

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

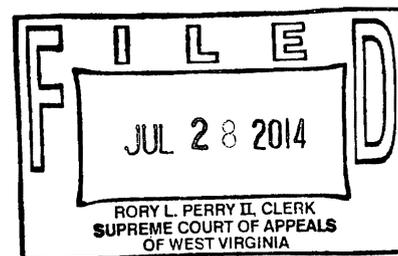
AMERICAN BITUMINOUS POWER PARTNERS, L.P.,
a Delaware limited partnership, PLEASANT VALLEY
ENERGY COMPANY, a California corporation, and
AMERICAN HYDRO POWER PARTNERS, L.P., a
Pennsylvania limited partnership,

Defendants Below, Petitioners

vs.

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

Plaintiff Below, Respondent.



BRIEF OF PETITIONERS

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

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III. ASSIGNMENTS OF ERROR

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.

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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. STATEMENT OF THE CASE

Factual Background.

The Grant Town Power Plant was constructed using \$150 million in Solid Waste Disposal Revenue Bonds issued by the Marion County Commission, the repayment of which is governed by a document titled Trust Indenture (Jan. 1, 1990). [00721] The Trust Indenture includes the prioritization of various payments – referred to between the parties and herein as the “waterfall” of payments – including the bond repayment. [00803-05] It is the Trust Indenture waterfall that governs when and how Horizon is paid the rents for the Grant Town parcel upon which the power plant sits. [00712]

American Bituminous Power Partners, L.P., Pleasant Valley Energy Company, and American Hydro Power Partners, L.P.¹ (hereinafter collectively referred to as “AMBIT”) operate and own the Grant Town Power Plant in Marion County, West Virginia. [00004] Horizon is landlord to AMBIT, and the parties’ relationship *vis a vis* the Grant Town property is governed in part by a series of leases and by the Agreement to Resolve Pending Litigation Between American Bituminous Power Partners, LP, and Horizon Ventures of West Virginia, Inc. (hereinafter “1996 Settlement Agreement”), which documents set out the terms and conditions, in part, by which AMBIT constructed and now operates and maintains a waste-coal-powered electric generation plant for the sale of electricity. [00004, 00011]

¹ Horizon brought suit below as against “American Hydro Power Partners, LP.” However, the Power Partners are not a general partner of AMBIT. While all of the defendants below have denied and do deny Horizon’s allegations against them generally and specifically, most pointedly, defendants aver that the entity at issue, if any, is American Hydro Power Company (AHP), which is a general partner of AMBIT.

Horizon leased three parcels of land to AMBIT, portions of which included waste coal and coal fines, which are referenced in the lease as "Local Fuel." [00030] Pursuant to the leases and the 1996 Settlement Agreement, the monthly lease payment is a percentage of gross revenue received by AMBIT, with that percentage varying with whether *usable* fuel was available on the property. [00031] Specifically, as long as Local Fuel was available to AMBIT for use in the power plant, then the rent payments were three (3) percent of gross revenues, now reduced to 2-1/2 percent pursuant to agreement of the parties. Lease (June 30, 1987) at ¶ 6. Also pursuant to agreement of the parties, rent payments were reduced to one (1) percent of gross revenue if/when *usable* Local Fuel was no longer available. [00033, 00288] The leases further provided that, if, alternatively, AMBIT were to elect to use Foreign Fuel for anything other than an Operating Reason, the rent would remain at 2-1/2 percent. [00031-32] In a nutshell, 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. [00033] As soon as AMBIT has to purchase fuel elsewhere (and so increase its operating costs in order to operate the plant), the lease payment were reduced 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, then the rent remains 2-1/2 percent of gross revenues. [00030-34]

The original lease agreement defines Operating and Non-Operating Reasons as follows:

As used herein, the term "Operating Reason" means that Tenant [AMBIT], in its sole judgment, has determined that a percentage (partial or total) of Foreign Fuel is 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. As used herein, the term "Non-Operating Reason" means that Tenant has determined, in its sole judgment, to partially or exclusively use Foreign Fuel to the extent there is no Operating Reason to do so.

[00153-54] The Amended and Restated Lease (Nov. 28, 1989) (hereinafter “Amended Lease”) defines “Operating Reason” to include that

Tenant, in its reasonable judgment, has determined that a percentage (partial or total) of Foreign Fuel is required for any one or more of the following reasons: . . . (d) to operate any Plants on the Demised Premises in compliance with any operation and maintenance manual prepared or modified by the person who, or entity which, designs, constructs, manufactures, repairs, modifies or improves the Plants or the equipment therein and all laws or regulations applicable to such Plants; (e) due to the inability of Tenant to use Local Fuel as a result of any law, rule, regulation or order of any court or other administrative, governmental or quasi-governmental agency or authority including, without limitation, as a result of the rejection of this Lease in bankruptcy; or (f) due to exhaustion of the usable waste coal material on the Demised Premises.

[00030-31] Subsequently, the parties entered into a 1996 Settlement Agreement to resolve certain pending disputes at that time. The 1996 Settlement Agreement provided in part, as follows:

Tenant acknowledges . . . 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] Of note, however, the 1996 Settlement Agreement by its own terms is a narrow agreement resolving disputes at that time and clearly provides that **“this Agreement does not supersede the Lease”** with certain limited exceptions not applicable in the instant case [emphasis added]. [00577] The language in the 1996 Settlement Agreement does not have application to any future disputes.

