

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF WEST VIRGINIA

**ENTERED**

REGAL COAL, INC., and  
VIRGIL D. LAROSA,

NOV 16 2004

U.S. DISTRICT COURT  
CLARKSBURG, WV 26301

Plaintiffs,

v.

CIVIL ACTION NO. 2:03CV90

DOMINICK LAROSA, and  
RESEARCH FUELS, INC.,

Defendants.

**REPORT AND RECOMMENDATION**

**I.  
PROCEDURAL HISTORY**

On October 16, 2003, Plaintiffs Regal Coal, Inc., (hereinafter "Regal") and Virgil D. LaRosa (hereinafter "Virgil") (collectively hereinafter "Plaintiffs") filed a two-count complaint with this Court seeking declaratory and injunctive relief (Docket Entry No. 1). On November 17, 2003, Plaintiffs filed a Motion for Preliminary Injunction and Memorandum in Support of Motion (Docket Entry No. 3). Plaintiffs filed an Amended Complaint with the Court on November 20, 2003, seeking declaratory relief, injunctive relief, relief for breach of contract/unjust enrichment, relief for tortious interference with the right to contract, relief for intentional infliction of emotional distress, relief for fraud and relief for quantum merit. On December 5, 2003, Defendants Dominick LaRosa (hereinafter "Dominick") and Research Fuels, Inc., (hereinafter "Research") (collectively hereinafter "Defendants") filed their answer.

On February 26, 2004, by Order of the United States District Judge, all pre-trial development of this matter was referred to the undersigned United States Magistrate Judge (Docket Entry No.

78

14). Between April 21 and 26, 2004, Plaintiffs elected to not then pursue their request for a preliminary injunction.

On May 4, 2004, Defendants Dominick and Research filed their *Motion for [sic] to Enjoin the Plaintiffs from the Continued Occupation of Real Property and Utilization of Coal Mining Permits Issued by the West Virginia Division Of Environmental Protection and Incorporated Memorandum of Law* (Docket Entry No. 38). On May 21, 2004, Plaintiffs filed with the Court their *Memorandum in Response to Motion to Enjoin the Plaintiffs from the Continued Occupation of Real Property and Utilization of Coal Mining Permits Issued by The West Virginia Division of Environmental Protection and Incorporated Memorandum of Law* (Docket Entry No. 40).

The Court heard testimony, received exhibits and heard oral arguments on June 8, 2004. By Report and Recommendation dated August 22, 2004 (Docket Entry 59), the undersigned recommended that Defendants' Motion For Injunctive Relief be denied. By Order dated October 26, 2004 (Docket Entry 75), the District Judge accepted the recommendation of the undersigned and denied Defendants' Motion For Injunctive Relief.

On October 15, 2004, Plaintiffs filed their Motion To Enjoin Defendant Dominick LaRosa (Docket Entry 66) (hereinafter "Motion"). The matter was scheduled for hearing before the Court by Order dated October 15, 2004 (Docket Entry 67). As a result of conflicts in schedules of counsel and appropriate motions having been filed to alert the Court to those conflicts, the Court modified the hearing schedule by an Order dated October 19, 2004 (Docket Entry 71). Defendant Dominick filed his Response to Plaintiffs' Motion on October 20, 2004 (Docket Entry 73). The hearing on the Motion commenced on October 21, 2004, as scheduled, and was continued for the taking of

additional evidence to October 25, October 28, and November 1, 2004, on which date the evidence was closed and the matter was submitted to the undersigned for the preparation and submission of a Report and Recommendation.

## **II STATEMENT OF RELEVANT FACTS<sup>1</sup>**

This is a contract action brought by Virgil and a company owned by him, Regal, against Dominick and a company owned by him, Research. Plaintiffs allege that an agreement was reached with Defendants in 2001 calling for Plaintiffs to mine coal Defendants owned or controlled in North Central West Virginia for a period of fifteen (15) to twenty (20) years, depending on how long it took to mine the estimated twenty (20) million tons of coal under permit and in reserve. Third Party Intervenor Courtney F. Foos Coal Company (hereinafter interchangeably referred to "Foos" or "Foos Coal") contends, in reliance on the agreement between Plaintiffs and Defendants and representations of Defendant Dominick, he secured and obligated his company to long term supply agreements with several eastern utilities. Plaintiffs and Foos Coal contend Defendants breached the agreement starting in late 2002 or early 2003 and continue to breach the agreement by taking actions designed to make the coal remaining in the ground unavailable to Plaintiffs to mine and sell to the end user utility markets. Defendant Dominick denies any agreement was reached and denies that he breached any agreement. It is in this general context that the undersigned, based on a preponderance of the

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<sup>1</sup>The undersigned prepared the Statement of Relevant Facts from his hearing notes, the transcript from the July 2004 injunction hearing, which was made a part of the evidence in the subject preliminary injunction hearing and the exhibits filed in the October 2004 injunction hearing. The undersigned believed that substantial justice may be impaired by the delay of waiting for a hearing transcript to be prepared before starting preparation of this Report and Recommendation.

evidence presented during the four (4) days of hearing, finds and makes this Statement of Relevant Facts.

***Parties***

Dominick, a resident of Potomac, Maryland, owns three companies that are pertinent to the subject Motion. The first, Research, employs him to sell coal to utilities at the maximum price he can get any a certain time. The only employees of Research are Dominick and his son, Derek. Tr. p. 126 July 23, 2004, Hearing. The second, Energy Marketing Company, Inc. (hereinafter “Energy”), a West Virginia corporation, holds properties and develops properties. The only employee of Energy is Dominick. Tr. p. 126 July 23, 2004, Hearing. The third, Credible, Inc. (hereinafter “Credible”), a Maryland corporation, owns minerals and mining permits. Tr. p. 89-90 July 23, 2004, Hearing. The only employees of Credible are Dominick and his son, Derek. Tr. p. 126 July 23, 2004, Hearing. Of the three companies, only Credible owns coal or coal permits.

***Properties***

Dominick acquired coal reserves and operations held by Rauer Coal (hereinafter “Rauer”) through a bankruptcy liquidation sale in late 1995. Tr. p. 115 July 23, 2004, Hearing. The properties included: Permit UO401=Isaac’s Run; U-24-84= 106-A; U-8-85=108-I, UO520=105-A; and U-74-83=105 East Portal and 102 Tipple combined.

It was during the mid 1990's that Christopher Blair Wolfe (hereinafter “Wolfe”), a mining engineer,<sup>2</sup> first became acquainted with and associated with Dominick. Wolfe performed

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<sup>2</sup>Christopher Blair Wolfe is a professional mining engineer licenced in West Virginia and Maryland. He has a B.S. in Engineering and an MBA. He has been in the coal business since 1976 and currently is self employed with Wolf and Associates in Farmington, West Virginia. He has done underground mine mapping, ventilation plans and roof control plans for the operators,

engineering work on the properties Dominick had acquired from Rauer. The engineering services were paid for by Energy.<sup>3</sup>

Dominick operated some of the mines from approximately 1995 through a contract miner, Global Mining (hereinafter "Global"). Global was operated by Dominick's brother-in-law. Tr. p. 116 July 23, 2004, Hearing.

Between 1995 and 1998, Wolfe and Associates was given limited power of attorney by Dominick to sign for Energy. Defendants' Exhibit 4. According to Wolfe, the address used by Energy during this period of time was "338 Washington Avenue, Clarksburg, West Virginia." This was the address for Robert Frashure (hereinafter "Frashure"), accountant for Dominick. Wolfe also testified that after 1998 to middle 1999, even though his company no longer had limited power of attorney to sign documents for Energy, if he needed documents signed, he got Frashure to sign them for Energy. According to Wolfe, in the middle of 1999, Dominick told him to get Butch Coffman at Global (hereinafter "Coffman") to sign documents for Energy. After Global ceased operations, Dominick told Wolfe to contact Virgil if something needed to be signed on behalf of Energy.

Of the coal reserves, four mines were located on the properties held by Credible: 108-I, Isaac's Run, 106-A and 105-A. The 108-I mine is located on property that is owned by Credible. The 105-A and 106-A mines are located on coal properties owned by Penn Virginia (hereinafter "Penn"). Tr. p. 90-92 July 23, 2004, Hearing.

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public service districts, owners of mineral interests and the DNR. Wolfe performed engineering services for Virgil, Cheyanne, Regal, the Rawhide Tipple for which he was paid \$160,008.25. He still performs services for Virgil or his companies.

<sup>3</sup>Wolfe later sued Energy over a billing for services dispute. Wolfe did not join Dominick personally in the suit nor did he sue Dominick personally. The suit was later settled.

## *Agreement*

Virgil and Dominick met on several occasions during 2000 concerning the possibility of entering into a business relationship to mine the coal of Dominick. They reached oral agreement in the late fall of 2000. Dominick had an understanding in his mind of what his deal with Regal was. Tr. p. 159-160 July 23, 2004, Hearing.

The agreement, as discussed by the two men, included “all coal owned or leased by Dominick LaRosa in Harrison, Barbour and Upshur Counties, West Virginia, including permitted coal and unpermitted coal reserves.”<sup>4</sup> At the time of the parties agreement, the mines previously operated by Global had been shut down. According to engineer Wolfe, the Isaac’s Run Mine had been temporarily abandoned; the 106-A mine had not yet been started; the 108-I mine was an existing deep mine that had been temporarily abandoned; the 105-A mine had been inactive since 1984; the 102 Tipple was capable of being refurbished and placed back into service; and the 105 East mine had been completed and reclamation had been done by Energy in 2001. The condition of the coal according to Wolfe was:

- 1) Isaac’s Run - The Redstone seam of coal had roof control problems and needed rehabilitation.
- 2) 108-I - Similar condition to the Redstone seam of coal in the Isaac’s Run Mine.

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<sup>4</sup>In questioning by the Court at the July 2004 hearing, Dominick testified in response to a question to determine which of the coal mines controlled by Energy were on coal owned by Penn: “Isaac Run. 106-A, 105-A - - and there is another one that’s called White.” The Court questioned: “Well, but it’s not involved in this litigation?” Dominick corrected the Court’s misconception by testifying: “Well, but it’s part of it Virgil is supposed to face up and - - yes and do like” The Court added: “Yeah. It’s one of those many things that turned over in 2001, correct?” Dominick responded: “I believe - - I believe that they were going to do it in good faith.”

Wolfe estimated the cost of rehabilitation to get to the Redstone seam of coal to be between one-hundred-fifty-thousand dollars (\$150,000) and three-hundred thousand dollars (\$300,000).

- 3) 106-A - This site was a pasture. Plans had to be made to establish a mine entrance before coal could be mined.
- 4) 102 Tipple - Tracks, bin and conveyor needed rehabilitation.
- 5) 105-A - Required clean up of the high wall, construction of three (3) new portals and preparation of the existing portals to use as returns, installation of a new belt drive, and refurbishment of the electric substation at an estimated cost of fifty-thousand dollars (\$50,000) to sixty-thousand dollars (\$60,000).

