



## West Virginia E-Filing Notice

CC-19-2016-C-257

Judge: David Sanders

To: Charles Printz  
cprintz@bowlesrice.com

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### NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT OF JEFFERSON, WEST VIRGINIA

Division 1

PNGI CHARLES TOWN GAMING, LLC v. YORK BUILDING PRODUCTS CO., INC.

CC-19-2016-C-257

The following answer was FILED on 12/7/2016 1:54:53 PM

Notice Date: 12/7/2016 1:54:53 PM

Laura Storm  
CLERK OF THE CIRCUIT

Jefferson  
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CHARLES TOWN, WV 25414

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**EXHIBIT**  
**2**

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA**

**PNGI CHARLES TOWN GAMING, LLC,  
a West Virginia limited liability company,**

**Plaintiff,**

**v.**

**Civil Action No. 16-C-257  
Judge David H. Sanders**

**YORK BUILDING PRODUCTS CO., INC.  
and YORK BUILDING AGGREGATES,  
LLC,**

**Defendants.**

**ANSWER AND COUNTERCLAIM**

COME NOW the Defendants, York Building Products Co., Inc., a Pennsylvania corporation ("YBP"), and York Building Aggregates, LLC, a Pennsylvania limited liability company ("YBA") (YBP and YBA are collectively referred to as "Defendant"), by counsel, Kenneth J. Barton, Jr., Kelsey L. Swaim, and the law firm of Steptoe & Johnson PLLC and Rees Griffiths, Hunter B. Schenck, and CGA Law Firm, and for their Answer to Plaintiff's Complaint state as follows:

**ANSWER**

**Parties, Jurisdiction and Venue**

1. The allegations contained in Paragraph 1 are admitted. Notwithstanding the foregoing, the Plaintiff now alleges for jurisdictional purposes that its sole member, CRC Holdings, Inc., is a Florida corporation with its principal place of business located in Berks County, Pennsylvania.

2. The allegations contained in Paragraph 2 are admitted.

3. The allegations contained in Paragraph 3 are admitted in part and denied in part.

The allegations contained in Paragraph 3 are admitted to the extent that YBA is a Pennsylvania

corporation. The allegations contained in Paragraph 3 are denied to the extent that there was no basis in law or fact to sue YBA in this case and YBA should not be a named Defendant.

4. Paragraph 4 states a legal conclusion to which no response is required. To the extent a response is required, the allegations contained in Paragraph 4 are admitted.

5. Paragraph 5 states a legal conclusion to which no response is required. To the extent a response is required, the allegations contained in Paragraph 5 are admitted.

### **Facts**

6. The allegations contained in Paragraph 6 are admitted.

7. The Defendant is without information sufficient to form a belief as to the truth of the allegations of Paragraph 7, and therefore can neither admit nor deny same.

8. The allegations contained in Paragraph 8 are admitted in part and denied in part. The allegations contained in Paragraph 8 are admitted as they apply to YBP. The allegations contained in Paragraph 8 are denied as they apply to YBA. YBA was not a party to the contract and has no liability for an alleged breach of contract. YBA was wrongfully sued without factual or legal basis. The claim that YBA is liable for breach on the contract for "supporting" an alleged contracting party (in this case by providing payroll services to YBP) has no merit in fact or law.

9. The allegations contained in Paragraph 9, 10, and 11 are admitted in part and denied in part. The allegations contained in Paragraphs 9, 10, and 11 are admitted to the extent that the website is quoted accurately. The allegations contained in Paragraph 9, 10, and 11 are denied to the extent that the quoted language has any bearing on this case. Any implication that Defendant reviewed it or relied on it here is specifically denied. As set forth more fully below, Plaintiff had been purchasing YBP's Mason Sand for approximately seven (7) years and was

intimately familiar with its characteristics, quality and composition. Specifically, Plaintiff knew YBP's Mason Sand had to be inspected and screened for gravel before application on a racetrack. In order to induce YBP to sell it sand, Plaintiff by word and deed assured Defendant that it (Plaintiff) would inspect and screen it before it was applied.

10. The allegations contained in Paragraph 12 are denied as phrased. YBP's website does not advertise its aggregate product for thoroughbred racetrack use. The equestrian uses for which its product is suggested are unrelated to thoroughbred horse racing. By way of further reply, Plaintiff well knew that Mason Sand must be inspected and screened before it is applied to a racetrack.