The Circuit Court of Ohio County found as a matter of law that Horizon and AMBIT are parties to only a series of leases and to the 1996 Settlement Agreement. [00973] However, to the contrary, the relationship between the parties regarding the payment and subordination of rent is governed in part by the Trust Indenture, which is referenced both in the leases and in the 1996 Settlement Agreement and which structures payments made by AMBIT relative to the Plant. [00570] The Trust Indenture sets out the disbursement of *inter alia* Senior Debt payments, 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]

Horizon (plaintiff below) filed suit, alleging that AMBIT failed to pay rent that was due and owing. Horizon alleged that, as of January 1, 2014, AMBIT owed rental payments totaling \$1,163,841.78 and that AMBIT continues to accrue overdue rental payments at the rate of 2.5 percent of all gross revenues thereafter. [00003, 00982-83] Horizon further alleged that the Amended Lease provides that 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. 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] AMBIT's position on Horizon's dispositive efforts after only 90 days of discovery on this million-dollar-plus claim has been that "summary judgment on these issues is premature and . . . further discovery is necessary. AMBIT also argues that the Court must consider extrinsic evidence in ruling on the motion." [00971] The Court below precluded AMBIT from presenting extrinsic evidence, which resulted in Horizon's order stating that "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." [00978-79]

AMBIT advised the Circuit Court repeatedly that serious and meaningful ambiguities obviously remained. [00710-19, 00979] However, the Circuit Court relied upon the 1996 Settlement Agreement, adopting Horizon's incorrect analysis of its terms relative to rent payments based on the availability of fuels, notwithstanding the clear and unambiguous language in the 1996 Settlement Agreement that "this Agreement does not supercede the Lease.". [00974-75] The Court adopted Horizon's position, as follows:

26. The [1996 Settlement Agreement] 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.

[00976] Among the ambiguities not addressed here is how this provision comports with the fuel/rent provisions in the Lease between Horizon and AMBIT. The 1996 Settlement Agreement was a settlement of litigation then pending and does not apply to any new dispute unless it specifically references future rents. [00577] All usable Local Fuel was exhausted in 2003, and there has been no use of any material on the Leased site since that time. [00874] The 1996 Settlement Agreement explicitly provides that "this Agreement does not supersede the Lease" with certain limited exceptions not applicable in the instant case.[00577] The dispositive ruling came before even one deposition was taken of anyone with knowledge of the fuels required of the Plant or the meaning of the 1996 Settlement Agreement, although, as instructed by West Virginia law, AMBIT advised the Court below that summary proceedings were premature and produced two affidavits on the subject of remaining discovery. [00714, 00872, 00874] One of the affidavits specifically addressed the subject of Local Fuel and, thereby, the amount of rent owed.[00874] However, even after that process, the Court ignored the un rebutted affidavit showing no usable "Local Fuel" remained. [00874]

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 resolution 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 the 1996 Settlement Agreement, (4) the Order at issue includes 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]

V. SUMMARY OF ARGUMENT.

Horizon is landlord to AMBIT, which owns and operates the Grant Town Power Plant in Marion County, West Virginia. Among the agreements entered between and among these two parties and the other parties to the project prior to construction of the Power Plant was a Trust Indenture that included among its provisions a list of priorities of payments to be made by AMBIT over time. The lease between Horizon and AMBIT references the Trust Indenture, as do several of the subsequent

written agreements between them. Pursuant to the terms of the Trust Indenture, lease payments to Horizon are the seventh priority of payments. Senior Debt is a term identified in the lease agreements as well.

Senior Debt shall mean all indebtedness, obligations, and liabilities of Tenant pursuant to all notes, letters of credit, loan agreement, reimbursement agreements and/or guarantees (collectively, 'Credit Agreements') between Tenant and 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 (including any interest accruing subsequent to the commencement of bankruptcy, insolvency or similar proceedings with respect to Tenant);

The 1996 Settlement Agreement specifically states that AMBIT shall pay rent as "Other Lease Rent," which is level seven of the waterfall. Senior Debt has priority over rent payments such that rent is subordinate to Senior Debt. Rent is also subordinate to specified operating expenses that have priority over Senior Debt payments. While it is true that nonpayment of operating expenses is not an excuse for nonpayment of rent [00568], the inverse is not true; payment of operating expenses does not require the payment of rent. Rent may only be paid if Senior Debt has been paid.

The complex relationships between Horizon, AMBIT and the lenders/financiers are structured by several written agreements carefully negotiated between and among a number of parties including AMBIT, lenders holding Senior Debt, Horizon, Monongahela Power Company, now First Energy Corp. and others. AMBIT advised the Court below that, while these documents might be open to resolution as a matter of law at some future time, the dismissal of the documents as irrelevant or any cursory review and then dismissal of same as inapplicable was inappropriate and

could not help but result in an improper outcome. The Circuit Court declined to consider them at all, accepting Horizon's inaccurate representations that any documents beyond the lease and the 1996 Settlement Agreement are not relevant and do not apply. As a result, the Circuit Court's ruling – findings of fact and conclusions of law prepared by AMBIT and entered verbatim by the Court – fails to consider all the agreements among the parties having a stake in the AMBIT power project and thus reaches an erroneous and fatally flawed conclusion. Also as a result, relevant ambiguities have been created among the stakeholders and their respective agreements. The summary judgment order prepared by Horizon addresses ambiguity in contract, identifying it as a question of law for the Court. However, Horizon fails to note that “[w]here a contract is ambiguous then issues of fact arise and summary judgment is ordinarily not proper.” The rapid resolution below was possible only because of the Circuit Court's failure to focus on contracts among Horizon, AMBIT, the lenders holding Senior Debt, First Energy and others, and therefore the Circuit Court reached the wrong result.

