

UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF MISSOURI

In Re:	)	
	)	
Patriot Coal Corporation, et al.,	)	Chapter 11
	)	Cause No. 12-51502-659
	)	Hon. Kathy A. Surratt-States
Debtors.	)	
	)	(Jointly Administered)
	)	
	)	
	)	
	)	Adv. Proc. No. 12-04355-659
	)	
Robin Land Company, LLC,	)	Objection Deadline: <b>March 12,</b>
	)	<b>2013</b>
Plaintiff,	)	Hearing Date: March 19, 2013,
	)	10:00 a.m.
v.	)	
	)	
STB Ventures, Inc., et al.	)	NOTICE OF STB VENTURES,
	)	INC.'S MOTION UNDER B.C.
	)	§ 365(D)(3) TO COMPEL
Defendants.	)	ROBIN LAND COMPANY TO
	)	PAY PART OR ALL OF THE
	)	POST-PETITION AMOUNTS
	)	DUE UNDER THE STB
	)	OVERRIDE AGREEMENT,
	)	AND, IN THE ALTERNATIVE,
	)	UNDER B.C. § 363 FOR
	)	ADEQUATE PROTECTION

**NOTICE OF MOTION OF STB VENTURES, INC. UNDER B.C. 365(D)(3) TO COMPEL ROBIN LAND COMPANY TO PAY PART OR ALL OF THE POST-PETITION AMOUNTS DUE UNDER THE STB OVERRIDE AGREEMENT, AND, IN THE ALTERNATIVE UNDER B.C. § 363 FOR ADEQUATE PROTECTION**

PLEASE TAKE NOTICE that on March 5, 2013, STB Ventures, Inc. filed a Motion (I) Under Bankruptcy Code § 365(d)(3) to Compel Robin Land Company to Pay Part or All of the Post-Petition Amounts Due Under the STB Override Agreement

Because (A) Payment of the STB Override Is a Condition of At Least One Unexpired Nonresidential Real Property Lease, and/or (B) The STB Override Agreement Is Integrated With Two Unexpired Nonresidential Real Property Leases, Or (II) In the Alternative, Under Bankruptcy Code § 363 to Provide STB Ventures Adequate Protection of Its Interests Under the STB Override Agreement (the “Motion”) in the above-captioned adversary proceeding.

PLEASE TAKE FURTHER NOTICE that any party wishing to oppose the entry of an order approving the Motion must file a response or objection (“Objection”) if any, to the Motion in accordance with this Court’s Order Establishing Certain Notice, Case Management and Administrative Procedures entered by the Court on October 18, 2012 [Docket No. 1386] (the “Case Management Order”), so as to be actually received by the parties required to be served under the Case Management Order and counsel to the Movant on or before the objection deadline of **March 12, 2013** (the “Objection Deadline”).

PLEASE TAKE FURTHER NOTICE that if no objection has been properly filed, served and received by the Objection Deadline, the Court may enter an order approving the Motion without further notice, submission or hearing. In the event one or more objections to the Motion are timely served and filed, and such objection(s) are not withdrawn or otherwise resolved, a hearing shall be held to consider such timely objections to the Motion on **March 19, 2013 at 10:00 a.m.** central standard time.

Date: March 5, 2013

SHOOK, HARDY & BACON L.L.P.

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ATTORNEYS FOR DEFENDANT  
STB VENTURES, INC.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 5<sup>th</sup> day of March, 2013, a true and correct copy of the above and foregoing was served via CM/ECF notification on all parties receiving such notification.

/s/ Mark Moedritzer  
Attorney for STB Ventures, Inc.

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

In re:

PATRIOT COAL CORPORATION, *et al.*

Debtors

ROBIN LAND COMPANY, LLC,

Plaintiff,

v.

STB VENTURES, INC., *et al.*

Defendants.

Chapter 11

Case No. 12-51502-659

Hon. Kathy A. Surratt-States

Adv. Pro. No. 12-04355-659

**STB VENTURES, INC.'S MOTION**

**(I) UNDER BANKRUPTCY CODE § 365(D)(3) TO COMPEL ROBIN LAND COMPANY TO PAY PART OR ALL OF THE POST-PETITION AMOUNTS DUE UNDER THE STB OVERRIDE AGREEMENT BECAUSE (A) PAYMENT OF THE STB OVERRIDE IS A CONDITION OF AT LEAST ONE UNEXPIRED NONRESIDENTIAL REAL PROPERTY LEASE, AND/OR (B) THE STB OVERRIDE AGREEMENT IS INTEGRATED WITH TWO UNEXPIRED NONRESIDENTIAL REAL PROPERTY LEASES, OR**

**(II) IN THE ALTERNATIVE, UNDER BANKRUPTCY CODE § 363 TO PROVIDE STB VENTURES ADEQUATE PROTECTION OF ITS INTERESTS UNDER THE STB OVERRIDE AGREEMENT**

Defendant STB Ventures, Inc. ("STB") hereby moves the Court for entry of an Order pursuant to § 365(d)(3) of the Bankruptcy Code compelling Plaintiff/Debtor Robin Land Company, LLC ("RLC") to (i) immediately pay to STB all past due post-petition amounts due under the STB Override Agreement and thereafter remain current on its post-petition, pre-assumption obligations under the STB Override Agreement or, (ii) immediately pay all past due

post-petition amounts under the STB Override Agreement and make current payments as they come due into an escrow fund pending resolution of this adversary proceeding. In the alternative, and as described in detail in footnote 1, *infra*, STB moves the Court under Bankruptcy Code § 363 to require RLC to provide STB with adequate protection of its interests in connection with the STB Override Agreement in the form of payment of such amounts owed under the STB Override Agreement pending the resolution of this adversary.

The basis for STB's Motion is that RLC is not excused from paying the STB Override by instituting this adversary proceeding challenging the nature of the STB Override Agreement. Debtors have the burden of proving that § 365(d)(3) does not apply and that burden is not met by mere allegations, even when the allegations are presented in the form of a complaint. To enable RLC to avoid its obligations under the STB Override Agreement until resolution of this adversary proceeding would expose STB to disproportionate risk as compared to other creditors in the event that RLC converts to a Chapter 7 liquidation, or becomes administratively insolvent.

Moreover, the relevant facts and circumstances pertaining to this proceeding indicate that the STB Override Agreement must be paid pending assumption or rejection under § 365(d)(3). First, § 365(d)(3) requires a debtor to perform all obligations under an unexpired, nonresidential real property lease post-petition and pre-assumption, including obligations owed to third-parties that are explicitly incorporated into the lease. Here, the Kelly-Hatfield Lease and a subsequent assignment of that Lease executed by the lessor, the assignor and RLC as assignee, expressly require payment to STB of an overriding royalty equal to 1.5% of the gross sales price on all coal mined from the premises of the Lease ("STB Override") pursuant to the Overriding Royalty Agreement dated October 31, 1994 ("STB Override Agreement"). Because payment of the STB

Override is an incorporated condition under the Lease, § 365(d)(3) requires payment of the STB Override pending assumption or rejection.

Second, § 365(d)(3) requires payment pending assumption or rejection of contracts that are integrated with and not severable from nonresidential real property leases. Here, the record clearly demonstrates that the STB Override Agreement is integrated with both the Kelly-Hatfield and the Lawson Heirs Leases (the “Leases”), and that RLC is obligated under documents integrated with those Leases to pay overriding royalties to STB on all coal mined from the premises of both Leases. Because the STB Override Agreement is integrated with both Leases, § 365(d)(3) requires payment of the STB Override pending assumption or rejection.

Because RLC has failed to establish that the STB Override Agreement need not be paid pending assumption or rejection under § 365(d)(3) and because a preponderance of the facts and circumstances indicate that the STB Override Agreement must be paid under § 365(d)(3), RLC must pay the STB Override to STB or, at the very least, into an escrow fund, pending resolution of the issues involved in the instant action.<sup>1</sup>

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<sup>1</sup> Debtors have filed a Motion wherein they seek to assume the Kelly-Hatfield Lease and the Lawson Heirs Leases, but defer assumption or rejection of the STB Override Agreement. [Doc. 1995 in the jointly administered Patriot Coal, et al. bankruptcies, No. 12-51502]. STB and others objected to assumption of the Leases on grounds that the STB Override Agreement is integrated with the Leases and also payment of the STB Override Agreement is a condition of the Leases, such that Debtors cannot assume the Leases without also assuming and paying the STB Override Agreement. Arch Coal, Inc. and RLC are negotiating a stipulation that, if agreed to, would allow RLC to undertake a limited assumption of the Leases. In this regard Plaintiff may argue that this Motion is moot due to its intervening assumption of the Kelly-Hatfield and Lawson Heirs Leases. However, even if such a stipulation is filed it would not moot RLC’s obligations under § 365(d)(3) because it would not be a full or complete assumption of the Leases. Rather, the stipulation will not address whether the assumption must include, as a condition, the assumption of the integrated STB Override Agreement. In fact, in the most recent draft of the stipulation Plaintiff acknowledges that assumption of the Leases is not complete and rather is dependent on whether the STB Override Agreement is determined by this Court to be integrated with and not severable from the Leases. If this Court were to deem this Motion to be moot on such grounds, STB believes it is entitled to substantially similar relief as adequate protection pursuant to Bankruptcy Code § 363 for the same reasons argued in this Motion in relation to § 365(d)(3). Plaintiff has filed this adversary challenging whether the STB Override Agreement is integrated/executory such that it also has to be assumed. However, for the same reasons as argued herein with respect to § 365(d)(3), that challenge and the attendant delay it causes should not excuse Plaintiff from paying adequate protection to STB in the interim or, at a minimum, adequate protection payments should be paid into escrow.

## I. BACKGROUND

### **Procedural Background**

1. On July 9, 2012, Patriot Coal Corporation (“Patriot”) and its affiliated debtor entities, including RLC, (collectively, the “Debtors”) filed voluntary cases for relief under Chapter 11 of the Bankruptcy Code (the “Petition”). The Debtors’ cases are being jointly administered pursuant to Bankruptcy Rule 1015(b).

2. On August 10, 2012, RLC filed the above-captioned adversary proceeding against STB seeking a declaration that (i) the STB Override Agreement is a non-executory contract for purposes of § 365 of the Bankruptcy Code, and (ii) the STB Override Agreement is not integrated with, and is severable from, any other agreement.

3. On February 4, 2013, following briefing by the parties on STB’s Motion to Dismiss for Robin Land Company, LLC’s Failure to Join a Necessary Party, the Court entered a Stipulation and Agreed Order allowing Arch Coal, Inc. (“Arch”), Ark Land Company (“Ark”) and Ark Land KH, Inc. (“Ark KH”) to intervene as defendants. [Doc. 27].

### **Ark’s 1994 Transaction with STB**

4. On October 31, 1994, Ark and Apogee Coal Company (“Apogee”), which until 2005 was a subsidiary of Arch, entered into an Asset Purchase Agreement (the “STB Asset Purchase Agreement”)<sup>2</sup> with STB, Eagle Minerals Company, Guyan Mining Company, and Guyan Equipment Company (collectively, the “Sellers”) whereby the Sellers sold certain assets to Ark and Apogee (the “STB Transaction”). Such assets included, among other things, the

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<sup>2</sup> The STB Asset Purchase Agreement was filed under seal as Exhibit B to RLC’s Complaint in this adversary proceeding.

Sellers' interests in three<sup>3</sup> coal leases pertaining to certain premises located in Logan and Boone Counties, West Virginia, (the "Premises").<sup>4</sup>

5. Also on October 31, 1994, pursuant to § 2.02(b)(i) of the Asset Purchase Agreement, Ark executed and delivered the STB Override Agreement<sup>5</sup> as "additional consideration" for delivery of the assets, which obligated Ark and its heirs, successors and assigns to pay to STB an overriding royalty equal to 1.5% of the gross sales price on all coal mined and sold from the premises demised in such Leases (the "STB Override" or the "Override Payments").<sup>6</sup>

6. The STB Override Agreement expressly references and incorporates the STB Asset Purchase Agreement for the definition of terms used therein, and references and incorporates the Kelly-Hatfield and Lawson Heirs Leases for identification of the duration of the Agreement and for other purposes.<sup>7</sup>

7. It is clear on the face of the STB Override Agreement that it is part of the larger STB Transaction and that it is meant to be construed together with the Leases. For example, the STB Override Agreement expressly references the Kelly-Hatfield Lease and the Lawson Heirs Lease. The second "Whereas" clause of the STB Override Agreement states that the "parties

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<sup>3</sup> The three leases sold in connection with the STB Transaction were combined and restated into (i) the Combined, Amended and Restated Coal Lease dated October 31, 1994 (the "Lawson Heirs Lease" and the leasehold premises conveyed thereby, the "Lawson Heirs Premises") by and between Ark and Lawson Heirs, Incorporated (as lessor); and (ii) the Combined, Amended and Restated Coal Lease dated October 31, 1994 (the "Kelly-Hatfield Lease" and the leasehold premises conveyed thereby, the "Kelly-Hatfield Premises") by and between Ark (as lessee) and Kelly-Hatfield Land Co. (as lessor). True and correct copies of the Lawson Heirs Lease and the Kelly-Hatfield Lease were filed under seal by RLC as Exhibits D and E, respectively, to its Complaint.

<sup>4</sup> *Id.* at 5-6.

<sup>5</sup> See STB Override Agreement attached hereto as Exhibit A.

<sup>6</sup> See § 2.02(b) of the STB Asset Purchase Agreement.

<sup>7</sup> See STB Override Agreement (attached as Exhibit A), ¶¶ 1, 2, 3 and 5.



contemplate that the Premises shall be demised by those two certain novation leases from (i) Lawson Heirs, Inc. to [Ark Land], dated October 31, 1994; and (ii) the Kelly-Hatfield Land Company, to [Ark Land], dated October 31, 1994....” Section 2 of the STB Override Agreement states that such agreement “shall take effect as of the Closing Date [(as defined in the Asset Purchase Agreement)] and shall continue for a period coextensive with the primary term, and any extension or renewal thereof, of the Leases....” And, section 3 of the STB Override Agreement provides, among other things, that the “[t]erms and conditions within the Leases shall govern as to royalty determination, late payment penalties, and all similar purposes.”

