

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION**

In re:)	
)	
MOUNTAINSIDE COAL COMPANY,)	Case No. 24-50161
INC.)	
)	Chapter 11
Debtor.)	
)	
)	
In re:)	
)	Case No. 24-50162
TRIPLE 7 COMMODITIES, INC.)	
)	Chapter 11
Debtor.)	

**MOTION TO (I) TRANSFER VENUE, OR (II) ALTERNATIVELY, APPOINT
A CHAPTER 11 TRUSTEE OR CONVERT THE CASE TO CHAPTER 7**

The U.S. Bankruptcy Administrator (the “BA”), under 28 U.S.C. §§ 1406, 1408 and 1412, moves the Court to transfer the venue of this case to the Eastern District of Kentucky, or alternatively, to appoint a chapter 11 trustee under 11 U.S.C. § 1104 or convert the case to chapter 7 under 11 U.S.C. § 1112(b). In support of this request, the BA states as follows:

SUMMARY

The corporate debtors filed these bankruptcy cases without counsel, contrary to well-established federal law and this Court’s Local Rule 1002-1(b). The customary remedy in such circumstances is dismissal. However, there are credible allegations of mismanagement, fraudulent transfers, and continuing depletion of assets by the debtors. Dismissal of the case may only aid efforts to hinder and delay

creditors. Additionally, there appear to be many varied creditors with claims totaling millions of dollars. Certain unsecured creditors have asserted that the debtor's coal washing plant could be reopened and operated at a profit. The appointment of a chapter 11 trustee or conversion of these cases to chapter 7 would better serve the interests of creditors.

That said, the debtors' businesses and assets are in Kentucky and West Virginia. The limited information available suggests that venue in this district is improper. Decisions about the future of these cases should be made in a proper venue, and venue should be transferred to the Eastern District of Kentucky.

BACKGROUND

1. The Court has jurisdiction over this case under 28 U.S.C. § 1334. Under 28 U.S.C. § 157(a), the United States District Court for the Middle District of North Carolina has referred these cases to this Court by its Local Rule 83.11. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2).

2. The debtors filed voluntary petitions under chapter 11 on March 1, 2024. Both debtors are corporations, and the cases were filed *pro se* by Damian Caldwell. It is well established, as set forth in this Court's show cause orders, that businesses can not represent themselves in bankruptcy cases.

3. The petitions for both Mountainside Coal Company, Inc. ("Mountainside") and Triple 7 Commodities Inc. ("Triple 7") indicate that the principal place of business for each debtor is 313 Ashford Court, Winston-Salem, NC 27103. However, Forsyth County tax records suggest this is residential property in

Damian Caldwell's name.¹ As discussed below, the weight of available evidence suggests that the principal place of business for each debtor is not in North Carolina.

4. Mountainside is a Tennessee corporation formed in 1982, according to the Tennessee Secretary of State's website.² Mountainside's petition indicates that its principal assets are at 5540 Hwy 1809, Barbourville, KY 40906. This address is also listed as Mountainside's principal office with the Tennessee Secretary of State.

5. Triple 7 is a West Virginia corporation formed in 2016, according to the West Virginia Secretary of State's website.³ Triple 7's petition indicates that its principal assets are at 1969 Yeshua Acres Road, Welch, NC 24801. However, this must be a typo. There is no Welch, NC, and 24801 is the zip code for Welch, WV. Additionally, Triple 7 filings with the U.S. Securities and Exchange Commission in 2020 identify its principal place of business as 1969 Yeshua Acres Road, Welch, WV 24801.⁴

6. There is conflicting information regarding Triple 7's principal place of business. According to the Kentucky Secretary of State's website, Triple 7's principal office is located at 5540 KY 1890, Barbourville, KY 40906. However, as discussed above, the debtor's SEC filings place the debtor's principal place of business in West Virginia.

¹ <https://lrcpwa.ncptscloud.com/forsyth/PropertySummary.aspx?REID=6803598516000> (last accessed March 6, 2024).

² <https://tnbear.tn.gov/Ecommerce/FilingDetail.aspx?CN=091152103195003035127192222114136035008116240112> (last accessed March 6, 2024).

³ <https://apps.sos.wv.gov/business/corporations/organization.aspx?org=358105> (last accessed March 6, 2024).

⁴ https://www.sec.gov/Archives/edgar/data/1785755/000149315220003215/xslFormDX01/primary_doc.xml (last accessed March 6, 2024).

7. Further conflict can be found in the West Virginia Secretary of State's records, which identify Triple 7's principal place of business as 313 Ashford Court, Winston-Salem, NC 27103. But a search of the North Carolina Secretary of State's website reveals no records for either Triple 7 or Mountainside. See Exhibit A.

8. In August 2023, a group of creditors (the "Spoltore Creditors") filed suit against the debtors, Damian Caldwell, and an entity called GME Mining & Reclamation Inc., in the U.S. District Court for the Eastern District of Kentucky, Case No. 6:23-cv-00143-REW-HAI. In January, 2024, the plaintiffs filed the attached motion to appoint a receiver, alleging, *inter alia*, that (i) the debtors had multiple creditors, including various default judgments, totaling millions of dollars, (ii) the debtors had "siphon[ed] assets out of Triple 7" and transferred money to Damian Caldwell or entities he controlled, and (iii) that Mountainside's coal wash plant "has been sitting idle for months due to mismanagement." A copy of the motion, with support exhibits and affidavits, is attached as Exhibit B.

9. The Spoltore Creditors' motion alleges that "nearby coal mines had already ceased washing their coal with [Mountainside] because it was misrepresenting ash content," and that in November 2023, the Kentucky Department of Natural Resources "revoked [Mountainside's] permit for operating the plant due to numerous violations and imposed a series of fines." *Id.* at p. 8.

10. The Spoltore Creditors, who appear to be largely or entirely unsecured creditors, argued that "there remains a demand in the marketplace for washed coal, and this plant remains a fully operational facility which could be brought back

online in short order.” *Id.* They argued that the plant could be reopened and operated profitably for the benefit of creditors. *Id.* at pp. 8-9. These allegations are supported by various exhibits submitted in connection with the motion, including the declarations of Myron McCoy and Edward Brantley.

11. At the time of the filing of this bankruptcy case, there was another motion for the appointment of a receiver for Mountainside pending in Kentucky state court, brought by a secured creditor. It asserts, *inter alia*, (i) many varied financial defaults to the secured creditor and other creditors, (ii) that Mountainside had failed to provide financial and operational information about its business, (iii) that Mountainside has no casualty or liability insurance for its coal washing plant, and (iv) that Mountainside had its operating permits terminated by the Kentucky Department of Natural Resources. A copy of the motion, together with supporting affidavits, and a supporting pleading filed by another secured creditor, are attached as Exhibit C.

ARGUMENT

Although the customary response to a *pro se* business case is dismissal, this case presents unique facts. There appear to be meaningful assets, and various secured and unsecured creditors owed millions. There are credible allegations of mismanagement and fraudulent transfers. Two different receivership motions were pending as of the petition date, and at least some creditors believe operations should be resumed to maximize value. Under these circumstances, dismissal may only further delay creditors. Based upon the limited facts currently available, it

appears the appointment of a chapter 11 trustee – who could investigate the facts and determine the best course of action – would be preferable to dismissal.

That said, it appears that this district is an improper venue for these cases. This Court should transfer venue to the Eastern District of Kentucky, where the future of these cases can be decided.

I. The Court should transfer venue of these cases to the Eastern District of Kentucky.

Under 28 U.S.C. § 1408(1), a bankruptcy case may be filed in the district of the debtor’s “domicile, residence, principal place of business in the United States, or principal assets in the United States” during the 180 days pre-petition (or longest portion of such 180-day period). A corporate debtor’s “principal place of business” is “where the corporation’s officers direct, control, and coordinate the corporation’s activities.” *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93, 130 S. Ct. 1181, 1192 (2010). A bankruptcy case can also be commenced in the district where the case of an affiliate is already pending. 28 U.S.C § 1408(2).

“[T]he venue requirements of 28 U.S.C. § 1408 are mandatory, not optional.” *In re Zagaroli*, 2018 Bankr. LEXIS 2117, at *2 (Bankr. M.D.N.C. July 18, 2018). When a bankruptcy case is filed in an improper venue, the court “shall dismiss, or if it be in the interest of justice, transfer such case” to an appropriate district. 28 U.S.C. § 1406(a); *see also* Fed. R. Bank. P. 1014(a)(2). Transfer is generally favored over dismissal. *See, e.g., In re Allen*, 2022 Bankr. LEXIS 922, at *4-5 (Bankr. M.D.N.C. Feb. 10, 2022) (collecting cases).

The available evidence is admittedly sparse. However, it suggests

Mountainside is a Tennessee corporation with its principal place of business and its principal assets in the Eastern District of Kentucky. It suggests that Triple 7 is a West Virginia corporation, with its principal place of business in West Virginia or Kentucky, and its principal assets in West Virginia.

The debtors' schedules state that their principal place of business is in North Carolina, but the available evidence suggests otherwise. First, the address provided is Damian Caldwell's personal residence. Second, to transact business within North Carolina, a corporation must obtain a certificate of authority from the North Carolina Secretary of State. N.C. Gen. Stat. § 55-15-01. Neither debtor has done so. Third, the debtors' assets and operations are not located in North Carolina. These factors support a conclusion that the debtors' principal places of business were not in North Carolina, despite the statements in the *pro se* petitions. Moreover, even Mr. Caldwell's residence was the debtors' principal place of business, this Court could still transfer venue "in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412.

Therefore, venue is not proper in this district. Venue for both cases should be transferred to the Eastern District of Kentucky. Venue for the Mountainside case is proper in the Eastern District of Kentucky, as the undisputed location of its principal assets. In Triple 7's case, venue is proper in the Eastern District of Kentucky – at minimum⁵ – as an affiliate of Mountainside.

II. Alternatively, if the Court declines to transfer venue, it should appoint a chapter 11 trustee or convert the cases to

⁵ As noted above, the records of the Kentucky Secretary of State identify Triple 7's principal place of business in Barbourville, KY.

chapter 7.

If this Court concludes that the limited available evidence is insufficient to support a venue transfer, the Court should appoint a chapter 11 trustee or convert the cases to chapter 7. Although dismissal of *pro se* business cases is customary, a bankruptcy court's hands are not tied when the facts suggest an alternative approach is in the best interests of creditors. *See, e.g., In re Sara's Nails LLC*, 2024 WL 665960 (Bankr. W.D. Mich. February 16, 2024) (converting rather than dismissing a *pro se* business case, which gave the court "a whiff of something irregular" and "perhaps implicat[ed] chapter 5 scrutiny of prepetition transfers"). Dismissal is certainly permissible due to the corporate debtors' lack of counsel, but would risk creating further delay for creditors.

Here, a chapter 11 trustee should be appointed to investigate the facts and determine the best course of action, including whether operations are feasible and advisable. A bankruptcy court "shall" appoint a chapter 11 trustee "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management . . . or . . . if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate." 11 U.S.C. § 1104(a). The Code's examples of "cause" are non-exclusive. *In re Marvel Entm't Grp.*, 140 F.3d 463, 472 (3d Cir. 1998) ("the language of § 1104(a)(1) does not promulgate an exclusive list of causes for which a trustee must be appointed").

Although there is reason to suspect fraud or gross mismanagement may have occurred here, cause exists for a simpler reason. The corporate debtors lack counsel

and cannot represent themselves. As such, it is impossible for them to proceed as debtors-in-possession. Therefore, cause exists to appoint a chapter 11 trustee under section 1104(a).

Lastly, if this Court declines to appoint a chapter 11 trustee, it should convert the case to chapter 7. “[T]he court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.” 11 U.S.C. § 1112(b)(1). Conversion would be preferable to dismissal given the allegations of fraudulent transfers and the landscape of competing claims against the debtors and their assets.

THEREFORE, the BA requests that the Court enter an order:

1. Transferring venue of these cases to the Eastern District of Kentucky;
- and
2. Alternatively, appointing a chapter 11 trustee;
3. Alternatively, converting the case to chapter 7; and
4. Granting such other relief as the Court deems proper.

Respectfully submitted on March 7, 2024.

JOHN PAUL H. COURNOYER
U.S. BANKRUPTCY ADMINISTRATOR

By: /s/ John Paul H. Cournoyer
John Paul H. Cournoyer
Bankruptcy Administrator
State Bar No. 42224

101 S. Edgeworth Street
Greensboro, NC 27401
Telephone: (336) 358-4176
jp_cournoyer@ncmba.uscourts.gov

CERTIFICATE OF SERVICE

This is to certify that, on this date, the foregoing *Motion to (I) Transfer Venue, or (II) Alternatively, Appoint a Chapter 11 Trustee or Convert the Case to Chapter 7*, together with the attached exhibits, was served upon the following parties or counsel by depositing a copy in the United States mail, first class, postage prepaid, addressed as follows:

SERVED BY US MAIL

Mountainside Coal Company Inc.
Attn: Damian Caldwell
313 Ashford Court
Winston-Salem, NC 27103

Mountainside Coal Company, Inc.
Attn: Officer or Managing Agent
5540 Hwy 1809
Barbourville, KY 40906

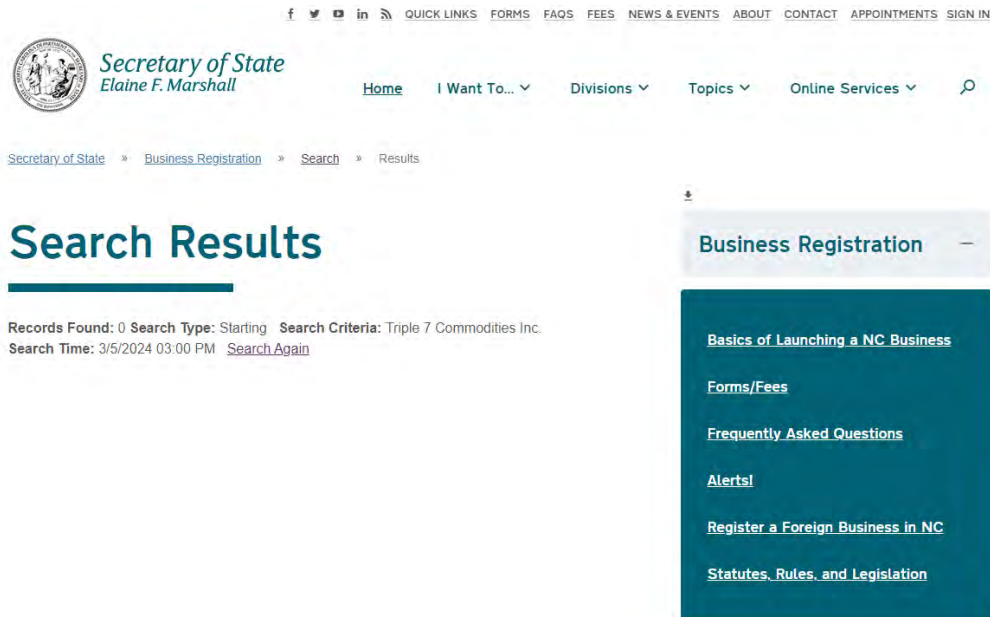
Triple 7 Commodities Inc.
Attn: Damian Caldwell
313 Ashford Court
Winston-Salem, NC 27103

Triple 7 Commodities Inc.
Attn: Officer or Managing Agent
1969 Yeshua Acres Road
Welch, WV 24801

Dated: March 6, 2024

/s/ Traci D. Galloway
Bankruptcy Paralegal

Exhibit A



The screenshot shows the N.C. Secretary of State website with the search results for "Triple 7 Commodities Inc." The page header includes the Secretary of State's name, Elaine F. Marshall, and navigation links. The search results section displays "Records Found: 0" and "Search Criteria: Triple 7 Commodities Inc." with a "Search Again" link. A sidebar on the right lists various business registration topics.

Secretary of State
Elaine F. Marshall

Home I Want To... Divisions Topics Online Services

Secretary of State » Business Registration » Search » Results

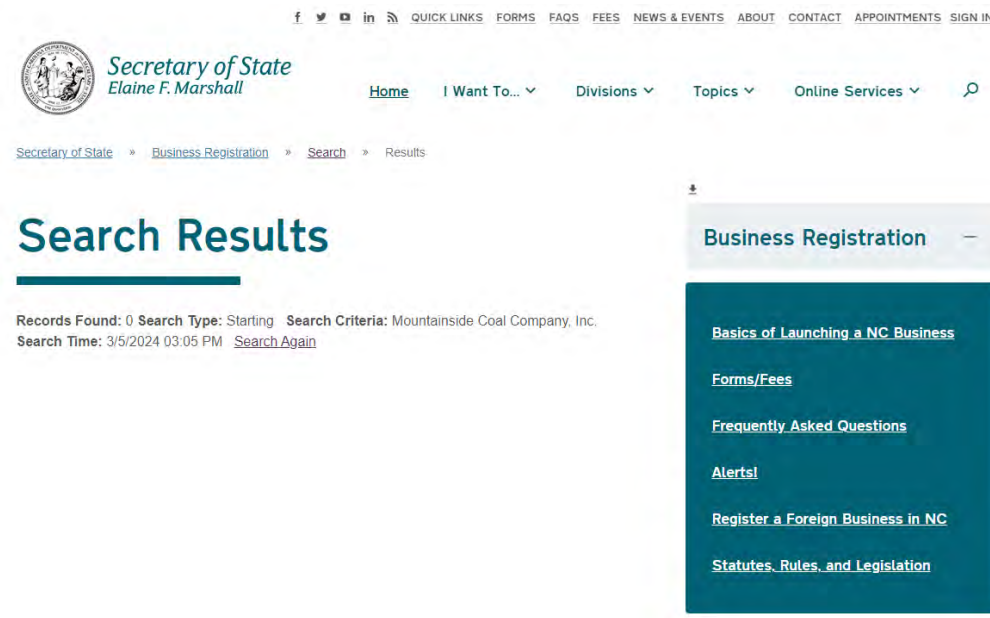
Search Results

Records Found: 0 Search Type: Starting Search Criteria: Triple 7 Commodities Inc.
Search Time: 3/5/2024 03:00 PM [Search Again](#)

Business Registration

- [Basics of Launching a NC Business](#)
- [Forms/Fees](#)
- [Frequently Asked Questions](#)
- [Alerts!](#)
- [Register a Foreign Business in NC](#)
- [Statutes, Rules, and Legislation](#)

Search results for “Triple 7 Commodities Inc.” from the N.C. Secretary of State’s website, https://www.sosnc.gov/online_services/search/ (last accessed March 5, 2024).



The screenshot shows the N.C. Secretary of State website with the search results for "Mountainside Coal Company, Inc." The page header includes the Secretary of State's name, Elaine F. Marshall, and navigation links. The search results section displays "Records Found: 0" and "Search Criteria: Mountainside Coal Company, Inc." with a "Search Again" link. A sidebar on the right lists various business registration topics.

Secretary of State
Elaine F. Marshall

Home I Want To... Divisions Topics Online Services

Secretary of State » Business Registration » Search » Results

Search Results

Records Found: 0 Search Type: Starting Search Criteria: Mountainside Coal Company, Inc.
Search Time: 3/5/2024 03:05 PM [Search Again](#)

Business Registration

- [Basics of Launching a NC Business](#)
- [Forms/Fees](#)
- [Frequently Asked Questions](#)
- [Alerts!](#)
- [Register a Foreign Business in NC](#)
- [Statutes, Rules, and Legislation](#)

Search results for “Mountainside Coal Company Inc.” from the N.C. Secretary of State’s website, https://www.sosnc.gov/online_services/search/ (last accessed March 5, 2024).

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

THEODORE M. SPOLTORE; THEODORE
M. SPOLTORE LIVING TRUST; DR.
JEFFREY EDWIN MIDDELDORF;
SUSAN KATHLEEN MIDDELDORF,
TRUSTEE; SUSAN K. MIDDELDORF
TRUST DATED APRIL 23, 1996;
DR. RICHARD LEVY; DR. DAVID J.
ESPOSITO; DR. RODRIGO R. SANTOS;
TOM DUNNE; and DR. GEORGE J.
DOUTHIT, JR.,

Case No.: 6:23-cv-00143-REW-HAI

Plaintiffs,

v.

TRIPLE 7 COMMODITIES, INC.; GME
MINING & RECLAMATION INC.;
MOUNTAINSIDE COAL CO., INC. and
DAMIAN A. CALDWELL,

Defendants.

PLAINTIFFS' MOTION FOR APPOINTMENT OF RECEIVER

Plaintiffs, Theodore M. Spoltore, the Theodore M. Spoltore Living Trust, Dr. Jeffrey Edwin Middeldorf, Susan Kathleen Middeldorf, Trustee, The Susan K. Middeldorf Trust dated April 23, 1996, Dr. Richard Levy, Dr. David J. Esposito, Dr. Rodrigo R. Santo, Tom Dunne, and Dr. George J. Douthit, Jr. (collectively, “**Plaintiffs**”), by and through their undersigned counsel, Tucker Arensberg, P.C., move the Court to appoint Sanford M. Simon as receiver to take control of and oversee the operations of Defendants Triple 7 Commodities, Inc. and Mountainside Coal Co., Inc. (collectively, “**Defendants**”). Mr. Simon’s qualifications and experience are provided herewith at Exhibit A.

As set forth more fully in Plaintiff’s Complaint and accompanying Memorandum in Support of this Motion, which are incorporated herein by reference, Plaintiffs invested

approximately \$2 million in Defendants' coal business since 2019 based on misrepresentations made by Defendant Damian A. Caldwell ("Caldwell"), their President and Director. However, rather than use the monies and assets of Defendants to repay Plaintiffs' loans, Caldwell instead transferred them to himself or other entities he owns or controls for his own personal benefit and gain.

On August 4, 2023, Plaintiffs accordingly commenced this action against Caldwell and Defendants asserting claims under, among other things, the Kentucky Uniform Voidable Transactions Act ("UVTA"), KRS § 378A.005, *et seq.* Both Federal Rule 66 and Section 7 of the UVTA specifically authorize the appointment of a receiver in situations where, like here, existing management's continuing control over the businesses will result in further harm to the value and assets of the businesses to the detriment of creditors and investors and ultimately, to the point the businesses no longer remain viable. KRS § 378A.070.

Indeed, in this case, unless Caldwell is replaced by a receiver, he will continue to waste the assets of Defendants to Plaintiffs' detriment. Accordingly, it is necessary to appoint a receiver to take control of the businesses and assets and protect them from destruction and waste pending the outcome of this action.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter the attached Order appointing Sanford M. Simon receiver over Defendants, together with such other and further relief as this Court deems appropriate.

Respectfully submitted,

/s/ Michael W. McClain

Michael W. McClain, Esq.
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Norton Commons
9301 Dayflower Street
Prospect, KY 40059
Tel: 502.589-4400
Fax: 502.410.0428
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-and-

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Pittsburgh, PA 15222
Tel: 412.566.1212
Fax: 412.594.5619

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 30th day of January, 2024, I served or caused to be served a true and correct copy of the Plaintiffs' Motion for Appointment of Receiver upon all parties in interest via the Court's CM/ECF electronic notification system.

/s/ Michael W. McClain

Michael W. McClain, Esq.
GOLDBERG SIMPSON LLC
Norton Commons
9301 Dayflower Street
Prospect, KY 40059
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Fax: 502.410.0428
mmcclain@goldbergsimpson.com

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

THEODORE M. SPOLTORE; THEODORE
M. SPOLTORE LIVING TRUST; DR.
JEFFREY EDWIN MIDDELDORF;
SUSAN KATHLEEN MIDDELDORF,
TRUSTEE; SUSAN K. MIDDELDORF
TRUST DATED APRIL 23, 1996;
DR. RICHARD LEVY; DR. DAVID J.
ESPOSITO; DR. RODRIGO R. SANTOS;
TOM DUNNE; and DR. GEORGE J.
DOUTHIT, JR.,

Case No.: 6:23-cv-00143-REW-HAI

Plaintiffs,

v.

TRIPLE 7 COMMODITIES, INC.; GME
MINING & RECLAMATION INC.;
MOUNTAINSIDE COAL CO., INC. and
DAMIAN A. CALDWELL,

Defendants.

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR APPOINTMENT OF RECEIVER**

Plaintiffs Theodore M. Spoltore, the Theodore M. Spoltore Living Trust, Dr. Jeffrey Edwin Middeldorf, Susan Kathleen Middeldorf, Trustee, The Susan K. Middeldorf Trust dated April 23, 1996, Dr. Richard Levy, Dr. David J. Esposito, Dr. Rodrigo R. Santo, Tom Dunne, and Dr. George J. Douthit, Jr. (collectively, “**Plaintiffs**”), file this Brief in Support of their Motion for Appointment of Receiver, seeking the appointment of a receiver for the businesses of Triple 7 Commodities, Inc. (“**Triple 7**”) and Mountainside Coal Co., Inc. (“**MCC**”) (collectively, “**Defendants**”), including the operations, personal property, books, and records related to those entities’ respective businesses.

I. FACTUAL BACKGROUND

Plaintiffs are individuals or trusts that lent over two (2) million dollars in the aggregate to some or all of the Defendants beginning in 2019. [Compl., Doc. No. 1 at ¶ 127]. The Defendants are owned, controlled and/or operated by Defendant Damian A. Caldwell (“**Caldwell**”). [*Id.* at ¶ 17].

Defendants Triple 7 and Caldwell initially communicated with certain of the Plaintiffs to induce them to lend funds through factoring agreements and promissory notes with Triple 7 with promises of a good rate of return and to make payments on stated dates. [*Id.* at ¶ 18]. As a result of the representations and promises of Defendants, each Plaintiff lent to or invested money in or provided goods or services to Triple 7 as detailed in the Complaint, which is incorporated herein by reference. [*Id.* at ¶ 19]. As security for the obligations, each of the Plaintiffs were granted a security interest in certain coal and other mineral rights in West Virginia. [*Id.* at ¶ 29, 35, 42, 48, 54, 60, 65, 74 79, 88, 98].

