14-0446

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

HORIZON VENTURES OF WEST VIRGINIA, INC., a West Virginia corporation Plaintiff, vs. AMERICAN BITUMINOUS POWER PARTNERS, L.P., et al. Defendants.	CIVIL ACTION NO.: 13-C-196G

CIRCUIT COURT OF OHIO COUNTY 2014 MAR 27 AM 10 CH BRENDA L. MILLER

ORDER

On the 7th day of March, 2014, came the Plaintiff, Horizon Ventures of West Virginia, Inc., by and through its counsel, Carl N. Frankovitch and Kevin M. Pearl, and came the Defendants, American Bituminous Power Partners, L.P., Pleasant Valley Energy Company, and American Hydro Power Partners, L.P., by and through their counsel, William D. Wilmoth. The parties appear pursuant to a notice of hearing on the Plaintiff's *Renewed Motion for Summary Judgment on Count I of Plaintiff's Complaint Seeking Declaratory Judgment and on Count II of the Amended Complaint.*

The Defendants filed a responsive brief to the motion, and the Plaintiff has filed a reply brief. The Court also heard the arguments and proffers of counsel in regard to the motion.

Upon review of the law and evidence, the papers and pleadings filed herein, and the arguments, the Court makes the following Findings of Fact and Conclusions of Law.

PROCEDURAL HISTORY

1. This matter arises out of a dispute regarding rental payments due pursuant to a lease agreement between the Plaintiff, Horizon Ventures of West Virginia, Inc. ("Horizon") and Defendant, American Bituminous Power Partners, L.P. (hereinafter "AMBIT").

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2. On June 17, 2013, the Plaintiff, Horizon filed the instant case against AMBIT and its general partners, Pleasant Valley Energy Company and American Hydro Power Partners, L.P.

3. The original Complaint alleged four (4) counts: 1) a request for declaratory judgment to determine the priority and order of the payments of rent to Horizon by AMBIT versus AMBIT's payment of other expenses; 2) a claim for damages for breach of contract for failure to pay rent under the Lease Agreement; 3) a claim for injunctive relief requesting that AMBIT cease making payments to other expenses subordinate to the rent payments prior to making rent payments to Horizon; and 4) a specific performance claim requesting access to records pursuant to the Lease.

4. On July 30, 2013, AMBIT and its general partners filed an Answer and Amended Counterclaim in response to the Complaint.

5. In the Amended Counterclaim, AMBIT asserts two (2) counts: 1) a claim for environmental contamination and remediation; and 2) a claim for overpayment of rent.

6. On or about August 14, 2013, Horizon filed a motion for summary judgment seeking judgment on Count I of its Complaint, which seeks declaratory judgment regarding the priority and order of rent payments to Horizon versus payment of other expenses, and on Count II of AMBIT's Amended Counterclaim, in which AMBIT asserts a claim for overpayment of rent.

7. On or about September 27, 2013, Horizon filed a motion to amend its Complaint to add claims relating to the offset of the rental payments owed alleged by AMBIT in its Counterclaim (Counts V-VIII), to assert an additional claim regarding the location of fly ash on the Leased Premises, and a request in equity for the removal of the fly ash. (Counts X and XI).

8. On October 2, 2013, AMBIT filed its *Response to Plaintiff's Motion for Summary Judgment on Count I of Plaintiff's Complaint Seeking Declaratory Judgment and on Count II of the Amended Counterclaim.*

9. Also on October 2, 2013, Horizon filed *Plaintiff's Reply in Support of Motion for Summary Judgment.*

10. On October 4, 2013, the Plaintiff's original motion for summary judgment came on for hearing before the Court. The parties appeared by and through their counsel, and the Court heard the arguments and proffers of counsel in regard to the motion.

11. At the October 4, 2013, hearing the Court announced its ruling, finding that the matters at issue in the Plaintiff's original motion for summary judgment were questions of law to be decided by the Court based upon the written contracts between the parties, but that it was prudent to allow limited discovery in regard to the matters at issue in the motion. As such, the Court directed the parties to engage in such discovery over a period of ninety (90) days from the date of the hearing.