Key among the ambiguities that the Order at issue fails to address is the disconnect between Horizon's self-defined Senior Debt and the real Senior Debt as set out in the documents the Circuit Court declined to consider or review. The Circuit Court accepted Horizon's draft order that included the truncated statement that Horizon is not a party to the Trust Indenture. Because of the severely limited period of discovery and because the Circuit Court declined to consider extrinsic evidence, the Court never learned that AMBIT's duties under the lenders loan documentation including the Trust Indenture are referenced in the leases and in the 1996 Settlement Agreement, as well as a legal opinion furnished by Volk, Frankovitch, Anetakis, Recht, Robertson & Hellerstedt, who were at the time of the Lease execution and currently serve as legal counsel to Horizon, that resulted in the

subordination of rent under the Lease to Senior Debt to the Trust Indenture. The Circuit Court failed to consider AMBIT's arguments and submissions relative to the Trust Indenture and the fact that the payments AMBIT makes toward the Senior Debt – by the express terms of the Trust Indenture – cause rent payments to be deferred and subordinated as was properly accomplished by AMBIT. By failing to recognize the relationship among the agreements, the Circuit Court has created new issues that will endanger the ability of the Grant Town Plant to continue to operate and will foster massive new litigation among several stakeholders.

Also ambiguous is the alleged provision in the 1996 Settlement Agreement that would preclude AMBIT from raising the issue of whether any Local Fuel is usable. Specifically, in the section "Tenant's Admissions," the 1996 Settlement Agreement states that Horizon will rely on AMBIT's purported admission that its use of Foreign Fuel is for non-operating reasons. However, pursuant to an affidavit executed by Steve Friend (employee of AMBIT for 20 years and Plant Manager for 5 years) that was submitted to the Circuit Court, "[a]ll usable Local Fuel is exhausted and has been since 2003." The truncated discovery period ordered by the Circuit Court of Ohio County precluded meaningful discovery into the ambiguity between the terms of the 1996 Settlement Agreement (relative to reliance upon admissions-against-interest made in 1996) and the lease agreements that set out specific definitions and parameters for Local versus Foreign Fuel. The Circuit Court failed to focus on the specific language in the 1996 Settlement Agreement that made clear that "this Agreement does not supercede the Lease." To read the 1996 Settlement Agreement without the leases at hand, to read the leases or the 1996 Settlement Agreement without the Trust Indenture, to read any of these documents without factual discovery as to the understandings of the parties and

the condition of the fuel on the properties is to embrace existing ambiguity and to create additional ambiguity that can only drive the parties into future litigation.

Genuine issues of material fact remain relative to the scope and intent of the various agreements. However, just as crucial (if not more so), are the genuine issues of material fact relative to whether *usable* Local Fuel remains on the Grant Town properties. The leases provide a methodology for determining whether the fuel is usable, but discovery below never advanced to even a discussion of a representative visiting the property and independently assessing the fuel situation or obtaining an expert's opinion. Whereas Horizon argued that the term "usable" does not appear in the agreements between the parties, a simple reading of the leases proves otherwise. All of these issues of fact were swept aside by the Court's premature order entered after barely ninety (90) days of discovery. The fuel issues between the parties were not resolved by the alleged discovery and summary Order entered in Ohio County, and, to the extent that suit was pending, it was the best opportunity for a full and fair exploration of same. However, AMBIT was, in effect, denied the opportunity to conduct meaningful discovery on those issues.

The findings of fact adopted by the Circuit Court of Ohio County are incorrect in several respects. For instance, Horizon misrepresents AMBIT's defense, which AMBIT has advised Horizon and the Court on multiple occasions: AMBIT may not pay rent to Horizon while it is in default on the payment of Senior Debt. Under the express terms of the lease agreement, AMBIT is not required to pay rent when it is in default on the Senior Debt, a fact reflected *inter alia* in the Second Amendment to Amended and Restated Lease. Pursuant to the express terms of all of the various lease agreements, AMBIT is not required to pay rent – indeed, it cannot effectively pay rent,

as all moneys are ultimately controlled by the Trustee – until the default of Senior Debt payment is cured. It is a simple and obvious concept that the Court ignores.

Also, the Order states that the only agreements between the parties are the Lease Agreement and the Agreement to Resolve Pending Litigation (the 1996 Settlement Agreement). [00973] However, there are multiple leasehold agreements, and the Trust Indenture (that is included by reference in the 1996 Settlement Agreement). The Order misstates the terms of the 1996 Settlement Agreement and misstates by omission the history of the project, the interrelationships among the parties, and the numerous agreements among the lenders holding Senior Debt, First Energy and others, which would demonstrate that the Court’s ruling is clearly wrong.

The Circuit Court of Ohio County failed to recognize that its ruling would result in an unworkable situation, where AMBIT cannot comply with the Court’s Order without running afoul of the other agreements with other parties who have contracts with AMBIT. The relief Horizon has sought will not be available to it and will lead to further litigation with the lenders holding Senior Debt as well as others.

VI. STATEMENT ON ORAL ARGUMENT.

Pursuant to West Virginia Appellate Rule 19(a), this matter is suitable for oral argument in that the assignments of error arise from the application of settled law; the Court’s exercise of discretion is unsustainable because the law governing that discretion is settled; the matter involves and narrow issue of law, and the result is against the weight of the evidence. For these reasons, Petitioners, by counsel, request an opportunity to be heard.