During the 4 years following the funding of the loans and investments, Defendants have made false and misleading promises and representations to Plaintiffs while siphoning assets out of Triple 7 and transferring valuable assets for less than reasonably equivalent value to the other Defendants or insiders of the Defendants. [*Id.* at ¶ 20]. Specifically, Caldwell has transferred or caused to be transferred, to himself or other entities owned or controlled by himself, monies from Triple 7, thereby rendering Triple 7 incapable of repaying creditors and investors including Plaintiffs. [*Id.* at ¶ 122]. Further, Defendants have transferred inventory consisting of coal in which Plaintiffs have an interest, but Defendants have not used the proceeds to repay Plaintiffs. [*Id.* at ¶ 123].

When pressed for repayment of the obligations, Defendants did not repay the obligations, instead making false promises and representations to induce Plaintiffs to forbear from enforcing contractual remedies. [*Id.* at ¶ 119]. Accordingly, on August 4, 2023, Plaintiffs commenced this action against Defendants asserting claims under, among other things, the Kentucky Uniform Voidable Transactions Act (“UVTA”), KRS § 378A.005, *et seq.*

Plaintiffs now ask the Court to appoint a receiver under Section 7 of UVTA and Fed. R. Civ. P. No. 66, to take control of the Defendants’ assets to preserve them and their revenue-producing potential until the receiver can determine the best way to marshal the assets and protect the rights of Plaintiffs and other creditors. KRS § 378A.070.

II. ARGUMENT

Pursuant to Section 7 of the UVTA, Plaintiffs are entitled, in cases of fraudulent transfer, to the “appointment of a receiver to take charge of the asset transferred or of the other property of the transferee.” KY Rev Stat § 378A.070 (2021). The appointment of a receiver is also authorized by federal law. Fed. R. Civ. P. 66. In the Sixth Circuit,

[a] district court enjoys broad equitable powers to appoint a receiver over assets disputed in litigation before the court. The receiver’s role, and the district court’s purpose in the appointment, is to safeguard the disputed assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary.

Liberte Capital Grp., LLC v. Capwill, 462 F.3d 543, 551 (6th Cir. 2006). District courts should consider a number of factors in deciding whether to appoint a receiver, including whether the property at issue is in “imminent danger of...being lost, concealed, injured, diminished in value, or squandered,” whether the defendant engaged in fraudulent conduct, “the inadequacy of the available legal remedies,” the lack of less drastic equitable remedies, and the likelihood that the appointment will do more good than harm. *Pension Benefit Guar. Corp. v. Evans Tempcon, Inc.*,

630 Fed. Appx. 410, 414 (6th Cir. 2015). As discussed below, the balance of these factors weighs in favor of appointing a receiver in this case.

Triple 7 currently owes debts to Plaintiffs in the amount in excess of \$2 million. [Compl., Doc. No. 1 at ¶ 127]. Currently, there are also default judgments against Triple 7 in the U.S. District for the Southern District of Indiana - Indianapolis Division in the amount of \$767,464.75 and the Supreme Court of the State of New York, County of Nassau, in the amount of \$77,460.00. [See Exhibits B and C]. In addition, a default judgment was taken against MCC in the U.S. District Court for the Northern District of Alabama - Jasper Division on August 18, 2023 in the amount of \$348,876.71. [Ex. D].

MCC, Caldwell, and Triple 7 are also defendants in an action filed in Wake County, North Carolina, alleging breach of a promissory note in the amount of \$357,083.40. [NC Compl., Ex. E]. In addition, Foreclosure proceedings have been commenced in North Carolina against Caldwell, both individually and in his capacity as president of MCC, Triple 7, Damian Caldwell Construction of the Carolinas, Inc., and Clay Laurel Mining, Inc., for default of a promissory note and deed of trust in the amount of \$3,800,000.00. [NC Notice of Commencement of Foreclosure, Ex. F; Affidavit of Default, Ex. G]. MCC and Triple 7 were also recently sued in Knox County Circuit Court for an amount in excess of \$1 million for defaulting under a series of other agreements. [KY Compl., Ex. H].

Defendants likely have additional creditors, though their number, identities, and outstanding liabilities are unknown given Defendants' lack of transparency. Regardless, the two (and only) profit and loss statements provided to investors show that MCC's net income was only \$113,037.49 in 2022 and \$343,577.03 in 2023; meaning that Defendants cannot even repay the known debts, much less the unknown ones. [See Exhibits I and J]. Without full and accurate

reporting, it is impossible for Plaintiffs or anyone to know exactly what is going on with Defendants' businesses (if anything), thereby necessitating a level of transparency only guaranteed through the involvement of a receiver. Furthermore, the appointment of a receiver will provide Plaintiffs (and perhaps other creditors as well) some stability and protection for the preservation, maintenance, and disposition of any assets to be used toward satisfying their judgments.

Moreover, a receiver should be appointed because Defendants' known limited assets are at risk of being lost, materially injured, and/or diminished. One of Defendants' principal assets -- a coal wash plant owned by MCC -- has been sitting idle for months due to mismanagement. Ordinarily, MCC purchased coal from mines which it processed through the wash plant and then resold to customers. However, due to insufficient cash flow and excessive debt, it was unable to continue purchasing coal, and shuttered this facility. [Declaration of Myron McCoy, Ex. K]. By that time, many nearby coal mines had already ceased washing their coal with MCC because it was misrepresenting ash content. [*Id.*]. Then, in November 2023, the Kentucky Department of Natural Resources ("DNR") revoked MCC's permit for operating the plant due to numerous violations and imposed a series of fines. [See DNR Letter, Ex. L].

But there remains a demand in the marketplace for washed coal, and this plant remains a fully operational facility which could be brought back online in short order. [McCoy Decl., Ex. K]. There are numerous coal producers within a 10-mile radius who would immediately use the plant if reopened under new management, given its proximity and the fact that the next closest wash facility is 40 miles away which results in significantly higher haulage fees [*Id.*; *see also* Declaration of Edward Brantley, Ex. M].

However, if Caldwell is permitted to remain in control of Defendants, this plant will simply continue lying dormant. Accordingly, having a receiver placed in charge of the companies provides

the best remedy for reopening the plant and turning a profit so that Plaintiffs and other creditors can be repaid.

Given that Caldwell completely controls the books and operations of Defendants, allowing the status quo to persist presents not only a danger but a likelihood that the companies will continue to operate at a loss or worse, become depleted to the point that they are no longer viable. It is therefore necessary that the Court appoint a receiver who will be answerable to this Court and entrusted with protecting and preserving the value, if any is left, of Defendants.

To that end, Plaintiffs propose to the Court that Sanford M. Simon of Atlanta, Georgia, be appointed as receiver. Mr. Simon has substantial experience in the metals, mining, and manufacturing industries, and in working with and turning around distressed businesses. His resume is attached as Exhibit A.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court grant its Motion for Appointment of Receiver.

Respectfully submitted,

/s/ Michael W. McClain

Michael W. McClain, Esq.

G. Michael Cain, Esq.

GOLDBERG SIMPSON LLC

Norton Commons

9301 Dayflower Street

Prospect, KY 40059

Tel: 502.589-4400

Fax: 502.410.0428

mmcclain@goldbergsimpson.com

mcain@goldbergsimpson.com

-and-

Michael A. Shiner, Esq. (*pro hac vice*)
mshiner@tuckerlaw.com
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Maribeth Thomas, Esq. (*pro hac vice*)
mthomas@tuckerlaw.com
Daniel R. Micheltmore, Esq. (*pro hac vice*)
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TUCKER ARENSBERG, P.C.
1500 One PPG Place
Pittsburgh, PA 15222
Tel: 412.566.1212
Fax: 412.594.5619

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 30th day of January, 2024, I served or caused to be served a true and correct copy of the Plaintiffs' Motion for Appointment of Receiver upon all parties in interest via the Court's CM/ECF electronic notification system.

/s/ Michael W. McClain
Michael W. McClain, Esq.
GOLDBERG SIMPSON LLC
Norton Commons
9301 Dayflower Street
Prospect, KY 40059
Tel: 502.589-4400
Fax: 502.410.0428
mmcclain@goldbergsimpson.com

EXHIBIT A



Sanford M. (Sandy) Simon

Senior Business Development Executive

Sandy Simon & Associates
Atlanta, Georgia, United States

Experience

Sandy Simon & Associates

Jan 2013 - Present · 10 yrs 4 mos - Managing Partner

Pacesetter Steel Service, Inc.

1997 - 2012 · 15 yrs - Vice President

Kennesaw, GA

- VICE PRESIDENT, BUSINESS DEVELOPMENT
VICE PRESIDENT, SALES & MARKETING

Recognized as a perceptive listener, I am influential, persuasive and totally at ease throughout the entire sales, marketing, business development, supply chain, cycle. I am able to quickly build trust and rapport with prospects. consistently been able to achieve an insight into customers' needs and expectations, establish a strong value proposition, and effectively articulate the value of products and services to customers of all organizational levels from front-line managers up to C-level executives. Further, I have proven my ability to spearhead entry into new markets, lead corporate repositioning efforts, and motivate and lead teams to higher levels of performance

Career is showcased by a consistent record of strong sales and marketing contributions. Responsibilities have encompassed strategic planning, market positioning, pricing, contract negotiations, client and supplier relationship

management, and recruiting and managing high performance teams and supply chain integration .

- Sales Management
- Market Positioning
- Profit & Loss
- Client & Supplier Relationships
- Value-Added Sales
- Business Development
- Account Management
- Strategic Pricing
- Strategic Planning
- New Product Development
- Account Development
- Supply Chain Strategy

○ **Education**



Duquesne University
Bachelor of Science (BS), Business Administration



Gannon University
MBA



University of Virginia Darden School of Business
Executive Program Sales Marketing Finance

EXHIBIT B

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

IONJI, LLC d/b/a IONJI CONSULTING,)

Plaintiff,)

vs.)

Case No. 1:23-cv-00129-JRS-MG

TRIPLE 7 COMMODITIES, INC. and)

ROBERT CHRISTIANSEN,)

Defendants.)

DEFAULT JUDGMENT

Plaintiff Ionji, LLC d/b/a Ionji Consulting (“Ionji” or “Plaintiff”), by counsel, has moved the Court for entry of default judgment against Defendants Triple 7 Commodities, Inc. (“T7C”) and Robert Christiansen (“Christiansen”) (collectively, “Defendants”) pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure and has submitted affidavits in support thereof. The Court, being duly advised, now finds as follows:

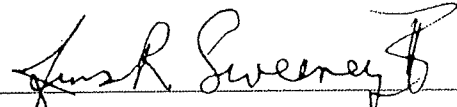
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff is entitled to a default judgment against Defendants, jointly and severally, in the amount of Seven Hundred Sixty-Seven Thousand Four Hundred Sixty-Four Dollars and Seventy-Five Cents (\$767,464.75), inclusive of default interest, late fees and attorneys’ fees and costs.

IT IS SO ORDERED.

Date: 08/14/2023

Roger A.G. Sharpe, Clerk

BY: Samantha Burmester
Deputy Clerk, U.S. District Court


JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

Distribution to all counsel of record by operation of the Court’s ECF system.

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SUPREME CAPITAL SOURCE,

Plaintiff,

-against-

TRIPLE 7 COMMODITIES INC, and
DAMIEN CALDWELL,

Defendants.

Index No.: 603137/2020

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached is a true and correct copy of a Decision/Order dated November 15, 2021 and duly entered in the office of the Clerk of the Supreme Court of the State of New York, County of Nassau, on November 19, 2021.

Dated: March 11, 2022
New York, NY



David J. Austin, Esq.
AUSTIN LLP
43 West 43rd Street, Suite 288
New York, NY 10036-7424
Tel. 646-328-0710
Fax 917-924-4403
Attorneys for Plaintiff

To:

TRIPLE 7 COMMODITIES INC
1969 Yeshua Acres Road
Welch, WV 24801

DAMIEN CALDWELL
313 Ashford Court
Winston-Salem, NC 27103

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

SUPREME CAPITAL SOURCE,

Plaintiff,

-against-

TRIPLE 7 COMMODITIES INC. and
DAMIEN CALDWELL,

Defendants.

TRIAL/IAS PART 30
NASSAU COUNTY

Index No.: 603137/2020
Motion Seq. No.: 04
Motion Date: 08/09/2021
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affidavit, Affirmation and Exhibits and	
Memorandum of Law	<u>1</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3215, for an order granting a default judgment against defendants, jointly and severally; and moves for an order enjoining defendants from transferring, dissipating, assigning, conveying, encumbering or otherwise disposing of the properties, or any assets of defendant Triple 7 Commodities Inc; and moves, pursuant to CPLR §§ 5225(c) and 6220, for an order directing defendants to execute and provide any documents necessary to effect payment of the judgment to plaintiff; and moves for an order awarding plaintiff costs, disbursements and attorney's fees in connection with the action. No opposition was submitted to the motion.

Plaintiff proves jurisdiction by annexing copies of the Affidavits of Service of the Summons and Verified Complaint upon defendants. *See* Plaintiff's Affirmation in Support

Exhibit D. Plaintiff proves defendants' default in the Affirmation of Counsel. Plaintiff proves its claims in the Affidavit of Lazer Preizler, Chief Executive Officer for plaintiff company, and the supporting exhibits. See Plaintiff's Affidavit in Support; Plaintiff's Affirmation in Support Exhibits A-C; CPLR § 3215(f); *Joosten v. Gale*, 129 A.D.2d 531, 514 N.Y.S.2d 729 (1st Dept. 1987).

The Court notes plaintiff's compliance with additional service of the Summons and Verified Complaint, pursuant to CPLR § 3215(g)(3). See Plaintiff's Affirmation in Support Exhibit E.

Therefore, based upon the above, plaintiff's motion, pursuant to CPLR § 3215, for an order granting a default judgment against defendants, jointly and severally; and for an order enjoining defendants from transferring, dissipating, assigning, conveying, encumbering or otherwise disposing of the properties, or any assets of defendant Triple 7 Commodities Inc; and, pursuant to CPLR §§ 5225(c) and 6220, for an order directing defendants to execute and provide any documents necessary to effect payment of the judgment to plaintiff; and for an order awarding plaintiff costs, disbursements and attorney's fees in connection with the action, is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.

XXX

Dated: Mineola, New York
November 15, 2021

ENTERED

Nov 19 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Index No.: 603137/2020

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SUPREME CAPITAL SOURCE,

Plaintiff,

-against-

TRIPLE 7 COMMODITIES INC, and DAMIEN CALDWELL,


Defendants.

NOTICE OF ENTRY

AUSTIN LLP
Attorneys for Plaintiff
43 West 43rd Street, Suite 288
New York, NY 10036-7434
Tel. 646-328-0710
Fax 917-924-4403
david.austin@austinllp.com

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: March 11, 2022
New York, NY



David J. Austin, Esq.

PLEASE TAKE NOTICE, that the within is a true copy of a NOTICE OF ENTRY entered in the office of the Clerk of the within named Court on November 19, 2021.

Dated: March 11, 2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SUPREME CAPITAL SOURCE,

Plaintiff,

-against-

TRIPLE 7 COMMODITIES INC, and
DAMIEN CALDWELL,

Defendants.

Index No.: 603137/2020

AFFIRMATION OF SERVICE

STATE OF NEW YORK }
 } ss.:
COUNTY OF NEW YORK }

DAVID J. AUSTIN, ESQ., an attorney duly admitted to practice law in the courts of the State of New York, affirms under penalty of perjury that:

1. I am an attorney at the law firm Austin LLP, attorneys for Plaintiff in the above-captioned action.

2. I am over the age of eighteen and am not a party to this action.

3. On March 11, 2022, I caused to be served Notice of Entry of Decision/Order entered November 19, 2021, upon the following parties at the addresses designated for that purpose:

TRIPLE 7 COMMODITIES INC
1969 Yeshua Acres Road
Welch, WV 24801

DAMIEN CALDWELL
313 Ashford Court
Winston-Salem, NC 27103

4. Said service was made by depositing a true copy of the above-referenced papers enclosed in a prepaid first-class, sealed envelope, properly addressed to the above-named party,

in an official depository under the exclusive care and custody of the United States Postal Service,
within the State of New York.

Dated: March 11, 2022
New York, NY



David J. Austin, Esq.
AUSTIN LLP
43 West 43rd Street, Suite 288
New York, NY 10036-7424
Tel. 646-328-0710
Fax 917-924-4403
Attorneys for Plaintiff

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SUPREME CAPITAL SOURCE,

Plaintiff,

-against-

TRIPLE 7 COMMODITIES INC, and
DAMIEN CALDWELL,

Defendants.

Index No.: 603137/2020

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT JUDGMENTS**

David J. Austin, Esq.
Attorney for Plaintiff
43 West 43rd Street, Suite 288
New York, NY 10036-7424
Tel. 646-328-0710
Fax 917-924-4403
david.austin@austinllp.com

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Plaintiff, Supreme Capital Source (“Supreme Capital” or “Plaintiff”), respectfully submits this memorandum of law in support of its motion for entry of an order directing the Clerk of the Court to enter default judgments against Defendants Triple 7 Commodities Inc (“Triple 7 Commodities”) and Damien Caldwell (“Mr. Caldwell”) (collectively, “Defendants”) for failure to appear in this action pursuant to Civil Practice Law and Rules (“CPLR”) § 3215(a).

PRELIMINARY STATEMENT

Based upon the record of this case, entry of a default judgment is authorized and appropriate in accordance with CPLR § 3215(a) due to the Defendants’ failure to appear despite being served on numerous occasions in accordance with the requirements of the CPLR.

STATEMENT OF FACTS

This is an action to recover debts owed to Supreme Capital by Defendants Triple 7 Commodities and Mr. Caldwell, under a Revenue Purchase Agreement (the “RPA”) (**Exhibit A**) in the amount of \$77,390.00, plus costs and interest. For a detailed recitation of the facts, the Court is respectfully referred to the Affidavit of Lazer Preizler (the “Affidavit”) dated July 8, 2021, the Attorney Affirmation of David J. Austin, Esq. (the “Attorney Affirmation in Support”), and the accompanying exhibits thereto filed contemporaneously herewith and incorporated by reference herein in full, including the summons & complaint attached at **Exhibit C**.

Supreme Capital is in the business of providing advance payments to small businesses in exchange for a percentage of the businesses’ future revenue. These funding transactions are also known as “merchant cash advances” or a “revenue purchase agreements.” Under a revenue purchase agreement (“RPA”), Supreme Capital purchases the right to a certain amount of a business’s future sales in exchange for an advance, lump-sum payment to the business. The

business then remits periodic payments to Supreme Capital, drawn from the business's actual revenue, until the purchased amount is satisfied. Structured in this manner, a revenue purchase agreement is not a loan, but rather a purchase of a portion of a business's future revenue and is a form of factoring that is common in the financial services industry.

Mr. Caldwell, on behalf of Triple 7 Commodities applied with Supreme Capital for funding to help expand the business. Supreme Capital provided \$50,000.00 in funding to Triple 7 Commodities in exchange for the right to \$74,950.00 of Triple 7 Commodities's future revenue. (Lazer Preizler Aff. ¶¶6-7.) Under the RPA, Triple 7 Commodities promised and covenanted to pay a portion of its revenue to Supreme Capital, until Supreme Capital's interest in Triple 7 Commodities purchased revenue was satisfied. (Lazer Preizler Aff. ¶8.) In addition, Mr. Caldwell signed a personal guarantee of performance. (Lazer Preizler Aff. ¶16.)

Triple 7 Commodities's payment history is attached at **Exhibit B**. Triple 7 Commodities ceased making payments to Supreme Capital as of October 10, 2019, while still conducting business and accepting revenue, at least in the form of accounts receivables. (Lazer Preizler Aff. ¶10.) Triple 7 Commodities further breached the RPA by defaulting on its representations and warranties to Supreme Capital under the RPA by failing to deposit Triple 7 Commodities's revenue into the bank account designated for that purpose, by disposing of Triple 7 Commodities's revenue and assets without Supreme Capital's prior express written consent, and/or by depositing purchased revenue into a bank account other than the bank account designated for that purpose, thereby blocking the designated account from which ACH debit payments were to be made. (Lazer Preizler Aff. ¶11.)

Pursuant to the RPA, in the event of default, Supreme Capital is entitled to recover a refund of the purchased revenue amount from Triple 7 Commodities and Mr. Caldwell less any

amounts paid. (Lazer Preizler Aff. ¶19.) Prior to default, Triple 7 Commodities delivered \$8,995.00 to Supreme Capital, leaving a balance owed on the RPA in the amount of \$65,955.00. (Lazer Preizler Aff. ¶20.) Triple 7 Commodities has also accrued fees in the amount of \$11,435.00. (Lazer Preizler Aff. ¶23.) The balance due and owing to Supreme Capital on the RFA, including the balance of purchased revenue owed and fees accrued, is \$77,390.00, plus costs and interest. (Lazer Preizler Aff. ¶26.)

The record is clear that Defendants were properly served in this action and failed to appear or otherwise respond warranting entry of default judgments against Defendants in accordance with CPLR § 3215(a). Specifically, the Affidavits of Service at **Exhibit D** establish that the Defendants were served, pursuant to the CPLR, by licensed process servers and the affidavits of service upon Defendants were timely filed. Defendants were also served an additional copy of the Summons and Verified Complaint to comply with the “Additional Notice” requirement set forth by CPLR §§ 3215(g)(3)(4) as further noted in the Affirmation at **Exhibit E**. As such, there is no question that Defendants were aware they were being sued and they were obligated to respond within the time prescribed by law as indicated on the Summons.

As of the date of this Memorandum and Motion for Entry of Default Judgments, Defendants neither have responded nor appeared, nor have they requested an extension of time to respond. Rather, they are in default of this action. Therefore, as detailed in the Lazer Preizler Affidavit, Plaintiff is entitled to judgments of default against Defendants in the amount of \$77,390.00, jointly and severally, plus costs and interest, in addition to any other amounts the Court deems appropriate.

Accordingly, Triple 7 Commodities and Mr. Caldwell have forced Supreme Capital to bring this action against Triple 7 Commodities and Mr. Caldwell.

ARGUMENT

I. Supreme Capital Has Established a Breach of Contract and Breach of Guaranty

To establish a cause of action for breach of contract, the plaintiff must show (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. *See, e.g., Harris v Seward Park Housing Corp.*, 79 AD3d 425 (1st Dept. 2010).

Further, “where a guaranty to a contract is clear and unambiguous on its face and, by its language, absolute and unconditional, the guarantor signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement.” *See, e.g., Citibank, N.A. v. Uri Schwartz & Sons Diamonds Ltd.*, 97 AD3d 444, 446-447 (1st Dept. 2012), quoting *National Westminster Bank USA v Sardi's Inc.*, 174 AD2d 470, 471 (1st Dept. 1991).

Here, the Complaint and Affidavit of Lazer Preizler, Chief Executive Officer of Supreme Capital dated July 8, 2021 establishes the existence of a contract and guaranty (the RPA at Exhibit A), performance by the Plaintiff under the RPA, breach of the RPA and guaranty, and resulting damages. Moreover, having failed to answer the Complaint, the defendants are “deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from them.” *See, e.g., Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003).

II. Supreme Capital is Entitled to Judgment by Default

Under CPLR § 3215(a), if a Defendant fails to appear or plead, a plaintiff may obtain default judgment. On a motion for leave to enter a default judgment pursuant to CPLR § 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing. *See, e.g., CPLR § 3215(f) and Atlantic Cas. Ins. Co. v. RJNJ Services, Inc.*, 89 AD3d 649 (2nd

Dept. 2011); *see also* *Raizel Fried et al., v. Jacob Holding, Inc.*, 970 N.Y.S.2d 260, 263.

(N.Y.S.2d 2013). The proof submitted must establish a *prima facie* case. *See, e.g., Silberstein v. Presbyterian Hosp.*, 95 AD2d 773 (2nd Dept. 1983).

All Defendants were lawfully served, and supplemental service of the action was also provided in accordance with CPLR § 3215(g)(3)(i) and CPLR § 3215(g)(4)(i). Nevertheless, Defendants have not responded to this litigation and are in default. Plaintiff submitted the requisite proof to obtain the default judgments by providing evidence of lawful service on Defendants at Exhibit D.

“Contracting parties may agree to means of service alternative to the statutorily required means.” *See, e.g., People v. N. Leasing Sys., Inc.*, 75 N.Y.S.3d 785, 799 (N.Y. Sup. Ct. 2017). Service of process by mail, including electronic mail (e-mail) is proper where the parties to an agreement have consented to personal jurisdiction and agreed to such service. *See, e.g., Gallant Funding, L.P. v. Tocci*, 950 N.Y.S.2d 491 (N.Y. Sup. Ct. 2011) (“the Court finds that the [agreement] provisions sufficiently establish that the defendants consented to the personal jurisdiction of the courts of New York and authorized [the defendant] to receive service of process on their behalf by mail.”); *see also Alfred E. Mann v. Etirc*, 78 A.D.3d 137, 141 (N.Y. App. Div. 2010) (“We observe that while service of process by e-mail is not directly authorized by either the CPLR or the Hague Convention, it is not prohibited under either state or federal law, or the Hague Convention, given appropriate circumstances.”). Here, Defendants have agreed in the RPA at **Exhibit A** to personal jurisdiction in the Courts of New York. *See Exhibit A* at Section 4.5. (“Governing Law, Venue and Jurisdiction. This Agreement shall be binding upon and inure to the benefit of Merchant, SCS and their respective successors and assigns, except that Merchant shall not have the right to assign its rights hereunder or any interest herein

without the prior written consent of SCS which consent may be withheld in SCS's sole discretion. SCS reserves the rights to assign this Agreement with or without prior written notice to Merchant. This Agreement shall be governed by and construed in accordance with the laws of the state of New York, without regards to any applicable principals of conflicts of law. Any suit, action or proceeding arising hereunder, or the interpretation, performance or breach hereof, shall, if SCS so elects, be instituted in any court sitting in New York, (the "Acceptable Forums"). Merchant agrees that the Acceptable Forums are convenient to it, and submits to the jurisdiction of the Acceptable Forums and waives any and all objections to jurisdiction or venue. Should such proceeding be initiated in any other forum, Merchant waives any right to oppose any motion or application made by SCS to transfer such proceeding to an Acceptable Forum.”).

