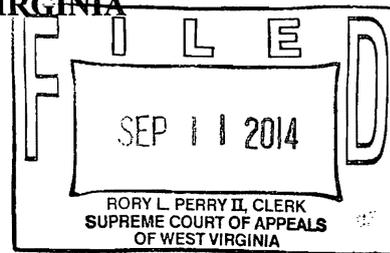


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 14-0446



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.

Plaintiff Below, Respondent.

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**BRIEF OF THE RESPONDENT**

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

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## STATEMENT OF THE CASE

### **A. Factual Background:**

On November 29, 1989, Horizon Ventures of West Virginia, Inc. (hereinafter “Horizon”) and American Bituminous Power Partners, L.P. (hereinafter “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 for the purpose of constructing, operating, and maintaining an electric generation plant. [00011-00264] The construction project was financed, and Section 7A of the Lease Agreement between Horizon and AMBIT called for the subordination of the payment of rent solely to the payment of “Senior Debt” owed to the lenders involved with the financing. [00040-48] Senior Debt is limited to the original indebtedness used for the construction of the electrical generation plant. [Id.] The Lease Agreement specifically states that AMBIT’s obligation to pay rent is “absolute and unconditional” and that the rental obligation is subordinated solely to the payment of the holders of Senior Debt. [00047] Rent owed to Horizon for the leased premises is calculated based upon AMBIT’s gross revenue, and until 1996, was based upon the source of the fuel utilized to fire the plant. [00030-36; 00568-587]

Subsequent to signing the Lease Agreement, without any participation by Horizon, and unbeknownst to Horizon, on January 1, 1990, AMBIT entered into a Trust Indenture, which AMBIT and the Amicus Curiae maintain changed the terms of the Lease. [00721; 00803-805] Despite the fact that Horizon is not a party to the Trust Indenture, AMBIT maintains that the rent owed to Horizon is governed by the Trust Indenture, rather than the agreements between Horizon and AMBIT. [Id.] According to AMBIT as well as the Amicus Curiae, it was permissible for

AMBIT to alter its agreement with Horizon by contracting with another party without Horizon's participation.

The dispute between AMBIT and Horizon regarding the priority of rental payments has been the source of litigation in the past. In early 1994 AMBIT became delinquent on the rent due under the Lease. At the time the delinquency arose, AMBIT took the same position it now takes – that payments to Horizon were subordinate to payments other than Senior Debt, despite the clear language of the Lease. In April of 1994, Horizon filed suit against AMBIT for AMBIT's failure to pay Horizon rent under the Lease. On or about May 23, 1994, the litigation was resolved by agreement. [00565-567] AMBIT paid to Horizon all of the past due rent plus interest and attorneys' fees. [Id.] The resolution of the 1994 litigation did not determine the priority of the payments of rent to Horizon, and Horizon maintained that its priority was dictated solely by the Lease between the parties. [Id. at ¶ 5]

In October and December of 1995 AMBIT again became delinquent on the rent due under the Lease. On February 2, 1996, Horizon filed suit against AMBIT in the Circuit Court of Ohio County at Civil Action Number 96-C-32 for AMBIT's failure to pay Horizon rent under the Lease. Again, despite the clear language of the Lease, AMBIT maintained that its payments to Horizon were subordinate to payments other than Senior Debt just as it now argues. The 1996 litigation between Horizon and AMBIT was resolved pursuant to an Agreement to Resolve Pending Litigation dated May 28, 1996. [00568-587]

The Agreement to Resolve Pending Litigation provided for the cure of the outstanding rent owed to Horizon and nullified the Third Lease Amendment. [00571-572] The Agreement to Resolve Pending Litigation also resolved the issue of the priority of the rent owed by AMBIT to Horizon. [00568-569] In the agreement Horizon expressly asserted, and AMBIT acknowledged,

that the payment of rent to Horizon was subordinate only to the payment of the debt incurred constructing the power plant, in accordance with the clear language of the Lease. [Id.] AMBIT further agreed that it would not in the future assert that its obligation to pay rent to Horizon was subordinate to any payment other than its obligation to its lenders. [Id.]

