Judge: here's an early case.

(149 Ky. 312.)

LOUISVILLE TITLE CO. v. DARNELL'S COMMITTEE et al.

(Court of Appeals of Kentucky. June 21, 1912.)

1. INSANE PERSONS (§ 26*)—ADJUDICATION OF INSANITY—SUFFICIENCY OF RECORD.

Under Ky. St. § 2156, which limits the jurisdiction of the presiding judge of a county court to hold an inquest as to insanity to cases where no circuit court is in session in the county, a judgment of the county court adjudging one to be of unsound mind is not invalidated through failure of the record to show that no circuit court was in session.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 35, 36; Dec. Dig. § 26.*]

2. PROCESS (§ 4*)—SUMMONS—NECESSITY—"COUNTERCLAIM."

In an action for partition sale, an answer setting up a mortgage lien constituted a "counterclaim," within Civ. Code Prac. § 97, subsec. 2, which provides that no summons is required on a counterclaim.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 4, 6, 55; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 2, pp. 1645–1650; vol. 8, pp. 7620, 7621.]

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Action by W. H. Darnell's Committee and others against Mary E. Darnell and others. From a judgment sustaining exceptions to a report of sale and setting the sale aside, defendant Louisville Title Company appeals. Reversed and remanded.

E. L. McDonald, of Louisville, for appellant. R. W. Hunn, of Louisville, for appellee Ronald. Ernest Macpherson, of Louisville, Leslie Morris, of Frankfort, and George A. Brent, of Louisville, for other appellees.

CLAY, C. William W. Darnell died a resident of Jefferson county, Ky., in the year 1909. By his will, which was duly probated in the Jefferson county court, he appointed his widow, Mary E. Darnell, executrix, and directed that his property be equally divided between his widow, his daughter, Eleanor W. Darnell, and his sons, John H. T., Randolph, and William H. Darnell. Mary E. Darnell qualified as executrix. William H. Darnell, one of the devisees under the will, was adjudged by the Franklin county court to be a person of unsound mind, and the Capital Trust Company was appointed and qualified as his committee. On May 22, 1909, William W. Darnell and his wife, Mary E. Darnell, executed and delivered to the Louisville Title Company a mortgage on a certain lot of ground situated on Haldeman avenue, near the city of Louisville, in Jefferson county, Ky. This mortgage was given to secure the payment of two notes of $500 each.

This action was brought by the Capital Trust Company, as committee of William H. Darnell, and by Randolph Darnell and John H. T. Darnell, against Mary E. Darnell, executrix, Eleanor W. Yancey, formerly Eleanor E. Darnell, wife of E. H. Yancey, and E. H. Yancey, for the purpose of selling the lot of land on Haldeman avenue, and another lot in Frankfort, Ky., upon the ground that both of said lots were jointly owned by and in possession of plaintiffs and defendants, and that neither could be divided without materially impairing the value thereof, and also for the purpose of having the case referred to the master commissioner to settle the accounts of the executrix. To this petition the Louisville Title Company was not made a party, but it was charged in the petition that the property in question was free of liens so far as plaintiffs knew. The executrix, Mary E. Darnell, filed an answer and cross-petition, setting up a cause of action under sections 428 and 489 of the Civil Code. After setting up certain other debts of the decedent, she alleged that the Louisville Title Company held a mortgage lien on the property on Haldeman avenue in the sum of $1,000, and asked that the Louisville Title Company be made a party defendant, and be required to answer and set up its claim. The only process that was issued on the answer and cross-petition of the executrix was against the Louisville Title Company, which thereafter filed a pleading setting up its mortgage lien, hereinbefore referred to. This pleading was denominated an answer and counterclaim to the petition, and a cross-petition against the defendants Mary E. Darnell, the executrix, and Eleanor W. Yancey and her husband, E. H. Yancey. Upon this answer, counterclaim, and cross-petition no service of process was had. A few months later the Capital Trust Company as committee of William H. Darnell and the other plaintiffs filed an amended petition, wherein they alleged that they failed to state that the Louisville Title Company had a mortgage lien on the property on Haldeman avenue, and asked that the Louisville Title Company be made a party defendant, and required to set up its claim. On October 7th the Louisville Title Company entered its appearance to the amended petition.

It was thereupon stipulated and agreed between plaintiffs and defendants, and ordered by the court, that the answer, counterclaim, and cross-petition of the Louisville Title Company be taken as and for its answer and counterclaim to the amended petition, with the same effect as if then filed. On November 11, 1911, plaintiffs filed a reply to certain portions of the answer and cross-petition of Mary E. Darnell, executrix. On the same day the case was submitted on the answer, counterclaim, and cross-petition of the defendant Louisville Title Company, and judgment rendered in its favor against Mary E. Darnell, as executrix of the estate of W. W. Darnell, for the sum

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of $1,000, with interest from November 22, 1910, until paid, and costs. To secure the payment of this sum, the Louisville Title Company was adjudged a lien on the property on Haldeman avenue. It was further adjudged that the property could not be divided without materially impairing its value, and the commissioner was directed to sell the same. The property was purchased by E. H. Yancey, who assigned his bid to A. G. Ronald, who thereafter filed exceptions to the report of sale. Before the exceptions were filed, the executrix tendered to A. G. Ronald a deed.

The grounds of exception are as follows: First. The judgment of the Franklin county court, adjudging W. H. Darnell of unsound mind, and the order appointing the Capital Trust Company committee of said W. H. Darnell, are void, because the record of that court fails to show that the Franklin circuit court was not in session when the inquest was held. Second. The order of sale is void as to W. H. Darnell, because no service of process was had on the Louisville Title Company's answer, counterclaim, and cross-petition, upon which the property was sold. Third. The deed tendered by the executrix did not cure the defects in the title, because the executrix was not given power under the will to sell the property.

On the hearing, the record of the inquest held on W. H. Darnell in the Franklin circuit court was filed. There was also filed an affidavit of the clerk of the Franklin circuit court, setting forth the terms of that court, and also stating that no regular or special term of that court, and no sessions in chambers, were held during the month of November, 1910, when the inquest proceedings were held. The chancellor held that, as the record of the Franklin county court failed to show that no circuit court was in session in the county, the judgment on the inquest was void, and that the Capital Trust Company therefore had no authority to make W. H. Darnell a party plaintiff, and, that being true, he was not reached by the Louisville Title Company's counterclaim. The court was also of the opinion that the deed tendered by the executrix was not sufficient to cure the defects in the title, inasmuch as the will did not confer upon her the power to sell. In conformity with the opinion of the chancellor, judgment was entered sustaining the exceptions to the report of sale, and setting the sale aside. From that judgment the Louisville Title Company appeals.

[1] Section 2156, Kentucky Statutes, provides: "Inquests under this chapter shall, when a circuit court is in session in the county in which the inquest is held, be held only by such court. When no circuit court is in session in the county, such inquest may be held by a judge of a circuit court, or by the presiding judge of the county court; but in no case shall an inquest upon an idiot be held except in the circuit court."

Section 2157, Kentucky Statutes, provides: "No inquest shall be held unless the person charged to be of unsound mind or an imbecile or incompetent to manage his estate is in court and personally in the presence of the jury. The personal presence of the person charged shall not be dispensed with unless it shall appear, by oath or affidavits of two regularly practicing physicians, that they have personally examined the individual charged to be of unsound mind or an imbecile or incompetent to manage his estate, and that they verily believe him to be an idiot or lunatic, or incompetent to manage his estate, as the case may be, and that his condition is such that it would be unsafe to bring him into court."

From the foregoing it will be seen that the facts necessary to confer jurisdiction on the county court are: First, the circuit court shall not be in session in the county; second, the person charged to be of unsound mind must be in court and personally in the presence of the jury, or his personal presence must be dispensed with by the necessary oaths or affidavits of two regularly practicing physicians. The principal question presented on this appeal is: Is the judgment of the county court, adjudging one to be of unsound mind, void merely because the record of the proceedings fails to show affirmatively the facts necessary to confer jurisdiction?

It is true that this court, in the case of Crown Real Estate Co. v. Rogers' Committee, etc., 132 Ky. 790, 117 S. W. 275, 136 Am. St. Rep. 202, said: "This court will in no case approve an inquest held in a county court, or its appointment of a committee for a lunatic, unless the record of the proceedings therein is sufficient to show jurisdiction of the court, and a substantial compliance in other respects with the statutory requirements." In that case, however, the judgment on the inquest was rendered by the Jefferson circuit court, a court of general jurisdiction, and the language employed by the court was not necessary to the determination of the question actually involved. The same is true of the cases of Goss' Ex'r v. Ky. Refining Co., 137 Ky. 405, 125 S. W. 1061, and Paslick v. Shay, 148 Ky. 642, 147 S. W. 369. It is also true that the court, in the case of Taylor v. Moore, 112 Ky. 330, 65 S. W. 612, 23 Ky. Law Rep. 1572, used the following language: "The rule is elementary that in courts of limited or special jurisdiction the jurisdictional facts must appear upon the record or the judgment is a nullity." But in that case the person upon whom the inquest was held was not present in court, nor was her absence dispensed with in the manner provided by the statute. For this reason, the court held the judgment void. In the case of Stewart v. Taylor, 111 Ky. 247, 63 S. W. 783, 23 Ky. Law Rep. 577, it also affirmatively appeared that the person charged with being a lunatic was not present in court and that her presence was not dis-

pensed with in the manner required by the statute.

In the only two cases, however, where the precise question herein involved was decided by this court, the court held that the failure of the record of the inquest proceedings in the county court to show the jurisdictional facts did not render the judgment void. Thus, in the case of Porter, etc., v. Eastern Kentucky Asylum for the Insane, 121 Ky. 816, 90 S. W. 263, 28 Ky. Law Rep. 796, where the asylum sought to recover for keeping a lunatic, and the lunatic defended on the ground that the inquest was void, the court said: "While the inquest is void if held without notice to the lunatic and without his presence at the trial, this fact is not shown by the inquest held here. The reasonable construction of the record is that the lunatic was in the custody of the court. The law requires his presence at the inquest, and the presumption is that the officer did his duty. If he was not present at the inquest, this fact may be set up by plea."

And in the recent case of Eversole v. Eastern Ky. Asylum for the Insane, 100 S. W. 300, 30 Ky. Law Rep. 989, the court said: "Appellant further objects and excepts to the report of sale, because the petition in the circuit court does not disclose the fact that Isaah Daugherty was in the presence of the jury in person, or by notice, when he was adjudged to be a lunatic in 1890, in the Harlan county court. This, we apprehend, is appellant's real objection to the confirmation of the sale. It is true this court in the case of Taylor v. Moore, 112 Ky. 330, 65 S. W. 612, 23 Ky. Law Rep. 1572, says: 'The rule is elementary that in courts of limited or special jurisdiction the jurisdictional facts must appear upon the record or the judgment is a nullity.' And in support of this ruling Newman's Pleading, p. 49, is cited, and in the case of Stewart v. Taylor, 111 Ky. 247, 63 S. W. 783, 23 Ky. Law Rep. 577, this court said: 'That an inquest held without the presence of the person charged, and without notice to him, was void.' In each of these cases, however, this court was referring to the condition of the record in the county court, and in each case it was affirmatively shown that the record in the county court disclosed the fact that the person on trial on the insanity charge was not present in court, or his personal presence dispensed with by the affidavits required by statute. But this court, in the recent case of Porter v. Eastern Kentucky Asylum for the Insane [121 Ky. 816], 90 S. W. 263, 28 Ky. Law Rep. 796, held that the presumption that the officers in the county court did their duty would prevail, and that it was the duty of one attacking the validity of the judgment to affirmatively plead and show that the lunatic was not present in court at the trial. The pleadings in the case before us allege that Isaah Daugherty was committed to the plaintiff institution from the county of Harlan, December 13, 1890, by order of the county court of Harlan county, which had jurisdiction of the party and the subject-matter, and, in the absence of any allegation to the contrary, as said in the case of Porter v. Eastern Kentucky Asylum for the Insane, supra, the presumption is that the trial in the Harlan county court was in due form and that the requirements of the statutes were fully complied with."

While it is true that the language employed in Crown Real Estate Co. v. Rogers' Committee, etc., supra, and in Taylor v. Moore, supra, is supported by the earlier cases on the subject, the tendency of the more recent cases is to relax the rule, and to conform to the views announced in Porter v. Eastern Ky. Asylum for the Insane and Eversole v. Eastern Ky. Asylum for the Insane, supra. Thus in Jolley v. Foltz, 34 Cal. 321, where the question was directly involved and decided, the Supreme Court of that state held that any fact essential to jurisdiction might be shown by evidence aliunde. In Van Deusen v. Sweet, 51 N. Y. 381, objection was made to the record of an inquest of lunacy held by a county court, on the ground that the record did not show the jurisdictional fact of residence, etc. The court said: "In answer to which it is sufficient and only necessary to say that the record is not required to show affirmatively and on its face these facts. It is enough that they did exist and were properly shown to the court; and as it was not on the trial claimed in support of either the first or sixth objection that they were not established by proof, it is too late to raise the question on this appeal. If it had been raised at that time, the objection could have been obviated by competent testimony."

The same rule was announced by this court in Singleton v. Cogar, 7 Dana, 479. In that case the validity of a judgment of a circuit court, in the exercise of a special and limited jurisdiction, ordering a guardian to sell real estate descended to infants, was involved. The record failed to show the jurisdictional fact that the real estate was acquired by descent; but, this fact being shown, the court refused to hold the judgment void. In discussing the question, the court said: "The difference is between that which the record affirms or imports, and that respecting which it is altogether silent—between what appears, and that which does not appear in it. In such a case, that concerning which such a record is silent may be supplied by extraneous proof, because such evidence could not be inconsistent with anything either expressed or implied by the higher grade of proof—the record. If, in this case, Cogar's title was acquired by descent, his guardian had in fact legal authority to sell the land, with the concurrence of the circuit judge; and that judge had in fact jurisdiction to authorize the sale, and therefore the sale and conveyance to Single-

ton were in fact not void. * * * Therefore it does not appear to us that, as in a proceeding conformable with the statute in every other respect that the omission to show clearly that the title had descended to the ward, the guardian, under the sanction of the court, sold land which in fact had descended to his ward, and which, therefore, he had a right thus to sell, his sale should not now be deemed void. And it appears to us, also, that, as the whole proceeding was only a statutory mode of conveyance, the fact that nothing was sold but that which the statute authorized the guardian and the court to sell may be proved in support of the validity of the sale, when the proof of it will not in any degree contradict the record, nor any judicial deduction from it."

While the county court is not authorized to hold an inquest unless the circuit court is not in session, and unless the person to be tried is present in the court, or his presence is dispensed with in the manner required by statute, there is nothing in the statute that requires these jurisdictional facts to be shown by the record of the proceedings. That being true, we see no reason why proof aliunde may not be heard to sustain the judgment, where the record itself is silent as to such jurisdictional facts. Of course, if the record speaks, it cannot be impeached, except in a direct proceeding based on fraud or mistake. If the record is silent, and the statute does not require it to speak, evidence aliunde to show a jurisdictional fact in no way impeaches the record.

The harshness of the rule holding a judgment on an inquest, rendered in a county court, void because the jurisdictional facts do not appear of record, is well illustrated in this case. It is admitted that the Franklin circuit court was not in session when the inquest was held in the Franklin county court. Notwithstanding this fact, we are asked to hold that a judgment of inquest is void merely because the record of the county court fails affirmatively to show that the Franklin circuit court was not in session. It seems to us that the better and safer rule is to follow the doctrine announced in Porter v. Eastern Ky. Asylum for the Insane, supra, and hold the judgment affirmatively valid, in the absence of a plea and proof that the circuit court was in session when the inquest was held. As it is admitted that the Franklin circuit court was not in session when the inquest proceedings were held, it follows that the judgment of the Franklin county court, adjudging W. H. Darnell to be of unsound mind, and the order appointing the Capital Trust Company as his committee, are valid.

[2] But it is insisted that the order of sale is void as to W. H. Darnell, a person of unsound mind, because no service of process was had upon the Louisville Title Company's answer, counterclaim, and cross-petition. While it is true that the Louisville Title Company was not made a party defendant to the original petition, it was made a party defendant to the answer and cross-petition of Mary E. Darnell, executrix. Thereupon it filed its answer, counterclaim, and cross-petition, setting up its lien. Subsequently plaintiffs, including the Capital Trust Company, as committee of W. H. Darnell, filed an amended petition, wherein they alleged that they failed to state that the Louisville Title Company had a mortgage lien on the property on Haldeman avenue, and asked that that company be made a party defendant and required to set up its claim. Thereupon the Louisville Title Company entered its appearance to the amended petition, and it was stipulated and agreed between plaintiffs and defendants, and ordered by the court, that the answer, counterclaim, and cross-petition of the Louisville Title Company be taken as its answer and counterclaim to the amended petition, with the same effect as if then filed. As the mortgage lien of the Louisville Title Company was on the lot of ground located on Haldeman avenue, and plaintiffs themselves asked that it be sold, there can be no doubt that the pleading setting up this lien is necessarily connected with the subject of the action embraced in the petition, and is therefore properly a counterclaim against the plaintiffs. Civil Code, § 96.

Section 97, subsec. 2, provides: "No summons is required upon a set-off or counterclaim against the plaintiff." This section applies to plaintiffs generally, and does not make any exception in the case of plaintiffs who are under disability. As the Louisville Title Company was made a party defendant by the amended petition, and entered its appearance thereto, and the court ordered that its answer and counterclaim be made a counterclaim to the amended petition, and as no process was required thereon against the plaintiffs, we conclude that the plaintiff and incompetent, William H. Darnell, was properly before the court on the answer and counterclaim, and that his interest in the property sold passed by the judgment.

It follows that the exceptions to the report of sale should have been overruled.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

(149 Ky. 188.)

WILLIAMS v. BRUSH CREEK COAL CO.

(Court of Appeals of Kentucky. June 20, 1912.)

1. BOUNDARIES (§ 3*) — CORNERS — NATURAL OBJECTS—COURSES AND DISTANCES.

Where a corner called for in a survey is a natural object which can be located on the ground, courses and distances must yield, if necessary, to reach the corner.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3–41; Dec. Dig. § 3.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

File in one of the Formaldehyde Case files

GULF SOUTH INSULATION, et al., Petitioners,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION, Respondent.

C.P. CHEMICAL COMPANY, INC., et al., Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION, Respondent.

PUBLIC CITIZEN, Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION, Respondent.

The FORMALDEHYDE INSTITUTE, INC., for and on behalf of its members, Virgil E. Stewart, Jr. and William E. Nash, Petitioner,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION, Respondent.

Nos. 82-4218, 82-4136, 82-4311 and 82-4135.

United States Court of Appeals, Fifth Circuit.

April 7, 1983.

On petitions for review of an order of the Consumer Product Safety Commission, the Court of Appeals, Clark, Chief Judge, held that: (1) record developed before the Commission did not contain the substantial evidence necessary to support the Commission's ban on use of urea-formaldehyde foam insulation, and (2) record being totally devoid of evidence to support extension of the ban to schools, Commission improperly proceeded under Consumer Product Safety Act, and Commission's desire to avoid complex and lengthy nature of rule-making proceeding that would be required under the Federal Hazardous Substances Act was not sufficient reason to proceed under CPSA.

Rule vacated.

1. Consumer Protection ⇐14

Under substantial-evidence test, applicable to product standards promulgated by United States Consumer Product Safety Commission, facts that detract from agency position as well as those that support it are to be considered, and if record contains such relevant evidence as reasonable mind might accept as adequate to support conclusion, Commission has sustained its burden of adducing substantial evidence on record as a whole and rule must be affirmed, but if not, rule must be vacated. Consumer Product Safety Act, §§ 9(f)(1, 3), (f)(3)(A), 11(a, c), as amended, 15 U.S.C.A. §§ 2058(f)(1, 3), (f)(3)(A), 2060(a, c).

2. Consumer Protection ⇐11

In-home study focused on complaint residences, not average residences, not randomly selected residences, and studies reflecting conditions similar to unheated, unair-conditioned home, not average home, were inadequate to serve as data base for assessment of risk of cancer from use of urea-formaldehyde foam insulation. Consumer Product Safety Act, §§ 2 et seq., 8, 31(a), 35, as amended, 15 U.S.C.A. §§ 2051 et seq., 2057, 2080(a), 2082; § 10, 15 U.S.C. (1976 Ed.) § 2059.

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3. Consumer Protection ⇐14

It was not good science to rely on single experiment, particularly one involving only 240 rats, to make precise estimates of cancer risk, and problem was exacerbated by other concerns including fact that rats in fact were exposed regularly to much higher doses than average level of exposure and for such reason as well as Consumer Product Safety Commission's improper reliance on in-home data gathered largely from complaint homes failed to support finding of unreasonable risk of cancer from use of urea-formaldehyde foam insulation. Consumer Product Safety Act, §§ 9(f)(1, 3), (f)(3)(A), 11(a, c), as amended, 15 U.S.C.A. §§ 2058(f)(1, 3), (f)(3)(A), 2060(a, c).

4. Consumer Protection ⇐11

Taken as a whole, complaints of acute irritant effects from use of urea-formaldehyde foam insulation identified real problem, but regulation could not issue unless severity of injury that might result from product, factored by likelihood of injury, offset harm which regulation imposed upon manufacturers and consumers, and failure of complaints to demonstrate how likely it was that acute symptoms would occur required setting aside United States Consumer Product Safety Commission's ban on use. Consumer Product Safety Act, §§ 2 et seq., 8, 9(f)(1, 3), (f)(3)(A), 11(a, c), as amended, 15 U.S.C.A. §§ 2051 et seq., 2057, 2058(f)(1, 3), (f)(3)(A), 2060(a, c).

5. Consumer Protection ⇐14

United States Consumer Product Safety Commission can proceed under less stringent procedural provisions of Consumer Product Safety Act, rather than under Federal Hazardous Substances Act, only if Commission shows either that risk could not be regulated sufficiently under Federal Hazardous Substances Act or that it is in public interest to proceed under the Consumer Product Safety Act. U.S.C.A. Const.Amend. 6; Consumer Product Safety Act, § 30(d), as amended, 15 U.S.C.A. § 2079(d); Federal Hazardous Substances Act, §§ 2–21, 3(a)(2), 15 U.S.C.A. §§ 1261–1276, 1262(a)(2).

6. Consumer Protection ⇐14

Record being totally devoid of evidence to support extension, to schools, of ban on use of urea-formaldehyde foam insulation, Consumer Product Safety Commission improperly proceeded under Consumer Product Safety Act, and Commission's desire to avoid complex and lengthy nature of rulemaking proceeding that would be required under Federal Hazardous Substances Act was not sufficient reason to proceed under CPSA. U.S.C.A. Const.Amend. 6; Consumer Product Safety Act, § 30(d), as amended, 15 U.S.C.A. § 2079(d); Federal Hazardous Substances Act, §§ 2–21, 3(a)(2), 15 U.S.C.A. §§ 1261–1276, 1262(a)(2).

Petitions for Review of an Order of the Consumer Product Safety Commission.

Before CLARK, Chief Judge, THORNBERRY and POLITZ, Circuit Judges.

CLARK, Chief Judge:

On April 2, 1982, the Consumer Product Safety Commission (Commission) concluded a six-year investigation and rulemaking with the issuance of a final rule banning urea-formaldehyde foam insulation (UFFI) in residences and schools. Ban of Urea-Formaldehyde Foam Insulation, 47 Fed. Reg. 14,366 (1982) (to be codified at 16

C.F.R. pt. 1306). The Commission found that UFFI presents an unreasonable risk of injury from irritation and cancer and that no feasible product standard exists that would adequately protect the public from these hazards.[1]

Petitions seeking review of the rule were filed in this court and in the United States Court of Appeals for the District of Columbia Circuit. In an opinion dated July 2, 1982, this court was determined to be the proper venue. Consolidation here of all petitions for review was ordered. *Formaldehyde Institute, Inc. v. CPSC,* 681 F.2d 255 (5th Cir.1982).

