

**APPENDIX TO THE MEMORANDUM OPINION  
AND FINAL AWARD OF THE ARBITRATION PANEL**

**This Appendix shall be considered for all purposes as a material part of the  
Memorandum Opinion and Final Award of the Arbitration Panel.**

**I. Tonnages Mined, Produced and Sold from the EMC Property**

The Panel finds by a preponderance of the evidence that the following tonnages were mined, produced and sold from the EMC Property from January, 2001 through March 31, 2005:

<u>Mine</u>	<u>Year</u>	<u>Tons</u>
106A	2001	-
	2002	44,517
	2003	72,242
	2004	61,407
	2005	<u>19,643</u>
		197,809

<u>Mine</u>	<u>Year</u>	<u>Tons</u>
Isaac's Run	2001	42,480
	2002	49,613
	2003	28,219
	2004	-
	2005	<u>-</u>
		120,312

<u>Mine</u>	<u>Year</u>	<u>Tons</u>
105A	2001	-
	2002	8,231
	2003	14,534
	2004	-
	2005	<u>-</u>
		22,765

<u>Mine</u>	<u>Year</u>	<u>Tons</u>
108-I	2001	108,118
	2002	261,800
	2003	284,042
	2004	306,756
	2005	<u>46,040</u>
		1,006,756

**Total 1,347,642 (197,809 + 120,312 + 22,765 + 1,006,756)**

Plaintiff's Exhibits 199, 200, 201 and 202 (for tons through March, 2005) and Defendant's Exhibit 224, Schedules 10A, 10B, 10C and 10D

## **II. Issues and Awards as presented in the Panel's Memorandum Opinion**

### **A. The Arrangement Among the Parties, 2001-2005**

- 1. DEBT REPAYMENT - No Award.**
- 2. CENTURY RESERVES - No Award.**
- 3. RECLAMATION / MAINTENANCE OF DEP PERMITS AND DEP CIVIL PENALTIES -**

#### **a. Reclamation / Maintenance -**

##### **106A Mine Reclamation/Escrow Calculation**

The Panel finds that Dominick's companies are entitled to receive from Virgil D.'s companies an amount of \$0.50 per ton for the tons mined at the 106A Mine (DEP Mining Permit No. U-24-84) during the January, 2001 through March 31, 2005 time-frame. (See Item I. above in this Appendix.)

$$197,809 \text{ tons} \cdot \$0.50 = \$98,905.$$

##### **108-I, Isaac's Run and 105A Mines Reclamation/Escrow Calculation**

The Panel finds that Dominick's companies are entitled to receive from Virgil D.'s companies an amount of \$0.25 per ton for the tons mined at the 108-I, Isaac's Run and 105A Mines (DEP Mining Permit Nos. U-885, UO-401 and UO-520, respectively) during the January, 2001 through March 31, 2005 time-frame. (See Item I. above in this Appendix.)

$$1,006,756 + 120,312 + 22,765 = 1,149,833 \text{ tons} \cdot \$0.25 = \$287,458.$$

$$\text{Total Reclamation/Escrow Amount } (\$98,905 + \$287,458) = \$386,363.$$

#### **b. DEP Civil Penalties - No Award.**

### **4. EQUIPMENT -**

The Panel finds by a preponderance of the evidence that an award of \$0.05 per ton is commercially reasonable for an equipment charge for the equipment owned by one or more of Dominick's respective companies and which was used or used for parts by Cherokee's contract miners at the 105A, 106A and Isaac's Run Mines (but not the 108-I Mine). The equipment was not in good condition and was originally acquired by Dominick as surplus equipment from auction. The tons this fee would apply to equal  $197,809 + 120,312 + 22,765 = 340,886$

$$340,886 \cdot \$0.05 = \$17,044.$$

## 5. ROYALTY -

### a. Regular Royalty -

The Panel makes the following royalty calculation and findings pertaining to the tons mined, produced and sold from the EMC Property during the applicable time-frame, January 1, 2001 through March 31, 2005. Only tons from the 108-I Mine form part of this royalty calculation since these tons are from that portion of the EMC Property owned by EMC.