Also resolved in the Agreement to Resolve Pending Litigation was the issue of the future payment of rent to Horizon based upon the use of Local Fuel versus Foreign Fuel used for Operating Reasons versus Non-Operating Reasons. [00571-572] Rather than attempting to audit AMBIT's fuel usage, and the reasons for such fuel usage, the parties agreed that all of the Foreign Fuel utilized by AMBIT would be deemed to be for Non-Operating Reasons so long as any Local Fuel (even if not usable in operations) was located on the premises. [Id.] In consideration, Horizon agreed to waive a portion of the rent and receive two and one-half percent (2.5%) of AMBIT's gross revenues from the operation of the power plant. [00572-573]

In February 2013, AMBIT informed Horizon that it would not pay the full rent due under the Lease. AMBIT further informed Horizon that there would be no rental payments until at least approximately September 2013. At that time, despite the unambiguous language of the contracts between the parties, AMBIT again took the position that rental payments to Horizon were subordinated to payments other than those defined as "Senior Debt" under the Lease. Faced with no alternative, Horizon filed suit. [000003] In response, AMBIT attempted to argue the very defenses it waived in the Agreement to Resolve Pending Litigation. [00268-289] AMBIT further asserted a counterclaim alleging that it had overpaid rent for a period of approximately ten (10) years despite the resolution of that issue in the Agreement to Resolve Pending Litigation. [000268-289; 00568-569]

**B. Procedural History:**

On June 17, 2013, Horizon filed this case against AMBIT and its general partners because it had not received a full rental payment from AMBIT in the preceding four (4) months, and likewise did not receive any assurance from AMBIT that rent would be paid at any time in the foreseeable future. [000003] On July 30, 2013, AMBIT filed an Answer and Amended Counterclaim in response to the Complaint. [000268]

Inasmuch as the matters at issue in Horizon's request for declaratory judgment are governed by unambiguous written agreements, on or about August 14, 2013, Horizon filed a motion for summary judgment seeking judgment on Count I of its Complaint, which sought 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 asserted its claim for overpayment of rent. [000297]

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*. [0000710] Horizon filed *Plaintiff's Reply in Support of Motion for Summary Judgment* on October 2, 2013, and on October 4, 2013, Horizon's motion came on for hearing before the Court. [000876]

At the October 4, 2013, hearing the Court announced its ruling, finding that the matters at issue in the Horizon's 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. [00899] 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. [Id.] The parties engaged in written discovery following the October 4, 2013,

hearing, but at no time did AMBIT request or conduct any of the depositions it now claims are necessary.

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.

[000902] On or about March 4, 2014, AMBIT filed *Defendants' Response to Plaintiff's Renewed Motion for Summary Judgment*. [000950] 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*.

[000959] At no time in its responses to Horizon's motion did AMBIT identify any additional discovery that was necessary prior to the ruling. [000950]

Horizon's renewed motion for summary judgment came on for hearing before the Court on March 7, 2014. At the hearing, the Court announced its ruling, correctly finding that the dispute between the parties is governed by the Lease Agreement and the Agreement to Resolve Pending Litigation, which unambiguously require AMBIT to pay rent at a rate of two and one-half percent (2.5%) of its gross revenues, subordinate only to its obligation to pay the Senior Debt obligation to its lenders arising out of the construction of the electric generation plant.

[00968] The Court signed an Order containing detailed Findings of Fact and Conclusions of Law on March 26, 2014, and the Circuit Clerk entered the judgment on March 27, 2014. [Id.]

On April 25, 2014, AMBIT filed the instant appeal.

## **SUMMARY OF ARGUMENT**

The Circuit Court of Ohio County's ruling is supported by the law and the evidence and must be affirmed. AMBIT and the Amicus Curiae urge this Court to turn the law of contract construction on its head. Rather than reading the agreements and enforcing them according to their plain language, as mandated by longstanding jurisprudence in this State, AMBIT and the Amicus Curiae argue that extrinsic evidence must be considered in order to read ambiguity into the agreements. Both this Court and the Circuit Court are required by law to interpret the contracts between AMBIT and Horizon according to their plain meaning, and must not consider extrinsic evidence unless and until an ambiguity is demonstrated within the documents themselves.