Wolfe discussed the permits, conditions of the mines, coal reserves and projected costs of getting the mines in producing order with Dominick and Virgil in 2001. At the same time, Wolfe discussed the reserves of Pittsburgh coal available on non-permitted lands located at Isaac's Run, 105-A, 106-A and Century Reserve. Wolfe had mine maps showing the estimated tonnages of Redstone and Pittsburgh coal available to be mined on existing permits and permits that could be obtained in the future. Plaintiffs' Exhibit 27.<sup>5</sup> During these discussions, Wolfe testified Dominick

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<sup>5</sup>Based on Plaintiffs' Exhibit 27, as of January 2001, it was Wolfe's opinion that:

- 1) The estimated recoverable tons of permitted coal available on properties of Energy was 2,870,248.
- 2) The estimated recoverable tons on not permitted coal available on properties of Energy was 11,620,835.

Wolfe broke those tonnages down by permits and mines as follows:

- 1) Isaac's Run:
  - a. Redstone 405,101 tons in reserve under permit UO-401A
  - b. Pittsburgh 800,777 tons in reserve under permit U)-401A
- 2) 108-I:

and Virgil talked about the depletion of permitted and reserve coal based on estimated production rates. Wolfe testified that it was understood Virgil was going to be conducting mining operations on the permitted sites and would pay for development of the coal reserves on non-permitted properties.

During the discussions between Dominick and Virgil, based on information provided by Wolfe, an engineer who had performed mining engineering services for Penn, as well as for Dominick and Virgil, it was concluded there was enough coal in the permitted area and the reserves to last approximately twenty (20) years. Plaintiffs' Exhibit 27. Dominick personally estimated his holdings to be twenty-million (20,000,000) tons. He also represented that he personally owned the coal.

Under the parties' agreement, Virgil was expected to: 1) pay the property taxes on the coal involved; 2) maintain the producing permits with the West Virginia Department of Environmental Protection (hereinafter "DEP"), including other properties and permits of Energy that did not generate any coal (Tr. p. 144-145 July 23, 2004, Hearing); 3) fill purchase orders for coal obtained by Dominick; 4) deal with the DEP and other governmental regulatory agencies relative to the operations at the mines and the permits; and 5) make new mine sites as the need arose.

Under the same agreement, Dominick was expected: 1) to sign the papers necessary for Virgil

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3) 106-A:	a.	Redstone	1,295,028 tons under permit U-8-85
	b.	Pittsburgh	727,059 tons under permit U-8-85
4) 105-A:	a.	Redstone	349,520 tons under permit U-24-84
	b.	Pittsburgh	1,202,717 tons under permit U-24-84
	a.	Redstone	93,560 tons under permit UO-520A-A
	b.	Pittsburgh	102,800 tons under permit U)-520A-A

to produce coal to fill the orders; 2) to sell some of the coal by arranging for purchase orders; and 3) through profits from the coal sales, to amortize a debt owed by Virgil's father to Dominick. It is not clear whether Dominick denies payment of the debt owed by the father of Virgil was part of the consideration for the agreement.<sup>6</sup>

### *Performance*

Following the meetings, Wolfe and Virgil met and planned the development of the coal reserves. Virgil incurred five-thousand dollars (\$5,000) to six-thousand dollars (\$6,000) in engineering fees with Wolfe in developing these plans.

Virgil planned to perform the obligations he agreed to under the agreement with Dominick through various corporate entities he owned or created. The companies he intended to use were: 1) Cherokee Processing, Inc. (hereinafter "Cherokee"), to operate the permits and produce coal from them by and through contract miners to which it leased the coal properties; 2) Regal to purchase the coal mined from the permits to fill the orders obtained by Dominick; and 3) Cheyenne Coal Sales, Inc., to process and ship the coal. Dominick testified he first became aware that Regal wasn't itself producing coal, but that some other party under Regal was in there working on the coal in 2001. Tr. p. 159 July 23, 2004, Hearing. However, Dominick permitted these third parties to continue to mine

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<sup>6</sup>When asked: "Did it have anything to do with the retiring of his father's debt to you?" Dominick replied: "The - - originally, I bought the property because again, the father called me and tell me they don't have the coal and you know you're the only one that know how to do this, and we don't have any money. And then find out there was plenty money in the bank to pay and, but I did it again to assist my relatives who I believe, my father, I mean, and my uncle who is Virgil B. Father, always told me to respect your family. And he always told me to help Virgil all the time as long as he live, and there was 21 years difference between my dad and my uncle and I respect him like a grandfather. So, that's why I did what I did and I went in good faith that the son, Virgil David LaRosa, would comply to do the right things so that everybody could benefit by and here we are in the courtroom today." Tr. p. 143 July 23, 2004, Hearing.

after discovery because: 1) Virgil had promised to sign the agreement prepared by the Pittsburgh, Pennsylvania, law firm of Kirkpatrick and Lockhart; 2) Dominick and Virgil had commitments with the utilities through purchase orders that had to be honored; and 3) the possibility of damages if they did not fulfill the purchase orders. Tr. p. 161-162 July 23, 2004, Hearing.

Dominick had Kirkpatrick and Lockhart prepare written documents purporting to contain the terms and conditions of the agreement he reached with Virgil. Tr. p. 93 July 23, 2004, Hearing. The agreements were presented to Virgil in late 2001. By the time they were presented, mining had already commenced. Virgil refused to sign the agreement as presented because it contained a requirement that he pay for Dominick's legal fees at Kirkpatrick and Lockhart; did not contain dollar figures in critical spaces dealing with the financial terms of the agreement; and gave a perpetual exclusive right to Dominick to sell the coal. Dominick interpreted this clause to mean that "all the coal going through Rawhide, Research Fuel was the exclusive agent to sell this coal." Tr. p. 113 July 23, 2004, Hearing. A second version of the agreement was drafted and presented to Virgil about May 1, 2002. Virgil refused to sign it for the same reasons he refused to sign the original draft. Plaintiffs' Exhibits 18 and 19.

Consistent with the parties' conversations and agreements, on November 13, 2000, a "Request For Advance Approval Of Operator Assignment (MR-19)" on behalf of Energy, Permittee, was signed with the name of Dominick LaRosa. The document was also signed by Virgil on behalf of Cherokee on the same date. This document requested a limited sixty (60) day approval of assignment of the right of operation of the coal properties under Permit Nos.: UO-401 (Isaac's Run), U-74-83 (102 Tipple), and U-8-85 (108-I) to Cherokee. Plaintiffs' Exhibit 1. Energy's address is shown on the Request for Advance Approval of Operator Assignment as: "PO Box 1704 Clarksburg,

WV 26302." The address on the Advertisement Application For Operator Assignment (MR-19) for Energy is: "338 Washington Ave. Clarksburg, WV 26302".<sup>7</sup> These are the same two addresses shown for Energy in Section A-3 of the Ownership and Control Information portion of the Application submitted to DEP. On January 2, 2001, Dominick wrote Brent Wiles (hereinafter Wiles) of the Office of Mining and Reclamation in Philippi, West Virginia, and requested that, with respect to all permits, the address of Energy be changed to 13 East Lincoln Street, Buckhannon, West Virginia, 26201. Tr. p. 130 July 23, 2004, Hearing.

On November 13, 2000, an "Application for Change in Permit Responsibility"(herein previously referred to as "Application") was signed with the name of Dominick LaRosa seeking the same operator assignment to Cherokee as described in the Request for Advance Approval of Operator Assignment. Plaintiffs' Exhibit 1. Section A-12 of the Application shows that the applicant, Cherokee, does not claim to own the coal but has authority to mine all of the coal by "AGREEMENT." Plaintiffs' Exhibit 1.

Dominick denies he signed or authorized anyone to sign his name to the MR-19 granting Cherokee permission to extract coal from 108-I, Isaac's Run, 106-A or 105-A. Tr. p. 123-125 and 128-129 July 23, 2004, Hearing. However, Wolfe testified he was at the meetings and stated that Dominick told him (Wolfe) that Virgil had authority to sign his name and his company's name (Energy) to the MR-19. Wolfe also testified that, consistent with that authority, in 2001, Virgil did sign Dominick's name as an officer of Energy on the MR-19 authorizing Fairmont Energy, Inc. (hereinafter "Fairmont"), to mine at the 106-A mine U24-84. Wolfe did not see a written limited

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<sup>7</sup>Dominick testified he did not authorize anyone to prepare the Exhibit or to use the 338 Washington Avenue address for Energy. Tr. p. 171-172 July 23, 2004, Hearing

power of attorney signed by Dominick authorizing Virgil to sign Dominick's name or the name of Dominick's company.

On March 8, 2001, Dominick advised Wiles that Virgil was fully authorized and personally assumed responsibility to act and direct for any and all the requirements needed to comply with overall Energy permits. Tr. p. 131-132 July 23, 2004, Hearing and Plaintiffs' Exhibit No. 3 to that Hearing.

On March 28, 2001, DEP approved the Request for Advance Approval of Operator Assignment. Plaintiffs' Exhibit 1.

### *108-I*

Consistent with the agreement reached with Dominick, Virgil activated Cherokee to obtain contract operators to mine the coal. He approached Robert R. Jeran (hereinafter "Jeran"), president of Roblee Coal Company (hereinafter "Roblee"), to mine the coal in 108-I. Jeran had approximately twenty-one (21) years experience in the deep mining business. Roblee signed a "Coal Production Contract" with Cherokee on April 30, 2001. Plaintiffs' Exhibit 13. Under the contract, Roblee was to mine and remove the Pittsburgh and Redstone seams of coal located in the 108-I mine located in Union District, Barbour County, West Virginia. The contract called for mining to commence within ninety (90) days. It also called for a minimum of ten-thousand (10,000) tons of Pittsburgh coal and a minimum of ten-thousand (10,000) tons of Redstone coal to be mined per month. Roblee was to be paid 91% FOB Pit price for the A coal with 14% or less ash and 91% FOB Pit for the B or dirty coal.

Roblee began mining the 108-I in July 2001. The mine was in "deplorable condition" according to Jeran. To begin operations, his company had to: bring equipment to the Redstone coal

seam; install belt lines; bring power to the mine; establish ventilation; and generally cleanup and renovate the mine. Roblee invested several hundred thousand dollars to reopen the 108-I mine in 2001, expecting to be mining for a period of eight (8) to ten (10) years.

***Isaac's Run***

Virgil, through Cherokee, approached Signal Resources, LLC (hereinafter "Signal"), another contract miner, to deep mine the Dominick coal at Isaac's Run under permit UO-401 and NPDES Permit WV1010069. Cherokee and Signal entered into a written contract dated January 16, 2001, "to mine and remove, by the deep mining method only, the coal owned and contained in the Redstone seam of coal located in Isaac's Run mine, located in Union District, Barbour County, West Virginia, on the waters of Isaac's Creek, and to load said coal into trucks supplied by Lessor [Cherokee] for transport and delivery." Plaintiffs' Exhibit 14. Under the contract, Signal was to begin mining within thirty (30) days; "carry general comprehensive liability insurance of \$250,000 to \$500,000 for bodily injury and \$1,000,000 for property damage and to take and carry comprehensive automobile liability including non-owned and hired cars with limits of liability no less than \$500,000 for bodily injury and \$500,000 for property damage"; and pay any and all governmental fines and assessments levied by any governmental entity as a result of the mining operations. Cherokee obligated itself under the contract to pay Signal fourteen dollars (\$14.00) per ton for "A Coal" (less than 14% ash) and \$12.50 per ton for "B Coal" (14% to 20.5% ash) for coal produced and sold between the 1<sup>st</sup> and 30<sup>th</sup> of the month, by the 30<sup>th</sup> day of the succeeding month.