VII. ARGUMENT.

A. Introduction.

Horizon is landlord to American Bituminous Power Partners, L.P. (“AMBIT”) for property leased by Horizon to AMBIT on which sits the Grant Town Power Plant. The Plant, which sells power to Monongahela Power Company, now owned by First Energy, was built with proceeds from the public sale of over \$150 million in Marion County municipal revenue bonds. Horizon’s right to receive rent is subordinated to AMBIT’s obligation to pay principal and interest on those bonds and all related obligations of the financial institutions issuing letters of credit and credit enhancement for the bonds (“Senior Debt”). The rent payment is calculated as a percentage of AMBIT’s gross revenues, with the percentage varying depending on whether AMBIT uses any remaining waste coal fuel located on the leased property (Local Fuel) or whether AMBIT must purchase its fuel elsewhere (Foreign Fuel) in order to operate the power plant. A series of leases, agreements and other documents (e.g., Trust Indenture, Mortgage, Recognition Agreement) structure the relationships – the rights and duties – of all parties relative to the Grant Town Power Plant, including the relationship between AMBIT and Horizon. In addition, a 1996 Settlement Agreement between Horizon and AMBIT (“1996 Settlement Agreement”) settled a dispute occurring at that time regarding provisions of the Lease, but not govern any future dispute except where specifically noted.

In February 2013, AMBIT discontinued payments to Horizon because AMBIT had insufficient funds available to pay Senior Debt. The instant suit was filed on June 17, 2013. In its complaint, Horizon alleges that, as of January 1, 2014, AMBIT’s past due rent would total \$1,163,841.78. In its response, AMBIT reported that it is in default in the payment of its Senior Debt

and under the terms of the Lease and that payment of rent is subordinated to the payment of Senior Debt until and unless the default in the payment of Senior Debt is cured. In addition, AMBIT filed a counterclaim, alleging that Horizon had been unjustly enriched by prior rent payments because there is no usable waste coal material (“Local Fuel”) on the leased property and that AMBIT had not used any “Local Fuel” since 2003.

Horizon alleges that AMBIT improperly “diverted” would-be rent moneys to operations and maintenance expenses, claiming that rent payments are subordinate only to “Senior Debt,” and not operating and maintenance expenses. AMBIT responded that Horizon has misinterpreted the terms of the Lease as well as the agreements with the bond holders and financial institutions, including the Trust Indenture, where payment of operations and maintenance expenses are required before payment of Senior Debt. AMBIT is required by the terms of the Trust Indenture to pay moneys for the operation and maintenance of the Power Plant prior to the payment of rent. The fact that AMBIT has paid operation and maintenance expenses is not relevant to Horizon’s express agreement to subordinate payment of rent to the payment of Senior Debt, which remains unpaid and is in default.

On August 14, 2013, less than two months after initiating suit, Horizon filed a motion for summary judgment on the declaratory judgment portion of its complaint, asking the Circuit Court of Ohio County to find as a matter of law that AMBIT failed to pay rent according to the terms set forth in the various agreements between the parties. [00297] Horizon also asked the Court to find as a matter of law (based on the agreements between the parties) that AMBIT’s counterclaim must fail, as [2.5] percent of gross revenues was the appropriate rent amount regardless of whether there was usable Local Fuel. [00307-08]

On October 29, 2013, the Court denied Horizon's dispositive motion, finding that material facts remained. [00899-90] The Court ordered discovery but limited the discovery period to 90 days. Limited but voluminous written discovery was exchanged, leaving no time for deposition testimony – a fact noted by AMBIT in opposition to summary disposition. [00955]

On January 23, 2014, Horizon re-filed its motion for summary judgment, and the parties briefed the issues once more. [00902, 00950] At a hearing held on March 7, 2014, the Circuit Court of Ohio County ruled from the bench and granted Horizon's motion for summary judgment. The Court's Order (prepared by Horizon and entered verbatim by the Court) reserved two counts of the Complaint and one count of the Amended Counterclaim for future resolution but found finally 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." [00984-00985]

AMBIT appeals the summary judgment granted to Horizon on the basis that the Circuit Court of Ohio County erred in interpreting the Lease and Senior Debt documents and failed to recognize or appreciate the relationships among the parties created by the numerous documents. The Circuit Court of Ohio County also failed to properly consider extrinsic materials as part of the dispositive process. Additionally, the Circuit Court's Order includes factually inaccurate statements that are clearly contradicted by the documents the Court declined to review and that Horizon and its counsel are aware of and either ignored or purposefully misrepresented.²

² Given the voluminous documents at issue, the decades of contractual agreements between and among the parties and others, and the newly revised Business Court rules (with the expanded referral timeframe), this case would be an appropriate candidate for submission to the Business Court Division for full examination and resolution by a tribunal possessing the judicial resources and time that this complex business dispute demands.

B. 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).

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.

The Circuit Court of Ohio County failed to determine accurately what agreements actually exist between the parties. Specifically, Horizon averred repeatedly that the only two agreements between Horizon and AMBIT are the lease agreements and 1996 Settlement Agreement. Horizon so stated in the Order that was adopted by the Circuit Court in granting Horizon’s summary judgment. However, the Circuit Court failed to focus on the fact placed before it that Horizon ratified and/or assented to the terms of the Trust Indenture and its prioritization of payments (the “waterfall”). Additionally, significant and meaningful portions of the Trust Indenture are included

in part and by reference in the lease agreements entered between the parties such that the finding that only two documents control the parties relationship – the leases and the 1996 Settlement Agreement – is recklessly inaccurate.