Moreover, accepting AMBIT's argument would not only overturn the law concerning the interpretation of contracts, but would also require undermining basic tenets of contract law. According to AMBIT, it was permitted to make a contract with Horizon and then alter the material terms of that contract by making a subsequent contract with another party. That is not the law nor could it be the law.

The documents at issue are devoid of any ambiguity. The lack of any ambiguity requires that the contracts be enforced as written. Likewise, AMBIT was not permitted to alter the terms of its contracts with Horizon by entering into a contract with another party. The Circuit Court's Order enforces the contracts as written in accordance with the law. Therefore, the Order must stand.

## **STATEMENT REGARDING ORAL ARGUMENT**

Pursuant to Rules 18(a)(3) and 18(a)(4) of the West Virginia Rules of Appellate Procedure, Horizon submits that oral argument is unnecessary in this case. The matters at issue

have been authoritatively decided by this Court in numerous prior opinions, and the facts and legal arguments are adequately presented both in the briefs filed by the parties and in the record on appeal.

## **ARGUMENT**

### **A. Introduction:**

The dispute at issue in this case is definitively resolved by the language of the contracts between AMBIT and Horizon. Summary judgment in Horizon's favor was an appropriate disposition of both Horizon's declaratory judgment claim as well as AMBIT's counterclaim alleging overpayment of rent. Both issues are governed by unambiguous written agreements. The Circuit Court entered an Order containing detailed findings of fact and conclusions of law that are fully supported by the evidence in the record. There is no error in this case, and the Circuit Court's judgment should be affirmed.

### **B. Standard of Review:**

The standard of review for an order granting summary judgment is *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). This Court's function, as a reviewing court, is to determine whether the stated reasons for the granting of summary judgment by the Circuit Court are supported by the record. *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 353, 484 S.E.2d 232, 236 (1997).

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. Pts. 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). "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. “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.

Although the moving party has the initial burden of proof, once that party shows by affirmative evidence that there is no genuine issue of material fact, the burden shifts to the nonmoving party. Syl. Pt. 3 *Williams*, 194 W.Va. 52, 459 S.E.2d 329. “[T]o withstand the motion, the nonmoving party must show there will be enough competent evidence available at trial to enable a finding favorable to the nonmoving party.” *Id.* at 60-61, 459 S.E.2d at 337-38. Summary judgment is mandated if the record, when reviewed most favorably to the nonmoving party, discloses “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, in part, *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W.Va. 160, 133 S.E.2d 770.

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). 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.*

**C. Response to Assignment of Error Number 1: The contracts existing between the parties are devoid of ambiguities, and the Circuit Court of Ohio County properly enforced the contracts as written**

**1. The law requires enforcement of the contracts as written.**

In construing the terms of a contract the Court utilizes common-sense canons of contract interpretation. *Payne*, 195 W.Va. at 507, 466 S.E.2d at 166. The meaning of an agreement is ascertained 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). 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).

The Court's task is not to rewrite the terms of the contract between the parties, but to enforce it as written. Syl. Pt. 2 *Bennett v. Dove*, 166 W.Va. 772, 277 S.E.2d 617 (1981). "It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." Syl. Pt. 3 *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962)

In construing a written instrument, it is the duty of the court to construe 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). "An unambiguous written contract entered into as the result of verbal or written negotiations will, in the absence of fraud or mistake, 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 of conversations had or statements made contemporaneously with

or prior to its execution.” *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).

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).

Contract language is 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 the words employed and the 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.”) This 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).