In all, four petitioners take exception to the UFFI ban. In Nos. 82–4135 and 82–4218, the Formaldehyde Institute and Gulf South Insulation (together "the industry") challenge the ban generally. In No. 82–4136, C.P. Chemical Company argues that its product, Tripolymer 105, is safer than typical UFFIs and should have been exempted from the ban. Only Public Citizen, in No. 82–4311, complains that the ban was too narrow. It contends that the prohibition of UFFI should have extended to all structures, not just residences and schools,[2] and that the Commission exceeded its statutory authority in incorporating an exemption feature into the rule.

The record developed before the agency does not contain the substantial evidence necessary to support the Commission's ban. Accordingly, we grant the industry's petitions for review and vacate the Commission's rule. Because of this decision, we do not address the issues raised by C.P. Chemical and Public Citizen.

I. THE PRODUCT

UFFI is a thermal insulation material used in residences and other buildings. It is manufactured at the job site by mixing a liquid resin containing formaldehyde, a foaming agent, and compressed gas. The resulting liquid foam, which resembles shaving cream, is pumped into the walls of the building being insulated. After a time the mixture solidifies.

According to the industry, UFFI exhibits several characteristics that make it a particularly attractive insulation alternative. Although relatively inexpensive, it has excellent thermal resistance and energy conservation properties. Unlike some other insulation materials, it is resistant to fire.[3] Perhaps most important, UFFI is well suited for installations in existing structures, termed by the industry the "retrofit" market.

1. Findings of unreasonable risk and no feasible product standard are essential to support a product ban under the Consumer Product Safety Act. 15 U.S.C. § 2057.

2. The Commission's proposed rule, which was published February 5, 1981, at 46 Fed.Reg. 11,188 (1981), banned installation of UFFI in all structures. The Commission stated that the final rule was limited to residences and schools because of a dearth of exposure data about other types of buildings. 47 Fed.Reg. at 14,399. The response to Public Citizen's petition reveals an additional insight into the decision not to make the ban pervasive. The Commission was reluctant to regulate UFFI in buildings within the regulatory province of the Occupational Safety and Health Administration. *See* 15 U.S.C. § 2080(a) ("The Commission shall have no authority under this chapter to regulate any risk of injury associated with a consumer product if such risk could be eliminated or reduced to a sufficient extent by actions taken under the Occupational Safety and Health Act ....").

3. Congress enacted the Emergency Interim Consumer Product Safety Act of 1978, Pub.L. No. 95–319, 92 Stat. 286 (codified at 15 U.S.C. § 2082), specifically to deal with the fire hazard posed by cellulose insulation.

The attribute of UFFI that spawned this rulemaking is its propensity to emit formaldehyde gas. Formaldehyde is a colorless gas composed of carbon, hydrogen, and oxygen.[4] It is present in every cell in the human body and in the atmosphere. Formaldehyde has been in widespread commercial use for almost a century. Seven billion pounds per year are produced in the United States. According to the industry, formaldehyde is a component of products aggregating 8% of this country's Gross National Product. Approximately half of the formaldehyde produced in the United States is used in preparing bonding resins. These resins are used in producing plywood, particleboard, fiberboard and permanent press products, in addition to UFFI. Such products as shampoo, toothpaste, cosmetics, and paper towels also contain formaldehyde.

II. THE RULEMAKING

The Commission's involvement with UFFI began in October 1976 when the Metropolitan Denver District Attorney's Consumer Office filed a petition under 15 U.S.C. § 2059 requesting development of a safety standard for certain home insulation products, including UFFI.[5] After reviewing the available literature on the health problems linked to formaldehyde exposure, the Commission on March 5, 1979, instructed its staff to gather additional information about UFFI. 44 Fed.Reg. 12,080 (1979).

A. Formaldehyde Levels

The Commission's initial step was to determine the average levels of formaldehyde in UFFI homes and non-UFFI homes. The agency obtained results of formaldehyde measurements in 1,164 UFFI homes. The tests showed that formaldehyde levels are highest for several months after installation. They then decrease gradually over a several-year period, eventually approaching ambient levels. The Commission determined that the average level of formaldehyde over a nine-year period after installation of UFFI is .08 parts per million. In tests of 103 non-UFFI homes, an average level of .03 ppm was found.

To obtain more data, the Commission arranged tests on a number of commercially available UFFI products in simulated wall panels. The tests were conducted by the Franklin Institute Research Laboratory (Franklin Lab), the Oak Ridge National Laboratory (Oak Ridge Lab), and the Commission Engineering Laboratory. The Oak Ridge Lab concluded that the panels emitted formaldehyde at levels ranging from .03–.44 ppm sixteen months after foaming. The average level was .13 ppm.

B. Acute Irritant Effects

The Commission's primary concern when it began investigating UFFI was the link between formaldehyde exposure and acute irritant symptoms. According to the agency, these symptoms include eye, nose, and throat irritation, persistent cough, respiratory distress, skin irritation, nausea, headaches, and dizziness.

From 1979 to 1981 the Commission investigated 350 homes whose occupants had complained of adverse health effects related to UFFI. The agency obtained information about the particular UFFI product in-

4. The chemical formula for formaldehyde is HCOH.

5. Section 2059 has since been repealed by Congress, effective August 13, 1981. Pub.L. No. 97–35, § 1210, 95 Stat. 721.

stalled, the method of installation, the surrounding environment, and the symptoms suffered by household members. According to the Commission, numerous families were forced to evacuate their homes after installation of UFFI, and in several cases acute symptoms were so severe that hospitalization was required. The agency concluded that "taken as a whole, the complaints do identify a real problem." 47 Fed.Reg. at 14,382.

The agency commissioned the National Academy of Sciences to determine whether there is a level of formaldehyde exposure below which no acute symptoms will be experienced. After reviewing the available scientific literature, the Committee on Toxicology, a group of experts empaneled by the academy, concluded that there is no threshold for the irritant effects of formaldehyde. According to the committee, even at concentrations of formaldehyde below .25 ppm somewhat less than 20% of the population may experience some degree of irritation.

Based on this finding and its own complaint data, the Commission reached the conclusion that formaldehyde emitted from UFFI poses an unreasonable risk of acute irritant effects.

C. Carcinogenicity

While the investigation of acute effects was ongoing, the industry apprised the Commission of the preliminary results of a Chemical Industry Institute for Toxicology (Chemical Institute) study linking formaldehyde exposure at high levels to nasal cancer in rats. The agency subsequently established the Federal Panel on Formaldehyde, a group of sixteen scientists from various government agencies, to evaluate the Chemical Institute findings. The panel concluded that the Chemical Institute study was valid and that formaldehyde should be presumed to pose a carcinogenic risk to humans.

The Commission's next step was to extrapolate from the high exposure rat data in order to quantify the risk of cancer to humans at the low levels of formaldehyde exposure associated with UFFI. To perform this task, the agency selected a computerized mathematical risk assessment model called Global 79. Global 79 was chosen over a number of other predictive models because it incorporated several assumptions the Commission believed were applicable to formaldehyde carcinogenesis. Unlike some other models, Global 79 does not predict an actual or most likely risk. Rather it predicts a range of risk within which there is a 95% possibility the actual risk will fall. Based on the actual formaldehyde levels found in the tests of 1,164 homes, the model predicted that the increased risk of cancer to a person living in a UFFI home for 9 years, 16 hours a day, would range from 0 to 51 in 1,000,000. From the results of the Franklin and Oak Ridge Labs studies, Global 79 predicted a risk range of between 0 and 37 in 1,000,000.[6]

6. As we have noted, the Commission concluded from the in-home tests that the average formaldehyde level in a UFFI home over a nine-year period is .08 ppm. The average level found in the Franklin/Oak Ridge Lab studies was .13 ppm. It seems anomalous, then, that Global 79 predicted a higher risk from the in-home data than from the Franklin/Oak Ridge Lab data. The explanation for this discrepancy apparently lies in the Commission's use of the declining curve of formaldehyde levels found in the in-home tests, not the average level, in the Global 79 risk assessment.

From the Global 79 analysis of the Chemical Institute rat study, the Commission concluded that UFFI poses an unreasonable risk of cancer to humans. This determination, coupled with the agency's finding of an unreasonable risk of acute irritant effects, is the reason for the ban. The Commission acknowledges that unless substantial evidence supports both its carcinogenicity and acute effects findings the ban was not proper.

The industry challenges both of these findings and the procedures employed by the Commission in reaching them. Before addressing these contentions in detail, we outline the standard by which we review rules promulgated under the Consumer Product Safety Act (Act).

III. STANDARD OF REVIEW

The Act contains detailed procedures the Commission must follow in issuing consumer product safety rules. Numerous findings are mandated. *See* 15 U.S.C. § 2058(f)(1) and (f)(3). Under section 2058(f)(3)(A), the Commission is expressly prohibited from promulgating a safety rule unless it finds that the product that will be subject to the rule poses an unreasonable risk of injury. The central focus of our analysis is on the Commission's finding that UFFI poses such a risk.

Jurisdiction to review rules issued under the Act is vested in the courts of appeals. 15 U.S.C. § 2060(a).[7] Section 2060(c) provides that a consumer product safety rule shall not be affirmed "unless the Commission's findings ... are supported by substantial evidence on the record taken as a whole." Our specific inquiry, then, is whether the Commission's finding that UFFI poses an unreasonable risk of injury is supported by substantial evidence.

[1] The leading decision in this circuit on the meaning of the substantial evidence test in the context of this Act is *Aqua Slide 'N' Dive v. CPSC,* 569 F.2d 831 (5th Cir. 1978), which involved the first product standard the Commission promulgated. There we found that "Congress put the substantial evidence test in the statute because it wanted the courts to scrutinize the Commission's actions more closely than an 'arbitrary and capricious' standard would allow." *Id.* at 837 (citing H.R.Rep. No. 1153, 92d Cong., 2d Sess. 38 (1972); S.Rep. No. 749, 92d Cong., 2d Sess. 35 (1972); 118 Cong.Rec. 31378 (1972) (remarks of Cong. Moss)).[8] The facts that detract from the agency as well as those that support it are

7. Section 2060(a) authorizes petitions for review to be filed in the United States Court of Appeals for the District of Columbia Circuit or the court of appeals for the circuit in which the petitioner resides or has its principal place of business.

8. In *Aqua Slide* we noted the inherent difficulty of applying this heightened standard to the informal record developed in a rulemaking proceeding under the Act.

> The result is a legislative anomaly. Congress has mandated that the courts take a harder look, but has provided for a record whose volume, technical complexity, and remote relationship to the actual decisionmaking process of the agency impede clear vision.... A reviewing court must either "scour the four corners of the record to find [the] evidence for itself," *Ethyl Corp. v. EPA,* 176 U.S.App. D.C. 373, 439, 541 F.2d 1, 67 (1976) (Bazelon, J. concurring) or rely exclusively on citations provided by counsel, *Texas v. EPA,* 499 F.2d 289, 297 & n. 8 (5th Cir.1974), *cert. denied,* 427 U.S. 905, 96 S.Ct. 3191, 49 L.Ed.2d 1199 (1976).

569 F.2d at 837. This difficulty is compounded in the instant case. The informal record developed below consists of 102 volumes. Fortunately for the review process, the text of the rule outlined which parts of the record the Commission relied on, which it rejected, and why.

to be considered. *Id.* at 838 (citing *Universal Camera v. NLRB,* 340 U.S. 474, 478, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951)). "The ultimate question is whether the record contains 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938)). If it does, the Commission has sustained its burden of adducing "substantial evidence on the record as a whole" and the rule must be affirmed. *Id.* If not, the rule must be vacated.

In attacking the UFFI ban, the industry and amici [9] leave very few stones unturned. They take issue with numerous aspects of the Commission's findings with respect to acute irritant effects. The bigger salvo, however, is aimed at the finding that UFFI poses an unreasonable risk of injury from cancer. We therefore address the Commission's cancer risk assessment first.

IV. THE RISK OF CANCER FROM UFFI

As we have noted, the Commission incorporated the results of the Chemical Institute high-exposure rat study into its Global 79 computerized risk assessment model in order to predict the cancer risk to humans at the low levels of formaldehyde exposure associated with UFFI. Based on actual formaldehyde levels found in 1,164 homes, the Commission found that "[a]ny individual living in a home with U.F. foam insulation for 9 years after installation would, according to the assessment, have an additional risk of 51 in a million of developing cancer from the formaldehyde released by the insulation." 47 Fed.Reg. at 14,372. The Franklin/Oak Ridge Lab studies predicted an additional risk of 37 in a million.

According to the industry, these predictions are flawed for a number of reasons. The industry argues that: (1) neither the formaldehyde levels found in the 1,164 test homes nor the Franklin/Oak Ridge Labs test results are accurate indicators of the formaldehyde levels in average UFFI homes; (2) the Commission erred in relying exclusively on the Chemical Institute rat data in its risk assessment model and ignored numerous epidemiologic studies indicating that formaldehyde is not a human carcinogen; (3) the Commission ignored the real explanation for the incidence of tumors at the high levels of formaldehyde exposure involved in the Chemical Institute study; (4) no substantial evidence supports the Commission's assumption that the effective formaldehyde dose for humans is the same as that for rats; (5) Global 79 incorporates several assumptions about formaldehyde carcinogenicity that are not supported by substantial evidence; (6) Global 79 predicts only an upper limit of risk and does not constitute substantial evidence that "it is at least more likely than not that [UFFI] presents a significant risk of [cancer]," *Industrial Union Dept. AFL–CIO v. American Petroleum Inst.,* 448 U.S. 607, 653, 100 S.Ct. 2844, 2869, 65 L.Ed.2d 1010 (1980); and (7) other federal agencies have determined that formaldehyde does not pose a substantial health risk to man. We need examine only the first two contentions in detail.

A. Formaldehyde Levels

[2] At the outset, the industry asserts that the average formaldehyde level attrib-

9. Our disposition of this case is aided by *amicus curiae* briefs filed by the American Council on Science and Health and the Washington Legal Foundation, which urge us to vacate the ban, and the National Consumers League, which seeks its affirmance. Our references to positions taken by the industry and by the Commission include arguments of the *amici.*

uted by the Commission to UFFI homes is inaccurate and grossly exaggerates the true level. In fact, the industry contends that there is no significant difference between formaldehyde levels in UFFI homes and non-UFFI homes.

According to the industry, the in-home measurements, which resulted in a predicted additional risk of cancer of 51 in a million, were scientifically invalid and do not constitute substantial evidence. The industry points out that the great majority of the tests were conducted by state agencies, not Commission personnel. Measurement methodologies differed from state to state. Twenty percent of the test homes were located in Massachusetts and Minnesota, where measurement techniques of questionable accuracy were used. More important, the test homes were not randomly chosen. A large percentage of the measurements taken were in residences whose occupants had complained about UFFI-related health problems.[10] According to the industry, this tended to overstate the actual average level. Additionally, the high formaldehyde levels that were recorded in many of the "complaint" homes were the result of faulty installation.[11] These problems could be eliminated by a product standard. The industry concludes that the Commission should have conducted its own tests of randomly selected UFFI homes before taking the draconian step of a product ban.

The industry also asserts that the Franklin/Oak Ridge Labs test data do not accurately predict formaldehyde levels in actual homes. It notes that only nine panels were tested and that the results varied widely around the mean of .13 ppm.[12] The industry also argues that storage of the panels in extreme conditions invalidated the test results.[13] Additionally, the industry contends that the test did not account for the air flow and exchange that occurs in actual homes and that Oak Ridge Lab recognized that this failure could lead to errors of two- to threefold. According to the industry, even the Commission recognized that in-home measurements could not be extrapolated from the Franklin/Oak Ridge Labs data.

The industry bases its claim that formaldehyde levels in UFFI homes do not differ significantly from levels in non-UFFI homes on three studies. A University of Iowa study conducted by Dr. Frank found no difference in formaldehyde levels in randomly selected UFFI and non-UFFI homes.[14] Studies conducted by the Canadian government and by Dr. Firstman of the Georgia Institute of Technology detected only negligible differences.[15] The industry

10. Of the 1,164 in-home measurements, 827 were conducted in complaint homes, 337 in non-complaint homes.

11. Installation errors included placing UFFI in ceilings, attics, or interior walls rather than limiting it to exterior walls. Improper mixing of chemicals also resulted in atypically high measurements.

12. Seven of the nine panels produced a mean result of .07 ppm. The other two were considerably higher, however, and raised the mean for the entire group to .13 ppm.

13. The panels were stored horizontally under black plastic sheeting in an open carport for nine to twelve months.

14. Dr. Frank's study actually found an average level of .059 ppm in UFFI homes compared to .063 in non-UFFI homes.

15. The Canadian study found an average level of .054 ppm in 1,146 UFFI homes that were the subject of inquiries, .04 ppm in 651 randomly selected UFFI homes, and .034 ppm in 378 non-UFFI homes. Dr. Firstman concluded that UFFI appears to add, at most, .01 ppm formaldehyde to the home environment.

also relies on *Borden v. Commissioner of Pub. Health,* No. 38,478, slip. op. (Mass.Super.Ct. Jan. 19, 1982), which overturned as arbitrary and capricious a state ban of UFFI. The *Borden* court specifically found that "there has been no showing that the ambient level of formaldehyde concentration in houses in which UFFI has been properly installed is significantly more appreciable or different than the level of formaldehyde in houses without UFFI." Slip op. at 20.

The Commission contends that the Frank, Firstman, and Canadian studies were invalid. None of the three considered the length of time that had elapsed since installation of the UFFI, a vital factor in the level of formaldehyde emitted. Therefore, they do not support the claim that UFFI adds only trace amounts of formaldehyde to the home environment.

The agency also defends its use of Franklin/Oak Ridge Labs data. It argues that the conditions to which the panels were exposed before testing were no worse than would exist in a home without heating or air-conditioning. The Commission does not address other concerns raised by the industry about the Franklin/Oak Ridge Labs studies, but nevertheless concludes that the study was valid because its results were similar to those obtained in the in-home tests. Two significant omissions with respect to the in-home tests cloud this conclusion. The Commission does not explain its reliance on a data base comprised largely of complaint houses. Nor does the agency justify its failure to conduct a study of randomly selected UFFI homes before issuing the product ban.

We do not reach the conclusion the *Borden* court did. The studies relied on by the industry do not demonstrate conclusively that formaldehyde levels in UFFI and non-UFFI homes are essentially the same. As the Commission notes, age is a vital factor in the level of formaldehyde emitted by UFFI. The in-home and Franklin/Oak Ridge Labs studies do suggest that UFFI appreciably raises in-home formaldehyde levels.

But the Commission did not use the studies only to support such a generalized finding. They were also incorporated into an exacting, precise, and extremely complicated risk assessment model. The goal of the model was to determine the risk of cancer to a consumer living in an average UFFI home. The difficulty in reaching this goal is that neither the in-home nor the Franklin/Oak Ridge Labs studies were consistent with this aim. The in-home study focused on complaint residences, not average residences, not randomly selected residences. The Franklin/Oak Ridge Labs studies reflected conditions similar to an unheated, unair-conditioned home, not an average home. The similar results achieved by the two studies validate neither. The studies were inadequate to serve as a data base for the Global 79 risk assessment.

B. Evidence of Carcinogenicity: Epidemiologic Data and the Chemical Institute Study

[3] The industry next contends that the numerous studies of humans exposed to formaldehyde in the workplace discredit the Commission's finding that formaldehyde is carcinogenic at low levels. Eleven epidemiologic studies involving a total of 10,000 workers were introduced into the record. None of the studies' authors found a statistically significant increase in the number of cancers among workers exposed to formaldehyde compared to the general population. The largest studies were con-

ducted by Dr. Marsh, who found no nasal cancer and no dose-response relationship between formaldehyde exposure and other respiratory cancers among 2,490 formaldehyde workers; Drs. Walrath and Fraumeni of the National Cancer Institute, who found no nasal cancer mortality and no unusual respiratory cancer mortality in their study of 1,106 morticians; and Dr. Wong of Tabershaw Occupational Medical Associates, who found no nasal cancer mortality or excess respiratory cancer mortality among 2,026 formaldehyde workers. Dr. Wong concluded that "at this point there is no epidemiologic evidence that formaldehyde is a human carcinogen."

The industry also relies on studies that were not completed until after the close of the record. The Federal Panel on Formaldehyde, which was convened by the Commission to assess the carcinogenicity of formaldehyde, stated in its recommendations to the agency that three pending studies of embalmers would "provide a good estimate of potential risk from formaldehyde exposure." [16] Results in two of the three have now been released.[17] In neither were nasal cancers or excess respiratory cancers found.

Finally, the industry points to statements made by Dr. Higginson, former director of the International Agency for Research on Cancer, in a letter submitted to the Commission shortly before issuance of the ban. Dr. Higginson stated that the epidemiologic data "are insufficient to exclude a minimal risk, but certainly they weigh heavily against the view that formaldehyde constitutes any considerable risk for nasal cancer to man." He also wrote that "[e]xact estimates as to the number of cases of a cancer that might be expected to occur in man based on a single experiment [the Chemical Institute rat study] are silly and simply ignore biological realities."

The Commission defends its reliance on the Chemical Institute rat data by reminding us that the Federal Panel found the study valid and concluded that formaldehyde should be presumed to pose a carcinogenic risk to humans. The agency rejects the industry's contention that the available epidemiologic evidence demonstrates that formaldehyde is safe. The Commission points to the small number of workers involved in the epidemiologic studies and their failure to account for the duration and concentration of formaldehyde exposure.

Again, the truth appears to lie somewhere between the positions taken by the Commission and the industry. We agree with the agency that the epidemiologic studies cited by the industry do not demonstrate conclusively that formaldehyde poses no cancer risk to man. The Commission concluded that the increased risk of cancer from formaldehyde exposure (at the levels it attributed to UFFI) was *up to* approximately 1 in 20,000 (51 in a million). It is highly unlikely that studies involving a total of 10,000 workers would detect such a small risk. Additionally, the failure to consider either the length of time the workers were exposed to formaldehyde or the levels to which they were exposed diminishes the studies' usefulness.

While the Commission correctly notes that the epidemiologic evidence is not con-

16. Two of the studies were conducted by Dr. Walrath, who collaborated with Dr. Fraumeni on the earlier National Cancer Institute study. The other was conducted by Dr. Levine.

17. The results of one of the Walrath studies have not yet been made public.

clusive, its exclusive reliance on the Chemical Institute study in its Global 79 risk assessment is equally unsupportable. In the study 240 rats were exposed to an average of 14.3 ppm formaldehyde for six hours a day, five days a week.[18] After 24 months 103 of the rats developed nasal carcinomas. This was the only empirical datum with respect to formaldehyde carcinogenicity that was incorporated into the Global 79 model. But in a study as small as this one the margin of error is inherently large. For example, had 20 fewer rats, or 20 more, developed carcinomas, the risk predicted by Global 79 would be altered drastically.[19]

The element of doubt present here is similar to that with respect to formaldehyde levels. The Federal Panel's findings that the Chemical Institute study was valid and that formaldehyde should be presumed to pose a cancer risk to man do not authenticate the use of the study's results, and only those results, to predict exactly the cancer risk UFFI poses to man. As Dr. Higginson aptly stated, it is not good science to rely on a single experiment, particularly one involving only 240 subjects, to make precise estimates of cancer risk.

18. Rats were also exposed to levels of 5.6 ppm and 2.0 ppm in the Chemical Institute study. Neither of these levels produced a statistically significant number of cancers.

19. A more recent study has been conducted at New York University. Of 200 rats exposed to 14.6 ppm formaldehyde for 18 months, only approximately 10% developed nasal carcinomas. The Commission does not explain the wide gap between the results of this study and the Chemical Institute study. Nor does it apprise us how many tumors the Global 79 model would have predicted under the conditions of the NYU study. The NYU study shows it is doubtful that an experiment replicating the conditions of the Chemical Institute study would achieve identical results.

This problem is exacerbated by concerns about the Chemical Institute study raised by the industry. Although the average level of formaldehyde exposure in the experiment was 14.3 ppm, the rats in fact were exposed regularly to much higher doses. The average daily high was a near-lethal 32.4 ppm. We do not have to agree with the industry that this disparity renders the study invalid for all purposes to conclude that the Commission could not properly use the study as it did. To make precise estimates, precise data are required.