11. The allegations contained in Paragraph 13 are admitted in part and denied in part. The allegations contained in Paragraph 13 are admitted to the extent that the website is quoted accurately. The allegations contained in Paragraph 13 are denied to the extent that the Plaintiff either reviewed or relied on the quoted language in connection with this transaction. By way of further reply, as set forth more fully below, Plaintiff neither relied on these representations nor are they relevant to this litigation. As set forth more fully below, Plaintiff knew from the parties' prior course of dealing that it would need to inspect and screen the Mason Sand before application. Plaintiff induced YBP to sell and deliver the Mason Sand by assuring Defendant, through words and conduct that Plaintiff would screen the aggregate product and did not do so.

12. The allegations contained in Paragraph 14 are denied as phrased. On or about that date, Plaintiff purchased Mason Sand from YBP that it (Plaintiff) knew would need to be inspected and pre-screened before installation. Plaintiff requested YBP sell the Mason Sand because Plaintiff's regular source of supply was closed down and Plaintiff needed an immediate supply of sand. YBP also relied on the parties' prior course of dealing and Plaintiff's assurances

that Plaintiff would inspect and screen the Mason Sand before installation. YBP would not have shipped the Mason Sand if Plaintiff refused to accept the duty to inspect and screen the sand as it had on prior occasions. Based upon information and belief, Plaintiff neither inspected nor screened the sand and did not disclose that fact because it needed a supply of sand on short notice. Under those circumstances, Plaintiff's Standard Purchase Order never became a part of the contract.

13. The allegations contained in Paragraph 15 are denied. As set forth above, Defendant neither warranted nor contracted that its Mason Sand would meet the quoted specification unless it was screened by Plaintiff and Plaintiff knew and understood that. The Defendant's website does not represent that sand meets this specification without screening and this specification never became part of the parties' contract.

14. The allegations contained in Paragraphs 16, 17, and 18 are admitted in part and denied in part. The allegations contained in Paragraphs 16, 17, and 18 are admitted to the extent that the website is quoted accurately. The allegations contained in Paragraphs 16, 17, and 18 are denied to the extent that the quoted language applies to the Mason Sand that was purchased and sold as a part of this transaction. The quality, characteristics, and composition of that sand, as well as the need for Plaintiff to inspect and screen the sand, were well understood by the parties and defined by their prior experience.

15. The allegations contained in Paragraph 19 are denied. In 2009, Plaintiff purchased sand from Defendant that it attempted to spread without first screening for gravel. On that occasion, Plaintiff concluded the sand was not suitable for its use and insisted that Defendant inspect and screen at Defendant's expense. Defendant refused and declined to continue to supply sand to Plaintiff unless Plaintiff accepted responsibility to inspect and screen it. In 2014,

Plaintiff again purchased sand that it concluded was not suitable for its use. On that occasion, Defendant, at an additional cost of \$18,000.00, screened its sand to address Plaintiff's objections. Defendant notified Plaintiff it would refuse further purchase orders except on condition that Plaintiff screen the sand at its own expense. On three (3) subsequent occasions, Plaintiff purchased sand on those terms and Plaintiff screened it. In March 2016, Plaintiff, claiming an emergency, sought to order additional sand because its regular supplier had no inventory. Defendant again required Plaintiff to screen the sand at its expense before application and sold its Mason Sand on that basis.

16. The allegations contained in Paragraph 20, 21, and 22 are denied. After a reasonable investigation, Defendant is without information sufficient to form a belief as to the truth of the allegations of Paragraphs 20, 21, and 22, and therefore demands strict proof of the same.

17. The allegations contained in Paragraph 23 are denied. Defendant neither knew nor should have been expected to know Defendant had any special needs for sand for the Kentucky Derby. Neither should Defendant have any reason to expect that Plaintiff would be unable to cover (i.e., obtain from another supplier) the required quantities of sand if it chose not to apply Defendant's sand after the reasonable inspection required by statute. As described above, Defendant rarely did business with Plaintiff because Plaintiff claimed that Mason Sand was, according to Plaintiff, not suitable for use on its racetrack without screening. Defendant advised Plaintiff to screen its Mason Sand at Plaintiff's expense to address its concerns.

18. The allegations contained in Paragraph 24 are denied. Defendant sold and delivered Mason Sand to Plaintiff on the express condition and agreement that Plaintiff would screen the sand at its expense.

