

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA


Empire Coal Sales, Inc., an Alabama)
Corporation, and The John Charles Fay,)
Jr. Trust Amended and Restated,)
John C. Fay, Jr. as Trustee,)

Plaintiffs,)

v.)

Alamerica Bank, a banking business)
operating in Jefferson County, Alabama,)
by and through it's authorized Agent,)
Alan Grice, Senior Vice President,)
Charles McKell, an individual and owner)
of Allied Minerals, Inc., Allied Minerals,)
Inc., an Alabama Corporation,)
Bert Wesley Calvert, an individual and)
owner of MLC Minerals, LLC,)
MLC Minerals, LLC, an Alabama)
Corporation, Defendants A, B, and C,)
the persons, firms or corporations)
whose true names and legal entities are)
unknown at this time, but will be)
substituted by amendment when)
ascertained, who are responsible directly)
or indirectly in some manner for the)
occurrences and actions alleged herein,)
and whose acts and conduct alleged)
herein contributed to the damages as)
alleged herein made the basis of the)
Plaintiffs' Complaint.)

Defendants.)


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Shelby Cnty Judge of Probate, AL
07/16/2010 03:49:51 PM FILED/CERT

CIVIL ACTION NUMBER

CV 201001910

FILED IN OFFICE

JUL 08 2010

ANNE-MARIE ADAMS
Clerk

SUMMONS

TO ANY SHERIFF or any person authorized by Rule 4.1(B)(2) or 4.2 (b)(2) or 4.4(b)(2)
of the Alabama Rules of Civil Procedure to effect service in the State of Alabama.

You are hereby commanded to serve this Summons and a copy of the Complaint to
Defendant in this action upon:

NOTICE TO: **Allied Minerals, Inc.**
c/o Charles McKell, Owner
1800 Mountain Woods Place
Birmingham, Alabama 35216

NOTICE TO DEFENDANT

THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS. YOU OR YOUR ATTORNEY ARE REQUIRED TO MAIL OR HAND DELIVER A COPY OF A WRITTEN ANSWER, EITHER ADMITTING OR DENYING EACH ALLEGATION IN THE COMPLAINT TO THE PLAINTIFF'S ATTORNEY, JAMES E. HARRIS, HARRIS LAW FIRM, WHOSE ADDRESS IS 1117 21ST STREET NORTH, BIRMINGHAM, ALABAMA 35234.

THIS ANSWER MUST BE MAILED OR DELIVERED WITHIN 30 DAYS AFTER THIS SUMMONS AND COMPLAINT WERE DELIVERED TO YOU OR A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER THINGS DEMANDED IN THE COMPLAINT. YOU MUST ALSO FILE THE ORIGINAL OR YOUR ANSWER WITH THE CLERK OF THIS COURT.

DATE

CLERK OF COURT

RETURN OF SERVICE

Received this Summons at _____ on
_____ and on _____ at _____
I served it on the within named _____
by delivering a copy of the process and accompanying documents to him/her.

Dated _____, 2010.

BY:



20100716000228640 2/25 \$88.00
Shelby Cnty Judge of Probate, AL
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Corporation, Defendants A, B, and C,)
the persons, firms or corporations)
whose true names and legal entities are)
unknown at this time, but will be)
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ascertained, who are responsible directly)
or indirectly in some manner for the)
occurrences and actions alleged herein,)
and whose acts and conduct alleged)
herein contributed to the damages as)
alleged herein made the basis of the)
Plaintiffs' Complaint.)

Defendants.)

CIVIL ACTION NUMBER

CV 2010-01910

COMPLAINT

COMES NOW, Plaintiffs, Empire Coal Sales, Inc., (hereinafter referred to as "Empire"), and The John Charles Fay, Jr. Trust Amended and Restated, John C. Fay, Jr., Trustee, (hereinafter referred to as "Trust") and alleges as follows:

1. Plaintiff, Empire is an Alabama Corporation.



2. Plaintiff, Trust is a family trust formed in 2005 in Jefferson County, Alabama.

3. Defendant, Alamerica Bank acting through it's authorized agent, Alan Grice, Senior Vice President, is an Alabama Bank doing banking business in Jefferson County, Alabama.

4. Defendant, Charles McKell is an individual who owns and operates Allied Minerals, Inc. and is a resident of Jefferson County, Alabama and who is over the age of nineteen years.

5. Defendant, Allied Minerals, Inc. is a coal company located in Jefferson County, Alabama.

6. Defendant, Bert Wesley Calvert is an individual that owns and operates, MLC Minerals, LLC, and who is over the age of nineteen years.