8. Likewise, the STB Override Agreement expressly references the Asset Purchase Agreement. The first “Whereas” clause of the STB Override Agreement states that “pursuant to that certain Asset Purchase Agreement, of even date, by and among [Ark, Apogee and the Sellers], Sellers have sold and transferred to [Ark and Apogee] the Acquired Assets....” The “Now, Therefore” clause of the STB Override Agreement states that the agreements contained in the STB Override Agreement were given “in consideration of the mutual covenants and agreements contained herein and in the Asset Purchase Agreement”) (emphasis added). And section 1 of the STB Override Agreement incorporates the defined terms of the Asset Purchase Agreement.

9. The express language of the Asset Purchase Agreement also makes clear that the STB Override Agreement is a part of the larger STB Transaction. For example, the “Entire Agreement” clause of the Asset Purchase Agreement includes the STB Override Agreement, the Guyan Lease Assignment, the Liabilities Undertaking Agreement, the Kelly-Hatfield Lease and the Lawson Heirs Lease as part of the “entire agreement” of the parties to the Asset Purchase Agreement. Specifically, the “Entire Agreement” clause of the Asset Purchase Agreement states

that the Asset Purchase Agreement “(including the documents referred to [t]herein)...constitute the entire agreement of the parties [t]hereto...” *See* Asset Purchase Agreement §9.07. The STB Override Agreement is referenced in section 2.02(b)(i) of the Asset Purchase Agreement; the Guyan Lease Assignment is referenced in section 2.03(b)(iii) of the Asset Purchase Agreement; the Liabilities Undertaking Agreement is referenced in section 2.02(b)(iv) of the Asset Purchase Agreement; and the Kelly-Hatfield Lease and the Lawson Heirs Lease are novation leases of the leases assigned to Ark Land pursuant to the Guyan Lease Assignment, and such anticipated novation is referred to in the second whereas clause of the STB Override Agreement.

10. The language of the “Entire Agreement” clause of the STB Override Agreement is consistent with the fact that the STB Override Agreement is an integral part of the broader STB Transaction and not a standalone contract. The “Entire Agreement” clause of the STB Override Agreement specifies that the STB Override Agreement is integrated only “in respect of the Overriding Royalty specified [t]herein.” It does not state that the STB Override Agreement is a standalone integrated instrument in and of itself. *See* STB Override Agreement § 8.

11. Also in connection with the STB Transaction, Arch Mineral Corporation, predecessor in interest to Arch, executed a Guaranty dated October 31, 1994 (the “Guaranty”)<sup>8</sup> in favor of STB whereby Arch agreed to guarantee all of Ark’s and Apogee’s obligations under the STB Asset Purchase Agreement and all documents delivered pursuant thereto – including the STB Override Agreement. STB has asserted that Arch will be obligated under the Guaranty if RLC does not pay the STB Override.

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<sup>8</sup> The Guaranty was filed as Exhibit 1 to Arch, et al.’s Answer in this adversary.

### **Arch and Ark's 2005 and 2007 Transactions with Magnum and RLC**

12. On December 31, 2005, Arch, the then parent to Ark, entered into a Purchase and Sale Agreement (the "Magnum PSA") with Magnum Coal Company (n.k.a. Magnum Coal Company, LLC, "Magnum"), a debtor in these jointly administered Chapter 11 proceedings<sup>9</sup> whereby Arch sold assets, including Arch's equity interests in RLC and several other entities, each of which is now a debtor in the Debtors' jointly administered Chapter 11 cases, to Magnum (the "Magnum Transaction").

13. To facilitate the Magnum Transaction, on December 30, 2005 – one day prior to the execution of the Magnum PSA – Ark and RLC executed an Assignment and Assumption Agreement (the "Ark Assignment Agreement"), pursuant to which Ark assigned the Lawson Heirs Lease, the STB Override Agreement, and the STB Asset Purchase Agreement to RLC whereby RLC agreed to assume the obligation to pay the STB Override with respect to the Lawson Heirs Premises.<sup>10</sup>

14. Also in connection with the Magnum Transaction, on the same day as the execution of the Magnum PSA – December 31, 2005 – Ark and RLC executed a Partial Assignment and Assumption of Lease (the "Initial Partial Assignment")<sup>11</sup> whereby Ark assigned a portion of the Kelly-Hatfield Premises to RLC and RLC agreed to pay the STB Override "to the extent that the STB Override applies to coal mined from the Assigned Lease Portion of the

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<sup>9</sup> The Magnum PSA (excluding the Schedules and Exhibits thereto) was filed as Exhibit 5 to Arch's Answer in this adversary.

<sup>10</sup> See Ark Assignment Agreement, ¶ 2 and Schedule 1 at p. 16 attached hereto as Exhibit B.

<sup>11</sup> See Initial Partial Assignment, attached hereto as Exhibit C.

Premises,” and agreed to indemnify Ark for any failure to perform its obligations, including its obligation to pay the relevant portion of the STB Override.<sup>12</sup>

15. Two years later, after Ark KH had purchased the Kelly-Hatfield Premises, Ark, Ark KH and RLC executed the Amended and Restated Partial Assignment and Assumption of Lease dated May 22, 2007 (the “Amended and Restated Partial Assignment”)<sup>13</sup> pursuant to which Ark assigned an additional portion of the Kelly-Hatfield Premises to RLC. In that document, RLC agreed to pay the STB Override with respect to the original *and* supplemental portions of the Kelly-Hatfield Premises assigned to RLC, and agreed to indemnify Ark and Ark KH for any failure to perform their obligations under the Kelly-Hatfield Lease, including the obligation to pay the relevant portion of the STB Override.<sup>14</sup>

16. The Ark Assignment Agreement, the Initial Partial Assignment and the Amended and Restated Partial Assignment are hereinafter collectively referred to as the “Lease Assignment Agreements.” The covenants by RLC to assume the duties and obligations under the Lawson Heirs Lease, the Kelly-Hatfield Lease, the STB Override Agreement, and the Lease Assignment Agreements constituted a material portion of the consideration given by RLC under the Lease Assignment Agreements, and Ark would not have entered into such Lease Assignment Agreements or the other documents entered into in connection therewith, without such covenants by RLC.<sup>15</sup>

17. Since entering the Lease Assignment Agreements and up until the filing of the Petition, RLC performed its obligations under the Lawson Heirs Lease, the Kelly-Hatfield Lease,

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<sup>12</sup> See *id.* at ¶ 2.

<sup>13</sup> See Amended and Restated Partial Assignment, attached hereto as Exhibit D.

<sup>14</sup> See *id.* at ¶ 3.

<sup>15</sup> See Answer and Counterclaims of Arch Coal, Inc., et al., Doc. 30, at p. 22, ¶ 81.

the STB Override Agreement, and the Lease Assignment Agreements, including paying \$13,667,879.86 in Override Payments pursuant to the terms of the STB Override Agreement.

18. In particular, RLC paid the STB Override Payments in the following amounts per year:

Year	Royalty
2006	\$ 1,786,202.00
2007	\$ 1,691,529.00
2008	\$ 2,183,686.00
2009	\$ 2,257,159.00
2010	\$ 2,398,657.00
2011	\$ 2,538,061.00
2012 (Pre-Petition)	\$ 812,585.86
<b>Total</b>	<b>\$ 13,667,879.86</b>

19. Since filing the Petition in July 2012, RLC has continued to pay on the Leases assigned to it under the Lease Assignment Agreements, but has not paid STB any of the STB Override on coal mined and sold from the Premises.

20. The exact amount owed to STB under the STB Override Agreement since the filing of the Petition is currently unknown because it will depend on the amount of coal mined and sold from the Premises. However, based on historic practices, the amount owed would average approximately \$180,000 per month, such that the total owed for the almost eight months since the filing of the Petition would be approximately \$1.44 million.

21. The deadline for Debtors to assume or reject nonresidential real property leases was February 4, 2013. In anticipation of that deadline, Debtors filed their Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real Property on January 15, 2012.<sup>16</sup> In the Motion they proposed to assume the 1994 Kelly-Hatfield and Lawson

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<sup>16</sup> See Doc. 1995 in the jointly administered Patriot Coal, et al. bankruptcies, No. 12—51502.

Heirs Leases as unexpired leases of nonresidential real property, but deferred assumption or rejection of the STB Override Agreement and the Lease Assignment Agreements.<sup>17</sup>

22. On January 22, 2013, STB and Arch, Ark and Ark KH filed objections to the proposed assumption of the Leases on the grounds that payment of the STB Override Agreement is a condition of the Leases such that the Leases cannot be assumed without RLC paying all post-petition past due amounts owed under the STB Override Agreement, and/or that the STB Override Agreement is integrated with and not severable from the Leases such that Debtors cannot assume the Leases without also assuming the STB Override Agreement, among other arguments.

23. The Debtors have adjourned the hearing on the STB and Arch, et al. objections until March 19, 2013.

## II. ARGUMENT AND AUTHORITIES

RLC has failed to provide a sufficient basis to avoid payment of the STB Override Agreement under § 365(d)(3). Moreover, the relevant facts and circumstances pertaining to this proceeding indicate that the STB Override Agreement must be paid pending assumption or rejection under § 365(d)(3). Therefore, RLC cannot avoid payment of the STB Override pending resolution of this proceeding and, instead, must make required payments directly to STB or into an escrow fund. Otherwise, STB will be subjected to disproportionate risk as compared to other creditors in the event that RLC becomes administratively insolvent or converts to Chapter 7 liquidation.

For the convenience of this Court, STB's arguments have been separated into three distinct sections: (A) RLC's Challenge to the STB Override Agreement Does Not Excuse Its

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<sup>17</sup> See *id.* at Schedule A, p. 3 and Schedule C, pp. 2, 4.

Obligation Under § 365(d)(3) to Pay the STB Override Pending Resolution of this Adversary Proceeding, (B) RLC Is Required To Pay Portions of the Post-Petition Amounts Due Under the STB Override Agreement Because Such Payments Are Incorporated Obligations Under A Nonresidential Real Property Lease Pursuant To Bankruptcy Code § 365(d)(3), and (C) Bankruptcy Code § 365(d)(3) Also Requires RLC To Pay Post-Petition Amounts Due Under the STB Override Agreement Because It Is Integrated With Both the Kelly-Hatfield and Lawson Heirs Leases. Each of these sections is addressed below.

**A. RLC's Challenge to the STB Override Agreement Does Not Excuse Its Obligation Under § 365(d)(3) to Pay the STB Override Pending Resolution of this Adversary Proceeding.**

Under § 365(d)(3), RLC has the burden of proving that the STB Override Agreement need not be paid pending assumption or rejection,<sup>18</sup> and until it does so, RLC must pay amounts due under the STB Override Agreement either to STB directly or into an escrow fund. It is the debtors' burden to persuade a court that the agreements at issue are not required lease terms, and "that burden is not met by mere allegations, even when the allegations are presented in the form of a complaint" *In re Mirant Corp.*, No. 03-46590, 2004 WL 5643668, at \*3 (Bankr. N.D. Tex. Sept. 15, 2004).<sup>19</sup> By requiring debtors to make such payments until the debtors have persuaded the court that the agreements are not entitled to recognition as lease terms under § 365(d)(3), non-debtor parties are protected in the event that the case is converted to Chapter 7 or the estate

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<sup>18</sup> In fact, the relevant facts and circumstances indicate that the STB Override Agreement is an express condition of the Kelly-Hatfield Lease or, in the alternative, that it is integrated with the Kelly-Hatfield Lease and the Lawson Heirs Lease. See Section II(B)-(C), below.

<sup>19</sup> See also *In re Stone Barn Manhattan LLC*, 405 B.R. 68, 77-78 (Bankr. S.D.N.Y. 2009) (in dealing with question of whether debtor must pay disputed leases during period in which debtor challenges whether the documents at issue are "true leases," court cites favorably to *Elder-Beerman* and *Mirant* decisions as grounds for requiring debtors to make such payments); *In re Tel-Central Communications, Inc.*, 212 B.R. 342, 345-46 (Bankr. W.D.Mo. 1997) (court cites favorably to *Elder-Beerman* decision for principle that lessor's entitlement to payment of rent under lease during pre-assumption period is now automatic).

becomes 'administratively insolvent.' *In re Elder-Beerman Stores Corp.*, 201 B.R. 759, 764 (Bankr. S.D. Ohio 1996); *see also In re Leisure Time Sports, Inc.*, 189 B.R. 511, 513 (Bankr. S.D.Cal. 1995).

In *In re Mirant Corp.*, debtors were parties to leases and filed an adversary proceeding seeking a declaration that the leases were not "true leases" such that the obligations thereunder could be treated as simple debt. Debtors then failed to pay on the leases post-petition, and lessors filed a motion seeking to compel the debtors to pay on the lease under § 365(d)(3) pending assumption or rejection. The court found in favor of the lessors and required the debtors to make post-petition payments on the leases pending determination of their challenge. The court stated that it was the debtors' burden to persuade the court that the agreements at issue were not leases and "that burden is not met by mere allegations, even when the allegations are presented in the form of a complaint." 2004 WL 5643668 at \*3.

RLC has filed this adversary proceeding challenging the nature of the STB Override Agreement and seeking a declaratory judgment that the STB Override Agreement is not integrated with and is severable from the Lawson Heirs Lease and the Kelly-Hatfield Lease. The only information that has been provided by RLC at this point in the litigation are allegations in the form of a Complaint. Thus, RLC must honor its obligations under the STB Override Agreement until this Court orders otherwise.

Alternatively, the Court should order RLC to immediately bring its post-petition payments under the STB Override current by paying all applicable past due amounts, and all applicable current amounts as they become due, into escrow pending resolution of this adversary proceeding, with the condition that if STB prevails in the adversary it is entitled to the funds and if RLC prevails it is entitled to a return of the funds. This escrow procedure would protect STB



(and Ark as guarantor of the obligations under the STB Override Agreement) in the event RLC converts the case to a Chapter 7 liquidation or is administratively insolvent, and protects RLC because if it prevails in this adversary the funds would be returned to it.