Affidavits of service made by a process server are considered prima facie evidence of proper service under CPLR § 308 and are entitled to a presumption of regularity. *See Beneficial Homeowner Service Corporation v. Poucher Girault*, 875 N.Y.S.2d 815, 816 (N.Y.S.2d 2009).

CPLR § 3215(g) requires the mailing of an additional copy of the Summons and Complaint to both individual and corporate Defendants at least 20 days before entry of judgment. Further, New York military law requires the submission of an Affidavit of Non-Military Status for individual Defendants. Plaintiff provided proof of additional mailing as required by CPLR § 3215(g) as evidenced by the Affirmation at **Exhibit E**.

Plaintiff further provided proof of its claims via the Verified Complaint, the Affidavit of Lazer Preizler, and the exhibits annexed thereto. As noted in *IMG International Marketing Group, Inc. v. SDS William Street, LLC*, 936 N.Y.S.2d 59 (N.Y.S.Ct. 2011), when a Defendant defaults, all of the factual allegations, and reasonable inferences to be drawn therefrom, are considered admitted as they relate to liability. In addition, the standard of proof only requires

firsthand confirmation of facts. *IMG Int'l.* at 59. Thus, Plaintiff has met its burden of proving the facts in support of its claims.

III. Supreme Capital is Entitled to Attorney's Fees

Due to the actions of Triple 7 Commodities Inc and Damien Caldwell, Supreme Capital has incurred and continues to incur expenses including attorney's fees. Pursuant to the RPA at **Exhibit A**, the Debtor and Guarantor agreed to pay costs related to any legal actions taken in the event of a default, including but not limited to reasonable attorney's fees. **Exhibit A** at Section 3.4. Supreme Capital has engaged Austin LLP in this matter on a flat fee for service arrangement. To date, Supreme Capital has incurred attorney's fees of at least \$250.00 for the filing of the summons & complaint and \$350.00 for the filing of the present motion. (Attorney Aff. in Support ¶¶15-17.) Thus, pursuant to the RPA, Supreme Capital is entitled to \$1,575.00 in attorney's fees. *See, e.g., LG Funding, LLC v. Johnson & Son Locksmith, Inc.*, 170 A.D.3d 1153, 1154 (N.Y. App. Div. 2019).

IV. Defendant Guarantor is Not in the Military


Attorney David J. Austin, Esq. ("Mr. Austin") has sworn that to his knowledge, and as confirmed by the Department of Defense Manpower Data Center, Defendant Damien Caldwell is not in the military. Mr. Austin has provided an affirmation to this effect as well as a certification of the Defendant's non-military status issued by the Department of Defense Manpower Data Center at **Exhibit F**.

CONCLUSION

For the reasons and causes of action contained herein and in the Verified Complaint as well as the various affidavits and Attorney Affirmation in Support submitted herewith, Plaintiff respectfully requests the following:

- 1) Granting an Order pursuant to CPLR § 3215, directing the Clerk to enter default judgments against Defendants Triple 7 Commodities Inc and Damien Caldwell in the amount of \$77,390.00 pursuant to the Agreements plus costs and interest from October 10, 2019, the date of default, through entry of judgment herein;
- 2) Enjoining Defendants from transferring, dissipating, assigning, conveying, encumbering or otherwise disposing of the properties, or any assets of Defendant Triple 7 Commodities Inc;
- 3) Granting an Order pursuant to CPLR §§ 5225 and 6220 for Defendants to execute and provide any documents necessary to effect payment of the Judgment to Supreme Capital Source
- 4) Awarding Supreme Capital Source reasonable attorney's fees in the amount of \$1,575.00 in connection with this action; and
- 5) Granting such other and further relief as the Court deems just and proper.

Dated: July 8, 2021
New York, NY



David J. Austin, Esq.
AUSTIN LLP
43 West 43rd Street, Suite 288
New York, NY 10036-7424
Tel. 646-328-0710
Fax 917-924-4403
david.austin@austinllp.com
Attorneys for Plaintiff

Index No.: 603137/2020

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SUPREME CAPITAL SOURCE,

Plaintiff,

-against-

TRIPLE 7 COMMODITIES INC, and DAMIEN CALDWELL,

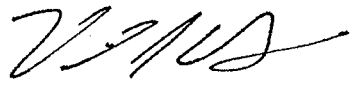
Defendants.

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT JUDGMENTS**

AUSTIN LLP
Attorneys for Plaintiff
43 West 43rd Street, Suite 288
New York, NY 10036-7424
Tel. 646-328-0710
Fax 917-924-4403
david.austin@austinllp.com

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: July 8, 2021
New York, NY



David J. Austin, Esq.

EXHIBIT D

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION**

**RANGER ENVIRONMENTAL
SERVICES, LLC,**

Plaintiff,

v.

**MOUNTAINSIDE COAL
COMPANY, INC. and DAMIEN
CALDWELL,**

Defendants.

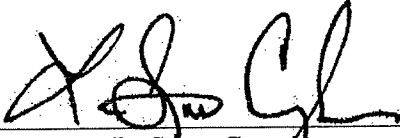
6:23-cv-00366-LSC

ORDER

Pending before the Court are the Motions for Default Judgment (docs. 14, 21) filed by Plaintiff Ranger Environmental Services, LLC against Defendants Mountainside Coal Company, Inc. and Damian A. Caldwell on the grounds that Defendants have failed to answer, plead, appear, or otherwise defend as required by the Federal Rules of Civil Procedure. The Clerk of Court has entered default as to each defendant. (Docs. 13, 20.) Plaintiff has submitted affidavits supporting its claim for a sum certain (doc. 21-1) and for reasonable attorney's fees and expenses (doc. 22). Having considered the motions and having reviewed the entire record carefully, the Court finds that default judgment is due to be **GRANTED** against the Defendants.

Judgment is hereby **ENTERED** in favor of Plaintiff Ranger Environmental Services, LLC and against the Defendants Mountainside Coal Company Inc. and Damian A. Caldwell, jointly and severally, in the amount of \$331,763.79. It is further **ORDERED** that Plaintiff recover from the Defendants, jointly and severally, attorney's fees and expenses in the amount of \$17,112.92, which the Court finds reasonable, for a total sum of \$348,876.71, plus costs and interest according to law from the date of this judgment until the entire amount is paid.

DONE and **ORDERED** on August 18, 2023.



L. Scott Coogler
United States District Judge

215647

EXHIBIT E

Wake County Clerk of Superior Court
STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
23CV007010-910

COUNTY OF WAKE

LANDOVER ENERGY, LLC

Plaintiff,

VS.

MOUNTAINSIDE COAL CO., INC., CLAY
LAUREL MINING, INC., TRIPLE 7
COMMODITIES, INC., and DAMIAN
CALDWELL, individually,

Defendant.

COMPLAINT

COMES NOW, Plaintiff Landover Energy, LLC, by and through its attorney of record, John S. Austin, and for its Complaint against Defendants Mountainside Coal Co., Inc., Clay Laurel Mining, Inc., Triple 7 Commodities, Inc., and Damian Caldwell, individually, states and alleges as follows:

PARTIES, JURISDICTION & VENUE

1. Plaintiff Landover Energy, LLC ("Landover"), is an entity organized under the laws of the State of North Carolina and authorized to conduct business in Wake County, North Carolina.
2. Defendant Mountainside Coal Co., Inc. ("Mountainside"), is a corporation formed under the laws of the State of Tennessee, and at all times relevant, conducted business in Wake County, North Carolina.
3. Defendant Clay Laurel Mining, Inc. ("Clay Laurel Mining"), is a corporation formed under the laws of the State of Kentucky and at all times relevant, conducted business in Wake County, North Carolina.

4. Defendant Triple 7 Commodities, Inc. ("Triple 7"), is a corporation formed under the laws of the State of Kentucky and at all times relevant, conducted business in Wake County, North Carolina.

5. Defendant Damian Caldwell is a citizen and resident of Forsyth County, North Carolina, and at all times relevant, and also acted as a corporate officer of Defendant Mountainside and Defendant Laurel Mining and in his individual capacity.

6. This court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-240.

7. Venue is proper in this Court pursuant to N.C. Gen. Stat. § 1-82.

BREACH OF CONTRACT FOR MONEY OWED

8. Plaintiff incorporates by reference the allegations contained in Paragraphs 1 through 7 as though fully set forth herein.

9. On June 9, 2021, Damian Caldwell, individually, and in his capacity as President on behalf of Defendants Triple 7, Mountainside, and Clay Laurel executed a promissory note ("Promissory Note") for payment of \$357,083.40 payable to Plaintiff Landover in Wake County, North Carolina. The Promissory Note is attached hereto as Exhibit A.

10. The Promissory Note provides that the principal shall be due and payable on or before July 9, 2021.

11. Defendants, and each of them, have failed to make payment of the \$357,083.40 principal before July 9, 2021, and remains amounts due and unpaid, plus additional interest in the amount of 10%, plus attorney fees not to exceed 15% of the outstanding balance.

12. On February 7, 2023, Helena R. Jackson, Esq., sent a letter to Defendants demanding payment under the Promissory Note. The February 7, 2023 letter is attached hereto as Exhibit B and incorporated herein by reference.

13. Plaintiff Landover took all reasonable, required and necessary steps to attempt collection upon the amounts owed by Defendants, and each of them, under N.C. Gen. Stat. § 6-21.2.


14. As a result of Defendants' breaches of the Promissory Note, Plaintiff Landover has incurred monetary damages in the principal amount of \$357,083.40 plus interest at the rate of 10% from July 9, 2021, until the date of judgment and the legal rate thereafter.

15. The Promissory Note provides, pursuant to N.C. Gen. Stat. § 6-21.2, for payment of attorney fees, not to exceed 15% of the outstanding balance owed on the Promissory Note, plus all other reasonable expenses incurred by Plaintiff in exercising its rights and remedies under default.

WHEREFORE, Plaintiff Landover Energy, LLC, prays for the following relief:

1. Judgment against Defendants Mountainside Coal Co., Inc., Clay Laurel Mining, Inc., Triple 7 Commodities, Inc., and Damian Caldwell, jointly and severally, in the amount of \$357,083.40 plus interest at the rate of 10% from July 9, 2021, until the date of judgment and the legal rate thereafter.;
2. Attorney fees and costs as permitted under the Promissory Note and N.C. Gen. Stat. § 6-21.2; and
3. For such other and further relief the Court deems just and proper.

This the 24th day of March, 2023.


John S. Austin
Austin Law Firm, PLLC
P.O. Box 30
Raleigh, NC 27602
Telephone: (919) 278-7634
Facsimile: (919) 424-7007
Attorney for Plaintiff

SATISFACTION: The debt evidenced by this Note has been satisfied in full this th day of June, 2021.

Signed: _____

PROMISSORY NOTE

Raleigh, N.C.

\$357,083.40 _____

June 9, 2021

FOR VALUE RECEIVED the undersigned, jointly and severally, promise to pay to

Landover Energy, LLC or order.

the principal sum of THREE HUNDRED FIFTY-SEVEN THOUSAND EIGHTY-THREE AND 40/100 DOLLARS (\$357,083.40), payable in lawful money of the United States of America, at the office of Landover Energy, LLC or at such place as the legal holder hereof may designate in writing.

The principal shall be due and payable as follows:

Payable on or before July 9, 2021.

This is a commercial transaction and does not involve any individual consumer goods or transactions.

If not sooner paid, the entire remaining indebtedness shall be due and payable on or before July 9, 2021.

If payable in installments, each such installment shall, unless otherwise provided, be applied first to payment of interest then accrued and due on the unpaid principal balance, with the remainder applied to the unpaid principal.

Unless otherwise provided, this Note may be prepaid in full or in part at any time without penalty or premium. Partial prepayments shall be applied to installments due in reverse order of their maturity.

In the event of (a) default in payment of any installment of principal or interest hereof as the same becomes due and such default is not cured within ten (10) days from the due date, or (b) default under the terms of any instrument securing this Note, and such default is not cured within fifteen (15) days after written notice to maker, then in either such event the holder may without further notice, declare the remainder of the principal sum, together with all interest accrued thereon and, the prepayment premium, if any, at once due and payable. Failure to exercise this option shall not constitute a waiver of the right to exercise the same at any other time. The unpaid principal of this Note and any part thereof, accrued interest and all other sums due under this Note and the Deed of Trust, if any, shall bear interest at the rate of Ten per cent (10 %) per annum after default until paid.

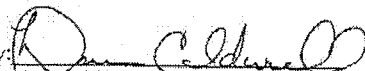
All parties to this Note, including maker and any sureties, endorsers, or guarantors hereby waive protest, presentment, notice of dishonor, and notice of acceleration of maturity and agree to continue to remain bound for the payment of principal, interest and all other sums due under this Note and the Deed of Trust notwithstanding any change or changes by way of release, surrender, exchange, modification or substitution of any security for this Note or by way of any extension or extensions of time for the payment of principal and interest; and all such parties waive all and every kind of notice of such change or changes and agree that the same may be made without notice or consent of any of them.

Upon default the holder of this Note may employ an attorney to enforce the holder's rights and remedies and the maker, principal, surety, guarantor and endorsers of this Note hereby agree to pay to the holder reasonable attorney's fees not exceeding a sum equal to fifteen percent (15%) of the outstanding balance owing on said note, plus all other reasonable expenses incurred by the holder in exercising any of the holder's rights and remedies upon default. The rights and remedies of the holder as provided in this note and any instrument securing this note shall be cumulative and may be pursued singly, successively, or against the property described in the Deed of Trust or any other funds, property or security held by the holder for payment or security, in the sole discretion of the holder. The failure to exercise any such right or remedy shall not be a waiver or release of such rights or remedies or the right to exercise any of them at another time.

This Note is to be governed and construed in accordance with the laws of North Carolina.

This Note is given for a loan in the above amount.

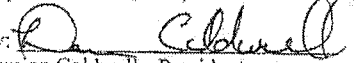
Mountainside Coal Co., Inc.

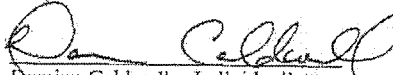
By: 
Damian Caldwell - President

Clay Laurel Mining, Inc.

By: 
Damian Caldwell - President

Triple 7 Commodities, Inc.

By: 
Damian Caldwell - President


Damian Caldwell - Individually



HR JACKSON LAW P.L.L.C.

A Kentucky Professional Limited Liability Company

February 7, 2023

**VIA CERTIFIED MAIL,
RETURN RECEIPT
REQUESTED**

Mr. Damian Caldwell
Damian Caldwell Construction Company of the Carolinas, Inc.
Mountainside Coal Co., Inc.
Clay Laurel Mining, Inc.
Triple 7 Commodities, Inc.

313 Ashford Court
Winston Salem, North Carolina 27103

Attn: **President Damian Caldwell**

RE: DEMAND FOR IMMEDIATE PAYMENT

Dear Sir:

I represent Landover Energy, LLC ("Landover") and WEW Checkbook, LLC ("WEW").

As you know, during September of 2020, you, on behalf of Triple 7 Commodities, Inc. executed a Contract Management Agreement, during which you agreed to (i) pay to Landover a royalty of Three Dollars (\$3.00) for every clean ton of coal mined from the premises owned or under the control of Triple 7; to pay to Landover a royalty of Three Dollars (\$3.00) for each ton of coal processed at the wash plant (such wash plant located on the property and known as 5544-KY-1809 Wash Plant (Emelyn), Barbourville, Kentucky 40906); and to pay to Landover a royalty of Three Dollars (\$3.00) for each clean ton of coal sold (as mined from those properties known as the Flay Ridge Mine, the Mosley Branch Mine and the Wind Hollow Mine); and (ii) Triple 7 was to pay Landover weekly, on Friday for the coal processed/sold on the previous week, performed as an extract mirror to all contracts.

Then on or about May 19, 2021, you, on behalf of Damien Caldwell Construction of the Carolinas, Inc. and individually, executed a Promissory Note (the "May 19, 2021 Note") through which you agreed to pay to WEW the sum of Eight Hundred Thousand Dollars and No Cents (\$800,000.00), payable on or before July 19, 2021. Interest was to be in the amount of \$100,000.00 payable on or before July 19, 2021 in addition to the principal amount of the Note. You were permitted to exercise an option to extend the due date of the Note for a specific term not to exceed sixty (60) days for the payment of interest in the amount of 10% of the amount of the note for each months' extension upon written notice no less than ten (10) days prior to the due date.

Exhibit B



HR JACKSON LAW P.L.L.C.

A Kentucky Professional Limited Liability Company

With the May 19, 2021 Note, you executed a Deed of Trust, both as an individual and on behalf of Damian Caldwell Construction Company of the Carolinas, Inc., securing the sum of Six Hundred Thousand Dollars and No Cents (\$600,000.00). This obligation is secured by a tract or parcel of land located in Wake County, North Carolina.

Last, on or about June 9, 2021, you, on behalf of Mountainside Coal Co., Inc. Triple 7 Commodities, Inc., Clay Laurel Mining, Inc. and individually executed a Promissory Note (the "June 9, 2021 Note") agreeing to pay to Landover the sum of Three Hundred Fifty-Seven Thousand Eighty-Three Dollars and Forty Cents (\$357,083.40) with interest at the rate of ten percent (10%) per annum after default until paid.

And so as of today's date, because you have paid Zero Dollars (\$0.00) towards any of the amounts owed, with interest included, the total obligation you owe has risen to over One Million Forty-Four Thousand Dollars and No Cents (\$1,044,000.00).

As a result, Landover and WEW hereby demand your immediate payment under the terms of the Contract Management Agreement, the May 19, 2021 Note and the June 9, 2021 Note, together with interest on all of same, within ten (10) days of your receipt of this Demand, or it will be forced to pursue any and all of its applicable remedies in law or in equity, including but not limited to, the value of the secured property interest to which WEW is entitled, damages for the tort of conversion, damages in the form of quantum meruit, late fees, prejudgment and post judgment interest, punitive damages and attorneys' fees (under N.C.G.S. § 6-21.2).

Thank you for your consideration and immediately attention to this matter.

Sincerely,

Helena Racin Jackson, Esq.

C: Mr. Edward Brantley
John S. Austin, Esq.

EXHIBIT F

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE CLERK

WAKE COUNTY

23 SP 3431

In the Matter of the Foreclosure of the)
Deed of Trust executed by DAMIAN CALDWELL)
and DAMIAN CALDWELL CONSTRUCTION)
OF THE CAROLINAS, INC., Grantors, securing)
securing an indebtedness in the original principal)
amount of \$600,000.00, dated May 24, 2021 and)
recorded in Deed Book 18522 at Page 2351 in the)
Wake County Registry.)

NOTICE OF HEARING
AS TO
COMMENCEMENT OF FORECLOSURE PROCEEDINGS

TO: DAMIAN CALDWELL, INDIVIDUALLY; and as
PRESIDENT or AUTHORIZED CORPORATE OFFICER OF
DAMIAN CALDWELL CONSTRUCTION OF THE CAROLINAS, INC.;
TRIPLE 7 COMMODITIES, INC.; MOUNTAINSIDE COAL COMPANY; and
CLAY LAUREL MINING, INC.
313 Ashford Court
Winston-Salem, North Carolina 27103

EDWARD BRANTLEY, INDIVIDUALLY; and as THE
MANAGER OF MASON FARM ESTATES, LLC;
and as the PRESIDENT OF WYNNLY, INC.
9409 South Mere Street
Raleigh, North Carolina 27615

1. You are hereby notified that WEW CHECKBOOK, LLC, as Noteholder, intends to commence foreclosure on the promissory note in the sum of \$600,000.00 and the deed of trust, dated May 24, 2021, and recorded in Deed Book 18522 at Page 2351, Wake County Registry. The Noteholder's address is as follows: WEW CHECKBOOK, LLC, 3000 Bethesda Place, Suite 703, Winston-Salem, North Carolina 27103.
2. The legal description of the property to be foreclosed upon is as follows:

of the written statement, and the amount of other expenses the holder contends is owed as of the date of the statement.

8. During the two years preceding the date of the statement no requests for information have been made by the borrower to the holder or servicer pursuant to G.S. 45-93.
9. If you so desire, you have the right to appear before the Clerk of the Superior Court of Wake County, on January 12, 2024 at 3:00 p.m. at the Wake County Courthouse, Room 1220, 316 Fayetteville Street, Raleigh, north Carolina 27601 where you will be afforded the opportunity to show cause, if any, as to why the foreclosure should not be allowed to be held.
 - A. If you do not intend to contest the Noteholder's allegations of default, you are not required to appear at this hearing, and your failure to appear will not affect your right to pay the indebtedness thereby preventing the proposed sale or affect your right to attend the actual sale should you elect to do so.
 - B. The trustee, or substitute trustee, is a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding.
 - C. You have the right to apply to a judge of the superior court pursuant to G.S. 45-21.34 to enjoin the sale, upon any legal or equitable ground that the court may deem sufficient prior to the time that the rights of the parties to the sale or resale become fixed, provided that you comply with the requirements of G.S. 45-21.34.
 - D. You have the right to appear at the hearing and contest the evidence that the clerk is to consider under G.S. 45-21.16(d), and that to authorize the foreclosure the clerk must find the existence of: (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to notice.
 - E. If you fail to appear at the hearing, the trustee will ask the clerk for an order to sell the real property being foreclosed.
 - F. You have the right to seek the advice of an attorney and free legal services may be available to you by contacting Legal Aid of North Carolina or other legal services organizations.
 - G. Foreclosure hearings held before the Clerk of the Superior Court of Wake County are conducted remotely using WebEx. You are responsible for notifying the Clerk of the Superior Court of Wake County, as well as the Substitute Trustee, of a working email address which will permit you to receive a link to be used in accessing the hearing.

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE CLERK

WAKE COUNTY

23 SP 3431

In the Matter of the Foreclosure of the)
Deed of Trust executed by DAMIAN CALDWELL)
and DAMIAN CALDWELL CONSTRUCTION)
OF THE CAROLINAS, INC., Grantors, securing)
securing an indebtedness in the original principal)
amount of \$600,000.00, dated May 24, 2021 and)
recorded in Deed Book 18522 at Page 2351 in the)
Wake County Registry.)

NOTICE OF HEARING
AS TO
COMMENCEMENT OF FORECLOSURE PROCEEDINGS

TO: DAMIAN CALDWELL, INDIVIDUALLY; and as
PRESIDENT or AUTHORIZED CORPORATE OFFICER OF
DAMIAN CALDWELL CONSTRUCTION OF THE CAROLINAS, INC.;
TRIPLE 7 COMMODITIES, INC.; MOUNTAINSIDE COAL COMPANY; and
CLAY LAUREL MINING, INC.
313 Ashford Court
Winston-Salem, North Carolina 27103

EDWARD BRANTLEY, INDIVIDUALLY; and as THE
MANAGER OF MASON FARM ESTATES, LLC;
and as the PRESIDENT OF WYNNLY, INC.
9409 South Mere Street
Raleigh, North Carolina 27615

1. You are hereby notified that WEW CHECKBOOK, LLC, as Noteholder, intends to commence foreclosure on the promissory note in the sum of \$600,000.00 and the deed of trust, dated May 24, 2021, and recorded in Deed Book 18522 at Page 2351, Wake County Registry. The Noteholder's address is as follows: WEW CHECKBOOK, LLC, 3000 Bethesda Place, Suite 703, Winston-Salem, North Carolina 27103.
2. The legal description of the property to be foreclosed upon is as follows:

of the written statement, and the amount of other expenses the holder contends is owed as of the date of the statement.

8. During the two years preceding the date of the statement no requests for information have been made by the borrower to the holder or servicer pursuant to G.S. 45-93.
9. If you so desire, you have the right to appear before the Clerk of the Superior Court of Wake County, on January 12, 2024 at 3:00 p.m. at the Wake County Courthouse, Room 1220, 316 Fayetteville Street, Raleigh, north Carolina 27601 where you will be afforded the opportunity to show cause, if any, as to why the foreclosure should not be allowed to be held.
 - A. If you do not intend to contest the Noteholder's allegations of default, you are not required to appear at this hearing, and your failure to appear will not affect your right to pay the indebtedness thereby preventing the proposed sale or affect your right to attend the actual sale should you elect to do so.
 - B. The trustee, or substitute trustee, is a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding.
 - C. You have the right to apply to a judge of the superior court pursuant to G.S. 45-21.34 to enjoin the sale, upon any legal or equitable ground that the court may deem sufficient prior to the time that the rights of the parties to the sale or resale become fixed, provided that you comply with the requirements of G.S. 45-21.34.
 - D. You have the right to appear at the hearing and contest the evidence that the clerk is to consider under G.S. 45-21.16(d), and that to authorize the foreclosure the clerk must find the existence of: (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to notice.
 - E. If you fail to appear at the hearing, the trustee will ask the clerk for an order to sell the real property being foreclosed.
 - F. You have the right to seek the advice of an attorney and free legal services may be available to you by contacting Legal Aid of North Carolina or other legal services organizations.
 - G. Foreclosure hearings held before the Clerk of the Superior Court of Wake County are conducted remotely using WebEx. You are responsible for notifying the Clerk of the Superior Court of Wake County, as well as the Substitute Trustee, of a working email address which will permit you to receive a link to be used in accessing the hearing.

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAKE COUNTY

BEFORE THE CLERK

23 SP 3431

In the Matter of the Foreclosure of the)
Deed of Trust executed by DAMIAN CALDWELL)
and DAMIAN CALDWELL CONSTRUCTION)
OF THE CAROLINAS, INC., Grantors, securing)
securing an indebtedness in the original principal)
amount of \$600,000.00, dated May 24, 2021 and)
recorded in Deed Book 18522 at Page 2351 in the)
Wake County Registry.)