Regardless of any findings of fact entered in the Circuit Court, rent payments are actually *level seven* in the Trust Indenture payment hierarchy, also known as the “waterfall.” [00803-05] Indeed, Section 2.b of the 1996 Settlement Agreement specifically states that AMBIT shall pay rent as “Other Lease Rent,” which is level seven of the waterfall. [00571] Senior Debt has priority of payment to rent payments such that rent is subordinate to Senior Debt (as Horizon has acknowledged). Horizon is correct that nonpayment 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. Rent may only be paid if Senior Debt has been paid.

Senior Debt is a term identified in the lease agreements as well.

‘Senior Debt’ shall mean all indebtedness, obligations, and liabilities of Tenant pursuant to all notes, letters of credit, loan agreement, reimbursement agreements and/or guarantees (collectively, ‘Credit Agreements’) between Tenant and 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 (including any interest accruing subsequent to the commencement of bankruptcy, insolvency or similar proceedings with respect to Tenant);

[00023-24, 00972] The term “Senior Debt” arises from the Trust Indenture document, which is referenced in the Circuit Court’s Order (along with being referenced repeatedly in the documents between the parties as set forth herein).

Horizon has referenced the Trust Indenture in the order it prepared for the Circuit Court, albeit advising the Court that the Trust Indenture is irrelevant based solely on the fact that Horizon is not expressly a party to that document. [00973] The 1996 Settlement Agreement includes among its Definitions both “Significant Documents” (the first of which listed there is the Trust Indenture) and includes a separate entry just for the Trust Indenture. [00570]

The Trust Indenture is at the heart of the contracts between these parties, in part because any and all payments to Horizon are governed by the Trust Indenture’s waterfall, which was before the Circuit Court at all times at issue. [00721]

AMBIT has never claimed that it does not owe rent to Horizon. AMBIT admits that its rent payments are in arrears. [00714-17] AMBIT avers that interest continues to run on the amounts now due. However, AMBIT has stated and continues to state that it cannot divert the moneys from the waterfall in the Trust Indenture without bringing calamity to itself and to Horizon. [00714-17] Horizon’s actions stand to effect the holders of the \$150 million in Solid Waste Disposal Revenue Bonds issued by the County Commission of Marion County, along with the hundreds of West Virginians whose livelihoods are tied to the operation of this unique waste-coal-fired power plant.

As the Court is aware, pursuant to West Virginia law, “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). Among the

remaining issues/fact that mitigate against summary disposition are the following: (1) meaningful contractual ambiguities remain between Horizon, AMBIT and the financial institutions who hold Senior Debt, (2) the resolution 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 the 1996 Settlement Agreement, (4) the order prepared by Horizon includes factual errors that further complicate matters between Horizon, AMBIT and the financial institutions, and (5) the order will lead to additional extensive litigation with additional parties.

The Circuit Court's Order does not accurately reflect the controlling documents, the relationship among agreements with Horizon and the other parties, nor the status of the rent payments and Senior Debt. 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 remaining and new ambiguities it embraces and introduces. The best resolution is a return to the trial court level – or, better yet, the business court – for a full and fair examination of the facts and issues between the parties.

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.

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). 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”). *Pingley v. Huttonsville Public Service District*, 225 W. Va. 205, 207-08, 691 S.E.2d 531, 533-34 (2010), quoting Syl. pt. 3, in part, *Crain v. Lightner*, 178 W. Va. 765, 364 S.E.2d 778 (1987) (“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.”); Syl. pt. 4, *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 545 S.E.2d 338 (2000) (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)).

“The essence of the inquiry the court must make is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’ ” *Wilson v. Daily Gazette Co.*, 214 W. Va. 208, 588 S.E.2d 197 (2003)(quoting *Williams v. Precision Coil*, 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995)). The dispute about a material fact is genuine only when a reasonable jury could render a verdict for the nonmoving party if the record at trial were identical to the record compiled in the summary judgment proceedings. *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996).

Crum v. Equity Inns, Inc., 224 W. Va. 246, 253, 685 S.E.2d 219, 226 (2009).

The summary judgment order prepared by Horizon and adopted by the Circuit Court states that whether a contract is ambiguous is a question of law for the Court to determine. [00979] Horizon further included in the order that it submitted to the Court the fact that the parties do not agree to the construction of a contract in and of itself does not render that contract ambiguous. [00979] AMBIT agrees that these are appropriate statements of West Virginia law, but AMBIT challenges whether they reflect the proper application of West Virginia law to the facts of this case.

AMBIT's position on Horizon's dispositive efforts after only 90 days of discovery on this million-dollar-plus claim has been that "summary judgment on these issues is premature and . . . further discovery is necessary. AMBIT also argues that the Court must consider extrinsic evidence in ruling on the motion." [00971] AMBIT was precluded from presenting extrinsic evidence, which resulted in Horizon's order stating that "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." [00978-79]

Case dispositive ambiguities remain. For instance, the Circuit Court of Ohio County relied upon the 1996 Settlement Agreement, adopting Horizon's analysis of its terms relative to rent payments based on the availability of fuels. [00974-76]

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.