***106 -A***

By agreement dated April 1, 2002, (Plaintiffs' Exhibit 16) Cherokee leased the coal and Isaac's Run Mine 106A (U-24-84 NPDES Permit WV1010361) to another contract miner,

Fairmont. Fairmont sub-leased to Bishoff Brothers, Inc. (hereinafter "Bishoff"). Dominick was aware of the sub-lease arrangement with Bishoff even though there is nothing in writing signed by Dominick agreeing to the sublease. Tr. p. 87 July 23, 2004, Hearing.

Prior to the agreement between Dominick and Virgil, the 106-A permit did not have a mine or portal. It consisted of a highwall with little of the coal exposed. Dominick was getting coal orders and Virgil needed the low sulphur coal in the 106-A permit to fill those orders.

In order to ready the site for mining, Virgil had to:

- 1) excavate for a mine opening.
- 2) run almost a mile of electric service.
- 3) put in an electric substation to change the AC current to DC current.
- 4) build mine portals.
- 5) finance the contract miners (Fairmont).

Virgil requested that Dominick assist in the costs of readying the 106-A mine for opening. Dominick refused to contribute any money.

Under the agreement of April 1, 2002, Fairmont obligated itself to "mine and remove, by the deep mining method only, the coal owned and contained in the Redstone Seam of coal located in Issac's Run Mine 106-A, located in Union District, Barbour County, West Virginia, and to load said coal into trucks supplied by Lessor (Cherokee) for transport and delivery." Fairmont agreed to begin mining operations within thirty (30) days of signing the contract. Under the addendum to the contract, Cherokee agreed to advance Fairmont \$273,451.85 for general operating expenses. Virgil testified his company loaned Bishoff (Fairmont) \$373,452.00 in order to get the 106-A mine operational.

This was confirmed by Johnny Bishoff's hearing testimony. He stated two (2) canopies had to be constructed in order to commence mining operations. One was built by Bishoff and the other was built by Cherokee – Virgil's company. He testified Virgil arranged for a loan of approximately two-hundred-seventy-one-thousand dollars (\$271,000.00) for supplies and wages to get the mine started and another one-hundred-thousand dollars (\$100,000.00) to install electric to the mine. According to Johnny Bishoff, work commenced in March 2001. Johnny Bishoff confirmed that he had conversations with Dominick concerning the source of the money for the construction needed to open the mine during February and early March 2001, prior to Virgil making the loans available.

Contractor (Fairmont) agreed to pay Cherokee on each ton of stoker coal sold to a third party: the royalty Cherokee owed Gebruder, Inc. (hereinafter "Gebruder"), fifteen cents (\$0.15) per ton reclamation fee, an amount equal to the severance tax and black lung tax, two dollars (\$2.00) per ton royalty for Cherokee, and reimbursement at the rate of one dollar (\$1.00) per ton for as long as money remained due Cherokee for monies advanced. The contract also called for Fairmont to provide the same limits of liability insurance as contained in the earlier contract with Signal. However, in addition to Cherokee being named as a co-insured, Regal was also to be named as a co-insured because it "supplied trucks to the Contractor for the transportation of its coal production." The contract called for Fairmont to mine and deliver a minimum of ten-thousand (10,000) tons of coal per month and a maximum of fifteen-thousand (15,000) raw tons of coal per month from the Redstone seam. Cherokee agreed to pay Fairmont \$17.35 per ton for "A Coal," consisting of 11% to 13% ash; \$14.10 per ton for "B Coal," consisting of 14% to 20% ash, and market price to be agreed on for stoker coal, consisting of 10% or less ash. The compensation clause also called for an increase in the royalty paid (\$0.10 per ton) if the royalty due Gebruder on the A or B coals fell below \$2.10 per ton.

Johnny Bishoff testified that his contract was with Fairmont to operate the 106-A mine as a contract miner. He stated during the October 2004 hearing that he expected active mining to last five (5) years. He estimated there remained approximately one-hundred-fifty thousand (150,000) tons of coal to be mined and that his company was mining it as the present time at tonnages ranging between the present four-thousand (4,000) to five thousand (5,000) tons per month to twelve thousand (12,000) to fifteen thousand (15,000) tons per month. He explained that the mining operation was at a point where additional tonnages could be mined easier than the conditions had allowed for the past eighteen (18) months.

### ***Operations***

The contract miners obtained by Virgil began mining operations at the various mine sites. Based on the Mine Safety Health Administration records, Wolfe testified as follows with respect to each of the mines:

- 1) there were more violations before 2001 than there were after 2001;
- 2) tonnages per man hour were lower when Global operated the mines that they were for the contract miners under Virgil after 2001; and
- 3) there were less accidents under the contract miners obtained by Virgil after 2001 than there were under Global prior to 2001. Plaintiffs' Exhibit 30.

### ***Coal Purchase Orders***

Dominick was to secure coal purchase orders for his coal as it was being produced by Virgil. In the early period following the agreement, Dominick had the exclusive right to sell the coal. In the Fall of 2000, Joe Staud (hereinafter "Staud") told Virgil of Courtney Foos, of Foos Coal, as a possible link to user markets for the coal to be produced from the Dominick holdings. Since

Dominick had exclusivity with respect to the coal in his reserves and permits, Virgil suggested Foos deal directly with Dominick.

Staud referred Foos to Dominick in late 2000. Foos already was acquainted with Dominick through his earlier marketing of Dominick's Century 102 Mine coal. Tr. p. 50. July 23, 2004, Hearing. At the end of 2000, the coal being shipped by Dominick to fill the orders at B.L. England Station (hereinafter "England Station") and Constellation Power Source Generation (hereinafter "Constellation") were too high in ash and the BTU's were too low. The plants were not able to burn the coal. The DEP shut down the Century 102 operations. As a result, Foos began talking to Dominick about supplying coal to fill orders to eastern power plant users. From the outset of the relationship, Foos was told by both Virgil and Dominick to "never talk to the producer, to Regal. . . ." Foos honored that arrangement for approximately the first year and a half of the relationship. Tr. p. 49-52, 103 July 23, 2004, Hearing .

A Coal Purchase Order was entered into on April 2, 2001. Plaintiffs' Exhibit 4. The purchase order is on Energy's letterhead. The address of Energy is shown as P.O. Box 34668, Bethesda, Maryland, 20827. The order calls for "10 trains April through December 2001; 1 train monthly, 2 trains August, 29 trains Jan. 1, 2002 through Dec. 31, 2002. 2 trains monthly, 3 trains a month for 5 months, Foos Coal and Research has the right to cover from another source any months seller cannot maintain shipment schedule." The coal was to be shipped to: Delmarva Power & Light, Indian River Power Plant, Millsboro, DE. Tr. p. 133 July 23, 2004, Hearing and Plaintiffs' Exhibit No. 4 of that Hearing.

A Coal Purchase Order was entered into on April 2, 2001. Plaintiffs' Exhibit 5. The purchase order is on Research's letterhead. The address of Research is shown as 10 Tobin Court,

Rockville, Maryland, 20854. The order calls for “10 trains April through December 2001; 1 train monthly, 2 trains August, 29 trains Jan. 1, 2002 through Dec. 31, 2002. 2 trains monthly, 3 trains a month for 5 months, Foos Coal and Research has the right to cover from another source any months seller cannot maintain shipment schedule.” The coal was to be shipped to: Delmarva Power & Light, Indian River Power Plant, Millsboro, DE. In every respect, except the names on the letterhead and the dates of signature, the coal purchase order #2001 which is Plaintiffs' Exhibit 5 is identical with the coal purchase order #2001 which is Plaintiffs' Exhibit 4. On Plaintiffs' Exhibit 4, Dominick signed April 3, 2001, as president of Research on Energy's letterhead, and on Plaintiffs' Exhibit 5, Dominick signed April 6, 2001, as president of Research on Research's letterhead. Dominick explained this purchase order was signed because the purchase order on the Energy letterhead was a mistake. Tr. p. 134 July 23, 2004, Hearing.

A third version of order #2001 (Plaintiffs' Exhibit 6) dated April 2, 2001, involving the same parties, same tonnages of coal, same terms and conditions, was entered into and signed by the same people on behalf of the same corporations as Plaintiffs' Exhibits 4 and 5. The only discernable difference between Plaintiffs' Exhibit 5 and 6 is the format of the Quantity Order in Exhibit 6. The substance remains the same.

A coal purchase order #2002, dated June 28, 2001, was entered on Research's letterhead. Plaintiffs' Exhibit 7. The address for Research is 10 Tobin Court, Rockville, Maryland. It called for two-hundred-fifty thousand (250,000) tons per year for 2002 and 2003 from Regal to be shipped to Atlantic City Electric Co. (hereinafter “Atlantic”) at the England Station in Palermo, N.J. Payment for the coal was to be made to Research through its account with Foos Coal. The language of the order provides: “[t]his purchase order may be extended into 2004 and 2005 by mutual

agreement of all parties.” Dominick signed this purchase order as president of Research on July 8, 2001. Virgil signed it on July 5, 2001 as president of Regal.

A coal purchase order #2003, dated July 12, 2001, on Research’s letterhead was signed by Dominick as president of Research and by Virgil as president of Regal. Plaintiffs’ Exhibit 8. The order called for one-hundred thousand (100,000) tons of coal per year from Regal to Constellation at the C.P. Crane Station in Chase, MD, for years 2002, 2003, and 2004. Payment was to be made to Research through the account of Foos Coal. This purchase order was signed by both Dominick and by Virgil on July 14, 2001.

A coal purchase order #2004 dated August 2, 2001, on Energy’s letterhead was signed by Dominick as president of Research on August 6, 2001, and by Virgil as president of Regal on August 6, 2001. The order called for “one train monthly July, August, September; Two trains monthly October 2001 through December 31, 2002.” The coal was to be shipped to First Energy Generation Corporation (hereinafter “First Energy”). Payment was to be made to Research through its account with Foos Coal. The purchase order gives Energy’s address as a post office box in Bethesda, MD, but lists its telephone numbers as 301-469-8070 (Dominick’s telephone number) and 304-472-0024 (the 102 Tipple managed by Virgil). Plaintiffs’ Exhibit 9. Tr. p. 156-157 July 23, 2004, Hearing.

A coal purchase order #2004, dated August 2, 2001, on Research’s letterhead was signed on August 6, 2001. Plaintiffs’ Exhibit 10. The terms and conditions of this purchase order are the same as the purchase order bearing the same date. Plaintiffs’ Exhibit 9. The only difference between the two purchase orders is the letterheads used.

