty
408 Lee Ave.
Clarksburg, WV 26301
(304) 624-7832
(304) 622-7649 (facsimile)

EXHIBIT

No. 1

Start-up Cost

CONTRACT MINING AGREEMENT

THIS CONTRACT MINING AGREEMENT ("Agreement"), is made and entered into as of the 20th day of July 2013 (the "Effective Date"), by and between CONTINUUM COAL LLC, a West Virginia limited liability company ("Owner") and STOLLINGS TRUCKING COMPANY, INC., a West Virginia corporation ("Contractor").

WITNESSETH:

WHEREAS, Owner has the right to mine and remove coal from the Red Ash seam by the surface mining method from certain property located in McDowell County, West Virginia; and

WHEREAS, Owner desires to engage Contractor, as an independent contract miner, to surface mine and remove coal from that property in accordance with and subject to the terms and conditions set forth in this Agreement; and

WHEREAS, Contractor desires to accept such engagement.

NOW, THEREFORE, for and in consideration of the premises, which are not mere recitals but an integral part hereof, and of the mutual covenants, benefits and undertakings hereinafter set forth, the adequacy and sufficiency of which are hereby acknowledged, the parties covenant, agree, represent and warrant as follows:

1. ENGAGEMENT OF CONTRACTOR. Owner, upon the terms and conditions hereinafter set forth, hereby engages the services of Contractor as an independent contractor to mine and remove, by usual and accepted surface or strip mining methods both now known and hereafter developed (including but not limited to highwall, contour, mountain top, and auger), the coal contained in the coal seam located in or on the property more particularly described on the map attached hereto and made a part hereof as Exhibit A (the "Property").

RECEIVED & FILED
CIRCUIT COURT
MCDOWELL COUNTY, W.VA.
JUL 22 AM 10:33

2. EXCLUSIVE CONTROL. It is understood by the parties that the Contractor shall exercise complete and exclusive control over the mining activity and mining operations contemplated by this Agreement. The Contractor shall exercise complete and exclusive control over its employees and shall have the right to employ, discharge and fix the compensation of all of its employees. Contractor shall be solely responsible for all compensation concerning its employees. Contractor shall be chargeable and shall take care of all duties, obligations and records arising out of its employee-employer relationships. Owner shall exercise no control of Contractor's employees or mining operations hereunder except as required for protection of the Property and to ensure conformity with the plan of mining and related projections. Contractor shall conduct its operations hereunder in such a manner as to do no more damage to the Property than would occur in the ordinary prudent operation of a mining facility. Nothing herein shall be construed as creating a single enterprise, joint venture, landlord-tenant, or employer-employee relationship between Contractor and Owner. Contractor is not, and shall not represent itself to be, a partner, joint venturer, agent or representative of Owner. Nothing herein shall be deemed to create a partnership between the parties hereto, to convey to either party, by operation of law or otherwise, any interest in, right to, or ownership of, any property of the other party, or to constitute Contractor as an agent of Owner for any purpose. Contractor will carry out the services contemplated by this Agreement as an independent contractor.

3. QUALITY OF RESERVES. OWNER MAKES NO IMPLIED OR EXPRESS WARRANTY OR REPRESENTATION CONCERNING THE EXISTENCE, QUANTITY, QUALITY, MINABILITY OR MERCHANTABILITY OF THE COAL SEAMS ON OR WITHIN THE PROPERTY OR OTHERWISE AND CONTRACTOR COVENANTS AND AGREES THAT NO REPRESENTATIONS, STATEMENTS OR WARRANTIES, EXPRESS

OR IMPLIED, HAVE BEEN MADE BY OR ON BEHALF OF OWNER CONCERNING THE PROPERTY, ITS CONDITION, THE USE OR OCCUPATION THAT MAY BE MADE THEREOF, THE LENGTH OF TIME OF CONTRACTOR'S OPERATION, THE ECONOMIC FEASIBILITY OR SUCCESS OF CONTRACTOR'S OPERATION, OR THE INCOME THAT MAY BE DERIVED THEREFROM.

4. ECONOMIC INTEREST. It is understood and agreed that Owner shall obtain or possess title to the coal mined or to be mined under this Agreement.

