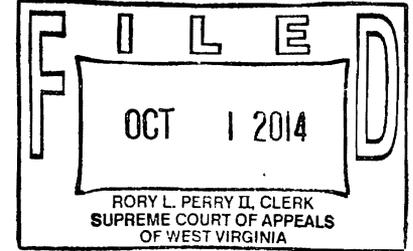


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 14-0446**

**AMERICAN BITUMINOUS POWER PARTNERS, L.P.,  
a Delaware limited partnership, PLEASANT VALLEY  
ENERGY COMPANY, a California corporation, and  
AMERICAN HYDRO POWER PARTNERS, L.P., a  
Pennsylvania limited partnership,**



**Defendants Below, Petitioners**

**vs.**

**HORIZON VENTURES OF WEST VIRGINIA, INC.,  
A West Virginia corporation,**

**Plaintiff Below, Respondent.**

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**REPLY BRIEF OF PETITIONERS**

**(Appeal from Circuit Court of Ohio County Civil Action No. 13-C-196)**

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**Renewed Assignment of Error Number 1:** The Circuit Court of Ohio County's failure to recognize and resolve the meaningful contractual ambiguities between Horizon and AMBIT and the financial institutions who hold Senior Debt has resulted in a summary disposition that misstates the legal and financial obligations of AMBIT to Horizon and the responsibility of Horizon to AMBIT. For that reason, the Court's Order cannot stand.

**Renewed Assignment of Error Number 2:** The Circuit Court of Ohio County failed to allow sufficient time for discovery on the Local Fuel versus Foreign Fuel issue for the amount of rent owed by AMBIT to Horizon. The Court further refused to consider the extrinsic evidence that was developed in discovery on the subject. Therefore, the Order entered by the Circuit Court is premature, improvident and contrary to facts well known by the parties and governmental authorities. In addition, it fails to address and resolve the ambiguities in the lease and the 1996 Settlement Agreement and fails to consider – or allow the parties to consider – the genuine issues of material fact that the Court inexplicably ignored.

**Renewed Assignment of Error Number 3:** The Circuit Court of Ohio County failed to recognize the numerous substantive factual errors in its Order, prepared entirely by Horizon, and entered verbatim by the Court.

### **IV. REPLY TO RESPONDENT'S STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT**

#### **Factual Background.**

American Bituminous Power Partners, L.P., Pleasant Valley Energy Company, and American Hydro Power Partners, L.P. (hereinafter collectively referred to as "AMBIT") renew,

as if set forth in its entirety herein, the Statement of the Case provided in Brief of Petitioners. Additionally, AMBIT replies to Horizon Ventures of West Virginia's ("Horizon") Statement of the Case as follows.

- A. All parties agree that rent payments are subordinated to "Senior Debt" as defined in the lease; however, Horizon does not understand that, as long as AMBIT is in default on its bond payments, no moneys whatsoever may be diverted to rent.

Horizon and AMBIT agree that rent payments are due and owing. [00714-17, 00951] Horizon and AMBIT also agree that AMBIT has been in default on its "Senior Debt" payments since February 2013 [00872] and that AMBIT cannot pay rent under the lease with Horizon while it is in default on "Senior Debt." Indeed, as of September 30, 2014, AMBIT was in default in the amount of \$5.2 million on its payments on the Solid Waste Disposal Revenue Bonds issued by the Marion County Commission. Horizon and AMBIT further agree that the only payments being made by AMBIT from revenues are those to the employees of AMBIT, the banks who financed the project, and the necessary service providers, suppliers and vendors required to keep the plant operational. [00951] Whereas AMBIT asserts that it is allowed – even mandated – to pay operations and maintenance even if in default on Senior Debt (in order to keep the plant operational), Horizon argues that rent must be paid before operations and maintenance. It remains unclear how Horizon expects AMBIT to pay the rent, if operations and maintenance expenses are not paid. In any event, under the terms of the lease with Horizon, no rent can be paid while AMBIT has defaulted in the payment of Senior Debt.