***Breach***

There were no significant problems in the relationship between Foos, Dominick and Virgil for the first year and a half.

Foos, a sixty-eight (68) year old self-employed bituminous coal broker of forty-three (43) years duration, testified at the October 2004 hearings. The undersigned permitted Foos Coal intervenor status in the pending civil action during the July 2004 hearing on the preliminary injunction requested by Energy and Dominick<sup>8</sup>. Foos locates supplies of coal and connects those supplies with end users.

Dominick suggested that Foos sign an exclusive sales agency agreement. Foos was agreeable and encouraged Dominick to send a proposal. When the proposed agreement arrived, Foos refused to sign because it limited him from contracting with any operator/supplier within a two-hundred-fifty (250) mile radius for Foos lifetime. Tr. p. 70 July 23, 2004, Hearing.

On August 29, 2001, Dominick individually signed a "Letter Agreement" with Foos, confirming Foos Coal "exclusive authority to establish an all rail freight rate from Rawhide to the Mansfield Power Plant of First Energy" and "to represent our coals loading over Rawhide to First Energy; and to negotiate a 2, 3, or 5 year contract with First Energy for the slurry and other coals mixed with it for Mansfield Power Plant." Foos' Exhibit 5. The "Letter Agreement" was also signed by Virgil.

On April 11, 2003, Dominick, as president of Research, wrote to Foos, authorizing him "to commit 200,000 tons from Rawhide or 102 to the England Station in years 2004 and 2005 at a price of \$26.00, along with a 10% price reopener for the years 2006 and 2007." The last sentence of the letter states: "When you have finalized this with Conectiv, I will sign the standard purchase order reflecting the above." Foos' Exhibit 6.

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<sup>8</sup>The preliminary injunction requested by Energy and Dominick was denied by Order of the District Judge, which adopted the report and recommendation of the undersigned Magistrate Judge.

By letter dated July 3, 2003, Dominick, writing on Research's letterhead, stated: "Based on our long discussions and preparations, I was hopeful that we had a clear understanding to work toward a long range goal for coal contracts up to fifteen or twenty years. Nothing is easy. But with my coal assets and expertise in the coal business coupled with yours, I thought we agreed we could both make this happen, benefiting [sic] both of us for the long term. I still believe it can be done!" Earlier in the same letter, Dominick confirmed the authorization Research gave Foos on April 11, 2003, relating to the four-year extension of the England Station purchase order. Foos' Exhibit 7.

Based on the 2001 agreement between Dominick and Virgil, and the continuing encouragement of Dominick, Foos obtained coal purchase orders.

Dominick insisted that Foos pay him direct on the First Energy orders, and Virgil agreed. As a result, Dominick, through Research, paid Virgil for the coal produced pursuant to the First Energy, as well as other, coal purchase orders. Tr. p. 149 July 23, 2004, Hearing.

During the summer of 2002, Foos received complaints from First Energy concerning the oversized coal being shipped. Honoring Dominick's insistence that all communications go through him, Foos contacted Dominick with the complaints. Dominick assured Foos he would take care of it. Foos continued to receive complaints from First Energy, and First Energy finally shut down its operations for two days because it was not able to burn the oversized coal. Foos communicated with Dominick and learned that nothing had been communicated to Virgil. Foos then talked to Virgil, who addressed the problem by running future coal shipments through a crusher before forwarding to First Energy.

Foos began getting notifications from Regal (Virgil's company) in March 2003 that they weren't getting paid. Foos attempted to mediate the situation for approximately one year before

things started to come apart on November 15, 2003. Tr. p. 49 and 51 July 23, 2004, Hearing. During this same period of time, the first six (6) months of 2003, Foos testified Dominick called him night after night about getting Virgil out of the coal business. According to Foos, there was no logic to Dominick's arguments. In August 2003, Dominick asked Foos to stop payments to Virgil for two (2) months to force Virgil out of the coal business. Foos refused. During the period, Foos considered severing his relationship with Dominick and wrote a letter doing so but never sent it.

The problems of non-payment continued. With respect to Purchase Order # 2003, Virgil, of Regal, notified Foos that the Regal was not being paid for the coal mined by the contract miner and shipped to Constellation. Foos contacted Dominick concerning the situation. Foos told Dominick, "[t]here is one cardinal rule in the coal business, if you don't pay the mines you lose your reputation and you're not going to get the coal and for God's sake pay them." Tr. p. 41 July 23, 2004, Hearing. Dominick then re-instituted payments.

Foos was again notified that Regal was not getting paid for the coal shipped under Purchase Order # 2003. Foos contacted Dominick, who reassured him that Regal had been paid in full. Tr. p. 44 July 23, 2004, Hearing.

It was at this time that Foos became aware there was no written agreement between Virgil and Dominick. Tr. p. 71 July 23, 2004, Hearing.

Believing there was a crisis and that Regal would cut off shipments to Constellation resulting in a breach and financial disaster to Foos and Dominick, Foos unilaterally cancelled the order with Dominick's company, Research, executed a new purchase order directly with Regal and started paying the amounts due Dominick and Regal for the coals shipped directly to each in accord with what he understood to be their interests. Tr. p. 42 July 23, 2004, Hearing.

In February 2003, Foos entered into a coal order directly with Regal to supply coal to First Energy. Sometime after July 2003, Foos entered into a coal order with Regal to supply coal to Mirant. Tr. p. 58 July 23, 2004, Hearing.

With Foos' termination of purchase order #2003 with Research, no written purchase orders or agreements remained between Foos and Research or any other company owned by Dominick as of the July 23, 2004, hearing on Defendants' Motion For Injunctive Relief.

Tr. p. 45, 85 July 23, 2004, Hearing.

Foos obtained a bid from Conectiv. After repeated attempts to get Dominick to sign, and Dominick repeatedly refusing on the grounds that he had been advised not to accept the liquidated damages clause, Foos offered the order to Regal on July 8, 2004. Tr. p. 48 July 23, 2004, Hearing. The agreement or order was for a primary term of two (2) years, with a 10% reopener. Tr. p. 61-62 July 23, 2004, Hearing. Foos delayed renewing orders with Constellation, First Energy and Mirant so he would not be liable to supply coal to those entities after December 31, 2004. Tr. p. 61 July 23, 2004, Hearing.

Foos paid Research what Foos understood was due Research for the coal being shipped under the purchase orders. Between November 1, 2003, and October 15, 2004, Foos paid Research \$229,071.60. Foos' Exhibit 8.

Dominick complained Energy received Notices of Violation from the DEP (Defendants' Exhibit Nos. 4 and 5 of the July 23, 2004, Hearing) and Notice of Default of the lease from Penn subjecting himself, personally, and his company to liability. Tr. p. 100-102 July 23, 2004, Hearing.

Penn served Energy with the Notice of Default on May 26, 2004. Penn determined Energy: 1) assigned the leases to Credible without Penn's consent; 2) allowed the Isaac's Run mine to

remain inactive for an extended period of time; 3) allowed required liability insurance to lapse. Tr. p. 188- July 23, 2004, Hearing. As of the July 23, 2004, hearing, it was the opinion of Gary Steven Begley (hereinafter "Begley"), a mining engineer with Penn, that Energy would have to do the following things in order to continue operating the Isaac's Run and the 105-A Mines: 1) cure all Notices of Violation issued by the DEP, which included allowing the operation to remain inactive for excess of thirty (30) days without obtaining inactive status because of a failure to maintain insurance; and 2) sign a MR-19 Operator Reassignment to whatever operating entity would go in to operate the mine. Tr. p.190-191 July 23, 2004, Hearing. With respect to the 106-A mine, it was Begley's opinion that Dominick's refusal to execute "some minor Article 3 on the MPDS permits that required EMC authorization" would result in the potential for Penn to lose a significant amount of coal. The modifications would permit the operator to penetrate into an existing abandoned coal mine to establish a header to get to additional coal. Tr. p. 194 July 23, 2004, Hearing. Dominick, on behalf of Energy, responded to the Notice of Default, indicating Virgil was responsible for all the problems. Tr. p. 195 July 23, 2004, Hearing and Plaintiffs' Exhibit No. 12 to that Hearing.

In response to questioning as to why Energy did not obtain general liability insurance to satisfy the violation, Dominick testified: "Energy Market wanted the properties vacant they won't have insurance." Tr. p. 110, 163 July 23, 2004, Hearing. Dominick admits that Cherokee obtained insurance for two years: 2001 and 2002. The DEP violation notice also asserts reclamation of a refuse pond which contains fine coal has not been done. Dominick testified he was working with the DEP to permit him to remove and sell the fine coal and, thereafter, reclaim the pond. Tr. p. 164 July 23, 2004, Hearing.

Begley further testified that a default by Energy would not affect Roblee in the mine it was

operating because Penn had a direct relationship (lease) with Roblee. Tr. p. 208 July 23, 2004, Hearing.

Defendants' Exhibit 4 is a Notice by DEP, asserting that, in addition to a failure to submit proof of insurance on an annual basis, another serious violation was that roads were not properly maintained. Tr. p.164 July 23, 2004, Hearing.

Wolfe testified that, with respect to Isaac's Run, absent Dominick's signature in behalf of Energy on the NPDES Permit, the mine permit would be revoked by the DEP and reclamation would be ordered. According to Wolfe, this would result in the remaining coal covered by the Isaac's Run Permit not being mined unless a new permit would be obtained. Wolfe estimated that approximately one-hundred-ninety-three thousand (193,000) tons of Redstone coal could be lost if the rehabilitation required is not done before the next change in weather cycle (winter). In addition, Wolfe testified that the Pittsburgh coal could be adversely affected if the Redstone seam of coal is not rehabilitated and mined. Plaintiffs' Exhibit 28.<sup>9</sup>

With respect to the Pittsburgh coal in the 105-A area, Wolfe testified that it was not permitted, and he had not prepared a permit application for Virgil to mine that coal. He stated he had begun the process of revising or amending the existing permit to "slope down" from the existing Redstone coal workings into the Pittsburgh seam of coal. This would allow the mining operation

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<sup>9</sup>As Wolfe explained in his testimony, the area enclosed by the orange line represents the coal operations at Isaac's Run by Rauer to 1996. That area has been open for ten (10) years and, due to mine weathering, is in need of rehabilitation. The area enclosed by the red line on Exhibit 28 represents the area of the Isaac's Run mine operation by Global under Dominick to 2001. According to Wolfe, it, too, needs to be rehabilitated prior to another weather cycle (winter) to facilitate future mining. The area enclosed by the green line on Exhibit 28 represents the area mined by Signal between January 2001 and September 2003. It is the blocked areas outside and outlined in light gray that constitutes the remaining estimated 193,000 tons of recoverable coal at the Isaac's Run site.

to use the Redstone portal. It is much less expensive, does not disturb the surface as construction of a new portal would, and would be easier to get approved by the DEP.

Wolfe testified the 106-A mine permit as last operated by Bishoff was in good standing.