5. CONTRACTOR'S OBLIGATION TO MINE. (a) Contractor agrees and binds itself to diligently and promptly commence operations hereunder as soon as all applicable permits and approvals are received, and to diligently prosecute all operations hereunder in a careful, skillful, continuous and workmanlike manner, according to modern methods and practices of mining, while expending reasonable and necessary funds for proper health and safety measures, so as to secure the greatest commercially reasonable and economically feasible recovery of merchantable and minable coal, as clean and free from extraneous materials as can be accomplished in a commercially reasonable and economically feasible fashion and in compliance with the requirements set forth in this Agreement.

(b) If Contractor has not commenced mining activities on the Property within 30 calendar days after the Owner has obtained (and provided to the Contractor evidence of Owner having obtained) all permits and bonding required to be obtained by the Owner pursuant to this Agreement to allow for the commencement of mining by the Contractor, this Agreement may be cancelled by either party upon 10 calendar days written notice to the other party. This Agreement shall be deemed terminated upon the expiration of the 10th calendar day unless Contractor has prior thereto commenced mining activities on the premises.

(c) Whenever used in this Agreement, the phrase "commercially reasonable and economically feasible," or words of similar import, shall mean coal which when reached in the ordinary course of mining operations ordinarily can be mined and marketed at reasonable profit to Contractor and Owner by the use of machinery and mining methods which are at that time modern and efficient and by the use of efficient management and planning. Such phrase shall be construed to the effect that as much coal shall be recovered as is commercially and economically reasonable and practicable, but without imposing an unreasonable burden upon the Contractor where unfavorable natural conditions are encountered.

6. INVESTIGATION BY CONTRACTOR. Contractor acknowledges that before entering into this Agreement it has made a commercially reasonable investigation into: (i) the existing conditions on the Property, (ii) any observable physical limitations applicable to areas on which operations will occur, (iii) the type of equipment necessary to complete the work anticipated by this Agreement, (iv) laws affecting performance by Contractor of work under this Agreement, and (v) any dangerous conditions which are ascertainable by reasonable investigation on the Property. Contractor hereby accepts the Property in its existing physical condition. Owner agrees to promptly provide Contractor with copies of all engineering and geological data relative to the premises in the possession of Owner.

7. CONFORMITY WITH LAWS. Subject to the other terms of this Agreement, Contractor covenants and agrees to fully and completely comply with all laws, statutes, rules, regulations, ordinances, orders and directives of all governmental authorities with respect to the work to be performed hereunder by Contractor or in any manner incidental to such work, including but not limited to the Federal Fair Labor Standards Act, the Walsh-Healey Public

Contract Act, the Federal Mine Safety and Health Act of 1977, and the Surface Mining Control and Reclamation Act of 1977.

8. MINE PLANS AND INSPECTION BY OWNER. (a) In order to allow Owner protection and conformity for its mining operations and properties, Owner and Contractor shall jointly prepare and mutually agree upon all mining plans and projections. As mining progresses, Contractor may recommend adjustments to the mining plan and projections, subject to the approval of Owner, which approval shall not be unreasonably withheld or delayed. Contractor shall conduct its mining operations in accordance with the mutually agreed upon mining plans and in a manner as to secure the largest commercially reasonable and economically feasible yield of merchantable and minable coal from the premises before any part thereof is abandoned. Contractor shall use reasonable care and diligence under all of the circumstances so that the mining of any vein or seam of coal shall not unreasonably destroy any other vein or seam of merchantable and minable coal found on the Property.

(b) Owner shall have the right to enter and inspect the Property and Contractor's operations and shall further have the right to enter the area being mined by the Contractor, provided that such entry does not violate any restrictions placed upon the Contractor by its insurance company. Such inspections shall not unreasonably interfere with Contractor's mining operations. Contractor may require Owner or its designee, as a condition to access to the Property and Contractor's operations, to execute and deliver to Contractor such written consents, waivers, releases, or other documentation as may be generally required by Contractor of third parties desiring access to the premises or the Contractor's operations.

9. MANAGEMENT, MACHINERY, TOOLS, SUPPLIES. (a) Contractor shall perform the work required by this Agreement according to its own manner and methods which

are not inconsistent with the other provisions hereof, and without direction by Owner except as may be necessary for Owner to protect its property or ensure conformity with the mining plans and projections as set forth above.

(b) Contractor shall furnish, repair, replace, and maintain all tools, supplies, material and equipment used by it in the production and delivery of coal. Contractor shall use recognized modern mining methods, employ capable management, expend reasonable and necessary funds for proper health and safety measures, mine development, reclamation for which Contractor is responsible, drainage and pollution control, and take all other actions reasonably necessary to enable it to secure the largest commercially reasonable and economically feasible yield of merchantable and minable coal and deliver the same to Owner as herein set forth.