RETURN OF SERVICE

I certify that the Notice of Foreclosure Hearing was received and served as follows:

_____ By delivery to Edward Brantley of a copy of the Notice of Foreclosure Hearing;

OR

_____ By leaving a copy of the Notice of Foreclosure Hearing at the dwelling house or usual place of abode of Edward Brantley with a person of suitable age and discretion then residing therein;

OR

_____ Edward Brantley was NOT served for the following reason: _____

This _____ day of _____ 2023.

SHERIFF OF WAKE COUNTY

By: _____
Deputy Sheriff

Date of Service: _____

EXHIBIT G

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE CLERK
23 SP 3431

WAKE COUNTY

In the Matter of the Foreclosure of the)
Deed of Trust executed by DAMIAN CALDWELL)
and DAMIAN CALDWELL CONSTRUCTION)
OF THE CAROLINAS, INC., Grantors, securing)
securing an indebtedness in the original principal)
amount of \$600,000.00, dated May 24, 2021 and)
recorded in Deed Book 18522 at Page 2351 in the)
Wake County Registry.)

AFFIDAVIT OF DEFAULT

DAVID F. TAMER, first being duly sworn, deposes and says that:

1. I am the duly named and acting Substitute Trustee under that certain deed of trust executed by Damian Caldwell and Damian Caldwell Construction of the Carolinas, Inc. dated May 24, 2021 and recorded in Deed Book 18522 at Page 2351 of the Wake County Registry. I have personal knowledge of the matters set forth herein.

2. Attached hereto and incorporated by reference herein as Exhibit A is a promissory note executed and delivered to WEW Checkbook, LLC on or about May 19, 2021, together with a deed of trust executed and delivered to WEW Checkbook, LLC on or about May 24, 2021, a copy of which is attached hereto and incorporated by reference herein as Exhibit B, securing the repayment of the indebtedness represented by the promissory note.

3. As of the date of this affidavit, the sum due and owing under this promissory note and deed of trust amounted to \$3,800,000.00.

4. The obligors under the aforesaid promissory note and deed of trust, Damian Caldwell and Damian Caldwell Construction of the Carolinas, Inc., are in default thereof by reason of the nonpayment thereof according to the terms and conditions therein stated. WEW Checkbook, LLC, the beneficiary under the deed of trust identified in paragraph 1, has accelerated the obligation and made demand of full payment thereof, which has not been received, and demanded of the Substitute Trustee a foreclosure of the deed of trust as provided in the instrument. Notices of default and alternatives to foreclosure have been duly delivered to Damian Caldwell and Damian Caldwell Construction of the Carolinas, Inc. Copies of such notices of default and alternatives to foreclosure are attached hereto and incorporated by reference herein as Exhibits C and D, respectively.

5. The indebtedness secured by the deed of trust accrues additional interest at the rate of \$3,000.00 per day.

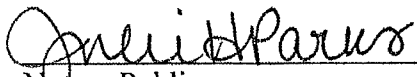
6. The obligation of Damian Caldwell and Damian Caldwell Construction of the Carolinas, Inc. has been accelerated pursuant to the terms and conditions of the promissory note and deed of trust.

7. Because of the default of Damian Caldwell and Damian Caldwell Construction of the Carolinas, Inc., as aforesaid, the beneficiary of the deed of trust has demanded a foreclosure of the deed of trust securing said note, which deed of trust is recorded in Deed Book 18522 at Page 2351 of the Wake County Registry.

This the 10th day of January 2024.


DAVID F. TAMER, SUBSTITUTE TRUSTEE

Sworn to and subscribed before me,
this the 10th day of January 2024.


Notary Public
My commission expires: 7/22/2024

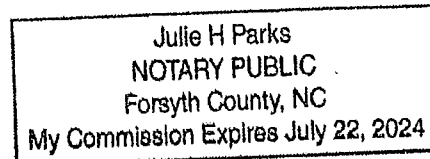


EXHIBIT A

SATISFACTION: The debt evidenced by
this Note has been satisfied in full this
_____ day of _____ 2021.

Signed: _____

PROMISSORY NOTE

Raleigh, N.C.

\$800,000.00 _____

May 19, 2021

FOR VALUE RECEIVED the undersigned, jointly and severally, promise to pay to
WEW Checkbook, LLC or order,
the principal sum of EIGHT HUNDRED THOUSAND AND NO/100 DOLLARS (\$800,000.00), payable in lawful money of the United States of
America, at the office of WEW Checkbook, LLC, 245 Fox Lake Court, Winston-Salem, NC 27106-4467, or at such place as the legal holder hereof may
designate in writing.

The principal shall be due and payable as follows:

Payable on or before July 19, 2021.

This is a commercial transaction and does not involve any individual consumer goods or transactions.

If not sooner paid, the entire remaining indebtedness shall be due and payable on or before July 19, 2021.

Interest shall be in the amount of \$100,000.00 payable on or before July 19, 2021 in addition to the principal amount of the note.

Borrower shall have the option to extend the due date of the note for a specific term not to exceed sixty (60) days for the payment of interest in the amount
of 10% of the amount of the note for each month's extension upon written notice to holder no less than ten (10) days prior to the due date.

If payable in installments, each such installment shall, unless otherwise provided, be applied first to payment of interest then accrued and due on the
unpaid principal balance, with the remainder applied to the unpaid principal.

Time will be of the essence with regard to all obligations under this promissory note and the deed of trust which secures its payment.

Unless otherwise provided, this Note may be prepaid in full or in part at any time without penalty or premium. Partial prepayments shall be applied to
installments due in reverse order of their maturity.


In the event of (a) default in payment of any installment of principal or interest hereof as the same becomes due and such default is not cured within ten
(10) days from the due date, or (b) default under the terms of any instrument securing this Note, and such default is not cured within fifteen (15) days
after written notice to maker, then in either such event the holder may without further notice, declare the remainder of the principal sum, together with all
interest accrued thereon and, the prepayment premium, if any, at once due and payable. Failure to exercise this option shall not constitute a waiver of
the right to exercise the same at any other time. The unpaid principal of this Note and any part thereof, accrued interest and all other sums due under this
Note and the Deed of Trust, if any, shall bear interest at the rate of Eighteen percent (18%) per annum after default until paid.

All parties to this Note, including maker and any sureties, endorsers, or guarantors hereby waive protest, presentment, notice of dishonor, and notice of
acceleration of maturity and agree to continue to remain bound for the payment of principal, interest and all other sums due under this Note and the Deed
of Trust notwithstanding any change or changes by way of release, surrender, exchange, modification or substitution of any security for this Note or by
way of any extension or extensions of time for the payment of principal and interest; and all such parties waive all and every kind of notice of such
change or changes and agree that the same may be made without notice or consent of any of them.

Upon default the holder of this Note may employ an attorney to enforce the holder's rights and remedies and the maker, principal, surety, guarantor, and
endorsers of this Note hereby agree to pay to the holder attorney's fees equal to fifteen percent (15%) of the outstanding balance owing on said note, plus
all other reasonable expenses incurred by the holder in exercising any of the holder's rights and remedies upon default. The rights and remedies of the
holder as provided in this note and any instrument securing this note shall be cumulative and may be pursued singly, successively, or against the property
described in the Deed of Trust or any other funds, property or security held by the holder for payment or security, in the sole discretion of the holder.
The failure to exercise any such right or remedy shall not be a waiver or release of such rights or remedies or the right to exercise any of them at another
time.

This Note is to be governed and construed in accordance with the laws of North Carolina.

Damian Caldwell Construction of the Carolinas, Inc.

By: 
Damian Caldwell - President Damian Caldwell
President

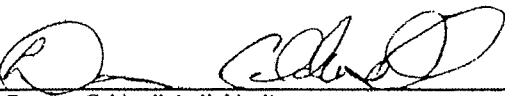

Damian Caldwell, Individually

EXHIBIT B

WAKE COUNTY, NC 99
TAMMY L. BRUNNER
REGISTER OF DEEDS
PRESENTED & RECORDED ON
05/26/2021 16:12:32

BOOK: 018522 PAGE: 02351 - 02357

SATISFACTION: The debt secured by the within Deed of Trust together with the contracts secured thereby have been satisfied in full.

This the _____ day of _____, 200____.

Signed:

ADDRESS OF BENEFICIARY:

WEW CHECKBOOK, LLC
3000 BETHESDA PLACE, SUITE 703
WINSTON-SALEM, NORTH CAROLINA 27103

Recording: Time, Book and Page

Tax Lot No. _____ Parcel Identification No. 0021282.

Mail after recording to William E. West, Jr., 3000 Bethesda Place, Suite 703, Winston-Salem, NC 27103
This instrument was prepared by William E. West, Jr.
Brief description for the Index: 0 Church Street, Morrisville, North Carolina 27560

NORTH CAROLINA DEED OF TRUST

THIS DEED OF TRUST, made this 24th day of May 2021, by and between DAMIAN CALDWELL and DAMIAN CALDWELL CONSTRUCTION OF THE CAROLINAS, INC., as their interests might appear of record (hereinafter referred to as "Grantor"); ROBERT T. HEDRICK (hereinafter referred to as "Trustee") of Carteret County, North Carolina; and WEW CHECKBOOK, LLC, a limited liability company organized and existing under the laws of the State of North Carolina with its office and principal place of business located in Forsyth County, North Carolina at 3000 Bethesda Place, Suite 703, Winston-Salem, North Carolina 27103 (hereinafter referred to as the "Beneficiary"). The designation Grantor, Trustee, and Beneficiary as used herein shall include said parties, their heirs, successors, and assigns, and shall include singular, plural, masculine, feminine, or neuter as required by context.

WITNESSETH:

WHEREAS, the Grantor desire to secure the repayment of certain indebtedness due to Beneficiary from Grantor in the amount of SIX HUNDRED THOUSAND and 00/100ths DOLLARS as evidenced by a certain promissory note of even date herewith, the terms of which are incorporated herein by reference as if fully set forth;

NOW, THEREFORE, as security as a first lien for the repayment of said indebtedness, the Grantor has bargained, sold, given, granted, and conveyed and does by these presents bargain, sell, give, grant, and convey to said Trustee, his heirs or successors and assigns, that certain lot and parcel of land situated in Wake County, North Carolina (hereinafter referred to as the "Premises"), and more particularly described as follows:

SEE EXHIBIT A ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE FOR A MORE PARTICULAR PROPERTY DESCRIPTION.

TO HAVE AND TO HOLD said Premises with all privileges and appurtenances thereunto belonging, to said Trustee, his heirs, successors, and assigns forever, upon the trusts, terms, and conditions, for the uses hereinafter set forth.

IF THE GRANTOR SHALL PAY the Indebtedness secured hereby in accordance with its terms, together with interest thereon, any renewals or extensions thereof in whole or in part, and all other sums secured hereby, and shall comply with all of the covenants, terms, and conditions of this Deed of Trust, then this conveyance shall be null and void and may be cancelled of record at the request of the Grantor. If, however, there shall be any default (a) in the payment of any sums due under the indebtedness, this Deed of Trust or any other instrument securing the indebtedness and such default is not cured within Ten (10) days from the due date, or (b) if there shall be default in any of the other covenants, terms, or conditions contained in this Deed of Trust or any other instrument securing the indebtedness and such default is not cured within Fifteen (15) days after written notice, then and in any of such events, without further notice, it shall be lawful for and the duty of the Trustee, upon request of the Beneficiary, to sell the land herein conveyed at public auction for cash, after having first given such notice of hearing as to commencement of foreclosure proceedings and obtained such findings or leave of court as may be then required by law and giving such notice and advertising the time and place of such sale in such manner as may be then provided by law, and upon such and any resales and upon compliance with the law then relating to foreclosure proceedings under power of sale to convey title to the purchaser in as full and ample manner as the Trustee is empowered. The Trustee shall be authorized to retain an attorney to represent him in such proceedings.

THE PROCEEDS OF THE SALE SHALL, after the Trustee retains his commission, together with reasonable attorney's fees incurred by the Trustee in such proceedings, be applied to the costs of sale, including, but not limited to, costs of collection, taxes, assessments, cost of recording, service fees, and incidental expenditures, the amount due on the indebtedness hereby secured and advancements and other sums expended by the Beneficiary according to the provisions hereof and otherwise as required by the then existing law relating to foreclosures. The Trustee's commission shall be Five Percent (5%) of the gross proceeds of the sale or the minimum of One Thousand and no/100 Dollars (\$1,000.00) whichever is greater, for a completed foreclosure. In the event foreclosure is commenced, but not completed, the Grantor shall pay all expenses incurred by the Trustee, including reasonable attorney's fees, and a partial commission computed on Five Percent (5%) of the outstanding indebtedness or the above-stated minimum sum, whichever is greater, in accordance with the following schedule, to wit: One-fourth (1/4) thereof before the Trustee issues a notice of hearing on the right to foreclosure; One-half (1/2) thereof after issuance of said notice; Three-fourths (3/4) thereof after such hearing; and the greater of the full commission or minimum after the initial sale.

And the said Grantor does hereby covenant and agree with the Trustee as follows:

1. **INSURANCE.** Grantor shall keep all improvements on said land, now or hereafter erected, constantly insured for the benefit of the Beneficiary against loss by fire, windstorm and such other casualties and contingencies, in such manner and in such companies and for such amounts, not less than that amount necessary to pay the sum secured by this Deed of Trust, and as may be satisfactory to the Beneficiary. Grantor shall purchase such insurance, pay all premiums therefor, and shall deliver to Beneficiary such

policies along with evidence of premium payment as long as the indebtedness secured hereby remains unpaid. If Grantor fails to purchase such insurance, pay premiums therefor or deliver said policies along with evidence of payment of premiums thereon, then Beneficiary, at his option, may purchase such insurance. Such amounts paid by Beneficiary shall be added to the principal of the indebtedness secured by this Deed of Trust and shall be due and payable upon demand of Beneficiary. All proceeds from any insurance so maintained shall at the option of Beneficiary be applied to the debt secured hereby and if payable in installments, applied in the inverse order of maturity of such installments or to the repair or reconstruction of any improvements located upon the Property.

2. **TAXES, ASSESSMENTS, CHARGES.** Grantor shall pay all taxes, assessments and charges as may be lawfully levied against said Premises within thirty (30) days after the same shall become due. In the event that Grantor fails to so pay all taxes, assessments and charges as herein required, then Beneficiary, at his option, may pay the same and the amounts so paid shall be added to the principal of the indebtedness secured by this Deed of Trust, and shall be due and payable upon demand of Beneficiary.

3. **ASSIGNMENTS OF RENTS AND PROFITS.** Grantor assigns to Beneficiary, in the event of default, all rents and profits from the land and any improvements thereon, and authorizes Beneficiary to enter upon and take possession of such land and improvements, to rent same, at any reasonable rate of rent determined by Beneficiary, and after deducting from any such rents the cost of reletting and collection, to apply the remainder to the debt secured hereby.

4. **PARTIAL RELEASE.** Grantor shall not be entitled to the partial release of any of the above described property unless a specific provision providing therefor is included in this Deed of Trust. In the event a partial release provision is included in this Deed of Trust, Grantor must strictly comply with the terms thereof. Notwithstanding anything herein contained, Grantor shall not be entitled to any release of property unless Grantor is not in default and is in full compliance with all of the terms and provisions of the indebtedness, this Deed of Trust, and any other instruments that may be securing said indebtedness.

5. **WASTE.** The Grantor covenants that they will keep the Premises herein conveyed in as good order, repair and condition as they are now, reasonable wear and tear expected, and will comply with all governmental requirements respecting the Premises or their use, and that they will not commit or permit any waste.

6. **CONDEMNATION.** In the event that any or all of the Premises shall be condemned and taken under the power of eminent domain, Grantor shall give immediate written notice to Beneficiary and Beneficiary shall have the right to receive and collect all damages awarded by reason of such taking, and the right to such damages hereby is assigned to Beneficiary who shall have the discretion to apply the amount so received, or any part thereof, to the indebtedness due hereunder and if payable in installments, applied in the inverse order of maturity of such installments, or to any alteration, repair or restoration of the Premises by Grantor.

7. **WARRANTIES.** Grantor covenants with Trustee and Beneficiary that she is seized of the Premises in fee simple, has the right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that they will warrant and defend the title against the lawful claims of all persons whomsoever, except for the exceptions hereinafter stated. NONE.

8. **SUBSTITUTION OF TRUSTEE.** Grantor and Trustee covenant and agree to and with Beneficiary that in case the said Trustee, or any successor trustee, shall die, become incapable of acting, renounce his trust, or for any reason the holder of the indebtedness desires to replace said Trustee, then the holder may appoint, in writing, a trustee to take the place of the Trustee, and upon the probate and registration of the same, the trustee thus appointed shall succeed to all rights, powers and duties of the Trustee.

XXX 9. THE FOLLOWING PARAGRAPH, 9. SALE OF PREMISES, SHALL NOT APPLY UNLESS THE BLANK TO THE LEFT MARGIN OF THIS SENTENCE IS MARKED AND/OR INITIALED.

9. SALE OF PREMISES. Grantor agrees that if the Premises or any part thereof or interest therein is sold, assigned, transferred, conveyed or otherwise alienated by Grantor, whether voluntarily or involuntarily or by operation of law [other than: (i) the creation of a lien or other encumbrance subordinate to this Deed of Trust which does not relate to a transfer of rights of occupancy in the Premises; (ii) the creation of a purchase money security interest for household appliances; (iii) a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety; (iv) the grant of a leasehold interest of three (3) years or less not containing an option to purchase; (v) a transfer to a relative resulting from the death of a Grantor; (vi) a transfer where the spouse or children of the Grantor become the owner of the Premise; (vii) a transfer resulting from a decree of a dissolution of marriage, legal separation agreement or from an incidental property settlement agreement, by which the spouse of a Grantor becomes an owner of the Premises; (viii) a transfer into an inter vivos trust in which a Grantor is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the Premise], without the prior written consent of Beneficiary. Beneficiary, at his own option, may declare the indebtedness secured hereby and all other obligations hereunder to be forthwith due and payable. Any change in the legal or equitable title of the Premises or in the beneficial ownership of the Premises, including the sale, conveyance or disposition of a majority interest in the Grantor if a corporation or partnership, whether or not of record and whether or not for consideration, shall be deemed to be the transfer of an interest in the Premises.

10. ADVANCEMENTS. If Grantor shall fail to perform any of the covenants or obligations contained herein or in any other instrument given as additional security for the indebtedness secured hereby, the Beneficiary may, but without obligation, make advances to perform such covenants or obligations, and all such sums so advanced shall be added to the principal sum, shall bear interest at the rate provided in the indebtedness secured hereby for sums due after default and shall be due from Grantor on demand of the Beneficiary. No advancement or anything contained in this paragraph shall constitute a waiver by Beneficiary or prevent such failure to perform from constituting an event of default.

11. INDEMNITY. If any suit or proceeding is brought against the Trustee or Beneficiary or if any suit or proceeding is brought which may affect the value or title of the Premises, Grantor shall defend, indemnify and hold harmless and on demand reimburse Trustee or Beneficiary from any loss, cost, damage or expense and any sums expended by Trustee or Beneficiary shall bear interest as provided in the indebtedness secured hereby for sums due after default and shall be due and payable on demand.

12. WAIVERS. Grantor waives all rights to require marshalling of assets by the Trustee or Beneficiary. No delay or omission of the Trustee or Beneficiary in the exercise of any right, power or remedy arising under the indebtedness or this Deed of Trust shall be deemed a waiver of any default or acquiescence therein or shall impair or waive the exercise of such right, power or remedy by Trustee or Beneficiary at any other time.

13. CIVIL ACTION. In the event that the Trustee is named as a party to any civil action as Trustee in this Deed of Trust, the Trustee shall be entitled to employ an attorney at law, including himself if he is a licensed attorney, to represent him in said action and the reasonable attorney's fee of the Trustee in such action shall be paid by the Beneficiary and added to the principal of the indebtedness secured by this Deed of Trust and bear interest at the rate provided in the indebtedness for such due after default.



14. OTHER LIENS. Default under the terms of any instrument secured by a lien to which this Deed of Trust is subordinate shall constitute default hereunder.

15. RULES OF THE NORTH CAROLINA STATE BAR. Grantor agrees and stipulates that Beneficiary has, in all respects, complied with the Rules of the North Carolina State Bar with regard to the execution and delivery of this deed of trust, as well as with regard to the

underlying transaction of which it is a part. Grantor understands that it has the absolute right to consult with independent legal counsel of its choice prior to entering into this transaction and executing this deed of trust. Furthermore, Grantor has the absolute right to decline to enter into this transaction or, in the alternative, to delay entering into this transaction for purpose of consulting with independent legal counsel. By entering into this transaction, Grantor expressly understands and agrees that Beneficiary has drafted this deed of trust for his own account. Grantor further agrees that Beneficiary has not rendered professional services to it or on its behalf in this specific matter and that Beneficiary has not given Grantor any legal advice in connection with this specific matter.

16. RESIDENTIAL DISCLOSURE. Grantor agrees and stipulates that the subject property is not principal residence of Grantor's family.

IN WITNESS THEREOF, the above Grantor has caused this instrument to be executed on the date first above written.

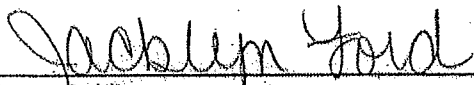

(SEAL)
DAMIAN CALDWELL, Individually and in his
representative capacity as PRESIDENT of DAMIAN
CALDWELL CONSTRUCTION OF THE
CAROLINAS, INC. 

NORTH CAROLINA

Forsyth COUNTY

I, Jacklyn Ford, a notary public of the County and State aforesaid, certify that DAMIAN CALDWELL personally came before me this day and acknowledged the due execution of the foregoing instrument in both his individual and representative capacities.

Witness my hand and seal, this 24 day of May, 2021.


Notary Public

My commission expires: 12.11.2021

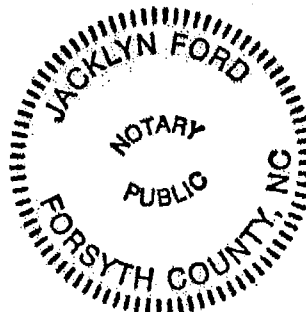
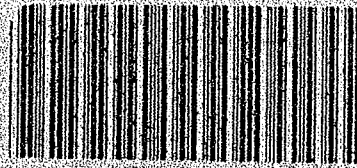


EXHIBIT A

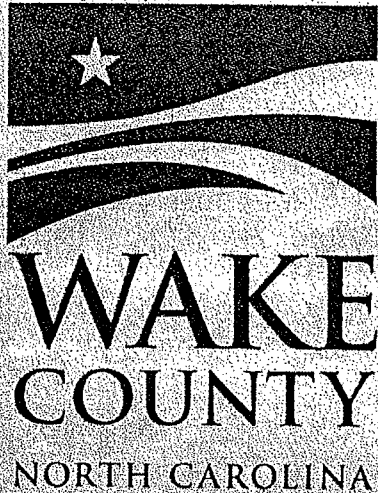
Legal Description of Property

Being all that certain tract or parcel of land lying and being situate in Wake County, North Carolina, and being more particularly described as:

Beginning at an iron stake on the East side of Old North Carolina Highway No. 10, Said iron stake being 227.05 feet in a Westerly direction from the West right-of-way line of the Old North Carolina R. R. at Shilo Baptist Church's Northwest corner; thence along and with the East line of Old North Carolina Highway No. 10, in a Northern direction 1360 feet to an iron stake in the West right-of-way line of Old North Carolina R. R.; thence along and with the West right-of-way line of Old North Carolina R.R. in a Southerly direction 1298 feet to an iron stake at Shilo Baptist Church; thence along the North line of Shilo Baptist Church South 72 degs. 35 mins. West 227.5 feet to an iron stake, the point of beginning, Containing 3.75 acres, more or less, according to plat and survey thereof by Eugene A. Davis, Registered Surveyor, dated July, 1961, filed in the Office of the Register of Deeds of Wake County, N.C., in Book of Maps 1961, at page 20, to which reference is hereby made for a more particular description of same, and being shown as Tract No. 3, on said above plat, and being a portion of the Jessie Harris Farm.



BOOK:018522 PAGE:02351 - 02357



Please retain yellow trailer page

It is part of the recorded document and must be submitted with the original for re-recording.

TAMMY L. BRUNNER

Register of Deeds

Wake County Justice Center
300 South Salisbury Street, Suite 1700
Raleigh, NC 27601

☐ New Time Stamp

☐ \$25 Non-Standard Fee

☐ Additional Document Fee

☐ Additional Reference Fee

This Customer Group

_____ # of Excessive Entities

2 # of Time Stamps Needed

This Document

_____ # of Pages 66

EXHIBIT H

**COMMONWEALTH OF KENTUCKY
KNOX CIRCUIT COURT
DIVISION NO. _____
EFILE**

ACTION NO. 24-CI-_____

BRCPF M&M MOUNTAINSIDE BLKR LLC

PLAINTIFF

-VS-

**MOUNTAINSIDE COAL COMPANY, BINDERLESS
COAL BRIQUETTING COMPANY PTY LIMITED,
MID SOUTH CAPITAL PARTNERS LP, KNOX
COUNTY, KENTUCKY, ALDEN RESOURCES LLC,
THOMAS R. GAMBREL, CHARLISA G. STEWART,
TRIPLE 7 COMMODITIES, INC., CLAY LAUREL
MINING, INC. and ALLEGIANT SECURITY SERVICES, LLC**

DEFENDANTS

*** * * * ***
COMPLAINT
*** * * * ***

Comes the Plaintiff, BRCPR M&M Mountainside Blkr LLC, (hereinafter "Plaintiff") by counsel and for its Complaint states as follows:

1. The Plaintiff is a Delaware limited liability company with an address at LP 33 South Six Street, Suite 4100, Minneapolis, Minnesota 55402.
2. The Defendant, Mountainside Coal Company, (hereinafter "Defendant MCC") is a Tennessee corporation, authorized to conduct business in the Commonwealth of Kentucky, with an address of 313 Ashford Court, Winston Salem, North Carolina 27103. Serve Corporation Service Company, 421 West Main Street, Frankfort, KY 40601, its Registered Agent for service of process.
3. The Defendant, Binderless Coal Briquetting Company PTY Limited, (hereinafter "Defendant BCBC") is a company organized under the laws of New

South Wales, Australia, with an address of Level 7, 167 Eagle Street, Brisbane, Australia QLD 4000. Serve: Chrisandrea L. Turner, Esq., Stites & Harbison PLLC, 250 West Main Street, Suite 2300, Lexington, KY 40507.