Because of the nature of the power plant project – in particular, its funding by the \$150 million in Solid Waste Disposal Revenue Bonds issued by the Marion County Commission – AMBIT's revenue funds are earmarked and their use structured and limited by a variety of

financial documents. By 1989, these financial documents set out the concept of “Senior Debt,” which AMBIT and Horizon agree is all indebtedness, obligations and liabilities pursuant to all notes, letters of credit, loan agreements, reimbursement agreements and/or guarantees between AMBIT and any other banks or other financial institutions. [00040-41] Among the earliest of agreements between Horizon and AMBIT is the Amended and Restated Lease, which recognized that AMBIT was going to take on considerable debt to make this project happen and recognized that the rent payments to Horizon were going to have to fall in line behind that debt. Dated November 28, 1989, the Amended and Restated Lease included a provision not in the original Lease. The Amended and Restated Lease included Section 7A, Subordination of Rent, which introduced for the first time the concept of “Senior Debt.” [00040]

AMBIT and Horizon agree that the Amended and Restated 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 . . . 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. . . including, without limitation, all principal, premium (if any) and interest on all loans and other extensions of credit made pursuant to the Credit Agreements and any and all refinancings, renewals or extensions thereof . . . provided, however, that the term Senior Debt as used herein (I) shall be limited to an aggregate principal amount of indebtedness or liabilities not exceeding at any time the sum of \$165,000,000, and (ii) shall not include any new loans or other extensions of credit. . .

[00040-41 (emphasis added).] The same or similar language appears in later iterations of the lease, including the Amendment to Amended and Restated Lease (executed December 1989) and

Second Amendment to Amended and Restated Lease (January 1990) [00227, 00247]. As early as November 1989, Horizon demonstrated knowledge that the Grant Town project was going to require indebtedness, obligations and liabilities that would take precedence over payment of rent.

AMBIT's finances are governed by a document titled the Trust Indenture (Jan. 1, 1990). [00721] The Trust Indenture is the document that governs the repayment of the \$150 million in Solid Waste Disposal Revenue Bonds issued by the Marion County Commission, used to construct the Grant Town Power Plant. [00721] Specifically, the Trust Indenture includes the prioritization of various payments – referred to between the parties and herein as the “waterfall” of payments – including both rent and the bond repayment. [00803-05] Whereas Horizon is not expressly a signatory to the Trust Indenture, Horizon did acknowledge and, arguably thereby, ratified the document and its terms.<sup>1</sup> Specifically, the only agreement entered by AMBIT and Horizon after the signing of the Trust Indenture – the 1996 Settlement Agreement – includes among its Definitions both “Significant Documents” (the first of which listed there is the Trust Indenture) and a separate entry for the Trust Indenture alone. [00570] Moreover, the Trust Indenture is a Senior Debt document as defined in the lease with Horizon.

Therefore, as early as 1989, Horizon demonstrated knowledge that rent would be subordinated to indebtedness, obligations and liabilities necessary to make the project happen. By 1996, in the most recent written agreement between the parties, Horizon recognized and endorsed

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<sup>1</sup> Whereas Horizon is not expressly a signatory to the Trust Indenture, Horizon arguably ratified the document and its terms as well, especially given Horizon's failure of timely repudiation. *See, e.g., Caperton v. A. T. Massey Coal Co., Inc.*, 225 W. Va. 128, 153, 690 S.E.2d 322, 347 (2009); *Berardi v. Meadowbrook Mall Co.*, 212 W. Va. 377, 384-85, 572 S.E.2d 900, 907-08 (2002).

the Trust Indenture, which sets out the subordination waterfall, the document that instructs AMBIT who to pay and in what order to make those payments. [00803-805]

The parties agree that Senior Debt includes payments on the Solid Waste Disposal Revenue Bonds and to the Banks that have been and currently are in default in an amount equal to \$5.2 million. Furthermore, under the terms of the lease, Horizon has agreed not to accept the payment of any rent while a default in Senior Debt has occurred and is continuing.

AMBIT and Horizon agree that Senior Debt is all indebtedness, obligations and liabilities pursuant to all notes, letters of credit, loan agreements, reimbursement agreements and/or guarantees between AMBIT and any other banks or other financial institutions. Horizon has argued that it is not a party to the Trust Indenture.<sup>2</sup> However, significant and meaningful portions of the Trust Indenture are included in part and by reference in the lease agreements entered between the parties. Through the leases, Horizon demonstrated knowledge that AMBIT would have debt and that the debt would be secured by notes or letters of credit or loan agreements or reimbursement agreements or guarantees. The debt would be repaid through the operation and maintenance of the AMBIT facility. By participating in the closing for the Senior Debt in January 1990, and through the 1996 Settlement Agreement, Horizon knew the name of one such debt instrument – the Trust Indenture – and identified it by name in that document. Horizon endorsed and ratified the Trust Indenture by identifying it as a “Significant Document” and by providing the Trust Indenture its own entry under Definitions. [00570] The Trust Indenture sets out the disbursement of *inter alia* Senior Debt payments.