(c) All labor and supplies provided by Contractor in furtherance of mining the premises shall be provided at actual cost, without added profit to Contractor.

10. MINING PERMITS AND LICENSES. Owner shall timely obtain all necessary permit(s) required by any governmental authority for the conduct of mining operations and performance of work pursuant to this Agreement, including all required reclamation permits. Owner shall timely obtain all necessary bond(s) required by any governmental authority for the conduct of mining operations and performance of work pursuant to this Agreement. Owner already has paid the first incremental bonding in the amount of twenty-eight thousand eight hundred dollars and no cents (\$28,800.00). Contractor has paid the second incremental bonding in the amount of one hundred thirty-six thousand eight hundred dollars and no cents (\$136,800.00). Owner has paid a state road construction bond in the amount of fifty thousand dollars and no cents (\$50,000.00). Once production begins, Contractor shall be paid two dollars and twenty-eight cents (\$2.28) per ton of the first sixty thousand (60,000) tons of mined coal to

reimburse Contractor for one hundred thirty-six thousand eight hundred dollars and no cents (\$136,800.00) expended for bonding. Once production begins, Owner shall be paid one dollar and thirty-two cents (\$1.32) per ton of the first sixty thousand (60,000) tons of mined coal to reimburse Owner for seventy-eight thousand eight hundred dollars and no cents (\$78,800.00) expended for bonding. A Bonding Account will be established that shall be maintained for the purpose of placing the additional incremental bonds to continue mining operations at a rate of \$X.XX per clean ton of coal sold. Contractor shall conduct its mining operations hereunder in strict compliance with all permit(s) and all applicable federal, state and local laws, rules and regulations and shall obtain all other necessary federal, state and local governmental licenses, consents and approvals for its operations hereunder pursuant to such laws, rules and regulations. If either party shall receive any warning, notice, citation, violation or order issued by any governmental authority having jurisdiction over the Property or the mining operations, such party shall promptly notify the other party and provide copies of such communications to the other party. Owner shall use due diligence to make application for further mining and reclamation permits and bonds so that (i) upon the completion of mining operations and abandonment of each permitted area continuous mining operation may be conducted on the Property during the continuance of this Agreement, and (ii) that mining may be commenced upon the Property as soon as practicable. Upon release of any portion of the total bond amount, the released funds shall be distributed sixty percent (60.00%) to Owner and forty percent (40.00%) to Contractor.

XJ
H

11. RESPONSIBILITY FOR EMPLOYEES. (a) Contractor, solely and exclusively, shall employ, direct, supervise, discharge and fix the compensation and working conditions and practices of its employees, shall be solely responsible for their payment and shall comply with all

laws pertaining to payment of employees including without limitation the provisions of WV Code 21-5-1, *et seq.*, and provide Owner either a copy of the bond posted as required by WV Code 21-5-14 or assurance that is reasonably satisfactory to Owner that posting of such bond is not required.

(b) Contractor, solely and exclusively, shall be responsible for; and, at its sole cost and expense, shall pay for and maintain any and all private and group life, accidental death and dismemberment, health, sickness and accident insurance which may be required for its employees and with regard thereto shall indemnify and save Owner harmless from any and all claims and liability related thereto.

(c) Contractor, solely and exclusively, shall be responsible for, and shall exercise complete control over its employees in all matters, disputes or grievances arising out of or any way connected with Contractor's operations.

12. INSURANCE AND INDEMNITY. (a) Contractor agrees to obtain the following insurance coverages: (i) coverage for any civil action arising under WV Code 23-4-2; (ii) general comprehensive liability coverage (specifically including coverage for subsidence damage and environmental pollution coverage) with limits of liability no less than combined single limits of \$2,000,000.00 for bodily injury and property damage; (iii) comprehensive automobile liability including non-owned and hired cars with limits of liability no less than single limits of \$1,000,000.00 for bodily injury and \$2,000,000.00 property damage; (iv) employer's liability insurance with limits of liability no less than \$1,000,000.00 per occurrence; (v) pollution legal liability coverage with a \$5,000,000 incident limit and (vi) Workers' Compensation insurance coverage for its employees as permitted or required under the laws of West Virginia and maintain insurance for, or otherwise guarantee the payment of, black lung benefits to its