Contrary to AMBIT’s arguments, ambiguity cannot arise from facts and circumstances extrinsic to the contracts. In fact, extrinsic evidence of the parties’ statements about an unambiguous “instrument which occur contemporaneously with, or prior to its execution, [are] inadmissible to contradict, add to, detract from, vary or explain the terms of such instrument, in the absence of a showing of illegality, fraud, duress, mistake, or insufficiency of consideration.” *Edmiston v. Wilson*, 146 W.Va. 511, 120 S.E.2d 491, 499 (1961).

As set forth below, the contracts between AMBIT and Horizon are devoid of any ambiguity and are clear on their face. AMBIT has alleged no facts that would even permit the consideration of extrinsic evidence. Both the Circuit Court and this Court are obligated to enforce the agreements as written. When the agreements are enforced as written, it is abundantly clear that the Circuit Court's ruling is correct and must be affirmed.

**2. The agreements between the parties unambiguously require AMBIT to pay rent to Horizon subject only to the payment of Senior Debt**

In discovery, AMBIT admitted that the only contracts between AMBIT and Horizon are the Lease Agreement and the Agreement to Resolve Pending Litigation. [00916] AMBIT further admitted that Horizon is not a party to the Trust Indenture. [Id.] As such, it is the language of the Lease Agreement and the Agreement to Resolve Pending Litigation that dictate the relationship between the parties and the matters at issue in this litigation. Both agreements state clearly on their faces that the only payments to which rent is subordinated are payments to AMBIT's lenders. To place other creditors or obligations ahead of Horizon would be to re-write the agreements between the parties, which is not the province of any court.

**a. The Lease Agreement subordinates rent solely to Senior Debt**

The Lease Agreement unambiguously states that Horizon's rental payments are subordinate solely to "Senior Debt." [00040-48.] 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.

[00040]

The Lease Agreement specifically states that all rent owed to Horizon shall be paid until or unless a default in the payment of Senior Debt occurs, and that the rent obligation is unconditional. [00047] Section 7A(j) 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.

[Id.]

Senior Debt is defined in the Lease Agreement 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 or the Kiln Facility 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 (including any interest accruing subsequent to the commencement of bankruptcy, insolvency or similar proceedings with respect to Tenant); 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 made to Tenant or AKP pursuant to an amendment of any of the Credit Agreements after completion of the Initial Cogeneration Plan and the Kiln Facility unless the proceeds thereof are used for the purpose of operating, maintaining or improving the Initial Cogeneration Plant or the Kiln Facility and, in the case of loans or extensions of credit to Tenant, are approved by the Public Service Commission of West Virginia and further, in the case of loans or extensions of credit to AKP or relating to the Kiln Facility, the aggregate outstanding principal amount of indebtedness or liabilities of AKP or relating to the Kiln Facility shall not at any time exceed the sum of \$10,000,000. The aggregate principal amount of Senior Debt shall be repayable (except in the case of (a) any refinancings, renewals or extensions thereof, (b) any new loans or other extensions of credit made in

accordance with the provisions of clause (ii) of the preceding sentence, (c) the expiration of any letter of credit with respect thereto, (d) default in the payment thereof or (e) acceleration thereof due to an event of default) as set forth in the amortization schedule attached as Exhibit E [Best Case Amortization Schedule] hereto.

[0040-42]

The language of the Lease Agreement is abundantly clear that the only payments that take priority over the payments of rent to Horizon are the payments to the Senior Debt. [0040-42] Senior Debt is likewise plainly defined as payments to AMBIT's lenders for the construction of the power plant. [Id.]

Notwithstanding the plain language of the Lease Agreement, AMBIT and the Amicus Curiae argue that AMBIT's obligations to Horizon are also subordinate to *inter alia* operating and maintenance expenses for the power plant, and fees and expenses to fiduciaries. To support their arguments AMBIT and the Amicus Curiae point to the Trust Indenture, an agreement to which Horizon is not even a party. [00802-803] The Lease Agreement unambiguously provides that the rent owed by AMBIT to Horizon is subordinate only to the principal and interest payments owed to AMBIT's lenders for the construction of the power plant. [00040-48] This Court is obligated, as the Circuit Court was likewise obligated, to enforce the language of the contracts between the parties as written. When that is done, it is clear that the Circuit Court's Order was correct and must be affirmed.