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<sup>2</sup> See Brief of Respondent at 13.

By the express terms of the leases, Horizon indicated a willingness to receive payment only *after* AMBIT's payment of indebtedness, obligations and liabilities as set forth in notes, letters of credit, loan agreements, reimbursement agreements and/or guarantees. The Trust Indenture is just such a loan agreement, and by its terms, it sets a hierarchy of payments that Horizon had seen prior to the 1996 Settlement Agreement and yet referenced, endorsed and ratified in the 1996 Settlement Agreement.

Horizon alleges and AMBIT admits that its rent payments are in arrears. [00714-17, 00951] Horizon and AMBIT admit that rent payments come after payments on Senior Debt. Senior Debt includes all indebtedness, obligations and liabilities pursuant to all notes, letters of credit, loan agreements, reimbursement agreements and/or guarantees between AMBIT and any other banks or other financial institutions. [00040-41] The Trust Indenture is a loan agreement that sets out AMBIT's indebtedness, also setting a hierarchy of payments that includes operations and maintenance, debt service and rent.

The contractual recitals between the parties demonstrate that the Trust Indenture – as recognized, endorsed and arguably ratified by Horizon – is the evidence of debt envisioned in the leases between AMBIT and Horizon. The Trust Indenture waterfall governs AMBIT's use of its moneys, including payment of rent, repayment of debt, and, indeed, by logical necessity, operation and maintenance costs.

Senior Debt includes all indebtedness, obligations and liabilities, which by logic and necessity includes operation and maintenance costs, and included in those payments is “[t]o or as directed by the borrower to pay Actual Operating and Maintenance Expenses then due and payment or anticipated to become due and payable in such month for which no prior provision

for payment has been made, ..." [00803] By the plain language of the lease and the terms of the Senior Debt documents, Horizon may not be paid while AMBIT is in default, and AMBIT has been in default since February 2013. [00042] Beyond that, Horizon has agreed in the lease and Senior Debt documents not to accept, and to return, all rent paid to Horizon if received while AMBIT in in default pursuant to the Senior Debt documents. [00042]

- B. The lease entered between the parties bases the cost of rent on the existence, if any, of *usable* fuel (usable waste coal reserves) on the property. The lease entered between the parties also provides a mechanism for resolving disputes relative to the nature and/or existence of coal reserves on the property. Neither of these facts was considered by the Court below.

Pursuant to the lease entered between the parties, the rent had two components: 1) payment for the use of the property for the construction and operation of the plant (1 percent of revenue) and 2) payment for the use of usable fuel to power the plant (an additional 1.5 percent of revenues). As long as usable fuel was available on the property, AMBIT would pay a higher percent of gross revenue as rent in recognition of the fuel savings – 2.5 percent of gross revenues. [00033] As soon as AMBIT had to purchase fuel elsewhere (and so increase its cost in operating the plant), the lease payment dropped to 1 percent of gross revenues. If usable fuel is available on the property and AMBIT, for whatever reason, elects not to use that fuel for anything other than an Operating Reason,<sup>3</sup> then the rent remains 2.5 percent of gross revenues. [00030-34] As of 2003, no *usable* fuel remained on the demised (leased) property. [00874] Therefore, the appropriate rent is and has been 1 percent of gross revenues. The Court ignored AMBIT's un rebutted affidavit showing that, as of 2003, no usable "Local Fuel" remained. [00874]

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<sup>3</sup> Operating reason is one "required to (a) achieve and maintain the manufacturer's rated output of the Plant, (b) operate the Plant in a safe manner or (c) operate the Plant in compliance with applicable laws or regulations." [00153-54]

Horizon relies upon the 1996 Settlement Agreement to avoid addressing the fuel issue. In the order prepared by Horizon and adopted verbatim by the Court below, Horizon's position is encapsulated in part as follows:

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. ...