employees in accordance with applicable laws. Contractor shall pay all premiums thereon and shall, in such policy or policies where applicable and available at no additional cost to Contractor, name the Owner as additional insured as its interests may appear. Contractor shall furnish Owner certificates of insurance demonstrating Contractor's compliance with all of the provisions of this Paragraph prior to commencement of mining hereunder and maintain on file with Owner such certificate(s) during the entire period of this Agreement. All insurance required under this Section 12, other than Workers' Compensation and black lung coverage, shall contain a provision requiring the insurance company to notify the Owner in writing not less than 10 days prior to any cancellation of any such insurance. Contractor further agrees to acquire a minimum \$5,000,000 umbrella policy.

(b) Notwithstanding Contractor's obligation to obtain insurance as above set forth, Contractor agrees and covenants to at all times indemnify and save Owner, its affiliates and subsidiaries, and their respective Representatives harmless against and from any and all claims, damages, injuries to person or property, consequential damages, fines, penalties, assessments, losses and expenses, (including attorneys' fees and other legal expenses) which arise out of, result from, or are in consequence of (i) the performance by Contractor of any of its duties hereunder, (ii) the act or failure to act by Contractor or Contractor's Representatives (other than the Owner), or (iii) the breach or non-performance by Contractor of any of its covenants, warranties, or representations set forth in this Agreement. For all purposes of this Agreement, a party's "Representatives" shall include that party's shareholders, directors, officers, employees, agents, contractors, licensees, and invitees.

(c) Owner covenants and agrees to indemnify and save Contractor, its affiliates and subsidiaries, and their respective Representatives harmless against and from any

and all claims, damages, injuries to person or property, consequential damages, fines, penalties, assessments, losses and expenses, (including attorneys' fees and other legal expenses) which arise out of, result from, or are in consequence of (i) the performance by Owner of any of its duties hereunder, (ii) the act or failure to act by Owner or Owner's Representatives (other than the Contractor), or (iii) the breach or non-performance by Owner of any of its covenants, warranties, or representations set forth in this Agreement.

(d) The insurance and indemnity provisions of this paragraph shall survive the termination of this Agreement.

13. ROYALTIES, TAXES, FEES, EXPENSES, AND NET PROFIT DISTRIBUTION. (a) Gross Selling Price is defined as the price paid for the mined coal at point

of delivery. Net Profit is defined as Gross Selling Price minus the following:

- (i) 10% of Gross Selling Price shall be paid to GSE; GSE shall be responsible for all royalty payments pursuant to leases of the mined property;
- (ii) all wheelage, haulage, and portal fees;
- (iii) all severance taxes imposed by Federal or State law, including but not limited to the West Virginia Severance Tax and the West Virginia Additional Severance Tax;
- (iv) all real property taxes levied on the premises or the minerals, including but not limited to unmined mineral taxes;
- (v) all trucking, handling, and other transportation costs;
- (vi) all Federal Form 720 Excise Taxes;
- (vii) all Federal Office of Surface Mine Taxes including but not limited to the OSM Reclamation Tax;
- (viii) all West Virginia Special Coal Taxes;
- (ix) all costs and expenses incurred in engineering services relative to the mining operations or the premises;

- (x) the fees and expense of obtaining and maintaining all mining and reclamation permits and bonds;
- (xi) the cost of water monitoring and testing;
- (xii) the cost of reclamation attributable to mining operations;
- (xiii) all surface mining control and reclamation fees;
- (xiv) all brokerage fees associated with the sale of coal;
- (xv) all electrical and other utility bills from the mining site(s);
- (xvi) all pond inspection fees and costs;
- (xvii) loss of value of Contractor's equipment shall be paid as an expense in equal installments over a twelve-month period;
- (xviii) equipment repair costs (repair costs of twenty-five thousand dollars (\$25,000.00) or more for equipment owned by Contractor shall be paid as an expense in equal installments over a twelve-month period);
- (xix) start-up costs incurred by Contractor prior to commencement of mining operations shall be paid as an expense on a _____ (\$____) per ton basis from the first _____ thousand (____,000) tons of mined coal; XXX
- (xx) Owner's accounting costs;
- (xxi) a Reclamation Account that shall be maintained for the purpose of reclamation following total cessation of mining operations at a rate of \$X.XX per clean ton of coal sold;
- (xxii) a Bonding Account that shall be maintained for the purpose of placing the additional incremental bonds to continue mining operations at a rate of \$X.XX per clean ton of coal sold; and
- (xxiii) all labor and supplies necessary to mine the premises, subject to Section 9(c) of this Agreement.