**b. The Agreement to Resolve Pending Litigation subordinates rent solely to Senior Debt**

As set forth in the Factual Background above, the issue of the priority of the rental payments owed by AMBIT to Horizon was previously litigated and settled. [00568-587] The law favors and encourages the resolution of controversies by contracts of compromise and settlement, rather than by litigation. *Woodrum v. Johnson*, 210 W.Va. 762, 771, 559 S.E.2d 908,

917 (2001); Syl. Pt. 1, *Sanders v. Roselawn Memorial Gardens*, 152 W.Va. 91, 159 S.E.2d 784 (1968). A “[s]ettlement agreement is favored by law and is to be construed as any other contract.” *Floyd v. Watson*, 163 W.Va. 65, 68, 254 S.E.2d 687, 690 (1979) (internal citations omitted).

In the Agreement to Resolve Pending Litigation Horizon expressly asserted, and AMBIT acknowledged and agreed, that the payment of rent to Horizon was subordinate only to the payment of Senior Debt. [00568-569] AMBIT further acknowledged and agreed that Senior Debt did not include any of the expenses it now asserts form a defense against payment of its rental obligation to Horizon. [Id.] Finally, AMBIT agreed that it would never again assert, nor would it permit its counsel to assert, that any default in payment to any entity other than its lenders would form a defense to its rent obligation. [00569] The relevant paragraph of the Agreement to Resolve Pending Litigation states:

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. 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.

[00568-569]

There is no reasonable interpretation of the Agreement to Resolve Pending Litigation that would allow subordination of AMBIT's rental obligation to anything other than its payments to its lenders. In fact, in the Agreement to Resolve Pending Litigation AMBIT contractually agreed not to assert the very defense to payment of rent it now argues to this Court, and further agreed that the rent owed to Horizon was an Operating and Maintenance expense. [000568-569; 00571] The contract is clear on its face and must be enforced as written. As such, the Circuit Court's Order must be affirmed.

**3. The Trust Indenture has no bearing on AMBIT's obligation to Horizon**

The elements of a contract are an offer and an acceptance supported by consideration. Syl. Pt. 1, *First Nat. Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W.Va. 636, 153 S.E.2d 172 (1967). "The fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement." Syl. Pt. 5, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253 (1926). "A meeting of the minds of the parties is a *sine qua non* of all contracts." Syl. Pt. 1, *Burdette v. Burdette Realty Improvement, Inc.*, 214 W.Va. 448, 590 S.E.2d 641 (2003); Syl. Pt. 1, *Martin v. Ewing*, 112 W.Va. 332, 164 S.E. 859 (1932).

It is undisputed in this case that Horizon is not a party to the Trust Indenture. [00916] Inasmuch as Horizon is not a party to the Trust Indenture, none of its provisions can have any effect on AMBIT's obligations to Horizon. There is simply no contract in existence between Horizon and AMBIT that binds Horizon to any of the Trust Indenture's provisions. The sole contracts between AMBIT and Horizon are the Lease Agreement and the Agreement to Resolve

Pending Litigation. [Id] As such, it is those contracts that dictate the relationship between AMBIT and Horizon. The Trust Indenture has no application to any obligation between AMBIT and Horizon.

Moreover, the analysis advanced by AMBIT and the Amicus Curiae would turn the law of contracts on its head. AMBIT and the Amicus Curiae erroneously argue the following proposition to this Court:

A makes a contract with B

A makes a subsequent contract with C that modifies its contract with A

A's contract with C governs A's contractual obligations to B

The preceding example is not and cannot be the law in this or any other jurisdiction. If taken to its logical conclusion, the arguments of AMBIT and the Amicus Curiae would wreak havoc. For example, a second position mortgagee could obligate a borrower to pay the second mortgage ahead of the first mortgage and likewise obligate the first position mortgagee simply by including language in the mortgage documents indicating that the second mortgage has priority.