[00976] Horizon has not addressed nor explained the fact that the Agreement by its express terms **“does not supersede the Lease”** with certain limited exceptions not applicable in the instant case [emphasis added]. [00577] The 1996 Settlement Agreement was drafted and implemented to resolve a dispute between AMBIT and Horizon at the time it was executed. It has no prospective application with limited exceptions not here applicable. Paragraph 14 of the 1996 Settlement Agreement states **“that this Agreement does not supersede the Lease.”** [00577] The Circuit Court erred in ignoring the plain language of the 1996 Settlement Agreement.

Further, regardless of whether the Court below or this Court adopts the logic from the leases, the fact remains that any fuel/rent dispute should be resolved pursuant to the agreed-to remedy set forth in the lease. Specifically, by express agreement of the parties, “[a]ny disputes between Tenant and Landlord with regard to whether the use of Foreign Fuel is for an Operating Reason or a Non-Operating Reason shall be submitted to the consulting engineer retained by the Lenders; . . . or, if such consulting engineer refuses or is unable to serve in such capacity, by any

qualified, competent engineer acceptable to Landlord and Tenant. The decision of the engineer to which the dispute is submitted shall be binding on both Landlord and Tenant.” [00032] Any ruling on the fuel issues is premature and incomplete to the extent that it did not consider, address nor employ the contractual remedy negotiated between and adopted by the parties. The Court below ignored this contractual remedy.

- C. Serious and meaningful ambiguities remain that require the assistance of factfinders to resolve.

As this Honorable Court has held, “summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963). “Where a contract is ambiguous then issues of fact arise and summary judgment is ordinarily not proper.” Syl. pt. 2, *Glenmark Assoc., Inc., v. Americare of West Virginia, Inc.*, 179 W. Va. 632, 371 S.E.2d 353 (1988). The Circuit Court of Ohio County was advised that the remaining issues/fact that mitigate against summary disposition include the following: (1) meaningful contractual ambiguities remain between Horizon, AMBIT and the financial institutions who hold Senior Debt, (2) the summary judgment order does not accurately reflect the relationship nor the agreements nor the relative rights/responsibilities between Horizon, AMBIT and the financial institutions who hold Senior Debt, (3) the Court’s ruling fails to resolve the Local Fuel versus Foreign Fuel issue because it ignores ambiguities in and between the 1996 Settlement Agreement and the lease, (4) the Order at issue includes material factual errors that further complicate matters between Horizon, AMBIT

and the financial institutions, and (5) this premature and incomplete resolution if allowed to stand will lead to new, additional extensive litigation with additional parties.[00710-875]

AMBIT asks this Court to address these issues and remand this matter to the Circuit Court – or to the Business Court Division – for a full and fair inquiry into the ambiguities set forth herein and, finally, a resolution of the factual issues that have plagued this relationship – both as set forth herein.

#### **VI. RENEWED STATEMENT ON ORAL ARGUMENT.**

AMBIT has reviewed and considered Horizon’s position on oral argument. Nonetheless, pursuant to West Virginia Appellate Rule 19(a), AMBIT maintains its position that this matter is suitable for oral argument for the following reasons: (1) the assignments of error arise from the application of settled law; (2) the Court’s exercise of discretion is unsustainable because the law governing that discretion is settled; (3) the matter involves a narrow issue of law, and the result is against the weight of the evidence. For these reasons, Petitioners, by counsel, renew their request for the opportunity to be heard.

#### **VII. RENEWED ARGUMENT.**

##### **A. Introduction.**

As demonstrated by the voluminous Appendix in this appeal and the voluminous Appendix submitted with the Amicus Curiae, the decades-long relationship between AMBIT and Horizon is governed by a lease that has been revised, renewed, amended at least three times, by financial documents including the Trust Indenture, and by the 1996 Settlement Agreement. Since their initial contract/lease in the late 1980s, AMBIT and Horizon have had a complex relationship, with disputes arising as to the terms of the lease agreement in its various forms and

the debt documentation. The factual and legal issues between them have proven to be capable of repetition but have thus far evaded the scrutiny and thorough airing necessary to bring certainty and clarity to the relationship. The Grant Town project places AMBIT and Horizon together as business partners for years to come and impacts the lives and livelihoods of thousands of West Virginia citizens who rely upon the electric power produced by the project. Therefore, AMBIT seeks the opportunity to have the issues fully litigated and finally decided.