C. Other Contentions

The industry attacks the Commission's cancer findings on several other grounds. Most of these relate to assumptions made by the Commission in its risk assessment. Although several of these contentions present substantial questions,[20] we do not address them. The predictions made by the risk assessment model are no better than the data base. We have concluded that this base was inadequate. The Commission improperly relied on in-home data gathered largely from complaint homes. It

20. At least two of the assumptions are of questionable validity. The Commission assumed that at identical exposure levels the effective dose for rats is the same as that for humans. The industry points out that the effective dose for mice is much less than that for rats and argues that it is far more sensible to assume that rats equal mice than that rats equal humans.

Probably the most controversial assumption incorporated into Global 79 is that the risk of cancer from formaldehyde is linear at low dose—in other words that there is no threshold below which formaldehyde poses no risk of cancer. As the Commission acknowledges, this assumption leads inescapably to the conclusion that ambient air is carcinogenic, albeit to a lesser extent that UFFI.

failed to conduct a controlled study of randomly selected residences. The result is that the Commission's finding that UFFI poses an unreasonable risk of cancer is not supported by substantial evidence on the record as a whole.[21]

V. ACUTE IRRITANT EFFECTS

[4] The Commission relied on its findings with respect to both cancer and acute irritant effects in promulgating the UFFI ban. With one of the two supports gone, the ban cannot stand.[22] Because of this our brief discussion of the agency's finding that UFFI poses an unreasonable risk of acute irritant effects is intended only to indicate that we would also find this conclusion to be unsupported by substantial evidence.

From its in-depth investigations, the Commission concluded that inhabitants of UFFI homes suffer eye, nose, and throat irritation, persistent cough, respiratory distress, skin irritation, nausea, headaches, and dizziness. The industry asserts that "in-depth" is a misleading misnomer. It points out that very few of the reported symptoms, which resemble those of influenza and colds, were diagnosed by physicians to be related to formaldehyde. Additionally, the industry notes that formaldehyde measurements were taken in very few homes. The industry takes the position that the complaint data are worthless and do not establish a causal relationship between UFFI and the symptoms reported. The Commission responds to this assessment with the following facts: Symptoms (1) were reported by more than one family member in many homes; (2) normally manifested themselves immediately after installation and often persisted for months or even years; (3) frequently dissipated outside the home; and (4) in several cases were verified to be linked to formaldehyde by physicians.

Certainly the investigations do not establish that all the reported symptoms were caused by formaldehyde emitted by UFFI. But the Commission's defense of its investigations persuades us that UFFI is not completely innocent. We agree that "taken as a whole, the complaints do identify a real problem." 47 Fed.Reg. at 14,382.

The problem is the complaints do no more. Specifically, they do not answer the question whether the risk of injury from acute irritant effects is unreasonable. This inquiry involves "a balancing test like that familiar in tort law: The regulation may issue if the severity of the injury that may result from the product, factored by the

21. The industry also refers to findings of other government agencies that are inconsistent with those of the Commission. After reviewing the Chemical Institute study and much of the other evidence relied on by the Commission, the Environmental Protection Agency concluded that formaldehyde does not present a significant risk of serious or widespread harm. The Food and Drug Administration made a similar determination. The Occupational Safety and Health Administration denied an emergency petition seeking to lower the present workplace standard from the present 3 ppm, a level many times that attributed by the Commission to UFFI.

These contrary pronouncements of course do not prove the Commission wrong, and we do not rely on them in reaching our decision. But they are disconcerting. Regulatory agencies such as these were created primarily to protect the public from latent risks. For them to be effective, the public must be confident in their ability to determine which products are unsafe, which drugs are dangerous, and which substances are carcinogenic. Interagency disagreement undermines such confidence.

22. Counsel for the Commission conceded at oral argument that we would have to affirm both findings in order to uphold the rule.

likelihood of the injury, offsets the harm the regulation imposes upon manufacturers and consumers." *Southland Mower v. CPSC,* 619 F.2d 499, 508–09 (5th Cir.1980) (quoting *Aqua Slide 'N' Dive,* 569 F.2d at 839). *See also* H.R.Rep. No. 1153, 92d Cong., 2d Sess. 33 (1972). What the complaints fail to demonstrate is how likely it is that acute symptoms will occur.

To fill this gap in the equation, the Commission points to the conclusion reached by the National Academy of Sciences' Committee on Toxicology. That committee found that somewhat less than 20% of healthy adults may respond to the irritant effects of formaldehyde at .25 ppm. For the Commission's purposes and ours, this finding is worth exactly nothing. First, it does not state whether the response at .25 ppm is expected to be slight or severe. All record evidence indicates the former.[23] Second, with the exception of the first few months after installation, .25 ppm is much higher than the formaldehyde level associated with UFFI. The committee did not address the risk at the appropriate level. Third, the agency states that the committee predicted that "somewhat less than 20%" of the population may respond at .25%. This, like the Commission's cancer prediction of "up to 51 in a million," provides us no basis for review under the substantial evidence standard.

We conclude that the Commission's finding that UFFI poses an unreasonable risk of injury from acute irritant effects is not supported by substantial evidence. The failure to quantify the risk at the exposure levels actually associated with UFFI is the finding's Achilles heel. Predicting how likely an injury is to occur, at least in general terms, is essential to a determination of whether the risk of that injury is unreasonable.

VI. THE CONSUMER PRODUCT SAFETY ACT vs. THE FEDERAL HAZARDOUS SUBSTANCES ACT

One procedural issue is tangential to our present review of the rule. It may nevertheless become important if the Commission wishes to take action with respect to UFFI in the future. The industry contends that the Consumer Product Safety Act is an improper vehicle for this rulemaking; that the rule should have been promulgated pursuant to the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261–1276. The rulemaking procedures mandated by the two acts differ substantially. The Consumer Product Safety Act provides for an informal rulemaking.[24] In contrast, the Federal Hazardous Substances Act requires a formal hearing, complete with rules of evidence and the right to confront and cross-examine witnesses. *See* 15 U.S.C. § 1262(a)(2). The Commission's failure to conduct such a hearing is the substantive reason for the industry's procedural objection.

[5] Congress has mandated which act's procedures the Commission must follow. In 15 U.S.C. § 2079(d), the Consumer Product Safety Act provides:

> A risk of injury which is associated with a consumer product and which could be eliminated or reduced to a sufficient

23. The record tends to indicate that the great majority of health problems actually caused by UFFI are attributable to anomalously high formaldehyde levels resulting from faulty installation. The industry has proposed a product standard with the aim of preventing such occurrences.

24. See note 9 *supra.*

> extent by action under the Federal Hazardous Substances Act ... may be regulated under this [Act] only if the Commission by rule finds that it is in the public interest to regulate such risk of injury under this [Act].

The Commission thus can proceed under the less stringent procedural provisions of the Consumer Product Safety Act if it satisfies one of two tests. It must show either that the risk could not be regulated sufficiently under the Federal Hazardous Substances Act or that it is in the public interest to proceed under the Consumer Product Safety Act rather than the Federal Hazardous Substances Act. The Commission asserts that it has met both tests.

[6] In support of its finding that UFFI could not be regulated adequately under the Federal Hazardous Substances Act, the agency points out that that Act is limited in scope to products for use in the household. 15 U.S.C. § 126(q)(1)(B). *See Barnes v. Litton Indus. Prod., Inc.,* 555 F.2d 1184 (4th Cir.1977). Unlike the final rule here, a regulation promulgated under the Federal Hazardous Substances Act could not have banned UFFI in schools. Additionally, the Commission notes that its original proposed rule extended to all buildings, not just homes and schools. 464 Fed.Reg. 11,188 (1981). The Commission argues that the intended scope of the rule when the proceeding was initiated should be determinative. Because the proposed rule was unlimited, the agency asserts that the Federal Hazardous Substances Act was wholly inadequate and its decision to proceed under the Consumer Product Safety Act cannot be challenged.

We reject the Commission's reliance on the need to regulate UFFI in schools to justify proceeding under the Consumer Product Safety Act. The record is totally devoid of evidence to support extension of the ban to schools. From the beginning the Commission focused its attention exclusively on homes. The cancer risk assessment used the formaldehyde levels found in the in-home tests [25] to predict the risk to a person present in a UFFI home for sixteen hours a day, seven days a week. No academic institution was shown to have a curriculum requiring such constant attendance. The in-depth investigations of acute effects also ignored schools. Only one complaint was received regarding a school. It was not investigated. We cannot understand why the Commission decided to extend the ban to schools unless it was to justify its decision to proceed under the Consumer Product Safety Act. Because the ban in schools was completely unsubstantiated, we find that it was insufficient for this purpose.

The agency's argument that a Consumer Product Safety Act rulemaking was justified because the proposed ban was unlimited is also unpersuasive. The initial selection of procedures must be based on assumptions made at the outset of the rulemaking. But if it immediately becomes apparent, as it did here, that other procedures should control, those procedures must be used. The record clearly demonstrates that the Commission never made any real attempt to address the risk from UFFI in buildings other than homes. This belies the major premise underlying the

25. The industry presented evidence that, because of different construction practices, UFFI installed in large buildings such as schools emits lower levels of formaldehyde than in homes. The Commission relied on this evidence in *Public Citizen* to justify its decision not to extend the ban to commercial buildings.

initial decision to proceed under the Consumer Product Safety Act, a decision that denied the industry important procedural rights guaranteed by the Federal Hazardous Substances Act. In our view the differences between the acts demand an ongoing evaluation of the facts as they develop. We need not decide here the extreme case where last minute proof indicates a change of procedures. Because the record makes clear that from the outset the Commission's entire effort was channelled to investigating the risk of UFFI in homes, we reject the finding that the risk could not have been regulated sufficiently under the Federal Hazardous Substances Act.

The Commission's finding that it was in the public interest to regulate UFFI under the Consumer Product Safety Act was based solely on a desire to avoid "the complex and lengthy nature of the rulemaking proceeding that would be required under the FHSA ...." 47 Fed.Reg. at 14,369. We reject this reasoning. If the due process procedures mandated by the Federal Hazardous Substances Act justify discarding it, the Commission would never have to use it. Congress has provided otherwise. Rulemaking under the Consumer Product Safety Act is to be the exception, not the rule. We do not say that it could never be in the public interest to regulate an extremely dangerous product under the Consumer Product Safety Act for the sake of speed and efficiency. We say only that UFFI is not such a product.

The Commission's decision to continue its rulemaking under the Consumer Product Safety Act was improper. The selection of procedures is too important to be based on unexplored theories and desires for administrative convenience. Any future regulatory effort directed at UFFI must be made pursuant to the Federal Hazardous Substances Act unless the Commission substantiates its decision to proceed under the Consumer Product Safety Act with the findings required by section 2079(d).

VII. CONCLUSION

We are not unmindful that regulating in the face of scientific uncertainty within ever-tightening budgetary constraints presents the Commission with a difficult task. We nevertheless cannot abdicate our role in the regulatory process. Congress and our circuit's precedents require us to take a "harder look" [26] to determine whether rules adopted under the Consumer Product Safety Act are supported by substantial evidence. That look discloses that the evidence is lacking here. The Commission's rule banning UFFI is

VACATED.

26. *Aqua Slide 'N' Dive*, 569 F.2d at 837.

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110 -

110(a) Ident Tag

16 Sept 1982

Jason Moore - purchased from. $200.00

at Booth residence

M1 Carbine - Plainfield.

30 Cal semi-auto.

rear sight Loose.

Ent N.R.M. 2"

111

15 Nov. 1983

Photo - Safety fuse w/ blasting

Cap affixed thereto.

Received from Basil Ray Moore

turned over to Robert Farar.

Cross - Patunda =

Ray-mac - guns were more modern and had a higher rate of fire.

Thomas =

did not get any gun or guns from Ray mac

Kirkland =

Cap + ~~fuse~~

Lead moore to believe that he would get a better deal.

Implied that deal made.

implied that gun may have belonged to someone other than Basil -

However, Kemp said - moore said, "it was his"

Harwell:

How his statement was made

doesn't remember making any notes

has statement - no notes

81 Ar Jun 2 507

Govt witness

1:15 Pearl Booth
McDowell

Phillip Gene Booth

She & husband Contract Mined for Ed Jones — he had mineral we put it on ground
Bryan Coal Co.

Bryan — Calamity

K — to put out Coal

1979 = Acquainted w/ Edgar Jones

Feb 82 — Deputy Sheriff

Statement about Ray-Mac shouldn't be allowed to strip in hollow above Bentley.
15 Mar 82
Went to office of Ed Jones

Ray-Mac — Turner & Cooley had underbid him — needed to arrange a strike.

Harwell
Pafunda
Walbrune
Spencer

All miners of his contract mines had to go on strike or they would lose their job.

She went to Bryan—

Told men there was going to be a strike - Told Johnson to make a belt set up and rest go on picket line.

Called Calamity.

Told Morris Ray that all men to go on strike.

Told men had to go on strike or we would lose our orders

Went back to office and Told Edgar men on picket line

Monday told her to get what was needed for men and if necessary to pay the men.

Went to to Phillips Parents and got mini 14 & 30-30 took to her house

Edgar Jones called:

have Phillips on picket line, men

She called Donahue Habert to get ammo. told him what was

going on - that we were going to stop Roy-mac from working non-Union

Donahue said - He would do anything to help us, but he wouldn't do nothing to help Edgar Jones

Monday evening -

men who worked for them and some on picket line came to her house

Rondy Blankenship
Eugene Tackett
Tim Mullins -
Hermit Newsome -
Rondy Moore

Hall

Talk

Guys accused on Monday were taken by Phillips to Pickett line on Tuesday

i

Tuesday
She went to Edgar Office
Phillip Booth
Phillip Dale Moore
German Stumbo

Agreed to get more Ammo or whatever it took to stop Ray-Mac
Agreed to send men in the hill to spot a place where men could shoot down on Ray-Mac.
Doesn't Know whether Jason was there at time.
Jason left first
German next

Edgar said the only way to get to Ray-Mac was through the equipment.
Edgar said he couldn't afford to have guns traced to him

Went home called Brother and got some guns from him
He brought guns
~~She~~

2:30

Jason Moore brought list to her of shells they needed.

She gave list to Phillip Dale to take to Donahue.

She called Donahue - he said he had it.

She gave Phillip Dale + gave him check on Calamity.

She gave Morris Ray Hall Cash.

Exhibit Z

Ex 122

2/16/82

She filled it out in Blank and gave it to Phillip Dale Moore

to Donahue Gun smith.

Knew that Donahue had worked for Edgar - Eugene Trockett went with Phillip Dale.

Tuesday Nite

Randy Blaskin ship

Hermit Newsome

Raymond Hall.

Kenneth Rowland

Talk of going into hill but can't remember who said what

Phillips Dale brought back
Slips - Showing guns and
Ammo. —

Cont
NPM. 22
T.E
113 —— 4473

this was slips that Phillips
Dale brought back

He got slips from Donahue
OR He had stolen the slips
from Donahue.
9 mm. pistol
He gave pistol to Phillips
Booth.
He left Ammo in box in
living room.

Wednesday Hall Glen
Phillips Booth — Morris Joe — Thornsberry
took guns to men who were
going up into the hills — they
left early
To Stumbo Barn

Later that Morning
Edgar Jones wanted her to go
see what was going on.
If Drexil under arrest report
if not have Drexil come to Edgar's office
Went to JRM. Tyggle

Gayheart. + others at tyggle

they put guns in her car.

Someone shot at her near
her house —
Got guns and took to
Randy Blankenship sisters house

Went back to tyggle

Drexil there but Police wouldn't
allow him to leave.
Drexil would spill his guts

Couldn't get Drexil.

Go Get Danny Blanton with
Warrant. and Phillip
She went to Prestonburg & at warrant
for Danny Blanton

Gave to Trooper Hall —
(Had to give him 6,000 each to pay on Coal truck)

Edgar Jones said the only way to get to Ray Mac was through their equipment

Called Donahue — UZI, Carbines, and ammo.

Told Edgar he said he would re-imburse her — did not want it traced back to him —

Wed
SAW
Jason Moore = brought list of Ammo — didn't have enough to stop Ray Mac

Edgar & German talked about going into hills — Early in day on Wednesday

Called Donahue and told him what we needed.

Donahue said German and others had been there to get ammo.

Govt Ex 114.

Post dated check

— Gave this check to Phillip Dale moore in blank

Check # 111 - Calamity Coal Co.

Dated - Wed evening dated thursday

Signed her name and Husband's name to check

Lee Jones went w/ Phillip Dale.

Phillip Dale
Philip
Randy
setting around table

Eugene said he was going to get sleep so he could be in hills early Wed + am

Thursday

Phillip + Glen took ammo to men - who were going into hills

She went to office of Edgar.

He said men trapped in hill.

German an old hand - he could take care of himself.

the timber rats could take care of themselves.

the only way to get at Ray Mac was to hit them where it hurts — through their equipment.

Edgar was furious about Ray Mac beating him on lease of Typle;

Jason said;

German's side got out but Panhandle's side was trapped.

Met w/ Phillips — Edgar Jones —

Told Phillips to take a vacation — Timber rats were going to take care of the equipment;

that thursday nite she went to Winchester — Phillips went separately returned Sunday

Benny Caudill said Ray-Mac's equipment blown up and that German and Panhandle

took Care get

On Monday
At impact restaurant SAW
all men - Edgar & Phillip

*** Edgar Jones said it wasn't over
he was like J. R. Ewing
mad at Cobb Turner and
Jr. Hamilton

On Monday
Jones said - nothing else
to do - put men back to
work - It wasn't over with
Ray Mac.

Told men to go back
to work

Sent Morris Ray Hall
Govt. to Donahue's to get UZ1.
Gave Morris Ray Check

BB

115 to cash. Check < 24 Feb 1982
for Donahue-Halbert - She filled in
date & signature

2 UZI
2 Carbines - 30 Cal.
Crate of 9 mm. Ammo.

Took 1 UZI to office and Edgar said that's what we needed. He would see that we were paid for them. We may need them later -

These guns were later seized by Mr. McAllister.

Jason Moore brought some guns back to house
2 guns - 2 & 3 and not sure of the other
Called Brother he came and got them
Kemp and Pearl went to Brother's and got 2 guns they looked like the guns that Jason had brought back.

Caudill said tipple to be burned on day before his anniversary.

Donahue come by her home
to get 35m.m. Shells to make
up for inventory - ATF had
Come by ——— he had gotten
a box from German and needed
a box from her.

Bryan charged to
Big Mac. after trouble with
Ray Mac.

Cross. - Harwell.

Credibility.

Argumentative.

Monday - 15th Feb.

Phillips came and got her.

don't recall guns being mentioned on this monday

Went to mines + told men a Strike

then to Calamity

then back to Edgar's Office

2nd meeting -

Told him + had called Donahue about shells for our guns before 2nd meeting.

Went to Bryan 1st = and then went to Calamity (. Phillips may have gone also)

Edgar knew want at his home at any time.

Tuesday
Went to JRM office

Told Phillip Shot:
Everyone said we didn't have big enough Guns.

Mr Jones told me to do what every it took to Stop Ray Mac.
Jason more brought her a list of guns and Ammo to get
Jones didn't tell her what, where, nor re-imburse her for

Edgar told her on Monday and Tuesday to be sure that Phillip and men were on picket line

Jones Exhibit photo 5
10 a
10 (H)

Tuesday Nite:

10 (d)
(H)
(F)

Phillip Dale came w/ list
gave check - left - returned

Wednesday Nite

Monday evening & Tuesday morning sent Morris Ray Hall to Donahue to pick up Shells gave him cash

"go pick up ammo for her"

Any further evidence would be more prejudicial than beneficial.

Wants to introduce other instances of Criminal Conduct of the witnesses and other Co-defendants (presumably upon basis this witness had knowledge of it.)

denied

(1) Permit some evidence of other specific criminal conduct as bearing upon the truthfulness or untruthfulness of the witness

It is of the opinion there is sufficient evidence in the record for the jury to make a decision upon credibility [illegible] for satisfying

further evidence is of a collateral matter

Whether to show bias, etc would be more prejudicial than beneficial.

601 F2 385

521 F2 556 - To Frame another Δ in a precisely parallel crime

676 F2 1245

546 F2 170 - Probation.

Abstract statement

Each Δ

At Conclusion - put in by avowal the specific acts - Tell How they reflect bias, etc -

Wednesday Nite -

Thursday

Jones said, to go check on men
Went to toggle.

22 Feb

Edgar — Like J.R.

Ewing

Benny Caudill

does not recall statements of

Husband

16 Feb borrowed rifles

from Brother.

Pafunda -

Cross David Thomas

Pafunda
Hall employee of adkins,
Hall strong union man

Thomas
Known Eugene Tackett for
13 years.
Worked for Phillip as a
Foreman.
Has a speech defect.

Walbourne
18 Emp Bryan
Calamality.

Hermit newsonee worked
for Pearl and Phillip.
Harold Moore.
Benny Caudill

Spencer -
Linville Mosley
doesn't know whether Linville
being a matter, or at his home.

Adams -
Randy Blankenship
Cousin of Phillips
Randy was at his house all the time
Randy did not tell him to take gun
to his sister.
Randy sitting on steps
Church — have to get on hill
or you won't have a job.

Branson - Donahue Hulbert
Deputy Sheriff

Kirkland -

Stanley, Kinney, Moore Joson
Rowland, Hall

Postman - hauled Coal
Kinney - never worked for them
Strong union men
Moore -
Problems
Raymond Hall, dont know him to
well
German Stumbo -

Jason Moore and telly Kennedy said that Edgar Jones had given (them or Firmen) money for ~~guns~~ ammo.

this was during week of trouble does not know whether by checks or cash.

TE 104

after trouble w/ Ray-Mac Edgar said to not let Jason haul coal.

went to Tipple & ~~[illegible]~~ guarded vs: Picket line of Jason

Benny Caudill Trial Ex 1

56 — nothing inconsistent
49 nor consistent.
32

Wendall Ray Newman
mine operator -8-10 years

Feb 1982

Gave Pearl some guns
2 30-06 - 203

Said someone had shot
at her and he husband had
taken all the guns away
from the house

1st day of trouble.

dont know if he gave 3rd gun
(30 Cal. Carbine) or she
came and got it.

Benny Caudill -

Went to Edgar's office
had sold him some land

Pearl + Phillys were going to
be taken care of and everyone on

hell was going to be taken
Care of —
Some fellow went to
Elkhorn and shot off his
mouth — he was going
to be sorry.

2 guns returned
1 gun belonged to him
1 wasn't.

TE 109 — his gun
T.E. 108 — not his gun } these were the guns

Howell
Cross — 30 years gone

Paul 35 years

Known Edgar - 12 years

Been in office of Edgar

10 ~~years~~ times

Never been an employee

Had Conversation 8 times

last 5 years.

might have been there

two times

Close to Noon

Was there 10-15 minutes

E. J Walbourne.

Went to sisters house - 4 or 5 times during week ending Feb 15 some week before and week after.

Whether people there or not the amount was normal.

Phillip Dale Moore,
Sandstone Minn.
Pike County, Jail

Plea Agreement w/ U.S.
approximately 1 yr. ago

Foreman - Phillip Booth
Bryan Coal
3rd Shift - (11-7.)

Barry Moore
M J Hall
Skeens
Eugene Tarkett

Week of 15 Feb 1982

Monday evening 2:30
Gary - Hall - 2nd Shift no work
tomorrow - all Hell broke loose
Called Phillip Booth no work
mine on Strike - ~~be on pocket line~~ Pulled mine out to be on pocket line.
Something about Ray Mac
undersellingJones

went to Booth's house.
Phillip said to meet at
Ed Jones Tipple: - Tell men to
Pearl there.
be at tipple next Morning

next a.m. 7:30 - 30-40-50

(1) New some.
(2) Jason Moore
(3) Benny Caudill

Phillip Booth said lets go to
top of hill where Coal trucks are.
He rode up w/ Phillip Booth

Govt. Ex 8-9. area photos - pectures of McDowell
John Hall Branch,
Waited until Coal trucks arrived
so we could stop them - 8:30 - 9 am.
~~Some~~
Told them on Picket line -
Some turned around and went back
Some went on to the mine.
Stumbo - Moore - Booth
talked to truck drivers
Phillip Booth gave him a
pistol

Some of the men may have been drinking.

He was not a member of the U.M.W. of A.

Gun a S+W 38.