4. The Defendant Mid South Capital Partners LP, (hereinafter "Defendant Mid South") is a Kentucky limited partnership, with an address at P.O. Box 525, Lexington, Kentucky 40588. Serve Jud Patterson, 144 North Broadway, Lexington, KY 40588, its Registered Agent for service of process.

5. The Defendant, Knox County, Kentucky, (hereinafter "Defendant Knox County") has an address of c/o Gilbert Hollard, Knox County Attorney, Knox County Courthouse, Suite 107, P.O. Box 1809, Barbourville, Kentucky 40906. Serve Defendant Knox County by serving its County Attorney at the above address.

6. The Defendant, Alden Resources, LLC, (hereinafter "Defendant Alden") is a Delaware limited liability company, having an address of 332 W. Cumberland Gap Parkway, Corbin, Kentucky 40701. Serve CT Corporation System, 306 S. Main Street, Suite 512, Frankfort, KY 40601, its Registered Agent for service of process.

7. The Defendant, Thomas R. Gambrell, is a resident of Whitley County, Kentucky, with an address of 10807 Highway 92 E., Williamsburg, Kentucky 40769. Serve Defendant Thomas R. Gambrell at the above address.

8. The Defendant, Charlisa G. Stewart is a resident of Laurel County, Kentucky, with an address of 176 Dogwood Trail, London, Kentucky 40741. Serve the Defendant at the above address. The Defendants, Thomas R. Gambrell

and Charlisa G. Stewart , are hereinafter referred to as “Defendants Gambrell/Stewart”.

9. The Defendant, Triple 7 Commodities, Inc., (“hereinafter “Defendant Triple 7”) is a West Virginia corporation, having an address of 313 Ashford Court, Winston Salem North Carolina 27103. Serve Registered Agent, Inc., 212 N. 2nd Street, Suite 100, Richmond, KY 40475, its Registered Agent for service of process.

10. The Defendant, Clay Laurel Mining Inc., (hereinafter “Defendant “CLM”), is a Kentucky corporation, having an address of 5540 KY 1890, Barbourville, KY 40906. Serve Edward Paul Sizemore, 150 Sizemore Boulevard, Avawam, KY 41713, its Registered Agent for service of process.

11. The Defendant Allegiant Security Services, LLC (hereinafter “Defendant Allegiant”) is a Kentucky limited liability company, having an address of 300 W. Vine Street, Suite 1410, Lexington, KY 40507. Serve Robert D. Tackett, 116 Santa Barbara Blvd., Georgetown KY 40324, its Registered Agent for service of process.

12. The Plaintiff and the Defendant MCC are parties to an Agreement dated March 31, 2021, and having an Effective Date of April 16, 2021, (the “Agreement”), a copy of which is attached hereto and made a part hereof marked Exhibit A.

13. The Plaintiff, Defendant MCC and Defendant CLM are parties to a Tonnage Payment and Overriding Royalty Agreement dated March 31, 2021, and having an Effective Date of April 16, 2021, (“TPORA”), a copy of which is attached

hereto and made a part hereof marked Exhibit B which is recorded in the Knox County Clerk's Office in Book L111, Page 489-520.

14. The Plaintiff, Defendant CLM and Defendant Triple 7 are parties to Guaranty Agreement dated March 31, 2021, and having an Effective Date of April 16, 2021, ("Guaranty"), a copy of which is attached hereto and made a part hereof marked Exhibit C.

15. The Plaintiff and Defendant MCC are parties to a Mortgage, Security Agreement and Fixture Filing dated March 31, 2021, and having an Effective Date of April 16, 2021, a copy of which is attached hereto and made a part hereof marked Exhibit D, which is recorded in the Knox County Clerk's Office in Book M483, Pages 427-456, and a UCC Financing Statement which was filed with the Kentucky Secretary of State in Financing Statement No. 2001-3141947-1401 (the "Plaintiff's Mortgage"), a copy of which is attached hereto and made a part hereof marked Exhibit E.

16. Prior to the Effective Date of the Agreement the Plaintiff was the owner of 392 shares of the outstanding stock of Defendant MCC as evidenced by Stock Certificate No. 9.

17. Pursuant to the Agreement, Defendant MCC redeemed (the "Redemption") all of the 392 shares of stock in the Defendant MCC owned by the Plaintiff and as a result of the Redemption the Defendant MCC became the owner of such shares.

18. In consideration of the Redemption, Defendant MCC, Defendant Triple 7 and Defendant CLM are obligated to the Plaintiff to perform all of the obligations set forth in the Agreement, the TPORA and the Mortgage.

19. Pursuant to the Agreement, Defendant MCC is obligated to the Plaintiff to perform the following:

a. Maintain the "Plant Lease" in good standing and comply with all the provisions and covenants contained therein. The Plant Lease is Lease dated September 30, 2008, between Tommy Gambrel and Ethal Gambrel, his wife, to Defendant MCC which was amended by Amendment to and Ratification of Lease Agreement dated February 17, 2014, between Defendants Gambrel/Stewart and Defendant MCC. Memoranda of the Plant Lease are recorded in Book L110, Page 123, of the Knox County Clerk's Office, Book L110, Page 135, same office, and Book L111, Page 448, same office.

b. ~~Maintain its existing and future Coal Leases ("Mountainside Coal Leases") and Surface Coal Mining and Reclamation Operations Permits (the "Permits") in full force and effect and in good standing, free and clear of all liens and encumbrances and comply with all the provisions and covenants contained therein. A list of the Mountainside Coal Leases and Permits is attached as Exhibit D to the Agreement and as Exhibit A to the TPORA.~~

c. ~~Provide the Plaintiff with monthly coal production reports regarding coal mined from the Mountainside Coal Leases and/or processed through the preparation plant (the "Plant") located on the Plant Lease within fourteen (14) days of the end of each month.~~

d. Provide Plaintiff with annual financial reports within 120 days from the end of each calendar year.

e. Execute the TPORA and the Mortgage.

f. Pay to the Plaintiff the amount of \$405,720 and the sum of \$38,710 within one hundred (100) days of the Effective Date of the Agreement, such sums which represented the amount of the Plaintiff's collateral posted with either Forcht Bank or the Commonwealth of Kentucky to secure the reclamation bonds posted to secure Defendant MCC's performance on the Permits. (collectively the "Collateral Replacement Obligation").

20. The Agreement contains a "Put Option" in which the Plaintiff could require the Defendant MCC to pay the Plaintiff the sum of Five Million Dollars (\$5,000,000.00), beginning eighteen (18) months from the Effective Date of the Agreement and extending for a period of five (5) years thereafter. In the event the Plaintiff exercises the Put Option, Defendant MCC is required to pay Plaintiff the above sum which would result in Defendant MCC fulfilling all its obligations to Plaintiff.

21. The Agreement grants Defendant MCC the right, but not the obligation, to purchase all amounts due Plaintiff for the consideration of Ten Million Dollars (\$10,000,000.00) (the "Call Option"). The Call Option can be exercised by Defendant MCC at any time beginning eighteen (18) months from the Effective Date of the Agreement and for a period of five (5) years thereafter. In the event Defendant MCC exercises its right under the Call Option and pays

the Plaintiff the above sum, Defendant MCC would fulfill all of its obligations to the Plaintiff.

22. Pursuant to the TPORA Defendant MCC is obligated to pay the Plaintiff the following sums:

a. A tonnage payment (the "Tonnage Payment") in the amount shown on Table 1 attached to the TPORA for each ton of 2,000 pounds of coal, on a clean coal basis, processed through the Plant regardless of the source of such coal.

b. A monthly minimum tonnage payment (the "Monthly Minimum Tonnage Payment") in the amount of Ten Thousand Dollars (\$10,000.00) beginning with June 1, 2021, and continuing each month thereafter, including any month for which coal is not processed at the Plant. Defendant MCC was entitled to recoup the Tonnage Payment against the Monthly Minimum Tonnage Payment for a period of three (3) months.

c. An overriding royalty ("Overriding Royalty") in the amount shown on Table 2 of the TPORA for each ton of 2,000 pounds of coal, on a clean coal basis, mined and sold from the Mountainside Coal Leases and future coal leases identified on Exhibit A to the TPORA, whether or not the coal was processed through the Plant.

d. The Tonnage Payment and the Overriding Royalty are due and payable to Plaintiff on the 25th day of the month following the month such coal was mined and sold or processed and sold.

23. In the TPORA, Defendant MCC grants Plaintiff, or its representatives, the right to inspect Defendant MCC's records at reasonable times to confirm Defendant MCC's compliance with the terms and conditions set forth in the TPORA.

24. Pursuant to the Guaranty Defendant Triple 7 and Defendant CLM agreed to unconditionally and irrevocably guarantee to Plaintiff the full and faithful performance of all of the obligations of Defendant MCC to Plaintiff pursuant to the Agreement, the TPORA and the Mortgage.

25. The obligations of Defendant MCC set forth in the Agreement and the TPORA are secured by the Mortgage. The following are the relevant provisions set forth in the Mortgage:

a. The Mortgage secures the payment to Plaintiff of the amount of Twenty Five Million Dollars (\$25,000,000.00) which is the maximum amount required by the TPORA and all monies due Plaintiff pursuant to the terms of the Agreement, including the Collateral Replacement Obligation subject however to the \$5,000,000.00 Put Option and the \$10,000,000.00 Call Option, if exercised.

b. The termination date of the Mortgage is the earlier of 25 years from its Effective Date of April 16, 2021, or until all of the above amounts set forth in numerical paragraph 25 a. are paid.

c. The Mortgage grants a first mortgage lien and security interest in the Plant Lease, the Mountainside Coal Leases in Knox and Whitley Counties, Kentucky, the Permits and all improvements, fixtures, machinery, appliances, facilities, and personal property of every kind or whatsoever which are part of or

associated with the Plant constructed on the property described in the Plant Lease and all other improvements owned by Defendant MCC (collectively hereinafter referred to as the "Mortgaged Property").

26. The Mortgage obligates and requires Defendant MCC to perform the following:

a. Maintain the Mortgaged Property in good order and condition, ordinary wear and tear excepted.

b. Maintain insurance on all improvements located on the Mortgaged Property, including the Plant, against loss or damage by fire or flood or such other risks of damage, hazards, casualties and contingencies. The required insurance is required to have Plaintiff named as an additional insured and to provide notice to Plaintiff if cancelled.

c. Maintain the Mortgaged Property free and clear of all mortgages, security interests, charges, liens or other encumbrances and to discharge any such lien of record within 30 days after a lien is filed.

d. Pay all taxes assessed against the Mortgaged Property when such taxes are due.

e. That there be no judicial or administrative actions, suits or proceedings (including without limitation any judgments, garnishments or attachments) pending or threatened against, affecting or involving the Mortgaged Property.

f. That all rents, royalties and additional sums payable under the Mountainside Coal Leases be paid when due and payable and all other terms of

said leases be complied with and to do all things necessary to keep the Plaintiff's rights unimpaired in and to said leases, and not to commit or permit to be committed or to incur any event of default under the Mountainside Coal Leases or modify, amend, supplement or terminate any of the same without having obtained the prior written consent from the Plaintiff.

g. Requires Defendant MCC to provide Plaintiff immediately upon the receipt of any notice of default related to the Mountainside Coal Leases.

27. Defendants MCC, Triple 7 and CLM have defaulted in their collective obligations set forth in the Agreement, the TPORA, the Mortgage and the Guaranty. The nature of the defaults are numerous and the following are the existing defaults known to the Plaintiff:

a. Failure to maintain the Plant Lease in good standing and comply with all the provisions and covenants contained therein.

b. Failure to maintain the Mountainside Coal Leases (which includes the Plant Lease) in full force and effect and in good standing.

c. Failure to provide monthly coal production reports regarding coal mined from the Mountainside Coal Leases and/or processed through the Plant.

d. Failure to provide annual financial reports.

e. Failure to pay in full the Collateral Replacement Obligation when due.

f. Failure to pay all the Tonnage Payments when due.

g. Failure to pay all the Monthly Minimum Tonnage Payments when due.

- h. Failure to pay all the Overriding Royalties when due.
- i. Failure to provide monthly royalty reports.
- j. Failure to allow access to records to confirm compliance with the terms of the TPORA.
- k. Failure to maintain casualty and/or general liability insurance coverage on the Plant or the Mortgaged Property.
- l. Failure to maintain the Mortgaged Property free and clear of all liens or other encumbrances and to discharge any liens of record.
- m. Failure to pay ad valorem property taxes, both real and tangible.
- n. Failure to prevent judicial proceedings, including judgments or attachments, against the Mortgaged Property.
- o. Violated the requirement that none of the Mountainside Coal Leases would be modified, amended, supplemented or terminated without first obtaining Plaintiff's written consent.
- p. Failure to provide Plaintiff immediately upon receipt with any notice of default relating to the Mountainside Coal Leases.

28. As a result of Defendant MCC's failure to provide Plaintiff with documentation of the amount of coal mined from the Mountainside Coal Leases and/or processed through the Plant, the Plaintiff cannot state with certainty the amount of indebtedness owed to Plaintiff by Defendants MCC, Triple 7 and CLM. Notwithstanding the above, Plaintiff has not been paid all Monthly Minimum Tonnage Payments due, has not been paid the entire Collateral Replacement Obligation and has not received all Tonnage Payments and/or Overriding

Royalty Payments, all totaling in excess of \$1,000,000.00, and all of which are long past due.

29. On numerous occasions Plaintiff has demanded Defendant MCC to cure the defaults set forth in numerical paragraph 27, a. through p., and none of the defaults have been cured or remedied despite Defendant MCC advising Plaintiff on several occasions it would promptly do so. The above listed defaults by Defendant MCC are continuing.

30. The Mortgage provides that in the event of a default ("Event of Default") on the part of Defendant MCC of the terms, conditions and obligations set forth in the Agreement, the TPORA and/or the Mortgage the Plaintiff was entitled to the following remedies:

a. Plaintiff may exercise any one or more of the rights and remedies granted pursuant to the Mortgage or given to a secured party under applicable law, as it may be amended from time to time, including, without limitation, the right to accelerate the maturity of the Defendant MCC's obligations to the Plaintiff and the right to foreclose the mortgage lien and security interest granted in the Mortgage.

b. In any proceeding (i) to foreclose the mortgage lien and security interest granted to Plaintiff in the Mortgage or enforce any other remedy given to Plaintiff under the Mortgage; (ii) in which Plaintiff is named as a party in connection with any of the Mortgaged Property; (iii) affecting the Agreement, the Mortgage or any of the Mortgaged Property; or (iv) in preparation for the commencement or defense of any proceeding or threatened suit or proceeding in

connection therewith, there will be allowed and included, as additional indebtedness in the judgment or decree resulting therefrom, any and all of the following expenses paid or incurred in connection with such proceeding by or on behalf of Plaintiff, reasonable attorneys' fees, appraisers' fees, outlays for documentary and expert evidence, stenographers' charges, publication costs, survey costs, and costs (which may be estimated as to items to be expended after entry of such judgment or decree) of procuring all abstracts of title, title searches and examinations, title insurance policies, and any similar data and assurances with respect to title to the Mortgaged Property as Plaintiff may deem reasonably necessary either to prosecute or defend in such proceeding or to evidence to bidders at any sale pursuant to such decree the true condition of the title to or value of the Mortgaged Property. All expenses of the foregoing nature will be immediately due and payable by Defendant MCC.

c. The proceeds of any foreclosure sale of the Mortgaged Property, or any part thereof, will be distributed and applied in the following order of priority: (i) on account of all costs and expenses incident to the foreclosure proceedings, including all such items as are mentioned in Section 30 b. hereof; (ii) to the payment of delinquent or current real and tangible property taxes; (iii) to the Plaintiff in payment of all obligations and amounts due Plaintiff by Defendants MCC, Triple 7 and CLM; (iv) to the other Defendants which possess liens of any kind against the Mortgaged Property, in the order of their priority; and (v) the balance, if any, to Defendant MCC.

d. Since Defendant MCC's defaults are continuing, without abatement, the Plaintiff's collateral (the Mortgaged Property), particularly the Plant, which is uninsured for casualty loss, the Plant Lease and a number of the Mountainside Coal Leases which are believed to be in default, and are subject to being terminated, have resulted and/or could result in substantial damage to the Plaintiff and any other Defendant which possesses a lien on the Mortgaged Property.

e. The Mortgage provides, in addition to all other remedies, for the Court to appoint a receiver (hereinafter "Receiver") to (i) enter upon, take possession of, and manage and operate the Mortgaged Property; (ii) let or re-let the Mortgaged Property or any part thereof; (iii) bring or defend any suits in connection with the possession of the Mortgaged Property or any part thereof, in the name of either Plaintiff or Defendant MCC; (iv) make such repairs as Plaintiff may deem appropriate; (v) pay out of rents, income or profits any liens, taxes, assessments, insurance premiums, utility charges or costs of keeping the Mortgaged Property in good condition and repair; (vi) in the name of either Plaintiff or Defendant MCC sue for or otherwise collect and receive all rents, issues and profits, including those past due and unpaid; and (vii) do all other things Plaintiff may deem necessary or proper to protect its security. Entry upon and taking possession of the Mortgaged Property or any part thereof and the collection of the rents and the application thereof will not operate to cure or waive any default under any instrument given by Defendant MCC to Plaintiff or prohibit the taking of any other action by Plaintiff under any such other instrument, or

at law or in equity to enforce the payment of the indebtedness/obligations owed to Plaintiff by Defendant MCC or to realize on any other security or guarantee.

f. In addition to the above provisions related to a Receiver, the Mortgage further provides upon or at any time after the occurrence of an Event of Default, Plaintiff may request the appointment of a Receiver of the Mortgaged Property. In the event Plaintiff elects to seek the appointment of a Receiver for the Mortgaged Property upon the occurrence of an Event of Default hereunder, Defendant MCC expressly consents to the appointment of such Receiver, who will be entitled to a reasonable fee for so managing the Mortgaged Property. Such appointment may be made either before or after any foreclosure action or sale, without notice, and without regard to (i) the solvency or insolvency, at the time of application for such Receiver, of the person or persons, if any, liable for the payment of the obligations/indebtedness of Defendant MCC; or (ii) the value of the Mortgaged Property at such time, and without bond being required of the applicant. The Receiver will have the power to take possession, control, use and care of the Mortgaged Property and to collect all rents, issues, deposits, proceeds and profits thereof. Notwithstanding the appointment of any Receiver, trustee, or other custodian, Plaintiff will be entitled to the possession and control of any cash or other instruments at the time held by, or payable or deliverable under the terms of this Mortgage to Plaintiff.

g. Upon any foreclosure sale, pursuant to judicial proceedings, Plaintiff may bid for and purchase the Mortgaged Property, and upon compliance with the terms of the sale, may hold, retain, possess and dispose of such property as

its own absolute right without further accountability. Any such purchase will permit Plaintiff to apply to the purchase price any portion of or all sums due to Plaintiff pursuant to the Agreement, the TPORA and this Mortgage in lieu of cash, to the amount which will, upon distribution of the net proceeds of such sale, be payable thereon.

31. In the Mortgage Defendant MCC also granted to Plaintiff a security interest in any of the Mortgaged Property, particularly the Plant and each and every component thereof or therein, the Permits and other property for which a security interest may be granted pursuant to the Uniform Commercial Code, including fixtures (the "UCC Collateral"). The provisions in the Mortgage related to the UCC collateral provide for the following remedies upon the occurrence of an Event of Default:

a. Plaintiff will have the remedies of a secured party under the Uniform Commercial Code, and the remedies provided in the Mortgage, under applicable law or in equity.

b. In exercising any of the remedies available to Plaintiff pursuant to the Uniform Commercial Code, Plaintiff may proceed against the Mountainside Coal Leases (including the Plant Lease) and any items of personal property, including the Plant, specified above as part of the Mortgaged Property separately or together and in any order whatsoever, without in any way affecting the availability of Plaintiff's remedies under the Uniform Commercial Code or the other remedies set forth in the Mortgage.

32. Defendant BCBC is named as a Defendant as a result of Defendant MCC granting Defendant BCBC a Mortgage, Security Interest and Fixture Filing dated March 31, 2021, with an Effective Date of April 16, 2021, (the "BCBC Mortgage") on the Mortgaged Property. The BCBC Mortgage is recorded in Book M483, Pages 457-475, and a UCC Financing Statement was recorded with the Kentucky Secretary of State as Financing Statement No. 2021-3142142-02.01 and were recorded after the recording of the Mortgage and therefore the BCBC Mortgage is inferior to the Mortgage. As a result of the above, the Defendant BCBC should answer the allegations set forth in this Complaint and assert any claim it may have against the remaining Defendants herein and/or related to the Mortgaged Property.

33. The Defendant Mid South is named as a Defendant as a result of its purchase of several property tax bills from Defendant Knox County related to the Mortgaged Property (the "Tax Bills"). The following are the Tax Bills purchased by Defendant Mid South, and to Plaintiff's best knowledge have not been paid:

a. Tax Bill #13631 issued by Knox County to Defendant MCC for payment of 2020 taxes on Parcel #064-00-004.017, which is recorded in Miscellaneous Book 57, Page 371.

b. Tax Bill #12861 for payment of 2021 taxes on Parcel #064-00-004.017, which is recorded in Miscellaneous Book 58, Page 333.

c. Tax Bill #13015 for payment of 2022 taxes on Parcel #064-00-004.017, which is recorded in Miscellaneous Book 58, Page 834.

34. The Defendant Knox County is named as a Defendant as a result of real or tangible property taxes issued on the Mortgaged Property for tax year 2023 having not been paid, but which are due and payable as of the date hereof. Defendant Knox County should answer the allegations set forth in this Complaint and assert any claim it may have for taxes owed on the Mortgaged Property.

35. The Defendants Gambrel/Stewart are named as Defendants as a result of their being the lessors pursuant to the Plant Lease and they should answer the allegations set forth in this Complaint and assert any interest they may have relating to the Plant, the Plant Lease or any of the Mortgaged Property.

36. The Defendant Alden is named as a Defendant as a result of Defendant MCC entering into a Sublease Agreement with Defendant Alden (the "Alden Sublease"), granting Defendant Alden the right to mine pursuant to one of the Permits and a number of the Mountainside Coal Leases located on Hubbs Hollow in Knox County, Kentucky. It is Plaintiff's belief Defendant Alden has been mining on the Alden Sublease for a number of months, and perhaps as long as two (2) years and has paid a tonnage royalty to Defendant MCC in the amount of Eight Dollars (\$8.00) per ton for all such coal mined (the "Alden Payment"). Pursuant to the TPORA, Defendant Alden is required to pay Plaintiff the Alden Payment. Defendant Alden had actual knowledge pursuant to the recorded TPORA and knew the Alden Payment should have been paid to Plaintiff and not Defendant MCC, and Defendant Alden failed to do so.

37. Defendant Allegiant is named as a Defendant as a result of it possessing a Judgment Lien in civil action styled *Allegiant Security Services, LLC vs. Mountainside Coal Company, Inc.*, pending in the Knox Circuit Court, Civil Action No. 23-CI-00200, and filed in Lis Pendens Book 38, Page 272. Defendant Allegiant should answer the allegations set forth in the Complaint and assert any interest it may have against the remaining Defendants herein and/or to the Mortgaged Property.

38. The Defendants MCC, Triple 7 and CLM are indebted to the Plaintiff in excess of One Million Dollars (\$1,000,000.00) and such other amounts as may be determined after Plaintiff has been furnished with all information regarding coal mined from the Mountainside Coal Leases and/or processed through the Plant. All the above amounts are due and owing, are past due and have not been paid.

39. As a result of the numerous defaults set forth in numerical paragraph 27 a. through p. hereof, and until the Mortgaged Property is sold by the Master Commissioner pursuant to a judicial sale, a Receiver should be appointed by the Court to manage and operate the business affairs of Defendant MCC, to collect the Alden Payments, to utilize any proceeds received by the Receiver to obtain and pay for casualty insurance on the Plant, general liability insurance on the Mortgaged Property, cure any defaults under the Plant Lease or any of the other Mountainside Coal Leases and to perform all acts necessary to operate Defendant MCC as a going concern, all to the exclusion of the present ownership and management of Defendant MCC.

40. With the exception of the amounts due for delinquent real and tangible property taxes due on the Mortgaged Property, the Mortgage constitutes a first and prior mortgage on the Mortgaged Property.

41. To the best of Plaintiff's knowledge all of the liens and encumbrances described herein are the only liens and encumbrances on the Mortgaged Property.

42. Pursuant to the terms of the Agreement, the TPORA, the Mortgage and the Guaranty the Defendants MCC, Triple 7 and CLM expressly consented to submitting any dispute to the exclusive jurisdiction of the Knox Circuit Court.

WHEREFORE, the Plaintiff prays as follows:

1. That it recover from Defendants MCC, Triple 7 and CLM all sums currently owed by these Defendants for the unpaid Monthly Minimum Tonnage Payment, the Tonnage Payment, Overriding Royalty, and the unpaid amount of the Collateral Replacement Obligation which currently exceeds One Million Dollars (\$1,000,000.00) and which will increase as Defendant MCC fails to make such payments in the future and for amounts determined that are due after the required documentation is provided to Plaintiff.