Wolfe testified the 108-I permit needed haul road maintenance and repair, including installation of a culvert pipe. Referring to Plaintiffs' Exhibit 31, Wolfe testified: 1) the area enclosed by an orange line on Exhibit 31 represented mining by Rauer from 1993 to 1995; 2) the area enclosed by a red line on Exhibit 31 represented mining by Global between 1995 and 2001; and 3) the area enclosed by a green line on Exhibit 31 represented mining by Roblee from May 2001 to October 18, 2004. Wolfe testified there were approximately three-hundred-five-thousand (305,000) to four-hundred-ten-thousand (410,000) tons of recoverable Redstone coal left, which, at a rate of extraction of fifteen thousand (15,000) tons per month, would permit mining operations in the Redstone seam to continue for approximately nine (9) to ten (10) months. Wolfe also testified that the Pittsburgh seam of coal in the 108-I permit lay thirty-five (35) to forty-two (42) feet below the Redstone seam of coal and was available to mine. He estimated 271,778 tons of recoverable Pittsburgh coal under the permit and an additional 340,826 tons of recoverable Pittsburgh coal to the south of the permit where a new portal is under construction. Plaintiffs' Exhibit 32. Wolfe further testified that the Pittsburgh coal in the 108-I permit was part of the reserve coal discussed in his presence by Dominick and Virgil in 2001.

Wolfe also testified the Century Reserve of nine and one-half (9.5) million tons of coal was discussed with Dominick and Virgil as coal to be developed under their agreement. This discussion initially took place in the presence of Wolfe in 2001 and again in January 2003. Coffman was present during the January 2003 discussions. At that time, the discussion centered around

development of a portal into the Century Reserve. According to Wolfe, a site for that portal was actually selected.

According to the testimony of Wolfe, at no time, up to the present litigation, and certainly when the parties were discussing a portal opening in the Century Reserve, was Wolfe aware that Energy had conveyed away its interest in the Century Reserve coal, as well as all of its interest in the Pittsburgh coal under 105-A, 106-A and Isaac's Run to Gebruder by agreement dated July 1, 2001.

Wolfe testified that these reserves were the same reserves discussed and subjected to the 2001 agreement between Dominick and Virgil. Plaintiffs' Exhibit 33. The July 1, 2001, agreement contains the following provision:

12. Neither party hereto shall record this Agreement without the prior written consent of the other party hereto. Either party shall, upon the request of the other party, execute and acknowledge a "short form" memorandum of this Agreement for recording purposes in accordance with West Virginia law. Such memorandum shall contain no more than necessary in order to give constructive notice to third parties of any additional leasehold estates granted to EMC hereunder, and shall, in no case, contain any of the economic terms and provisions hereof.

The agreement also contained an Exhibit B, which provided for a right of first refusal to Energy to purchase coal offered for sale by Marion Docks, Inc., an entity designated by Gebruder as the future lessee of the coal. Plaintiffs' Exhibit 33. Dominick confirmed to Foos, by faxed memorandum, dated October 30, 2002, that Kevin Bealko "gave Research the first refusal and the exclusive authority to offer the sale of coal." The last sentence of the memo states: "In any event, I do have the rights of 50% of all the coal produced on the properties." Foos' Exhibit 10.

Jeran of Roblee testified that Dominick talked to him several times about eliminating Virgil and Cherokee from the picture and instead dealing directly. Jeran testified that he tried to convince

Dominick that the coal from the 108-I mine needed to be cleaned before being shipped to the power plant consumers and that Virgil had a coal washing plant set up that was doing that.

Johnny Bishoff, of Bishoff, testified Dominick stopped at the 106-A mine from time to time to ask how things were going. Approximately six (6) or seven (7) months prior to the October 2004 hearing, Dominick asked Johnny Bishoff if he “would stay if something would happen.” Johnny Bishoff testified that he ask Dominick what was going to happen, but that Dominick did not tell him what was going to happen or what he meant by the statement.

***Harm***

Foos testified that if Dominick was permitted to force Virgil and his contract miners off the coal properties that are the subject of the within litigation and thereby cut off the coal shipments to Conectiv (Atlantic) - England Station, Constellation (Baltimore Gas & Electric) - C.P. Crane Station, First Energy - East Lake and Mirant (Potomac Electric) - Chalk Point/Morgantown as shown by Foos' Exhibit 4, his company would be forced into bankruptcy because of the liquidated damages claims it would suffer by its failure to honor purchase orders it obtained in reliance on the representations of Dominick and that there is a strong likelihood of rolling blackouts on portions of the East Coast of the United States served by electric utilities dependent on the coal, particularly if the coming winter is cold.

In support of this conclusion, Foos testified that the electric utility coal supply market is very tight. There is little coal to meet demand. He testified that eastern utility companies have, on average, a supply of thirty (30) days. Atlantic is down to a seven (7) day supply and is calling him daily asking for coal. In further support of his testimony and his conclusions, he offered Plaintiffs' Exhibit 25, an email he received October 15, 2004, from DiGregorio of Conectiv.com, which stated:

“Please be advised that the current coal inventory at B. L. England is down to approximately 15,000 tons which equates to 7 days burn availability. It is imperative that Rawhide continues to ship their contracted tonnage to this plant on a timely basis as any interruption of coal shipments could prove disastrous given the extremely low inventory on the pile. The present coal inventory is at it’s lowest level in the history of B.L England at this time of year when we should be building the pile for winter. As you know this is a regulated plant in New Jersey and I am extremely concerned of the runout threat which would incur the wrath of the New Jersey regulatory commission in addition to PJM and FERC investigations/lawsuits etc...”

Foos also testified to shortages at other end run electric utility users of coal. He related that Constellation ran out of coal and covered it up by paying over one-hundred dollars (\$100.00) per ton for coal from New Orleans when that coal should have cost thirty dollars (\$30.00) per ton. Foos stated his company provided one-third (1/3) of the coal used by Constellation but has had to cut that back by 50% or to approximately one-sixth (1/6) of the coal needed.

With respect to Foos’ Merrit customer, Foos testified he had turned down a direct request to advance the shipment of coal from the end of the month to the beginning of the month in return for a cash payment of ten-thousand dollars (\$10,000.00) over the cost of the coal.

Foos testified that, in his experience, an inventory of twenty (20) days was a crisis.

Based on information contained in an industry publication, Foos’ Exhibit 1, Foos concluded that the current crisis is the result of three factors:

- 1) Rail transportation problems – delay in getting available coal from the suppliers to the users.
- 2) A projected 1% increase and a protected 2.5% increase in the demand for power generation coal in 2004 and 2005 respectively.
- 3) Coal supplies are tight and there is no surplus.

Jeran of Roblee testified that, as of the November 2004 hearing, there remained approximately four-hundred-thousand (400,000) tons of Redstone coal that could be mined and was

being mined by his company at the rate of forty-thousand (40,000) raw tons per month and that the Pittsburgh seam of coal was being faced up in order to commence mining operations. He indicated that Dominick has approached him to continue the mining operations for Dominick. However, Jeran testified he preferred to work for Virgil. In the event the mine was forced to cease operations, Jeran testified: his company would be forced into bankruptcy because of the investment it has made in the mine exceeds what it has made to date in return; the forty (40) miners his company employs at the 108-I mine would be laid off; and the remaining coal in the mine may not be recovered.

Johnny Bishoff testified that if Dominick were permitted to continue to refuse to execute the required MR-19: 1) he and his brother would probably lose everything for which they had worked because they had tied eighty-thousand dollars (\$80,000.00) of their own money up in the mine and were still obligated to Cherokee and Virgil for part of the start-up money that had been borrowed<sup>10</sup>; 2) their fourteen (14) employees would be laid off; and 3) the ability to reach approximately three-hundred-thousand (300,000) tons of additional coal using exiting mine working may be lost. Johnny Bishoff testified that the above losses are real and possible because, on October 14, 2004, the Department of Natural Resources issued a letter which threatens closure of the mine.

### **III ISSUES PRESENTED**

- 1) Was an agreement reached between Dominick and Virgil?
  - A. Who were the parties to any such agreement?
  - B. What was the subject matter of such agreement?

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<sup>10</sup>Johnny Bishoff testified he paid \$0.75 on every ton of coal shipped toward the \$271,000.00 loan and that he estimated he still owed \$140,000.00 on that loan plus something on the \$115,000.00 loan.

- C. What was the term of such agreement?
  - D. What were the obligations of the parties to such an agreement?
  - E. What consideration, if any, was there for such an agreement?
- 2) Was there part performance which defeats a claim that any oral agreement is barred by the applicable statute of limitations?
  - 3) Is Dominick estopped from avoiding any agreement with Virgil?
  - 4) Are the corporations of Research, Energy, and Credible the alter egos of Dominick and should their corporate veils be pierced for purposes of the motion for injunctive relief?
  - 5) Did Dominick give Virgil authority to sign documents required by the DEP in the name of Energy?
  - 6) Did Dominick have the power to revoke any authority he gave to Virgil to sign documents required by the DEP in the name of Energy?
  - 7) Are Plaintiffs required to exhaust administrative remedies prior to seeking injunctive relief?
  - 8) Are the Plaintiffs entitled to injunctive relief against Dominick?
    - A. Is there a likelihood of irreparable harm to the Plaintiffs if the preliminary injunction is denied?
    - B. Is there a likelihood of harm to the Defendants if the requested relief is granted?
    - C. Is there a likelihood that the Plaintiffs will succeed on the merits in this civil action?
    - D. What public interest is involved in the granting or denial of the requested injunctive relief?
  - 9) What bond is appropriate?

#### IV APPLICABLE LAW

##### *Statute of Frauds*

West Virginia statutory law provides: “No action shall be brought . . . (f) Upon any agreement that is not to be performed with a year . . . Unless the offer, promise, contract, agreement, representation, assurance, or ratification, or some memorandum or not thereof, be in writing and signed by the party to be charged thereby or his agent. But the consideration need not be set forth or expressed in the writing; and it may be proved (where a consideration is necessary) by other evidence.” W. Va. Code § 55-1-1. West Virginia Code §36-1-3 provides: “No contract for the sale of land, or the lease thereof for more than one year shall be enforceable unless the contract or some note or memorandum thereof be in writing and signed by the party to be charged thereby, or by his agent. But the consideration need not be set forth or expressed in the writing, and it may be proved by other evidence.”

Coal in place (not mined and thereby converted to personal property) is subject to the West Virginia statute. *Blair v. Dickinson*, 133 W.Va. 38, *cert. denied*, 338 U.S. 904, 70 S. Ct. 306, 94 L. Ed. 556 (1949).