7. Defendant, MLC Minerals, LLC, is a coal company located in Walker County, Alabama.

8. Plaintiff is ignorant of the true names and capacities of defendants sued as fictitious parties A, B and C. Plaintiffs will amend this Complaint to allege defendants' true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants are responsible in some manner for the occurrences and actions alleged herein, and that Plaintiff's damages as alleged herein were proximately caused by defendants' conduct.

9. Plaintiff is informed and believes and thereon alleges that each of the defendants sued herein, whether named or named fictitiously, was the agent and/or employee, co-adventurer, partner or in some manner, the agent and/or principal of each of the other defendants, and was acting within the course and scope of said agency,

representation or employment or doing or failing to do the acts alleged herein. The acts and conduct alleged herein and each defendant were known, authorized and ratified by each and every remaining defendant.

FACTS:

10. Plaintiff, Empire buys and sells coal. Empire is operated by John C. Fay, Jr. who uses his knowledge, experience and expertise to buy different types of coal, both expensive and inexpensive, and blend them together to meet the specifications of a particular customer.

11. In March of 2010, Empire entered into an Agreement with Charles McKell of Allied Minerals, Inc. and Wes Calvert of MLC Minerals, LLC to blend Empire's less expensive coal with the more expensive coal they were purchasing from National Coal of Alabama, (hereinafter referred to as "NCA") to meet the specification of their customers Lehigh Cement, La Farge Cement, National Concrete and Chem Lime. (Hereinafter referred to as "customers").

12. Empire, MLC and Allied Minerals were all having cash flow and credit problems, therefore Wes Calvert went to Defendant Alamerica Bank to obtain a \$250,000.00 Letter of Credit to be issued to NCA, the coal provider who made the request for an LOC.

13. In order for Defendant Alamerica Bank to issue a \$250,000.00 Letter of Credit it was necessary, and John C. Fay, Jr. agreed, to mortgage unimproved property held by the John Charles Fay, Jr. as Trustee. Said mortgage was executed and the \$250,000.00 letter of credit was issued to NCA.

14. On March 31, 2010, a Reimbursement Agreement was made between Alamerica Bank and the Borrowers: Bert Wesley Calvert, MLC Minerals, LLC and the Trust. (Ex. A, attached hereto and made a part hereof). The Reimbursement Agreement took the Trust property as collateral for issuing the \$250,000.00 letter of credit to NCA. Page 11 of the agreement contained an Addendum that stated, "The obligations of the Trust are subject to termination upon fulfillment of the provision of the Security Agreement".

15. On March 31, 2010, the Security Agreement was executed by Empire, John C. Fay, Jr., President and no other parties. (Ex. B, attached hereto and made a part hereof).

16. Page 24 of the Security Agreement contained the following addendum:

Debtor is purchasing coal from MLC Minerals, LLC ("MLC") for resale. Debtor agrees to transmit directly to Lender all amounts due from Debtor to MLC. Lender agrees, out of and to the extent of such funds received, to pay over to the producer of such coal, based on invoices received from MLC, such amounts as are due to such producer, and, to the extent the funds received are greater than the amounts due the producer ("remainder") Lender will hold one dollar (\$1.00) of such remainder, per each ton of coal so purchased by Debtor from MLC, in a reserve account, which account shall be pledged as security for the obligations under the Reimbursement Agreement between Borrowers and Lender (the "Reserve Account"). When the balance of the Reserve Account reaches \$250,000, then, provided no default exists under the Loan Documents, and upon receipt by Lender of written demand from Debtor, Lender agrees to release this Security Agreement and the Mortgage and Security Agreement executed by the sole owner of Debtor, being the John Charles Fay, Jr. Trust Amended and Restated (a revocable living trust).

17. On May 17, 2010, Defendant Charles McKell wrote Defendant Alamerica Bank's agent, Sr. V.P. Alan Grice and confirmed the May 14, 2010 agreement that all future payments for coal purchase were to be sent to NCA after Renee Finch reconciled the shipment and receipts. (Ex. C, "May 17, 2010 letter to Defendant Alamerica Bank",

attached hereto and made a part hereof).

18. On May 24, 2010, John C. Fay, Jr. as President of Empire went to Alamerica Bank and met with Alan Grice, Sr. V.P. to determine whether \$201,013.24 was going to be paid to NCA (National Coal of Alabama) or whether it was being held in reserve for the \$250,000.00 letter of credit. Mr. Grice refused to give Mr. Fay an answer stating, the matter was now out of his hands that he was being directed by Larry Tate, President of Alamerica Bank.