(b) For itself and on behalf of the Owner, Contractor shall pay the following sums which are payable with respect to the mining operations of Contractor pursuant to this Contract Mining Agreement:

- (i) all personal property taxes assessed on Contractor's personal property;
- (ii) all social security taxes, income taxes, payroll taxes, sales and use taxes and other taxes and fees which Contractor is obligated to pay under applicable law; and
- (iii) all taxes imposed under the Black Lung Benefits Reform Act of 1977 as set forth in Internal Revenue Code Section 4121, as amended from time to time.

14. FINES OR PENALTIES. Contractor shall be responsible and solely liable for payment of any assessments, penalties or other fines imposed by any federal, state or local agency for any violation of any local, state or federal law or regulation arising out of the conduct of Contractor's operations hereunder, except to the extent such is due to the act or failure to act by Owner or Owner's Representatives (other than the Contractor). Should Owner be an interested party as a permittee on any mining permit or obligee on any bond, Owner may compromise and settle any claims for fines or penalties only with the prior written approval of Contractor, which shall not be unreasonably withheld. If Contractor diligently responds to and remedies such violation of any local, state or federal law or regulation arising out of the conduct of Contractor's operations hereunder, then the assessment, penalty, and/or fine shall be treated as a cost pursuant to 13(a) above. Notwithstanding any of the above, should Owner be assessed or fined for any such violation arising out of the conduct of Contractor's operations hereunder, Contractor shall fully reimburse Owner for any expenses incurred in connection therewith, including payments made to any federal, state, or local agency in satisfaction of such fine or penalty; and, Owner is hereby authorized and empowered, subject to first giving Contractor

advance written notice of at least 10 calendar days, to withhold such sums from any monies due Contractor under the terms and conditions of this Agreement.

15. MINING PERMITS AND IDENTIFICATION NUMBERS.

Notwithstanding any other terms and provisions of this Agreement, Owner shall obtain, in its name, the reclamation permits required to conduct mining activity upon the premises and shall be primarily responsible for compliance with such permits (the "Reclamation Permits"). Any modifications to the Reclamation Permits which would adversely affect the Contractor will be made only with the prior written consent and supervision of both Owner and Contractor, which consent shall not be unreasonably withheld and which supervision shall not be unreasonably exercised. The Owner shall file all required Forms MR 19 for the Contractor with the West Virginia Department of Environmental Protection. The Contractor shall be responsible for complying with the terms of the approved Reclamation Permits in the Contractor's area of operation and other areas affected by Contractor's operation. Provided, however, consistent with other provisions of this Agreement, Contractor shall be solely responsible for any and all assessments, penalties, or other fines imposed under the Reclamation Permits by virtue of or arising out of the conduct by Contractor of its operation hereunder, except to the extent such is due to the act or failure to act by Owner or Owner's Representatives (other than the Contractor).

16. RECLAMATION RESPONSIBILITIES. Contractor shall be responsible for reclamation liabilities attributable to mining operations conducted by Contractor pursuant to this Agreement. Owner shall maintain the Reclamation Account, as defined above, to cover reclamation costs following cessation of mining activities at a rate of \$x.xx per ton. As bonds are released, remaining funds in the Reclamation Account shall be distributed 60.0% to Owner and 40.0% to Contractor in proportion to the percentage of the total bond amount released. For

example, at the time of release of 50.0% of the total bond amount, 30.0% of the funds remaining in the Reclamation Account shall be distributed to Owner and 20.0% of the funds remaining in the Reclamation Account shall be distributed to Contractor.

17. BEST COMMERCIAL EFFORTS. Contractor shall exercise best commercial efforts to mine and deliver the coal.

18. SCALES AND TESTING. All of the coal removed from the premises shall be weighed on scales without commingling with coal from other mining operations. The quantity of coal mined pursuant to this Contract Mining Agreement shall be determined by the certified scales of the arm's length buyer of the coal, or by such other methods as the parties hereto shall, from time to time, approve in writing.