B. Renewed Standard of Review.

“A circuit court's entry of summary judgment is reviewed *de novo*.” Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). When employing the *de novo* standard of review, this Court reviews

anew the findings and conclusions of the circuit court, affording no deference to the lower court's ruling. See *West Virginia Div. of Env'tl. Protection v. Kingwood Coal Co.*, 200 W. Va. 734,745, 490 S.E.2d 823, 834 (1997) (“ ‘De novo refers to a plenary form of review that affords no deference to the previous decisionmaker.’ ” (quoting *Fall River County v. South Dakota Dep't of Revenue*, 1996 SD 106, ¶ 14, 552 N.W.2d 620, 624 (1996) (citations omitted))). See also *West Virginia Div. of Env'tl. Protection v. Kingwood Coal Co.*, 200 W.Va. at 745, 490 S.E.2d at 834 (“The term ‘*de novo*’ means “[a]new; afresh; a second time.”” (quoting *Frymier-Halloran v. Paige*, 193 W.Va. 687, 693, 458 S.E.2d 780, 786 (1995) (quoting Black's Law Dictionary 435 (6th ed. 1990)))).

*Blake v. Charleston Area Medical Center*, 201 W. Va. 469, 475, 498 S.E.2d 41, 47 (1997).

AMBIT and Horizon agree that Rule 56 of the West Virginia Rules of Civil Procedure provide that summary judgment is appropriate where no genuine issues of material fact remain and where no inquiry is required to clarify the application of the law. Syl. pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963). “Where a contract is ambiguous then issues of fact arise and summary judgment is ordinarily not proper.”

Syl. pt. 2, *Glenmark Assoc., Inc., v. Americare of West Virginia, Inc.*, 179 W. Va. 632, 371 S.E.2d 353 (1988). Among the remaining issues/fact that mitigate against summary disposition are the following: (1) meaningful contractual ambiguities remain undeveloped and unresolved between Horizon, AMBIT and the financial institutions who hold Senior Debt, (2) the resolution reached by the Court does not accurately reflect the relationship nor the agreements nor the relative rights and responsibilities among Horizon, AMBIT and the financial institutions who hold Senior Debt, (3) the Court's ruling does not resolve the Local Fuel versus Foreign Fuel issue, given in part the ambiguities in and between the 1996 Settlement Agreement and the lease, (4) the order of the Circuit Court (adopted verbatim from the document prepared by Horizon) includes material factual errors that further complicate matters between Horizon, AMBIT and the financial institutions, and (5) the order, if not reversed, will lead to additional extensive litigation with additional parties.

The interpretation and integration of the lease in all of its forms, the Trust Indenture and the 1996 Settlement Agreement has been complicated by the ambiguities in the numerous documents and the parties' interpretations of key terms, including the scope of the phrases "Senior Debt," "indebtedness, obligations and liabilities," "notes, letters of credit, loan agreements, reimbursement agreements and/or guarantees." See *Barn-Chestnut, Inc. v. CFM Development Corp.*, 193 W. Va. 565, 571, 457 S.E.2d 502, 508 (1995), quoting *Ashland Oil, Inc. v. Donahue*, 159 W. Va. 463, 469, 223 S.E.2d 443, 437 (1976), for the proposition that documents must be read together when "[a] fair reading of the documents discloses that they are so interrelated on their face that either, standing alone would be meaningless without the other...." In the face of the myriad documents that define the relationships, rights and duties at

issue, it is error to try to read only the 1996 Settlement Agreement and the Lease<sup>4</sup> in order to understand the rights and responsibilities of the parties.

The rent/fuel issue that remains between the parties is purely factual and should never have been resolved as a matter of law. Whereas summary judgment is appropriate where no genuine issues remain, here, the genuine issues remain and cannot help but complicate the future for these entities without further discovery and full and fair resolution.

**Renewed Assignment of Error Number 1:** The Circuit Court of Ohio County's failure to recognize and resolve the meaningful contractual ambiguities between Horizon and AMBIT and the financial institutions who hold Senior Debt has resulted in a summary disposition that misstates the legal and financial obligations of AMBIT to Horizon and the responsibility of Horizon to AMBIT. For that reason, the Court's Order cannot stand.