19. Mr. Fay pointed out that \$1.00 per ton had already been taken in reserve as provided by the Security Agreement and that by refusing to send the funds held by the Bank to NCA they were going to cause NCA to draw on the Letter of Credit that was collateralized by his Trust property. (Ex. D, "May 24, 2010 letter to Alan Grice, regarding the May 24th meeting", attached hereto and made a part hereof).

20. On May 25, 2010, Defendant Charles McKell sent an E-mail to the Alabama Banking Commission's Mr. Jack Evans wherein McKell notified the Banking Commission of Alamerica's refusal to pay the \$201,013.24 to NCA or to provide an accounting for the nearly \$49,000.00 in fees charged and taken by Alamerica Bank. (Ex. E, "May 25, 2010 E-mail to Alabama Banking Commission", attached hereto and made a part hereof). Additionally, Mr. McKell attached a May 12, 2010 letter from Defendant, Alamerica Bank's Alan Grice to Le High Cement, directing Le High to make all future payments to Alamerica Bank. (Ex. F, "May 12, 2010 letter", attached hereto and made a part hereof).

21. On May 20, 2010 McKell closed his account at Alamerica Bank in order to stop future receivables being held by Alamerica Bank for payments to NCA. Additional

receivables of more than \$225,000.00 was collected from customers by Charles McKell and Allied Minerals. Charles McKell and Allied Minerals refused to honor Empire invoice of \$144,000.00 for receivables due to Empire from Allied Minerals. Subsequently McKell used said funds in addition to the payments from the customers at Allied Mineral account to pay off NCA the remaining \$179,000.00 for coal shipped to the customers.

22. On May 27, 2010, Alan Grice sent Mr. Fay a copy of the sight draft submitted to Alamerica Bank by NCA for the \$250,000.00 letter of credit, with notice that the bank was paying the \$250,000.00 to NCA, therefore causing a foreclosure on the Trust property that was used to collateralized the letter of credit. (Ex. G, "May 27, 2010 letter from Bank to Fay", attached hereto and made a part hereof).

23. On June 13, 2010, John C. Fay, Jr. went to Alan Grice's office again to inquire on status of his collateral. Grice notified Fay that Alamerica Bank had sold the note to Charles McKell as an individual and (Bank) was out of it. At no time did Alamerica offer to sale the mortgage note back to Fay. Subsequently, Mr. Grice sent Mr. Fay a letter (Ex. H, attached hereto and made a part hereof), stating Mr. McKell had purchased the mortgage and note for the difference of \$201,000.00 and \$250,000.00.

24. At all times Empire performed all their duties to each of the named defendants. Empire incurred debts at coal companies (for the less expensive coal used to blend), testing companies and trucking companies.

25. On June 8, 2010, Defendant Charles McKell purchased the mortgage from Defendant Alamerica Bank, using the \$201,000.00 that had been collected for coal sales to customers that Empire had blended coal, tested and trucked to the customers.

In addition, McKell used the additional \$225,000.00 received from customers to make up the difference between the \$200,000.00 plus the Bank had and the \$250,000.00.

26. On June 14, 2010, Defendant Charles McKell had his attorney send a Notice of Intent to Foreclose on the mortgaged property. (Ex. I, attached hereto and made a part hereof).

COUNT I.

BREACH OF CONTRACT

(By Plaintiff Against All Defendants)

27. Plaintiff incorporate paragraphs 1 through 26 as though fully set forth herein.

28. On March 31, 2010, Plaintiff entered into a written contract with Defendants by the execution of two (2) documents, a Reimbursement Agreement signed by the Defendant, "Lender" Alamerica Bank, by its Sr. V.P., Alan Grice and by Bert Wesley Calvert for MLC Minerals, LLC, and The John Charles Fay, Jr. Trust Amended and Restated by John C. Fay, Jr., Trustee. Both Calvert and Fay signed as "Obligors" or "Borrowers". This Reimbursement Agreement was a vehicle that allowed MLC Minerals, Allied Minerals and Empire to buy coal from NCA, blend other coal with it and sell it to customers for the financial benefit of all parties. Defendant Alamerica Bank issued a \$250,000.00 Letter of Credit and The Trust mortgaged unimproved property valued at \$550,000.00 as collateral. The second document signed by Defendants, Alamerica Bank "Secured Party" or "Lender", and Bert Wesley Calvert, MLC Minerals, LLC and John C. Fay, Jr., as Trustee of The John Charles Fay, Jr. Trust Amended and Restated, ("Borrowers"). The Security Agreement contained an agreement which

contained an Addendum as follows:

Debtor is purchasing coal from MLC Minerals, LLC ("MLC") for resale. Debtor agrees to transmit directly to Lender all amounts due from Debtor to MLC. Lender agrees, out of and to the extent of such funds received, to pay over to the producer of such coal, based on invoices received from MLC, such amounts as are due to such producer, and, to the extent the funds received are greater than the amounts due the producer ("remainder") Lender will hold one dollar (\$1.00) of such remainder, per each ton of coal so purchased by Debtor from MLC, in a reserve account, which account shall be pledged as security for the obligations under the Reimbursement Agreement between Borrowers and Lender (the "Reserve Account"). When the balance of the Reserve Account reaches \$250,000, then, provided no default exists under the Loan Documents, and upon receipt by Lender of written demand from Debtor, Lender agrees to release this Security Agreement and the Mortgage and Security Agreement executed by the sole owner of Debtor, being the John Charles Fay, Jr. Trust Amended and Restated (a revocable living trust).

Further, Charles McKell, owner of Allied Minerals verified his and Allied Minerals participation in this contractual agreement by his May 7, 2010 letter to Defendant.

Alamerica Bank (Ex. C) and by attaching a copy of his May 12, 2010 letter (Ex. F) that was sent to all the parties customers directing future payments for coal to be sent directly to Defendant Alamerica Bank. Over the next several weeks some \$248,000.00 was sent to Defendant, Alamerica Bank to pay NCA but none of the money was ever paid to NCA. On May 21, 2010 Allied Minerals closed their account with Defendant, Alamerica Bank and continued to collect approximately \$225,000.00 in additional funds from the customers of the parties. Defendant Alamerica Bank breached the contract by withholding all the money that was sent to them to be paid to NCA. Defendants MLC and Allied Minerals breached the agreement by collecting all the money received from customers and allowing Defendant Alamerica Bank to pay the \$250,000.00 Letter of Credit to NCA, causing a default of the mortgage provided by the Plaintiff.

WHEREFORE, the Plaintiff prays for a judgment against all defendants for \$500,000.00, plus reasonable attorney fees and court costs.

COUNT II.

BREACH OF COVENANT OF GOOD FAITH & FAIR DEALING

(By Plaintiff Against All Defendants)

29. Plaintiff incorporate paragraphs 1 through 28 as though fully set forth herein.

30. The contract between Plaintiff and Defendants contained an implied covenant of good faith and fair dealing which obligated Defendants to perform the terms and conditions of the contract fairly and in good faith and to refrain from doing any act that would prevent or impede plaintiffs from performing any or all of the conditions of the contract that Plaintiff agreed to perform or any acts that would deprive plaintiff of the benefits of the contract.

31. Plaintiff performed all conditions, covenants, and promises in accordance with the terms and conditions of his agreement with defendants.

32. Defendants knew the Plaintiff had fulfilled all of its duties and conditions under the contract.

33. Defendants, and each of them, breached the implied covenant of good faith and fair dealing by participating in a scheme to sell coal purchased from NCA, the Plaintiff, Empire then blended other coal it had purchased, then paid for it to be independently tested and then shipped to the customers. The Defendants then deliberately failed to pay NCA causing a call on the Letter of Credit which Defendant

Alamerica Bank paid to NCA and a default on the collateral of the mortgaged Trust property. Furthermore, Defendants, and each of them, deliberately hid this scheme from Plaintiff to reap additional money from Plaintiff.

34. As a proximate result of Defendants' breach, Empire has suffered damages in an amount to be proven at the time of trial, but at least \$500,000.00 during the duration of the contract, which is in excess of the court's minimum jurisdictional limit. Plaintiffs further are entitled to damages including the money owed trucking companies for delivery of coal, the costs of having independent testing to labs to make sure the coal met the customers specifications and for lost profits, damage to business reputation, loss of good will and other consequential damages, as well as interest at the prevailing legal rate. Plaintiff will seek leave of this court to assert the exact amount of damages once ascertained.

35. The acts of Defendants were willful and malicious, and done in conscious disregard of Plaintiff's rights. Therefore, Plaintiffs are entitled to punitive damages.

COUNT III.