Cod Truck then 30 minutes came back —

Phillip Booth shot first

Cod Truck coming down hill didn't shoot first. No men on hill shot first.

Blanton + other drivers got out of truck and shot a shot gun

W. Jones got behind jeep and shot the pistol 5 times.

Jeep Benny Caudill drove

Duvall Hall shot

Jason Moore shot on other side of Rd.

Phillip Booth shot

Shooting didn't last too long

He drove Booth's Car back to Tipple - Hermit Newsome accompanied him

at Jones tipple - Phillip was there - said he got shot stayed at tipple 10-15 minutes.

went W/ Phillip to Ed. Jones office.

Ed. Jones
Secretary
Pearl Booth
German Stubbs
Phillip Booth
Teddy Fleming
Jason Moore

(Phillip more) He said if he was going back up there would bigger plans

Ed Jones said he would see they got them.

Meeting lasted 15-20 minutes

German Stubbs + Edgar Jones went into another room

German ran a mine for Edgar before — But his mine had been shut down.

Ed Jones said there was enough work for everyone to return if they could stop Ray-Mac.

Phillip Booth took Dale to typle and then went to Booth's home - Picked up Ed Tackett,

Pearl gave him list said
that Jason - German gave her list.
He took this and went to Donahue
Halbert's - Blank checks - Calamunty
Coal

Donahue Halbert filled it in
9 mm. pistol -
Shells

1st time didn't tell Donahue what
shells were for.
Ed Tarkett went with him.

Took this to Phillips Booth
he said to be back at Jones
Tipple - next Morning - (Wed).
at tipple Wed Morning

New sone
Caudill
Kinney
Moseley
J. Moore
K. Rowland
B. Moore
D. Hall
Pebo Gay hart
Raymond Hall
Philip Booth

Decided to go on hill to shoot at Roy-Mac to scare them.

Jason passed out gun - 243 & box of shells, said Pap Pa wants you have a good one - Pap Pa - Ed Jones gave Hamit Newsome.

Ed Jones stopped at tuggle before guns passed out.

He talked to Jason & Phillips Booth

Hamit Newsome said he would go if Ed went - (we in both foreman)

Hamit Newsome
Teddy Kinney
Ken. Rowden
Pete Gayhart
Bo Moore
Roy Hall
Aaron Stubbs
Jake Moore
Dee Moore

Hill on other side of Roy-Mac Mine Site.

9 guys went on hill all had high powered rifles.

German Stumbo and John Moore in front - they knew the Hill -

Got to Top and walked around to Ray Mac sites - saw shadows near Rock line.

Left Bo Moore & Raymond Hall behind to watch shadows through scope and fire warning shots if anything suspicious happened.

Went around to Ray Mac mine site.

Saw tool shed - 1500-2000 feet. Shot at tool to scare them. the Guys we saw shot back. Someone fired back -

We fired first - all of us shot.

Came back to where Bo Moore & Raymond Hall - went off hill different route.

Got to Highway - Benny Caudill picked us up - he had to make 2 trips went to Stiffy Stumbo's Store. German's father -

Drank Beer - ate -

Phillip Booth came by - went to Phillip's house

Pearl & Phillip sent him to

Donahue's to get more shells took blank check - 260.00

Lee Jones went w/ him

Donahue showed him special shells

Told him shooting McDowell all to pieces.

Told Pearl not going on hill anymore.

Went to Lexington w/ Phillips Fri - Sat.

Phillips called and wanted him to go w/ him

Stayed all nite at Lexington

Came back in evening.

Phillips said Ed Jones said get a good witness - something was going to happen.

Conv. w/ Randy Blankenship - after it was over and had gone back to work - like viet nam.

Harold P. Moore - behind tree they shot back off tree.

Phillips Booth said his men would get paid like they were working - this was before it started

Impact restaurant.
Booth - Ed Jones talked
came out
Booth said get case of
liquor - Jack Daniels - put in
Booth's car -
It was passed out to men
on Picket line
Went to meeting at Union
Hall.
Bunch of Men - Some belonged
to union Some didn't.

On Wed nite he purchased
rifle shells

Govt
N.N.N.
T.E
117
117(a)
117(b)
Govt
M.M.M.
T.E.
118

- Shells for 243 - used to have them these
were shells he had for his rifle - given to him by
gave them to Richard Kemp Jason Moore

108
109

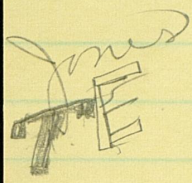
109 — Was gun given to him by Jason Moore and taken in hand by him

During week
Jason Wasn't employed
Stubbs " "
Hall " "
Kinney " "
Caudill worked for Ed Jones
Rowland hauled for Edgy
Blankenship — Booth
Tschutt — Booth
Harold Moore — Booth
Newsome — Booth
Mulvin — Booth
Meade — don't Know
Nal
Bo Moore — Truck for Ed Jones
Gay Hurst — don't Know
Mosley — " "
Hall — Truck for Ed Jones

Cross - Darwell.

Monday evening learned of Strike before going to work

Phillips wanted his men to come out of the mines and be on picket line.



14

Those things which have been brought to your attention, which had nothing to do w/ Roy Mc are permitted to be brought to your attention only because you may wish to consider it when you decide, as w/ any witness, whether you believe his testimony.

stubs

T. E.

4.

2. Self indicating need for a break. Some of the jurors seem to be cold?

Flowers sent to

Marilyn

THOMAS B. FENLON, P.C.
THOMAS F. NOONE, P.C.
BERNARD F. JOYCE, P.C.
LAWRENCE B. THOMPSON
JOHN E. BENNETT
WILLIAM A. LEET
WENDELL DAVIS, JR.
DAVID M. DALY
DAVID M. MAHLE
PETER B. TISNE
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SIDNEY M. RUTHENBERG
JAMES F. STOMBER, JR.
CARL L. WISE
JODY L. COSGROVE
SVETLANA V. PETROFF
JULIAN A. McQUISTON
COLLEEN T. JOYCE
PATRICIA A. SCRIVEN
JOSEPH A. HANCZOR

August 5, 1983

Hon. G. Wix Unthank
United States District Court
P.O. Box 131
Pikeville, Kentucky
41501

Att: Leslie E. Whitner
Clerk

Re: The Bank of New York v.
William J.M. Polan, et.al.
Index# 83-116

Dear Sir:

We represent The Bank of New York, the plaintiff in the captioned action. Enclosed is a copy of motion for the appointment of a receiver. On August 19, 1983 motions in the captioned action and in several related actions have been scheduled for hearing. We have noticed the enclosed motion for hearing on that date as well if that is conveinent for the Court.

Very truly yours,

Eric M. Reuben

Eric M. Reuben

cc: Henry Kinser Esq.

Judge's Copy

FILED AUG 16 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CASE NO. 83-116

THE BANK OF NEW YORK — PLAINTIFF

MOTION FOR APPOINTMENT OF A RECEIVER FOR WILLIAM J. M. POLAN

WILLIAM J.M. POLAN, ET. AL — DEFENDANTS

Comes the Plaintiff, The Bank of New York, by counsel, Emmet, Marvin & Martin and Kincaid, Wilson, Schaeffer & Hembree, and move the Court for the appointment of a receiver for the assets and property of William J.M. Polan, individually and d/b/a W.J.M.P. Mining. As is more fully set forth in the affidavit of Matthew G. Gilmartin, a Vice President of Plaintiff, submitted in support of this motion, this action was brought to foreclose certain mortgages and security interests held by Plaintiff as security for indebtedness of Polan, and others; that by the terms of the mortgages, Plaintiff is entitled to the appointment of a receiver; and that the collateral encumbered by the mortgages and security has and will continue to deteriorate and to decline in value unless a receiver is appointed.

Kincaid Wilson Schaeffer
& Hembree
Kincaid Towers
Lexington, Kentucky

Emmet Marvin & Martin
48 Wall Street
New York, New York

By: Glen M. Reuben
A Member of the Firm

NOTICE

The foregoing motion will be brought before the Judge of this Court on August 19, 1983, or in such other time or place as may be deemed convenient for the Court.

CERTIFICATION

I hereby certify that a true and correct copy of the foregoing was mailed postage prepaid to the parties listed on the Exhibit A on this 5th day of August, 1983.

Eric M. Barber

Attorney at Law

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

THE BANK OF NEW YORK PLAINTIFF

AFFIDAVIT IN SUPPORT OF MOTION FOR APPOINTMENT OF A RECEIVER FOR WILLIAM J. M. POLAN
Case No. 83-81

WILLIAM J.M. POLAN, ET. AL DEFENDANTS

Matthew G. Gilmartin, being duly sworn, deposes and says:

1. I am a Vice President of The Bank of New York, the Plaintiff in this action. This affidavit is submitted in support of Plaintiff's motion for the appointment of a receiver for the property and assets of William J.M. Polan, individually and d/b/a W.J.M.P. Mining.

2. Plaintiff instituted this action by Complaint, dated March 3, 1983 (the "Complaint") to recover in excess of $11,000,000.00 from the defendants, William J.M. Polan, individually and d/b/a W.J.M.P. Mining ("Polan"), Crest Coal Company ("Crest") Inc., and Admiral Mining, Inc. ("Admiral") and to foreclose certain mortgages and security interests held by the Plaintiff as security for such indebtedness.

3. On or about May 6, 1981, Polan, Crest and Admiral executed and delivered to the Plaintiff a Mortgage and

Security Agreement (the "Mortgage") as security for their obligation for the notes evidencing the indebtedness described in paragraph 2 hereof and as security for future indebtedness not to exceed $10,000,000. A copy of the Mortgage is annexed hereto as Exhibit A.

4. As recited in the Complaint, Events of Default have occurred under the Mortgage and Plaintiff has demanded payment of the notes secured by the Mortgage.

5. Paragraph 28 of the Mortgage provides:

> "Upon the occurrence of an Event of Default and upon the commencement of any action, suit or proceeding at law or equity, including a foreclosure action, the Mortgagee shall be entitled to apply at any time to any court having jurisdiction thereof, for the appointment of a receiver of all and singular the Property and of the income thereof from whatsoever source derived and to manage the Property. The receiver shall have the usual powers and duties of receivers in like cases. Said appointment shall be made by the court as a matter of strict right to Mortgagee, and without reference to the adequacy or inadequacy of the value of the Property, or to the solvency of insolvency of Mortgagor or any other party defendant to such suit. Mortgagor hereby specifically waives the right to object to the appointment of a receiver as aforesaid and hereby expressly consents that such appointment shall be made as an admitted equity and as a matter of absolute right to Mortgagee and that the same may be done without notice to Mortgagor." (Emphasis added).

6. The collateral encumbered by the Mortgage includes numerous leasehold interests on properties located

in Magoffin and Brethirtt County, Kentucky, various mining equipment, and all other personal property owned by Polan, Crest and Admiral.

7. The leasehold interests are the primary collateral and are almost uniformly held by Polan, individually, as lessee. Under the terms of the various leases, Polan was granted the right to mine coal from the properties covered by the leases.

8. In most instances, the leases have terms of between three and five years. The leases generally require the lessee, Polan, diligently to mine all mineable and merchantable coal on the property and to pay a certain stipulated royalty based on the amount of coal mined and either a fixed dollar amount per ton or a percentage of the sales price. If no mining is performed, the lessee is required to pay a stipulated minimum royalty, in most instances on an annual basis.

9. In the event any of the leases encumbered by the Mortgage were to be declared in default or terminated either by reason of Polan's failure to perform the required mining or by reason of the failure of Polan to pay the minimum royalties, the Plaintiff's collateral would dissipate entirely, since the failure of Polan to perform under the leases would give the Lessors the right to cancel the lease.

10. In order to maintain and preserve the value of leasehold collateral and to obtain the highest value from the leases, it is essential that an operator with the financial resources, personnel and equipment to mine and to ship the coal and to negotiate and obtain contracts to purchase the coal be in possession of the leased premises and be engaged in mining.

11. It is also essential that a party with authority be present locally to locate and to negotiate with the lessors and to assure that all required royalties payments are made.

12. On or about January 14, 1983, Plaintiff, concerned that Polan had apparently not engaged in any mining and that Polan was in default in payment of minimum royalties, sent a letter, a copy of which is annexed as Exhibit B, notifying Polan, Crest and Admiral that defaults existed in payment under the leases encumbered by the Mortgage and that as a result the Plaintiff had and would continue to undertake to protect its interests in the leases in accordance with the terms of the Mortgage. The letters were addressed and sent to the last known address of the Polan, Crest and Admiral and were returned unclaimed.

13. Thereafter, Plaintiff, through its New York counsel sought to determine the status of the approximately 170 leases encumbered by the Mortgage by writing directly to

each lessor. Approximately one third of the letters were returned as undeliverable. Of the responses that were obtained certain lessors claimed that the leases had been terminated or expired as the result of non-payment of royalties by Polan, or by reason of Polan's failure to mine. Certain other lessors indicated that their leases were in default by reason of the non-payment of royalties but indicated a willingness to accept payments to bring the leases current.

14. By letter dated March 7, 1983, a copy of which is annexed hereto as Exhibit C, Plaintiff's counsel notified Defendant's counsel in Florida of the status of the responses. The letter advised that the Plaintiff would undertake to make certain payments for past due royalties to those lessors who had indicated a willingness to accept payment to bring their leases current. The letter also requested that Polan provide written objection to any of the proposed payments and to advise Plaintiff if payment of royalties to any other lessors would obtain reinstatment of their leases.

15. Neither Polan nor his counsel responded to this letter and request for information.

16. Thereafter, Plaintiff sent to the parties identified in its March 7 letter the specified royalty payments. In the covering letter, Plaintiff also requested that the

lessors advise Plaintiff of the date on which the next royalty payments were due. In response to such request Plaintiff received additional requests for royalties.

17. On or about June 16, 1983, Plaintiff's counsel again wrote to Defendant's counsel in Florida and Kentucky. A copy of the letter is annexed hereto as Exhibit D. The letter again confirmed Plaintiff's willingness to pay royalties to lessors, subject to receipt of appropriate back-up information. The letter also indicated that the Plaintiff had received supplemental responses from certain lessors, and would again make the requested payments unless Plaintiff received written objection from Polan. In that letter Plaintiff also indicated that it had received an inquiry from a local coal company which expressed an interest in subleasing and developing certain of Polan's property.

18. Again, no response to this letter was received from Polan or from Polan's Florida or Kentucky counsel, either with respect to the payment of royalties or with respect to the proposed subleasing and development.

19. In the motion to Dismiss filed by Polan, Crest and Admiral in this action, a copy of which is annexed as Exhibit E, Polan states that he is now a resident of the State of Florida.

20. It appears from Polan's and his counsel's refusal to respond to Plaintiff's requests for information regarding

royalties, from Polan's failure and apparent inability to mine and from Polan's withdrawal from the State of Kentucky that there is no person located in Kentucky having day-to-day responsibility for the administration of the leases, for the conduct of mining operations, or for the preservation or maintenance of the leases which form the basis of the Plaintiff's collateral.

21. As the responses to Plaintiff's inquiries indicate, the status of the leases is precarious and threatens to deteriorate even more unless a Receiver is appointed to administer the assets of Polan.

22. An appropriate receiver would be able to deal with the lessors and would be able to negotiate with capable and financially responsible operators to mine the properties pending the disposition of the litigation.

23. In this regard, Plaintiff has again been contacted by Mr. Ken Hall of Brandem & Baker Coal Company located in Prestonburg, Kentucky, the Company that Plaintiff referred to in its June 17 letter to Polan's counsel. Brandem & Baker has operations in the area covered by Polan's leases and has again indicated an interest in subleasing certain of Polan's properties for mining purposes. Such subleases with Brandem & Baker, or other appropriate parties, would prevent further waste of the collateral, and would generate revenue that would serve to reduce Polan's indebtedness to the Plaintiff.

24. Based on the foregoing, Plaintiff respectfully requests that a receiver be appointed, with the usual powers, for the assets of William J.M. Polan, individually and d/b/a W.J.M.P. Mining.

s/_____
Matthew G. Gilmartin

Sworn to on the_____
day of August, 1983

_____

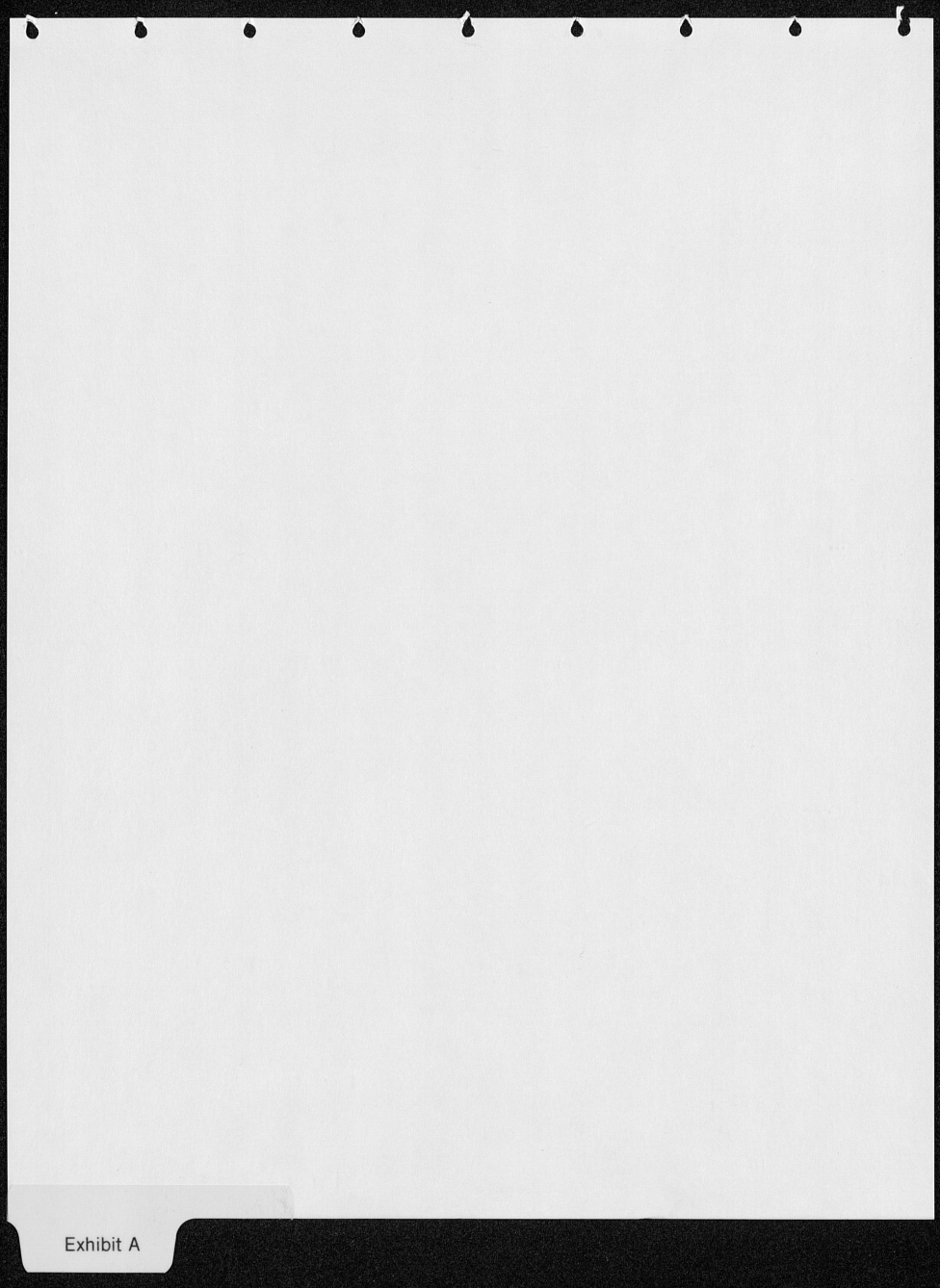
Exhibit A

MORTGAGE AND SECURITY AGREEMENT

DATED AS OF MAY 6, 1981

CREST COAL COMPANY, INC.
ADMIRAL MINING, INC.
WILLIAM J.M. POLAN, individually
and d/b/a W.J.M.P. MINING

TO

THE BANK OF NEW YORK

MAY 8 3:09
BY

This instrument was prepared by:

Eric M. Reuben
Emmet, Marvin & Martin
48 Wall Street
New York, New York
10005

THIS MORTGAGE AND SECURITY AGREEMENT, dated as of May 6, 1981 from CREST COAL COMPANY, INC., a Kentucky corporation, ADMIRAL MINING, INC., a Kentucky corporation (the "Corporate Mortgagors"), WILLIAM J. M. POLAN, individually and doing business as W.J.M.P. MINING (the "Individual Mortgagor"), all having an office at P. O. Box 475, Salyerville, Kentucky (the Corporate Mortgagors and the Individual Mortgagors are collectively hereinafter referred to as the "Mortgagor") and THE BANK OF NEW YORK, a New York corporation having its principal place of business and post office address at 48 Wall Street, New York, New York ("Mortgagee").

GRANTING CLAUSE

IN CONSIDERATION of the matters hereinafter set forth the Mortgagor hereby grants, bargains, sells, assigns, transfers, pledges, conveys, mortgages and grants a security interest to the Mortgagee in the following described property (collectively hereinafter referred to as the "Property" or the "Collateral"):

(1) All right, title and interest of Mortgagor in and to the leases described in Exhibit A (the "Leases") and all land and real property covered by the Leases (the "Premises"); and

(2) All tipples, unit train loading facilities, and washing plants, presently existing or hereafter erected or placed upon the premises; and

(3) All the coal and other solid, liquid or gaseous hydrocarbons and other associated or related substances (herein called the "Hydrocarbons") now or hereafter in, on, under or attributable to the Leases; and

(4) All the items belonging to the Mortgagor now or hereafter incorporated as part of or attributable to any of the real property included in the Leases in such a manner that such items are no longer personal property under applicable state law; and

(5) All the machinery, apparatus, equipment, fittings and other articles of personal property and fixtures, belonging to the Mortgagor, now or hereafter located in, on or under, affixed or attributable to or obtained or used in connection with any of the Leases and that are used or usable in connection with any present or future operation of said real estate; and

(6) All the accounts, contract rights and general intangibles now existing or hereafter arising in connection with the production, treatment, storage, transportation, manufacture or sale of Hydrocarbons related to the Leases, including, without limitation, all right, title and interest of Mortgagor in and to moneys due and to become due hereunder; and

(7) All the severed and extracted Hydrocarbons now or hereafter produced from the real property included in or attributable to the Leases; and

(8) All and singular the tenements, hereditaments, easements, rights of way, appurtenances, passages, waters, water courses, riparian rights, other rights, liberties and privileges thereof or in any way now or hereafter appertaining thereto, including any other claims at law or in equity, as well as any franchise or license and reversion or remainder thereof, hereby also releasing, waiving and relinquishing all exemptions, rights of courtesy, dower and home-

stead, in and to the Property, whether vested or inchoate; and

(9) All of Mortgagor's rights to the proceeds of any fire or hazard insurance policies covering the Property and awards heretofore and hereafter made to the Mortgagor for taking, or in lieu of taking, by eminent domain the whole or any part of the Property or any easment therein, which said awards are hereby assigned to the Mortgagee, who is hereby authorized to collect and receive the proceeds of such awards and to give proper receipts and acquittances therefor, and to apply the same as hereinafter more fully set forth in paragraph 6; and the Mortgagor hereby agrees, upon request, to make, execute and deliver any and all assignments and other instruments sufficient for the purpose of assigning said awards to the Mortgagee, free, clear and discharged of any encumbrances of any kind or nature whatsoever except as otherwise set forth herein; and

(10) All rents, issues and profits now existing or hereafter arising from the Leases; and

(11) All proceeds and products of all of the foregoing together with the appurtenances and all the estate and rights of the Mortgagor of, in and to the Property under and by virtue of the Leases; and

Together with and including any and all options, if any, to renew the Leases and the exclusive discretion to enforce and exercise the said options during the terms of the Mortgage.

All of the Property shall be deemed to be a portion of the security for the Indebtedness hereinafter defined and to be covered by this Mortgage, and this Mortgage is hereby

deemed to be as well a security agreement under the Uniform Commercial Code of Kentucky for the purpose of creating a security interest in the Property, securing the Indebtedness for the benefit of the Mortgagee.