2. An amount equal to the Tonnage Payments multiplied by the coal remaining to be mined pursuant to the Mountainside Coal Leases, not to exceed however the sum of Twenty Five Million Dollars (\$25,000,000.00).

3. In lieu of the amounts prayed for in numerical paragraph 2 above, the amount of Ten Million Dollars (\$10,000,000.00) which represents the

amount due Plaintiff by Defendant MCC under the Call Option in the event it exercises the Call Option and complies with the payment terms thereof.

4. That it recover all expenses related to this action and which are set forth in the Mortgage, including, but not limited to, its reasonable attorney's fees.

5. That the Defendant Alden be required to pay the Plaintiff all monies which are being paid Defendant MCC pursuant to the Alden Sublease, or in the alternative, that such monies be paid to the Receiver, if a Receiver is appointed by the Court to manage the affairs of Defendant MCC.

6. That the Court appoint a Receiver to manage the affairs of Defendant MCC and any monies collected by the Receiver be utilized to pay the operating expenses, casualty and general liability insurance premiums, rents and/or royalties due Defendants Gambrel/Stewart and other lessors of the Mountainside Coal Leases in order to cure any monetary default, all in order to maintain the viability of Defendant MCC's business until the property can be sold at a judicial sale.

7. Subject to the delinquent and current real and tangible property taxes, that the Plaintiff be adjudged to have a first and prior mortgage and security interest in the Mortgaged Property, including both real and personal property, and that the Court direct a sale of the Mortgaged Property after duly advertising the same in accordance with law and after having the Mortgaged Property appraised, and that the proceeds of the judicial sale be applied to the aforesaid obligations and indebtedness owed to the Plaintiff and to the other Defendants in order of their priority.

8. That the Court determine the priorities of all other Defendants which possess a lien or encumbrance on the Mortgaged Property.

9. That any purchaser at a judicial sale be granted a Writ of Possession for the Mortgaged Property purchased at such sale.

10. For all other proper, legal and equitable relief to which the Plaintiff may be entitled.

/s/ Charles J. Baird, Esq.
Baird & Baird, P.S.C.
P. O. Box 351
Pikeville, KY 41502
606/437-6276
cbaird@bairdandbaird.com

/s/ David J. Baird, Esq.
Baird & Baird, P.S.C.
P. O. Box 351
Pikeville, KY 41502
606/437-6276
dbaird@bairdandbaird.com

EXHIBIT I

Mountainside Coal Company, Inc.

Profit and Loss

January - December 2022

	Total
Income	
Sales	2,101,047.39
Sales of Product Income	1,506,902.84
Uncategorized Income	140,753.75
Total Income	\$ 3,748,703.98
Cost of Goods Sold	
Contractors & Consultants	668,480.86
Cost of Goods Sold	747,764.27
Processing Costs - COGS	350,201.73
Repairs & Maintenance - COGS	7,300.00
Shipping	1,128.33
Supplies & Materials - COGS	244,385.89
Workers Compensation	2,096.52
Total Cost of Goods Sold	\$ 2,021,357.60
Gross Profit	\$ 1,727,346.38
Expenses	
Bank Charges & Fees	18,541.18
Car & Truck	7,102.37
Contractors	762,784.36
Insurance	100,778.64
Job Supplies	17,402.57
Legal & Professional Services	3,000.00
Meals & Entertainment	4,875.86
Office Supplies & Software	43,678.49
Personal Expenses	69.52
Rent & Lease	549,107.92
Repairs & Maintenance	18,831.36
Taxes & Licenses	45,076.83
Travel	16,309.40
Uncategorized Expense	4,865.91
Utilities	21,884.48
Total Expenses	\$ 1,614,308.89
Net Operating Income	\$ 113,037.49
Net Income	\$ 113,037.49

EXHIBIT J

Mountainside Coal Company, Inc.
Profit and Loss
January - March, 2023

	Total
Income	
Sales	327,612.52
Sales of Product Income	1,839,706.05
Total Income	\$ 2,167,318.57
Cost of Goods Sold	
Contractors & Consultants	317,436.46
Cost of Goods Sold	52,183.42
Processing Costs - COGS	948,734.74
Shipping	275.03
Supplies & Materials - COGS	212,871.97
Total Cost of Goods Sold	\$ 1,531,501.62
Gross Profit	\$ 635,816.95
Expenses	
Bank Charges & Fees	3,774.46
Car & Truck	2,324.14
Contractors	79,322.92
Insurance	961.06
Job Supplies	9,452.43
Meals & Entertainment	1,480.96
Office Supplies & Software	2,127.49
Rent & Lease	162,350.50
Repairs & Maintenance	3,374.86
Travel	26,764.25
Uncategorized Expense	306.85
Total Expenses	\$ 292,239.92
Net Operating Income	\$ 343,577.03
Net Income	\$ 343,577.03

Friday, Apr 14, 2023 06:27:03 AM GMT-7 - Accrual Basis

EXHIBIT K

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

THEODORE M. SPOLTORE; THEODORE
M. SPOLTORE LIVING TRUST; DR.
JEFFREY EDWIN MIDDELDORF;
SUSAN KATHLEEN MIDDELDORF,
TRUSTEE; SUSAN K. MIDDELDORF
TRUST DATED APRIL 23, 1996;
DR. RICHARD LEVY; DR. DAVID J.
ESPOSITO; DR. RODRIGO R. SANTOS;
TOM DUNNE; and DR. GEORGE J.
DOUTHIT, JR.,

Case No.: 6:23-cv-00143-REW-HAI

Plaintiffs,

v.

TRIPLE 7 COMMODITIES, INC.; GME
MINING & RECLAMATION INC.;
MOUNTAINSIDE COAL CO., INC. and
DAMIAN A. CALDWELL,

Defendants.

DECLARATION OF MYRON McCOY

I, Myron McCoy, hereby declare, pursuant to 28 U.S.C. § 1746, as follows:

1. Myron McCoy, Lonesome Pine Development LLC, a mineral leasing and management company, with 40 years experience as a Mine Foremen in surface and underground mines with a BA in Biology from James Madison University (DEP questions), and a degree in Mining Engineering from University of Kentucky. I became acquainted with Damian Caldwell and his company(s) Triple 7 and Mountainside as he acquired the wash plant that Mountainside presently has, as he wanted advise and consulting to make the plant operational and to help exploit the 3 mines attached to the Prep Plant. It became clear in numerous meetings that Mr. Caldwell did not have sufficient knowledge to operate the plant. Mr. Caldwell tried to gain the use of my knowledge without remuneration, a behavior I have seen him repeat several times.

2. I sold some coal to the Prep Plant and ceased because he did 2 things; He did not pay at all on some deliveries; or he claimed that lab results on the amount of ash in the coal came back radically different than the lab tests I ran prior to delivery. To the order of saying that 80% or better coal was actually below 50%, which fraudulently shorted us on our funds, (Copies of Pit Tickets and lab reports included). This is something I have witnessed him do to numerous other local mines. Now Mountainside is unable to purchase any coal to wash despite the fact that there is a huge financial incentive for local mines to do so, because he has reportedly not paid various mines for hundreds of thousands or even millions of dollars in coal, damaging the local economy. Using my lifelong involvement in the local community and the fact that I also have permits within 10 miles of the plant, I would bring coal to the plant on the first day, creating much needed cash flow to the plant.
3. If a receiver is appointed, we would work with the receiver to ensure the plant operates profitably and successfully. There is tremendous need for the plant and its' services sufficient that it could operate at a double shift if needed. Many of the leading producers in a 10 mile radius are anxious to provide coal (it would cut haulage fees for most of them from \$10-15/ton down to \$2/ton). The nearest wash plant is about 40 miles away. The receiver could also commence to operate the 2 mines that are economically reasonable to operate as there are sufficient reserves recoverable at a reasonable cost to justify the working capital. One of the mines was included for the even though it has been deep mined for decades and any recoverable coal on the surface would require a highwall miner which would reduce recovery of the reserve.

...

I declare under penalty of perjury that the foregoing is true and correct to best of my knowledge, information and belief. Executed on January 25th, 2024.

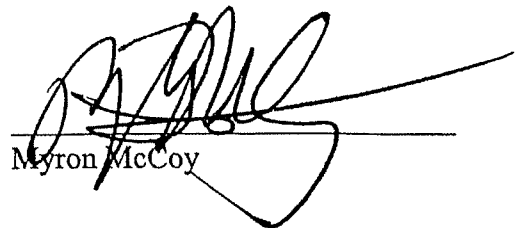

Myron McCoy

EXHIBIT L



Andy Beshear
GOVERNOR

ENERGY AND ENVIRONMENT CABINET
DEPARTMENT FOR NATURAL RESOURCES

300 Sower Boulevard
Frankfort, Kentucky 40601
Phone: (502) 564-6940

Rebecca Goodman
SECRETARY

Gordon R. Slone
COMMISSIONER

November 7, 2023

MOUNTAINSIDE COAL CO., INC
5540 KY 1809
BARBOURVILLE KY 40906

RE: Application No. 861-0543
AM-01

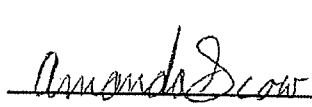
Dear Sir or Madam:

The Division of Mine Permits has completed its review of the above referenced application and has determined that due to the following problem, a permit cannot be issued at this time:

- The applicant has an outstanding non-respondent for the second quarter of 2023.
- The applicant has an outstanding civil penalty in West Virginia on permit no. O400911.
- The applicant has an outstanding civil penalty in the amount of \$1,900 on permit no. 861-0559, non-compliance no. 237539.
- The applicant has an outstanding civil penalty in the amount of \$1,400 on permit no. 861-0559, non-compliance no. 237547.
- The applicant has an outstanding civil penalty in the amount of \$17,350 on permit no. 918-0465, non-compliance no. 237961.
- The applicant has an outstanding civil penalty in the amount of \$1,000 on permit no. 918-0509, non-compliance no. 238213.
- The applicant has an outstanding cessation order (233225) on permit no. 861-0559.
- The applicant has an outstanding cessation order (233760) on permit no. 861-0559.
- The applicant has an outstanding cessation order (233761) on permit no. 861-0559.
- The applicant has an outstanding cessation order (233151) on permit no. 918-0465.

The applicant must diligently pursue resolution of the above problem within a timely manner or this permit may be denied. If you have any questions regarding this application, contact me at (502) 782-6849.

Sincerely,

 for Kim Sca

Kim Sca, Supervisor
Ownership and Control Review Section
Division of Mine Permits

KS/ET/kr

c: O & C File No. 861-0543 AM-01
Ed Taylor, O & C Reviewer
IAS
716 TROY TRAIL
LEXINGTON KY 40517

EXHIBIT M

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

THEODORE M. SPOLTORE; THEODORE
M. SPOLTORE LIVING TRUST; DR.
JEFFREY EDWIN MIDDELDORF;
SUSAN KATHLEEN MIDDELDORF,
TRUSTEE; SUSAN K. MIDDELDORF
TRUST DATED APRIL 23, 1996;
DR. RICHARD LEVY; DR. DAVID J.
ESPOSITO; DR. RODRIGO R. SANTOS;
TOM DUNNE; and DR. GEORGE J.
DOUTHIT, JR.,

Case No.: 6:23-cv-00143-REW-HAI

Plaintiffs,

v.

TRIPLE 7 COMMODITIES, INC.; GME
MINING & RECLAMATION INC.;
MOUNTAINSIDE COAL CO., INC. and
DAMIAN A. CALDWELL,

Defendants.

DECLARATION OF EDWARD BRANTLEY

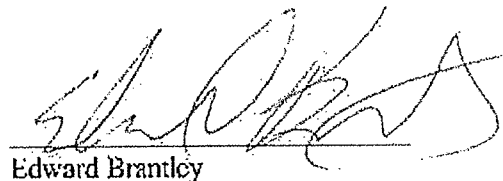
I, W. Edward Brantley, hereby declare, pursuant to 28 U.S.C. § 1746, as follows:

1. Edward Brantly, manager of Landover Energy, LLC, an energy and natural resource company, had multiple meetings with Damian Caldwell with regard to numerous real estate and coal mining opportunities known to him. These discussions included a residential real estate land development deal in Raleigh, North Carolina (which is presently in litigation) and a coal cleaning Prep Plant and 3 surface coal mines in South Eastern Kentucky, which is owned by Mr. Caldwell's companies: Mountainside and Triple 7 Commodities.

2. Landover Energy lent Mr. Caldwell, Triple 7 and Mountainside \$357,083.40 on June 9, 2021 repayable on July 9, 2021(attached hereto as Ex. A). The borrowers have defaulted. As part of this transaction Landover Energy also received 300,000 shares of Triple 7, which share certificate may have been altered (attached hereto as Ex. B). Triple 7 entered into a Management Contract with Landover Energy to operate three mines at the wash plant, as well as, to operate the wash plant (attached hereto as Ex. C).When Landover Energy tried to exercise this right, Triple 7 reneged. Neither Mr. Caldwell or his companies have paid for coal that Mountainside washed and sold. This has resulted in his inability to purchase coal in sufficient quantities to even generate a breakeven operation for the wash plant, despite the fact that this is a service greatly needed in the area.
He also did not pay workers and suppliers so that he could operate the three mines that comprise part of the company assets. Although the three mines are do not have the grade or quantity of coal he has represented to the community and Investors, he should have been able to recover enough coal by auger and drill to approach breakeven.
He has not paid the various regulatory fees required on a timely basis and incurred multiple fines.

3. If managed correctly, this plant would become profitable, as washed coal is a product in high demand as it commands a price much higher over raw coal than the cost of washing. There are more than 10 permits nearby that will not do business with Mountainside due to non-payment; and each of them would net an extra \$8-12 per ton if it was done nearby. There is no doubt that that the multiple coal producers nearby would immediately resume washing at the MCC plant if it reopened under new management.

I declare under penalty of perjury that the foregoing is true and correct to best of my knowledge, information and belief. Executed on January 25, 2024.


Edward Brantley

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

THEODORE M. SPOLTORE; THEODORE
M. SPOLTORE LIVING TRUST; DR.
JEFFREY EDWIN MIDDELDORF;
SUSAN KATHLEEN MIDDELDORF,
TRUSTEE; SUSAN K. MIDDELDORF
TRUST DATED APRIL 23, 1996;
DR. RICHARD LEVY; DR. DAVID J.
ESPOSITO; DR. RODRIGO R. SANTOS;
TOM DUNNE; and DR. GEORGE J.
DOUTHIT, JR.,

Case No.: 6:23-cv-00143-REW-HAI

Plaintiffs,

v.

TRIPLE 7 COMMODITIES, INC.; GME
MINING & RECLAMATION INC.;
MOUNTAINSIDE COAL CO., INC. and
DAMIAN A. CALDWELL,

Defendants.

ORDER

AND NOW, this ____ day of _____, 2024, upon consideration of the foregoing Motion for Appointment of Receiver filed by Plaintiffs, it is hereby ORDERED that said Petition is GRANTED as follows:

1. The Court appoints Sanford M. Simon to serve as Receiver over Defendants Triple 7 Commodities, Inc. and Mountainside Coal Co., Inc. (“Defendants”) and their businesses, assets and property during the pendency of this action or until further order of this Court. This Court specifically instructs Plaintiffs, Defendants, and the Receiver as follows:
 - a. All employees, accountants, attorneys, or other agents of Defendants shall act in accordance with the Receiver’s instructions and fully cooperate with the Receiver in the implementation of this Court’s Order;
 - b. The Receiver shall have the right to take possession and control of all the businesses, assets, property, records, operations and facilities of Defendants,

including without limitation all accounts, correspondence, and books of accounts relating thereto;

- c. The Receiver shall be responsible to this Court to oversee the ongoing business and operation of Defendants pursuant to and in a manner consistent with the powers conferred upon the Receiver by this Order and by law;
- d. The Receiver is authorized in his discretion to employ such managers, agents, employees, servants, accountants, and attorneys as may in his or her judgment be advisable or necessary in the management, conduct, control, or custody of the affairs of Defendants and of the assets thereof; and that Receiver is authorized to make such payments and disbursements as may be needful and proper for the preservation of the properties of Defendants, including the authority to make payments of debts entitled to priority;
- e. The Receiver is authorized to receive and collect any and all sums of money due or owing to the Defendants in any manner whatsoever, whether the same are now due or shall hereafter become due and payable;
- f. The Receiver is authorized to institute, prosecute and defend, compromise, adjust, intervene in or become party to such actions or proceedings in state or federal courts as may in his opinion be necessary to proper for the protection, maintenance or preservation of the assets of the Defendants, or to carry out the terms of this Order; and
- g. The Receiver shall maintain or cause to be maintained and preserved an accurate ledger, or similar books of account of all receipts and all disbursements made by him, and shall otherwise safely protect the operating statements, business records and accounts of Defendants or any of its agents.

IT IS FURTHER ORDERED that this Order may be modified or amended, upon notice and hearing. This Order shall remain in full force and effect unless and until further order of this Court.

BY THE COURT:

JUDGE, UNITED STATES DISTRICT COURT

Exhibit C

**COMMONWEALTH OF KENTUCKY
KNOX CIRCUIT COURT
DIVISION NO. I
EFILE**

ACTION NO. 24-CI-00040

BRCPF M&M MOUNTAINSIDE BLKR LLC

PLAINTIFF

-VS-

**MOUNTAINSIDE COAL COMPANY, BINDERLESS DEFENDANTS
COAL BRIQUETTING COMPANY PTY LIMITED,
MID SOUTH CAPITAL PARTNERS LP, KNOX
COUNTY, KENTUCKY, ALDEN RESOURCES LLC,
THOMAS R. GAMBREL, CHARLISA G. STEWART,
TRIPLE 7 COMMODITIES, INC., CLAY LAUREL
MINING, INC. and ALLEGIANT SECURITY SERVICES, LLC**

* * * * *

MOTION TO APPOINT RECEIVER

* * * * *

Comes the Plaintiff, BRCPF M&M Mountainside Blkr LLC (the "Plaintiff"),
and for its Motion to Appoint a Receiver states as follows:

1. The Motion to Appoint Receiver is brought by the Plaintiff pursuant
to KRS 425.600.

2. The Defendant, Mountainside Coal Company ("Mountainside") is
currently indebted to the Plaintiff in the amount of over One Million Dollars
(\$1,000,000.00) as a result of Mountainside failing to fulfill its obligations to the
Plaintiff pursuant to the requirements set forth in Agreement dated March 31,
2021, (the "Agreement") between Plaintiff and Mountainside, a copy of which was

attached as Exhibit A to the Complaint and the failure to pay Plaintiff all the amounts due Plaintiff pursuant to Tonnage Payment and Overriding Royalty Agreement dated March 31, 2021, (the "TPORA"), a copy of which is attached as Exhibit B to the Complaint and which is also recorded in the Knox County Clerk's Office in Book L111, Pages 489-520. Mountainside has been in default of the above obligations for many, many months.

3. Mountainside's obligations to the Plaintiff are secured by Mortgage, Security Agreement and Fixture Filing dated March 31, 2021, a copy of which is attached as Exhibit D to the Complaint and which is recorded in Book M483, Pages 427-456, in the Knox County Clerk's Office, and the Financing Statement is filed with the Kentucky Secretary of State in Financing Statement No. 2001-3141947-1401 (the "Mortgage"), a copy of which is attached as Exhibit E to the Complaint.

4. Mountainside's obligations set forth in the Mortgage require Mountainside to perform the following:

a. Maintain the Mortgaged Property, as defined in the Mortgage, in good order and condition, ordinary wear and tear excepted.

b. Maintain insurance on all improvements located on the Mortgaged Property, including the Preparation Plant (the "Plant"), against loss or damage by fire or flood or such other risks of damage, hazards, casualties and contingencies. The insurance is required to have Plaintiff named as an additional insured and to provide notice to Plaintiff if cancelled.

c. Maintain the Mortgaged Property free and clear of all mortgages, security interests, charges, liens or other encumbrances and to discharge any such lien of record within 30 days after a lien is filed.

d. Pay all taxes assessed against the Mortgaged Property when such taxes are due.

e. There be no judicial or administrative actions, suits or proceedings (including without limitation any judgments, garnishments or attachments) pending or threatened against, affecting or involving the Mortgaged Property.

f. All rents, royalties and additional sums payable under the Mountainside Coal Leases, as defined in the TPORA (sometimes the “Leases”), be paid when due and payable and all other terms of the Leases be complied with and to do all things necessary to keep the Plaintiff’s rights unimpaired in and to the Leases, and not to commit or permit to be committed or to incur any event of default under the Leases or modify, amend, supplement or terminate any of the same without having obtained the prior written consent from the Plaintiff.

g. To provide Plaintiff immediately upon the receipt of any notice of default related to the Mountainside Coal Leases.

h. Maintain the Permits in good standing.

5. Mountainside has defaulted in each and every one of its obligations set forth in numerical paragraph 4 hereof. The nature of Mountainside’s defaults are numerous and serious. The defaults known by the Plaintiff are existing on

the date hereof and the effect thereof on the Plaintiff and Mountainside's ability to continue in business are as follows:

a. **Failure to maintain the Plant Lease in good standing and comply with all the provisions and covenants contained therein.** The lessors under the Plant Lease, Thomas R. Gambrell and Charlisa G. Stewart, are believed to be owed in excess of One Hundred and Fifty Thousand Dollars (\$150,000.00) in rent due them pursuant to the terms of the Plant Lease, which represents over a year of past due monthly rentals. Obviously if the Plant Lease is terminated by Gambrell and Stewart, the "game is over" for Mountainside and the Plaintiff loses the primary security for Mountainside's obligations.

b. **Failure to maintain the Mountainside Coal Leases (which includes the Plant Lease) in full force and effect and in good standing.** Representatives of Mountainside have advised Plaintiff that several of the Leases have been terminated due to defaults and a number of the Leases have been subleased to Alden Resources. All the Leases which have been terminated and/or subleased to Alden Resources by Mountainside were subject to the Mortgage, wherein the Plaintiff was granted a leasehold mortgage on the same. The sublease of some of the Leases to Alden Resources and termination of a number of the Leases were done without the knowledge or written consent of the Plaintiff as required in the Mortgage and has adversely affected the Plaintiff's collateral.

c. **Failure to provide monthly coal production reports regarding coal mined from the Mountainside Coal Leases and/or processed through the Plant.** Since March 31, 2021, the Plaintiff has been furnished a very limited number of monthly coal production reports or information concerning the amount of coal processed through the Plant. Without the monthly coal production reports and reports showing how much coal had been processed through the Plant, the Plaintiff cannot ascertain the monies owed to Plaintiff by Mountainside pursuant to the terms of the TPORA.

d. **Failure to provide annual financial reports.** No annual financial reports have been provided to the Plaintiff, and as a result thereof the Plaintiff has no knowledge of Mountainside's financial condition.

e. **Failure to pay in full the Collateral Replacement Obligation when due.** Mountainside has failed to replace the collateral posted by Plaintiff to secure certain of Mountainside's reclamation bonds (the "Bonds") posted on its mining permits (the "Permits"). In fact, it recently became known to the Plaintiff that Mountainside had filed with the Kentucky Department for Natural Resources ("DNR") requests for release of a number of Bonds (the "Bond Release Requests") for undisturbed Permits. Mountainside has also filed Bond Release Requests which have been approved by DNR on the Permits which were subject to the sublease to Alden Resources, and Mountainside has been paid the cash which had been posted by the Plaintiff to secure the Bonds. In other words, Mountainside has obtained Bond Releases on a number of Permits and the cash

collateral posted to secure the Bonds was to be paid to the Plaintiff, the same being described in the Agreement as the “Collateral Replacement Obligation”.

f. **Failure to pay all the Tonnage Payments when due.** Plaintiff believes there are hundreds of thousands of dollars due to the Plaintiff for Tonnage Payments required to be made by Mountainside pursuant to the TPORA.

g. **Failure to pay all the Monthly Minimum Tonnage Payment when due.** Mountainside is obligated to pay to the Plaintiff \$10,000.00 for a “Monthly Minimum Tonnage Payment”, and the Plaintiff states there are tens of thousands of dollars due to the Plaintiff as a result of Mountainside not paying the same.

h. **Failure to pay all the Overriding Royalties when due.** The Plaintiff states that Mountainside owes certain sums for “Overriding Royalties” which have not been paid.

i. **Failure to allow access to records to confirm compliance with the terms of the TPORA.** The Plaintiff has requested Damian Caldwell, the President of Mountainside and who is believed to be its sole Member, and has also requested Mountainside’s attorney, David Jorjani, on numerous occasions, to provide all the records to the Plaintiff as required in the TPROA and elsewhere. Without such records, it is impossible for the Plaintiff to know exactly what Mountainside owes the Plaintiff and to confirm Mountainside’s financial condition.

j. **Failure to maintain casualty and/or general liability insurance coverage on the Plant or the Mortgaged Property.** Perhaps one of the biggest defaults is that the Plaintiff believes Mountainside does not have the Plant insured against casualties. The Mortgage requires the Plant to be insured against casualties and that the insurance name the Plaintiff as an additional insured. In the event there is a casualty to the Plant, and it is unsecured, the Plaintiff will suffer substantial loss.

k. **Failure to maintain the Mortgaged Property free and clear of all liens or other encumbrances and to discharge any liens of record.** The Plaintiff is accumulating the liens which are recorded in both Knox County and Whitley County and will provide copies of the recorded liens at the Hearing on this Motion.

l. **Failure to pay ad valorem property taxes, both real and tangible.** The ad valorem taxes have not been paid as indicated by the Tax Bills which were assigned by the Knox County Clerk to the Defendant, Mid South Capital Partners, LP which is claiming a lien on the Prep Plant.

m. **Failure to prevent judicial proceedings, including judgments or attachments, against the Mortgaged Property.** The Plaintiff believes there are Judgments against Mountainside that may affect the Mortgaged Property and those Judgments are being accumulated and will be presented at the Hearing on this Motion.

n. **Violated the requirement that none of the Mountainside Coal Leases would be modified, amended, supplemented or terminated without first obtaining Plaintiff's written consent.** The Plaintiff believes Mountainside has modified, amended or supplemented the Plant Lease, without first obtaining the Plaintiff's written consent, and that many Leases have been terminated in violation of Mountainside's obligations set forth in the Mortgage.

o. **Failure to provide Plaintiff immediately upon receipt with any notice of default relating to the Mountainside Coal Leases.** The Plaintiff has not received any notice of default sent to Mountainside from the lessors of the Leases; however, it is believed that many notices of default, and perhaps termination notices, have been sent to Mountainside. If any of the Leases have in fact been cancelled due to Mountainside's breach of the obligation to notify Plaintiff of any default (which would allow the Plaintiff the opportunity to cure such defaults) then not only has Mountainside breached the obligation to notify, but also has caused the Plaintiff substantial damage.

p. **Failure to maintain the Permits in good standing.** As previously stated, Mountainside has terminated many of the Permits by filing Bond Release Requests and receiving Release of the Bonds from DNR, which terminates all of Mountainside's rights in the Permits. The same applies to the Permits which were transferred by Mountainside to Alden Resources. In other words, the Permits were valid and could be mined by Mountainside, or perhaps another entity who would purchase the Leases at the Master Commissioner's Sale in this

action. Now these Permits are terminated and no mining can be conducted thereon. By terminating the Permits, Mountainside has caused a portion of the Plaintiff's collateral to be worthless. The same can be said if the underlying Leases related to the Permits have been cancelled, no mining can take place on those Permits without a valid "right of entry" which ceased to exist when a number of the Leases were cancelled.