Likewise, divorcing spouses could limit the rights of creditors simply by including language in settlement agreements that one spouse or the other is obligated to the creditor and that the creditor shall have no right as against the other spouse. Under AMBIT's version of the law, the rights of contracting parties would not be dictated by the agreements between them, but by the universe of agreements between either of the contracting parties and any other party with whom either contracting party has an agreement. That is simply not the law, and cannot be the law.



The Trust Indenture is indisputably extrinsic to the contracts between the parties. As such, it cannot be considered unless and until there is some ambiguity in the contracts between AMBIT and Horizon. As discussed above, no such ambiguity exists, and the contracts between the parties clearly dictate that AMBIT's obligation to Horizon is subordinate only to its payment of obligations to its lenders. Therefore, summary judgment in Horizon's favor was appropriate, and the Circuit Court's Order must stand.

**4. The Agreement to Resolve Pending Litigation resolved the matters at issue in Count II of AMBIT's Counterclaim alleging overpayment of rent**

AMBIT's obligation to pay rent to Horizon was unambiguously modified by the Agreement to Resolve Pending Litigation. [00568-587] The Agreement to Resolve Pending Litigation abolished the Third Amendment to the Lease. [00568] The Third Amendment to the Lease provided that all use of Foreign Fuel by AMBIT would be deemed to be for Non-Operating Reasons and also provided for a committee amongst AMBIT and Horizon for the purposes of monitoring the reclamation of Local Fuel.

In order to resolve the dispute over the use of Local Fuel versus Foreign Fuel, the parties agreed that Horizon would receive a "Base Amount" of rent in the amount of two and one-half percent (2.5%) of AMBIT's gross revenues so long as **any** waste coal material, whether usable or not, remained on the leased premises. [00573] In exchange for the Base Amount, Horizon waived a portion of the rent payable. [00572-573] The Agreement to Resolve Pending Litigation states:

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.**

[00571 (emphasis added)]

Under the terms of the Agreement to Resolve Pending Litigation so long as any waste coal material, whether usable or not, remains on the leased premises, AMBIT's rental obligation to Horizon is two and one-half percent (2.5%) of gross revenues. [Id.] The term "usable" is absent from the Agreement to Resolve Pending Litigation while the contract expressly states, "so long as any Local Fuel is located at the Demised Premises..." The Court is not permitted to insert absent language into the contract between the parties, nor can it delete language that is present in the agreement. Unless and until AMBIT can show that there is no Local Fuel on the premises, it is obligated to pay Horizon two and one-half percent (2.5%) of its gross revenues. [Id.]

In discovery, AMBIT admitted that waste coal material was present on the premises. [00917] From May 1996 up to the genesis of the present dispute, AMBIT has paid two and one-half percent (2.5%) of gross revenues to Horizon as rent in accordance with the Agreement. AMBIT would have the Court believe that from 2003 to 2013 (when it ceased paying rent to Horizon) that it overpaid that rent. In reality, when AMBIT was paying rent, it did so consistent with the terms of the Agreement to Resolve Pending Litigation.

AMBIT's arguments concerning paragraph 14 of the Agreement to Resolve Pending Litigation are completely without merit. The language of paragraph 2(a) states that AMBIT is admitting that Local Fuel "[a]s contemplated by the Lease Agreement" means *all* waste coal material, regardless of whether it can be utilized to fire the power plant or not. [00571] To read the Agreement to Resolve Pending Litigation as AMBIT urges would require the Court to add

language to the contract that is not present. It would also require subtracting language, as there can be no future reliance if the Agreement to Resolve Pending Litigation was limited to the resolution of the controversy in 1996. The Court cannot rewrite the agreements between the parties, and must enforce them as written. As such, summary judgment in Horizon's favor was appropriate, and the Circuit Court's ruling should be affirmed.