12. On October 4, 2013, the Court also granted Horizon's motion to amend.

13. On or about October 22, 2013, AMBIT answered Horizon's Amended Complaint.

14. An Order reflecting the Court's ruling at the October 4, 2013, hearing was signed by the Court on October 29, 2013, and entered in the Court file on October 31, 2013.

15. Based upon the Court file and the representations of counsel, the parties engaged in discovery as directed in this Court's October 31, 2013, Order.

16. On or about January 23, 2014, Horizon filed its *Renewed Motion for Summary Judgment on Count I of Plaintiff's Complaint Seeking Declaratory Judgment and on Count II of*

the Amended Counterclaim providing additional support to its original motion in the form of discovery responses served by AMBIT as well as additional arguments in support of its motion.

17. On or about March 4, 2014, AMBIT, Pleasant Valley Energy Company, and American Hydro Power Partners, L.P. filed *Defendants' Response to Plaintiff's Renewed Motion for Summary Judgment*.

18. On or about March 6, 2014, Horizon filed *Plaintiff's Reply Brief in Support of Renewed Motion for Summary Judgment on Count I of Plaintiff's Complaint Seeking Declaratory Judgment and on Count II of the Amended Counterclaim.*

19. Both the original motion for summary judgment and the renewed motion for summary judgment have been fully briefed by both parties.

20. Horizon asserts that summary judgment in its favor on the issue of liability in regard to Count I of its Amended Complaint and Count II of AMBIT's Amended Counterclaim is appropriate at this time.

21. AMBIT continues to assert that summary judgment on these issues is premature and that further discovery is necessary. AMBIT also argues that the Court must consider extrinsic evidence in ruling on the motion.

FINDINGS OF FACT

A. Background:

1. On or about November 29, 1989, Horizon and AMBIT entered into an Amended and Restated Lease Agreement whereby AMBIT leased from Horizon certain parcels of real property located in Marion County, West Virginia (hereinafter "Leased Premises") for the purpose of constructing, operating, and maintaining an electric generation plant to be located on the Leased

Premises for the generation and sale of electricity, steam, ash, hot water, and hot air under and pursuant to the terms of the Lease Agreement.

2. The November 29, 1989, Amended and Restated Lease Agreement between Horizon and AMBIT was amended by an Amendment to Amended and Restated Lease dated December 28, 1989, a Second Amendment to Amended and Restated Lease dated January 11, 1990, and a Third Amendment to Amended and Restated Lease dated April 1, 1993. The Third Amendment to the Amended and Restated Lease was nullified by agreement between the parties on or about May 28, 1996. The November 29, 1989, Amended and Restated Lease Agreement, together with the Amendment to Amended and Restated Lease dated December 28, 1989, and Second Amendment to Amended and Restated Lease dated January 11, 1990, are hereinafter referred to collectively as the "Lease Agreement."

3. The Lease Agreement was attached as an exhibit to the Complaint filed in this matter as well as the original motion for summary judgment, and is a part of the record.

4. The parties have had prior disputes regarding the Lease Agreement and payment of rent, and have previously litigated those cases in this Court in both 1994 and 1996.

5. For the purposes of the inquiry into the pending motion, the resolution of the prior litigation between the parties at Circuit Court of Ohio County Civil Action Number 96-C-32 is relevant inasmuch as the parties resolved that litigation through a written agreement entitled "Agreement to Resolve Pending Litigation" that affected the rights of the parties and the interpretation of the Lease Agreement.

6. The Agreement to Resolve Pending Litigation was attached to the motion and is a part of the record.

B. Motion for Summary Judgment as to Count I of the Complaint:

7. At issue in Count I of Horizon's Amended Complaint is whether and to what extent AMBIT's rental obligations to Horizon are subordinated to other payments and expenses owed by AMBIT.