[00976] Among the ambiguities not addressed here include how this provision comports with the fuel/rent provisions in the Lease between Horizon and AMBIT. The 1996 Settlement Agreement was a settlement of litigation then pending and does not apply to any new dispute unless it specifically references future rents. [00577] All usable Local Fuel was exhausted in 2003, and there has been no use of any material on the Lease since that time. [00874] 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] The dispositive ruling came before even one deposition was taken of anyone with knowledge of the fuels required of the Plant or the meaning of the 1996 Settlement Agreement. No factual inquiries were made into whether "Local Fuel" actually remains, although AMBIT submitted an affidavit on that point once it appeared that the truncated discovery period would lapse.

Whereas Horizon repeatedly and successfully urged the Circuit Court toward the 1996 Settlement Agreement as controlling over the leases in this matter, the 1996 Settlement Agreement itself expressly states that the Agreement does not supersede the Lease. [00577] It was a settlement

of the issues at that time. This distinction is meaningful here in that the order that Horizon prepared for the Circuit Court states that “[t]here 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.” [00976] This key finding is simply wrong.

Rather, the Amended and Restated Lease itself provides that “the term ‘Operating Reason’ means that Tenant, in its reasonable judgment, has determined that a percentage (partial or total) of Foreign Fuel is required for any one or more of the following reasons[,]” which include maintaining the rated output of the plant, maintaining safe operations, complying with the agreement with Monongahelia Power (now First Energy) or “**due to exhaustion of the *usable* waste coal materials**” on the premise [emphasis added]. [00031-32]

Horizon has advised the Court that, in discovery, AMBIT “admitted that there is waste coal material present on the leased premises.” [00910] However, as demonstrated herein, that is not the meaningful issue. AMBIT has repeatedly denied that *usable* waste coal material remains.³ Any suggestion to the contrary is inaccurate and outside the extremely limited evidence adduced below.

³ In point of fact, AMBIT has responded as follows [00917]:

10. Admit that there is waste coal material located on the Leased Premises.

RESPONSE: Admitted in part, denied in part. AMBIT admits that there is waste coal material located on the Leased Premises, but deny that it is “usable” waste coal material as set forth in Section 6.f of the Lease Agreement.

The Local versus Foreign Fuel determination is key because it affects the actual amount of rent owed by AMBIT to Horizon. The Amended and Restated Lease provides a remedy that was eliminated by Horizon's efforts to prematurely resolve this matter. [00032] Specifically, decades prior to this litigation, the parties agreed that

[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. *See* Complaint at Exhibit A (Amended and Restated Lease at § 6 (Rent)). AMBIT believes the calculations are clear; however, even assuming *arguendo* that a discrepancy could be found to exist relative to Local Fuel and Foreign Fuel, it is an ambiguity in the contractual relationships between the parties that must be resolved at this time, in this Court.

Further, as referenced above, Section 14 of the 1996 Settlement Agreement provides that the Lease is not modified or superseded by that Agreement. [00577] Further, the Tenant's Admissions in Section 2.a of the Agreement do not state nor suggest nor are they intended to mean that Local Fuel will be available at all future times. [00571] In point of fact, as stated previously herein and as attested to by Steve Friend by affidavit below, no local waste coal remains; no local waste coal has been used at the AMBIT facility in over a decade. [00874]

Also overlooked was the pattern of the parties' practice under the Agreement. The express provisions of the 1996 Settlement Agreement demonstrate that the relationship among the parties and others such as the lenders holding Senior Debt and First Energy that purchases power from the AMBIT power project is vastly more complex than Horizon has represented, but those provisions do not provide or prescript future actions involving (nor the relationship between) AMBIT and

Horizon. Indeed, all filings or arguments to the contrary constitute a mistake or misrepresentation.

Also ambiguous is the alleged provision in the 1996 Settlement Agreement that clouded the issue of whether any Local Fuel is usable. Specifically, in the section “Tenant’s Admissions,” the 1996 Settlement Agreement states that Horizon will rely on AMBIT’s purported admission that its use of Foreign Fuel is for non-operating reasons. [00571] Perhaps that was the case in 1996 for purposes of settlement of issues to that date. However, pursuant to an affidavit executed by Steve Friend (employee of AMBIT for 20 years and Plant Manager for 5 years) that was submitted to the Court, “[a]ll usable Local Fuel is exhausted and has been since 2003.” [00874] Any meaningful resolution of the disputes between the parties would have needed discovery into the ambiguity between the terms of the 1996 Settlement Agreement, which clearly states that it does not supercede the Lease, and the Lease that set out specific definitions and parameters for Local versus Foreign Fuel. To read the 1996 Settlement Agreement without the Lease at hand and before all usable fuel was exhausted in 2003 can only embrace additional ambiguity that will drive the parties into future litigation.

In point of fact, no usable Local Fuel remains on the leased property, which is a fact that AMBIT proved through unrebutted affidavits and which AMBIT can confirm through expert examination of the site in discovery. Specifically, the Lease between the parties addresses the dichotomy of Local Fuel versus Foreign Fuel. [00031-32] Included in the determination is whether AMBIT has elected one variety of fuel over another for operating or non-operating reasons. [00031-32] By the express terms of the Lease, an “‘operating reason’ means that Tenant, in its sole judgment, has determined that a percentage (partial or total) of Foreign Fuel is 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]

It is inescapable that the 1996 Settlement Agreement and the Lease between the parties create a factual ambiguity that could have and should have been addressed and resolved, as it is unlikely to be resolved by the summary assertions in the Order at issue. Paragraph 14 of the 1996 Settlement Agreement specifically provides that "this Agreement does not supersede the Lease" and the Court simply ignored the clear language.