19. NO MIXING OF CONTRACT COAL. Contractor understands and agrees that if it is mining in multiple seams or is mining on more than one contract area, Contractor shall not mix the coal from different seams or different operations in or on its trucks, belts or any other vehicle of conveyance to the delivery point designated by Owner unless Owner shall direct such mixing in writing. The decision as to whether to wash the coal delivered hereunder, to load the same raw or to mix or blend with other coal, shall be at the sole discretion of Owner; provided, however, that such shall not cause a reduction in the available sales price of the coal.

20. SPLIT OF NET PROFIT. Owner shall pay Contractor forty percent (40.00%) of the Net Profits from mining. If Contractor's split of Net Profits results in a payment less than fifteen dollars (\$15.00) per ton of mined coal on a quarterly basis, then Contractor's percentage of Net Profits shall increase from forty percent (40.00%) to the percentage necessary to achieve payment of fifteen dollars (\$15.00) per ton of mined coal up to a maximum of fifty percent (50.00%) of Net Profits. If payment of fifty percent (50.00%) of Net Profits would fail to yield a

payment to Contractor of fifteen dollars (\$15.00) per ton of mined coal, Owner and Contractor shall meet to determine whether to continue mining, and, if so, how to distribute Net Profits.

21. PAYMENTS TO CONTRACTOR. Owner shall pay Contractor its share of Net Profits for the coal delivered pursuant to this Agreement within 20 calendar days after receipt of payment by Owner for such coal.

22. RECORDS. Each party shall keep, for a minimum of three (3) years from the date of termination or expiration of this Agreement, accurate records reflecting all aspects of its operations hereunder. Each party shall have the right and privilege, at all times upon at least two (2) calendar days written notice, to enter upon the business premises of the other party for the purpose of examining the other party's books, accounts, statements, maps and plans which are commercially relevant for the purposes of ascertaining the coal taken from the premises, the sales price and terms of sale of such coal, the manner in which the operations of the other party which are relevant to this Agreement are being conducted, and to verify compliance of the other party with any provisions of this Agreement.

23. INDEPENDENT AUDIT; COST CONTROL. (a) Each party shall make available its books and records which are relevant to its obligations hereunder for review by a certified public accountant of the other party's choice and at the other party's sole expense. The accountant designated by a party shall have the right to review such relevant books and records of the other party to verify that the other party has fully paid and is current on its obligations hereunder. The accountant shall report the results of the review to the party requesting the review. Each party shall have the right to request such an audit no more frequently than quarterly but shall not be required to do so. Any such audit shall be conducted in a fashion so as to minimize the interference with the ongoing business operations of the party being reviewed.

Notwithstanding the foregoing, prior to undertaking such an audit, the requesting party shall first make inquiry of the accounting firm of the other party to determine if the other party's accounting firm can provide the requesting party with sufficient information or assurances as shall remove the necessity for an audit.

(b) Contractor must receive approval from Owner prior to (1) the purchase of any new equipment for use under this Agreement by Contractor; or (2) contracting for any equipment repair that costs five thousand dollars (\$5,000.00) or more.

(c) Loss of value of Contractor's equipment shall be determined by (1) obtaining a fair valuation of Contractor's equipment prior to this Agreement becoming effective, or at purchase date, by a disinterested independent appraiser; (2) obtaining an estimation of the value of the equipment following one year of use, assuming proper maintenance and usage, by the same appraiser; and (3) subtracting the second value from the first. Loss of value of Contractor's equipment in subsequent years shall be determined by obtaining an estimation of the value of the equipment following the next year of use, or contract termination, assuming proper maintenance and usage, by the same appraiser, and subtracting the third value from the second, and so forth for subsequent years. If Contractor's equipment appreciates in value for any reason, including repair or maintenance costs paid as an expense, loss of value shall not include depreciation from the higher value to the value prior to appreciation. (I.e., there shall be no double counting of depreciation.)

24. TAXES. Contractor shall be responsible for all taxes identified in Paragraph 13(b) of this Agreement. Taxes identified in Paragraph 13(a) of this Agreement shall be considered an expense to be paid out of Gross Sale Price proceeds, prior to determination of Net Profit.

25. STRUCTURE, FACILITIES AND SERVICE ROADS. Contractor shall construct and maintain such structures and facilities and such access, service, and/or haul roads as are required in the performance of this Agreement. Contractor shall comply with all federal, state or local laws relative to Contractor's use of said roads. Contractor may use, free of charge, any structures, facilities, access, service and/or haul roads constructed on the premises prior to the date of this Agreement. Contractor shall be solely responsible for removing any structures (including ponds or dams), facilities, or roads constructed by Contractor or Contractor's Representatives.