This is precisely what the court did in *In re Elder-Beerman Stores Corp.*, 201 B.R. 759 (Bankr. S.D. Ohio 1996). There, the debtors and a lessor were party to certain lease agreements. After the Chapter 11 case was filed, debtors brought an adversary proceeding against the creditor seeking a declaratory judgment that the purported lease transactions between them were actually security agreements, and while the adversary was pending debtors failed to make any payments on the leases.

The lessor filed a motion requesting the establishment of “lease payment security procedures,” arguing that the court can and should address the issue of adequate protection at that time, without waiting for the resolution of the adversary.<sup>20</sup> The lessor requested that the debtors be required to pay the current lease payments monthly directly to the lessor, or in the alternative, into a separate escrow account established by the court. The argument was that the contents of the escrow account would be paid to the lessor or refunded to the debtors, depending on the court’s decision in the adversary. The court granted the lessor’s motion and required the debtors to pay the post-petition amounts owed under the leases into escrow, stating:

[i]n the case at bar, the court finds that it is not inequitable to require the Debtors to continue to perform on their ‘lease obligations’ until the court has had an opportunity to weigh the facts of the matter. This is consistent with the findings of the Courts that have had an opportunity to address issues under § 365(d)(10). See *In re Leisure Time Sports, Inc.*, 189 B.R. 511, 513 (Bankr. S.D.Cal. 1995); *In re Brennick*, 178 B.R. 305, 308 (Bankr. D.Mass. 1995) (comparing § 365(d)(10) to § 365(d)(3), which the Court stated “provides a right ... not a remedy.”). In addition, by requiring the Debtors to make such payments as are due under the agreements, Star Bank is protected in the event that the case is converted to

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<sup>20</sup> *Id.* at 761.

Chapter 7 or the estate becomes ‘administratively insolvent.’ *Leisure Time*, 189 B.R. at 513.

*Id.* at 764. As in *In re Elder-Beerman*, this type of “lease payment security procedure[.]” would protect STB and Ark in the event RLC converts the case to a Chapter 7 liquidation or is administratively insolvent, and protects RLC because if RLC prevails it would get the funds back. *Id.* at 761.

Ordering RLC to honor its obligations under the STB Override Agreement is fair and reasonable not only because RLC has failed to prove that the STB Override Agreement is not entitled to payment under § 365(d)(3), but because the relevant facts and circumstances indicate that the STB Override Agreement must, in fact and at law, be paid pending assumption or rejection. As will be demonstrated below, the relevant facts and circumstances indicate that payment of the STB Override Agreement is an express condition of Kelly-Hatfield Lease or, in the alternative, is integrated with the Lawson Heirs Lease and the Kelly-Hatfield Lease.

**B. RLC Is Required To Pay Portions of the Post-Petition Amounts Due Under the STB Override Agreement Because Such Payments Are Incorporated Obligations Under A Nonresidential Real Property Lease Pursuant To Bankruptcy Code § 365(d)(3).**

Payments due under the STB Override Agreement are expressly required by the Kelly-Hatfield Lease. As such, those payments must be kept current in the same manner as rent payments under a nonresidential real property lease. Section 365(d)(3) of the Bankruptcy Code requires debtors to remain current on unexpired, nonresidential real property leases pending assumption or rejection. Specifically, § 365(d)(3) provides that:

The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order of relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

11 U.S.C. § 365(d)(3) (emphasis added); *see also In re Burival*, 406 B.R. 548 (Bankr. 8<sup>th</sup> Cir. 2009), *aff'd*, 613 F.3d 810 (8<sup>th</sup> Cir. 2010)(§ 365(d)(3) obligates a debtor-in-possession to timely perform all post-petition, pre-rejection obligations under an unexpired, nonresidential real property lease on a priority basis as they become due, and the lessor is not required to demonstrate any benefit to the debtor or the estate in order to be entitled to payment).

The obligation to remain current on nonresidential real property leases includes all terms and conditions of the leases, not just rent. *See, e.g., In re DeCicco of Montvale, Inc.*, 239 B.R. 475 (Bankr. D.N.J. 1999) (in action brought by landlord and guarantor of debtor's lease obligations, debtor was obligated to pay rent, common area charges, and taxes due under terms of unexpired nonresidential real property lease for period post-petition and pre-assumption or rejection of lease).<sup>21</sup>

In addition, the obligation to remain current on nonresidential real property leases includes payment of obligations owed to third parties if such third party obligations are a condition of a nonresidential real property lease. For example, in *In re Full House Foods, Inc.*, 279 B.R. 71, 74-79 (Bankr. S.D.N.Y. 2002), the debtor lessee owed rent to the lessor under the lease, and, in connection with the execution of the lease, had assumed the lessor's obligations on notes owed to a master lessor. The court found that § 365(d)(3) did not distinguish between rent and other lease obligations, and thus the debtor had to remain current on note payments owed to the third party post-petition and pre-rejection, as that obligation had been incorporated into and

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<sup>21</sup> *See also In re Valley Media, Inc.*, 290 B.R. 73 (Bankr. D. Del. 2003) (debtor was obligated under § 365(d)(3) and the terms of an unexpired nonresidential real property lease to pay post-petition pre-rejection real estate taxes on leased property); *In re Exchange Res., Inc.*, 214 B.R. 366, 369 (Bankr. D. Minn. 1997) (requirement under § 365(d)(3) to remain current on lease obligations post-petition includes duty to pay post-petition attorney fees incurred by landlord as a result of debtor's post-petition default in payment on rent, where recovery of such attorney fees were an express condition of lease).

was an obligation of the lease. The note payments had been classified in the sublease as “additional rent” obligations of the debtor lessee. *Id.* at 79.

Other courts have similarly held that the § 365(d)(3) obligation to remain current on a nonresidential real property lease includes amounts incorporated into the lease that are owed to third parties. *See, e.g., In re Goody’s Family Clothing*, 443 B.R. 5, 12-13 (Bankr. D. Del. 2010) (debtor lessee was required by terms of lease and § 365(d)(3) to pay property taxes that came due post-petition and pre-rejection “directly to the relevant taxing authority”); *In re Bachrach Clothing, Inc.*, 396 B.R. 219, 220-21 (N.D. Ill. 2008) (reaching the same conclusion); *In re Garden Ridge Corp.*, 321 B.R. 669, 677-78 (Bankr. D. Del. 2005) (where debtor was required by lease to pay real property taxes to taxing authority by certain date and to provide proof of payment to landlord by another date, and both dates were after bankruptcy petition was filed, payment of the taxes was a post-petition obligation of the debtor lessee’s under § 365(d)(3)).

In this case, compliance with the Kelly-Hatfield Lease, under which RLC is the lessee, is expressly conditioned on payment of the STB Override. In October 1994, Ark acquired two coal leases, the Kelly-Hatfield Lease and the Lawson Heirs Lease, through a transaction with STB and others.<sup>22</sup> As part of the STB Transaction, Ark executed the STB Override Agreement which granted STB the continuing right to receive royalty payments on sales of coal mined from the premises identified in the Leases. The STB Override Agreement was expressly incorporated into the STB Asset Purchase Agreement, and identified as “additional consideration” for the STB Transaction.<sup>23</sup> The STB Override Agreement itself also expressly incorporates the terms of the STB Asset Purchase Agreement (“Any capitalized term used but not defined herein shall have

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<sup>22</sup> It is undisputed that the Leases are unexpired, nonresidential real property leases under which RLC is the lessee by assignment. *See* paragraph 21 and footnote 16 herein.

<sup>23</sup> *See* STB Asset Purchase Agreement, § 2.02(b)(i), at p. 7.

the meaning assigned to it in the Assert Purchase Agreement”), and incorporates as its term the term of the Leases (“This Agreement . . . shall continue for a period coextensive with the primary term, and any extension or renewal thereof, of the Leases . . . “).<sup>24</sup>

Ark assigned the Leases to RLC in 2005. As part of that transaction, Ark assigned a portion of the Kelly-Hatfield Premises to RLC under the Initial Partial Assignment and in that same document RLC agreed to pay the STB Override “to the extent that the STB Override applies to coal mined from the Assigned Lease Portion of the Premises,” and agreed to indemnify Ark for any failure to perform its obligations, including its obligation to pay the relevant portion of the STB Override.<sup>25</sup>

Two years later, after Ark KH purchased the Kelly Hatfield Premises, Ark assigned an additional portion of the Kelly-Hatfield Premises to RLC pursuant to the Amended and Restated Partial Assignment dated May 22, 2007. Parties to that agreement included Ark KH as the consenting lessor, Ark as the assignor and RLC as the assignee. By execution of that agreement, RLC re-affirmed its obligation to pay the STB Override with respect to the original partial assignment of the Kelly-Hatfield Premises, and agreed to pay the STB Override with respect to the supplemental assignment of the Kelly-Hatfield Premises to its assignor, Ark, and its consenting landlord, Ark KH. Moreover, by execution of the Amended and Restated Partial Assignment dated May 22, 2007, RLC again agreed to indemnify Ark for any failure to perform this obligation.<sup>26</sup>

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<sup>24</sup> See STB Override Agreement (Exhibit A hereto), ¶¶ 1, 2.

<sup>25</sup> See Initial Partial Assignment (Exhibit C hereto) ¶ 2.

<sup>26</sup> See Amended and Restated Partial Assignment (Exhibit D hereto), ¶ 3.

The result of these two assignments was that, as with the STB Transaction that preceded them, the obligation to pay the STB Override remained tied to and ran with the leased coal properties on which it was based, and became an incorporated condition of the Kelly-Hatfield Lease.

Not only are the documents clear on this point, the law is as well. As a matter of West Virginia law,<sup>27</sup> a covenant runs with the land when (1) there is a privity of estate between covenantor and covenantee, (2) the benefit and burden of said covenant “touches and concerns” the respective estates of covenantor and covenantee, and (3) the intent of the parties was for the covenant to run with the land. *See McIntosh v. Vail*, 28 S.E.2d 607, 609-10 (W. Va. 1943). If those essential requirements are met, a subsequent grantee of the covenantor shall be bound by said covenant. *See id.*

Here, the covenant to pay the STB Override is clearly a covenant running with the land. The Amended and Restated Partial Assignment was entered into by Ark, the lessee; RLC, the assignee; and Ark KH, the landlord. Thus, privity of estate -- a contractual relationship between common interest holders of realty -- exists not only between the lessee and the assignee, but also between the landlord and the assignee.

Both the Initial Partial Assignment and the Amended and Restated Partial Assignment required RLC to pay the STB Override on quantities of coal mined from the property. Thus, the STB Override obligation touches upon and concerns the Kelly-Hatfield Premises.

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<sup>27</sup> *In re S.E. Nichols, Inc.*, 120 B.R. 745, 748 (Bankr. S.D.N.Y. 1990) (“For purposes of Section 365, interpretation of the legal status of lease agreements is governed by state law.”). Here, the Kelly-Hatfield Lease, the Lawson Heirs Lease and the STB Asset Purchase Agreement all contain express choice of law provisions indicating that West Virginia law governs such instruments. The STB Override Agreement does not have an express choice of law clause, but does pertain to realty contained within the boundaries of the State of West Virginia. Thus, West Virginia law applies with regard to the integration of the STB Override Agreement with the Leases.

Moreover, language utilized in the Amended and Restated Partial Assignment and the circumstances involving its execution indicate that the parties intended for the STB Override obligation to become a covenant running with the land. First, the title of the document is “Amended and Restated Partial Assignment and Assumption of Lease.” The mere mention of “Assumption of Lease” in the title of the document is evidence that the parties intended for the covenants under the Kelly-Hatfield Lease, and the additional covenants included in the Amended and Restated Partial Assignment, including the STB Override obligation, to run with the land. Second, the consent granted by Ark KH under the Amended and Restated Partial Assignment, was contingent upon RLC’s assumption of the obligation to pay the STB Override. Third, the terms of the STB Override Agreement, which were incorporated into Paragraph 3 of the Amended and Restated Partial Assignment, require payment of the STB Override until exhaustion of all mineable and merchantable tons of coal lying in, on, or under the Kelly-Hatfield Premises. Thus, as a covenant that runs with the land, the obligation to pay the STB Override is also tied to the Kelly-Hatfield Lease under relevant law. *See River Place East Housing Corp. v. Rosenfeld*, 23 F.3d 833, 837 (4<sup>th</sup> Cir. 1994) (in adversary proceeding involving debtor’s obligation to pay coop dues on property he owned, the court held that the obligation to pay the dues ran with the land, and therefore was not discharged in bankruptcy as a pre-petition contractual obligation, but rather arose through his continued post-petition ownership of the property) (superseded by statute on other grounds).

Therefore, under *Full House Foods* and similar authority related to lease obligations running to third-parties, RLC is obligated to pay the royalties required by the STB Override

Agreement with respect to at least the Kelly-Hatfield Premises, if not also the Lawson Heirs Premises,<sup>28</sup> pending assumption or rejection of the Leases.<sup>29</sup>

In addition, there is sufficient evidence indicating that the STB Override Agreement is economically interrelated with the Kelly-Hatfield Lease and the Lawson Heirs Lease and, as such, should be honored similarly under § 365(d)(3). Such evidence and applicable law related thereto is addressed in the next section.

**C. Bankruptcy Code § 365(d)(3) Also Requires RLC To Pay Post-Petition Amounts Due Under the STB Override Agreement Because It Is Integrated With Both the Kelly-Hatfield and Lawson Heirs Leases.**

Section 365(d)(3) requires performance under nonresidential real property leases, and all agreements integrated therewith, pending assumption or rejection thereof. The facts and circumstances pertaining to this proceeding indicate that the STB Override Agreement is integrated with and not severable from the Kelly-Hatfield Lease and the Lawson Heirs Lease. As such, RLC should continue to honor its obligations under the STB Override Agreement pending assumption or rejection of the Kelly-Hatfield Lease and the Lawson Heirs Lease. To facilitate a clear understanding of this issue, this section is divided into two subsections: (1) § 365(d)(3) Requires Performance Under Nonresidential Real Property Leases and Performance Under Other Agreements Integrated Therewith Pending Assumption or Rejection Thereof; and (2) The STB Override Agreement Is Integrated With the Leases. These issues are addressed, in turn, below.