Additionally, AMBIT's efforts to engage in factual discovery of the relative "fitness for intended use" of any conceivable remaining Local Fuel failed. In response to Horizon's renewed efforts to end inquiry into the facts of the matter, AMBIT produced multiple affidavits from persons with knowledge of the facts at issue and addressed with the Court the need for depositions in this matter. [00872, 874] Whereas West Virginia law focuses on fitness for use in many circumstances – habitability, merchantability – in effect, AMBIT was precluded from providing the Court with the facts of what fuel is available and what the effects – financially, environmentally – would be of those choices. To the extent that AMBIT had evidence to present that whatever Local Fuel/refuse coal has remained since 2003 is not truly "fuel" in that its quality and the time/cost/impact of using it far outweighs any possible benefit, that is information that the Circuit Court was never able to receive. Certainly, if AMBIT had been given the chance to conduct additional discovery and provide evidence, it could have advised the Circuit Court specifically of the reasons why all Local Fuel had been exhausted and the fact that Horizon was aware at some point of time that all usable waste coal had been exhausted.

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.

The Circuit Court of Ohio County, West Virginia, entered verbatim an order on March 26, 2014, that was prepared by Horizon, which Order is filled with inaccuracies, oversimplifications and mischaracterizations. Whereas by and through Horizon's Order the Court found that no genuine issues of material fact remained and that the relationship between the parties was clear and unambiguous, Horizon mischaracterized *inter alia* the agreements themselves and failed to identify and factor in other documents that structure the interrelationship between and among all of the parties to this venture as those documents are included by reference before the Circuit Court. Horizon misstated the law, misstated the facts and discovery, and engineered the mistakes made below.

Horizon's mischaracterizations of key documents and the omission of others resulted in the entry of an order replete with mistakes, misstatements, and oversimplifications relative to the identity of the key documents and their provisions, the status of the fuel on the property and, thereby, the amount of rent due and payable, and the numerous entities affected by the documents and rents through the Trust Indenture's waterfall. These mischaracterizations were made even though the law firm, Volk, Frankovitch, Anetakis, Recht, Robertson and Hellerstedt, which currently represents Horizon, provided a legal opinion to the lenders holding the Senior Debt in January 1990 and were intimately familiar with the key documents.

Horizon misled the Circuit Court to believe that AMBIT may make rent payments while Senior Debt has not been paid. However, the truth of the matter is that rent payments are *level seven*

in the Trust Indenture payment hierarchy, also known as the “waterfall.” [00803-805] Indeed, Section 2.b of the 1996 Settlement Agreement specifically states that AMBIT shall pay rent as “Other Lease Rent,” which is level seven of the waterfall. [00571] Senior Debt payments have priority over rent payments such that rent is subordinate to Senior Debt. Whereas nonpayment of operating expenses is not an excuse for nonpayment of rent, payment of operating expense does not require the payment of rent.[00568]. Rent may only be paid if Senior Debt has been paid.

The Order below states that only two documents structure the relationship between Horizon and AMBIT – the leases and the 1996 Settlement Agreement. [00973] However, that is a dangerous oversimplification. In point of fact, Senior Debt has priority of payment in the waterfall. Senior Debt also is a term identified in the lease agreements:

‘Senior Debt’ shall mean all indebtedness, obligations, and liabilities of Tenant pursuant to all notes, letters of credit, loan agreement, reimbursement agreements and/or guarantees (collectively, ‘Credit Agreements’) between Tenant and 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 (including any interest accruing subsequent to the commencement of bankruptcy, insolvency or similar proceedings with respect to Tenant);

[00023-24, 00972] The term “Senior Debt” arises from the Trust Indenture document, which is referenced in the Court’s Order (along with being referenced repeatedly in the documents between the parties as set forth herein). The Trust Indenture appears in the Order at issue.[00973] The Circuit Court’s Order embraces Horizon’s position that the Trust Indenture is irrelevant based solely on the fact that Horizon is not expressly a party to that document. Beyond appearing in the leases, the Trust

Indenture is referenced in the 1996 Settlement Agreement between the parties. Specifically, the 1996 Settlement Agreement includes among its Definitions both “Significant Documents” (the first of which listed there is the Trust Indenture) and includes a separate entry just for the Trust Indenture. [00931]

The Trust Indenture is at the heart of the contracts between these parties, in part because any and all payments to Horizon are governed by the Trust Indenture’s waterfall, which was before the Circuit Court at all times at issue. [00721] The document speaks for itself: Horizon is **tier seven**.

AMBIT admits that its rent payments are in arrears. [00872] AMBIT has stated and continues to state that it cannot (and the Trustee that makes payments cannot) divert the moneys under the waterfall without bringing calamity to itself and to Horizon. Any earmarked moneys that would reach Horizon would immediately be subject to forfeiture to the lenders. Given Horizon’s position on the Trust Indenture, that process may necessitate suit, and as AMBIT advised, first, Horizon, and then the Circuit Court, Horizon’s actions have affected and will continue to affect the lenders and First Energy. As a direct consequence, Horizon’s actions stand to effect the \$150 million in Solid Waste Disposal Revenue Bonds issued by the County Commission of Marion County, along with the hundreds of West Virginians whose livelihoods are tied to that plant.