8. Horizon argues both in its original motion and its renewed motion that the rental payments owed are subordinate only to "Senior Debt," which Horizon urges is defined as solely AMBIT's obligations to its lenders arising out of loans utilized to finance bonds for the construction of the electric generation plant.

9. In its responses to both the original motion and the renewed motion, AMBIT argues that the definition of Senior Debt includes all of its expenses incurred in the operation of the electric generation plant.

10. AMBIT further argues that its payment to Horizon must be performed in accordance with a Trust Indenture entered into by AMBIT at the time that the loans for the bonds and construction were executed, but after the signing of the Lease Agreement.

11. Horizon argues that the Trust Indenture is irrelevant inasmuch as Horizon is not a party to the agreement and that there was no meeting of the minds between Horizon and AMBIT in regard to the Trust Indenture and the priority of payments set forth therein.

12. The Court finds that Horizon is not a party to the Trust Indenture.

13. Based upon the evidence in the record, including admissions of AMBIT confirming the same, the Court finds that the only agreements between Horizon and AMBIT are the Lease Agreement and the Agreement to Resolve Pending Litigation.

14. The Lease Agreement states:

> All Percentage Rent, any and all interest with respect to Percentage Rent and all Post-Startup Minimum Rent (hereinafter collectively called the "Subordinated

Rent") is subordinated and subject in right of payment to the prior payment in full when due of all Senior Debt of Tenant in accordance with the provisions of this Section 7A.

(Lease Agreement at 7A.)

15. The Lease Agreement defines Senior Debt as follows:

As used herein, the term "Senior Debt" shall mean all indebtedness, obligations, and liabilities of Tenant pursuant to all notes, letters of credit, loan agreements, reimbursement agreements and/or guarantees (collectively, "Credit Agreements") between (i) Tenant or American Kiln Partners, L.P., A Limited Partnership, a Delaware limited partnership, which will own the Kiln Facility ("AKP") and (ii) any banks or other financial institutions providing a letter of credit or other form of security or credit enhancement for the tax-exempt bonds being used to finance a portion of the costs of the Initial Cogeneration Plant ("Project Bonds") and/or providing other financing for the Initial Cogeneration Plant.

(Lease Agreement at 7A(a).)

16. The Lease Agreement also provides and a cap for the amount of Senior Debt AMBIT is permitted to obtain. (Id.)

17. Section 7A(j) of the Lease Agreement states:

Nothing contained in this Section 7A is intended or shall impair as between Tenant, its creditors other than the holders of Senior Debt, and Landlord, the obligation of Tenant, which is absolute and unconditional, to pay to Landlord as and when the same shall become due and payable in accordance with its terms, the Subordinated Rent, subject to the rights of holders of Senior Debt as herein provided, or to affect the relative rights of Landlord and creditors of Tenant other than the holders of Senior Debt.

18. The parties have previously litigated the very same issue on the priority of the rental payments owed by AMBIT to Horizon in Circuit Court of Ohio County Civil Action Number 96-C-32.

19. Civil Action Number 96-C-32 was resolved between the parties prior to trial and AMBIT and Horizon entered into a written agreement memorializing the resolution entitled Agreement to Resolve Pending Litigation.

20. The Agreement to Resolve Pending Litigation further defined the priority of the rental payments due from AMBIT to Horizon.

21. The relevant portion of the Agreement to Resolve Pending Litigation states as follows:

> Tenant acknowledges and agrees that the payment of Tenant's obligations to Horizon under the Lease (hereinafter the "Lease Obligations") has been subordinated under the Lease to the payment of "Senior Debt," as that term is defined in the Lease, on the terms and conditions, and subject to the limitations contained in the Lease. Horizon has not agreed with Tenant (or, Horizon asserts, with any other person or entity), to subordinate any payment of Lease Obligations to any other claims against Tenant, including, without limitation, claims for payment of other operating and maintenance expenses of Tenant or the Plant, which are not included in the definition of "Senior Debt" under the Lease (such other claims against Tenant, including, without limitation, the payment of other operating and maintenance expenses of Tenant or the Plant, which are not included in the definition of "Senior Debt" under the Lease, being hereinafter referred to as "Non-Senior Project Obligations"). Tenant acknowledges that any failure to pay or perform any of the Non-Senior Project Obligations (hereinafter a "Non-Senior Project Obligation Default") neither is intended to nor does constitute an excuse for nonpayment or nonperformance of, or a defense to payment, performance or enforcement of the Lease Obligations.