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<sup>28</sup> As indicated in ¶ 9, p. 6, herein, when RLC took assignment of the Lawson Heirs Lease, it also agreed in the same document to pay the STB Override with respect to the Lawson Heirs premises.

<sup>29</sup> This conclusion is in substance no different than a situation where a debtor under a triple net lease would be required by the terms of the lease to pay post-petition taxes to the third party taxing authority.



**1. § 365(d)(3) Requires Performance Under Nonresidential Real Property Leases and Performance Under Other Agreements Integrated Therewith Pending Assumption or Rejection Thereof.**

Section 365(d)(3) of the Bankruptcy Code requires debtors to remain current on unexpired nonresidential real property leases pending assumption or rejection. In addition, if a non-lease contract is integrated with a nonresidential real property lease, §365(d)(3) requires that the debtor remain current on the non-lease pending assumption or rejection.

For example, in *In re Integrated Health Services, Inc.*, No. 00-389, 2000 WL 33712484 (Bankr. D. Del. July 7, 2000), the lessor argued that four contracts were integrated such that the debtor had to assume or reject all. *Id.* at \*2. The court stated that “[i]f the Non-Competition Agreement and the CCAA Leases represent one single integrated agreement, the Debtor would be required to assume or reject them *in toto* and, therefore, would be obligated to timely perform any duties under the Non-Competition Agreement, pending its decision to assume or reject.” *Id.* The court ultimately held that the agreements were not integrated for reasons not present here, *i.e.*, they were supported by separate consideration, covered different subject matter, involved different parties, and the object of the agreements was different. *Id.* at \*3. Accordingly, *Integrated Health Services* supports the proposition that where two or more contracts are integrated, and one is an unexpired, nonresidential real property lease, the debtor is required to perform under the integrated agreement pending assumption or rejection thereof.

As demonstrated below, the STB Override Agreement is entitled to payment under § 365(d)(3) because it is integrated with the Kelly-Hatfield Lease and the Lawson Heirs Lease.

**2. The STB Override Agreement Is Integrated With the Leases.**

The STB Override Agreement is integrated with the Leases because the body of documents comprising the relevant transactions clearly demonstrate that the intent of the parties

was that such documents be treated as part of the same transaction. Under West Virginia law,<sup>30</sup> whether two separate contracts are integrated into a single unified agreement is a question of the contracting parties' intent as expressed in the language and subject matter of the agreement. *See Amherst Land Co., Corp. v. United Fuel Gas Co.*, 84 S.E.2d 225, 229 (W. Va. 1954). In a case involving the determination of whether an assignment to a corporation of oil and gas leases could be severed from the contemporaneous associated transactional documents, the Supreme Court of Appeals of West Virginia held as follows:

One of several agreements, each of which is an integral part of an entire transaction, involving transfers of a number of separate and distinct rights and interests and incurrence of new obligations by some of the parties, cannot be treated by one of the parties thereto, as a disconnected agreement or a mere revocable offer, while claiming and acquiring a right belonging to the other, by consummation of other parts of the entire transaction.

Syl. Pt. 7, *Lawrence v. Potter*, 113 S.E. 266, 266 (W. Va. 1922).

In a later case involving a determination of whether a service station lease and dealer contract should be considered as forming an integrated transaction, the Supreme Court of Appeals of West Virginia held that "even though writings may be separate, they will be construed together and considered to constitute one transaction when the parties are the same, the subject matter is the same and the relationship between the documents is clearly apparent." *Ashland Oil, Inc. v. Donahue*, 223 S.E.2d 433, 437 (W. Va. 1976). In finding the lease agreement and the dealer contract were integrated contracts, the court noted that (1) they

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<sup>30</sup> Whether the rights and obligations under multiple instruments are deemed a single contract for purposes of § 365 of the Bankruptcy Code turns on the state law that governs such instruments. *See, e.g., In re Adelpia Bus. Solutions, Inc.*, 322 B.R. 51, 54 (Bankr. S.D.N.Y. 2005) (applying Missouri law to determine severability of leases that contained Missouri choice-of-law provisions); *In re S.E. Nichols, Inc.*, 120 B.R. 745, 748 (Bankr. S.D.N.Y. 1990) ("For purposes of Section 365, interpretation of the legal status of lease agreements is governed by state law."). Here, the Kelly-Hatfield Lease, the Lawson Heirs Lease and the STB Asset Purchase Agreement all contain express choice of law provisions indicating that West Virginia law governs such instruments. The STB Override Agreement does not have an express choice of law clause, but does pertain to realty contained within the boundaries of the State of West Virginia. Thus, West Virginia law applies with regard to the integration of the STB Override Agreement with the Leases.

involved the same parties, (2) they both dealt with the operation of a gas station at the identified premises, (3) they provided for the same initial term and automatic extensions from year to year, and (4) the terms of the lease were tied directly to aspects of the dealer contract.

Payment of the STB Override Agreement is an incorporated condition of the Leases, and that alone should be sufficient evidence that the contracts are integrated. Notwithstanding that fact, it is also clear from the face of the STB Transaction documents and the 2005 and 2007 Lease Assignment Agreements that the parties intended RLC's obligation to pay the STB Override to be integrated with and not severable from RLC's right to mine the Lawson Heirs Premises and the relevant portions of the Kelly-Hatfield Premises. Some, but not all, of the examples indicating the integration of the STB Override Agreement with the Leases are set forth below:

(a) Pursuant to the STB Asset Purchase Agreement, delivery of the STB Override Agreement by Ark was "additional consideration" for the transfer of the Acquired Assets (as defined in the STB Asset Purchase Agreement), which assets included the Kelly-Hatfield Lease and the Lawson Heirs Lease. *See* STB Asset Purchase Agreement § 2.02(b)(i).<sup>31</sup>

(b) The "Entire Agreement" clause of the STB Asset Purchase Agreement refers to the STB Asset Purchase Agreement and "the documents referred to herein"—which documents include the STB Override Agreement, the Kelly-Hatfield Lease and the Lawson Heirs Lease—as the "entire agreement" of the parties. *See* STB Asset Purchase Agreement § 9.07. The explicit reference to the inclusion of the STB Override Agreement, the Kelly-Hatfield Lease and the

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<sup>31</sup> Pursuant to the STB Asset Purchase Agreement, the STB Sellers sold their interests in the Premises to Ark Land and Apogee. The Kelly-Hatfield Lease and the Lawson Heirs Lease are novation leases that were executed concurrently with the STB Asset Purchase Agreement and the STB Override Agreement to effectuate such transfer.

Lawson Heirs Lease in the entire agreement clause of the STB Asset Purchase Agreement is clear evidence of the parties' intent that all such documents form part of the same business transaction. Consistent with that clause, the "Entire Agreement" clause in the STB Override Agreement specifies that the STB Override Agreement is only integrated "in respect of the Overriding Royalty specified [t]herein", not that the STB Override Agreement is a standalone integrated instrument in and of itself. *See* STB Override Agreement § 8.

(c) The STB Override Agreement expressly references the STB Asset Purchase Agreement, the Kelly-Hatfield Lease and the Lawson Heirs Lease, noting that it was anticipated that the Premises would be demised to Ark by two novation leases from Kelly-Hatfield and Lawson Heirs dated the same day as the STB Asset Purchase Agreement. *See* STB Override Agreement First and Second Whereas Clauses. The Kelly-Hatfield Lease and the Lawson Heirs Lease are such novation leases.

(d) The STB Override Agreement incorporates the terms of the STB Asset Purchase Agreement ("Any capitalized term used but not defined herein shall have the meaning assigned to it in the Assert Purchase Agreement"), and also incorporates as its term the term of the Leases ("This Agreement . . . shall continue for a period coextensive with the primary term, and any extension or renewal thereof, of the Leases . . . "). *See* STB Override Agreement at ¶¶ 1, 2. Thus, the STB Override Agreement cannot be performed as a stand-alone agreement, as it is reliant on the STB Asset Purchase Agreement and the Leases for essential terms.

(e) The "Now, Therefore" clause of the STB Override Agreement expressly states that the STB Override Agreement is provided in consideration of the mutual covenants and agreements contained in the STB Override Agreement and the STB Asset Purchase Agreement. *See* STB Override Agreement "Now, Therefore" clause.

(f) The STB Override Agreement incorporates terms of the Kelly-Hatfield Lease and the Lawson Heirs Lease by reference. The STB Override is a royalty assessed on coal mined and sold from the Kelly-Hatfield Premises and the Lawson Heirs Premises and the STB Override Agreement states that the “[t]erms and conditions within the [Kelly-Hatfield and Lawson Heirs] Leases shall govern as to royalty determination, late payment penalties, and all similar purposes.” *See* STB Override Agreement § 3.

(g) Both the Kelly-Hatfield Lease and the Lawson Heirs Lease reference the STB Asset Purchase Agreement. *See, e.g.*, Kelly-Hatfield Lease fifth and ninth “Whereas” clauses; Lawson Heirs Lease eighteenth “Whereas” clause.

(h) Pursuant to the Ark Assignment Agreement, the agreement by which RLC took an assignment of the Lawson Heirs Lease, RLC agreed to pay the portion of the STB Override related to the Lawson Heirs Premises and agreed to indemnify Ark for any failure to honor such obligation. *See* Ark Assignment Agreement § 2; Schedule 1 at p. 16.

(i) Pursuant to the Initial Partial Assignment, RLC “agree[d] to perform the duties and obligations of [Ark] contained in or arising under the [Kelly-Hatfield] Lease in accordance with the terms and conditions thereof, and [RLC] also assume[d] the obligation to pay the ‘STB Override’ to the extent that the STB Override applies to coal mined from the Assigned Lease Portion of the Premises.” RLC also agreed to Indemnify Ark for any failure by RLC to perform such obligations. *See* Initial Partial Assignment § 2.

(j) Similarly, in the Amended and Restated Partial Assignment, RLC “agree[d] to perform the duties and obligations of [Ark] contained in or arising under the [Kelly-Hatfield] Lease in accordance with the terms and conditions thereof, and [RLC] also assume[d] the obligation to pay the ‘STB Override’ as defined and identified in that certain Overriding Royalty

Agreement dated October 31, 1994 between [Ark] and STB Ventures, Inc. and as assigned to [RLC] by that certain Assignment and Assumption Agreement dated December 30, 2005 between [Ark] and [RLC] to the extent that the STB Override applies to coal mined from the Assigned Lease Portion of the Premises.” RLC also agreed to indemnify Ark for any failure by RLC to perform such obligations. *See* Amended and Restated Partial Assignment § 3.

It is clear on the face of the agreements referenced above, and based on the parties’ actions under such agreements, that the parties to the STB Transaction and the 2005 and 2007 Lease Assignment Agreements intended RLC’s obligations to pay the STB Override to be integrated with and not severable from its right to mine coal located on or under the Lawson Heirs Premises and the relevant portions of the Kelly-Hatfield Premises. Therefore, the STB Override Agreement is integrated with and not severable from the Leases.

Because the STB Override Agreement is integrated with the Kelly-Hatfield and Lawson Heirs Leases, RLC is required by § 365(d)(3) to pay the post-petition amounts due under the STB Override Agreement pending assumption or rejection.

### **III. CONCLUSION**

WHEREFORE, for the foregoing reasons, STB Ventures, Inc. respectfully requests this Court to enter an Order compelling RLC to make the post-petition, pre-assumption or rejection royalty payments due under the STB Override Agreement to STB or, in the alternative, into escrow pending resolution of this adversary proceeding, with the condition that if STB prevails in the adversary it is entitled to the funds and if RLC prevails it is entitled to a return of the funds.<sup>32</sup>

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<sup>32</sup> As indicated in footnote 1, *supra*, in the event that this Court determines that the remedies requested under this Motion are inapplicable at this juncture due to the Plaintiff’s assumption of the Kelly-Hatfield Lease and the Lawson Heirs Lease, STB asserts that it is entitled to adequate protection under Bankruptcy Code § 363 for similar reasons and, as such, is entitled to direct payment of overriding royalty payments under

Dated: March 5, 2013

SHOOK, HARDY & BACON L.L.P.

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ATTORNEYS FOR DEFENDANT STB  
VENTURES, INC.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 5<sup>th</sup> day of March, 2013, a true and correct copy of the above and foregoing was served via CM/ECF notification on all parties receiving such notification.

/s/ Mark Moedritzer

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the STB Overriding Royalty Agreement or, in the alternative, is entitled to an order requiring the Plaintiff to make payment of the STB Override into an escrow pending a resolution of this adversary proceeding.

# **Exhibit A**



### OVERRIDING ROYALTY AGREEMENT

THIS OVERRIDING ROYALTY AGREEMENT (the "Agreement") is made and entered into this 31st day of October, 1994, by and between **ARK LAND COMPANY** (Ark), a Delaware corporation, and **STB VENTURES, INC.**, a Virginia corporation ("STB").

#### WITNESSETH:

WHEREAS, pursuant to that certain Asset Purchase Agreement, of even date, by and among Ark and Apogee Coal Company (collectively the "Purchasers") and STB, Eagle Minerals Company, ("Eagle"), Guyan Equipment Company ("GEC") and Guyan Mining Company ("GMC") (STB, Eagle, GEC and GMC collectively the "Sellers"), Sellers have sold and transferred to Purchasers the Acquired Assets (as defined in the Asset Purchase Agreement); and

WHEREAS, the parties desire to enter into this Agreement to provide for an overriding royalty to be paid by Ark to STB for coal produced from tracts covered from all seams of coal underlying those various tracts or boundaries of land situate on or near the waters of Rum Creek, Buffalo Creek, and Brushy Fork in Logan and Boone Counties, West Virginia, currently held by Glenn Springs, lease, assignment, license or other title instrument by Sky Eagle, Inc., Island Creek Coal Company, Guyan Eagle Coal Company, Eagle, STB, or their successors, assigns, sublessees, or affiliates, from Kelly-Hatfield Land Company and Lawson Heirs, Inc. and which are assigned, transferred or otherwise consigned to Ark pursuant to the Asset Purchase Agreement (the "Premises"). The parties contemplate that the Premises shall be demised by those two certain novation leases from (i) the Lawson Heirs, Inc., to Ark, dated

October 31, 1994; and (ii) the Kelly-Hatfield Land Company, to Ark. dated October 31, 1994 and as they hereafter may be amended, modified, or supplemented, the "Leases".