The statute of frauds is designed to prevent fraud and, therefore, must not be used to perpetrate a fraud. *Cottrell v. Nurnberger*, 131 W.Va. 391 (1948). Even though an oral contract for the sale or lease of land is within the statute requiring it to be in writing and signed to be enforceable, the conduct of the party asserting the protection of the statute may stop him from asserting that protection. *Ross v. Midelbrug*, 129 W. Va. 851 (1947). “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and

which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires. In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence; (d) the reasonableness of the action or forbearance; (e) the extent to which the action or forbearance was foreseeable by the promisor.” *Everett v. Brown*, 174 W.Va. 35 (1984). In *Everett*, the West Virginia Supreme Court of Appeals held that a real estate agency was entitled to its claimed commission on the sale of a house even though the real estate listing contract had expired because the sellers had thereafter orally encouraged the real estate company complete the sale of their home, and the real estate company, in reliance thereon, did obtain a qualified buyer.

If there has been a clearly proved agreement, which is accompanied by the giving of possession of the realty which is the subject of the agreement and thereafter valuable improvements are placed on the property in reliance on the agreement or it is so far executed that it would be inequitable to refuse specific performance, then the agreement may be enforced notwithstanding the absence of a written agreement signed by the party to be charged. *Blair v. Dickinson, supra*. The pre-requisite is that the terms of the alleged verbal contract for the sale of real estate must be established by full, clear and convincing evidence. *Ice v. Ice*, 119 W.Va. 409 (1937).

### ***Judicial Admission***

Any admission of a contract made in the course of judicial proceedings will render the statute of frauds inoperative. The “judicial admission” exception is read broadly to include even parol admissions in depositions or in open court. *Timberlake v. Heflin*, 180 W.Va. 644 (1989).

### ***Part Performance and Equitable Estoppel***

Even though a contract for the conveyance of an interest in real estate be not in writing and signed, part performance made in good faith may be sufficient to take the matter out of the statute of frauds. *Bourn v. Dobbins*, 92 W.Va 263 (1922):

A corporation makes an oral sale of certain growing locust trees on its land, in consideration that the purchaser permit it to use certain lands under his control as a right of way for a tram road; the corporation uses the right of way until it has finished its work, and permits the purchaser to enter upon its lands, to cut the locust trees, and to haul a portion thereof away. The contract has become executed; and the purchaser, though the contract has thereafter been revoked by the corporation, has title to the severed trees, and the right to enter and remove them.

See also *Boyd v. Brown*, 47 W.Va. 238 (1899) and *Snyder v. Martin*, 17 W.Va. 276 (1880) for the proposition that: “A purchaser of land by parol contract, which has been so far executed as to vest in him the right to compel his vendor to execute the parol contract in a court of equity, has an equitable right in said land so purchased, which a court of equity will fully protect against the lien of a subsequent judgment creditor of his vendor.”

Possession, coupled with the subsequent making of actual improvements on the land in detrimental reliance on the verbal promise of conveyance, may be sufficient for a court of equity to remove the matter from the protection of the statute of frauds and specifically enforce the verbal agreement. *Frame v. Frame*, 32 W.Va. 463 (1889). This principle follows when the agent relies

on the representations of the principal and expends funds in the interest of the agency and his principal. Rather than permitting the principal to cut off the authority of his agent, the law favors permitting the agency to continue so the agent can recoup his investment. *Allied Equip. Co., Inc. v. Weber Engineered Prods., Inc.*, 237 F.2d 879, 882 (4<sup>th</sup> Cir. 1956). The West Virginia Supreme Court of Appeals re-iterated that an agreement to transact business can be made irrevocable and binding upon the principal if there is “consideration independent of the compensation to be rendered for the services to be performed.” *Angle v. Marshall*, 55 W.Va. 671, 47 S.E. 882, 885 (1904). “Where a party with full knowledge of his right and all material circumstances freely and advisedly does anything which amounts to a recognition of a transaction, or acts for a considerable length of time in a manner inconsistent with its repudiation, there is acquiescence, and the transaction, although originally impeachable, may thereby become unimpeachable.” *Drake v. Obrien*, 99 W.Va. 582 (1925).

### ***Corporate Veil - Piercing***

“The law presumes . . . that corporations are separate from their shareholders.” *Southern Electrical Supply, Co., v. Raleigh County National Bank*, 173 W.Va. 780 (1984). “While, legally speaking, a corporation constitutes an entity separate and apart from the persons who own it, such is a fiction of the law introduced for purpose of convenience and to subserve the ends of justice; and it is now well settled, as a general principle, that the fiction should be disregarded when it is urged with an intent not within its reason and purpose, and in such a way that its retention would produce injustices or inequitable consequences.” *Sanders v. Roselawn Memorial Gardens, [Inc.]*, 152 W.Va. 91 (1968). “In a case involving an alleged breach of contract, to ‘pierce the corporate veil’ in order to hold the shareholder(s) actively participating in the operation of the business personally

liable for such breach to the party who entered into the contract with the corporation, there is normally a two-prong test: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and of the individual shareholder(s) no longer exist (a disregard of formalities requirement) and (2) an inequitable result would occur if the acts are treated as those of the corporation alone (a fairness requirement).” *Lala v. Erin Homes, Inc.*, 177 W.Va. 343 (1986).

### ***Authority***

“The authority of an agent to bind his principal upon a contract required to be in writing need not be in writing. Code 1931, 36-1-3.” *Gallagher v. Washington County Savings, Loan & Buld. Co.*, 125 W.Va. 791 (1943).

### ***Preliminary Injunctions***

The Fourth Circuit of Appeals has recognized that “preliminary injunctions are extraordinary remedies involving the exercise of a very far-reaching power to be granted only sparingly and in limited circumstances.” *Microstrategy, Inc., v. Motorola, Inc.*, 245 F.3d 335, 339 (4<sup>th</sup> Cir. 2001)(quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4<sup>th</sup> Cir. 1992)(internal quotation marks omitted).

In *Blackwelder Furniture, Co., v. Seilig Mfg. Co., Inc.*, 550 F.2d 802 (4<sup>th</sup> Cir. 1977), *Rum Creek Coal Sales, Inc., v. Caperton*, 926 F.2d 353 (4<sup>th</sup> Cir. 1991) and *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802 (4<sup>th</sup> Cir. 1991), the Fourth Circuit established four factors which courts must consider in granting a preliminary injunction. Those factors are:

- (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied;
- (2) the likelihood of harm to the defendant if the requested relief is granted;
- (3) the likelihood that the plaintiff will succeed on the merits, and
- (4) the public interest.

*Direx Israel*, 952 F.2d at 812 (citing *Rum Creek*, 926 F.2d at 359). Additionally, the “[p]laintiff bears the burden of establishing that each of these factors supports granting the injunction.” *Id.*, (quoting *Technical Publishing, Co., v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7<sup>th</sup> Cir. 1984).

In evaluating the relative importance of each of the factors, the *Direx Israel* court held that, “[t]he ‘likelihood of irreparable harm to the plaintiff’ is the first factor to be considered in this connection.” *Id.* The *Direx Israel* court continued that if the “plaintiff makes ‘a clear showing’ of irreparable injury absent preliminary injunctive relief,” a district court must then balance the likelihood of irreparable harm to the plaintiff without an injunction against the likelihood of harm to the defendant with an injunction. *Id.*; see also *Blackweilder*, 550 F.2d at 195. Then, if after weighing the respective harms, the balance weighs in plaintiff’s favor, the plaintiff need not show a likelihood of success; plaintiff need only show that grave or serious questions are presented by plaintiff’s claim. *Id.* at 195-196; see also *James Merritt & Sons v. Marsh*, 791 F.2d 328, 330 (4<sup>th</sup> Cir. 1986). Although particular attention appears to be given to the first of the three factors, the Fourth Circuit has also made clear that, “[a]lways, of course, the public interest should be considered.” *Blackweilder*, 550 F.2d at 196. However, as the *Blackweilder* court continued, “[t]he two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with the decree.” *Id.*

The issuance of a preliminary injunction is committed to the sound discretion of the district court. *Conservation Council of North Carolina v. Costanzo*, 505 F.2d 498, 502 (4<sup>th</sup> Cir. 1974).

Pursuant to the Federal Magistrates Act, the majority of federal courts have taken the position that the Act authorizes the reference of a pretrial motion seeking injunctive relief to a magistrate judge to conduct hearings and submit to the district judge a report containing proposed findings of fact and recommendations for disposition, but not a determination or entering of judgment. See

*Jeffrey v. State Board of Education*, 896 F.2d 507 (Ga., 1990)(holding that a federal magistrate judge had properly conducted a pretrial hearing regarding the request for preliminary injunction within his jurisdiction under § 636(b)(1)(B) of the Federal Magistrates Act); *Fink v. Ylst*, 1995 US App LEXIS 20575 (9<sup>th</sup> Cir., 1995)(unpublished)(attached); *Berry v. McBride*, 86 Fed. Appx. 620 (4<sup>th</sup> Cir. 2004)(unpublished)(attached).

If a preliminary injunction is granted, the order granting the same must “set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts to be restrained.” *See* Fed.R.Civ.P. 65(d).

“No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.” Fed.R.Civ.P. 65(c).

## V DISCUSSION

### *Agreement*

The undersigned concludes from the law and a preponderance of the evidence presented that there is clear and convincing proof that an oral agreement specific in its essential terms was entered into between Dominick and Virgil in late 2000. *Blair, supra*. The agreement encompassed all of the coal Dominick owned or controlled in North Central West Virginia. Dominick represented he owned approximately twenty (20) million tons of coal which he had acquired from Rauer in the mid-

1990's. Wolfe was present at the meeting and participated in the discussions showing the coal on mine maps he had prepared and used in the days between 1995 and 2000 when the mine properties had been worked by Dominick through Global. The coal properties included: Permit UO401 = Isaac's's Run; U2484 = 106-A; U885 = 108-I; UO520 = 105-A; and U7483 = 105 East Portal and 102 Tipple combined. Under the agreement, Virgil was to mine and process the coal and Dominick was to find markets for and sell the coal. The term of the agreement as contemplated by the parties was the period of time it would take to mine the coal located in the already permitted locations and in the reserves. At the time of the parties agreement, the period of time contemplated was between fifteen (15) and twenty (20) years. Dominick instructed his attorneys, Kirkpatrick and Lockhart, to prepare a written document encompassing the agreement. That was done, but Virgil refused to sign it because it required him to pay Kirkpatrick and Lockhart's fees; gave Dominick exclusive sales right on all coal processed across the 102 Tipple and did not limit it to Dominick's coal processed across that tipple; and did not have the financial terms of the agreement filled in. No other term of the agreement was in dispute.