AMBIT and Horizon agree that the general rule of contract interpretation is that a contract should be enforced as written. *Cabot Oil & Gas Corp. v. Huffman*, 227 W. Va. 109, 705 S.E.2d 806, 814 (2010). However, the Circuit Court of Ohio County failed to consider all of the agreements that exist between these parties. The Court adopted Horizon's Order, which states that the only two agreements between Horizon and AMBIT are the lease agreements and 1996 Settlement Agreement. Order at ¶ 13. As this Court has recognized, the fact of multiple agreements and documents can introduce ambiguity in and of itself, unless all of the documents are read together. When a fair reading of documents discloses that they are interrelated and would be meaningless or incorrect if interpreted alone, the documents must be read together. *Barn-Chestnut, Inc. v. CFM Development Corp.*, 193 W. Va. 565, 571, 457 S.E.2d 502, 508 (1995), quoting *Ashland Oil, Inc. v. Donahue*, 159 W. Va. 463, 469, 223 S.E.2d 443, 437 (1976).

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<sup>4</sup> See Order (March 26, 2014) at ¶ 13.

The correct outcome lies in reading the interrelated documents together – the lease in all of its amendments, revisions and forms, the Trust Indenture and the 1996 Settlement Agreement. To read only one or two of the documents might reduce the ambiguity and simplify the issues, but the outcome would be meaningless or incorrect. The documents must be read together.

By 1989, the Amended and Restated Lease introduced the concept of “Senior Debt.”

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 . . . and (ii) any banks or other financial institutions[.]**

[00040-41 (emphasis added).] The Amended and Restated Lease further provided that “[a]ll rental payments shall be paid in accordance with Section 7 (Rent Payment) until and unless a default in payment of any Senior Debt when due shall occur.” [00042] Therefore, as early as November 1989, Horizon demonstrated knowledge that the Grant Town project was going to require that AMBIT take on indebtedness, obligations and liabilities – **all of which would take precedence over payment of rent.**

Within months of the Amended and Restated Lease, AMBIT’s payment schedules were formalized into the Trust Indenture (Jan. 1, 1990). [00721] Specifically, the Trust Indenture is a Senior Debt document that prioritizes AMBIT’s various payments and created the priority of payments (referred to as “the waterfall”) that includes the particulars of the indebtedness, obligations and liabilities that take precedence over payment of rent.

Horizon is not expressly a signatory to the Trust Indenture. However, Horizon participated in the closing of the Senior Debt documents in January 1990 and thus acknowledged and ratified – if not adopted by reference -- the document and its terms in the 1996 Settlement Agreement. The only agreement entered by AMBIT and Horizon after the signing of the Trust

Indenture, the 1996 Settlement Agreement includes among its Definitions both “Significant Documents” (the first of which listed there is the Trust Indenture) and a separate entry for the Trust Indenture alone. [00570] The payment of operating expenses is not an excuse for nonpayment of rent. [00568] However, the inverse is not true; payment of operating expense does not require the payment of rent. By the express terms of the lease, rent may only be paid if Senior Debt has been paid. [00721]

Horizon expressly demonstrated its commitment to the continuity of the Grant Town project when, in the Amended and Restated Lease, Horizon agreed to limit its remedy in the instance of missed rent payments. [00070] Horizon admits that it induced AMBIT to take on this project and that the inducement takes the form in part of limited remedies in the event of defaulted rent. [00070] Horizon entered these lease agreements demonstrating an unwillingness to operate the plant itself; it needs and wants AMBIT to stay in place, operating. The financial institutions and bondholders who have invested \$150 million in this project need and want AMBIT to stay in place, operating. Brief of the Amicus Curiae Bank Group Lenders in Support of Petitioners (hereinafter “Amicus Curiae”) at 7. Therefore, the documents that defined the relationships provided for the payment of operating and maintenance costs. The financiers included it within their notes, letters of credit, loan agreements, reimbursement agreements and guarantees. As stated by the Amicus Curiae, if the plant is not operational, it cannot fulfill its contractual obligations to its customer Monongahela Power. If the plant does not fulfill its contractual obligations to MonPower, its revenue stream dries up, and AMBIT cannot pay the banks, the bondholders or the landlord. Amicus Curiae at 7.<sup>5</sup> This reality was recognized from

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<sup>5</sup> Horizon recognized the importance of complying with AMBIT’s contractual obligations to MonPower, agreeing to fuel changes as necessary to comply with MonPower’s needs. [00031]

the inception of the project, and, therefore, continuity was built into each and every one of the documents that structure the relationships and the project. Each month of its operation, AMBIT has to start by paying Senior Debt so that it can remain viable and earn the moneys to then pay the rent to Horizon.