26. PONDS AND DRAINAGE. Contractor shall construct and maintain all necessary additional ponds or other such drainage and sediment control structures and perform all other work as may be required to control discharge and prevent pollution to surface and subsurface water courses, including but not limited to such structures specified and required in the mining permit approved by the West Virginia Department of Environmental Protection with respect to the premises. Contractor shall sample, test, and treat the water from such ponds before discharge in order that strict compliance shall be maintained with applicable mining permits and any and all state and federal pollution laws and regulations.

27. NON-ASSUMPTION OF LIABILITIES. The parties hereby affirm and acknowledge that Contractor shall not in any way be liable or responsible for or considered to have assumed any indebtedness or obligation of Owner. The Owner shall be solely responsible and liable for satisfaction in full of all liabilities and obligations incurred or accrued by Owner or its Representatives (other than Contractor) with respect to the premises or mining operations conducted on the premises prior to the date of this Agreement, whether determined, unknown or contingent.

28. ASSIGNMENT BY CONTRACTOR. Contractor shall not have the right to assign this Agreement or any part thereof without the prior written consent thereto of Owner, at Owner's sole discretion, and any violation of this covenant shall entitle Owner to terminate this Agreement immediately upon written notice to Contractor.

29. TERM. The term of this Agreement shall be for a period of one (1) year from the date hereof and shall be continued for an indefinite period thereafter unless and until either party gives notice to the other of its intention not to continue the Agreement by providing 90 days notice. Notwithstanding the foregoing, this Agreement shall terminate at such time as Contractor shall have mined and removed all of the merchantable and minable coal which is commercially reasonable and economically feasible to remove from the premises and otherwise fully complied with all applicable laws governing completion of mining operations, including reclamation.

30. DEFAULT. In the event either party shall default in the performance of any of its obligations hereunder and such default shall continue for a period of ten (10) calendar days after the defaulting party has received written notice of such default from the other party, the party not in default may, at its election, terminate this Contract Mining Agreement immediately upon the expiration of the aforesaid ten (10) day period by written notice of termination to the defaulting party. Notwithstanding the foregoing, a default shall not be deemed to be continuing if, within the aforesaid ten (10) calendar day period, the defaulting party has commenced and is diligently attempting to cure the default where the default is not reasonably subject to being cured within ten (10) days. A termination pursuant to this Section 30 shall not deprive the party not in default of any of its rights at law or in equity to proceed against the party in default.

31. TERMINATION AND REMOVAL OF EQUIPMENT. Upon termination of this Agreement for any reason, Contractor shall remove its vehicles, equipment, tools, trade fixtures,

supplies, movable structures, and improvements (collectively the "Contractor's Materials") from the premises within 90 days after termination. If Contractor fails to remove any of the Contractor's Materials from the premises within the 90 day period set forth above, all Contractor's Materials left thereafter on the premises, as well as all permanent fixtures placed by Contractor upon the premises, shall become the property of Owner. For all purposes of this Agreement, the phrase "termination of this Agreement" or any variation thereof, shall also include the "expiration" of this Agreement by its terms. A "trade fixture" shall mean any item that is not permanently affixed to the land and which may be removed without any material damage to the real property and "real property fixture" shall mean any item that is permanently affixed to the land and which cannot be removed without material damage to the real estate.

32. BANKRUPTCY OR TRANSFER FOR BENEFIT OF CREDITORS. It is further understood that any assignment, transfer or attempt so to do in any bankruptcy, receivership or insolvency proceedings, by or against Contractor, either voluntary or involuntary, or any such transfer, assignment or encumbrances of affirmative acts of or against Contractor purporting so to do, including, but not limited to an adjudication in any bankruptcy, levy or execution, receivership, creditor's suit, or other solvency proceedings, shall operate as an assignment of this Agreement.

33. NOTICE. Any notice, payment, report, consent or other communication required or permitted hereunder shall be effective upon mailing by United States Certified Mail, postage prepaid and Return Receipt Requested, addressed as follows:

To Owner at _____.

To Contractor at _____.

Either party may change his or its address for purposes of this Agreement by giving notice to the other parties in accordance with this Section _____ of such change of address.