6. As a result of Mountainside's defaults, which are continuing and which will continue without abatement, the Plaintiff's rights in the collateral (the Mortgaged Property), and are subject to being terminated which will result in substantial damage to the Plaintiff and other creditors which are owed by Mountainside.

7. Based on the above, it is clear that the Mortgaged Property and the Plaintiff's interest therein are in danger of being lost or materially damaged and therefore it is appropriate for the Court to appoint a Receiver to take charge of Mountainside's business during the pendency of this action. The Receiver can manage Mountainside's business, including the Mortgaged Property, until such time as the Mortgaged Property is sold at a Judicial Sale. The Receiver can be granted the power to take possession, control, use and care for the Mortgaged Property and collect all rents, deposits, proceeds and profits therefrom. Any monies collected by the Receiver can be utilized to pay the operating expenses, casualty and general liability insurance premiums, rents or other royalties due on the Mountainside Coal Leases in order to cure any monetary default, all in

order to maintain the viability of Mountainside's business until the property can be sold at a Judicial Sale.

8. At the Hearing on this Motion Plaintiff will present to the Court potential persons who are qualified to act as a Receiver.

WHEREFORE, the Plaintiff, BRCPF M&M MOUNTAINSIDE BLKR LLC, prays for the Court to appoint a Receiver with the power to conduct Mountainside Coal Company's business and perform the obligations hereinabove set forth.

Respectfully submitted,

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NOTICE

All counsel will take notice that the foregoing Motion to Appoint Receiver will come on for a Hearing in the Knox Circuit Court before Honorable Gregory A. Lay on Friday, March 1, 2024, at the hour of 9:00 o'clock a.m. or as soon thereafter as the parties may be heard.

CERTIFICATION

I certify a true copy of the Plaintiff's Motion to Appoint Receiver was electronically filed and served by email pursuant to CR 5.02 (2) to all attorneys and/or parties of record this 23rd day of February, 2024:

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/s/ Charles J. Baird

**COMMONWEALTH OF KENTUCKY
KNOX CIRCUIT COURT
CASE NO. 24-CI-00040**

Electronically Filed

BRCPF M&M MOUNTAINSIDE BLKR LLC

PLAINTIFF

v.

BINDERLESS COAL BRIQUETTING COMPANY PTY
LIMITED, ET AL.,

DEFENDANTS

**RESPONSE IN SUPPORT OF PLAINTIFF'S MOTION TO APPOINT
RECEIVER OVER MOUNTAINSIDE COAL COMPANY, INC.**

Defendant/Counterclaimant/Cross-Claimant Binderless Coal Briquetting Company, PTY Limited ("BCBC") files this response in support of the Motion to Appoint Receiver ("Motion") by Plaintiff BRCPF M&M Mountainside Blkr LLC ("BRCPF") seeking a Court Order appointing a receiver to manage and operate the business affairs of Defendant/Cross-Claim Defendant Mountainside Coal Company, Inc. ("MCC"). In support of this motion, BCBC states as follows:

I. Relevant Background

On March 29, 2021, Defendant/Cross-Defendant Clay Laurel Mining Inc. ("CLM") entered into a Stock Purchase Agreement ("SPA") with BCBC resulting in the transfer of 408 shares of common stock of MCC to CLM.¹ The purchase price set forth in the SPA equaled (i) \$3,400,000.00; plus (ii) the sum of 51 percent of (a) the Closing Date² Cash; (b) the Closing Date Recoverable Bonds; (c) the Closing Date Deposits Paid; and (d) the Closing Date Prepaid Insurance; less (iii) 51 percent of the Closing Date Trade Payables. The SPA further required a Deferred Purchase Price under which CLM was to pay BCBC (a) \$420,000.00 at the earlier of (i) the second business day following the release to MCC of amounts identified on the balance sheet

¹ A copy of the SPA is attached as Exhibit "A" to BCBC's Answer/Counterclaim/Cross-Claim.

² The capitalized terms in Part I have the meaning ascribed to them in the SPA attached as Exhibit "A" to BCBC's Answer/Counterclaim/Cross-Claim.

as Closing Date Recoverable Bonds; or (ii) 45 days following the Closing Date; (b) \$1,400,000.00 to be paid in eight monthly installments of \$175,000.00 each, with the first installment commencing on May 28, 2021, and with the seven subsequent installments to be paid on the 28th day of each succeeding month; and (c) the remaining balance of the Deferred Purchase Price (“Deferred Payments”) to be paid on December 28, 2021.

Defendant/Cross-Defendant Triple 7 Commodities, Inc. (“Triple 7”) executed a guaranty (“SPA Guaranty”) in favor of MCC in which Triple 7 unconditionally and irrevocably guaranteed to BCBC payment of the Deferred Payments.³ To secure the debt set forth in the SPA, MCC entered into a Mortgage, Security Agreement and Fixture Filing with BCBC dated March 31, 2021 with an effective date of April 16, 2021 (“MCC Mortgage”).⁴ The MCC Mortgage was recorded on April 16, 2021, Book M483, Pages 457-475 in the Knox County Clerk’s Office in Knox County, Kentucky.

Pursuant to the MCC Mortgage, BCBC received a mortgage lien on, and a security interest in and upon, all estate, title and interests of MCC in a September 30, 2008 Lease Agreement amended by Ratification of Lease Agreement dated February 17, 2014, and a second amendment to Lease Agreement dated December 1, 2014 (collectively “Plant Lease”). BCBC also received a security interest⁵ in all improvements, fixtures, machinery, appliances, facilities, and personal property of every kind whatsoever which are part of or associated with MCC’s coal preparation facility (“Plant”) in Knox County, Kentucky located on property leased to MCC pursuant to the Plant Lease.⁶ As a result of these filings, BCBC has a valid, perfected security interest in the following collateral (“MCC Mortgaged Collateral”): (a) the Plant Lease; (b) the Plant; (c) all

³ A copy of the SPA Guaranty is attached as Exhibit “B” to BCBC’s Answer/Counterclaim/Cross-Claim.

⁴ A copy of the MCC Mortgage is attached as Exhibit “C” to BCBC’s Answer/Counterclaim/Cross-Claim.

⁵ A copy of these financing statements is attached as Exhibit “D” to BCBC’s Answer/Counterclaim/Cross-Claim.

⁶ A Memorandum of the Plant Lease was recorded in Book L111, Pages 448 to 451 in the Knox County Clerk’s Office, Knox County, Kentucky.

contracts for or related to the maintenance, operation, leasing or sale of the MCC Mortgaged Collateral, and all plans, designs, specifications, books and records related thereto; (d) all damages, claims, losses, judgments, awards and settlements relating directly or indirectly to the MCC Mortgaged Collateral, including, but not limited to, those resulting from: (i) condemnation proceedings or the taking under the power of eminent domain; or (ii) insurance policies, including payments made thereunder, relating directly or indirectly to any items comprising the MCC Mortgaged Collateral; and (e) all extensions, additions, improvements, betterments, renewals, substitutions and replacements to any of the foregoing, and the proceeds of all of the foregoing.

CLM defaulted under the SPA by failing to make the required payments to BCBC. CLM's default triggered MCC's secured obligations under the MCC Mortgage. CLM's default also triggered Triple 7's guaranty obligations under the SPA Guaranty. By May 6, 2022, BCBC had received only \$80,000.00 of the Deferred Payments leaving a balance owed to BCBC in the amount of \$1,770,892.52. On said date, BCBC, through its counsel, formally demanded from CLM the following: (a) a payment of \$850,000 by May 31, 2022; and (b) a payment of \$920,892.52 by June 28, 2022.⁷ In the same correspondence, BCBC demanded MCC comply with its obligations under the MCC Mortgage, and that Triple 7 comply with its obligations under the SPA Guaranty. BCBC made clear in its May 6, 2022 Correspondence that acceptance of any partial payment would not waive any of BCBC's contractual rights and remedies or others in law or in equity. In August 2022, BCBC agreed to a new payment schedule with CLM, MCC, and Triple 7 which was updated on November 28, 2022 ("Revised Payment Schedule"). Pursuant to the Revised Payment Schedule, CLM paid \$30,000.00 to BCBC, and was to make "catch up" payments on scheduled intervals to put CLM back on course to make all payments previously

⁷ A copy of the May 6, 2022 Correspondence is attached as Exhibit "E" to BCBC's Answer/Counterclaim/Cross-Claim.

owed under the SPA by February 28, 2023. As of February 28, 2023 the balanced owed to BCBC from CLM was, and remains, \$1,740,892.52 (“Balance” or “Indebtedness”). Despite multiple requests by BCBC, CLM did not fulfill its payment obligations under the Revised Payment Schedule and defaulted under same.

On June 14, 2023, BCBC, through its counsel, sent a written formal demand to CLM for payment in full of the Balance of \$1,740,892.52 on or before July 17, 2023, which also included an assertion of BCBC’s rights against MCC under the MCC Mortgage and BCBC’s rights against Triple 7 under the SPA Guaranty.⁸ BCBC has not received payment of the Balance. CLM remains in default of the SPA and the Revised Payment Schedule. In addition to CLM’s default, MCC had also defaulted under the MCC Mortgage by failing to perform its obligations to (a) timely pay all taxes, assessments, levies, claims, and other charges related to or otherwise assessed against the MCC Mortgaged Collateral; (b) insure the MCC Mortgaged Collateral at all times; and (c) keep the Plant and the Plant Lease free from all security interests, charges, liens, or other non-permitted encumbrances; (d) maintain compliance with all laws, ordinances, regulations, permits, and other requirements of governmental authorities; and (e) keep current all rents, royalties, and payments under the Plant Lease.⁹ To date, Triple 7 has failed to perform its obligations under the SPA Guaranty and is in default.

On January 19, 2024, BRCPF initiated the above-styled action by filing a Complaint against CLM, MCC, and Triple 7, to foreclose upon MCC’s interest in the Plant and Plant Lease to collect the outstanding debts owed by these parties to BRCPF. BCBC, as well as other parties alleging to hold a pecuniary interest or right in the Plant and Plant Lease, were named as Defendants. On February 2, 2024, BCBC filed its Answer, Counterclaim, and Cross-Claim in

⁸ A copy of this correspondence is attached as Exhibit “F” to BCBC’s Answer/Counterclaim/Cross-Claim.

⁹ See Mortgage Security Agreement and Fixture Filing, Section 3(a) through (d), (g), (i), and (m), Exhibit “C” to BCBC’s Answer, Counterclaim, and Cross-Claim.

the above-styled action seeking similar relief against CLM, MCC, and Triple 7 as well as all other named parties.

II. Facts Relevant to Appointment of Receiver

In addition to the facts alleged in BRCPF's Motion, the following failures and other inactions by MCC support the conclusion that a receiver should be appointed to manage and operate the business affairs of MCC:

1. Breach by MCC, CLM, and Triple 7 of the MCC Mortgage, SPA, and Guaranty, respectively, under which the Indebtedness to BCBC totals \$1,740,892.52.
2. Failure to maintain the MCC Mortgaged Collateral free, clear and unencumbered pursuant to Section 3(a) of the MCC Mortgage. As set forth by Mid South Capital Partners, LP ("Mid South") in its February 14, 2024 Amended Answer, Counterclaim and Cross-Claim, Mid South has recorded three Certificates of Delinquency in the Knox County Clerk's Office against MCC. Additional information pertinent to this fact is set forth below.
3. Failure to promptly pay or perform all secured obligations¹⁰ under the MCC Mortgaged Collateral pursuant to Section 3(b) of the MCC Mortgage.
4. Failure to pay when due all taxes, assessments, claims and other charges related to or otherwise assessed against the MCC Mortgaged Collateral pursuant to Section 3(c) of the MCC Mortgage. Under its current ownership, MCC has never paid to Knox County any of MCC's real estate taxes. Mid South holds the following tax bills recorded in the Office of the Knox County Clerk: (a) 2020 Tax Bill #13631 regarding Parcel #064-00-004.017, Misc. Book 57, Page 371; (b) 2021 Tax Bill #12861 regarding Parcel #064-00-004.017, Misc. Book 58, Page 333; and (c) 2022 Tax Bill #13015 regarding Parcel #064-00-004.017, Misc. Book 58, Page 834.

¹⁰ See Exhibits "E", the May 6, 2022 written demand for payment, and Exhibit "F", the June 14, 2023 written demand for payment, attached to BCBC's Answer/Counterclaim/Cross-Claim.

5. Failure to comply with all laws, ordinances, rules, regulations, permits and other requirements of all governmental authorities having or claiming jurisdiction of or with respect to the MCC Mortgaged Collateral pursuant to 3(d) of the MCC Mortgage. The Surface Mining Information System's website maintained by the Energy and Environment Cabinet for the Commonwealth of Kentucky reflects nearly twenty instances of permit non-compliance by MCC¹¹ since December 2022 in Knox and Whitley Counties, all of which remain active ("Permit Violations"). Unpaid monetary penalties exceed \$75,000.00. Four cessation orders are in effect. Especially egregious acts include MCC's failure to maintain liability insurance, and conducting mining before Cabinet approved MCC's bond. A full summary of MCC's Permit Violations is attached hereto as Exhibit "1".

6. Failure to observe and comply with all conditions necessary to preserve and extend any and all rights, licenses, permits, and any other privileges applicable to the MCC Mortgaged Collateral, including the Plant, the Plant Lease, and other of MCC's leases pursuant to Section 3(d) of the MCC Mortgage. Many of these other leases have been terminated due to payment default by MCC. The existing Permit Violations in Exhibit "1" also trigger default of MCC's obligations as stated above.

7. Failure to maintain insurance on all improvements, including the Plant, against loss or damage including, but not limited to, fire, flood, or other risks of damage, hazards, casualties, and contingencies pursuant to Section 3(g) of the MCC Mortgage.

8. Failure to prevent judicial proceedings or administrative proceedings which affect or involve the MCC Mortgage Property pursuant to Section 3(l). On March 14, 2023, KLA Mining, Inc. filed¹² against MCC a civil suit seeking over \$20,000.00 for MCC's failure to pay for

¹¹ A live version of MCC's existing Permit Violations can be reviewed at <http://smis.ky.gov/SMIS.Web/Permits> (last visited on February 22, 2024).

¹² See *KLA Mining, Inc. v. Mountainside Coal Company, Inc.*, Whitley Circuit Court Civil Action No. 23-CI-00136.

coal related services. On May 2, 2023, Kentucky Oil and Refining Company, Inc. filed¹³ a civil suit against MCC for its failure to pay for coal related services. On September 28, 2023, Ranger Environmental Services, LLC registered¹⁴ against MCC a foreign judgment in the approximate amount of \$300,000.00 due to MCC's failure to pay for services. On August 4, 2023, Theodore M. Spoltore, along with five other entities and individuals, filed¹⁵ suit in federal district court against MCC, Triple 7, and Damian Caldwell¹⁶ seeking damages in excess of \$3.7 million for failure to make payments under promissory notes and various fraudulent acts.

9. Failure to observe or perform the covenants and conditions under the its leases with Defendant Thomas R. Gambrel and Defendant Charlisa Stewart, ("Plant Lessors") pursuant to Section 4(c) of the MCC Mortgage; Upon information and belief, MCC has defaulted under the Plant Lease and owes the Plant Lessors in excess of \$150,000.00.

10. Default under the Mortgage, Security Agreement and Fixture Filing dated March 31, 2021 and effective on April 16, 2021¹⁷ with BRCPF as well as the Overriding Royalty Agreement dated March 31, 2021 with BRCPF.

11. Failure to notify BCBC of default notices on MCC's Leases.

12. Failure to provide to BCBC certain information such as annual financial reports, monthly coal production reports regarding coal mined under MCC's Leases and/or process through the Plant, or monthly royalty reports which would give insight as to MCC's financial soundness. BRCPF has also been unsuccessful in its similar requests to MCC.

¹³ See *Kentucky Oil and Refining Company, Inc. v. Mountainside Coal Company, Inc.*, Floyd Circuit Court Civil Action No. 23-CI-00255.

¹⁴ See *Ranger Environmental Services, LLC v. Mountainside Coal Co., Inc.*, Knox Circuit Court Civil Action No. 23-CI-00370.

¹⁵ See *Spoltore, et al., v. Triple 7 Commodities, Inc., et al.*, U.S. District Court, Eastern District of Kentucky, Civil Action No. 23-CI-00143.

¹⁶ According to the Kentucky Secretary of State's website, Mr. Caldwell is the President and Director of MCC. He is also its sole member.

¹⁷ A copy of this Mortgage, Security Agreement and Fixture Filing dated March 31, 2021 and effective on April 16, 2021 is attached as Exhibit "A" to BRCPF's Complaint.

13. Refusal to allow access to records to confirm compliance by MCC with any contracts, leases, or other agreements. BRCPF has also been unsuccessful in its similar requests to MCC.

14. Refusal to cure defaults under the Plant Lease and other leases and agreements required by MCC.

15. Payment of the Deferred Purchase Price¹⁸ demanded on May 6, 2022 and June 14, 2023.

III. Legal Argument Supporting BRCPF's Motion

A contractual right to appoint a receiver has long been recognized in this state. *See, G.B. Brassfield and Son v. Northwestern Mutual Life Insurance Defendant*, 233 Ky. 94, 25 S.W.2d 72 (1930). In *Brassfield*, the mortgage contained a provision granting as security “all the rents, issues and profits” to the mortgagee and also providing that upon filing suit to enforce the mortgage lien, a receiver may be appointed to take possession of the premises and to collect the rents, issues and profits. The Court held that:

[b]y virtue of its provision [i.e., the mortgage] Appellee had a lien upon the rents and was thus entitled to a receiver both under the terms of the Mortgage, *Hanman v. Volk*, 99 S.W. 660, 30 Kentucky Law Reporter 818, and under the undenied allegations of the petition bringing the case within Section 299 Civil Code of Practice.

Brassfield, 25 S.W.2d at 72. Thus, the Court clearly observed that the words of the mortgage are meaningful and that the power to and duty upon the Court to appoint a receiver may arise solely from the mortgage. The Supreme Court of the United States of America concurred. Expounding upon the law of Kentucky and speaking through Justice Brandeis, the Court wrote:

. . . and where there is (as here) a pledge in the mortgage of rents, issues and profits, and provision for appointment of a receiver, the

¹⁸ Exhibits “E”, the May 6, 2022 written demand, and Exhibit “F”, the June 14, 2023 written demand, attached to BCBC’s Answer/Counterclaim/Cross-Claim.

Mortgagee is entitled as of right to have a receiver appointed to collect them for his benefit [citations omitted]. [Emphasis added].

Louisville Joint Stock Land Plaintiff v. Radford, 295 U.S. 555 (1935). *See, also, Thompson v. Branch Banking and Trust Co.* 2009 WL 1636369 (Ky. Ct. App. Jun. 12, 2009) (unpublished), attached as Exhibit “2”. Thus Section 6(g) of BRCPF’s mortgage¹⁹ supports the Motion for appointment of a receiver over the operations and business affairs of MCC. This right is also found in Section 6(g) of the MCC Mortgage between BCBC and MCC.²⁰ Both provisions allow the request for a receiver to occur “before or after any foreclosure action or sale.” The appointment may be made without regard to: (i) the solvency or insolvency or the person or persons, if any, liable for the payment of MCC’s secured obligations of MCC or (ii) the value of the mortgaged collateral at the time of the request. Through each of these provisions, MCC has already given express consent to the appointment of a receiver having the following powers: the taking of possession, control, use and care of its collateral including any deposits, proceeds or profits of same.

Other legal grounds permitting this Court to request a receiver are found in KRS 425.600. This general equity receivership statute provides for appointment upon a showing that a party “... has, or probably has, a right to, lien upon, or an interest in, any property or fund, the right to which is involved in the action, and that the property or fund is in danger of being lost, removed or materially injured.”²¹

KRS 425.600 provides that BRCPF is entitled to the appointment of a receiver upon a showing that it has a lien on collateral, which is in danger of being lost or impaired. In this regard,

¹⁹ A copy of this Mortgage, Security Agreement and Fixture Filing dated March 31, 2021 and effective on April 16, 2021 is attached as Exhibit “A” to BRCPF’s Complaint.

²⁰ *See* Mortgage, Security Agreement and Fixture Filing dated March 31, 2021 between BCBC and MCC (“MCC Mortgage”) attached as Exhibit “C” to BCBC’s Answer/Counterclaim/Cross-Claim.

²¹ KRS 425.600(1).

KRS 425.600(1) states in pertinent part:

On the motion of any party to an action who shows that he has, or probably has, a right to, a lien upon, or an interest in, any property or fund, the right to which is involved in the action, and the property or fund is in danger of being lost, removed or materially injured, the Court may appoint a receiver, or order the master commissioner to take charge of the property or fund during the pendency of this action, and may order and coerce the delivery of it to him.

Paragraphs 5 (a) through (p) of BRCPF's Motion, as well as Section II, Paragraphs (1) through (14) identify grounds upon which this Court may rely on KRS 425.600 for the appointment of a receiver over MCC.

BRCPF's Motion and BCBC's response provide this Court with a legal roadmap for determining a receiver to manage and operate the business affairs of MCC is proper, and evidentiary hearing will establish the factual grounds to support same.