22. AMBIT also agreed in the Agreement to Resolve Pending Litigation to waive any defenses to non-payment based upon its need to pay any obligations other than Senior Debt prior to paying its rent to Horizon. The Agreement to Resolve Pending Litigation states:

> Tenant agrees that it shall not, and it shall instruct its attorneys, accountants, financial advisors, investment bankers and other professionals representing it, that none of them shall assert at any time in any court or other legal proceeding that any prospective, threatened or actual Non-Senior Project Obligation Default constitutes or effects an excuse for or a defense to payment or performance of any Lease Obligations.

C. Count II of AMBIT's Amended Counterclaim:

23. In Count II of its Amended Counterclaim AMBIT asserts that it has overpaid rent to Horizon by virtue of the fact that the usable waste coal on the Leased Premises has been

exhausted, and therefore, the Lease provides for a rental payment of only one percent (1%) of gross revenues.

24. Horizon asserts in its motion that the rental payment owed by AMBIT, insofar as it concerns the use of waste coal from the Leased Premises or fuel from other sources, was resolved at the conclusion of Civil Action Number 96-C-32 by the Agreement to Resolve Pending Litigation.

25. AMBIT argues in its responsive briefs that the relevant inquiry is whether the waste coal located on the Leased Premises is usable waste coal for the purposes of fueling the power plant.

26. The Agreement to Resolve Pending Litigation states as follows:

> Tenant acknowledges, as a fact, that since the commencement of operations by the Plant, all Foreign Fuel used in the operation of the Plant has been used for Non-Operating Reasons, and further acknowledges, as a fact, that so long as any Local Fuel is located at the Demised Premises, any Foreign Fuel being used in the operation of the Plant is being used for Non-Operating Reasons. As contemplated by the Lease, Local Fuel includes "waste coal material" (as defined in the Lease) on the Demised Premises, whether or not permitted by permits whose issuance or continuance is subject to actions which are within Tenant's control and whether or not reclaimed, and is not dependent on the quality of the waste coal material. Tenant expects and intends that Horizon will detrimentally rely on this factual admission, that such reliance is foreseeable by Tenant and reasonable on the part of Horizon, and that such reliance is evidenced by Horizon's execution and delivery of this Agreement.

27. There is no provision within the Agreement to Resolve Pending Litigation that indicates that waste coal located on the Leased Premises must be usable, and on the contrary, the contract indicates that the rent payment shall be two and one-half percent (2.5%) so long as there is any waste coal on the Leased Premises, even if that waste coal is unusable for fueling the power plant.

28. Horizon has filed an affidavit indicating that large amounts of waste coal remain on the Leased Premises.

29. AMBIT has admitted in its responses to discovery that there is waste coal present on the Leased Premises.

30. The Agreement to Resolve Pending Litigation states that in the event that there is any waste coal material on the Leased Premises, the rental payment shall be upon two and one-half percent (2.5%) of AMBIT's gross revenues.

CONCLUSIONS OF LAW

A. Applicable Law:

1. Under Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is proper if there is no genuine issue of material fact and no inquiry is required to clarify the application of the law. Syl. Pt. 3 & 4, *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963); Syl. Pt. 1, *McCormick v. Allstate Insurance Co.*, 202 W.Va. 535, 505 S.E. 2d 454 (1998).