FRAUD

(By Plaintiffs Against All Defendants)

36. Plaintiffs incorporate paragraphs 1 through 35 as though fully set forth herein.

37. Empire provided coal to be blended with the coal purchased from NCA, the expertise and knowledge necessary to blend the coal, independent lab testing to make sure the coal met the customer's specifications and providing trucking services to

deliver the blended coal to the customers. The customers in turn sent payment to Defendant Alamerica Bank but instead of paying NCA for the coal it provided Defendant Alamerica Bank withheld all the money excluding some \$47,000.00 in unaccounted for or warranted fees and allowed NCA to made demand for the \$250,000.00, Defendant Alamerica Bank then paid NCA the \$250,000.00 and defaulted on the mortgage provided by the Plaintiffs. Further, Defendant Alamerica Bank then sold the mortgage to the Defendant Allied Minerals and Defendant Charles McKell for the \$201,000.00 being held by Defendant Alamerica Bank plus \$49,000.00 from Charles McKell. Defendant Charles McKell has now started foreclosure against Plaintiff property valued at \$550,000.00. Further, Defendants Calvert, MLC, Charles McKell and Allied Minerals continued to receive payments from coal sales in which Plaintiff Empire has a financial interest of at least \$225,000.00. Each of these defendants knew that Plaintiffs had performed its part of the agreement and that Plaintiffs was entitled to be reimbursed for its expenses and be paid its share of the profit from the sale and that Plaintiff Trust had made the whole deal workable by mortgaging property in order for each of the parties to do business. Defendants made false and misleading statements to get Plaintiff Trust to mortgage its property and for Plaintiff Empire to do the work and incur the expense to have the coal satisfactorily shipped and accepted by the customers. Defendants knew the statements were false and misleading. Defendants knew the Plaintiffs were relying on Defendants to perform as agreed and that as a consequence Plaintiffs have been injured due to their reliance upon defendants false and misleading statements and actions.

38. On May 25, 2010, Defendants, Charles McKell and Allied Minerals filed a



Complaint with the Alabama Banking Commission (Ex. E) stating that in excess of \$200,000.00 was being held in Defendant MLC account with Defendant Alamerica Bank that by agreement was to be paid to NCA (National Coal of Alabama). McKell stated in his Complaint that both he and Bert Wesley Calvert along with NCA had demanded account information from Defendant Alamerica Bank and that the full balance be forwarded to NCA and that Defendant Alamerica Bank had refused to do so.

39. On June 8, 2010, Defendant Alamerica Bank sold the Letter of Credit and collateralized mortgage property of the John C. Fay, Jr. Trust to Charles McKell for the money in the account and the difference of approximately \$49,000.00, to satisfy the \$250,000.00 Letter of Credit. This deal was struck so that Defendant Charles McKell would drop his Complaint with the Alabama Banking Commission and McKell would no longer be under the obligation to have customer money sent to Defendant Alamerica Bank under the remittance agreement that McKell had made with Defendant Alamerica Bank.

40. In less than two months Defendant Alamerica Bank charged over \$47,000.00 in banking fees, did not pay one cent to NCA as directed and obligated to do so by the documents previously provided and allowed the Plaintiff Trust property to be defaulted upon and foreclosure proceedings began. Defendant, Alamerica Bank knew that it had a legal obligation to pay NCA with the funds at its disposal and that Plaintiffs were relying on them to do so per the agreement.

41. As a proximate consequence of Defendants fraud, Plaintiffs have suffered damages in an amount to be proved at trial.

42. The acts of Defendants were willful and malicious, therefore, Plaintiff is

entitled to punitive damages. Punitive damages are appropriate given the Defendants conduct caused Plaintiff great and irreparable injury, as Plaintiff's business reputation and good will has been damaged and will continued to be damaged in the future, and an award of punitive damages would serve to prevent similar conduct in the future.

COUNT IV.

INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS

(Unjust Enrichment Alamerica Bank)

43. Plaintiff incorporate paragraphs 1 through 42 as though fully set forth herein.

44. By refusing to transfer held funds to NCA as previously agreed and by charging \$47,000.00 in undisclosed and unearned banking fees and costs, Defendant Alamerica Bank has been unjustly enriched at the expense of the Plaintiffs, Empire and John C. Fay, Jr. Trust.

45. WHEREFORE, Plaintiffs pray for a judgment in an amount to be determined at trial for said unjust enrichment.

COUNT V.

NEGLIGENCE INTERFERENCE WITH ECONOMIC RELATIONS

(Unjust Enrichment Defendants Charles McKell and Allied Minerals)

46. Plaintiff incorporate paragraphs 1 through 45 as though fully set forth herein.

47. On June 8, 2010, Defendant Charles McKell used funds belonging in part to Plaintiff Empire to purchase the defaulted Letter of Credit against Empire, thereby using Plaintiff Empire's money to purchase the right to default on the mortgaged property put

up by the Plaintiff Fay Trust for the benefit of Defendant Charles McKell, Defendant Allied Minerals, Defendant Bert Wesley Calvert, Defendant MLC Minerals and Plaintiff Empire.