***Judicial Admission***

The undersigned concludes from the law and a preponderance of the evidence presented that there is clear and convincing proof, including Dominick's admission during his under-oath testimony in the July, 2004, hearing on his motion for a preliminary injunction, that he had an understanding in his mind of what his deal was with Regal as a result of discussions he had with Virgil and his father in the Pittsburgh lawyer's offices. Tr. p. 159 (lines 19-25) and 160 (lines 1-25). *Timberlake, supra.*

### *Part Performance*

The undersigned concludes from the law and a preponderance of the evidence presented that there is clear and convincing proof that following the Pittsburgh meeting and in reliance on the verbal agreement reached during the meeting:

- 1) Virgil activated Cherokee to secure contract miners to mine the coal.
- 2) Virgil initiated the DEP process of getting approval for Cherokee to act as the assigned operator on the subject coal properties on behalf of the permittee, Energy, a company owned by Dominick by signing and filing:
  - A) Request For Advance Approval Of Operator Assignment (MR-19) on November 13, 2000.
  - B) Application for Change in Permit Responsibility on November 13, 2000.
- 3) DEP approved the requested Operator Assignment on March 28, 2001.
- 4) Cherokee entered into coal production contracts with:
  - A) Roblee, dated April 30, 2001, to mine and remove the Pittsburgh and Redstone seams coal from the 108-I mine.
  - B) Signal, dated January 16, 2001, to mine the Dominick coal at Isaac's's Run.
  - C) Fairmont (Bishoff), dated April 1, 2002, to mine the coal in the Redstone seam at the 106-A mine. *Bourn, Boyd and Snyder, supra.*
- 5) Roblee invested several hundred-thousand dollars to refurbish and reopen the 108-I mine in 2001. *Bourn, Boyd and Snyder, supra.*
- 6) Roblee started mining coal from the 108-I mine in July 2001. *Bourn, Boyd and Snyder, supra.*

- 7) Fairmont, through Bishoff, built one canopy, and Cherokee built the other canopy at the 106-A mine. *Bourn, Boyd and Snyder, supra.*
- 8) Virgil arranged for a loan of approximately \$271,000.00 for supplies and wages to Fairmont to get the mine at 106-A started. *Bourn, Boyd, Snyder and Angle, supra.*
- 9) Virgil loaned another \$100,000.00 to install electric to the 106-A mine. *Bourn, Boyd, Snyder and Angle, supra.*
- 10) Virgil performed, or caused to be performed, other remedial measures at other Dominick permits and sites to correct the DEP violations in order to prevent permit blockage. *Bourn, Boyd, Snyder and Frame, supra.*
- 11) Virgil refurbished the tipple for the processing of the coal being mined from Dominick's permits. *Bourn, Boyd and Snyder, supra.*
- 12) Virgil, through Cherokee, and its contract miners mined coal from the Dominick permits from 2001 to date. *Bourn, Boyd, Snyder and Frame, supra.*
- 13) Dominick, through Foos, secured purchase orders for the coal being produced from his permits by Virgil. *Bourn, Boyd and Snyder, supra.*
- 14) Dominick confirmed the authority of Foos to enter into coal purchase orders by his letter dated April 11, 2003 (Foos' Exhibit 6).
- 15) Dominick re-confirmed Foos' authority to enter into coal purchase orders by his letter dated July 3, 2003, (Foos' Exhibit 7) and, in that letter, confirmed the agreed to long-range goal for coal contracts up to fifteen (15) or twenty (20) years.
- 16) Dominick, through Foos, sold coal from the mines and permits in question to eastern utility

consumers from 2001 to date and remitted money from those sales to Dominick through one of the companies he controlled.. *Bourn, Boyd and Snyder, supra.*

***Authority***

Dominick argues he never gave any authority to Virgil to sign his name or the name of his company, Research, to any DEP MR-19's or other documents.

The undersigned concludes from the law and a preponderance of the evidence presented that there is clear and convincing proof that such an argument is not credible; is not supported by any reasonable interpretation of the facts; and flies in the face of:

- 1) Dominick's prior practice of having his engineer, Wolfe, and/or his accountant, Frashure, and Coffman at Global sign MR-19's, other DEP documents and checks in his name on behalf of Energy.
- 2) Wolfe's credible testimony that he was present at the meeting when Dominick told him that Virgil had authority to sign his (Dominick's) name as officer of Energy to the MR-19 authorizing Fairmont to mine at the 106-A mine.
- 3) The March 8, 2001, letter from Dominick to Wiles (of the Office of Mining and Reclamation) stating that Virgil was fully authorized and personally assumed responsibility to act and direct any and all the requirements needed to comply with overall Energy permits.

In addition, there can be no question, under the clear and convincing preponderance of the evidence presented at the combined hearings, that Virgil took possession of the coal properties, made improvements, and operated and mined coal for two (2) or more years under the authority extended to him by Dominick, thereby coupling authority with an interest. *Drake v. O'Brien*, 99 W.Va. 582 (1925) and *Gallagher, supra.*

### *Corporate Veil - Piercing*

Dominick asserts it was his company, Research, that was responsible for marketing and selling the coal 1) developed (mined) by one of his companies, Energy, and 2) owned by another of his companies, Credible.

The undersigned concludes from the law and a preponderance of the evidence presented that there is clear and convincing proof that Dominick is the alter ego of Energy, Research and Credible based, in part, on the following:

- 1) Research only has two (2) employees: Dominick and his son, Derek.
- 2) Energy only has one (1) employee: Dominick.
- 3) Credible only has two (2) employees: Dominick and his son, Derek.
- 4) Dominick controlled and directed all acts of each of his corporations.
- 5) Dominick signed documents interchangeably on letterheads of his companies relating to the coal that is the subject of this litigation. He used Energy letterhead on some CPO's (coal purchase orders) and Research letterhead for other CPO's.
- 6) Dominick signed some documents relating to the coal that is the subject of this litigation in his individual capacity rather than in his position as officer of the company.
- 7) Research paid Virgil for coal shipped pursuant to CPO's executed by Dominick on behalf of Energy.
- 8) Dominick, as president of Energy, executed a Deed and Assignment, dated the 8<sup>th</sup> day of December, 2002, conveying coal properties in Barbour County, Upshur County and Harrison County, including the coal properties involved in the subject litigation, to Credible, another of his companies. In the deed, Dominick declares that "the true and actual value of all

interests in the coal properties conveyed by this deed . . ." to be a total of "\$70,000.00." Plaintiffs' Exhibit 34. This conveyance was made after the dispute erupted between Dominick and Virgil. At the time, Energy was subject to a number of liens, including sizable tax liens which impact its ongoing financial viability, particularly in light of its conveyance of its major asset, the coal properties, to Credible. *Laya, supra*.

### ***Breach***

The undersigned further concludes from the law and a preponderance of the evidence presented that there is clear and convincing proof that, in 2002, after a year and a half of repairs, development, mining, processing and sale of coal by Virgil and a year and a half of income to Dominick from that mining, processing and sale of coal, Dominick deliberately initiated a course of conduct designed to force Virgil from the coal leases. The course of conduct included:

- 1) Cutting off payments to Virgil and thereby cutting off payment to the contract miners who were mining the coal that produced the revenue resulting in their inability to pay their expenses and threatening to cease mining operations.
- 2) Contacting Virgil's contract miners directly to make disparaging remarks about Virgil and to attempt to get them (the contract miners) to mine for him (Dominick) or one of the companies he owned and controlled if he (Dominick) were able to eliminate Virgil. The vituperative nature of the calls is represented by the conversation between Dominick and another individual, Bill Conya, captured on a telephone answering machine at Signal. Plaintiffs' Exhibit 20.
- 3) Contacting Foes to stop payments for the coal being mined and shipped for two (2) months in order to force Virgil out.

- 4) Conveying away coal reserves that were part of the fifteen (15) to twenty (20) million tons of coal available to be mined under the parties' 2001 agreement.
- 5) Refusing to sign or to authorize the signing of DEP required MR-19s.
- 6) Writing to the DEP and filing a MR-19N.

***Irreparable Harm***

The undersigned further concludes from the law (*Blackwelder, supra.*) and a preponderance of the evidence presented that there is clear and convincing proof that to permit Dominick to force Virgil off the leases after inducing him to invest hundreds of thousands of dollars is inequitable, (*Everett, supra.*), particularly in light of the liens against Energy and himself, and will result in irreparable harm that is actual and imminent and not remote or speculative (*Direx Israel, Ltd., v. Breakthrough Medical Corp.*, 952 F.2d 802 (4<sup>th</sup> Cir. 1991) in each of the following particulars:

- 1) Virgil will be forced into bankruptcy because of the money he has advanced to improve the leases and promote mining on the leases has not been repaid, and there will be no way to recoup the same.
- 2) Bishoff Brothers will lose everything they own because they invested eighty-thousand dollars (\$80,000.00) of their own personal resources, and they still owe Virgil approximately one-hundred-forty-thousand dollars (\$140,000) plus on the money Virgil loaned them on the 106-A mine they are operating for Fairmont under its agreement with Virgil; their fourteen (14) employees will lose their jobs; and there is a strong possibility that three-hundred-thousand (300,000) tons of coal that could be mined will be lost.
- 3) Roblee will be forced to lay off forty (40) mine workers it employs at the 108-I mine; would be forced to go bankrupt because it invested several hundred-thousand dollars to reopen the

mine; there is a strong probability that four-hundred-thousand (400,000) tons of Redstone coal would not be mined; and the opportunity to mine the Pittsburgh seam of coal would be lost.

- 4) Foos Coal would default on its purchase order agreements; would lose its good reputation in the coal broker business; and would be forced into bankruptcy.

***Public Interest***

The undersigned further concludes from the law (*Blackwelder, supra.*) and a preponderance of the evidence presented that there is clear and convincing proof that to permit Dominick to force Virgil off of the leases could result in rolling electric black outs on the East Coast of the United States, cutting off thousands in need of electric service during the winter months, resulting in unnecessary regulatory investigations and sanctions by regulatory bodies against utilities failing to provide needed electric service, all resulting from defaulted purchase orders based on coal from Dominick's mines in an environment of extremely tight supply.

***Harm To Dominick LaRosa***

The undersigned further concludes from the law (*Blackwelder, supra.*) and a preponderance of the evidence presented that there is clear and convincing proof that Dominick will suffer no significant harm or damage by the granting of injunctive relief as requested by plaintiffs for the following reasons:

- 1) Permitting plaintiffs to continue to mine the existing mines:
  - a) Is nothing more than Dominick agreed to do in 2001.
  - b) Is nothing more than Dominick has permitted to be done since 2001.
  - c) Involves two companies, Roblee and Bishoff, that Dominick solicited to continue

mining if he were able to eliminate Virgil.

- d) Preserves the existing mining operations and promotes the possibility of the development of future reserves for mining purposes. Simply stated, a mine that is operating is maintained and kept up to standards by inspections of government agencies and is, therefore, worth more than a mine left idle and fallow.
- e) Dominick will still receive the payments he is due under the agreement and regular accountings of coal mined and coal sold.

***Likelihood of Success***

The undersigned further concludes from the law (*Blackwelder, supra.*) and a preponderance of the evidence presented that, notwithstanding that “the balance of harm decidedly favors the plaintiff,” thereby not requiring him “to make a strong showing of a likelihood of success” in the underlying action, there is a strong likelihood that the plaintiff will prevail in the underlying civil action. *James A. Merritt & Sons v. Marsh*, 791 F.2d 328, 330 (4<sup>th</sup> Cir. 1986); *Blackwelder, supra* at 196.