2. "A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 60, 459 S.E.2d 329, 337 n. 13 (1995). For a material fact to constitute a "genuine issue" under Rule 56 there must be enough evidence in favor of the nonmoving party that a reasonable jury could return a verdict for the nonmoving party. *Id.*

3. "If the evidence favoring the nonmoving party is 'merely colorable ...or is not significantly probative,'" then there is no genuine issue and summary judgment is appropriate. *Id.* at 60-61, 459 S.E.2d at 337-38.

4. Where the unresolved issues in a case are primarily legal rather factual, summary judgment is an appropriate disposition. *Payne v. Weston*, 195 W.Va. 502, 505. 466 S.E.2d 161, 164 (1995).

5. Summary judgment is not a remedy to be exercised at the circuit court's option; it must be granted when there is no genuine dispute over a material fact. *Id.*

6. Under West Virginia law, in construing the terms of a contract, the Court is guided by the common-sense canons of contract interpretation. *Payne,* 195 W.Va. at 507, 466 S.E.2d at 166.

7. A court must ascertain the meaning of an agreement as manifested by its language. *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 196 W.Va. 97, 101, 468 S.E.2d 712, 716 (1996).

8. When the language used in a contract is plain and unambiguous, courts are required to apply, not construe, the contract. *Cabot Oil & Gas Corp. v. Huffman*, 227 W.Va. 109, 117, 705 S.E.2d 806, 814 (2010).

9. In interpreting a written instrument, it is the duty of the court to interpret it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principle of law. Syl. Pt. 1, *Maddy v. Maddy,* 87 W.Va. 581, 105 S.E. 803 (1921); Syl. Pt. 5, *Hall v. Hartley,* 146 W.Va. 328, 119 S.E.2d 759 (1961).

10. An unambiguous written contract entered into as the result of verbal or written negotiations will be conclusively presumed to contain the final agreement of the parties to it, and such contract may not be varied, contradicted or explained by extrinsic evidence. *Cabot Oil & Gas Corp.*, 227 W.Va. at 118, 705 S.E.2d at 815 (quoting Syl. Pt. 2 *Kanawha Banking and Trust*

Company v. Gilbert, 131 W.Va. 88, 46 S.E.2d 225 (1947)); Syl. Pt. 1, *Traverse Corp. v. Latimer*, 157 W.Va. 855, 205 S.E.2d 133 (1974).

11. The question of whether a contract is ambiguous is a question of law for the Court to determine. *Williams*, 194 W.Va. at 64-65, 459 S.E.2d at 341-42. The fact that the parties do not agree to the construction of a contract standing alone does not render it ambiguous. *Energy Dev. Corp. v. Moss*, 214 W.Va. 577, 585, 591 S.E.2d 135, 143 (2003).

12. Contract language is only considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken. *Williams*, 194 W.Va. at 65, 459 S.E.2d at 342 at n. 23 ("A contract is ambiguous when it is reasonably susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction.")

13. The West Virginia Supreme Court has defined ambiguity as language "reasonably susceptible of two different meanings" or language "of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning[.]" Syl. Pt. 1, in part, *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W.Va. 337, 332 S.E.2d 639 (1985).

14. All contracts must be made by a mutual agreement or a meeting of the minds of the parties involved. *Martin v. Ewing*, 112 W.Va. 332, 164 S.E. 859 (1932) ("A meeting of the minds of the parties is a sine qua non of all contracts.")

15. The Court finds that it is obligated under the applicable law to enforce the agreements between the parties according to their plain terms, and more specifically, that the Court is charged with enforcing the Lease Agreement and the Agreement to Resolve Pending Litigation according to their plain language.

B. Horizon's Motion for Summary Judgment as to Count I of the Amended Complaint:

16. The Court finds that the Lease Agreement between the parties is enforceable and unambiguous both as a whole and in regard to the definition of Senior Debt.

17. Because the Lease Agreement is enforceable and unambiguous, the contract language must be enforced by the Court under its plain terms and without any reference to extrinsic evidence.