**D. Response to Assignment of Error Number 2: AMBIT was provided with ample opportunity for discovery and failed to engage in discovery**

Rule 56 of the West Virginia Rules of Civil Procedure shifts the burden of production to the nonmoving party and requires the nonmoving party to: (1) rehabilitate evidence attacked by moving party; (2) produce additional evidence showing existence of genuine issue for trial; or (3) submit an affidavit explaining why further discovery is necessary. W.Va. R. Civ. P. 56; *Harbaugh v. Coffinbarger*, 209 W.Va. 57, 62, 543 S.E.2d 338, 343 (2000). If a party believes more discovery is necessary, this Court has made it abundantly clear that such need must be set clearly articulated pursuant to Rule 56(f) of the Rules of Civil Procedure:

Where a party is unable to resist a motion for summary judgment because of an inadequate opportunity to conduct discovery, that party should file an affidavit pursuant to *W.Va.R.Civ.P.* 56(f) and obtain a ruling thereon by the trial court. Such affidavit and ruling thereon, or other evidence that the question of a premature summary judgment motion was presented to and decided by the trial court, must be included in the appellate record to preserve the error for review by this Court.

Syl. Pt. 3 *Crain v. Lightner*, 178 W.Va. 765, 364 S.E.2d 778 (1987).

At a minimum, a party asserting that summary judgment is premature must: (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material;

and (4) demonstrate good cause for failure to have conducted the discovery earlier. Syl. Pt. 1 *Powderidge Unit Owners Association v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996); *Kanawha County Public Library Bd. v. Board of Educ. of County of Kanawha*, 231 W.Va. 386, 399-400, 745 S.E.2d 424, 437-38 (2013).

“A party may not simply assert in its brief that discovery was necessary and thereby overturn summary judgment[.]” *Powderidge Unit Owners Association*, 196 W.Va. at 702, 474 S.E.2d at 882. Simply put, the nonmoving party must set forth some plausible basis for the belief that additional material facts exist or that any additional discovery would suffice to engender a genuine issue of material fact. *Harbaugh*, 209 W.Va. at 63, 543 S.E.2d at 344. A Circuit Court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past. *Powderidge Unit Owners Association*, 196 W.Va. at 702, 474 S.E.2d at 882.

AMBIT’s characterization that this case was disposed of by summary judgment after only ninety days of discovery is disingenuous. This case was filed on June 17, 2013. [00001] Horizon filed its initial motion for summary judgment on August 15, 2013, and at no time prior to that date did AMBIT serve any discovery on Horizon. [Id.] Even after the Court’s announcement of its ruling on Horizon’s motion for summary judgment October 4, 2013, that ninety days of additional discovery would be permitted on the issues raised in the motion, AMBIT still requested no depositions, and rather served only written discovery, which was answered. [Id.]

Summary judgment was not requested again until January 24, 2014, after written discovery revealed nothing outside of the contracts between the parties relevant to the dispute. [00002] The hearing on the motion for summary judgment was not held until March 6, 2014.

[Id.] Still AMBIT sought none of the discovery it now argues was necessary. [Id.] In total, there were 262 days between the start of this litigation and the date of the Circuit Court's Order. At no time during those 262 days did AMBIT ever request depositions, or even suggest that depositions were necessary.

AMBIT has changed counsel since the beginning of this litigation, and will likely seek to portray to this Court that its prior counsel was dilatory in seeking necessary discovery. [000987] In reality, the truth of the matter is that AMBIT's counsel recognized that the relationship between the parties was dictated by the agreements between them, and further recognized that those agreements are unambiguous. In the absence of any ambiguity, the resolution of this case is one of law for the Court, and extrinsic evidence of the type AMBIT now argues should be considered is inadmissible. *Edmiston*, 146 W.Va. 511, 120 S.E.2d 491, 499. No depositions were taken, but it was not because AMBIT's counsel was dilatory, but because no admissible evidence could be gained from depositions. *Id.*

AMBIT admitted in discovery that the only agreements between the parties are the Lease Agreement and the Agreement to Resolve Pending Litigation. [00916] There was no discovery to be done in this case unless it was to come forward with some document other than the Lease Agreement and the Agreement to Resolve Pending Litigation that would further govern the relationship between the parties. AMBIT was invited to come forward with such a document or evidence in response to Horizon's written discovery, and was unable to do so.