48. The misuse of the money collected by Defendant Charles McKell from customers to purchase the \$250,000.00 Letter of Credit and the resulting foreclosure on property valued at \$550,000.00 is unjust enrichment for which the Plaintiffs' seek a judgment in an amount to be determined at trial.

COUNT VI.

PROMISSORY ESTOPPAL

49. Plaintiffs incorporate paragraphs 1 through 48 as though fully set forth herein.

50. On March 31, 2010, Defendant Alamerica Bank entered into an agreement with "Borrowers" Plaintiff Trust that it would pay invoices received from NCA for coal from proceeds paid by customers to the MLC account. On May 12, 2010 John C. Fay, Jr. met with Sr. V.P., Alan Grice of Defendant Alamerica Bank and was assured by Mr. Grice that said payments would be paid to NCA that day. They were not paid that day or at any other time. Defendant Alamerica Bank knew or should have known that Plaintiff Empire reasonably and foreseeably would rely on these representations.

51. Plaintiff relied reasonably and justifiably upon Defendant's representation.

52. Defendant Alamerica Bank representations either intentionally or negligently were false or not performed.

53. As a direct and proximate result, Plaintiffs have been damaged in an amount

to be proven at trial.

COUNT VII.

CONVERSION

(Against Defendant Charles McKell and Defendant Allied Minerals)

54. Plaintiff incorporate paragraphs 1 through 53 as though fully set forth herein.

55. Defendant Charles McKell and Defendant Allied Minerals, Defendant Bert Wesley Calvert and Defendant MLC Minerals directed payments from customers to their checking accounts that were to be used to satisfy payments owed to NCA.

56. Plaintiff Empire incurred \$144,000.00 in expenses in providing for the sales to customers and the Defendants' McKell, Allied Minerals, Bert Wesley Calvery, and MLC Minerals has and continues to exercise complete control over all monies paid by customers of approximately \$450,000.00.

57. A portion of this money (\$450,000.00) constitutes Plaintiff Empire's property.

58. Plaintiff Empire has demanded they be paid for their services and expenses from these funds.

59. Said Defendants have refused to make any money payments to Plaintiffs.

60. Defendants' retention of all the money received from customers is inconsistent with Plaintiffs' right of ownership.

61. As a direct and proximate result of Defendants' conversion, Plaintiffs have been damaged in an amount to be proven at trial.

COUNT VIII.

DECEPTIVE TRADE PRACTICE

62. Plaintiff incorporate paragraphs 1 through 61 as though fully set forth herein.

63. Defendant Alamerica Bank agreed to pay invoices to NCA for coal from proceeds made available to them from the customers of the Plaintiffs and other named Defendants. In turn, the Defendant Alamerica Bank was protected with a Security Agreement provided by Plaintiff Fay Trust that was collateralized with a Mortgage of property valued at \$550,000.00.

64. Defendant Alamerica Bank engaged in unconscionable false, misleading or deceptive acts in the conduct of trade or commerce as provided under the Alabama Trade Practices Act, specifically, Unlawful Trade Practices Act, Section 8-19-5 (27).

65. Plaintiffs were injured due to Defendant Alamerica Bank violation of said act and prays for a judgment of actual damages to be proven at trial, plus treble damage, costs, and attorney fees as provided under Section 8-19-10 (3).

COUNT IX.

CONSTRUCTIVE TRUST

66. Plaintiff incorporate paragraphs 1 through 65 as though fully set forth herein.

67. By and through unconscionable conduct, artifice concealment and/or fraudulent actions, the Defendants, Charles McKell, Allied Minerals, Bert Wesley Calvert, MLC Minerals and Alamerica Bank have obtained all the funds and the mortgaged property of the Plaintiffs, Empire and Fay Trust as of June 8, 2010.


68. Because of this conduct by the Defendants, a constructive trust in favor of the Plaintiffs, Empire and Fay Trust, continues to exist, in these funds.

69. The interest in these funds was gained by the Defendants through such

fraudulent and/or questionable means that the Defendants should not in equity or good conscience retain, hold, or enjoy any interest in these funds, and these funds and property should be returned to the Plaintiff, Empire and Plaintiff, Fay Trust.

70. As such, the Plaintiffs are entitled to a constructive trust *in invitum* against these funds and property and a judgment against all the Defendants for those funds and property obtained by fraud, duress and other inequitable means from the Plaintiffs in an amount to be determined at trial.