18. The Court finds that under the terms of the Lease Agreement, AMBIT's obligation to pay rent to Horizon is subordinate only to Senior Debt.

19. The Court finds that the Lease Agreement unambiguously defines Senior Debt to be solely AMBIT's payment obligations to its lenders arising out of the construction of the power plant.

20. The Court finds that even if any ambiguity did exist in the Lease Agreement, which the Court finds that it does not, any and all ambiguities in the Lease Agreement are resolved by the Agreement to Resolve Pending Litigation.

21. The Court finds that the Agreement to Resolve Pending Litigation is enforceable and unambiguous.

22. Because the Agreement to Resolve Pending Litigation is enforceable and unambiguous, the contract language must be enforced by the Court under its plain terms and without any reference to extrinsic evidence.

23. The Court finds that the Agreement to Resolve Pending Litigation unambiguously states that AMBIT's obligation to pay rent to Horizon is not subordinate to other operating and maintenance expenses of AMBIT.

24. The Court finds that in the Agreement to Resolve Pending Litigation AMBIT unambiguously waived its right to assert the very defenses it is attempting to assert in this case to Horizon's claim for non-payment of rent.

25. Horizon is not a party to the Trust Indenture, and the Court finds that there was no meeting of the minds between Horizon and AMBIT in regard to the Trust Indenture.

26. The Court finds that Horizon cannot be bound by any of the terms of the Trust Indenture.

27. Based upon the foregoing, the Court finds that there is no serious question regarding the priority of the rental payments owed by AMBIT to Horizon, that the rental payments are subordinate solely to AMBIT's payment obligations to its lenders, and that the rental payments are not subordinate to any other payment obligations AMBIT may have.

28. The Court is charged with interpreting the contracts according to their plain meaning, and is able to do so at this time in regard to Count I of Horizon's Amended Complaint.

29. In light of the foregoing findings of fact and conclusions of law, the Court finds that Horizon is entitled to summary judgment in its favor on Count I of its Amended Complaint, which seeks a declaration as to the priority of the rental payments owed by AMBIT to Horizon, and that judgment should be rendered in its favor.

C. Motion for Summary Judgment as to Count II of Defendant's Amended Counterclaim:

30. The Court finds that the Agreement to Resolve Pending Litigation unambiguously states that AMBIT's obligation to pay rent is not contingent on whether there is usable waste coal material on the Leased Premises, but rather, whether there is any waste coal material on the Leased Premises.

31. Horizon has filed an affidavit asserting that waste coal is present on the Leased Premises.

32. AMBIT has admitted in its discovery responses that there is waste coal present on the Leased Premises.

33. The Court finds that there is no dispute between the parties that there is waste coal material on the Leased Premises.

34. The Court finds that to the extent that AMBIT has paid rent to Horizon of two and one-half percent (2.5%) of its gross revenues, there has been no overpayment of rent from AMBIT to Horizon.

35. The Court finds that to the extent that AMBIT has paid rent of two and one-half percent (2.5%) of its gross revenues, that such payment was in compliance with the Agreement to Resolve Pending Litigation.

36. The Court is charged with interpreting the contracts according to their plain meaning, and is able to do so at this time in regard to Count II of AMBIT's Amended Counterclaim.

37. In light of the foregoing findings of fact and conclusions of law, the Court finds that Horizon is entitled to summary judgment in its favor on Count II of AMBIT's Amended Counterclaim, which asserts an overpayment of rent to Horizon, and that judgment should be rendered in its favor.

D. Scope and Finality of the Court's Ruling:

38. Based upon the representations of the parties at the hearing, the issue of the rent owed by AMBIT to Horizon is not truly at issue. Subsequent to the hearing, the parties have stipulated that the principal amount of rent owed by AMBIT to Horizon pursuant to the Lease

Agreement and Agreement to Resolve Pending Litigation is $1,163,841.78 through January 2014, with interest accruing as per the terms of the Lease Agreement and additional rent accruing based upon two and one-half percent (2.5%) of AMBIT's gross revenues after January 2014.