**VI  
RECOMMENDATION**

***Injunctive Relief***

**A.**

For the reasons stated above, it is the **RECOMMENDATION** of the undersigned that Plaintiffs’ Motion For Preliminary Injunction be **GRANTED** and that Defendants be preliminarily enjoined, directly or indirectly, whether alone or in concert with others, including an officer, agent, employee and/or representative of Defendant Dominick LaRosa’s other corporations not named as

parties to this litigation, to wit: Credible and Energy, until the further hearing and order of the Court, from:

1. Interfering with Virgil D. LaRosa, companies he owns and their subcontractor or sublessees, including, but not limited to, Roblee and Bishoff, operation of the 108-I (U-8-85) and the 106-A (U-24-84) mines and the 102 Tipple (U-74-83) and their mining, removal, preparation of, shipping of and sale of coal from said mines and tipple.
2. Taking any steps to terminate Virgil D. LaRosa's authority to operate under the permits numbered U-24-82 (106-A mine), U-8-85 (108-I mine) and U-74-83 (102 Tipple).
3. Taking any steps to terminate any existing purchase orders obtained by Foos, individually or as Foos Coal, for coal mined, processed, shipped and sold from the permits numbered U-24-82 and U8-85 or across the 102 Tipple.
4. Taking any steps to interfere with future purchase orders that may be obtained by Foos, individually or as Foos Coal, for coal mined, processed, shipped and sold from the permits numbered U-24-82 and U8-85 or across the 102 Tipple.
5. Contacting Foos' clients with respect to coal purchase orders that have been previously obtained by Foos or that may be obtained by Foos in the future.
6. Interfering with or preventing Virgil D. LaRosa from executing any MR-19 or other document in the name of Dominick LaRosa , individually and / or as president of Energy, that may be required by the DEP or other regulatory agency for the continued operation of the 108-I (U-8-85) and the 106-A (U-24-84) mines and the 102 Tipple (U-74-83) and the continued mining, removal, preparation of, shipping of and sale of coal from said mines and tipple, if Dominick LaRosa fails, is incapable of or refuses to execute the same pursuant to *B-1* of this Report and Recommendation.

**B.**

For the reasons stated above, it is further the **RECOMMENDATION** of the undersigned that Defendants, directly or indirectly, whether alone or in concert with others, including an officer, agent, employee and/or representative of Defendant Dominick LaRosa's other corporations not named as parties to this litigation, to wit: Credible and Energy, until the further hearing and order of the Court, be **MANDATED** to:

- 1) Within twenty-four (24) hours of the entry of any Order of the District Court adopting this particular recommendation, execute any and all documentation, including but not limited to, MR-19's that may be required by the DEP or other regulatory agency of the United States or the State of West Virginia in order to reinstate the prior authority granted to Virgil D. LaRosa, and/or his designated company, and/or contract miners or lessees acting under his authority, to operate the U-24-84 permit (106-A mine), the U-8-85 permit (108-I mine) and the U-74-83 permit (102 Tipple).
- 2) Within twenty-four (24) hours of the entry of any Order of the District Court adopting this particular recommendation, execute such indemnity agreement which permits Virgil D. LaRosa to indemnify Dominick LaRosa in order to meet the requirements necessary to Virgil D. LaRosa obtaining and maintaining insurance as required by the DEP on any and all of the permits held by Dominick LaRosa individually or through one of his corporations and which were found by the undersigned herein to be a part of the 2001 agreement.
- 3) Within twenty-four (24) hours of the entry of any Order of the District Court adopting this particular recommendation, execute an assignment of all of his rights or interests he has to purchase one-half of the coal mined from the coal reserves which are currently under the control of Penn.

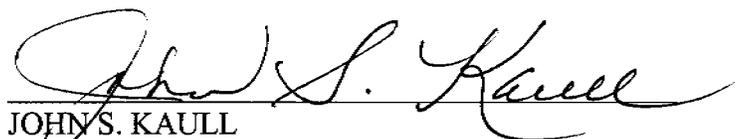
***Bond***

Pursuant to Federal Rule of Civil Procedure 65(c) and based primarily on the evidence of the value Dominick LaRosa placed on his own coal holdings in 2002 prior to the effects of continued mining (Plaintiffs' Exhibit 34), the temporary injunction, if this Report and Recommendation be adopted whole or in part by the District Court, shall be made effective as of the posting of a bond by the Plaintiffs or other security approved by the court in the amount \$35,000.00. See *District 17, United Mine Workers of America v. A&M Trucking, Inc.*, 991 F.2d 108, 109 (4<sup>th</sup> Cir. 1993).

Any party may, within ten (10) days after being served with a copy of this Report and Recommendation, file with the Clerk of the Court written objections identifying the portions of the Report and Recommendation for Disposition to which objection is made and the basis for such objection. A copy of such objections should also be submitted to the Honorable Robert E. Maxwell, United States District Judge. Failure to timely file objections to the Report and Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Report and Recommendation. 28 U.S.C. § 636(b)(1); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984), *cert. denied*, 467 U.S. 1208 (1984); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *Thomas v. Arn*, 474 U.S. 140 (1985).

The Clerk of the United States District Court for the Northern District of West Virginia is directed to provide copies to all counsel of record.

Dated: November 16, 2004

  
JOHN S. KAULL  
UNITED STATES MAGISTRATE JUDGE

## Westlaw

86 Fed.Appx. 620  
 86 Fed.Appx. 620, 2004 WL 232760 (4th Cir.(W.Va.))  
 (Cite as: 86 Fed.Appx. 620, 2004 WL 232760 (4th Cir.(W.Va.)))

Page 1

**H**

## Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

## UNPUBLISHED

Please use FIND to look at the applicable circuit court rule before citing this opinion. Fourth Circuit Rule 36(c). (FIND CTA4 Rule 36(c).)

United States Court of Appeals,  
 Fourth Circuit.

James William BERRY, Sr., Plaintiff--Appellant,  
 v.

Thomas MCBRIDE, Warden, "Newly Appointed";  
 James Rubenstein, Commissioner of  
 Corrections; Michael Coleman, Deputy Warden;  
 Betty Slayton, Magistrate of  
 M.O.C.C.; Carl Shellings, Unit Manager; William  
 Kincaid, Unit Manager;  
 Petrisha Hendsheaw, Postal Sup.; Brian Stump,  
 Correctional Officer;  
 Correctional Medical Services,  
 Defendants--Appellees.

No. 03-7567.

Submitted Jan. 29, 2004.

Decided Feb. 6, 2004.

Appeal from the United States District Court for  
 the Southern District of West Virginia, at Beckley.  
 David A. Faber, Chief District Judge. (CA-02-856).

James William Berry, Sr., Appellant pro se.  
 Charles Patrick Houdyschell, Jr., West Virginia  
 Division of Corrections, Charleston, West Virginia,  
 for Appellees.

Before WILKINSON, MICHAEL, and KING,  
 Circuit Judges.

Affirmed in part; dismissed in part by

unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in  
 this circuit. See Local Rule 36(c).

## PER CURIAM.

**\*\*1** James W. Berry, Sr., seeks to appeal from the  
 district court's order adopting the magistrate judge's  
 recommendation and (1) denying Berry's motion for  
 a temporary restraining order or a preliminary  
 injunction, (2) granting the motion to dismiss filed  
 by Correctional Medical Services, and (3) granting  
 in part the remaining Defendants' motion to dismiss.  
 The district court denied the motion to dismiss this  
 42 U.S.C. § 1983 (2000) action as to Berry's  
 discrimination, retaliation, and Eighth Amendment  
 claims. We affirm in part and dismiss in part.

This court may exercise jurisdiction only over final  
 orders, 28 U.S.C. § 1291 (2000), and certain  
 interlocutory and collateral orders, 28 U.S.C. §  
 1292 (2000). Fed.R.Civ.P. 54(b); *Cohen v.*  
*Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69  
 S.Ct. 1221, 93 L.Ed. 1528 (1949). Except to the  
 extent that Berry appeals from the denial of his  
 motion for a preliminary injunction, the order Berry  
 seeks to appeal is neither a final order nor an  
 appealable interlocutory or collateral order.  
 Accordingly, we dismiss this portion of the appeal  
 for lack of jurisdiction.

With respect to the appeal from the district court's  
 denial of Berry's motion for a preliminary  
 injunction, we have reviewed the record and find no  
 reversible error. Accordingly, we affirm this  
 portion of the appeal for the reasons stated by the  
 district court. See *Berry v. McBride*, No.  
 CA-02-856 (S.D.W.Va. Sept. 25, 2003). We  
 dispense with oral argument because the facts and  
 legal contentions are adequately presented in the  
 materials before the court and argument would not  
 aid the decisional process.

**AFFIRMED IN PART; DISMISSED IN PART**

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Westlaw.

61 F.3d 910 (Table)  
 61 F.3d 910 (Table), 1995 WL 430161 (9th Cir.(Cal.))  
 Unpublished Disposition  
 (Cite as: 61 F.3d 910, 1995 WL 430161 (9th Cir.(Cal.)))

Page 1

## Briefs and Other Related Documents

NOTICE: THIS IS AN UNPUBLISHED  
 OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.

David M. FINK, Plaintiff-Appellant,  
 v.  
 Eddie YLST, Warden, Defendant-Appellee.

No. 94-56730.

Submitted July 17, 1995. [FN\*]

FN\* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Decided July 20, 1995.

Appeal from the United States District Court for the Central District of California, No. CV-94-00590-JSL; J. Spencer Letts, District Judge, Presiding.

C.D.Cal.

Transferred.

Before: FLETCHER, KOZINSKI and  
 THOMPSON, Circuit Judges.

MEMORANDUM [FN\*\*]

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FN\*\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

\*\*1 David M. Fink, a California state prisoner, appeals pro se the magistrate judge's order denying his motion for reasonable law library access. In his underlying 42 U.S.C. § 1983 action, Fink alleges that his civil rights were violated following an incident in which a correctional officer was injured. We dismiss this appeal for lack of jurisdiction.

The power of federal magistrate judges is limited by 28 U.S.C. § 636. A district judge may authorize a magistrate judge to decide nondispositive pretrial matters and to prepare findings and recommendations on dispositive matters. See 28 U.S.C. § 636(b)(1); *Estate of Conners v. O'Connor*, 6 F.3d 656, 658 (9th Cir. 1993). However, a magistrate judge lacks the authority to issue a dispositive order, including an order denying injunctive relief, unless the parties consent to a decision by a magistrate judge. See 28 U.S.C. § 636(c)(1); *Reynaga v. Cammisa*, 971 F.2d 414, 416 (9th Cir. 1992).

Here, the parties did not consent to the magistrate judge's exercise of plenary authority. The magistrate judge therefore lacked the authority to decide Fink's motion for an injunction requiring prison officials to afford him increased library access. See *Reynaga*, 971 F.2d at 416. Because the magistrate judge did not have the authority to enter a final order, Fink's notice of appeal from that order "was a nullity and did not divest the district court of jurisdiction." See *Estate of Conners*, 6 F.3d at 659. In the interest of justice, we transfer this appeal to the district court for further action.

**TRANSFERRED.**

61 F.3d 910 (Table), 1995 WL 430161 (9th Cir.(Cal.)), Unpublished Disposition