The Circuit Court focused on the 1996 Settlement Agreement as controlling over the leases in this matter. However, the 1996 Settlement Agreement itself expressly states in Section 14 that the Agreement does not supersede the Lease. It was a settlement of the issues at that time. This distinction is meaningful in that the Order states that “[t]here 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.” [00976] This key finding is wrong or, at best, ambiguous.

The Amended and Restated Lease itself provides that “the term ‘Operating Reason’ means that Tenant, in its reasonable judgment, has determined that a percentage (partial or total) of Foreign Fuel is required for any one or more of the following reasons[,]” which include maintaining the rated output of the plant, maintaining safe operations, complying with the agreement with Mon Power or “**due to exhaustion of the *usable* waste coal materials**” on the premises [emphasis added]. [00031]

Whereas the Circuit Court was directed to believe that AMBIT had “admitted that there is waste coal material present on the leased premises,” the meaningful portion of that alleged admission when read in its entirety is that AMBIT has repeatedly denied that *usable* waste coal material remains.⁴ [00910, 00917] Any suggestion to the contrary is inaccurate and outside the evidence adduced in this matter to date.

A final remaining ambiguity erroneously embodied in the Order as “clear” is the actual amount of any alleged arrearage owed by AMBIT to Horizon. The Amended and Restated Lease provides a remedy that has been truncated by Horizon’s efforts to prematurely resolve this matter through the courts. Specifically, decades prior to this litigation, the parties agreed that

⁴ The discovery at issue reads as follows [00917]:

10. Admit that there is waste coal material located on the Leased Premises.

RESPONSE: Admitted in part, denied in part. AMBIT admits that there is waste coal material located on the Leased Premises, but deny that it is “usable” waste coal material as set forth in Section 6.f of the Lease Agreement.

[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] AMBIT believes the calculations are clear; however, even assuming *arguendo* that a discrepancy could be found to exist relative to Local Fuel and Foreign Fuel, it is an ambiguity in the contractual relationships between the parties that should have been resolved at the trial court.

Further, as referenced above, Section 14 of the 1996 Settlement Agreement provides that the Lease is not modified or superseded by that Agreement. [00577] The Tenant’s Admissions in Section 2.a of the Agreement do not state nor suggest nor are they intended to mean that Local Fuel will be available at all future. [00571] In fact, no local waste coal remains; no local waste coal has been used at the AMBIT facility in over a decade. [00874]

The findings of fact in the March 26 Order are incorrect in several respects. First and foremost, Horizon misrepresents AMBIT’s defense by incorrectly reciting that the Senior Debt includes operation and maintenance expenses. It does not. The Trust Indenture allows operation and maintenance expenses to be paid before Senior Debt. The findings of fact fail to reflect that under the express terms of the Lease, AMBIT is not required to pay rent when it is in default on the Senior Debt. Given the limited discovery in this matter, the Court was never made aware of the express terms of the Lease that subordinates all rental payments to the payment of Senior Debt. Pursuant to the express terms of the Lease, AMBIT is not required to pay rent – indeed, cannot effectively pay rent, as all moneys must first be paid for Senior Debt – until the default of Senior Debt payments is cured. Also, the Order drafted by Horizon states that the only agreements between the parties are the

Lease and the 1996 Settlement Agreement.[00973] However, there are multiple references in these documents to numerous relevant documents, including the Trust Indenture and Leasehold Mortgage of the financial institutions, which are not reflected in the findings of fact. In its order, Horizon misstated the terms of the 1996 Settlement Agreement and misstated by omission the full history of the project and the interrelationships among the parties.

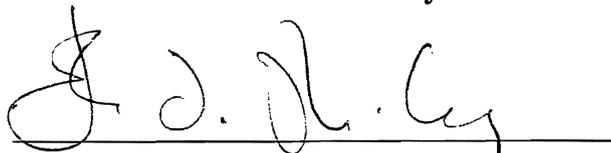
The factual misstatements in the March 26 Order reflect the haste of the parties in taking this claim from complaint to judgment in nine months. It is unclear which, if any, documents the Court actually reviewed. What was gained in apparent efficiency now stands to be lost through additional litigation and discord. Because these provisions, facts, documents, misstatements, and issues are not referenced in and accurately reflected by the order prepared by Horizon and entered by the Circuit Court on March 26, 2014, the parties must return to the matter at hand and, after full discovery, have the opportunity to present evidence for resolution of all contractual ambiguities. The history between these two parties demonstrates nothing more clearly than that a failure to achieve full and properly considered resolution is nothing more than a guarantee that the parties inefficiently, ineffectively, endlessly will return to court.

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 the full scope of the legal and factual issues before it, the “resolution” leaves fatal ambiguities that will result in additional litigation. Because of the circumstances of the litigation before it, the Court was left with an order that failed to capture accurately the facts and

circumstances. 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.

**AMERICAN BITUMINOUS POWER PARTNERS, L.P.,
PLEASANT VALLEY ENERGY COMPANY,
HYDRO POWER PARTNERS, L.P.,
By counsel.**

A handwritten signature in black ink, appearing to read "J. F. McCuskey", is written over a horizontal line.

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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

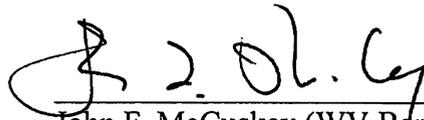
I, John F. McCuskey/Roberta F. Green, hereby certify that on the 28th day of July,
2014, a true copy of the foregoing "*Brief of Petitioners* and *Appendix*" was served on the
following by U. S. Mail, postage prepaid and addressed as follows:

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