39. This Order does not reach Count I of AMBIT's Amended Counterclaim, which asserts an environmental liability claim against Horizon.

40. This Order also does not reach Counts X and XI of Horizon's Complaint, which seek damages for AMBIT locating fly ash on the Leased Premises and equitable relief in the form of the removal of the fly ash.

41. Counsel for Horizon advised that Count III of its Complaint was rendered moot by this Order, and therefore, nothing further remains to be adjudicated in regard to that claim.

42. Counsel for Horizon advised that Count IV of its Complaint was rendered moot by the discovery produced by Horizon in this case, and therefore, nothing further remains to be adjudicated in regard to that claim.

43. The Court *sua sponte* dismisses without prejudice Counts V through VIII of Horizon's Amended Complaint inasmuch as the matters at issue in those claims appear to be resolved by the terms of this Order.

44. The Court further finds that the issue of the priority of the rental payment to Horizon is the crux of the problem between the parties as well as this litigation, and has been an ongoing and/or recurring problem between the parties over the course of their relationship, having been litigated on more than one occasion.

45. In light of the Court's finding that the priority of the rental payment is the crux of the problem between the parties, the Court further finds that there is no just reason for delay, and

pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, this Order shall be considered to be a final Order for the purposes of appeal.

JUDGMENT

Based upon the foregoing findings and conclusions, it is **ORDERED, ADJUDGED, and DECREED** that Horizon's motion for summary judgment as to Count I of its Amended Complaint seeking declaratory judgment as to the priority of the rental payments owed by AMBIT is **GRANTED** and the rent owed to Horizon is subordinate only to AMBIT's payment obligations to its lenders and not subordinate to any other payments or obligations AMBIT may have.

It is further **ORDERED, ADJUDGED, and DECREED** Horizon's motion for summary judgment as to Count II of AMBIT's Amended Counterclaim is **GRANTED** and AMBIT is not entitled to any reimbursement or set-off in regard to any alleged overpayment of rent, and that the rent paid and owed has been in compliance with the contracts between the parties.

It is further **ORDERED, ADJUDGED, and DECREED** that the following matters remain to be litigated: 1) Count I of AMBIT's Amended Counterclaim, which asserts an environmental liability claim against Horizon; and 2) Counts X and XI of Horizon's Complaint, which seek damages for locating fly ash on the Leased Premises and equitable relief in the form of the removal of the fly ash.

It is further **ORDERED, ADJUDGED, and DECREED** pursuant to the parties' stipulation that Horizon is granted judgment against AMBIT for the rent owed in the principal amount of $1,163,841.78 through January 2014, with interest accruing as per the terms of the Lease Agreement and additional rent accruing based upon two and one-half percent (2.5%) of AMBIT's gross revenues after January 2014.

It is further **ORDERED, ADJUDGED, and DECREED** that Counts III and IV of Horizon's Amended Complaint are **MOOT** in light of this Order.

It is further **ORDERED, ADJUDGED, and DECREED** that Counts V, VI, VII, and VIII of Horizon's Amended Complaint are **DISMISSED WITHOUT PREJUDICE.**

It is further **ORDERED, ADJUDGED, and DECREED** that there is no just reason for delay and that this Order is a final Order of this Court for the purposes of appeal pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure.

It is further **ORDERED, ADJUDGED, and DECREED** that the objections and exceptions of the parties to this Order are hereby preserved.

Finally, it is **ORDERED, ADJUDGED, and DECREED** that the Clerk shall forward attested copies of this Order to the following:

Carl N. Frankovitch, Esq.
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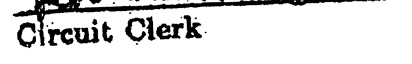
ENTERED this 26th of March, 2014.

HON. MARTIN J. GAUGHAN, Judge
Circuit Court of Brooke County, West Virginia

A copy, Teste:



Circuit Clerk

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