Respectfully submitted,



JAMES E. HARRIS (HAR021)
Attorney for Plaintiffs

Of Counsel:

Harris Law Firm
Civic Center Executive Suites
1117 21st Street North
Birmingham, Alabama 35234
(205) 322-5800 Telephone
(205) 322-5829 Fax
jehasoc@bellsouth.net

PLEASE SERVE DEFENDANTS AT THE FOLLOWING ADDRESSES:

Alamerica Bank

c/o Lawrence R. Tate, Registered Agent
2170 Highland Avenue, Ste. 150
Birmingham, Alabama 35205

Charles McKell

1800 Mountain Woods Place
Birmingham, Alabama 35216

Allied Minerals, Inc.

c/o Charles McKell, Owner
1800 Mountain Woods Place
Birmingham, Alabama 35216

Bert Wesley Calvert

1603 1st Avenue East
Jasper, Alabama 35501

MLC Minerals, LLC

c/o Wes Calvert, Owner
1603 1st Avenue East
Jasper, Alabama 35501

REIMBURSEMENT AGREEMENT

THIS AGREEMENT is made between the undersigned Obligors and Bank. Unless the context indicates a different meaning, the following words and phrases, as used herein, shall have the following respective meanings:

After Maturity

Rate: Eighteen percent (18%).

Bank: ALAMERICA BANK.

Bank Loan

Documents: This Agreement, the Letter of Credit, the Mortgage and Security Agreement executed by the Trust in favor of the Bank (the "Bank Mortgage"), and all other documents further evidencing and securing the Obligors' obligations to the Bank [including *inter alia* the Security Agreement executed by Empire Coal Sales, Inc., an Alabama corporation].

Bank's Notice

Address: 2170 Highland Avenue, Suite 150
Birmingham, Alabama 35205
Attention: Mr. Alan Grice

Borrower: BERT WESLEY CALVERT, MLC MINERALS, LLC, an Alabama limited liability company, and the TRUST.

Borrower's Notice

Address: P.O. Box 1582
Jasper, Alabama 35502.

Business Day: Any day other than (i) a Saturday, a Sunday, a legal holiday or a day on which the Bank is authorized by law to close or (ii) a day on which the New York Stock Exchange is closed.

Collateral: The collective reference to that real property conveyed by the Bank Mortgage and described in Exhibit A attached thereto; and any other property pledged to the Bank by the other Bank Loan Documents.

Date of

Issuance: The date of issuance of the Letter of Credit.

Drawing:

The collective reference to any one or more drawings under the Letter of Credit.

EXHIBIT A

PARCEL II:

Begin at the Southeast corner of the Southwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$ of Section 21, Township 19 South, Range 1 West, Shelby County, Alabama and run in a westerly direction along the South line of said $\frac{1}{4}$ - $\frac{1}{4}$ section a distance of 703.39 feet to a point; thence turn an interior angle of 87 degrees 42 minutes 20 seconds and run to the right in a northerly direction a distance of 318.58 feet to a point; thence turn an interior angle of 153 degrees 07 minutes 15 seconds and run to the right in a northeasterly direction a distance of 299.19 feet to a point; thence turn an interior angle of 119 degrees 10 minutes 25 seconds and run to the right in an easterly direction a distance of 548.72 feet to a point on the East line of said $\frac{1}{4}$ - $\frac{1}{4}$ section; thence turn an interior angle of 89 degrees 36 minutes 40 seconds and run to the right in a southerly direction and along the East line of said $\frac{1}{4}$ - $\frac{1}{4}$ section a distance of 579.57 feet to the point of beginning.



20100716000228640 22/25 \$88.00
Shelby Cnty Judge of Probate, AL
07/16/2010 03:49:51 PM FILED/CERT

STATE OF ALABAMA)
 :
SHELBY COUNTY)

This Instrument Prepared By:
Guy V. Martin, Jr., Esquire
Martin, Rawson & Woosley, P.C.
#2 Metroplex Drive, Suite 102
Birmingham, Alabama 35209

MORTGAGE AND SECURITY AGREEMENT

THIS INDENTURE, made and entered into by and between JOHN C. FAY JR., as Trustee of THE JOHN CHARLES FAY, JR. TRUST AMENDED AND RESTATED (A Revocable Living Trust), dated the 31st day of October, 2008 (herein collectively referred to as "Mortgagor" or as "Borrower"), and ALAMERICA BANK (hereinafter referred to as the "Bank" or as the "Lender" or as the "Mortgagee").