AMBIT was in default of its Senior Debt from the moment its financial reserves were wholly depleted and its inability to pay the next scheduled bond payment was clear: February 2013. [00872] As a consequence, rent has not been paid since that time. AMBIT continues to operate the Grant Town power plant and to sell power to MonPower, with the hope and expectation that funds will become available to pay Senior Debt and rent. [00872]

Senior Debt by definition must include operating and maintenance costs such as payroll and fuel, which are obligations and liabilities pursuant to all notes, letters of credit, loan agreements, reimbursement agreements and/or guarantees between AMBIT and the Banks. The Circuit Court failed to consider the plant's operating status and the financial structure that includes Horizon, AMBIT, the Banks, the Marion County Commission and West Virginia. *Amicus Curiae* at 2, 7.

Additionally, first and foremost among the indebtedness, obligations and liabilities pursuant to all notes, letters of credit, loan agreements, reimbursement agreements and/or guarantees referenced in Senior Debt (and endorsed and ratified in the 1996 Settlement Agreement) is the Trust Indenture. Any and all expenditures made by AMBIT are governed by the Trust Indenture. [00714-17] Any and all payments to Horizon are governed by the Trust Indenture's waterfall. [00721]

The Senior Debt documents, including the Trust Indenture, include operating and maintenance expense and places such expenses prior to rent. [00803-805] Horizon recognized and adopted the Trust Indenture's waterfall when it added "Senior Debt" to the Amended and Restated Lease and subordinated rent to it. [00040] AMBIT cannot pay rent to Horizon until it has satisfied the six higher tiers of the waterfall. Horizon recognized the overlay of financial agreements and institutions, and realized that their agreements would take precedence. Horizon understood the true nature of the business relationship and entered it knowingly – all as demonstrated by the documents before this Court.

**Renewed Assignment of Error Number 2:** The Circuit Court of Ohio County failed to allow sufficient time for discovery on the Local Fuel versus Foreign Fuel issue for the amount of rent owed by AMBIT to Horizon. The Court further refused to consider the extrinsic evidence that was developed in discovery on the subject. Therefore, the Order entered by the Circuit Court is premature, improvident and contrary to facts well known by the parties and governmental authorities. In addition, it fails to address and resolve the ambiguities in the lease and the 1996 Settlement Agreement and fails to consider – or allow the parties to consider – the genuine issues of material fact that the Court inexplicably ignored.

AMBIT and Horizon agree as follows. The lease agreements between Horizon and AMBIT calculated rent based on the availability and usability of waste coal on the property. When AMBIT leased the Demised Premises to AMBIT, the parties agreed that usable waste coal fuel was present on the property. Pursuant to the agreements between the parties, if AMBIT burned the usable waste fuel that was on the property – the "Local Fuel" – the rent amount would be 2.5 percent of the gross. Once the Local Fuel was no longer available and AMBIT had to purchase fuel ("Foreign Fuel"), the rent amount would be 1 percent of the gross, reflecting the fact that the Demised Premises were of lesser value to AMBIT. To the extent that AMBIT elected not to use the Local Fuel for anything other than an "operating reason," then the rent

amount would remain 2.5 percent. The Amended and Restated Lease identifies the parties' agreed-to list of operating reasons: manufacturer's rated output, safety, compliance with the Electric Energy Purchase Agreement with MonPower, or compliance with design/manufacture manuals or laws/regulations. [00031]

Despite these agreements, the rent calculations became complex because AMBIT and Horizon disagreed on the concept of "usable" and the distinction between non-operating and operating reasons to use foreign fuel. Horizon argued that "[l]arge quantities of waste coal material are . . . present on the leased premises." [00882] Conversely, AMBIT states that "[a]ll usable Local Fuel is exhausted and has been since 2003, [causing the power plant to] rely solely on the use of Foreign Fuel." [00874] The calculation of rent is governed by the Amended and Restated Lease, and the primary stumbling block has been the concept of *usable* fuel. [00030] Horizon relies upon the 1996 Settlement Agreement in trying to remove "usable" from the rent calculation. However, the 1996 Settlement Agreement explicitly provides that "**this Agreement does not supersede the Lease**" [emphasis added] with certain limited exceptions not applicable in the instant case. [00577]

It is a factual issue whether usable fuel remains on the Demised Premises. It is a factual issue whether AMBIT has reasonable and supportable operating reasons for not using any waste coal that is on the Demised Premises. The agreements between the parties provide an agreed-to mechanism for resolving these issues, which the Court below never addressed, let alone applied.