Respectfully submitted,

/s/ Chrisandrea L. Turner
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*Counsel for Defendant Binderless Coal
Briquetting Company PTY Limited*

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2024, a true and accurate copy of the foregoing was electronically filed pursuant to the KYeCourts electronic filing procedures. I further certify that I mailed the foregoing document by U.S. First Class Mail upon the following parties:

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/s/ Chrisandrea L. Turner
Counsel for Defendant Binderless Coal
Briquetting Company PTY Limited

Exhibit “1”

Mountainside Coal Co., Inc. VIOLATIONS

Non-Compliance #	Permit	County	Non Compliance Date	Amount Due	Cessation Orders	Final Disposition (FDP)	Remedial Measure	Violation Description	Reg/Statute	Environmental Hearing Board Case No.: https://dep.gateway.ky.gov/Hero/
238230	061E731	KNOX	10/11/23	\$ 800.00		NO	Complete backfilling and grading of trench sites. Seed and mulch all disturbed areas.	Exploration has expired and permittee has failed to backfill and grade trench sites.	Backfilling and Grading - KAR 16:190	
232833	118E550	WHITLEY	09/16/14	\$ -		NO	Permittee shall clean material from road and return the material to the exploration area(s).	Permittee has tracked material into county road (Tiny Branch).	Roads - KAR 16:220	PAH - 4-5847
231960	861-0508	KNOX	10/18/11	\$ -		NO	Submit (within 60 days) and obtain a permit revision covering all disturbed areas near Bench Fill #1. Immediately Cease all mining activity on non-permitted areas. Stabilize, seed, and mulch affected areas. Install effective temporary sediment control on affected areas.	Permittee has created off permit disturbances located near Bench Fill #1. Disturbances are adjacent to increment #1.	Off Permit Disturbance - KAR 7:040	
236615	861-0528	KNOX	08/23/21	\$ -		NO	Retrieve all materials possible from the affected area. Stabilize, seed, and mulch the slide area, submit (within 30 days) and obtain a permit revision to add the off-permit area to the permit. Provide alternate sediment control for the affected area.	Off-permit slide has occurred below the permit adjacent to sediment structure # 36 on increment # 3.	Off Permit Disturbance - KAR 7:040	
232429	861-0528	KNOX	10/02/23	\$ -		NO	Submit and obtain a permit revision for modification and, upon approval of plans, construct and certify as approved, or reconstruct to the approved designs and re-certify, or change status temporary or permanent to fit current field conditions.	Permittee has modified dams and/or sediment structures 013, 014, 016, 017, 034, 035, 036, 037, 038, and 039 prior to approval to remove from the Department.	Sedimentation Ponds - KAR 16:090	
							Within 30 days, submit the required annual Certification of Maintenance for impoundment, SME-22s, for Ponds present on the permit. If the annual certification of maintenance has not been conducted, within 30 days, conduct an annual certification of maintenance inspection and submit to the Middlesboro Regional office.	405 KAR 16:100 section 1 (9), (a), (b). Permittee has failed to submit the required annual Certification of Maintenance for impoundment, SME-22s, on Ponds present from 001 - 039.	Impoundments - KAR 16:100	

Mountainside Coal Co., Inc. VIOLATIONS

Non-Compliance #	Permit	County	Non Compliance Date	Amount Due	Cessation Orders	Final Disposition (FDP)	Remedial Measure	Violation Description	Reg/Statute	Environmental Hearing Board Case No.: https://dep.gateway.ky.gov/Hero/
237539	861-0559	KNOX	06/09/22	\$ 1,900.00		NO	Permittee shall install perimeter markers to clearly mark permit boundaries. Permittee shall immediately cease blasting operations until the required signs are posted. Post the required verbatim "Warning: Explosives in Use" signs.	Permittee has failed to clearly identify the permit area, Boundary markers. Permittee has failed to post/maintain signs which state verbatim "Warning: Explosives in Use".	Signs and Markers - KAR 16:030	PAC - 22-4-0384
							Submit required paperwork as outline on the most current permit face sheet and remove the (F1) condition before any more coal removal takes place.	Permittee has failed to remove condition (F1) from the permit prior to coal removal.	Other 405 KAR 8:010	
							Permittee shall submit required quarterly instream, groundwater and discharge water monitoring reports for 2nd quarter 2022 KPDES KYGE41127. Permittee shall implement a water monitoring system if one has not been established.	Permittee has failed to submit quarterly instream, groundwater, and/or discharge monitoring reports for 1st quarter 2022, KPDES KYGE41127, as required by approved permit plans and regulations.	Water Monitoring - KAR 16:110	
237547	861-0559	KNOX	11/03/22	\$ 1,400.00		NO	Permittee shall comply with the approved revegetation plan specified in the permit. Permittee shall revegetate affected area with rate and proper species to achieve the accepted revegetation standards approved in the permit package. Permittee shall complete revegetation of the affected areas in accordance with the permit and 405 KAR 16:200.	Permittee has failed to complete revegetation of the permitted area Backfill are above Ponds 001 and 002 in accordance with the approved revegetation plan and has failed to revegetate with rate and species of grasses indicated in the approved permit package. Permittee has failed to revegetate backfill area Increment 1 above Ponds 001 and 002 after backfilling and grading final grade.	Revegetation - KAR 16:200	PAC - 23-4-0186
238100	861-0559	KNOX	03/16/23	\$ 25,800.00	233225	NO	Construct diversions ST 16 and ST17 in accordance with approved designs and at the location approved in the permit plan.	Permittee has failed to construct diversions ST16 and ST17 according to the approved designs, Increment 2 on Blue Gem Coal Seam.	Sedimentation Ponds - KAR 16:090	PAC - 23-4-0431
238112	861-0559	KNOX	06/30/23	\$ -	233761	NO	Immediately cease all mining activities and further surface disturbance within the watershed of the pond. Construct Pond 3 according to the approved designs and submit a Certification.	Permittee failed to construct sediment pond, Pond 3, in accordance with the approved designs, on the Blue Gem coal seam, of Increment 2.	Sedimentation Ponds - KAR 16:090	
							Permittee shall reclaim areas, Jellico Coal seam on increment 1 and 2 to conform to the time frame specified in the approved reclamation plan and 405 KAR 16:020.	Permittee has failed to achieve the required reclamation within the specified time frame, Increments 1 and 2.	Contemporaneous Reclamation - KAR 16:020	
238969	861-0559	KNOX	09/14/23	\$ 23,600.00	233760	NO	Within 30 days, submit the required annual certification of maintenance for ponds 001 and 002 to the Middlesboro Regional Office. If the annual certification of maintenance has not been conducted, within 30 days conduct an annual certification of maintenance inspection and submit the report to the Middlesboro Regional Office.	Permittee has failed to conduct/submit the required annual certification of maintenance for impoundments Pond 001 and Pond 002 for 2023.	Impoundments - KAR 16:100	

Mountainside Coal Co., Inc. VIOLATIONS

Non-Compliance #	Permit	County	Non Compliance Date	Amount Due	Cessation Orders	Final Disposition (FDP)	Remedial Measure	Violation Description	Reg/Statute	Environmental Hearing Board Case No.: https://dep.gateway.ky.gov/Hero/
232430	861-5357	KNOX	10/10/23	\$ 840.00		NO	Within 30 days, submit the required Annual Maintenance of Impoundment SME22s for pond 3 and FWP-1 to the Middlesboro Regional Office. If reports are not available and inspections were not conducted; within 30 days conduct an inspection and submit a current quarter's SME22 to the Middlesboro Regional Office.	Impoundments - 405 KAR 18:100 - Permittee has failed to submit the required annual Certification of Maintenance on impoundment SME22s for Ponds 3 and	Impoundments - KAR 18:100	
							Within 30 days, submit the required quarterly certification for WF-1 to the Middlesboro Regional Office. If reports are not available and inspections were not conducted; within 30 days conduct an inspection and submit a current quarterly certification to the Middlesboro Regional Office.	Disposal of Excess Spoil - 405 KAR 18:130 - Permittee has failed to submit Certification for Coal Process Waste Bank WF-1 for 3rd quarter of 2023.	Disposal of Excess Spoil - KAR 18:130	
235776	918-0465	WHITLEY	07/05/19	\$ -		NO	Retrieve all mud, sediment, and debris possible from the affected area(s) seed and mulch all disturbances.	Mining activities have adversely impacted the hydrologic balance outside of the permit area at Harpes Creek Road. Impacted area is below dd-12.	General Hydrologic Requirements - KAR 16:060	
237961	918-0465	WHITLEY	09/14/22	\$ 17,350.00	233151	NO	Permittee knows that bond must be posted prior to disturbance of each increment. This is a permit condition listed on permit as condition E1. Immediately cease any further disturbance or mining activities on Increment #7. Obtain approval from the Cabinet of a performance bond covering the area that has been affected by surface coal mining operations on Increment #7. No equipment or activity on increment #7 occurring at this time.	Permittee has created disturbance of surface acreage on Increment #7 prior to receipt of approval from the Cabinet of a performance bond covering the area to be affected by surface coal mining operations and facilities. NC 23-7961 was issued on 9/14/22 and FTACO #23-3151 was issued on 11/14/22. Permittee submitted bond on 12/1/22 to the Middlesboro Regional office and was verified on 12/2/22. Permittee has created disturbance of surface acreage on Increment #7 prior to receipt of approval from the Cabinet of a performance bond covering the area to be affected by surface coal mining operations and facilities.	405 KAR 10:015 General Bonding Provisions	PAC - 22-4-0541
238221	918-0465	WHITLEY	05/17/23	\$ -		NO	Permittee shall seed and mulch the bare areas of the backfill near pond #132 on increment #2 and all bare areas associated with the construction of haul road #5 on increment #7 in accordance with the permit and 405 KAR 16:200.	Permittee has failed to revegetate backfill area near pond #132 on increment #2 and permittee has failed to seed and mulch the outcrops and adjacent areas associated with the construction of haul road #5 on increment #7.	Revegetation - KAR 16:200	

Mountainside Coal Co., Inc. VIOLATIONS

Non-Compliance #	Permit	County	Non Compliance Date	Amount Due	Cessation Orders	Final Disposition (FDP)	Remedial Measure	Violation Description	Reg/Statute	Environmental Hearing Board Case No.: https://dep.gateway.ky.gov/Hero/
238224	918-0465	WHITLEY	06/26/23	\$ -		NO	The permittee shall cease activities on the permitted area and submit within 30 days a new or updated Liability Insurance to either the Regional Office or the Assessment and Bonding Section in Frankfort. Failure to submit liability insurance within 30 days shall result in issuance of a Failure to Abate Cessation Order.	The Permittee has failed to maintain Liability Insurance in accordance with 405 KAR 10:030 Section 2.	Liability Insurance - KAR 10:030	
232625	918-0465	WHITLEY	11/13/23	\$ -		NO	Permittee shall complete revegetation of the affected areas in accordance with the permit and 405 KAR 16:200.	Permittee has failed to revegetate backfill areas near sediment structure #4 (Inc. #7) and near sediment structure #132 (Inc. #2).	Revegetation - KAR 16:200	
							Remove all non-coal waste from permit area and dispose of it according to your approved plan.	Permittee has allowed non-coal waste to be disposed of on the permit area on increment #1.	Disposal of Non-Coal Waste - KAR 16:150	
							Remove trees from emergency spillways of sediment structures #11A, #131 and #13.	Permittee has failed to maintain sediment structures #11A and #131 (Inc. #1) and sediment structure #13 (Inc. #2). Permittee has allowed trees to grow in the spillways of these structures.	Sedimentation Ponds - KAR 16:090	
							Regrade, fill, or otherwise stabilize the rills and gullies; seed and mulch all disturbed areas.	Permittee has failed to stabilize rills and gullies in backfill area on increment #2 near pond #132 and near pond #13 on increment #1.	Backfilling and Grading - KAR 16:190	
238213	918-0509	WHITLEY	12/12/22	\$ 1,000.00		NO	Permittee shall submit required quarterly instream and groundwater water monitoring reports for the 3rd quarter of 2022 to the Middlesboro Regional Office. If reports are not available and monitoring is not being conducted, within 30 days, the permittee must implement the approved water monitoring program to bring it current and submit the required reports to the Middlesboro Regional Office. Violation Non correctable – Because: Non-Correctable because the deadline for submitting reports has already passed.	Permittee has failed to submit quarterly instream and groundwater monitoring reports for the 3rd quarter of 2022 as required by approved permit plans and regulations	Water Monitoring - KAR 16:110	PAC - 22-4-0560
							Permittee shall seed and mulch the berm area near SS-005.	Permittee has failed to complete revegetation of the berm area near SS-005 in accordance with the approved revegetation plan. (Increment #1)	Revegetation - KAR 16:200	

Mountainside Coal Co., Inc. VIOLATIONS

Non-Compliance #	Permit	County	Non Compliance Date	Amount Due	Cessation Orders	Final Disposition (FDP)	Remedial Measure	Violation Description	Reg/Statute	Environmental Hearing Board Case No.: https://dep.gateway.ky.gov/Hero/
232407	918-0509	WHITLEY	09/26/23	\$ 2,700.00		NO	Permittee shall reclaim area in the drainage of SS-001, SS-002 and SS-005 to conform to the time frame specified in the approved reclamation plan and 405 KAR 16:020.	Permittee has failed to achieve the required reclamation within the specified time frame in the drainage area of SS-001, SS-002 and SS-005. (Increment #1)	Contemporaneous Reclamation - KAR 16:020	
							Regrade, fill, or otherwise stabilize the rills and gullies; seed and mulch all disturbed areas.	Permittee has failed to stabilize rills and gullies in backfill in drainage area of SS-001 and SS-002. (Increment #1)	Backfilling and Grading - KAR 16:190	

Exhibit “2”

2009 WL 1636369

Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST
RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Larry E. THOMPSON and Linda Thompson, Appellants

v.

BRANCH BANKING AND TRUST CO., Appellee.

No. 2008-CA-001217-MR.

|

June 12, 2009.

Appeal from Jefferson Circuit Court, Action No. 06-
CI-010885; [James M. Shake](#), Judge.

Attorneys and Law Firms

[Laurence J. Zielke](#), [Nancy J. Schook](#), David N. Hise,
Louisville, KY, for Appellants.

[Mark A. Robinson](#), Daniel T. Alberts, Jr., [Robert T. Wagner](#),
Louisville, KY, for Appellee.

Before [ACREE](#), [TAYLOR](#), and [THOMPSON](#), Judges.

OPINION

[ACREE](#), Judge.

*1 Pursuant to the finality provision of [Kentucky Revised Statutes \(KRS\) 425.600](#)(1), Larry and Linda Thompson appeal from a June 24, 2008 order of the Jefferson Circuit Court granting Branch Banking and Trust Company's (BB & T) motion for the appointment of a receiver. Finding no error, we affirm.

In January 2002, the Thompsons entered into a loan agreement with Bank of Louisville, BB & T's predecessor-in-interest, to borrow \$3,449,232.00. The loan was memorialized by a promissory note, and secured by a mortgage and assignment of rents on numerous parcels of real estate.

Both the mortgage agreement and the assignment of rents, signed by the Thompsons, expressly provided for the appointment of a receiver for the properties upon default, as follows:

Upon the occurrence of any Event of Default and at any time thereafter, Lender may exercise any one or more of the following rights and remedies, in addition to any other rights or remedies provided by law:

....

Appoint Receiver. Lender shall have the right to have a receiver appointed to take possession of all or any part of the Property, with the power to protect and preserve the Property, to operate the Property preceding foreclosure or sale, and to collect the Rents from the Property and apply the proceeds, over and above the cost of the receivership, against the Indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Property exceeds the Indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

In March 2006, the Thompsons failed to make payments of principal and interest and defaulted on their loan. On December 5, 2006, BB & T filed a complaint to collect the amounts due under the note and foreclose on the mortgage. The Thompsons continued to receive rents and represented that they were using those proceeds to maintain the property, to pay an obligation to the Internal Revenue Service, and to defray living expenses.

By contract, the Thompsons granted BB & T the right to have a receiver appointed if they should default. They defaulted. Consequently, BB & T filed a motion on February 21, 2008, for the appointment of a receiver. Finding that BB & T had the contractual right to the appointment of a receiver, as well as the same right under [KRS 425.600](#)(1) because of the contract, the trial court granted the motion. This appeal followed.

On appeal, the Thompsons claim the trial court's decision was an extraordinary remedy not merited by the facts of this case.


We review the trial court's findings of fact only to determine if they are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. The trial court's application of law, however, is reviewed *de novo*. [Monin v. Monin](#), 156 S.W.3d 309 (Ky.App.2004).

First, we address the Thompsons' claim that [CR 52.01](#) required the trial court to enter findings of fact with respect to the order entered upon BB & T's motion to appoint a receiver. We disagree.

*2 [CR 52.01](#) specifically provides that “[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02.” As the granting of a motion pursuant to [KRS 425.600](#) does not fall within the category of those motions which require the entry of written findings and conclusions, the trial court did not err by failing to make such an entry. *See, Clay v. Clay*, 424 S.W.2d 583, 584 (Ky.1968) (“[CR 52.01](#) exempts rulings on motions from its mandate for such findings of fact and conclusions of law.”), *citing, Powell v. Powell*, 423 S.W.2d 896, 897-98 (Ky.1968), and, *LeBus v. LeBus*, 408 S.W.2d 200, 202 (Ky.1966).

The only facts necessary to the trial court's ruling were whether the Thompsons executed the loan agreement and whether they defaulted. These facts are not disputed. All else is legal interpretation of the contract. Therefore, the Thompsons' argument does not, in fact, look to errors in the trial court's fact-finding. The appeal raises only a question of law-whether the trial court erroneously granted BB & T's motion for the appointment of a receiver pursuant to the loan documents and [KRS 425.600](#). That review, as noted above, we undertake *de novo*. *Monin, supra*.

We agree with BB & T that it had a contractual right to have a receiver appointed. The loan documents expressly provide for such an outcome upon default by the borrowers.

The Thompsons also claim that BB & T breached promises and agreements between the parties under which we should invoke the unclean hands doctrine. *See*  [Suter v. Mazzyck](#), 226 S.W.3d 837, 843 (Ky.App.2007). However, we find no factual support for these allegations in the record. If the Thompsons are able to develop these allegations into facts before the trial court, they will be protected by the provisions of [KRS 425.600\(3\)](#) which states: “Any income accruing during the pendency of proceedings under this section shall follow the property upon final disposition of the case .”

Having found a contractual right to a receiver, it is unnecessary for this Court to further consider whether BB & T has an independent statutory right under [KRS 425.600](#) except to note that in the absence of the contract BB & T's right would be a closer call. Because of the contract, however, the question is not close at all.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

All Citations

Not Reported in S.W.3d, 2009 WL 1636369

End of Document

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**COMMONWEALTH OF KENTUCKY
KNOX CIRCUIT COURT
DIVISION NO. I
EFILE**

ACTION NO. 24-CI-00040

BCRPF M&M MOUNTAINSIDE BLKR LLC

PLAINTIFF

-VS-

**MOUNTAINSIDE COAL COMPANY, BINDERLESS
COAL BRIQUETTING COMPANY PTY LIMITED,
MID SOUTH CAPITAL PARTNERS LP, KNOX
COUNTY, KENTUCKY, ALDEN RESOURCES LLC,
THOMAS R. GAMBREL, CHARLISA G. STEWART,
TRIPLE 7 COMMODITIES, INC., CLAY LAUREL
MINING, INC. and ALLEGIANT SECURITY SERVICES, LLC**

DEFENDANTS

NOTICE OF FILING

Comes the Plaintiff, BCRPF M&M MOUNTAINSIDE BLKR LLC, and gives Notice of the filing of the attached Affidavit of Torben Thordsen, Director of the Plaintiff, BCRPF M&M MOUNTAINSIDE BLKR LLC, wherein he verifies the authenticity of the allegations set forth in the Complaint and the Motion to Appoint a Receiver.

Respectfully submitted,

/s/ Charles J. Baird
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CERTIFICATION:

I certify a true copy of the Notice of Filing of the Affidavit of Torben Thordsen was duly electronically served by e-mail pursuant to CR 5.02 (2) to all attorneys of record this 29th day of February, 2024:

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NF : 000003 of 000003

**COMMONWEALTH OF KENTUCKY
KNOX CIRCUIT COURT
DIVISION NO. I
EFILE**

ACTION NO. 24-CI-00040

BRCPF M&M MOUNTAINSIDE BLKR LLC

PLAINTIFF

-VS-

**MOUNTAINSIDE COAL COMPANY, BINDERLESS
COAL BRIQUETTING COMPANY PTY LIMITED,
MID SOUTH CAPITAL PARTNERS LP, KNOX
COUNTY, KENTUCKY, ALDEN RESOURCES LLC,
THOMAS R. GAMBREL, CHARLISA G. STEWART,
TRIPLE 7 COMMODITIES, INC., CLAY LAUREL
MINING, INC. and ALLEGIANT SECURITY SERVICES, LLC**

DEFENDANTS

AFFIDAVIT OF TORBEN THORDSEN

COMES the Affiant, Torben Thordsen, and after being duly sworn, states as follows:

1. The Affiant is a resident of London, England, and is the Director of the Plaintiff, BRCPF M&M Mountainside BLKR LLC ("BRCPF").
2. The Affiant is knowledgeable about the allegations set forth in the Complaint and in the Motion to Appoint Receiver and in the dealings between BRCPF and Mountainside Coal Company.
3. The Affiant states that BRCPF had knowledge of the Sublease to Alden Resources LLC at the time it was consummated and acquiesced to the

same, contrary to what is stated in the above Motion; however, in acquiescing to the Sublease BRCPF relied on MCC's representation that it would receive the Tonnage Royalty as required in the TPOA and such Tonnage Royalties have not been paid to BRCPF.

4. Except as set forth above, the Affiant states the statements contained in the Complaint and in the Motion to Appoint Receiver as true.

THIS the 29th day of February, 2024.



(SEAL)

TORBEN THORSEN

UNITED KINGDOM

TOWN/CITY London

The foregoing Affidavit was subscribed and sworn to before me by Torben Thorsen on this the 29 day of February, 2024.

My Commission Expires: WITH LIFE


Notary Public

Steven Dasgupta
Notary Public
30 Stamford Street
London
SE1 9LQ
Tel 0207 019 9007
Email notary@inotarypublic.co.uk



COMMONWEALTH OF KENTUCKY
KNOX CIRCUIT COURT
CASE NO. 24-CI-00040

Electronically Filed

BRCPF M&M MOUNTAINSIDE BLKR LLC

PLAINTIFF

v.

BINDERLESS COAL BRIQUETTING COMPANY PTY
LIMITED, ET AL.,

DEFENDANTS

NOTICE OF FILING

Please take notice that Defendant Binderless Coal Briquetting Company PTY Limited hereby files the affidavit of Allan McCarthy in further support of Plaintiff BRCPF M&M Mountainside Blkr LLC's Motion to Appoint Receiver filed on February 23, 2024.

Respectfully submitted,

/s/ Chrisandrea L. Turner

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Briquetting Company PTY Limited*

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CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2024, a true and accurate copy of the foregoing was electronically filed pursuant to the KYeCourts electronic filing procedures. I further certify that I mailed the foregoing document by U.S. First Class Mail upon the following parties:

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/s/ Chrisandrea L. Turner
Counsel for Defendant Binderless Coal
Briquetting Company PTY Limited

**COMMONWEALTH OF KENTUCKY
KNOX CIRCUIT COURT
CASE NO. 24-CI-00040**

Electronically Filed

BRCPF M&M MOUNTAINSIDE BLKR LLC

PLAINTIFF

v.

AFFIDAVIT OF ALLAN MCCARTHY

**BINDERLESS COAL BRIQUETTING COMPANY
PTY LIMITED; MOUNTAINSIDE COAL
COMPANY, INC.; MID SOUTH CAPITAL
PARTNERS LP; KNOX COUNTY, KENTUCKY;
ALDEN RESOURCES LL; THOMAS R.
GAMBRELL; CHARLISA G. STEWART;
TOMMY STEWART; TRIPLE 7 COMMODITIES,
INC.; and CLAY LAUREL MINING INC.;**

DEFENDANTS

Affiant, Allan McCarthy, after being duly sworn, states as follows:

1. I am over the age of eighteen years.
2. I am a resident of Australia.
3. I have a Bachelor of Commerce degree and I am a Chartered Accountant.
4. I am the Chief Financial Officer of White Energy Company ("WEC"), and have been employed by WEC since August 2017.
5. Binderless Coal Briquetting Company PTY Limited ("BCBC") is a subsidiary of WEC.
6. I am knowledgeable of all facts in BCBC's Answer, Counterclaim, and Cross-Claim, and verify the truth and accuracy of the statements in same.
7. Since at least May 2022, Clay Laurel Mining Inc. ("CLM") has been in default of the Stock Purchase Agreement ("SPA") with BCBC referenced in the Answer, Counterclaim, and Cross-Claim.

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8. Since at least May 2022, Mountainside Coal Company, Inc. ("MCC") has been in default of the Mortgage, Security Agreement and Fixture Filing ("MCC Mortgage") with BCBC identified in the Answer, Counterclaim, and Cross-Claim as set forth in further detail herein.
9. Since at least May 2022 Triple 7 Commodities Inc. is in default of its Guaranty in favor of BCBC ("Guaranty") of CLM's payment obligations under the SPA.
10. The total amount owed to BCBC under the SPA is \$1,740,892.52.
11. Pursuant to the MCC Mortgage, BCBC received a mortgage lien on, and a security interest in and upon, all estate, title and interests of MCC in a September 30, 2008 Lease Agreement amended by Ratification of Lease Agreement dated February 17, 2014, and a second amendment to Lease Agreement dated December 1, 2014 (collectively "Plant Lease").
12. The MCC Mortgage is recorded in the Knox County Clerk's Office in Book M483, Pages 457-475.
13. BCBC has a security interest in all improvements, fixtures, machinery, appliances, facilities, and personal property of every kind whatsoever which are part of or associated with MCC's coal preparation facility ("Plant") in Knox County, Kentucky located on property leased to MCC pursuant to the Plant Lease.
14. To perfect this security interest, BCBC filed a UCC-1 Financing Statement with the Kentucky Secretary of State on April 16, 2021.
15. Three Certificates of Delinquency held by Mid-South Capital Partners, LP have been filed of record against the Plant Lease because MCC has failed to maintain the

collateral under the MCC Mortgage ("MCC Mortgaged Collateral") free, clear, and unencumbered required by Section 3(a) of the MCC Mortgage.

16. The Surface Mining Information System's website maintained by the Energy and Environment Cabinet for the Commonwealth of Kentucky reflects nearly twenty instances of permit non-compliance by MCC since December 2022 in Knox and Whitley Counties, all of which remain active ("Permit Violations").

17. The website also shows that four cessation orders exist and at least \$75,000.00 in monetary penalties are owed by MCC.

18. The Permit Violations violate Section 3(d) of the MCC Mortgage because MCC is required to comply with all laws, ordinances, rules, regulations, permits, and other requirements of governmental authorities.

19. MCC is in breach of or has allowed the termination of many of its mining leases, including the Plant Lease, all in violation of Section 3(d) of the MCC Mortgage.

20. MCC is a defendant in *Kentucky Oil and Refining Company, Inc. v. Mountainside Coal Company, Inc.*, Floyd Circuit Court Civil Action No. 23-CI-00255, which alleges MCC has failed to pay for business related services.

21. MCC is a defendant in *Ranger Environmental Services, LLC v. Mountainside Coal Co., Inc.*, Knox Circuit Court Civil Action No. 23-CI-00370, which is a domesticated foreign judgment against MCC in the amount of \$300,000.00 for failure to pay for business related services.

22. MCC and Triple 7 are defendants in an action filed by Theodore M. Spoltore, identified as U.S. District Court Civil Action No. 23-CI-00143 in the Eastern District of

Kentucky which alleges damages in excess of \$3.7 million for failure to make payments under promissory notes and for various fraudulent acts.

23. MCC is in violation of Section 3(l) of the MCC Mortgage because of these suits.

24. MCC has failed to observe or perform the covenants and conditions under its leases with Defendant Thomas R. Gambrel and Defendant Charlisa Stewart, ("Plant Lessors") pursuant to Section 4(c) of the MCC Mortgage, and owes the Plant Lessors in excess of \$150,000.00.

25. MCC has failed to notify BCBC that it is in default of the Plant Lease, and has refused to cure that default.

26. MCC has failed to provide to BCBC insurance policy certificates evidencing payment of premiums which is required to be provided under the terms of the Mortgage.

27. BCBC's security interest in the MCC Mortgaged Collateral is being diminished and materially injured due to the actions of MCC.

FURTHER THE AFFIANT SAYETH NAUGHT.

COUNTRY OF AUSTRALIA _____

STATE OF QUEENSLAND _____

CITY OF BRISBANE _____

A. M. C.

ALLAN JOHN MCCARTHY

The foregoing instrument was acknowledged before me this 29th day of February, 2024, by Allan McCarthy.

My commission expires: _____

Commission Number: _____

Aaron Jackson Webb
Notary Public
Level 32, 123 Eagle Street, Brisbane
Queensland Australia
My commission does not expire



[Signature]

NOTARY PUBLIC