To have and hold the Property and hereditaments hereby granted, or mentioned and intended so to be, with the appurtenances, unto Mortgagee, to and for the only proper use and behalf of the Mortgagee its successors and assigns forever.

OBLIGATIONS SECURED

A. This mortgage is given to secure the payment of the indebtedness evidenced by the following instruments (collectively referred to hereinafter as the "Notes"):

i. Collateral Note and Security Agreement, dated April 17, 1978, made by William J. M. Polan and Crest Coal Company to The Bank of New York, in the principal amount of $435,000.00.

ii. Collateral Note and Security Agreement, dated April 17, 1978, made by William J. M. Polan and Crest Coal Company to The Bank of New York, in the principal amount of $2,400,000.00.

iii. Collateral Note and Security Agreement, dated August 29, 1978, made by William J. M. Polan d/b/a/ W.J.M.P. Mining, Crest Coal Company and Admiral Mining, Inc. to The Bank of New York, in the principal amount of $2,750,000.00.

iv. Collateral Note and Security Agreement, dated March 19, 1979, made by William J. M. Polan

to The Bank of New York, in the principal amount of $250,000.00.

v. Collateral Note and Security Agreement, dated October 3, 1979, made by William J. M. Polan to The Bank of New York, in the principal amount of $250,000.00.

vi. Collateral Note and Security Agreement, dated July 22, 1980, made by Crest Coal Company, Admiral Mining, Inc. and William J. M. Polan, individually and d/b/a W.J.M.P. Mining to The Bank of New York, in the principal amount of $750,000.00

vii. Collateral Note and Security Agreement, dated July 28, 1980, made by Crest Coal Company, Inc. and William J. M. Polan to The Bank of New York, in the principal amount of $2,500,000.00.

viii. Collateral Note and Security Agreement, dated September 29, 1980, made by Crest Coal Company, Inc. and William J. M. Polan to The Bank of New York, in the principal amount of $2,500,000.00.

ix. Collateral Note and Security Agreement, dated April 24, 1981, made by Crest Coal Company, Inc. to The Bank of New York, in the principal amount of $350,000.00.

x. Collateral Note and Security Agreement, dated May 10, 1981, made by Crest Coal Company, Inc., Admiral Mining, Inc., and William J. M. Polan, individually and d/b/a/ W.J.M.P. Mining, in the principal amount of $1,000,000.00

B. This mortgage is also given to secure the payment of

i. All sums heretofore or hereafter, advanced and costs and expenses heretofore or hereafter incurred, including legal and engineering fees, in connection with the enforcement and collection of the Notes and the enforcement of the Agreement or in connection with the protection of the interests of Mortgagee under the Notes, the Agreements or this Mortgage;

ii. All present obligations and indebtedness of Mortgagor to Mortgagee not specifically enumerated herein and any and all future obligations and indebtedness of Mortgagor to Mortgagee, and all advances made to or on behalf of Mortgagor by Mortgagee (all such future obligations, indebtedness, and advances made to or on behalf of Mortgagor or Mortgagee shall be an amount not to exceed the sum of $10,000,000.00); all such indebtedness and all indebtedness of the Mortgagee set forth in the preceeding paragraph, and all indebtedness of the Mortgagor under the Notes and the Agreements are collectively hereinafter referred to as the "Indebtedness", all of which Indebtedness is payable on demand.

AND MORTGAGOR HEREBY FURTHER COVENANTS AND AGREES WITH MORTGAGEE AS FOLLOWS:

1. The Mortgagor hereby covenants, warrants and represents to the Mortgagee that:

(a) The Corporate Mortgagors are corporations duly organized, validly existing in good standing under the laws of the State of Kentucky and have all requisite power and authority to own and operate their property, have full power and lawful authority to sell, convey, transfer and mortgage the same, and to carry on their business as now being conducted and have taken all actions necessary to permit them to do business in each jurisdiction in which they carry on their business.

(b) The Mortgagor has full power and authority to enter into, execute, deliver and carry out the terms of this Mortgage, and to grant the security interests and liens contemplated hereby, all of which have been duly authorized by all proper and necessary corporate action. No consent or approval of shareholders is required to authorize, or is required in connection with the execution, delivery and performance of, or is required as a condition to the validity or enforceability against all persons, of this Mortgage.

(c) This Mortgage constitutes, the valid and legally binding obligations of the Mortgagor enforceable in accordance with its terms and this Mortgage has been consented to in writing by the Lessors under the Leases.

(d) All acts, conditions and things required to be done and performed and to have happened to constitute this Mortgage, and all other instruments delivered in connection herewith, the legal, valid and binding obligations of the Mortgagor, enforceable in accordance with their respective terms, have been done, performed and have happened in due and strict compliance with all applicable laws and regulations.

(e) The Mortgagor is indefeasibly seized with the absolute and unencumbered title to the Property and the liens and security interests granted to the Mortgagee by the Mortgagor constitute first, prior, fully perfected, continuing liens and security interests duly enforceable in accordance with their terms under all applicable laws, rules and regulations, subject to no exceptions, claims or liens of any kind.

(f) The Leases are in full force and effect and all rent, royalty and other payments due under the terms of the Leases are current in accordance with the terms thereof and Mortgagor is not otherwise in default under the terms thereof.

(g) Mortgagor hereby fully warrants to Mortgagee the title to the Property and will defend the same against the lawful claims and demands of all persons whomsoever.

2. Mortgagor shall pay the Indebtedness in accordance with the terms of the Notes and perform, comply with and abide by each and every one of the stipulations, agreements, conditions and covenants contained and set forth in the Notes and the Agreements and this Mortgage.

3. Mortgagor shall commit or suffer no waste upon the Property at any time, shall comply with, or cause to be complied with in all respects, all statutes, regulations, ordinances and requirements of any governmental or other authority relating to the Property; shall comply at all times with covenants and restrictions in any manner affecting said Property; shall do or permit to be done to the Property nothing that will alter or change the use of the Property nor use or permit the Property or any part thereof to be used for an illegal purpose; and Mortgagor shall do all

other acts which by reason of the character or use of the Property may be reasonably necessary to maintain the Property in a state of good repair and condition. To assure that the Property is being so maintained, the Mortgagee shall have the right to inspect the Property at all reasonable times during the term hereof. After notice and demand by Mortgagee, Mortgagor shall promptly commence restoration and repair of said equipments, fittings, improvements, fixtures and articles of personalty as specified in such notice and demand. And in case of the refusal, neglect or inability of Mortgagor to repair and maintain the Property, Mortgagee may, at its option, make such repairs or cause the same to be made, and advance monies in that behalf and the amount of such advances shall be added to the Indebtedness.

4. No Property now or hereafter covered by the lien of this Mortgage shall be removed, demolished or altered, nor shall any other improvements be constructed without the prior written consent of Mortgagee provided, however, that nothing contained herein shall prohibit the removal of fixtures or personal property used in the operation of the Property and replacements thereof with articles of like kind and quality.

5. Mortgagor shall keep the Property now or hereafter encumbered by the lien of this Mortgage insured against such hazards as may be required from time to time by the Mortgagee including but not limited to loss by fire, windstorm, lightning, explosion, tornado, earthquake, flooding and other hazards and casualties covered by the Standard Fire and Extended Coverage Insurance Policy, with vandalism and malicious mischief endorsements, for such periods and in such amounts as may be required by the Mortgagee but not for more than the full insurable value of the Property (subject to the provisions contained in the following sentence) and

to pay promptly when due all premiums for such insurance. It shall be incumbent upon Mortgagor to maintain such additional insurance as may be necessary to meet and comply fully with all co-insurance requirements contained in said policies to the end that Mortgagor is not a co-insurer thereunder. Insurance shall be written by a company or companies and in the form or forms approved by Mortgagee. No lien upon any of said policies of insurance to the extent applicable to the property encumbered hereby or upon any refund or return premium which may be payable on the cancellation or termination thereof, shall be given to other than Mortgagee, except by property endorsement affixed to such policy and approved by Mortgagee. Each policy of insurance shall have affixed thereto a Standard Mortgagee Clause without Contribution, making all loss or losses under such policy payable to Mortgagee as its interest may appear. Such policy may not be invalidated by any act or default of Mortgagor and each such policy shall be deposited with the Mortgagee as additional security hereunder ten days prior to the expiration of the then outstanding policy. In the event any sum or sums of money become payable thereunder Mortgagee shall, except as otherwise provided in the Lease, have the option to:

(i) receive all such insurance proceeds and pay the same to the Mortgagor in an amount equal to the cost to Mortgagor of restoring, replacing or rebuilding the Property, or

(ii) permit Mortgagor to receive it and use it, or any part thereof, to restore, replace or rebuild the Property without thereby waiving or impairing any equity or lien, under and by virtue of this Mortgage, or

(iii) retain the proceeds of insurance and apply the proceeds in whole or in part in reduction of the Indebtedness whether then matured or not in such order of priority as Mortgagee may determine.

In event of material loss or physical damage to the Property, Mortgagor shall give immediate notice thereof by mail to Mortgagee and Mortgagee may make proof of loss if the same is not made promptly by Mortgagor.

The application of such insurance proceeds toward the payment of the Indebtedness shall not be deemed a waiver by the Mortgagee of its right to receive payment of the balance of the Indebtedness secured hereby and the interest thereon in accordance with the provisions of the Notes, the Agreements and this Mortgage.

6. Mortgagor immediately upon obtaining knowledge of the institution of any proceedings for the condemnation of the Property or any portion thereof, shall notify Mortgagee of the pendency of such proceedings. Mortgagee may participate in any such proceedings to the extent permitted by the Lease, and Mortgagor from time to time will deliver to Mortgagee all instruments requested by it to permit such participation.

7. To the extent permitted by the Leases, Mortgagor assigns to Mortgagee all awards for any taking by eminent domain, or by condemnation or other injury to or decrease in value of the Property, and, notwithstanding any such taking or condemnation, Mortgagor shall continue to pay interest as provided in the Notes until any such award or payment shall have been actually received by Mortgagee and any reduction in the principal sum resulting from the application by Mortgagee of such award or payment as hereinafter set forth

shall be deemed to take effect only on the date of such receipt.

8. Mortgagor shall pay and discharge when the same shall become due any and all license fees or similar charges, together with any penalties and interest thereon, which may be imposed by the jurisdiction in which the Premises are situated. Mortgagor shall promptly cure any violation of law and comply with any order of said jurisdiction in respect of the Property.

9. Mortgagor, from time to time when the same shall become due, shall pay and discharge all taxes of every kind and nature (including without limitation, all real estate taxes and personal property taxes and income, franchise, withholding, profits and gross receipts taxes), all general and special assessments, levies, permits, inspection and license fees, and all other public charges whether of a like or different nature, imposed upon or assessed against it or the Property or any part thereof or upon any income or profits derived from the Property or arising in respect of the occupancy, use or possession thereof.

10. Mortgagor shall pay from time to time when the same shall become due, all claims and demands of mechanics, materialmen, laborers, and others which, if unpaid, might result in, or permit the creation of, a lien on the Property, whether paramount or subordinate to this Mortgage, or any part thereof, or on any income therefrom and in general will do or cause to be done everything necessary so that the first lien of this Mortgage shall be fully preserved, at the cost of the Mortgagor.

11. In the event of the enactment after this date of any law of the Federal, State or Municipal Governments,

deducting from the value of the land for the purpose of taxing any lien thereon, or imposing upon the Mortgagee the payment of the whole or any part of the taxes or assessments or charges of liens herein required to be paid by Mortgagor, or changing in any way the laws relating to the taxation of mortgages or debts secured by mortgages or the Mortgagor's interest in the Property or the manner of collection of taxes, so as to affect this Mortgage or the Indebtedness or the Mortgagee, then in such event, Mortgagor may at its option pay such taxes or assessments, provided that in the event Mortgagor elects not to pay such taxes or assessments, or if in the opinion of counsel for the Mortgagee (a) it might be unlawful to require the Mortgagor to make such payment or (b) the making of such payment might result in the imposition of interest beyond the maximum amount permitted by law, then in such event, Mortgagee may elect, by notice in writing given to Mortgagor, to declare all of the Indebtedness to be and become due and payable thirty days from the giving of such notice.

12. Mortgagor covenants with the Mortgagee, its successors and assigns, that it shall not nor will claim or demand or be entitled to receive any credit or credits on the interest payable on the Indebtedness, or on the moneys to secure payment of which this Mortgage is made, for any taxes assessed against the Property.

13. Mortgagor shall, at its own expense, perform, execute, acknowledge and deliver all and every such further acts, deeds, conveyances, mortgages, assignments, notices of assignments, transfers and assurances as Mortgagee shall from time to time reasonably require, to better assure the conveying, assigning, transferring and confirming unto Mortgagee the Property and rights hereby conveyed or assigned or intended now or hereafter so to be, or which Mortgagor may

be or may hereafter become bound to convey or assign to Mortgagee, or for carrying out the intention or facilitating the performance of the terms of this Mortgage or for filing, registering or recording this Mortgage and, on demand, will execute and deliver, and hereby authorizes Mortgagee to execute in the name and expense of Mortgagor to the extent it may lawfully do so, one or more financing statements, chattel mortgages or comparable security instruments, to evidence more effectively the lien hereof upon the mixed or personal property.

14. Mortgagor forthwith upon the execution and delivery of this Mortgage and thereafter from time to time, shall cause this Mortgage and other documents executed herewith or pursuant hereto, including any security instrument creating a lien or evidencing the lien hereof upon the Property or any part thereof, to be filed, registered or recorded as required by Mortgagee and Mortgagor agrees to pay all federal, state, county and municipal stamp taxes and other taxes, duties, imposts, assessments and charges arising out of or in connection with this Mortgage, any mortgage supplemental hereto, and any security instrument or any other instrument pursuant to this Mortgage.

15. Mortgagor shall keep adequate records and books of account in accordance with generally accepted accounting principles for a cash or accrual basis and will permit the Mortgagee, by its agents, accountants and attorneys, to visit and inspect the Property and examine its records and books of account relating to the Property at such reasonable times as may be requested by Mortgagee.

16. Mortgagor, at the request of Mortgagee, shall furnish a written statement of the amount of the Indebtedness then outstanding and therein state whether or not there

exist any defaults, claims, defenses or offsets thereto and if so, the particulars thereof.

17. Mortgagee hereby is authorized, but not required, whenever and as often as it may become necessary, or advisable, so to do, by reason of the delinquency of the Mortgagor in the performance of the covenants of this Mortgage or of the Leases to pay rents, royalties and disbursements as required by the Leases, to remedy defaults under the Leases, to procure, or renew, insurance, to rebuild, restore or replace the Property in proper condition and repair, to discharge taxes, assessments or other charges levied, imposed or assessed upon the real estate and personalty, or any part thereof, to redeem the same from any tax sale, or forfeiture or to purchase any tax title thereon, to remove any mechanic's lien, or other lien, or encumbrance thereon, to carry on the prosecution, or defense, of any suit affecting the security hereunder, and to advance, or expend, the necessary money for any of said purposes, including the payment of reasonable attorneys' fees and court costs, stenographers' charges and expenses for procuring evidence, if any, and any and all costs for the preparation for trial of any such suit. Any sums so advanced or expended shall, upon demand, be repaid to the Mortgagee by the Mortgagor with interest on each item at the rate of 15% per annum, and all of such sums and interest shall be added to the Indebtedness secured by this Mortgage.

18. The Mortgagor agrees to pay the out-of-pocket expenses of the Mortgagee (including filing and recording fees, taxes of all kinds, title search charges and title insurance premiums, survey charges, appraisal fees and the fees and expenses of counsel for the Mortgagee, Emmet, Marvin & Martin, and such other customary and reasonable expenses, as are incurred by the Mortgagee) in connection

with the preparation, execution and delivery of this Mortgage and the Notes and the Agreements and any modifications or amendments hereto and thereto. Mortgagor shall pay all and singular the costs, charges and expenses, including (but not limited to) attorney's, engineer's and accountant's fees and disbursements, title or abstract costs, and travel costs of Mortgagee's personnel or fees and disbursements of Mortgagee's agents, reasonably incurred or paid at any time by Mortgagee in connection with the failure of Mortgagor to perform, comply with and abide by each of the stipulations, agreements, conditions and covenants of the Notes, the Agreements, the Leases and this Mortgage, or upon the reasonable concern of Mortgagee with the condition of the Property, or with any taking of the Property or any part thereof, or to enter any action or proceeding to which Mortgagee is made a party or in which it becomes necessary to defend or uphold the rights under or lien of the Mortgage or the interest of Mortgagee under the Mortgage. In any action or proceeding be commenced to which action or proceeding Mortgagee is made a party or in which it becomes necessary to defend or uphold the lien of the Mortgage or the rights of Mortgagee thereunder, all sums paid by Mortgagee for the expense of any litigation to prosecute or defend such rights or lien (including reasonable counsel fees and disbursements), shall be paid by Mortgagor, and any such sums shall be added to the Indebtedness.

19. In order to accelerate the maturity of the Indebtedness because of the failure of Mortgagor to pay any tax, assessment, liability, obligation or encumbrance upon the Property as herein provided, it shall not be necessary nor requisite that Mortgagee shall first pay the same.

20. Any failure by Mortgagee to insist upon the strict performance by Mortgagor of any of the covenants, terms and

provisions hereof shall not be deemed to be a waiver thereof and Mortgagee, notwithstanding any such failure shall have the right thereafter to insist upon the strict performance by Mortgagor of any and all of the terms and provisions of this Mortgage to be performed by Mortgagor. Neither Mortgagor nor any other person now or hereafter obligated for the payment of the whole or any part of the Indebtedness shall be relieved of such obligation by reason of (i) the failure of Mortgagee to comply with any request of Mortgagor, or of any other person so obligated to take action to foreclose or otherwise enforce any of the provisions of this Mortgage or of any obligations secured thereby; (ii) the release, regardless of consideration, of the whole or any part of the security held for the Indebtedness; (iii) any agreement or stipulation between any subsequent owner or owners of the Property and Mortgagee extending the time of payment or modifying the terms of the Notes or this Mortgage, without first having obtained the consent of Mortgagor or such other person and, in the last mentioned event, Mortgagor and all such other persons shall continue liable to make such payments according to the terms of any such agreement of extension or modification unless expressly released and discharged in writing by Mortgagee; and Mortgagee may resort for the payment of the Indebtedness to any other security therefor held by Mortgagee in such order and manner as Mortgagee may elect.

21. The term "Event of Default" wherever used in this Mortgage shall mean any one or more of the following events:

(a) Failure of Mortgagor to pay when due, any installment of rent, royalty or other payment due under the Leases or installment of principal, interest, or other amount to be paid to Mortgagee under the Notes, any Agreement with the Mortgagee or this Mortgage; or

(b) Failure of Mortgagor to pay and tax, imposition or assessment when the same shall have become due and payable; or

(c) Failure of Mortgagor to keep the Property insured against loss as required heretofore; or

(d) Failure of Mortgagor to perform or comply with any other covenant, agreement, term or condition of the Notes, the Agreements, the Leases or of this Mortgage, not specifically enumerated in subparagraphs "a", "b", "c" of this section; or

(e) Commencement of any action or proceeding to foreclose any lien upon the Property or any part thereof in which said lien is not cancelled or otherwise removed of record within 30 days after commencement of any such action or proceeding but not including the lien of this Mortgage or any action or proceeding to foreclose a lien against the owner of the Property which will not impair Mortgagee's lien on the Property created hereunder; or

(f) If any representation or warranty of Mortgagor contained in Section 1 or in any other section of this Mortgage or in any of the Agreements shall prove be in any material respect incorrect; or

(g) If the Mortgagor shall, without prior written consent of the Mortgagee, sell, transfer or convey its interest in the Property or any part thereof, or permit the Property or any part thereof to be sold, transferred or conveyed. This provision shall apply to every sale, transfer or conveyance regardless of whether or not the Mortgagee has waived its rights hereunder with reference to any previous sale, transfer or conveyance; or

(h) Failure by the Mortgagor to comply with any terms, covenants and conditions of the Leases to be performed by Mortgagor within the applicable grace period granted to Mortgagor as lessee thereunder, other than the payment obligations thereunder referred to in paragraph "a" above; or

(i) Occurrence of a default or an event of default under the terms of any of the Notes or any of the Agreements; or

(j) Mortgagor shall suspend or discontinue its business, make an assignment for the benefit of creditors, admit in writing its inability to pay its debts as they become due, file a voluntary petition in bankruptcy, become insolvent (however such insolvency shall be evidenced), be adjudicated bankrupt or insolvent, file any petition or answer seeking for itself any reorganization, arrangement, composition, readjustment of debt, liquidation or similar relief under any present or future statute, law or regulation of any jurisdiction, petition or apply to any tribunal for any receiver or any trustee, or there shall be commenced against the Mortgagor any such proceedings which remains undismissed for a period of 30 days, or the Mortgagor shall file any answer admitting or not contesting the material allegations of any such petition filed against the Mortgagor or of any order, judgment or decree approving such a petition in any such proceeding, or shall seek, approve, consent to or acquiesce in any such proceeding or in the appointment of any trustee, receiver, liquidator, or fiscal agent of the Mortgagor or all of any substantial part of the assets of the Mortgagor, or shall suffer any such appointment to continue undischarged or unstayed for a period of 30 days, or the Mortgagor shall take any action for the purpose of effecting any of the foregoing or looking to the dissolution or liquidation of the Mortgagor.

22. Upon the occurrence of an Event of Default, Mortgagee may, at its option, do any or all of the following:

(a) Declare the Indebtedness due and payable;

(b) Institute proceedings for the complete, or, if applicable, the partial foreclosure of this Mortgage;

(c) Take possession of the Property as provided for hereafter;

(d) Exercise any of its rights and remedies provided by the Uniform Commercial Code as adopted by the State of Kentucky;

(e) Take any other or further steps, including the commencement of an action, suit or proceeding at law or equity, whether or not provided for in this Mortgage or the law of the applicable jurisdictions.

No remedy conferred upon or reserved to the Mortgagee in this Mortgage is intended to be exclusive of any other remedy or remedies available to Mortgagee, and each and every such remedy shall be cumulative and shall be in addition to every remedy given to the Mortgagee or now or hereafter existing at law or in equity or by statute and no single or partial exercise by Mortgagee of any right, remedy or power hereunder or under the Notes or the Agreements or this Mortgage shall preclude or any other or future exercise thereof. No delay or omission of the Mortgagee to exercise any right or power accruing upon the occurrence of an Event of Default shall impair any such right or power, or shall be construed to be a waiver of any such Event of Default or an acquiescence therein; and every power and remedy given by this Mortgage or the Note may be exercised from time to time

as often as may be deemed expedient by the Mortgagee. Failure on the part of the Mortgagee to require strict compliance with the terms and conditions set forth herein shall not be deemed a waiver of any rights to require such strict compliance at any time. Nothing herein contained shall operate as or constitute a waiver of any of the Mortgagee's rights under the Notes or the Agreements.

23. The Mortgagor agrees that it shall not surrender the Leases or the leasehold thereunder nor, without the prior written consent of the Mortgagee, consent to any modification, amendment or discharge of the Lease, so long as any of the Indebtedness shall remain unpaid.

24. Mortgagor and Mortgagee agree that so long as any of the Indebtedness shall remain unpaid, unless the Mortgagee shall otherwise in writing consent, the leasehold estate in the Property, shall not merge but shall always be kept separate and distinct notwithstanding the union of said estates either in the lessor or in the lessee, or in a third party, by purchase or otherwise, and the Mortgagor further covenants and agrees that, in case it shall acquire the fee title, or any other estate, title or interest in the Property, this Mortgage shall attach to and cover and be a lien upon such other estate so acquired, and such other estate so acquired by the Mortgagor shall be considered as assigned, or conveyed, to the Mortgagee with the same force and effect as though specifically herein assigned or conveyed.