W I T N E S S E T H:

WHEREAS, Borrower has requested Lender to issue one or more irrevocable letters of credit now and in the future (all such letters of credit, whether now or hereafter issued are referred to collectively as the "Letter of Credit") in favor of third party beneficiaries, for the account of BERT WESLEY CALVERT and MLC MINERALS, LLC, an Alabama limited liability company (collectively, the "Account Parties") (Borrower and the Account Parties are sometimes referred to as "Obligors");

WHEREAS, Obligors are obligated to Lender under the terms of a Reimbursement Agreement (referred to, together with this mortgage, and all guarantees, assignments, security agreements, and other documents executed to secure the obligation of Obligors under the Reimbursement Agreement, together with all extensions, renewals or modifications of any of the same, as the "Loan Documents"); and

WHEREAS, this instrument is entered into to induce the Lender to issue the Letter of Credit, and as additional security for the payment and performance by Obligors of all the obligations of Obligors under the Loan Documents (the "Obligations").

This instrument secures:

- (1) Payment and performance of the Obligations under all the Loan Documents, including all extensions, renewals and modifications of the Loan Documents.
- (2) The payment and performance of the Mortgagor's obligations under this Mortgage.



EXHIBIT A

PARCEL II:

Begin at the Southeast corner of the Southwest $\frac{1}{4}$ of the Southeast $\frac{1}{4}$ of Section 21, Township 19 South, Range 1 West, Shelby County, Alabama and run in a westerly direction along the South line of said $\frac{1}{4}$ - $\frac{1}{4}$ section a distance of 703.39 feet to a point; thence turn an interior angle of 87 degrees 42 minutes 20 seconds and run to the right in a northerly direction a distance of 318.58 feet to a point; thence turn an interior angle of 153 degrees 07 minutes 15 seconds and run to the right in a northeasterly direction a distance of 299.19 feet to a point; thence turn an interior angle of 119 degrees 10 minutes 25 seconds and run to the right in an easterly direction a distance of 548.72 feet to a point on the East line of said $\frac{1}{4}$ - $\frac{1}{4}$ section; thence turn an interior angle of 89 degrees 36 minutes 40 seconds and run to the right in a southerly direction and along the East line of said $\frac{1}{4}$ - $\frac{1}{4}$ section a distance of 579.57 feet to the point of beginning.



RE: Attached Image

Tue, May 25, 2010 2:20:45 PM

From: "Evans, Jack" <Jack.Evans@banking.alabama.g...> View Contact
To: Charles Mckell <charlesmckell@yahoo.com>

EXHIBIT "E"

Mr. McKel,

We will review the matter. I will mail you a letter stating such.

Jack Evans

From: Charles Mckell [mailto:charlesmckell@yahoo.com]
Sent: Tuesday, May 25, 2010 2:13 PM
To: Evans, Jack
Subject: Fw: Attached Image

Dear Mr. Evans:

I am contacting you regarding what I consider to be at best inappropriate banking practices/actions on the part of Alamerica Bank here in Birmingham.

In early May, I was put in touch with Alan Grice of Alamerica Bank. The purpose was to set up a checking account for direct remittance by my customers similar to a lock box arrangement for the benefit of National Coal of Alabama. There are two other entities involved with me regarding the relationship with National Coal:

- 1) MLC Minerals (Wes Calvert) Provider of a standby letter of credit with National Coal as the beneficiary.
- 2) John Fay, provider of an unimproved piece of property in Shelby County as collateral for the letter of credit.

Regarding the letter of credit, in addition to the usual fees, there is a charge of \$2.00 per ton. \$1.00 per ton is for a reserve account and the other \$1.00 per ton is designated as a bank fee.

Remittance from my customers is received into my account and at the direction of myself or Renee Finch is transferred into MLC's account.

At that time Alamerica Bank is supposed to deduct their fees and transfer the balance to National Coal.

Currently, there is in excess of \$200,000.00 in MLC's account which I have not authorized the transfer of and the bank, after taking their fees, has refused to forward to National Coal.

Myself and Wes Calvert, in addition to National Coal have demanded account information and that the full balance be forwarded to National Coal, and Alamerica Bank has refused to do so.

Finally, I have attached one of the customer remittance agreements and the transfer of monies directive.

In response to these actions by Alamerica Bank, on May 20th I closed my checking account and requested in writing that all customer remittance agreements be cancelled.

Alamerica Bank has refused to cancel the remittance agreements therefore leaving me unable to collect receivables.

In addition, by Alamerica Bank refusing to forward scheduled monies to National Coal this action has suspended shipments of material designated for customers and completely shut all of our business down.

We request that Alamerica Bank immediately transfer all monies in MLC's account to National Coal, and Alamerica Bank cancel all customer remittance agreements immediately.

Thank you for your help.

Charles Mckel
Allied Minerals, Inc.
P.O.Box 660097



20100716000228640 25/25 \$88.00
Shelby Cnty Judge of Probate, AL
07/16/2010 03:49:51 PM FILED/CERT