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein and in the Asset Purchase Agreement, the parties, intending to be legally bound, hereby agree as follows:

1. Defined Terms. Any capitalized term used but not defined herein shall have the meaning assigned to it in the Asset Purchase Agreement.

2. Term. This agreement shall take effect as of the Closing Date and shall continue for a period coextensive with the primary term, and any extension or renewal thereof, of the Leases, or until the exhaustion of all minable and merchantable coal (as defined under the Leases) from the Premises.

3. Payment of Overriding Royalty. For the term hereof, Purchasers shall pay to STB an overriding royalty (the "Overriding Royalty") on all sales of coal to third parties for each ton of 2,000 pounds of coal mined and sold from the Premises of one and one-half percent (1 ½%) of the Gross Sales Price. As used herein, the term "Gross Sales Price" shall have the meaning set forth under the terms of the Leases. Terms and conditions within the Leases shall govern as to royalty determination, late payment penalties, and all similar purposes. All payments of Overriding Royalty shall be due without demand on or before the 20th day of the month following the month in which the coal is mined and removed. All payments of Overriding Royalty shall be made by mailing the same, first class mail, to STB at P.O. Box 1560, Grundy, Virginia 24614, unless otherwise directed.

4. Assignment. This Lease shall be binding and shall inure to the benefit of the parties hereto, their heirs, successors and assigns.

5. Obligation to Mine. Nothing in this Agreement or implied by its execution shall be deemed to enlarge the burden of Purchasers to undertake or continue any mining operations greater than the burden provided by the provisions of the Leases.

6. Headings. The headings preceding the text of the articles of this Agreement are inserted solely for convenience of reference and shall not constitute a part of this Agreement or affect its meaning, construction or effect.

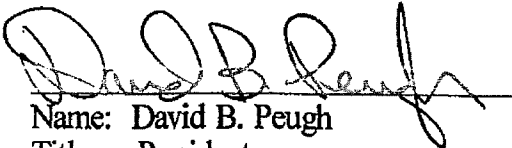
7. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one agreement.

8. Entire Agreement. This Agreement constitutes the entire agreement and understanding of the parties in respect to the Overriding Royalty specified herein and expresses all the obligations of and the restrictions imposed upon the parties with respect to the Overriding Royalty. All prior agreements, arrangements and understandings of the parties relating to the Overriding Royalty are hereby superseded, and this Agreement shall not be modified, supplemented or changed in whole or in part other than by an agreement in writing signed by all parties hereto or their respective successors or assigns.

IN WITNESS WHEREOF, the parties hereto have caused their names to be signed  
hereto by the proper officers, thereunto duly authorized, as of the day and year first above  
written.

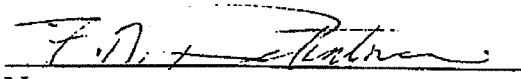
ATTEST:

**ARK LAND COMPANY**

By:   
Name: David B. Peugh  
Title: President

ATTEST:

**SIB VENTURES, INC.**

By:   
Name:  
Title: President

# **Exhibit B**

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**ASSIGNMENT AND ASSUMPTION AGREEMENT**

This Assignment and Assumption Agreement, made and entered into this 30<sup>th</sup> day of December, 2005, by and between ARK LAND COMPANY, a Delaware corporation, with offices at One CityPlace Drive, Suite 300, St. Louis, Missouri 63141 ("Assignor") and ROBIN LAND COMPANY, LLC, a Delaware limited liability company, with offices at One CityPlace Drive, Suite 300, St. Louis, Missouri 63141 ("Assignee").

**WITNESSETH:**

WHEREAS, Assignor is a party to those certain leases and other miscellaneous agreements for real property located in Logan County, West Virginia, as are more particularly set forth and described and set forth on Schedule 1 attached hereto and made a part hereof (the "Leases").

WHEREAS, Arch Coal, Inc., the parent corporation of Assignor, and ArcLight Capital Partners Fund I, L.P. and others entered into a Master Contribution Agreement dated October 7, 2005, which Master Contribution Agreement provided in part for the transfer of certain assets to Assignee, including all of the rights, titles and interests of Assignor in and to the Base Lease; and

WHEREAS, the above-referenced Master Contribution Agreement was superceded by a Purchase and Sale Agreement (the "Purchase Agreement") dated December 31, 2005, between Arch Coal, Inc. and Magnum Coal Company, which Purchase Agreement also provided in part for: (i) the transfer of certain assets to Assignee, including all of the rights, titles and interests of Assignor in and to the Base Lease, and (ii) the conveyance by Arch Coal, Inc. of all of its right, title and interest in and to and under the membership interests of Assignee to Magnum Coal Company; and

Suble 700, 1st Square  
300 Summers Street  
Charleston, WV 25301

BOOK 578 PAGE 826

**NOW, THEREFORE**, for and in consideration of the mutual covenants and conditions contained herein, Assignor does hereby assign, transfer, set over and convey unto Assignee the Leases and all of the rights, titles, interests and obligations of Assignor therein or arising thereunder, upon the following terms and conditions:

1. Assignor hereby represents and warrants that to the best of its knowledge that the Leases are in full force and effect and that Assignor has performed in accordance with all of the terms and conditions contained in such Leases, and that such Leases are valid, subsisting and in full force as of the date hereof. Further, Assignor represents and warrants that it is not aware of any breach of, nor aware of any default of, its obligations under the Leases, and that to the best of its knowledge that no event has occurred which, with the giving of notice or the passage of time, or both, would constitute such a breach or default on the part of Assignor.
2. Assignee agrees to, and does hereby, accept this Assignment and Assignee agrees to assume the full and complete performance of the Leases which respect to all of the obligations of the Assignor thereunder from and after the date hereof. Further, Assignee agrees to indemnify and hold Assignor harmless from any liability, expense or loss arising out of or in connection with the Leases or the operations of Assignee or its predecessor or its successors and assigns thereon either before or and after the date hereof.
3. Assignor and Assignee covenant and agree, one with the other, to execute and deliver, or to cause to be executed and delivered, and to do or make, or cause to be done or made, upon request of the other party, any and all agreements, instruments, papers, acts, or things, supplemental, confirmatory or otherwise, as reasonably may be required for the purpose of or in

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connection with, perfecting and completing the transfer of the Leases to Assignee as contemplated herein.

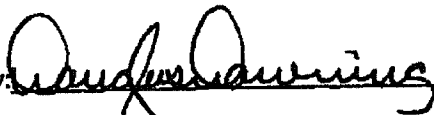
4. This Assignment shall be binding on and shall inure to the benefit of the parties hereto and their respective successors and assigns.

5. This Assignment and Assumption Agreement shall be executed, performed and interpreted in accordance with the substantive laws of the State of West Virginia.

IN TESTIMONY WHEREOF, witness the signatures of the parties hereto effective as of the day and year first above written.

ASSIGNOR:

ARK LAND COMPANY

By: 

Its: Vote - Plus

ASSIGNEE:

ROBIN LAND COMPANY, LLC

By: 

Its: Secretary



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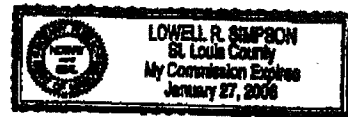
STATE OF Missouri )  
COUNTY OF St. Louis ) SS:

I, the undersigned, a Notary Public, in and for said State and County aforesaid, do hereby certify that DOUGLAS DOWNING, personally known to me to be the same person whose name is as the VICE PRESIDENT of Ark Land Company, a Delaware corporation, subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he, being duly and duly authorized, signed and delivered the said instrument as the free and voluntary act of said corporation and as his own free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 30<sup>th</sup> day of DECEMBER, 2005.

Lowell R. Simpson  
Notary Public

My Commission Expires: JANUARY 27, 2006



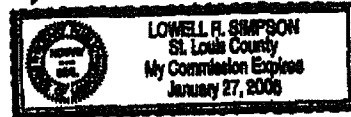
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STATE OF MISSOURI )  
COUNTY OF St. Louis ) SS:

I, the undersigned, a Notary Public, in and for said State and County aforesaid, do hereby certify that GREGORY BILLHARTZ, personally known to me to be the same person whose name is as the SECRETARY of ROBIN LAND COMPANY, LLC, a Delaware limited liability company, subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he, being thereunto duly authorized, signed and delivered the said instrument as the free and voluntary act of said corporation and as his own free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 30<sup>th</sup> day of DECEMBER, 2005.

Lowell R. Simpson  
Notary Public



My Commission Expires: JANUARY 27, 2006

THIS INSTRUMENT PREPARED BY:  
Gary L. Colley  
Gary L. Colley, Esq.  
Arch Coal, Inc.  
CityPlace One, Suite 300  
St. Louis, Missouri 63141  
314-994-2992

Schedule 1

Contract No.	Grantor/Lessor	Grantee/Lessee	Document Type	Property Estate	Book	Page	County	Date
AMA-165	Appalachian Electric Power Company	Logan County Coal Corporation (pred. to Ark)	Agreement	Surface	No recording information	No recording information	LOGAN	October 7, 1942
AMA-285	Pardee Land Company	Ark Land Company (4/23/64 Ag: Amherst Coal Company)	Agreement	Surface	306	62	LOGAN	April 23, 1964
AMA-286	Wittenberg Heirs (see 4/23/1964 Ag pg 1 for list) and Pardee Land Company	Ark Land Company (4/23/64 Ag: Amherst Coal Company)	Agreement	Surface	306	52	LOGAN	April 23, 1964
AMA-301	Buffalo Mining Company, Pardee Land Company	Ark Land Company (orig ag: Amherst Coal Company)	Agreement	Surface	No recording information	No recording information	LOGAN	August 10, 1985
AMA-467	Dingess-Rum Properties, Inc. (orig ag: Lowe, William D., Sr. (owner); and Dingess-Rum Properties, Inc.)	Jim C. Harner Co.	Agreement	Timber	No recording information	No recording information	LOGAN	October 10, 1997
AMA-509	Ark Land Company (orig ag: Apogee Coal Company d/b/a Arch of West Virginia)	Logan County Mine Services, Inc.	Agreement	Surface	No recording information	No recording information	LOGAN	November 22, 2002
AMA-325	Ark Land Company	Consumer Service, Inc. and Cashon Water Works	Bill of Sale & License Agreement	Surface	No recording information	No recording information	LOGAN	October 8, 1964

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Contract No.	Grantor/Lessor	Grantee/Lessee	Document Type	Property Estate	Book	Page	County	Date
AMA-113	Ark Land Company (orig ag: Amherst Coal Company)	Kelly-Hatfield Land Co.	Boundary Line Agmt	Surface and Coal	348	432	LOGAN	November 9, 1972
AMA-106	Ark Land Company	Orville Holiness Church	Commercial Sublease	Surface	No recording information 226	No recording information 249	LOGAN	November 1, 1985
AMA-121	Ark Land Company	Appalachian Electric Power Company	Easement Out	Surface	226		LOGAN	May 29, 1963
AMA-125	Ark Land Company	Appalachian Electric Power Company	Easement Out	Surface	243	329	LOGAN	October 20, 1951
AMA-154	Ark Land Company	Appalachian Power Company	Easement Out	Surface	No recording information	No recording information	LOGAN	April 20, 1981
AMA-164	Ark Land Company	Appalachian Power Company	Easement Out	Surface	No recording information	No recording information	LOGAN	January 21, 1984
AMA-184	Ark Land Company	West Virginia Department of Highways	Easement Out	Surface	401	59	LOGAN	January 9, 1979

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Contract No.	Grantor/Lessor	Grantee/Lessee	Document Type	Property Estate	Book	Page	County	Date
AMA-222	Ark Land Company	Appalachian Electric Power Company	Easement Out	Surface Powerline ROW	249	389	LOGAN	November 15, 1956
AMA-270	Ark Land Company (successor to Amherst Coal)	Blazer Energy Corp. (pred to Ashland Exploration)	Easement Out	Surface	No recording information	No recording information	LOGAN	December 1, 1983
AMA-272	Pardee Land Company	C&O Railroad (now CSX)	Easement Out	Surface, Rail Facilities	No recording information	No recording information	LOGAN	September 16, 1964
AMA-280	Ark Land Company (successor to Amherst Coal)	Hope Natural Gas Company	Easement Out	Surface	No recording information	No recording information	LOGAN	November 15, 1954
AMA-281	Ark Land Company (successor to Amherst Coal)	Hope Natural Gas Company	Easement Out	Surface	No recording information	No recording information	LOGAN	December 13, 1954
AMA-282	Ark Land Company (successor to Amherst Coal)	Hope Natural Gas Company	Easement Out	Surface	21	208	LOGAN	May 4, 1956
AMA-283	Ark Land Company (successor to Amherst Coal)	Hope Natural Gas Company	Easement Out	Surface	No recording information	No recording information	LOGAN	December 13, 1954

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Contract No.	Grantor/Lessor	Grantee/Lessee	Document Type	Property Estate	Book	Page	County	Date
AMA-320	Ark Land Company	Hope Natural Gas Company	Easement Out	Surface	17	43	LOGAN	February 4, 1954
AMA-335	Pardee Resources	Ark Land Company (as successor to Amherst Coal Company)	Lease	Coal			LOGAN	
AMA-341	Ark Land Company (successor to Amherst Coal)	Appalachian Electric Power Company	Easement Out	Surface	No recording information	No recording information	LOGAN	May 29, 1947
AMA-370	Ark Land Company (successor to Amherst Coal)	Buffalo Creek Public Service District	Easement Out	Surface	No recording information	No recording information	LOGAN	July 26, 1974
AMA-371	Ark Land Company (successor to Amherst Coal)	Buffalo Creek Public Service District	Easement Out	Surface	No recording information	No recording information	LOGAN	May 7, 1974
AMA-372	Ark Land Company (successor to Amherst Coal)	Buffalo Creek Public Service District	Easement Out	Surface	No recording information	No recording information	LOGAN	May 7, 1974
AMA-373	Ark Land Company (successor to Amherst Coal)	Buffalo Creek Public Service District	Easement Out	Surface	No recording information	No recording information	LOGAN	March 19, 1975