25. The Mortgagor will promptly pay all rents and royalties as and when the same shall become due, and will make all other payments and disbursements, as and when the same shall become due and under the Leases and will, in every case, take a proper receipt for the rent and royalty so paid, and will, within 10 days after a request therefor

by Mortgagee deliver to the Mortgagee a duplicate original receipt (or certified copy thereof), or other evidence satisfactory to the Mortgagee, for the payment of such rents and payments; and the Mortgagor will, in all respects, promptly and faithfully keep, perform and comply with all the terms, provisions, covenants, conditions, and agreements in the Leases to be kept, performed and complied with by the lessee therein, and will not do or permit anything to be done, the doing of which, or omit or refrain from doing anything, the omission of which, will be a ground for declaring a forfeiture of any of the Leases.

26. Mortgagor will give the Mortgagee immediate notice of any default under the Leases within its knowledge and of the receipt by it of any notice of default from the Lessor, and furnish to the Mortgagee any and all information that it may request concerning the performance by the Mortgagor of the covenants of the Leases, or of this Mortgage, and will permit the Mortgagee, at all reasonable times, to make investigation, or examination, concerning such performance; and that the Mortgagor will promptly deposit with the Mortgagee (to be held by it unitl the lien of the Mortgage shall be released) all documentary evidence received by it showing compliance by the Mortgagor with the provisions of the Leases, and will, also, deposit with the Mortgagee (to be held by it until the lien of this Mortgage shall be released) an exact copy of any notice, communication, plan, specification, or other instrument, or document, received, or given, by it in any way relating to, or affecting, the Leases, or the Property, that may concern, or affect the estate of the Lessor, or of the Lessee, in, or under, the Leases, or in the real estate thereby demised.

27. That, upon the happening of any Event of Default as hereinabove defined, the Mortgagor covenants, at any

time, or times, upon the demand of the Mortgagee, forthwith to surrender to it, and the Mortgagee shall be entitled to take actual possession of the Property, and the Mortgagee, in its discretion, may with or without force, and with or without process of law, and before, or after, declaring the principal of the Notes immediately due, enter upon, take and maintain possession of all, or any part, of the Property, together with all records, documents, leases, books, papers, and accounts of the Mortgagor relating thereto, and may hold, manage and operate the Property, and collect the rents thereof, and lease the same in such manner, and for such times, and on such terms, as it may see fit, and may cancel any lease or sublease, for any cause, or on any ground that would entitle the Mortgagor to cancel the same, and may sign the name of the Mortgagor, or its successors or assigns to all papers and documents in connection with such operation or may, as the attorney-in-fact or agent of the Mortgagor, or in its own name as assignee, acting under the assignment of rents hereinabove made, and under the powers herein granted, and without necessity of taking possession of the Property, or making demand therefor, collect the rents therefor, and exercise any rights and powers above granted, and take any legal proceedings necessary to do so; and the Mortgagee shall, after paying out of the revenues from the Property, all expenses of management and operating of the Property including rents, royalties and disbursements under the Leases, insurance premiums, and the costs of such repairs, replacements, alterations and useful additions as may seem to be proper and judicious, and all taxes, assessments or charges, or liens upon the Property, or any part thereof, together with reasonable attorneys' fees, and, after retaining from the amounts so collected reasonable compensation for its services in that behalf, apply the residue, if any, (1) to the payment of accrued interest, if any, on the Notes hereby secured; and (2) to the payment of the principal of the Notes, if any.

28. Upon the occurrence of an Event of Default and upon the commencement of any action, suit or proceeding at law or equity, including a foreclosure action, the Mortgagee shall be entitled to apply at any time to any court having jurisdiction thereof, for the appointment of a receiver of all and singular the Property and of the income thereof from whatsoever source derived and to manage the Property. The receiver shall have the usual powers and duties of receivers in like cases. Said appointment shall be made by the court as a matter of strict right to Mortgagee, and without reference to the adequacy or inadequacy of the value of the Property, or to the solvency of insolvency of Mortgagor or any other party defendant to such suit. Mortgagor hereby specifically waives the right to object to the appointment of a receiver as aforesaid and hereby expressly consents that such appointment shall be made as an admitted equity and as a matter of absolute right to Mortgagee and that the same may be done without notice to Mortgagor.

29. Mortgagee in exercising its rights hereunder, shall also have, without limitation, all of the rights and remedies provided by the Uniform Commercial Code of the State of Kentucky including the right to proceed under the Uniform Commercial Code provisions governing default as to any personal property which may be included in the Property separately from the real estate included therein, or to proceed as to all of the Property in accordance with its rights and remedies in respect of said real estate. If Mortgagee should elect to proceed separately as to such personal property, Mortgagor agrees to make such personal property available to Mortgagee at a place or places acceptable to Mortgagee, and if any notification of intended disposition of any of such personal property is required by law, such notification shall be deemed reasonably and properly given if given at least ten (10) days before such disposition in the manner below provided.

30. Mortgagee shall have the right from time to time to institute an equitable or legal action to recover any principal, interest, or any other sums required to be paid under the terms of this Mortgage, as the same become due, wihout regard to whether or not the entire amount of the unpaid principal and interest, or any other sums shall be due, and without prejudice to the right of Mortgagee thereafter to any other remedy provided herein. Nothing in this Mortgage or in the Notes shall affect the obligation of the Mortgagor to pay the Indebtedness in the manner and at the time and place as provided in the Notes.

31. To the extent permitted by applicable law, the Mortgagor shall not at any time insist upon, or plead, or in any manner whatever claim or take any benefit or advantage or, (i) any stay or extension or moratorium law, (ii) any exemption from execution or sale of the Property or any part thereof, wherever enacted, now or at any time hereafter in force, which may affect the covenants and terms of performance of this Mortgage, (iii) any law now or hereafter in force providing for the valuation or appraisal of the Property, or any part thereof, prior to any sale or sales thereof which may be made pursuant to any provision herein, or pursuant to the decree, judgment or order of any court of competent jurisdiction, (iv) any law now or hereafter in force permitting Mortgagor to waive any rights in or to the Property. Mortgagor further agrees that the Property may be sold on writ of execution. Mortgagor covenants not to hinder, delay or impede the execution of any power herein granted or delegated to Mortgagee, but to suffer and permit the execution of every power as though no such law or laws had been made or enacted. The Mortgagor, for itself and all who claim under it, waives to the extent that it lawfully may be, all right to have the Property marshalled upon any foreclosure hereof.

32. In the event the ownership of the Property of any part thereof becomes vested in an entity other than Mortgagor, Mortgagee may, without notice to Mortgagor, deal with such successor or successors in interest with reference to this Mortgage and the Indebtedness in the same manner as with Mortgagor, and may forbear to sue or may extend time for payment of the debt secured thereby, without discharging or in any way affecting the liability of Mortgagor hereunder or upon the Indebtedness.

33. To the extent of the Indebtedness then outstanding Mortgagee is hereby subrogated to the lien or liens and to the rights of the owners and holders thereof of each and every mortgage, or other lien or encumbrance on the Property which is paid or satisfied, in whole or in part, out of the proceeds of the loan evidenced by the Notes and secured hereby, and the respective liens of said deeds of trust and mortgages, or other liens or encumbrances shall be preserved and shall pass to and be held by Mortgagee herein as security for the Indebtedness to the same extent they would have been preserved and would have been passed to and been held by the Mortgagee had it been duly and regularly assigned, transferred, set over and delivered unto Mortgagee by separate deed of assignment, notwithstanding the fact that the same may be satisfied and cancelled of record, it being the intention of the parties hereto that the same will be satisfied and cancelled of record by the holder thereof at or about the time of the recording of this Mortgage. A portion of the proceeds of the Indebtedness secured by this Mortgage may be used for the purpose of erecting, constructing or improving a building on the property covered by the Leases.

34. If the date or dates of maturity of all or any part or parts of the Indebtedness shall be extended or renewed, then no such extension or extensions or renewal or

renewals shall alter, vary or diminish the force, effect or lien of this Mortgage, in favor of any junior encumbrance or conveyance of the Property, or any part thereof, or in favor of any person hereafter acquiring a lien, title or interest in or to the Property or any part thereof. And unless specifically agreed to in writing by Mortgagee, this lien shall continue as the first lien on all of the Property, until the Indebtedness shall be fully paid. Any extension or renewal agreement or agreements duly executed by Mortgagor shall, with the consent of Mortgagee, be sufficient to extend the lien hereby evidenced without the consent of any person hereafter acquiring a lien, title or interest in or to the Property or any part thereof. No other security now existing, or hereafter taken, to secure the payment of the Indebtedness or any part thereof, shall be impaired or affected in any manner by the execution of this Mortgage; and no security subsequently taken to secure the payment of the Indebtedness or any part thereof, shall affect or impair in any manner the lien of this instrument, but all such additional security shall be taken and held as cumulative.

35. In the event any one or more of the provisions contained in this Mortgage, or the Notes, or the Agreements shall for any reason be held to be inapplicable, invalid, illegal or unenforceable in any respect, such inapplicability, invalidity, illegality or unenforceability shall, at the option of the Mortgagee, not affect any other provision of this Mortgage, but this Mortgage shall be construed as if such inapplicable, invalid, illegal or unenforceable provision had never been contained herein or therein.

36. All notices and demands hereunder shall be in writing and shall be deemed to have been sufficiently given or served for all purposes when presented personally or sent by registered or certified mail with return receipt

requested to any party hereto at its address above stated or such other address of which written notification has been given to the other party.

37. In case of proceedings by or against the Mortgagor in insolvency or bankruptcy or any proceedings for its reorganization or involving the liquidation of its assets, then and in such case the Mortgagee shall be entitled to prove the whole amount of unpaid Indebtedness then accrued under the Notes to the full amount thereof, and all other payments, charges and costs due under this Mortgage, without deducting therefrom any proceeds obtained from the sale of the whole or any part of the Property, provided, however, that in no case shall the Mortgagee receive a greater amount than such principal and interest and such other payments, charges and costs from the aggregate amount of the proceeds of the sale of the Property.

38. The Mortgagor acknowledges that any payments made by it in partial or complete discharge of the Indebtedness to any entity other than Mortgagee or to an agent designated in writing by Mortgagee, shall constitute a payment to Mortgagor's agent and not to Mortgagee. Until said payment is actually in the possession of Mortgagee, or to such designated agent, said payment shall be deemed not to have been properly made, and Mortgagee shall not be required to release or discharge the Mortgage in satisfaction of the obligation pursuant to the provisions of this Mortgage and the Notes.

39. Mortgagor, or any subsequent owner of the Property, shall not amend, cancel, abridge, terminate or otherwise modify any lease of the Property or of any part thereof, or make any new lease or lease renewal or extension (other than renewals provided for in an existing lease),

consent to any assignment thereof, or subletting thereunder, or accept prepayment of installments of rent under any such lease for more than one month in advance without the prior written consent of Mortgagee, any of the foregoing of which shall be voidable at the option of Mortgagee and, at the option of the Mortgagee, shall be an Event of Default.

40. Mortgagor may not encumber the Property with any lien subordinate to the lien of this Mortgage, imposed in connection with any financing or other transaction.

41. If an Event of Default shall occur, Mortgagee may exercise its rights with respect to the Property in such manner as it deems appropriate, and may exercise its rights with respect to the Property, as a whole or in part, and may exercise its rights with respect to all or part of the Property in such order as it deems appropriate.

42. Mortgagor hereby waives any and all rights of redemption from sale under any order or decree of foreclosure of this Mortgage, on its own behalf and on behalf of each and every person or entity acquiring any interest in or title to the Property subsequent to the date of this Mortgage.

43. The intention of the parties being to conform strictly to the usury laws now in force, any contracts for interest in the Notes secured by this Mortgage shall be held to be subject to the reduction to the amount allowed under usury laws held applicable and as now in force, as now or hereafter construed by the court having jurisdiction.

44. All of the grants, covenants, terms, and provisions and conditions herein shall run with the land and shall apply to, bind and inure to the benefit of, the suc-

cessors and assigns of Mortgagor and the successors and assigns of Mortgagee.

45. All covenants, agreements, warranties and representations made herein, in the Notes in the Agreements and in all certificates or other documents delivered in connection with the Indebtedness shall survive the execution and delivery hereof and thereof and all such covenants, agreements, warranties and representations shall inure to the successors and assigns of the Mortgagee, whether or not so expressed. Neither this Mortgage nor the Notes nor any term, covenant or condition hereof or thereof may be amended waived, discharged, modified or terminated, except with the written consent of the Mortgagee.

IN WITNESS WHEREOF, the Mortgagor has executed these presents under seal the day and year first above written.

CREST COAL COMPANY, INC.

By: _____

ADMIRAL MINING, INC.

By: _____

_____
William J. M. Polan,
individually and d/b/a
W.J.M.P. Mining

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

The foregoing instrument was acknowledged before me this 6th day of May, 1981 by William J.M. Polan.

SUSAN B. KIRSCH
Notary Public, State of New York
No. 4696717
Qualified in Westchester County
Commission Expires March 30, 1983

Susan B Kirsch
Notary Public

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

The foregoing instrument was acknowledged before me this 6th day of May, 1981, by William J.M. Polan, President of Crest Coal Company, Inc., a Kentucky corporation on behalf of the corporation.

SUSAN B. KIRSCH
Notary Public, State of New York
No. 4696717
Qualified in Westchester County
Commission Expires March 30, 1983

Susan B Kirsch
Notary Public

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

The foregoing instrument was acknowledged before me this 6th day of May, 1981, by William J.M. Polan, President of Admiral Mining Inc., a Kentucky corporation on behalf of the corporation.

SUSAN B. KIRSCH
Notary Public, State of New York
No. 4696717
Qualified in Westchester County
Commission Expires March 30, 1983

Susan B Kirsch
Notary Public

LEASES HELD BY WILLIAM J. H. POLAN AND/OR CREST COAL COMPANY, INC.
MAGOFFIN, MORGAN AND BREATHITT COUNTIES, KENTUCKY.

1. Lease from Ted Adams, et al, recorded in Lease Book No. 54, Page 686, Magoffin County, Kentucky, on White Oak and containing approximately 1,200 acres.

2. Lease from Goms Allen, recorded in Lease Book No. 54, page 357, Magoffin County, Kentucky, on Craft Creek and containing approximately 58 acres.

3. Lease from Ford Allen and Mary McDaniel, recorded in Lease Book No. 52, Page 741, Magoffin County, Kentucky, on Board Tree and containing approximately 25 acres.

4. Lease from Rueben Allen, recorded in Lease Book No. 52, Page 731, Magoffin County, Kentucky, on Board Tree and containing approximately 18 acres.

5. Lease from Hatton Allen, recorded in Lease Book No. 52, page 726, Magoffin County, Kentucky, on Board Tree and containing approximately 28 acres.

6. Lease from Morgan Allen, recorded in Lease Book No. 52, Page 746, Magoffin County, Kentucky, on Board Tree and containing approximately 65 acres.

7. Lease from Henry Armstrong, recorded in Lease Book No. 2, Page 32, Breathit County, Kentucky, on Wolf Creek and containing approximately 200 acres.

8. Lease from John G. Arnett, recorded in Lease Book No. 51, page 522, Magoffin County, Kentucky, on Stable Branch and containing approximately 140 acres.

9. Lease from C. B. Arnett, Heirs, recorded in Lease Book No. 55, page 256, Lease Book No. 55, Page 333, Lease Book No. 54, Page 699, Magoffin County, Kentucky, on Half Mountain and containing approximately 55 acres.

10. Lease from Sanford and Nelda Arnett, recorded in Lease Book No. 50, Page 371, Magoffin County, Kentucky, on Lick Branch and containing approximately 100 acres.

11. Lease from Dave and Lizzie Arnett, recorded in Lease Book No. 50, Page 363, Magoffin County, Kentucky, on Stable Branch and containing approximately 75 acres.

12. Lease from Luther Arnett, recorded in Lease Book No. 53, Page 179, Magoffin County, Kentucky, on Board Tree and containing approximately 110 acres.

13. Lease from Pauline Arnett, recorded in Lease Book No. 52, Page 200, Magoffin County, Kentucky, on Board Tree and containing approximately 95 acres.

14. Lease from Bertha Arnett, recorded in Lease Book No. 49, Page 172, Magoffin County, Kentucky, on Middle Fork and containing approximately 200 acres.

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15. Lease from Green Arnett, recorded in Lease Book No. 4, page 28, Lease Book No. 2, page 35, Breathitt County, Kentucky, on Richie Fork and containing approximately 75 acres.

16. Lease from Meadie Back, recorded in Book No. 8, page 161, Breathitt County, Kentucky, on Wolf Creek and containing approixmately 60 acres.

17. Lease from Clarence Bailey, recorded in Book No. 4, page 319, Breathitt County, Kentucky, on Richie Fork and containing approixmately 90 acres.

18. Lease from Gene Back, recorded in Lease Book No. 52, page 384, Magoffin County, Kentucky on Lick Branch and containing approximately 50 acres.

19. Lease from Raliegh and Goldie Bailey, recorded in Lease Book No. 53, Page 19, Magoffin County, Kentucky, on Half Mountain and containing 222 acres.

20. Lease from Lonnie and Carrie Boggs, recorded in Book No. 4, page 178, Breathitt County, Kentucky, and containing approximately 60 acres.

21. Lease from Ralph and Merelene Back, recorded in Lease Book No. 50, page 367, Magoffin County, Kentucky, on Lick Branch and containing approximately 125 acres.

22. Lease from Ed Brown, Jr., recorded in Lease Book No. 4, page 643, Breathitt County, Kentucky, on Little Caney and contai ning approximately 500 acres.

23. Lease from William and Jean Brown, recorded in Lease Book No. 53, Page 194, Magoffin County, Kentucky, on Middle Fork and containing approximatel 40 acres.

24. Lease from Dud Carpenter, recorded in Lease Book No. 53, page 738, Magoffin County, Kentucky, on Sand Lick and containing approixmately 1,000 acres.

25. Lease from Creasie Carpenter, et al, recorded in Lease Book No. 55, page 249, Magoffin County, Kentucky, on Sand Lick and containing approximately 50 acres.

26. Lease from Mrs. Lewis Cornwell, et al, recorded in Lease Book No. 55, page 249, Magoffin County, Kentucky, on Half Mountain and containing approximately 250 acres.

27. Lease from D. J. and Ruby Carty, recorded in Lease Book No. 53, Page 667, Magoffin County, Kentucky, on Craft Creek and containing approximately 51 acres.

28. Lease from Silas and Mary Cole, recorded in Lease Book No. 52, page 259, Magoffin County, Kentucky, on Middle Fork and containing approximately 110 acres.

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29. Lease from Cleatis and Cora Craft, not recorded, but dated June 30, 1976, Magoffin County, Kentucky, on Sand Lick and containing approximately 223 acres.

30. Lease from Marvin and Norma Craft, recorded in Lease Book No. 51, page 589, Magoffin County, Kentucky, on Middle Fork and containing approximately 110 acres.

31. Lease from Daisy Craft, recorded in Lease Book No. 53, page 199, Magoffin County, Kentucky, on Lick Branch and containing approximately 62 acres.

32. Lease from Austin and Marie Dyer, recorded in Lease Book No. 53, page 403, Magoffin County, Kentucky, on Spruce Pine and containing approximately 70 acres.

33. Lease from Bonnie, Clayton and Pauline Gardner, recorded in Lease Book No. 52, page 356, Magoffin County, Kentucky, on Lick Branch and containing approximately 38 acres.

34. Lease from Harold R. Hamilton, recorded in Lease Book No. 52, Page 352, Magoffin County, Kentucky, on Lick Branch and containing approximately 2 acres.

35. Lease from Erma Georing, not recorded, but dated the 17th day of October, 1975, and covering the following:

Melvin Wells and Thomas Wells property, on Caney Creek and containing approximately 700 acres.

William M. Casky property, on Licking River and containing approximately 56 acres.

R. F. Casky property, on Licking River and containing approximately 100 acres.

Peter Lykins property, on Brushy Fork of Caney and containing approximatel 80 acres.

John Sebastian property, on Little Stone Coal of Caney and containing approximately 200 acres.

Isaac Lykins property, on Caney Creek and containing approximately 200 acres.

David K. Lykins property, on Caney Creek and containing approixmately 75 acres.

David Lykins property, on Caney Creek and containing approximately 100 acres.

Geo. D. Brown property, on Caney Creek and containing approximately 1,000 acres.

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Michael A. Watson property, on Caney Creek and containing 200 acres.

Andrew Martin property, on Caney Creek and containing approximately 60 acres.

Wm. Ferguson property, on Caney Creek and containing approximately 2,250 acres.

Isabella Benton property, on Caney Creek and containing approximately 175 acres.

Rueben Davis property, on Spew Branch and containing approximately 100 acres.

Eliza Oakley property, on Greasy Creek.

Uriah Cottle property, on Licking River and containing approximately 125 acres.

Gardiner M. Dyer property, on Licking River and containing approximately 100 acres.

C. M. Fallen property, on Grassy Creek and containing approximately 112 acres.

Richard Williams property, on Elk Fork and containing approximately 950 acres.

Isaac Hardin property, on Mordica and containing approximately 100 acres.

Jessie F. Casky property, on Elks Fork and containing approximately 100 acres.

Thomas J. Cassity property, on North Fork Licking and containing approximately 100 acres.

B. F. Peyton property, on Grassy and containing approximately 575 acres.

Henry G. Adkins property, on Sandy and containing approixmately 100 acres

Moses Lacey property, on Grassy and containing approximately 600 acres.

William Day property, on Elk Fork and containing approximately 300 acres.

Jessie P. Day property, on Pleasant Run Carrel Fork and containing approximately 365 acres.

John Lewis property, on Pleasant Run of Licking and containing approximately 1,000 acres.

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Nancy Whitt property, on White Oak Creek and containing approximately 100 acres.

James F. Purcell property, on White Oak and containing approximately 100 acres.

Elisha Bailey property, on Big Caney and containing approximately 200 acres.

William Haney property, on Big Caney and containing approximately 250 acres.

Cornelius Howard property, on Little Sandy and containing approximately 4,700 acres.

Meredith Whitt property, on Little Sandy and containing approximately 100 acres.

Rodah Horten property, on Little Sandy and containing approximately 600 acres.

Paterson Utterback property, on Johnson Creek and containing approximately 1,200 acres.

G. W. Stamper property, on Devils Fork and containing 400 acres.

Milton Gibbs property, on Caney Creek and containing approximately 200 acres.

A. K. McMurray Property.

F. O. Perry Property.

Isabel Benton Property, containing approximately 175 acres.

36. Lease from Harold Hamilton, recorded in Lease Book No. 57, page 216, Magoffin County, Kentucky, on Lick Branch and containing approximately 163 acres.

37. Lease from Oscar Holbrook, recorded in Book No. 1, page 67, Breathitt County, Kentucky, on Wolf Creek and containing approximately 650 acres.

38. Lease from Junie Clemons, recorded in Book No. 3, page 351, Breathitt County, Kentucky, on Pond Branch and containing approximately 100 acres.

39. Lease from Cisco Howard, recorded in Lease Book No. 51, page 527, Magoffin County, Kentucky, on Craft Creek and containing approximately 250 acres.

40. Lease from Clyde Howard, not recorded, but dated the 18th day of August, 1975, Magoffin County, Kentucky, on Craft Creek and containing approximately 600 acres.

41. Lease from Akel Howard, recorded in Lease Book No. 53, Page 672, Magoffin

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County, Kentucky, on Craft Creek and containing approximately 33 acres.

42. Lease from D. H. Howard, recorded in Lease Book No. 54, page 118, Magoffin County, Kentucky, on Craft Creek and containing approximately 50 acres.

43. Lease from Pansy Howard, recorded in Lease Book No. 53, page 794, Magoffin County, Kentucky, on Craft Creek and containing approximately 46 acres.

44. Lease from James Hensley, recorded in Lease Book No. 4, page 172, BreathittCounty, Kentucky, on Wynn Branch and containing approximately 300 acres.

45. Lease from Galen Howard, recorded in Lease Book No. 52, page 376, Magoffin County, Kentucky,on Craft Creek and containing approximately 100 acres.

46. Lease from Annette and Victor Jones, recorded in Lease Book No. 53, Page 707, Magoffin County, Kentucky, on Lick Branch and containing approximately 140 acres.

47. Lease from Cecil and Erma Lovely, recorded in Lease Book No. 55, page 33, Magoffin County, Kentucky, on Trace Fork and containing approximately 35 acres.

48. Lease from Jefferson Land and Mineral, recorded in Book No. 5, page 485, Breathitt County, Kentucky, and containing approximately 300 acres.