34. FULL UNDERSTANDING. It is understood and agreed by and between the parties hereto that this Agreement constitutes the full understanding and agreement between the parties hereto with respect to the subject matter hereof and it supercedes all prior agreements, representations or understandings by or between the parties.

35. WAIVER OF DEFAULT. The omission by either party at any time to enforce any default or right reserved to it, or to require performance of any of the terms, covenants, or provisions hereof by the other party at any time designated, shall not be a waiver of any such default or right to which the non-defaulting party is entitled, nor shall it in any way affect the right of the non-defaulting party to enforce such provisions thereafter.

36. MODIFICATION OF AGREEMENT. The parties hereto agree and understand that this Agreement may not be modified, added to, or changed in any particular except by mutual agreement of the parties reduced to writing and signed by them.

37. SEVERABILITY. The invalidity or unenforceability of any term or provision of this Agreement shall not affect the validity or enforceability of any of the remaining terms or provisions hereof. It is the intention of the parties that the provisions of this Agreement shall be enforced to the fullest extent possible under the laws and public policy of each state and jurisdiction in which such enforcement is sought, and that the unenforceability or modification to conform with such laws or public policies of any provision of this Agreement shall not render unenforceable or impair the remainder of this Agreement. Accordingly, in the event any provision of this Agreement shall be determined by a court of competent jurisdiction to be invalid or unenforceable, in whole or in part, this Agreement shall be deemed amended to delete

or modify (as and to the extent determined necessary by the said court) the invalid and unenforceable provisions, or portions thereof, or to alter the balance of this Agreement in order to render this Agreement valid and enforceable to the maximum extent possible.

38. APPLICABLE LAW: This Agreement shall be interpreted and governed by the laws of the State of West Virginia without regard to its conflicts of laws principles. The parties hereby irrevocably and exclusively submit to the jurisdiction of the Circuit Court of Kanawha County, West Virginia or the United States District Court having jurisdiction over Kanawha County, West Virginia and the proper Appellate Courts thereof, over any action or proceeding arising out of or relating to this Agreement. Each party hereby irrevocably agrees that all claims in respect of such action or proceeding may be heard and determined in such West Virginia State or Federal Court and waives any and all rights it may have to contest the jurisdiction and/or venue of the above mentioned Courts and to demand any other Court. Provided, however, nothing in this section shall affect the right of one party to bring proceedings against the other party in the Courts of any jurisdiction to enforce in any lawful manner a judgment obtained in accordance with this Agreement.

39. FORCE MAJEURE. A party shall be excused, during the period of existence of any condition of Force Majeure, from its contractual obligations hereunder (other than an obligation to pay money for services rendered and coal mined) if it is prevented or delayed in such performance by any of the following conditions of Force Majeure: act of God, act of the public enemy, authority of law, fire or explosion, war, insurrection, embargo, derailment, flood, frozen river, shortage of coal cars or trucks as the case may be, mining conditions, the quality of coal renders it unmerchantable, unusual inclement weather conditions, or any like causes beyond their reasonable control. The party claiming Force Majeure will, within five (5) calendar days

from the date of disability, excluding Saturdays, Sundays, and holidays, notify the other party of the existence of a Force Majeure condition and will similarly notify the other party within a period of five (5) calendar days, excluding Saturdays, Sundays, and holidays, when the condition of Force Majeure has ended.

40. FURTHER ACTION. Each party to this Agreement shall, in good faith, at any time and from time to time during the term of this Agreement, upon the reasonable request of the other party hereto, and without further consideration, execute and deliver such documents and take such action as may be reasonably necessary to effect the purpose and intent of this Agreement. In the event of any disagreement or dispute under this Agreement, the parties agree to engage in a friendly dialogue to attempt to resolve their differences in an amicable and prompt fashion.

41. INTERPRETATION. The section headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement. There will be no presumption against any party on the ground such party was responsible for preparing or drafting this Agreement or any part of it. The words "include," "includes" and "including" when used herein shall be deemed in each case to be followed by the words "without limitation." The word "herein" and similar references mean, except where a specific Section or Article reference is expressly indicated, the entire Agreement rather than any specific Section or Article.

WITNESS the signatures of the parties hereto on this the date first above-written.

CONTRACTOR:

a West Virginia XXXXXXXXX

By: Rhonda Marcum
Its: President

OWNER:

a West Virginia limited liability company

By: [Signature]
Its: Managing Member