By express agreement of the parties, "[a]ny disputes between Tenant and Landlord with regard to whether the use of Foreign Fuel is for an Operating Reason or a Non-Operating Reason shall be submitted to the consulting engineer retained by the 'Lenders; . . . or, if such consulting

engineer refuses or is unable to serve in such capacity, by any qualified, competent engineer acceptable to Landlord and Tenant. The decision of the engineer to which the dispute is submitted shall be binding on both Landlord and Tenant.” [00032] Any ruling on the fuel issues is premature and incomplete to the extent that it did not consider, address nor employ the contractual remedy negotiated between and adopted by the parties. Neither the Court below nor Horizon has addressed or considered this contractual remedy. Case dispositive ambiguities remain.

It has been recognized under West Virginia law that “[s]ummary judgment is appropriate only after the opposing party has had adequate time for discovery.” Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 56(f), at 1144 (3d ed. 2008).<sup>26</sup> While the agreed-to resolution of these issues – the engineer’s input on the fuel issue – might be extrinsic evidence, AMBIT argues that the Court must consider extrinsic evidence in ruling on the motion or must allow for the factfinders to consider the nature of whatever remains on the Demised Property. [00971]

**Renewed Assignment of Error Number 3:** The Circuit Court of Ohio County failed to recognize the numerous substantive factual errors in its Order, prepared entirely by Horizon, and entered verbatim by the Court.

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<sup>2</sup> AMBIT was unable to pay the \$5.2 million due on September 30, 2014, so, pursuant to a Reimbursement Agreement, the Banks have covered the payments to the bondholders and AMBIT repays the banks, all as set forth in, *inter alia*, the Reimbursement Agreement. See *Amicus Curiae* at 4, 8.

<sup>6</sup> See *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 701, 474 S.E.2d 872, 881 (1996) (“As a general rule, summary judgment is appropriate only after adequate time for discovery.”); *Board of Educ. of the County of Ohio v. Van Buren & Firestone Architects, Inc.*, 165 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980) (“a decision for summary judgment before discovery has been completed must be viewed as precipitous”).

The Circuit Court's Order does not accurately reflect the content of nor the interrelationship between the controlling documents. The Order does not reflect an understanding of the relationship among agreements with Horizon and the other parties nor the status of the rent payments and Senior Debt. Horizon understood, ratified and adopted the Trust Indenture's waterfall, and demonstrated repeatedly an interest in the plant's remaining viable. Horizon understands that AMBIT cannot pay rent to Horizon (tier seven) unless and until Senior Debt is paid. The Circuit Court's Order is the first step to additional litigation between these parties and among additional parties because of the errors it embraces and introduces. The best resolution is a return to the trial court level – or, better yet, the Business Court Division – for a full and fair examination of the facts and issues between the parties.

**Conclusion.**

The dispositive judgment entered in this matter was both premature and improvident in that it has not resolved – indeed, cannot resolve – the issues of the parties. Because the Circuit Court never fully considered and understood the full scope of the legal and factual issues before it, the “resolution” leaves fatal ambiguities that will result in additional litigation. AMBIT appeals to this Honorable Court for relief from the March 26 Order and seeks a full and fair opportunity to resolve the claims raised against it below.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 14-0446

**AMERICAN BITUMINOUS POWER PARTNERS, L.P.,  
a Delaware limited partnership, PLEASANT VALLEY  
ENERGY COMPANY, a California corporation, and  
AMERICAN HYDRO POWER PARTNERS, L.P., a  
Pennsylvania limited partnership,**

**Defendants Below, Petitioners**

vs.

**HORIZON VENTURES OF WEST VIRGINIA, INC.,  
A West Virginia corporation,**

**Plaintiff Below, Respondent.**

**CERTIFICATE OF SERVICE**

I, John F. McCuskey/Roberta F. Green, hereby certify that on the 1<sup>st</sup> day of October, 2014, a true copy of the foregoing "**Reply Brief of Petitioners**" was served on the following by U. S. Mail, postage prepaid and addressed as follows:

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