X49. Lease from Minnie Rose Risner, recorded(not) but dated February 2, 1976, in Magoffin County, Kentucky on Right Middle Fork and containing approximately 600 acres.

50. Lease from Lucy Kennard, recorded in Lease Book No. 53, Page 30, Magoffin County, Kentucky, on Middle Fork and containing approximately 34 acres.

51. Lease from Virgie and Coleman Loper, recorded in Lease Book No. 55, page 22, on Trace Fork and containing approximately 17 acres.

52. Lease from Willis and Cora Maxson, recorded (not) but dated 27th day of September, 1976, on Trace Fork and containing approxi mately 45 acres.

53. Lease from Price and Lona Montgomery, recorded in Book No. 3, Page 781, on Little Caney and containing approximately 125 acres.

54. Lease from Noah Minix, recorded in Lease Book No. 53, Page 627, on Craft Creek and containing approximately 160 acres.

55. Lease from J. B. Minix, recorded in Lease Book No 53, Page 633, on Craft Creek and containing approximately 125 acres.

56. Lease from Eliza Minix, recorded in Lease Book No. 53, Page 656, Magoffi County, Kentucky, on Craft Creek and containing approximately 68 acres.

57. Lease from Robinson and Jeanette Minix, recorded in Lease Book No. 53,

Page 639, Magoffin County, Kentucky on Craft Creek and containing approximately 55 acres.

58. Lease from Labe D. Minix, recorded in Lease Book No. 53, Page 184, Magoffin County, Kentucky on Sand Lick and contai ning approximately 165 acres.

59. Lease from Kennie and Ressie Montgomery, recorded in Lease Book No 51, page 703 and Lease Book No. 51, Page 709, Magoffin County, Kentucky, on Spruce Pine and containing approximately 600 acres.

60. Lease from Paul B. Mullins, recorded in Lease Book No 53, Page 1, Magoffin County, Kentucky, on Middle Fork and containing approximately 45 acres.

61. Lease from Robert and Audrey Montgomery, recorded in Lease Book No. 53, Page 393, Magoffin County, Kentucky, on Cranes Nest and containing approximately 165 acres.

62. Lease from Ida Mae Owens, recorded in Lease Book No. 52, Page 450, Magoffin County, Kentucky, on Buck Creek and containing approximately 325 acres.

63. Lease from Mager Patrick, recorded in Lease Book No. 4, Page 96, Breathitt County, Kentucky, on Richie Fork and contianing approximately 125 acres.

64. Lease from Dennis Patton, recorded in Book No. 2, page 334, Breathitt County, Kentucky.

65. Lease from Eliza Patton Heirs, recorded in Lease Book No. 52, page 270, Lease Book No 52, Page 344, Lease Book No 52, Page 339, Lease Book 52 Page 365, Lease Book No 52, Page 391, Magoffin County, Kentucky, on Middle Fork and containing approximately 65 acres.

66. Lease from Glenn Patton, recorded in Book No. 3, Page 199, Breathitt County, Kentucky, on Little Caney.

67. Lease from Charles Pendleton, recorded in Lease Book No. 50, page 190, Magoffin County, Kentucky, on Board Tree and containing approximately 250 acres.

68. Lease from Jackson Pinks, recorded in Lease Book No. 53, page 364, Magoffin County, Kentucky on Jake Wireman Fork and containing approixmate 35 acres.

69. Lease from Henry Pitts, recorded in Lease Book No. 2, Page 331, Breathitt County, Kentucky, on Richie Fork.

70. Lease from Lula Prater, recorded in Lease Book No. 53, Page 25, Magoffin County, Kentucky, on Half Mountain and containing approximately 55 acres.

71. Lease from Adam Pitts, recorded in Lease Book No. 3, Page 786, Lease Book No. 6, Page 298, Breathitt County, Kentucky, on Calico.

72. Lease from Creasie Ray Heirs, recorded in Lease Book No. 53, Page 738, Magoffin County, Kentucky and containing approximately 75 acres.

73. Lease from C. M. Reed, recorded in Lease Book No. 54, Page 529, Magoffin County, Kentucky, and covering the following:

    Hearl Howard property, on Elk Creek, Magoffin County, Kentucky and containing 213 acres.

    P. W. Gardner property, on Gardner Branch, Magoffin County, Kentucky and containing 600 acres.

    C. M. Reed property, on Elk Creek, Magoffin County, Kentucky and containing approximately 200 acres.

    John R. Connelley property, on Elk Creek, Magoffin County, Kentucky and containing approximately 400 acres.

    Knsas Holbrook property, on Elk Creek, Magoffin County, Kentucky and containing approximately 250 acres.

74. Lease from Dallas and Tivis Reynolds, recorded in Lease Book No. 54, Page 770, Magoffin County, Kentucky, on Bate Lick and containing approximately 75 acres.

75. Lease from Fred C. Rice, et al, recorded in Lease Book No. 52, Page 525, Lease Book No 53, Page 169, Magoffin County, Kentucky, on Buck Creek and containing approximately 350 acres.

76. Lease from Kelly and Cora Rife, recorded in Lease Book No. 55, page 231, Magoffin County, Kentucky on Trace Fork and containing approximately 135 acres.

77. Lease from Richard and Susie Rife, recorded in Lease Book No. 55, page 16, Magoffin County, Kentucky on Trace Fork.

78. Lease from Wiley Rife and May Rife, recorded in Lease Book No. 55, page 46, Magoffin County, Kentucky on Trace Fork.

79. Lease from Betty and Byron Salyer, recorded in Lease Book No. 53, Page 174, Magoffin County, Kentucky on Sand Lick and containing approximately 50 acres.

80. Lease from Robert and Thelma Salyer, recorded in Lease Book No. 51, page 245, Magoffin County, Kentucky, on Board Tree and containing approximately 30 and 195 acres.

81. Lease from Roscoe and Delia Jean Stephens, recorded in Lease Book No. 52, Page 519, Magoffin County, Kentucky on Buck Creek and containing approximately 625 acres.

82. Lease from Willie Sword, recorded in Lease Book No. or Misc. Contract No, 6, page 158, Breathitt county, Kentucky on Wolf Creek.

83. Lease from Gifford and Alene Taulbee, recorded in Lease Book No. 52, Page

EXHIBIT A

280, Magoffin County, Kentucky, on Lick Branch, and containing approximately 85 acres.

84. Lease from John and Goldie Taulbee, recorded in Lease Book No. 5, Page 696, Breathitt County, Kentucky, on Wynn Branch and containing 600 acres.

85. Lease from Forest and Lela Williams, not recorded but dated the 18th day of November, 1975, on Sand Lick and containing approximately 50 acres.

86. Lease from Frealin and Wava White, recorded in Lease Book No. 52, Page 445, Magoffin County, Kentucky, on Half Mountain and containing approximately 125 acres.

87. Lease from Bobbie and Wand Wireman, recorded in Lease Book No. 55, Page 51, Magoffin County, Kentucky on Trace Fork.

88. Lease from Elliott J. Wireman, recorded in Lease Book No. 55, page 109, Magoffin County, Kentucky, on Jake Wireman,

89. Lease from Lizzie Wireman, recorded in Lease Book No. 55, Page 109, Magoffin County, Kentucky, on Jake Wireman Fork.

90. Lease from Oscar and Bertha Wireman, recorded in Lease Book No. 55, Page 56, Magoffin County, Kentucky, on Trace Fork.

91. Lease from Mildred and Ray Wireman, recorded in Lease Book No. (not recorded) but dated the 17th day of September, 1976, in Magoffin County, Kentucky, on Trace Fork.

92. Lease from Sally Wireman, dated the 17th day of September, 1976, in Magoffin County, Kentucky, on Trace Fork.

93. Lease from Walter and Orgalee Wireman, recorded in Lease Book No. 55, Page 36, Magoffin County, Kentucky, on Trace Fork.

94. Lease from Woodrow Wireman, recorded in Lease Book No. 55, page 43, Magoffin county, Kentucky, on Trace Fork.

95. Lease from Ethel Wireman, recorded in Lease Book No. 55, Page 1, Magoffin County, Kentucky, on Trace Fork.

96. Lease from W. H. and Ada Wireman, recorded in Lease Book No. 54, Page 695, Magoffin County, Kentucky, on Trace Fork.

97. Lease from Clarence and Mary Wooten, recorded in Lease Book No. 52, Page 275, Magoffin County, Kentucky, on Lick Branch.

98. Lease from Paul and Sharon Porter, recorded in Lease Book No. 56, page 78, Magoffin County, Kentucky, on Rowan Creek.

99. Lease from Dud Arnett, recorded in Lease Book No. 55, Page 338, Magoffin County, Kentucky, on Oakley.

100. Lease from Clyde Bailey, recorded in Lease Book No. 55, page 347, Magoffin County, Kentucky, on Half Mountain.

101. Lease from C. B. Arnett Heirs, recorded in Lease Book No. 54, Page 699, Lease Book No. 55, Page 258, Lease Book No. 55, Page 333, Magoffin county, Kentucky, on Half Mountain.

102. Lease from Boone Coal and Timb er, recorded in Lease Book No. 51, Page 319, Magoffin County, Kentucky and covering the following:

James Dyer property, containing 382 acres.

F. O. and Ida Arnett property, containing 31 acres.

Silas Montgomery property, containing 37 acres.

Sandford R. Craft Property, containing 552 acres

Elbert Arnett Property, containing 27 acres.

Scofield Craft property, containing 43 acres.

John J. Kennard property, containing 202 acres.

Quenn Creen property, containing 38 acres.

L. T. Minix Property, containing 250 acres.

Louisa Craft property, containing 634 acres.

J. Milton Craft property, containing 80 acres.

Alfred Williams, property, containing 56 acres.

Russell Wisecup property, containing 27 acres.

Wilda Barnett property, containing 31 acres.

Alvin Back property, containing 110 acres.

W. M. Clemons property, containing 50 acres.

B. S. Clemons property, containing 147 acres.

Eddie Montgomery property, containing 77 acres.

B. F. Holbrook property, containing 283 acres.

Eddie Montgomery property, containing 79 acres

B. S. Clemons property, containing 22 acres.

B. S. Clemons property, containing 107 acres.

Mary Allen property, containing 79 acres.

Corbett Arnett property, containing 273 acres.

103. Lease from Ken Ny Securties Corporation, recorded in Lease Book No. 54, Page 661, Magoffin County, Kentucky and covering the following:

James Bailey property.

Bee and Kate Bailey property.

Synthia and Jeff Salyer property.

Lee and Lizzie Rigsby property.

Newt Rowe property, containing approximately 20 acres.

Morgan and Kate Rowe property, containing approximately 40 acres.

Elbert and Neolus Minix property, containing approximately 83 acres.

Watson Heirs, on Bee Tree, containing approximately 56 acres.

Warnie Williams, on Barb Tree Fork and containing approximately 112 acres.

G. C. and Mary Salyer property, Containing 64 acres.

Green and Phoeba property, containing approximately 37 acres.

104. Lease from Oscar and Dollie Mae Green, not recorded but dated the 9th day of September, 1977, on Middle Fork and containing approximately 124 acres.

105. Lease from Rosa Arnett, et al, recorded in Lease Book No. 56, Page 526, Magoffin County, Kentucky, on Middle Fork and containing approximately 300 acres.

106. Lease from Woodrow Allen, et al, not recorded but dated the 15th day of August, 1977, in Magoffin County, Kentucky, on Long Creek and containing approximately 150 acres.

107. Lease from David W. Allen and Paul Neil Allen, recorded in Lease Book No. 56, Page 318, Magoffin County, Kentucky, on Half Mountain and containing approximately 600 acres.

108. Lease from Myrtle Williams, et al, recorded in Lease Book No. 56, Page 546, Magoffin County, Kentucky, on Board Tree and containing approximately 125 acres.

109. Lease from Myrtle Williams, et al, recorded in Lease Book No. 56, Page 536, Magoffin County, Kentucky, on Board Tree and containing approximately 65 acres.

110. Lease from Cledith Wireman, recorded in Lease Book No. 56, Page 498, Magoffin County, Kentucky, on Trace Fork and containing approximately 300 acres.

111. Lease from Dovie Cisco, recorded in Lease Book No. 56, Page 489, Magoffin County, Kentucky, on Board Tree and containing approximately 110 acres.

112. Lease from Haskel Patrick, recorded in Lease Book No. 56, Page 480, Magoffin County, Kentucky, on Middle Fork and containing approximately 150 acres.

113. Lease from Chalmer Wireman, recorded in Lease Book No. 56, Page 436, Magoffin County, Kentucky, on Trace Fork and containing approximately 85 acres.

114. Lease from Wendell Arnett, recorded in Lease Book No. 56, Page 691, Magoffin County, Kentucky, on Johnson Fork and containing approxiamtely 125 acres.

115. Lease from Ollie Wireman, Sr., recorded in Lease Book No. 56, Page 700, Magoffin County, Kentucky, on Trace Fork and containing approximately 225 acres.

116. Lease from Kerns Land Corporation, recorded in Lease Book No. 56, Page 507, Magoffin County, Kentucky, on Johnson Fork and containing 625 acres.

117. Lease from Billy Joe Oney, recorded in Lease Book No. 56, Page 517, Magoffin County, Kentucky, on Johnson Fork and containing approximately 150 acres.

118. Lease from Gary Dale Oney, recorded in Lease Book No. 56, Page 370, Magoffin County, Kentucky, on Johnson Fork and containing approximately 250 acres.

119. Lease from Duane Arnett, et al, recorded in Lease Book No. 56, Page 386, Magoffin County, Kentucky, on Johnson Fork and containing approximately 225 acres.

120. Lease from Duane Arnett, recorded in Lease Book No. 56, Page 379, Magoffin County, Kentucky, on Johnson Fork and containing approxiamtely 50 acres.

121. Lease from Dudley (Dud) Carpenter, recorded in Lease Book No. 57, Page 110, Magoffin County, Kentucky, on Buck Creek and containing approximately 350 acres.

122. Lease from John B. Wireman, Jr., recorded in Lease Book No. 57, Page 119, Magoffin County, Kentucky, on Trace Fork and containing approximatel 125 acres.

123. Lease from Harold Hamilton, recorded in Lease Book No. 57, Page 216, Magoffin County, Kentucky, on Buck Branch and containing approximately 80 acres.

124. Lease from Jimmie Lovely, recorded in Lease Book No. 57, Page 137, Magoffin County, Kentucky, on Trace Fork.

EXHIBIT A- Page

125. Lease from Aaron Oliver, recorded in Lease Book No. 57, Page 146, Breathitt County, Kentucky, on Hawes Fork.

126. Lease from Sammie Howard, recorded in Lease Book No. 57, Page 155, Magoffin County, Kentucky, on Licking River.

127. Lease from Paul Salyers, recorded in Lease Book No. 57, Page 164, Magoffin County, Kentucky, On Rock House Fork.

128. Lease from William Porter, recorded in Lease Book No. 57, Page 225, Magoffin County, Kentucky, on Half Mountain.

129. Lease from Willia Collins, et al, recorded in Lease Book No. 8, Page 674, Breathitt County, Kentucky, on Poplar Fork of Hawes Fork.

130. Lease from Hattie Prater, recorded in Lease Book No. 8, Page 688, Breathitt County, Kentucky, on Peach Orchard Branch.

131. Lease from Arnold Wireman, recorded in Lease Book No. 54, Page 518, Magoffin County, Kentucky, on Trace Fork and containing approximately 235 acres.

132. Lease from Jim D. Whitaker, recorded in Lease Book No. 56, Page 35, Magoffin County, Kentucky, on Licking River and containing approximately 125 acres.

133. Lease from Nelson Salyer, Heirs, recorded in Lease Book No. 55, page 264, Magoffin County, Kentucky, on Buck Creek.

134. Lease from Muriel Salyer, Widow, et al, recorded in Lease Book No. 56, Page 107, Magoffin County, Kentucky, on Oakley Creek.

135. Lease from Carl Salyer, recorded in Lease Book No. 56, Page 37, Magoffin County, Kentucky, on Oakley Creek.

136. Lease from Carl Salyer, recorded in Lease Book No. 56, Page 69, Magoffin County, Kentucky, on Oakley Creek.

137. Lease from Myrtle K. Neely, Widow, et al, recorded in Lease Book No. 56, Page 127, Magoffin County, Kentucky, on Oakley Creek.

138. Lease from Willis Porter, et al, recorded in Lease Book No. 55, Page 386, Magoffin County, Kentucky, on Half Mountain.

139. Lease from Jessie Porter, et al, recorded in Lease Book No. 56, Page 148, Magoffin County, Kentucky, on Half Mountain.

140. Lease from Sally J. McNew, et al, recorded in Lease Book No. 56, Page 59, Magoffin County, Kentucky, on Trace Fork and containing approximately 625 acres.

141. Lease from Lillie Mae Minix, et al, recorded in Lease Book No. 56, Page 160, Magoffin County, Kentucky, on Trace Fork.

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142. Lease from Ted Manns, recorded in Lease Book No. 2, Page 333, Breathitt County, Kentucky, on Wolfe Creek.

143. Lease from Irvin Hopkins, et al, recorded in Lease Book No. 56, Page 96, Magoffin County, Kentucky, on Buck Creek and containing approximately 150 acres.

144. Lease from Fred Holbrook, recorded in Lease Book No. 2, Page 37, Breathitt County, Kentucky, on Wolfe Creek.

145. Lease from James Gardner, recorded in Lease Book No. 52, Page 291, Magoffin County, Kentucky, on Lick Branch of Middle Fork.

146. Lease from James Gardner, recorded in Lease book No. 52, Page 286, Magoffin County, Kentucky, on Lick Branch of Middle Fork.

147. Lease from DMAT Development Company, Inc., recorded in Lease Book No. 55, Page 365, Magoffin County, Kentucky, and covering the following:

Lillie Mae Patrick, et al property, on Half Mountain and containing approximately 224 acres.

Clarence Holliday property, on Half Mountain and containing approximately 250 acres.

148. Lease from Mary Bailey, Widow, recorded in Lease Book No. 56, Page 139, Magoffin County, Kentucky, on Half Mountain.

149. Lease from Harold Arnett, recorded in Lease Book No. (Misc. Book. No.) 8, Page 297, Breathitt County, Kentucky, on Caney Creek.

150. Lease from Joe Morgan Arnett, Jr., recorded in Lease Book No. 51, Page 163, Magoffin County, Kentucky, on the Breathitt and Magoffin County Line.

151. Lease from Farish Anderson, et al, recorded in Lease Book No. 53, Page 712, Magoffin County, Kentucky, on Board Tree.

152. Lease from Jack Alsept, recorded in Misc. Book No. 8, Page 156, Breathitt County, Kentucky, on Wolfe Creek.

153. Lease from Mary Allen McDaniel, recorded in Lease Book No. 52, Page 736, Magoffin County, Kentucky, on Board Tree.

EXHIBIT A-12

154. Lease from Johnnie Back and Jessie Back, his wife, not recorded but dated the 23rd day of September, 1977, Magoffin County, Kentucky on Big Half Mountain.

155. Lease from Gullett and Helton, recorded in Lease Book No. 56, Page 223, Magoffin County, Kentucky, on Quicksand and Spruce Pine.

156. Lease from Bennie Bailey and Lora Bailey, his wife, dated the 15th day of October, 1977, (not recorded) in Magoffin County, Kentucky, on Buck Creek.

157. Lease from Rhondal I. Wireman and Betty Wireman, his wife, dated the 16th day of October, 1977, (not recorded) Magoffin County, Kentucky, on Rye Branch of Trce Fork of Licking River.

158. Lease from H. H. Miller Heirs,recorded in Lease Book No. 2, Page 206, Breathitt County, Kentucky.

159. Lease from Kinner Howard and Maude Howard, his wife, dated the 19th day of September, 1977 (not recorded) Magoffi n County, Kentucky, on Craft Creek.

160. Lease from Katie Lovely, Elwood and Rosmand Lovely, dated the 31st day of September, 1977, (not recorded) Magoffin County, Kentucky, on Craft Creek.

161. Lease from Willard Arnett and Wanda Arnett, his wife, dated the 8th day of October, 1977, (not recorded) Magoffin County, Kentucky, on Craft Creek.

162. Lease from Kennith Auxier and Vonda Sue Auxier, his wi fe, recorded in Lease Book No. 57, Page 288, Magoffin County, Kentucky, on Salt Lick Branch.

163. Lease from Ollie Barnett and Bonnie Barnett, his wife, dated the 6th day of October, 1977, Magoffin County, Kentucky on Bear Branch.

164. Lease from Oral Barnett and Monnie Barnett, his wife, recorded in Lease Book No. 57, Page 306, Magoffin County, Kentucky on Bear Branch.

165. Lease from Myrtle Williams, et al, dated the 14th and 19th day of April, 1977 (not recorded), Magoffin County, Kentucky on Board Tree.

166. Lease from Willard Wireman and Edna Wireman, his wife, dated the 4th day of October, 1977, Magoffin County, Kentucky on Trace Fork of Licking River.

167. Lease from Clarence Miller and Jessie Miller, his wife, dated the 24th day of October, 1977 (not recorded) Magoffin County, Kentucky on Big Half Mountain Creek.

168. Lease from Edward Porter and Linda Porter, his wife, dated the

EXHIBIT A-1.

22nd day of October, 1977 (not recorded) Magoffin County, Kentucky on Big Half Mountain Creek.'

169. Lease from Jack Allen and Phyllis Allen, his wife, dated the 21st day of October, 1977 (not recorded) Magoffin County,Kentucky on Bear Branch.

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HOWARD & RUSSELL COAL COMPANY, INC. LEASE AGREEMENTS

	ACRES	RATE MINERAL	RATE SURFACE	TERM OF LEASE	ADVANCE ROYALTIES
& F ANCIS AUXIER	50 +-	$1.50 or 10%	.50¢	2 yrs. or vicinity	$1,000.00
B.TTY HOWARD	100 +-		.50¢ Sur.	5 yrs. or vicinity	3,000.00 recuped
MILLER	430	1.50 or 10%	.60	2 yrs.	15,000.00
OL. & POLLY WIREMAN	200+-21/58	1.50 or 10%	.50	5 yrs.	7,000.00 recuped
OL & POLLY WIREMAN	200+-		.50 Sur.	2 yrs.	3,000.00 recuped
E INE MINING CORP.					
ONG TR.	175 +-		Surface		
HOWARD TR.	100 +-		"		
ALLEN TR.	38 +-		"		
ALLEN TR.	38 +-		"		
CARPENTER TR.	400 +-		"		
HORN COAL					
# H-1989	580	Mineral			
# H-1983	64.70	"			
# H-1982	27.90	"			
# H-2011	81.80	"			
# H-1868	199.30	"			
LAND COAL CO.					
ATTIE BAILEY	754-	2.25		2 yrs. or vicinity	
COLEM JOSEPH & LORIE	150 +-	2.25		2 yrs. or vicinity	$16,000.00
ORE BAILEY	220 +-	2.25		2 yrs. or vicinity	
H. SALYER (HEIRS)	275 +-	2.00		2 yrs to 6 yrs	$10,000

1st.

KINDLE & POLLY WIREMAN

Date- 3-29-77
Term- 5 yrs. or until lessee has ceased mining in the vicinity of said land.
Rate- .50¢ per ton surface only
Rate- 1.50 per ton or 10% of gross selling price for each 2,000 pounds coal f
Coal only-applies only to those tract's that Lessor own coal.
Gas & Oil excepted form this lease.
Lessee further agrees to begin mining on said property within six months-
providing permit for this property has been approved.
Also Lessee shall have right to transport coal from other properties across
above said property.
Lessee agrees to build three ponds-if permitted by Federal Reg.

2nd.
Date-12-20-76 40 acres +-
Term- 2 yrs. from date hereof- or when lessee has ceased Mining upon Vicinity
of said land.
Rate- .50¢ per ton for all coal mined and removed from described surfaces tra
only.
Minerals are presently under lease.