The law does not permit the admission of extrinsic evidence in the absence of some ambiguity in the contracts between the parties. As set forth above, there are no ambiguities in the agreements, and thus, no extrinsic evidence is admissible. Depositions would be fruitless in that the task of both the Circuit Court and this Court is to enforce the contracts as written. When

that analysis is performed, it is clear that Horizon is entitled to judgment as a matter of law, and the Circuit Court's Order is correct.

**E. Response to Assignment of Error Number 3: There are no substantive factual errors present in the Circuit Court's Order**

In its final assignment of error AMBIT argues to this Court that the Circuit Court made factual errors because it relied on the plain language of the contracts as the law requires. As stated above, the Circuit Court's ruling was based on the unambiguous contracts between the parties. There are no factual errors in the Order.

Further, AMBIT fails to note to this Court that the Order entered by the Circuit Court was submitted to AMBIT's counsel before it was entered, and that no objections to the Order were lodged with the Circuit Court. AMBIT seems to suggest to this Court that Horizon did something untoward in obtaining entry of the Order, but there is no truth to that suggestion.

It is actually AMBIT that mischaracterizes the relationship between the parties by attempting to inject extrinsic evidence into the unambiguous agreements between them. First, as set forth above, Horizon is not a party to the Trust Indenture, nor can the Trust Indenture alter the contractual agreements between AMBIT and Horizon. AMBIT's argument that rental payments to Horizon are level seven in the Trust Indenture is completely irrelevant. When this issue was settled the first time eighteen years ago AMBIT acknowledged and agreed that its payments to Horizon were on a par with operating and maintenance expenses and that it would never allege that a failure to pay anything other than its obligations to its lenders excused it from paying rent to Horizon. [00571] AMBIT's arguments to the contrary are simply without merit.

Additionally, the Order below states that only two documents structure the relationship between the parties because AMBIT admitted in discovery that this was the case. [00916] AMBIT's argument on appeal that any other agreements have any bearing on the contractual

relationship between AMBIT and Horizon is simply false. Likewise false is AMBIT's assertion that the Trust Indenture is referenced in the Lease Agreement. The Lease Agreement contains no reference to the Trust Indenture whatsoever. [00011-264] Far from being the "heart of the agreement between the parties" the Trust Indenture is not part of the agreement between AMBIT and Horizon at all. (Petitioner's Brief, p. 30.) The Trust Indenture did not even exist when the Lease Agreement was executed. [00011-00264; 00721]

AMBIT also mischaracterizes the Circuit Court's Order. Horizon has never alleged that AMBIT may pay rent to Horizon prior to paying its debt obligations to its lenders, nor does the Circuit Court's Order state as such. Rather, the Order correctly states that AMBIT must pay Horizon prior to paying any obligations other than the debt to its lenders.

Finally, AMBIT's arguments concerning the consequences arising from enforcement of the contracts between it and Horizon cannot be permitted to have any bearing on the resolution of this litigation. For well over a year, Horizon has been deprived of its real estate as well as any compensation for AMBIT's occupancy of the real estate. While allowing enforcement of the judgment may have consequences, AMBIT cannot be permitted to simply occupy Horizon's property indefinitely in the absence of any payment. As such, the Circuit Court's Order should be affirmed.

### **CONCLUSION**

The relationship between AMBIT and Horizon is governed by unambiguous written contracts between the parties. The Circuit Court and this Court are obligated to enforce those contracts as written and not to inject language into the contracts or find ambiguity where none exists. When that analysis is performed it is clear that Horizon is entitled to judgment as a matter of law. The Circuit's Court's Order is correct, and must be affirmed.

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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.

Plaintiff Below, Respondent.

**CERTIFICATE OF SERVICE**

Service of the foregoing *Brief of the Respondent* was had upon the following by mailing a true and correct copy thereof by United States mail, postage prepaid, this 10<sup>th</sup> day of September, 2014, in accordance with the West Virginia Rules of Appellate Procedure:

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