<u>Year</u>	<u>Tons</u>	<u>Regal's Total Realization Per Ton*</u>	<u>Royalty Rate</u>	<u>Royalty Amount</u>
2001	108,118	\$28.62	7%	\$216,604
2002	261,800	\$31.02	7%	\$568,472
2003	284,042	\$30.36	7%	\$603,646
2004	306,756	\$31.17	7%	\$669,311
2005	46,040	\$35.39	7%	\$114,055
Total Royalty.				<b>\$2,172,088</b>

\*These "Realization Per Ton" figures are greater than the per ton realization figures set forth on Defendant's Exhibit 224, Schedule 11. These figures represent the price realized by Regal for each respective year (Defendant Exhibit 224, Schedules 2, 11, 12A-12E, inclusive) plus the per ton spread received by Research (*see* "Scenario II" of Plaintiff Exhibit 224A [Roger Osborne's handwritten notes], which scenario the Panel adopts as between it and "Scenario I"). Based on the Panel's findings and determinations of a fair and commercially reasonable structure the figures used by the Panel are reflective of the "total sales price" the Panel considers to have been paid by Foos Coal to Regal for the EMC tons which includes all the payments by Foos Coal to Regal, including "incentive payments", as calculated by Mr. Osborne (Defendant Exhibit 224, Schedules 2, 11, 12A-12E, inclusive) and the "spread" referenced above.<sup>25</sup> In fairness to Research, the spread is included in this figure to reflect the "full" price paid by Foos Coal from which royalties and override royalties and commissions are based herein (consistent with the Panel's findings and ruling that the back-to-back purchase orders did not constitute two distinct points of sale ["Sale 1" from Regal to Research and "Sale 2" from Research to Foos Coal]). The other components of the Panel's imposed fair and commercially reasonable terms to the arrangement are consistent with this analysis and reflect a more traditional lessor-lessee relationship between EMC and Regal without the component of a forced, fixed price sale back to the lessor.<sup>26</sup>

<sup>25</sup> 2001 -  $\$25.75 + 2.87 = \$28.62$ ; 2002 -  $\$28.15 + 2.87 = \$31.02$ ; 2003 -  $\$27.49 + 2.87 = \$30.36$ ; 2004 -  $\$28.30 + 2.87 = \$31.17$ ; and 2005 -  $\$32.52 + 2.87 = \$35.39$ .

<sup>26</sup> For example, if the Panel held that a forced sale at a fixed price to the lessor was a part of the arrangement, then royalty rates and override rates, if any, would be much lower figures (any likely cents per ton and not percentage based) and no award of a sales commission to the lessor would be made under the total facts and circumstances presented to the Panel.

**b. Override Royalty -**

The Panel makes the following override royalty calculation and findings pertaining to the tons mined, produced and sold from the EMC Property during the applicable time-frame. Only tons from the Isaac's Run, 105A and 106A Mines form part of this override royalty calculation since these tons are from that portion of the EMC Property that was leased by EMC (initially from Gebruder then later from Penn Virginia).

<u>Mine</u>	<u>Year</u>	<u>Tons</u>	<u>Regal's Total Realization Per Ton*</u>	<u>Override Rate</u>	<u>Override Amount</u>
106A	2001	-	\$28.62	3%	-
	2002	44,517	\$31.02	3%	\$41,427
	2003	72,242	\$30.36	3%	\$65,798
	2004	61,407	\$31.17	3%	\$57,422
	2005	<u>19,643</u>	<u>\$35.39</u>	<u>3%</u>	<u>\$20,855</u>
		197,809		<b>Total 106A Override</b>	<b>\$185,502</b>

<u>Mine</u>	<u>Year</u>	<u>Tons</u>	<u>Regal's Total Realization Per Ton*</u>	<u>Override Rate</u>	<u>Override Amount</u>
Isaac's Run	2001	42,480	\$28.62	3%	\$36,473
	2002	49,613	\$31.02	3%	\$46,170
	2003	28,219	\$30.36	3%	\$25,702
	2004	-	\$31.17	3%	-
	2005	<u>-</u>	<u>\$35.39</u>	<u>3%</u>	<u>-</u>
		120,312		<b>Total Isaac's Run Override</b>	<b>\$108,345</b>

<u>Mine</u>	<u>Year</u>	<u>Tons</u>	<u>Regal's Total Realization Per Ton*</u>	<u>Override Rate</u>	<u>Override Amount</u>
105A	2001	-	\$28.62	3%	-
	2002	8,231	\$31.02	3%	\$7,660
	2003	14,534	\$30.36	3%	\$13,238
	2004	-	\$31.17	3%	-
	2005	-	\$35.39	3%	-
				<b>Total 105A Override</b>	<b>\$20,898</b>

	<u>106A</u>		<u>Isaac's Run</u>		<u>105A</u>	
Total Override	\$185,502	+	\$108,345	+	\$20,898 =	<b>\$314,745</b>

\*Same definition and explanation for Royalty as set forth above.