3rd.
Date- 2-28-78 -advance royalty of 5,000.00 (Dollars)
Term- 5 yrs from date hereof- or until Lessee has ceased Mining Operations
upon or in vicinity of said Land.
Rate- .60¢ per ton-Surface tracts only.
Rate- $2.00 per ton or 10% of gross selling price for ea. 2,000 pounds of Co
for coal only-Applies to those tracts that Lessors own Coal.
All gas & oil excepted out from lease.
Lessee shall have the right to transport coal from other properties, across
above described property so long as Lessor is conduting mining operations o
Lessors property.
Lessee agrees not to construct any sediment structures on that portion of la
behind Lessor's dwelling.

EXHIBIT A - Page 18

DOVIE MILLER

Date- 10-4-77 $15,000.00 prepaid royalties
460 acres +-
Rate- .60¢ per ton for each 2,000 pounds of coal mined and removed for surface only.
Rate-$1.50 per ton or 10% of gross selling price of the coal for each 2,000 pounds of coal mined and removed-understood this is for coal only.
It is understood by and between the Lessor & Lessee that there is an outstanding 1/6 or 1/7 interest in the coal ohly, owned by a third party-will in no way effect the above stated price of the coal.
Lessee agrees to pay 5¢ per ton for each 2,000 pounds of Coal moved from other Coal properties across the above described land.
Term- 2 years from and after the date thereof and from year to year there after so long as coal is being mined.
All royalties are to be paid to Dovie Miller.

EXHIBIT A. Page 14

GEO. & BETTY HOWARD

Date- Dec.16-76
100 acres +-
Term- 5 years from and after the date hereof or until such time as the Lessee has ceased mining upon and in vicinity of said land.
Rate- .50¢ per ton for all coal mined and removed surface only
If Lessor owns a Less interest in the above described lands then the whole, then the royalties shall be paid to the Lessor only in the proportion to which Lessor's interest there in bears to the whole undivided fee.

AMOS & FRANCIS AUXIER

Date- 11-0-77 50acres +-
Lessee assums liability or damages to house
Term- 2 years from date of lease or until such time as the lessee has ceased mining operations upon or in vicinity of said land.
Lessee agrees to pay rate of .50¢ per ton for coal mined and removed from surface tracts only.
Rate- 1.50 or 10% per ton for the mineral only or coal only.

Exhibit B

THE BANK OF NEW YORK

NEW YORK'S FIRST BANK - FOUNDED 1784 BY ALEXANDER HAMILTON

48 WALL STREET, NEW YORK, N.Y. 10015

January 14, 1983

William J.M. Polan
Individually and d/b/a
W.J.M.P. Mining
P. O. Box 434
Salyersville, Kentucky

Crest Coal Company, Inc.
P. O. Box 434
Salyersville, Kentucky

Admiral Mining, Inc.
P. O. Box 434
Salyersville, Kentucky

Re: The Bank of New York - William J.M. Polan, Crest Coal Company, Inc., Admiral Mining, Inc.

Gentlemen:

Reference is made to the Mortgage and Security Agreement, dated May 6, 1981, from William J.M. Polan, individually and d/b/a W.J.M.P. Mining, Crest Coal Company, Inc., and Admiral Mining, Inc., and, in particular to paragraph 17, thereof, which provides as follows:

> "17. Mortgagee hereby is authorized, but not required, whenever and as often as it may become necessary, or advisable, so to do, by reason of the delinquency of the Mortgagor in the performance of the covenants of this Mortgage or of the Leases to pay rents, royalties and disbursements as required by the Leases, to remedy defaults under the Leases, to procure, or renew, insurance, to rebuild, restore or replace the Property in proper condition and repair, to discharge taxes, assessments or other charges levied, imposed or assessed upon the real estate and personalty, or any part thereof, to redeem the same from any tax sale, or forfeiture or to purchase any tax title thereon, to remove any mechanic's lien, or other lien, or encumbrance thereon, to carry on the prosecution, or defense,

of any suit affecting the security hereunder, and to advance, or expend, the necessary money for any of said purposes, including the payment of reasonable attorneys' fees and court costs, stenographers' charges and expenses for procuring evidence, if any, and any and all costs for the preparation for trail of any such suit. Any sums so advanced or expended shall, upon demand, be repaid to the Mortgagee by the Mortgagor with interest on each item at the rate of 15% per annum, and all of such sums and interest shall be added to the Indebtedness secured by this Mortgage."

We understand that there are defaults in payment of royalties due under the leases which are encumbered by the Mortgage. As a result of such defaults and in accordance with the provisions of paragraph 17 of the Mortgage, we have requested our counsel to undertake to ascertain the status of the leases and the amount, if any, of the royalties and rents due under the leases. Enclosed are copies of requests for information regarding the leases that our counsel has sent to each of the lessors.

In light of your failure to satisfy the conditions of the agreements under which the proceeds of sale of certain of the Florida properties were remitted to the Bank for disbursement at your request, upon satisfaction of such conditions, the Bank has determined that it is necessary to proceed to protect its interests in accordance with the terms of the Mortgage. In addition, we will when, as, and if the responses to the information requests are received or sooner, if we can obtain reliable information regarding the amount of royalties or rents that are due, unless you provide us with specific written notification to the contrary, review and evaluate the responses and proceed to take appropriate action in accordance with the terms of the Mortgage to protect our interests.

Very truly yours,

THE BANK OF NEW YORK

By:_____

/aam

cc: Eric M. Reuben, Esq.
S. Harvey Ziegler, Esq.
Frank Wilford, Esq.

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED

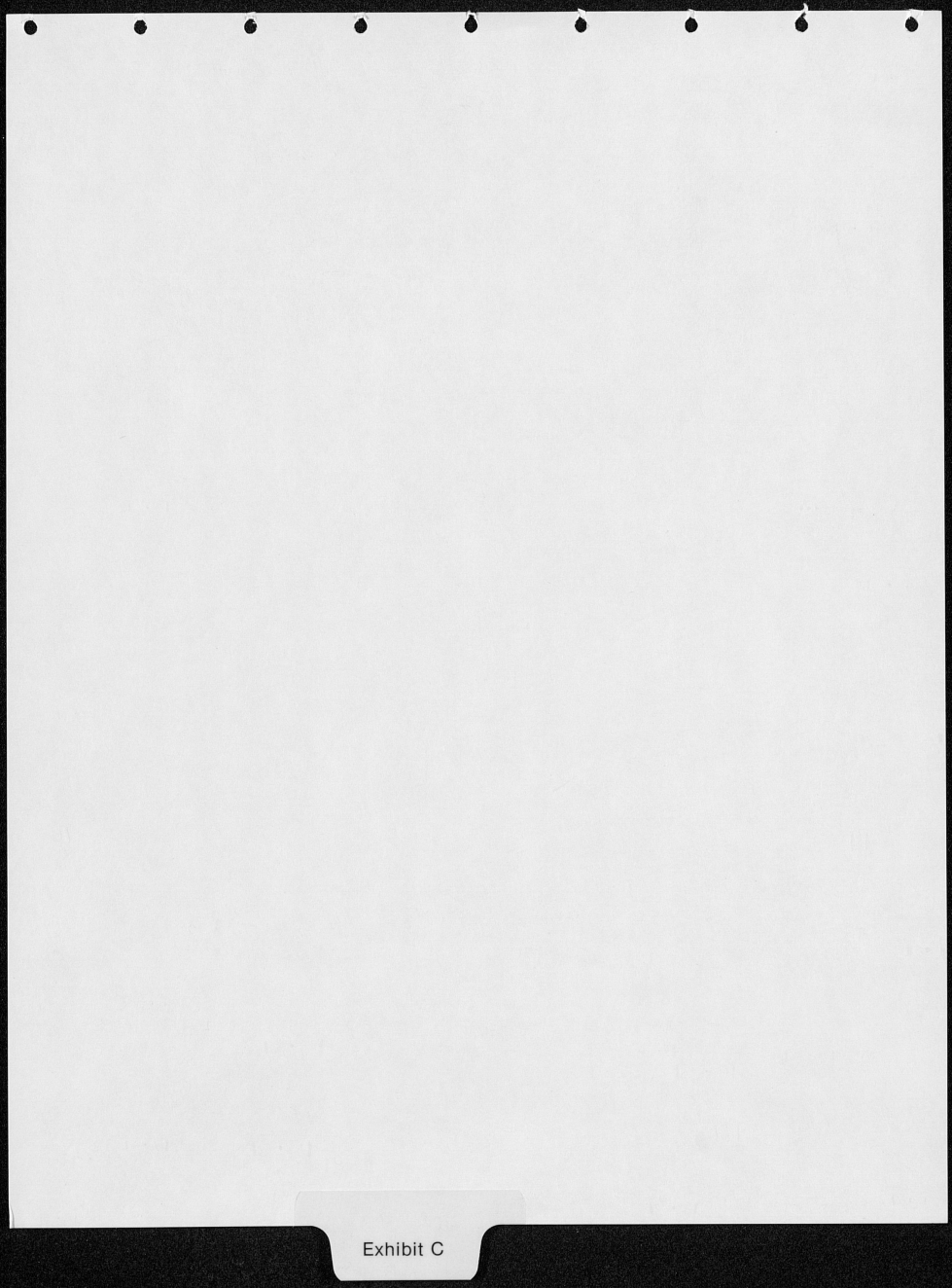
Exhibit C

THOMAS B. FENLON, P.C.
THOMAS F. NOONE, P.C.
BERNARD F. JOYCE, P.C.
LAWRENCE B. THOMPSON
JOHN E. BENNETT
WILLIAM A. LEET
WENDELL DAVIS, JR
DAVID M. DALY
DAVID M. MAHLE
PETER B. TISNE
MICHAEL C. JOHANSEN
LEONARD C. POJEDNIC
ROBERT W. VIETS
DENNIS C. FLEISCHMANN
ERIC M. REUBEN

OF COUNSEL
HUGH N. W. RONALDS
JOSEPH B. BREEN
HERBERT J. SEAKWOOD

EMMET, MARVIN & MARTIN
COUNSELLORS AT LAW
48 WALL STREET
NEW YORK, N.Y. 10005

(212) 422-2974
CABLE ADDRESS: EMMARRO
TELEX: 669170

EUNICE M. O'NEILL
JEFFREY S. CHAVKIN
STEPHEN P. CEROW
J. CHRISTOPHER EAGAN
ANNE T. SCHWAB
THOMAS E. TARANTINO
ELLEN J. BICKAL
JONATHAN S. GELLMAN
ELLEN P. EPPS
JEAN A. O'HARE
SIDNEY M. RUTHENBERG
JOAN P. MURTAGH
JAMES F. STOMBER, JR.
CARL L. WISE
JODY L. COSGROVE
SVETLANA V. PETROFF

March 7, 1983

FEDERAL EXPRESS

Basil Diamond, Esq.
Walton, Lantaff, Schroeder
& Carson
1675 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401

Re: William J.M. Polan

Dear Mr. Diamond:

The purpose of this letter is to confirm certain matters that we discussed at our meeting last Thursday in your office:

1. Lease Royalty Payments. You indicated that Mr. Polan has stated there are certain royalty payments that must be made immediately. In accordance with the understandings set forth in my letters to Mr. Winters of July 26 and October 7, this will confirm that the Bank remains ready and willing to make moneys which it received pursuant to such letters available for payment of past due royalties, subject to our receipt of confirmation that the lease in question has been recorded and that the lease is encumbered by the Bank's mortgage.

COPY

As I mentioned to you, on behalf of the Bank, we sent letters to the lessors of the various leases covered by the Bank's mortgage. The Bank's cover letter to Mr. Polan and a copy of the letters which were sent to the lessors were sent to Mr. Polan in Kentucky. We have not, however, been able to confirm whether these papers were received. For your records I have enclosed a duplicate set of these papers, together with copies of the responses that we have received to date. Based upon our initial responses, it is anticipated that the Bank would undertake to make the royalty payments to the following parties in the amounts indicated:

$ 2,500 - Ken-Ny Securities Corp.

1,600 - Cecil and Erma Lovely

$ 1,000 - Virgie and Coleman Loper
800 - Willie Sword
2,000 - Haskel Patrick
1,000 - Ford Allen
2,000 - Ford Allen
2,000 - Hatten Allen
1,000 - Morgan Allen Estate
2,000 - Pauline Arnett
5,000 - Marvin & Norma Craft
1,350 - Austin and Marie Dyer
6,000 - Billy Joe Oney
6,000 - Gary Dale Oney
3,125 - Duane Arnett
1,875 - Bennett Arnett
2,000 - Jimmie Lovely
2,000 - Marvin McDaniel
1,000 - Johnnie Bach
1,250 - Duane Arnett
6,500 - Myrtle Williams

Unless Mr. Polan has an objection to these payments, which should be sent to my attention promptly and in writing stating the grounds for the objection, the Bank will proceed on the foregoing basis. In addition, if Mr. Polan believes that he can obtain reinstatement of any lease that the lessor has indicated has been terminated, he should advise us of the basis on which he would be able to obtain reinstatement.

2. Tipple Lease. You also indicated that Mr. Polan has suggested that it might be possible to settle the litigation with the Arnetts with respect to the alleged termination of the Tipple Lease for a nominal amount. Although such a payment was not originally contemplated in my letters to Mr. Winters, the Bank would certainly consider a reasonable request for a payment to the Arnetts if it would effect a reinstatement of the lease. It is, however, essential that I receive information in this regard as soon as possible, and in any event by the end of this week, since the Bank must now determine whether and to what

extent it must pursue its litigation with the Arnetts and/or attempt to reach other accomodations with respect to that litigation.

3. Florida Real Estate. You indicated that you would be providing me with a list of the instances in which it is alleged that moneys received in respect of the sale of certain of the Florida properties were applied in a manner inconsistent with the terms on which the releases were delivered to Mr. Winters.

4. Tax Liabilities. The Bank is not at this time willing to make moneys that it received from the sale of the two Florida properties available for the payment of taxes on any basis which is inconsistent with the agreement upon which the moneys were received.

5. Kentucky Real Estate. Enclosed is a copy of the mortgage the Bank received from Mr. Polan in June of 1981. Among the exhibits annexed to the mortgage is a deed from J.B. Holbrook and Betty Sue Holbrook to William J.M. Polan. Also enclosed is a copy of that deed, as actually recorded. You will note that the deed was recorded on August 18, 1982 and the grantee in the deed was Susan Ester Polan. I would appreciate your discussing this matter with Mr. Polan and advising me of the explanation, if any, for the change in the name of the grantee and for the delay in recording.

6. Proposed Plan. You indicated that Mr. Polan was engaged in the preparation of a plan of some nature for the upcoming six to nine month period, which would involve a forebearance by the Bank. Although the Bank would consider any concrete proposals which Mr. Polan may have, the Bank has not now made any agreement whatsoever to forebear. Moreover, if a proposal is to be made, it should be made promptly since we are proceeding with our actions.

In any instance in which we have requested information or written responses from Mr. Polan I would appreciate your acting as intermediary to assure an orderly transmission of information.

Very truly yours,

Eric M. Reuben

EMR:aam

cc: Matthew G. Gilmartin

Exhibit D

THOMAS B. FENLON, P.C.
THOMAS F. NOONE, P.C.
BERNARD F. JOYCE, P.C.
LAWRENCE B. THOMPSON
JOHN E. BENNETT
WILLIAM A. LEET
WENDELL DAVIS, JR.
DAVID M. DALY
DAVID M. MAHLE
PETER B. TISNE
MICHAEL C. JOHANSEN
LEONARD C. POJEDNIC
ROBERT W. VIETS
DENNIS C. FLEISCHMANN
ERIC M. REUBEN

OF COUNSEL
HUGH N. W. RONALDS
JOSEPH B. BREEN
HERBERT J. SEAKWOOD

EMMET, MARVIN & MARTIN
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(212) 422-2974
CABLE ADDRESS: EMMARRO
TELEX: 669170

EUNICE M. O'NEILL
JEFFREY S. CHAVKIN
STEPHEN P. CEROW
J. CHRISTOPHER EAGAN
ANNE T. SCHWAB
THOMAS E. TARANTINO
ELLEN J. BICKAL
JONATHAN S. GELLMAN
ELLEN P. EPPS
JEAN A. O'HARE
SIDNEY M. RUTHENBERG
JOAN P. MURTAGH
JAMES F. STOMBER, JR.
CARL L. WISE
JODY L. COSGROVE
SVETLANA V. PETROFF

June 16, 1983

Basil Diamond, Esq.
Walton, Lantaff, Schroeder
& Carson
1675 Palm Beach Lakes
Boulevard
West Palm Beach, Florida 33401

Rudy Yessin, Esq.
411 West Broadway
Post Office Drawer B
Frankfort, Kentucky 40602

Re: William J. M. Polan

Dear Mr. Diamond:

Reference is made to my letter dated March 7, 1983 to Mr. Diamond. In that letter we confirmed on behalf of The Bank of New York, that the Bank remained ready and willing to make moneys which it had received in connection with the sale of certain Florida real estate available for the payment of past due royalties subject to the receipt of certain information outlined in that letter. In that letter we also indicated that we had communicated with land owners of various leases in an effort to tender royalty payments to them and requested certain information from Mr. Polan. Since we did not receive any response either from Mr. Diamond or Mr. Polan we proceeded on the basis outlined in our letter.

The letters which we sent to the various land owners requested that the land owners advise us of the next royalty payments that were due. In accordance with such letter we have received additional letters from the following land owners requesting additional payments for lease years commencing in various months of 1983:

1. Jimmie Lovely
2. Pauline Arnett
3. Wiley Rife and May Rife
4. Billy Joe Oney

5. Myrtle Williams
6. Haskell Patrick
7. Malcolm Wireman
8. Gary Dale Oney

Again, unless we receive written objection from Mr. Polan to the contrary, it would be the Bank's intention to proceed to make payment of the sums requested.

We again confirm on behalf of the Bank, the willingness to consider Mr. Polan's request for payments of additional moneys to any other land owner to whom royalties are due, on the same basis as outlined in the March 7, 1983 letter, and in previous correspondence with Mr. Polan's counsel.

We would appreciate your prompt response.

Reference is also made to my letter of March 30, 1983 to Mr. Diamond relating to the litigation entitled Boone Coal & Timber Company v. William J.M. Polan, The Bank of New York, et. al. In that letter, I requested information regarding a check for $25,000.00 that had been sent to Mr. Winters for the purpose of tendering it to Boone Coal & Timber in payment of past due minimum royalties. We have not received a response to that letter either. I would appreciate your responding to our request for information regarding that check.

Finally, on June 13, 1983 I received a telephone call from a Mr. Ken Hall, a representative of Brannem and Baker Coal Company. Mr. Hall called to inquire as to the status of Mr. Polan's leases and asked whether there was interest in subleasing any of these properties. I had advised him that The Bank of New York is the mortgagee of the property and is not in a position itself to sublease any property but that I would pass on this inquiry to you as attorneys for Mr. Polan. Please contact me if you think it appropriate to pursue this request.

Very truly yours,

EMR:aam

Eric M. Reuben

cc: Matthew G. Gilmartin
Henry Kinser, Esq.

Exhibit E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
-at Pikeville-

Action No. 83-31

THE BANK OF NEW YORK, a New York banking corporation — PLAINTIFF

vs.

MOTION TO DISMISS

WILLIAM J. M. POLAN, ET AL. — DEFENDANTS

* * * * * * * * * * *

Come the defendants, William J. M. Polan, Susan Polan, Crest Coal Company, Admiral Mining, Inc. and William J. M. Polan, Individually, and d/b/a W.J.M.P. Mining, by counsel, and moves the Court to dismiss the Plaintiff's complaint and as grounds for their motion state:

1. The complaint fails to state sufficient grounds to provide this Court with jurisdiction.

2. The Plaintiff has failed to identify all defendants named in the action as to their citizenship.

3. The Court lacks venue in addition to lack of jurisdiction.

4. The Plaintiff has instituted an action against one or more of these defendants in the state court of Florida in which a part of the subject matter for which it makes a claim in this action is being litigated in the Florida courts and there is involved in that action a counterclaim by these defendants to the claim of the Plaintiff.

5. Count 7 of the complaint contends that the Plaintiff loaned monies to Kentucky Coal Partners, a limited partnership, whereas, this party has not been named a party defendant. An allegation for relief based on fraud has been made by the Plaintiff which allegation is conclusionary and fails to state a claim upon which relief can be granted.

6. The claim for the appointment of a receiver is a claim upon which the Magoffin Circuit Court in the case of Arnett vs. Crest Coal Co. , CA 83-CI-029, has appointed a receiver to protect the assets of this company and others.

MOTION FOR LEAVE TO FILE MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS

Counsel for these defendants states that he has been employed to assist in the defense of this action; that the chief local counsel for these defendants is Mr. J. K. Wells, attorney at Paintsville, Kentucky; that the undersigned has been informed that Mr. Wells has been injured and has been absent from his office for an extended period of time and has been unable to prepare a responsive pleading to the complaint.

Counsel for these defendants states that he has not had an opportunity to consult with these defendants in that Mr. Polan is a resident of the State of Florida; that counsel has been in the process of terminating his partnership relation with the firm of Barnett & Alagia; has been in the process of physically moving from his former office and residence to a new office and residence; that he has been unable to devote the time necessary to consult with these defendants

and to prepare a memorandum in support of the motions made herein.

The basis for the motions made herein has been furnished to counsel by the defendants' Florida counsel and time will be required to coordinate the memorandum in support of the motions.

WHEREFORE, these defendants pray that the motions filed herein be considered by the Court; that the same be sustained; that the Court allow the defendants reasonable time in which to prepare a memorandum in support; that plaintiff's complaint be dismissed; for their costs herein expended, and for all other proper relief to which they may appear entitled.

RUDY YESSIN
411 West Broadway
P. O. Drawer B
Frankfort, KY 40602

and

MARRS ALLEN MAY
Stratton, May & Hays, PSC
P. O. Drawer 851
Pikeville, KY 41501

and

BASIL S. DIAMOND
Walton, Lantaff, Schroeder & Carson
Suite 500 Forum III
1675 Palm Beach Lakes Blvd.
P. O. Box 2966
West Palm Beach, FL 33402

Counsel for William J. M. Polan, Susan Polan, Crest Coal Co., Admiral Mining, Inc. and William J.M. Polan, Individually and d/b/a W.J.M.P. Mining

This is to certify that a copy of the foregoing Motions was this 14th day of April, 1983, mailed to the following:

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Counsel for Plaintiff
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Franklin Drake
Counsel for Defendants, Ford Motor
Credit Company and Associates
Commercial Corporation
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Louisville, KY 40202

CT Corporation System, Process Agent
Brandeis Machinery & Supply Corp.
Kentucky Home Life Bldg.
Louisville, KY 40201

Lawrence R. Webster
Attorney for Eastern Kentucky Mack
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Prestonsburg, KY 41653

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Commonwealth of Kentucky
410 Capitol Annex
Frankfort, KY 40620

J. F. Runke
Secretary of Transportation
Commonwealth of Kentucky
Bureau of Highways
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Buddy Adams, Process Agent
Department for Human Resources
Division of Unemployment
Office of the Secretary
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Louis Defalais, Process Agent
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Federal Building
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Anne Howard
Foraker, KY 41429

Cisco Howard
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Thomas R. Salyer, Process Agent
Magoffin County, Kentucky
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CT Corporation System, Process Agent
Midco Kentucky Company
Kentucky Home Life Building
Louisville, KY 40202

James Mansion, Process Agent
First Huntington National Bank
Office of the Secretary of State

State Capitol
Charleston, West Virginia 25305
Attn: Process Section

Barry Knipp, Process Agent
People's Bank of Olive Hill
Main Street
Olive Hill, KY 41164

CT Corporation System, Process Agent
International Harvester Credit Corp.
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CT Corporation System, Process Agent
Westinghouse Credit Corporation
Kentucky Home Life Building
Louisville, KY 40202

Hertz Commercial Leasing Corp.
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CT Corporation System, Process Agent
Mack Financial Corporation
Kentucky Home Life Building
Louisville, KY 40202

CT Corporation System, Process Agent
CIT Financial Services
Kentucky Home Life Building
Louisville, KY 40202

Richard U. Larson, Process Agent
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Louisville, KY 40218

General Coal Company
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Philadelphia, Pennsylvania 19109

First Pennsylvania Bank
First Pennsylvania Tower
Center Square
Philadelphia, Pennsylvania 19101

Rudy Yessin

Rudy Yessin