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Contract No.	Grantor/Lessor	Grantee/Lessee	Document Type	Property Estate	Book	Page	County	Date
AMA-396	Ark Land Company	Jackson Resources Company	Easement Out	Surface	No recording information	No recording information	LOGAN	June 30, 1995
AMA-398	Ark Land Company	Aracoma Coal Company	Easement Out	Surface	No recording information	No recording information	LOGAN	December 16, 1996
AMA-408	Ark Land Company	Appalachian Power Company	Easement Out	Surface	No recording information	No recording information	LOGAN	March 19, 1996
AMA-482	Ark Land Company	Appalachian Power Company	Easement Out	Surface	No recording information	No recording information	LOGAN	April 17, 2000
AMA-489	Ark Land Company	Classic Oil and Gas Resources	Easement Out	Surface	No recording information	No recording information	LOGAN	February 14, 2001
AMA-495	Ark Land Company	Jackson Resources Company	Easement Out	Surface	No recording information	No recording information	LOGAN	June 6, 2001
AMA-499	Ark Land Company	Appalachian Power Company	Easement Out	Surface	No recording information	No recording information	LOGAN	September 25, 2001

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Contract No.	Grantor/Lessor	Grantee/Lessee	Document Type	Property Estate	Book	Page	County	Date
AMA-602	Jackson Vinson et al	Ark Land Company	Lease	Coal	370	1	LOGAN	May 30, 1975
AMA-639	Ark Land Company	Buffalo Creek Public Service District	Easement Out	Surface	494	328	LOGAN	April 13, 1993
AMA-639	Ark Land Company	Buffalo Creek Public Service District	Easement Out	Surface	500	739	LOGAN	June 15, 1993
AMA-845	Ark Land Company	Logan County Public Service District	Easement Out	Surface	No recording information	No recording information	LOGAN	January 12, 1994
AMA-143	Ark Land Company	Appalachian Power Company	Easement Out	Surface	75	24	LOGAN	January 3, 1924
AMA-144	Ark Land Company	Appalachian Power Company	Easement Out	Surface	75	26	LOGAN	January 3, 1924
AMA-145	Ark Land Company (successor to Logan County Coal)	Appalachian Power Company	Easement Out	Surface	No recording information	No recording information	LOGAN	July 6, 1938



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Contract No.	Grantor/Lessor	Grantee/Lessee	Document Type	Property Estate	Book	Page	County	Date
AMA-146	Ark Land Company (successor to Amherst Coal Company)	Appalachian Power Company	Easement Out	Surface	No recording information	No recording information	LOGAN	November 10, 1989
AMA-147	Ark Land Company (successor to Amherst Coal Company)	Appalachian Power Company	Easement Out	Surface	No recording information	No recording information	LOGAN	March 23, 1972
AMA-148	Ark Land Company (successor to Amherst Coal Company)	Appalachian Power Company	Easement Out	Surface	No recording information	No recording information	LOGAN	February 20, 1979
AMA-149	Ark Land Company (successor to Amherst Coal Company)	Appalachian Power Company	Easement Out	Surface	No recording information	No recording information	LOGAN	July 25, 1974
AMA-151	Ark Land Company (successor to Amherst Coal Company)	Consolidated Gas Supply Company	Easement Out	Surface	No recording information	No recording information	LOGAN	January 29, 1971
AMA-155	Ark Land Company	Bleazer Energy Corp. (pred to Ashland Exploration)	Easement Out	Surface	No recording information	No recording information	LOGAN	December 1, 1983
AMA-117	Ark Land Company	C&O Railroad (now CSX)	Easement Out- Reversionary Interest	Surface	222	156	LOGAN	November 28, 1952

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Contract No.	Grantor/Lessor	Grantee/Lessee	Document Type	Property Estate	Book	Page	County	Date
AMA-118	Ark Land Company (successor to Aritherst Coal Company)	C&O Railroad (now CSX)	Easement Out- Reversionary Interest	Surface	No recording information	No recording information	LOGAN	December 17, 1946
AMA-119	Ark Land Company (successor to Aritherst Coal Company)	C&O Railroad (now CSX)	Easement Out- Reversionary Interest	Surface	No recording information	No recording information	LOGAN	December 17, 1946
AMA-120	Ark Land Company	C&O Railroad (now CSX)	Easement Out- Reversionary Interest	Surface	204	471	LOGAN	January 20, 1956
AMA-128	Ark Land Company	CSX Transportation	Easement Out- Reversionary Interest	Surface	275	6	LOGAN	August 1, 1960
AMA-132	Ark Land Company (successor to Buffalo Creek Coal and Coke)	C&O Railroad (now CSX)	Easement Out- Reversionary Interest	Surface	No recording information	No recording information	LOGAN	October 27, 1946
AMA-158	Ark Land Company	C&O Railroad	Easement Out- Reversionary Interest	Surface	316	464	LOGAN	March 14, 1967
AMA-200	Ark Land Company	C&O Railroad (now CSX)	Easement Out- Reversionary Interest	Surface	228	171	LOGAN	August 31, 1962

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Contract No.	Grantor/Lessor	Grantee/Lessee	Document Type	Property Estate	Book	Page	County	Date
AMA-202	Dingess Rum Coal Corporation (owner) and Amherst Coal Corporation (lessee)	C&O Railroad (now CSX)	Easement Out-Reversionary interest	Surface	145	319	LOGAN	September 2, 1942
AMA-226	Ark Land Company (successor to Amherst Coal Company)	Appalachian Electric Power Company	Joint Use Agreement	Surface	No recording information	No recording information	LOGAN	November 15, 1952
AMA-253	C&O Railroad (now CSX)	Ark Land Company (successor to Amherst Coal Company)	Lease In	Surface	No recording information	No recording information	LOGAN	September 6, 1985
AMA-340	Miller & Gilman	Ark Land Company	Lease In	Coal	539	257	LOGAN	August 8, 1988
AMA-514	Ruth H. Stafford	Ark Land Company	Lease In	Coal	566	543	LOGAN	October 15, 2001
AMA-142	C&O Railroad (pred. to CSX Transportation)	Ark Land Company (successor to Logan County Coal)	Lease In	Surface	No recording information	No recording information	LOGAN	July 8, 2029
AMA-366	Dingess-Rum Properties, Inc., as lessor, Ark Land Company, as lessee	Elkay Mining Company	License Out	Surface	No recording information	No recording information	LOGAN	October 31, 1991
AMA-411	Ark Land Company	West Virginia Department of Transportation	License Out	Surface	No recording information	No recording information	LOGAN	December 5, 1996

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Contract No.	Grantor/Lessor	Grantee/Lessee	Document Type	Property Estate	Book	Page	County	Date
AMA-414	Ark Land Company	Appalachian Power Company	License Out	Surface	No recording information	No recording information	LOGAN	August 16, 1986
AMA-436	Ark Land Company	State of West Virginia DEP	License Out	Surface	No recording information	No recording information	LOGAN	May 26, 1988
AMA-481	Ark Land Company	American Electric Power	License Out	Surface	No recording information	No recording information	LOGAN	November 15, 1989
AMA-520	Ark Land Company	WV Dept of Environmental Prot	License Out	Surface	No recording information	No recording information	LOGAN	January 22, 2002
AMA-635	Ark Land Company	Blazer Energy Corp.	License Out	Surface	No recording information	No recording information	LOGAN	September 26, 1988
AMA-643	Ark Land Company	Jackson Resources Company	License Out	Surface	497	576	LOGAN	June 23, 1993
AMA-519	Ark Land Company	Hampden Coal Company, Inc.	Outlease Coal	Coal	No recording information	No recording information	LOGAN	October 31, 2004

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Contract No.	Grantor/Lessor	Grantee/Lessee	Document Type	Property Estate	Book	Page	County	Date
AMA-486	Ark Land Company	Heater Construction, Inc.	Outlease Commercial	Surface	No recording information	No recording information	LOGAN	August 3, 2000
AMA-496	Ark Land Company	Bethel Chapel	Outlease Commercial	Surface	No recording information	No recording information	LOGAN	September 21, 2001
AMA-307	Ark Land Company	Jackson Resources	Outlease-Oil and Gas	Oil and Gas	No recording information	No recording information	LOGAN	October 29, 1991
AMA-313/AMA-313-1	Ark Land Company	Equitable Production Company, Dominion Appalachian	Outlease-Oil and Gas	Oil and Gas	10	271	LOGAN	December 1, 1942
AMA-314	Ark Land Company	Consolidated Gas Supply Company	Outlease-Oil and Gas	Oil and Gas	18	150	LOGAN	September 30, 1954
AMA-334-1	Dingess-Rum Properties, Inc.	Ark Land Company	Override-Bandmill	Coal	No recording information	No recording information	LOGAN	January 1, 2000
AMA-334-2	Dingess-Rum Properties, Inc.	Ark Land Company	Override-Slab Fork	Coal	No recording information	No recording information	LOGAN	September 1, 2000
AMA-359	Ark Land Company	STB Ventures, Inc.	Overriding Royalty	Coal	No recording information	No recording information	LOGAN	October 31, 1991

Contract No.	Grantor/Lessor	Grantee/Lessee	Document Type	Property Estate	Book	Page	County	Date
AMA-445	Ark Land Company	Blazer Energy Corporation/Eastern States	Pipeline Relocation Agreement	Surface	No recording information	No recording information	LOGAN	April 6, 1998
AMA-174	Ark Land Company (successor to Amherst Coal Company)	Dingess-Rum Properties, Inc.	Release	Surface	No recording information	No recording information	LOGAN	October 20, 1964
AMA-175	Ark Land Company (successor to Amherst Coal Company)	Dingess-Rum Properties, Inc.	Release	Surface	No recording information	No recording information	LOGAN	March 17, 1965
AMA-393	Ark Land Company	Stollings Trucking Company	sublease	Coal	No recording information	No recording information	LOGAN	March 1, 1995
AMA-394	Ark Land Company	Stollings Trucking Company	sublease	Coal	No recording information	No recording information	LOGAN	June 22, 1995
AMA-362	Ark Land Company	Apogee Coal Company, dba AOWV	Subsidiary Lease and Sublease	Surface and Coal	No recording information	No recording information	LOGAN	January 1, 1995
AMA-388	Ark Land Company	Apogee Coal Company, dba AOWV	Subsidiary License Agreement	Surface	No recording information	No recording information	LOGAN	January 1, 1995
AMA-103	Amherst Coal Company	WV Dept. of Highways	Temporary construction easement	Surface	No recording information	No recording information	LOGAN	June 10, 1986

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Contract No.	Grantor/Lessor	Grantee/Lessee	Document Type	Property Estate	Book	Page	County	Date
AMA-426	Eastern States Oil & Gas, Inc.; and Blazer Energy Corp	Ark Land Company, and Apogee Coal Company	Agreement	Surface	No recording information	No recording information	LOGAN	April 24, 1988
AMA-397-10	Ark Land Company	Bluefield Timber LLC	Joint Use Agreement	Timber	No recording information	No recording information	KANAWHA LOGAN WYOMING	July 31, 1995
AMA-337	Lawson Heirs, Incorporated	Ark Land Company	Lease In	Coal	#N/A	#N/A	LOGAN	October 31, 1994
None	Ark Land Company	Charlotte Bowens	Residential Outlease	Surface - Encumbrance	#N/A	#N/A	LOGAN	September 15, 2005
None	Ark Land Company	Charles Nelson	Residential Outlease	Surface - Encumbrance	#N/A	#N/A	LOGAN	September 21, 1999
None	Ark Land Company	Scott McComas	Residential Outlease	Surface - Encumbrance	#N/A	#N/A	LOGAN	December 1, 1994
None	Ark Land Company	James Vanover	Residential Outlease	Surface - Encumbrance	#N/A	#N/A	LOGAN	September 1, 2002

BOOK 578 PAGES 1-3  
Grantor/Lessor

Contract No.	Grantor/Lessor	Grantee/Lessee	Document Type	Property Estate	Book	Page	County	Date
AMA-800	Ark Land Company, AOWV	Elkay Mining Company	Transaction Agreement	Coal	#N/A	#N/A	LOGAN	November 12, 1987
AMA-377-1	STB Ventures, Inc	Ark Land Company and Apogee Coal Company	Transaction Agreement and assignment of leases	Surface and Coal	#N/A	#N/A	LOGAN	October 31, 1989
AMA-397-9	Ark Land Company	Bluefield Timber LLC	Assignment	Timber			KANAWHA BOONE LOGAN	July 31, 1985

THE OFFICE OF THE CLERK OF THE COUNTY COMMISSION:  
 11:38 AM  
 presented to me in my office, and thereupon, together  
 with a certificate thereunto annexed is admitted to record.  
 By *[Signature]*  
 LEONARD HOWARD, County Clerk  
 Deputy



# Exhibit C

**PARTIAL ASSIGNMENT AND ASSUMPTION OF LEASE**

**THIS PARTIAL ASSIGNMENT AND ASSUMPTION OF LEASE** is made and entered into this 31st day of December, 2005, by and between **ARK LAND COMPANY**, a Delaware corporation ("Assignor") and **ROBIN LAND COMPANY, LLC**, a Delaware limited liability company ("Assignee").

**WITNESSETH:**

**WHEREAS**, Kelly-Hatfield Land Company ("Lessor") and Assignor have heretofore entered into a Combined, Amended and Restated Coal Lease dated October 31, 1994, relating to certain real property located in Boone and Logan Counties, West Virginia (the "Premises"), which Combined, Amended and Restated Coal Lease has subsequently been supplemented and amended by Lessor and Assignor (the "Lease"); and

**WHEREAS**, Assignee has requested that Assignor partially assign its rights and obligations under the Lease to Assignee relating to a portion (the "Assigned Lease Portion") of the Premises covered by the Lease, with such Assigned Lease Portion of the Premises being more particularly described and set forth on the map attached hereto, made a part hereof and marked identification as Exhibit A; and

**WHEREAS**, Assignor is willing to grant the request of Assignee to acquire the Assigned Lease Portion of the Premises by partial assignment of the rights and obligations of Assignor under the Lease in and to the Assigned Lease Portion, and Assignee desires to accept such partial assignment of the Lease and the rights, titles and interests of Assignor thereunder relating to the Assigned Lease Portion of the Premises on the terms and conditions herein set forth.