**c. Landlord Royalty Reimbursement -**

The Panel finds by a preponderance of the evidence that EMC is due from the applicable Virgil D. company \$280,862 for non-reimbursed royalty payments. The Panel finds

that EMC did not prove by a preponderance of the evidence and is therefore not entitled to an additional sum of \$269,857 for recoupment of such landlord royalties. See Defendant Exhibit 224, Schedule 8.

**6. COMMISSION -**

The Panel makes the following finding pertaining to the total tons shipped on Foos Coal Orders from the Rawhide Plant from January, 2001 through March 31, 2005: 2,313,195 tons. See Plaintiff's Exhibit 205, and Defendant Exhibit 224, Schedule 10E.

The commission calculation due Research under the Panel's ruling is 2,313,195 tons · \$0.10 = **\$231,320**

**B. Other Issues Pertaining to the 2001-2005 Arrangement**

1. **TRESPASS COAL - No Award.**
2. **TORTIOUS INTERFERENCE -**
  - a. **Dominick's claims against Virgil D. and Foos Coal - No Award.**
  - b. **Virgil D.'s claims against Dominick - No Award.**
3. **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS - No Award.**

**C. Remaining Issues Involving the Settlement Agreement and Injunctive Relief**

1. **DEFAULT OF THE SETTLEMENT LEASE AND SUBLEASE -**
  - a. **Minimum Production -**

The Panel finds that 108-I Mine Settlement Lease, the 106A Mine Settlement Sublease, the Pole Building right-of-way agreement, the Assignment, and any other agreements pertaining thereto under the Settlement Agreement shall be terminated effective upon the Plaintiffs' receipt of the Award set forth below.

- b. **Fugitive Coal -**

The Panel finds by a preponderance of the evidence that Dominick's companies are entitled to a "Fugitive Fee" payment of \$7,527 pursuant to that certain Assignment effective April 1, 2005.

- c. **Inadequate Records - No Award.**
  2. **INJUNCTIVE RELIEF - No Award.**
  3. **CORPORATE VEIL - No Award.**

### III. Summary and Reconciliation Of Award To Monies Paid

1. Amounts "retained" by or paid to Dominick's Companies \$3,746,429  
*See Plaintiff's Exhibit 224A (Roger Osborne's handwritten notes)*

2. Summary of Total "Due" Dominick's Companies Under Panel's Decision and Award

A.	Reclamation/Escrow	\$386,363
B.	Equipment	\$17,044
C.	Royalty	\$2,172,088
D.	Override Royalty	\$314,745
E.	Landlord Royalties	\$280,862
F.	Commission	\$231,320
G.	Fugitive Fee	\$7,527

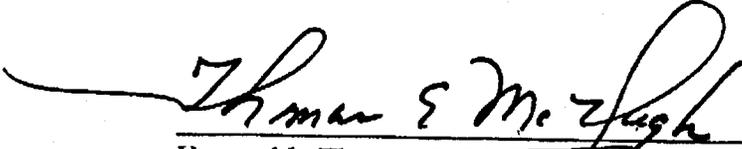
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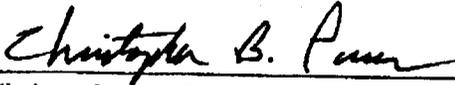
Total \$3,409,949

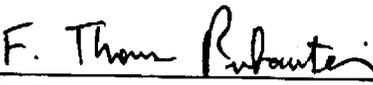
3. Amount Awarded by the Panel to be paid within thirty (30) calendar days of the date of this Memorandum Opinion and Final Award by any one or more of Dominick's companies to the Virgil D. company or companies specified by the Plaintiffs.

(\$3,746,429 - \$3,409,949) = \$336,480

Respectfully submitted this 14<sup>th</sup> day of January, 2008.

  
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Honorable Thomas E. McHugh, Arbitrator

  
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Christopher B. Power, Esq., Arbitrator

  
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F. Thomas Rubenstein, Esq., Arbitrator