**NOW, THEREFORE**, for and in consideration of the mutual covenants and conditions set forth hereinafter, Assignor does hereby assign unto Assignee all of its rights, titles and interests under the Lease insofar as the Lease pertains only to the Assigned Lease Portion of the Premises on the following terms and conditions:

1. This Partial Assignment is made upon and subject to the terms, conditions, rights, privileges, indemnities and undertakings contained in the Lease. Assignor assigns only such rights and privileges to the Assigned Lease Portion of the Premises under the Lease as it now owns, controls or possesses. Lessee excepts, reserves and retains and does not assign by this Partial Assignment all rights and interests under the Lease pertaining to that portion of the Premises remaining (the "Remaining Lease Portion") after the partial assignment of the Assigned Lease Portion of the Premises.

2. Insofar as the Lease applies to the Assigned Lease Portion of the Premises, Assignee, as of the Effective Date, hereby assumes, accepts and agrees to perform the duties and obligations of Assignor contained in or arising under the Lease in accordance

with the terms and conditions thereof, and Assignee also assumes the obligation to pay the "STB Override" to the extent that the STB Override applies to coal mined from the Assigned Lease Portion of the Premises. Further, inasmuch as Assignor is required by the Lease to remain responsible for the performance by Assignee of the terms and conditions of the Lease, Assignee agrees to indemnify and hold Assignor and its related companies from any liability, expense or loss arising out of or in connection with the Lease as it relates to the Assigned Lease Portion.

3. Assignor represents and warrants to Assignee that it has no knowledge of any default or event of default under the Lease relating to the Assigned Lease Portion of the Premises or otherwise, which with the giving of notice or the passage of time, or both, would constitute such a default, and that it has not made any prior transfer of the Lease which would affect the Assigned Lease Portion of the Premises, other than an intercompany Lease and Sublease dated January 1, 1995, between Assignor and Apogee Coal Company d/b/a Arch of West Virginia.

4. In addition to the Assigned Lease Portion, Assignor does hereby assign and set over to Assignee all of the Assignor's rights, titles and interests in and to the recoupable balance of Advance Minimum Royalty payments previously made by Assignor to Lessor pursuant to Section 6 of the Lease, and from and after the Effective Date, Assignee rather than Assignor shall have the right to recoup and offset Tonnage Royalties otherwise due for coal mined by Assignee from the Assigned Lease Portion of the Premises against such recoupable balance subject to the terms, conditions and limitations set forth in the Lease. Further, on each January 1<sup>st</sup> after the Effective Date, Assignee, rather than Assignor, shall be obligated to pay to Lessor the Advance Minimum Royalty amount currently required (i.e., \$500,000.00) by Section 6 of the Lease as and when such Advance Minimum Royalty Payments become due, and on a going forward basis, Assignor shall not take any recoupment for Tonnage Royalties due for coal mined from the Remaining Lease Portion. For all taxes which are required to be paid by the lessee under the Lease, Assignor and Assignee understand and agree that as and when such taxes are due and payable Assignor and Assignee shall each timely pay their proportionate part of such taxes based on the portion of such taxes as are attributable to the portion of the Premises held by Assignor and Assignee

5. Further, the parties hereto understand and agree that Assignor shall retain all of its rights relating to the Spruce Fork Surface Property, as more particularly described and set forth in Amendment No. 1 to the Lease, but Assignee agrees, and does hereby assume all obligations of Assignor, to make the nine (9) remaining Six Hundred Fifty Thousand Dollar (\$650,000.00) payments as are required pursuant to Paragraph 4 of Amendment No. 1 to the Lease, but Assignee shall not acquire any rights in and to the Spruce Fork Surface Property by virtue of such payments.

6. This Agreement shall be governed by and construed in accordance with the laws of the State of West Virginia.

7. This Agreement and all applicable provisions of the Lease set forth the entire agreement between the parties and supercede all prior and contemporaneous agreements, representations and understandings of the parties. No supplement, modification or amendment to this Agreement shall be binding on the parties hereto unless executed in writing by Assignor and Assignee.

8. The parties hereto further understand and agree that the "Effective Date" of this Agreement shall be the date on which all parties hereto have added their signatures hereto.

IN WITNESS WHEREOF, the parties, through their duly authorized officers or representatives have caused this Agreement to be executed as of the date which follows their individual signatures.

ARK LAND COMPANY

ROBIN LAND COMPANY, LLP

By: [Signature]  
Its: Unit Pres.  
Dated: 12/30/05

By: [Signature]  
Its: Secretary  
Dated: 12-30-05

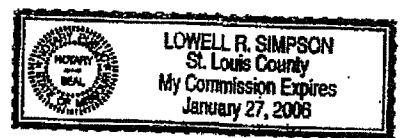
STATE OF MISSOURI )  
COUNTY OF ST. LOUIS ) SS:

I, the undersigned, a Notary Public, in and for said State and County aforesaid, do hereby certify that DOUGLAS DOWNING, personally known to me to be the same person whose name is as the VICE PRESIDENT of Ark Land Company, a Delaware corporation, subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he, being thereunto duly authorized, signed and delivered the said instrument as the free and voluntary act of said corporation and as his own free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 30<sup>th</sup> day of DECEMBER, 2005.

Lowell R. Simpson  
Notary Public

My Commission Expires: JANUARY 27, 2006



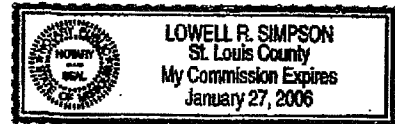
STATE OF MISSOURI )  
 )SS:  
COUNTY OF St. Louis )

I, the undersigned, a Notary Public, in and for said State and County aforesaid, do hereby certify that GREGORY BILLHARTZ, personally known to me to be the same person whose name is as the SECRETARY of Robin Land Company, LLC, Ark Land Company, a Delaware corporation, subscribed to he foregoing instrument, appeared before me this day in person and acknowledged that he, being thereunto duly authorized, signed and delivered the said instrument as the free and voluntary act of said corporation and as his own free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 30<sup>th</sup> day of DECEMBER, 2005.

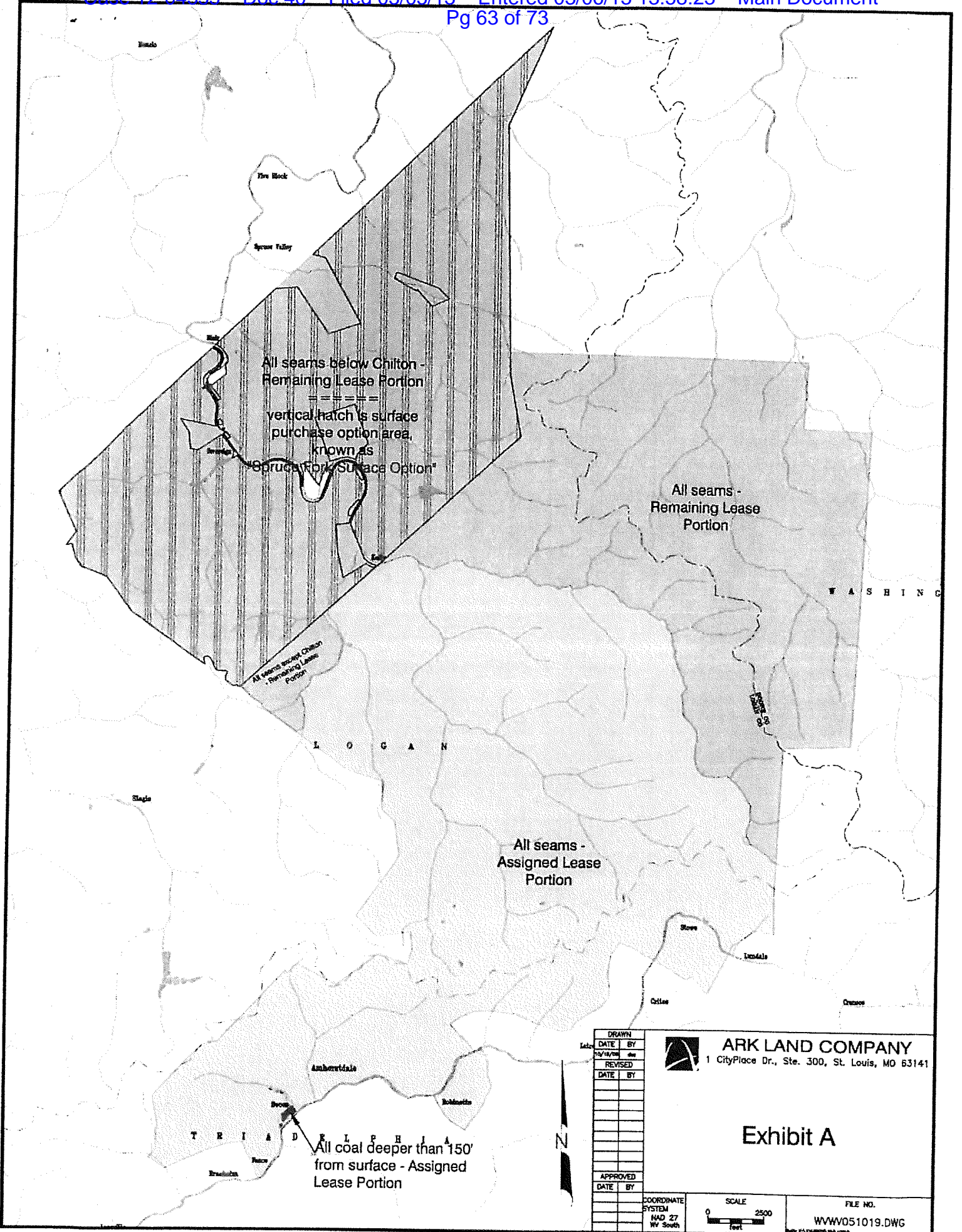
Lowell R. Simpson  
Notary Public

My Commission Expires: JANUARY 27, 2006



THIS INSTRUMENT PREPARED BY:

Gary L. Colley  
Gary L. Colley, Esq.  
Arch Coal, Inc.  
CityPlace One, Suite 300  
St. Louis, Missouri 63141  
314-994-2992

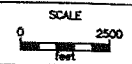


DRAWN	
DATE	BY
REVISED	
DATE	BY
APPROVED	
DATE	BY

**ARK LAND COMPANY**  
 1 CityPlace Dr., Ste. 300, St. Louis, MO 63141

**Exhibit A**

COORDINATE SYSTEM  
 NAD 27  
 NW South



FILE NO.  
 WWW051019.DWG

# **Exhibit D**



**FIREPROOF  
FILE**

DT-004343-1

**AMENDED AND RESTATED PARTIAL ASSIGNMENT  
AND ASSUMPTION OF LEASE**

**THIS AMENDED AND RESTATED PARTIAL ASSIGNMENT AND ASSUMPTION OF LEASE** (“Amended and Restated Partial Assignment”) is made and entered into this 22<sup>nd</sup> day of MAY, 2007, by and between **ARK LAND COMPANY**, a Delaware corporation (“Assignor”), **ROBIN LAND COMPANY, LLC**, a Delaware limited liability company (“Assignee”) and **ARK LAND KH, INC.**, a Delaware corporation (“Consenting Lessor” and sometimes hereinafter referred to as “Lessor”).

**WITNESSETH:**

**WHEREAS**, by Combined, Amended and Restated Coal Lease dated October 31, 1994 (“1994 Lease”), between Kelly-Hatfield Land Company (“Kelly Hatfield”), remote predecessor in interest to the Consenting Lessor, and Assignor, Kelly Hatfield leased unto Assignor certain real property located in Boone and Logan Counties, West Virginia, which Combined, Amended and Restated Coal Lease was subsequently supplemented and amended by Kelly Hatfield and Assignor by the Amendment No. 1 to Combined, Amended and Restated Coal Lease dated November 20, 2000 (the “Amendment”, and jointly with the 1994 Lease, the “Lease”) (the property described in the 1994 Lease and Amendment hereinafter referred to as the “Premises”); and

**WHEREAS**, on December 31, 2005 pursuant to the Partial Assignment and Assumption of Lease (“Partial Assignment”), Assignor partially assigned its rights and obligations under the Lease to Assignee relating to a portion (the “December 2005 Assigned Lease Portion”) of the Premises covered by the Lease, with such Assigned Lease Portion of the Premises being more particularly described and set forth on the map attached hereto, made a part hereof and marked identification as Exhibit A; and

**WHEREAS**, by mesne conveyances, Consenting Lessor became the owner of the Premises as successor by merger, name change and conversion, and, thus, the successor in interest as Lessor to Kelly Hatfield under the Lease, all as more particularly described in that certain Confirmatory Deed dated March 7, 2007 and recorded in Deed Book 253, page 836, Boone County Clerk’s office, and in Deed Book 584, page 409, Logan County Clerk’s office.

**WHEREAS**, Assignee has requested that Assignor partially assign further rights and obligations under the Lease to Assignee relating to a portion of the Premises covered by the Lease (the “May 2007 Assigned Lease Portion”) being more particularly described as all of the mineable and merchantable coal in the Buffalo Creek Seam and all seams lying vertically above the Buffalo Creek Seam, within and underlying certain property located in Logan County, West Virginia and depicted in the color “Yellow” and the right to use that certain road depicted in the color “Red” all as set forth on the map attached hereto, made a part hereof and marked identification as Exhibit B (the May 2007

Assigned Lease Portion together with December 2005 Assigned Lease Portion, the "Assigned Lease Portion"); and

**WHEREAS**, Assignor is willing to amend and restate the Partial Assignment to grant the request of Assignee to acquire the May 2007 Assigned Lease Portion of the Premises by partial assignment of the rights and obligations of Assignor under the Lease in and to the May 2007 Assigned Lease Portion, and Assignee desires to accept such partial assignment of the Lease and the rights, titles and interests of Assignor thereunder relating to the May 2007 Assigned Lease Portion of the Premises on the terms and conditions herein set forth; and

**WHEREAS**, Consenting Lessor is willing to consent to this Amended and Restated Partial Assignment as provided herein.

**NOW, THEREFORE**, for and in consideration of the mutual covenants and conditions set forth hereinafter, Assignor does hereby assign unto Assignee all of its rights, titles and interests under the Lease insofar as the Lease pertains only to the Assigned Lease Portion of the Premises on the following terms and conditions:

1. This Amended and Restated Partial Assignment is made upon and subject to the terms, conditions, rights, privileges, indemnities and undertakings contained in the Lease. Assignor assigns only such rights and privileges to the Assigned Lease Portion of the Premises under the Lease as it now owns, controls or possesses. Lessee excepts, reserves and retains and does not assign by this Partial Assignment all rights and interests under the Lease pertaining to that portion of the Premises remaining (the "Remaining Lease Portion") after the partial assignment of the Assigned Lease Portion of the Premises.

2. Consenting Lessor hereby consents to the assignment of the Assigned Lease Portion of the Premises as provided herein.

3. Insofar as the Lease applies to the Assigned Lease Portion of the Premises, Assignee, as of December 31, 2005 with respect to the December 2005 Assigned Lease Portion and the date of this Amended and Restated Partial Assignment with respect to the May 2007 Assigned Lease Portion, hereby assumes, accepts and agrees to perform the duties and obligations of Assignor contained in or arising under the Lease in accordance with the terms and conditions thereof, and Assignee also assumes the obligation to pay the "STB Override" as defined and identified in that certain Overriding Royalty Agreement dated October 31, 1994 between Assignor and STB Ventures, Inc. and as assigned to Assignee by that certain Assignment and Assumption Agreement dated December 30, 2005 between Assignor and Assignee to the extent that the STB Override applies to coal mined from the Assigned Lease Portion of the Premises. Further, inasmuch as Assignor is required by the Lease to remain responsible for the performance by Assignee of the terms and conditions of the Lease, Assignee agrees to indemnify and hold harmless Assignor and its related companies from any liability, expense or loss arising out of or in connection with the Lease as it relates to the Assigned Lease Portion.

4. Assignor represents and warrants to Assignee that it has no knowledge of any default or event of default under the Lease relating to the Assigned Lease Portion of the Premises or otherwise, which with the giving of notice or the passage of time, or both, would constitute such a default, and that it has not made any prior transfer of the Lease which would affect the Assigned Lease Portion of the Premises, other than an intercompany Lease and Sublease dated January 1, 1995, between Assignor and Apogee Coal Company d/b/a Arch of West Virginia.

5. In addition to the Assigned Lease Portion, Assignor does hereby assign and set over to Assignee all of the Assignor's rights, titles and interests in and to the recoupable balance of Advance Minimum Royalty payments previously made by Assignor to Lessor pursuant to Section 6 of the Lease, and from and after the December 31, 2005, Assignee rather than Assignor shall have the right to recoup and offset Tonnage Royalties otherwise due for coal mined by Assignee from the Assigned Lease Portion of the Premises against such recoupable balance subject to the terms, conditions and limitations set forth in the Lease. Further, on each January 1<sup>st</sup> after the December 31, 2005, Assignee, rather than Assignor, shall be obligated to pay to Lessor the Advance Minimum Royalty amount currently required (i.e., \$500,000.00) by Section 6 of the Lease as and when such Advance Minimum Royalty Payments become due, and on a going forward basis, Assignor shall not take any recoupment for Tonnage Royalties due for coal mined from the Remaining Lease Portion. For all taxes which are required to be paid by the lessee under the Lease, Assignor and Assignee understand and agree that as and when such taxes are due and payable Assignor and Assignee shall each timely pay their proportionate part of such taxes based on the portion of such taxes as are attributable to the portion of the Premises held by Assignor and Assignee

6. Further, the parties hereto understand and agree that Assignor shall retain all of its rights relating to the Spruce Fork Surface Property, as more particularly described and set forth in the Amendment, but Assignee agrees, and does hereby assume all obligations of Assignor, to make the eight (8) remaining Six Hundred Fifty Thousand Dollar (\$650,000.00) payments as are required pursuant to Paragraph 4 of the Amendment, but Assignee shall not acquire any rights in and to the Spruce Fork Surface Property by virtue of such payments.

7. Assignee hereby acknowledges that Ark Land KH, Inc. is the successor in interest as lessor under the Lease and that all duties and obligations under the Lease assumed by the Assignee hereunder and owed to the Lessor under the Lease and under this Amended and Restated Partial Assignment shall be owed to Ark Land KH, Inc.

8. This Agreement shall be governed by and construed in accordance with the laws of the State of West Virginia.

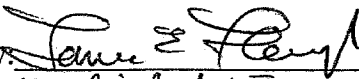
9. This Agreement and all applicable provisions of the Lease set forth the entire agreement between the parties and supercede all prior and contemporaneous agreements, representations and understandings of the parties. No supplement,

modification or amendment to this Agreement shall be binding on the parties hereto unless executed in writing by Assignor and Assignee.


10. The parties hereto further understand and agree that the "Effective Date" of this Agreement shall be the date on which all parties hereto have added their signatures hereto.

**IN WITNESS WHEREOF**, the parties, through their duly authorized officers or representatives have caused this Agreement to be executed as of the date which follows their individual signatures.

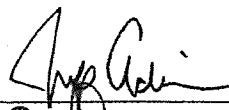
**ARK LAND COMPANY**  
(Assignor)

By:   
Its: Vice President & Treasurer  
Dated: 6-1-07

**ROBIN LAND COMPANY, LLC**  
(Assignee)

By:   
Its: President  
Dated: 5/22/07

**ARK LAND KH, INC.**  
(Consenting Lessor)

By:   
Its: President  
Dated: 6/1/07

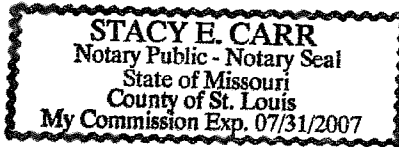
STATE OF Missouri )  
 ) SS:  
COUNTY OF St. Louis )

I, the undersigned, a Notary Public, in and for said State and County aforesaid, do hereby certify that JAMES E. PLOZYAK, personally known to me to be the same person whose name is as the Vice President & TREASURER of **Ark Land Company**, a Delaware corporation, subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he, being thereunto duly authorized, signed and delivered the said instrument as the free and voluntary act of said corporation and as his own free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 1st day of June, 2007.

Stacy E. Carr  
Notary Public

My Commission Expires:



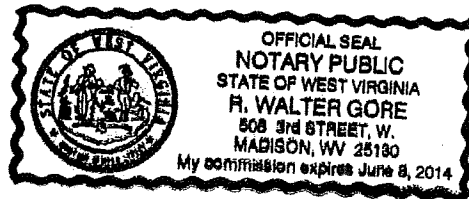
STATE OF WEST VIRGINIA )  
 ) SS:  
COUNTY OF KANAWHA )

I, the undersigned, a Notary Public, in and for said State and County aforesaid, do hereby certify that DAVID D. TURNBULL, personally known to me to be the same person whose name is as the PRESIDENT of **Robin Land Company, LLC**, a Delaware limited liability company, subscribed to he foregoing instrument, appeared before me this day in person and acknowledged that he, being thereunto duly authorized, signed and delivered the said instrument as the free and voluntary act of said limited liability company and as his own free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 22<sup>nd</sup> day of MAY, 2007.

R. Walter Gore  
Notary Public

My Commission Expires: 6-8-14



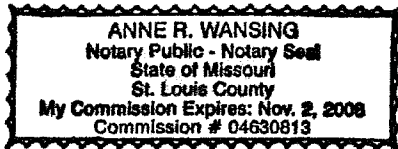
STATE OF Missouri )  
COUNTY OF St. Louis ) SS:

I, the undersigned, a Notary Public, in and for said State and County aforesaid, do hereby certify that Jeffrey Addison, personally known to me to be the same person whose name is as the President of **Ark Land KH, Inc**, a Delaware corporation, subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he, being thereunto duly authorized, signed and delivered the said instrument as the free and voluntary act of said corporation and as his own free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 1<sup>st</sup> day of June, 2007.

Anne R. Wansing  
Notary Public

My Commission Expires:

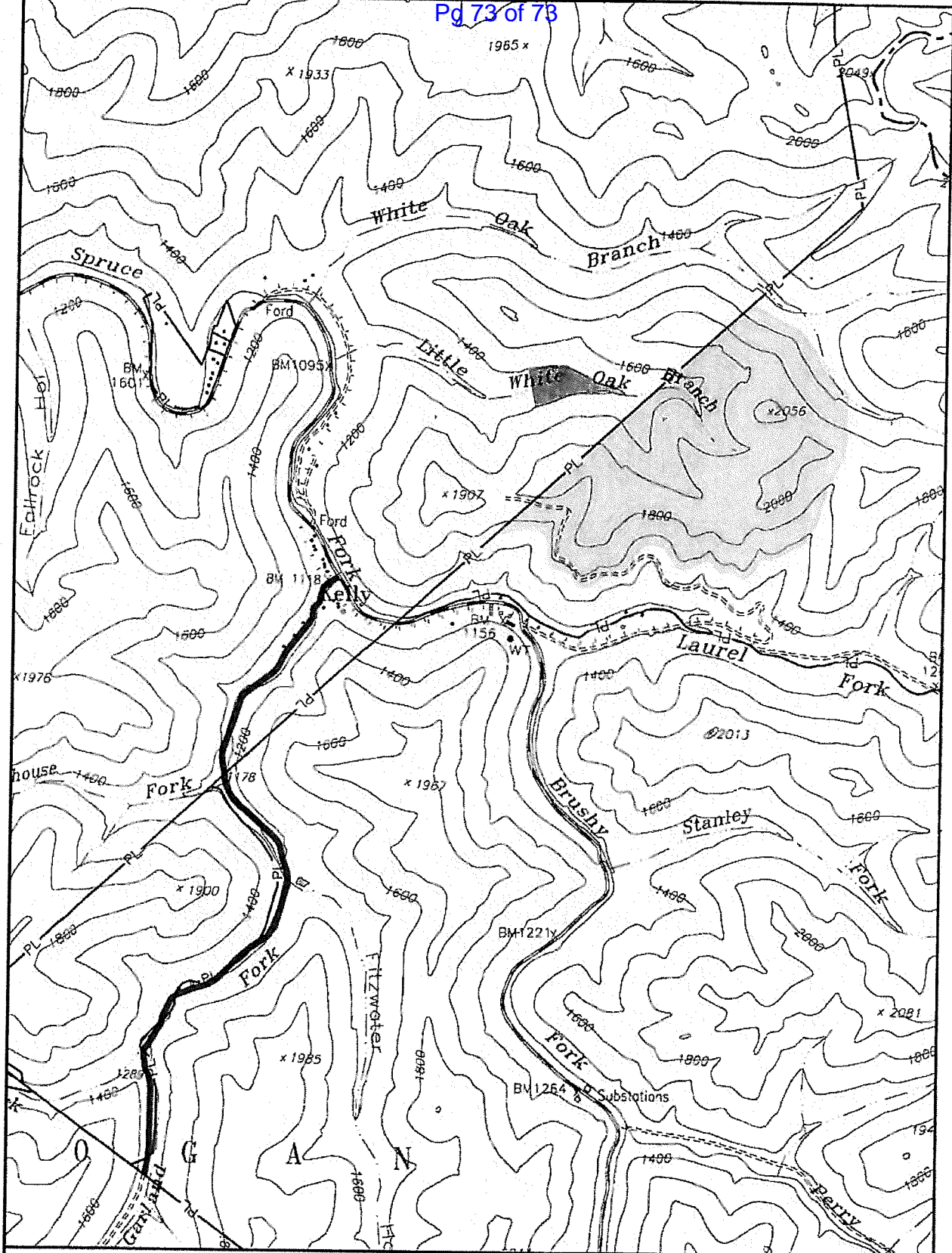


THIS INSTRUMENT PREPARED BY:

\_\_\_\_\_  
Barkley J. Sturgill, Jr, Esq.  
CityPlace One, Suite 300  
St. Louis, Missouri 63141







<p> Lease of Buffalo Creek and all seams above</p> <p> Access road</p>		<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td colspan="2" style="text-align: center;"><b>ARK LAND COMPANY</b></td> </tr> <tr> <td colspan="2" style="text-align: center;">1 CityPlace Dr., Ste. 300, St. Louis, MO 63141</td> </tr> <tr> <td colspan="2" style="text-align: center;"><b>Exhibit B</b></td> </tr> <tr> <td colspan="2" style="text-align: center;">to the Amended and Restated Partial Assignment and Assumption of Lease</td> </tr> <tr> <td colspan="2" style="text-align: center;">Dated _____</td> </tr> <tr> <td colspan="2" style="text-align: center;">between</td> </tr> <tr> <td colspan="2" style="text-align: center;">Ark Land Company, Robin Land Company and Ark Land KH, Inc.</td> </tr> <tr> <td style="font-size: small;">                 DESIGN: _____                  DATE: _____ BY: _____                  CHECKED: _____                  DATE: _____ BY: _____                  REVISED: _____                  DATE: _____ BY: _____                  APPROVED: _____                  DATE: _____ BY: _____             </td> <td style="font-size: small;">                 COORDINATE SYSTEM: NAD 83                  HAD 27                  WY South                  SCALE: 2000                  FILE NO.: WML070508.DWG                  DATE: 03/06/13 13:58:23             </td> </tr> </table>	<b>ARK LAND COMPANY</b>		1 CityPlace Dr., Ste. 300, St. Louis, MO 63141		<b>Exhibit B</b>		to the Amended and Restated Partial Assignment and Assumption of Lease		Dated _____		between		Ark Land Company, Robin Land Company and Ark Land KH, Inc.		DESIGN: _____ DATE: _____ BY: _____ CHECKED: _____ DATE: _____ BY: _____ REVISED: _____ DATE: _____ BY: _____ APPROVED: _____ DATE: _____ BY: _____	COORDINATE SYSTEM: NAD 83 HAD 27 WY South SCALE: 2000 FILE NO.: WML070508.DWG DATE: 03/06/13 13:58:23
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