19. The allegations contained in Paragraphs 25 and 26 are denied. After a reasonable investigation, Defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 25 and 26, and therefore demands strict proof of the same. By way of further reply, if the sand was defective as alleged, those defects would be readily apparent on reasonable inspection. Based upon information and belief, Defendant avers that Plaintiff failed to reasonably inspect and or inspect the Mason Sand.

20. The allegations contained in Paragraph 27 are denied. After a reasonable investigation, Defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 27, and therefore demands strict proof of the same.

21. The allegations contained in Paragraph 28 are denied, and Defendant incorporates its averments in Paragraphs 1-20 above. By way of further reply, before selling and delivering Mason Sand for use on Plaintiff's racetrack, Defendant disclosed that the sand would require screening before application, and Plaintiff agreed to pre-screen. Defendant did not warrant the sand unscreened and Plaintiff assumed the risk of applying the sand without screening.

#### **Count One: Breach of Contract**

22. In answer to the allegations of Paragraph 29, the Defendant incorporates its averments in Paragraphs 1-21 above.

23. The allegations contained in Paragraph 30 are denied. As to YBA, Plaintiff has failed to allege the existence of a contract, facts sufficient to create a quasi-contractual obligation, or any basis for liability whatsoever.

24. The allegations of Paragraph 31 are denied and strict proof of all damages is hereby demanded. As to YBA, Plaintiff has failed to allege the existence of a contract, facts sufficient to create a quasi-contractual obligation, or any basis for liability whatsoever.

25. Paragraph 32 states a legal conclusion to which a response is not required. To the extent a response is required, the allegations of Paragraph 32 are denied.

### **Prayer for Relief**

The Defendant denies that the Plaintiff is entitled to the relief sought.

### **FIRST AFFIRMATIVE DEFENSE**

Plaintiff's Complaint fails to set forth any claim or cause of action, or any facts that might support a claim or cause of action against YBA.

### **SECOND AFFIRMATIVE DEFENSE**

Plaintiff accepted the Mason Sand at issue without objection.

### **THIRD AFFIRMATIVE DEFENSE**

Plaintiff failed to revoke its acceptance of the Mason Sand.

### **FOURTH AFFIRMATIVE DEFENSE**

By accepting the Mason Sand, Plaintiff waived all defects that would have been discoverable by a reasonable inspection.

### **FIFTH AFFIRMATIVE DEFENSE**

The alleged presence of large rocks in the Mason Sand would, if true, not be a latent defect. Rather, the alleged defects in the Mason Sand as delivered were patent and were waived by Plaintiff's application of same without reasonable inspection and screening.

### **SIXTH AFFIRMATIVE DEFENSE**

Plaintiff's claims for incidental and consequential damages are barred by its failure to cover.



#### **SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's alleged losses were not caused by any conduct of YBP. Rather, Plaintiff's alleged losses were solely caused by its own breach of contract, namely its failure and refusal to screen the Mason Sand on this occasion.

#### **EIGHTH AFFIRMATIVE DEFENSE**

Plaintiff assumed the risk of loss by installing uninspected and unscreened sand.

#### **NINTH AFFIRMATIVE DEFENSE**

The prior course of dealing and course of performance between the parties supplement the terms of the contract and bar Plaintiff's cause of action. Specifically, in 2009, Plaintiff first purchased Mason Sand from YBP for installation at one of its racetracks. On that occasion, Plaintiff objected to the Mason Sand because they had to screen the material and use a rock picker to remove gravel from the track. Nevertheless, Plaintiff screened this initial order, installed it, and used the "rock picker" to remove gravel from the track. YBP advised Plaintiff that its Mason Sand was not gravel free and that, if Plaintiff wanted gravel free sand on its track, Plaintiff would be required to screen the material before application and potentially remove gravel following application. Alternatively, Plaintiff could purchase sand of a different grade and composition from another supplier. Instead, Plaintiff ordered 2,465 tons of the same material (i.e., Mason Sand) in 2010 and applied it to one of their racetracks knowing that the product would not be free of gravel. In 2014, YBP again filled an order for Mason Sand at Plaintiff's request, on the understanding that Plaintiff would screen the sand to its satisfaction before application. Nevertheless, Plaintiff did not screen the sand. As a result YBP was required to hire a third party to screen the sand at a cost of \$18,000.00. Thereafter, YBP advised Plaintiff it would no longer supply Mason Sand to Plaintiff because it would not be free of gravel. YBP

conditioned future sales to Plaintiff on Plaintiff's agreement to screen the Mason Sand to its satisfaction (and at Plaintiff's expense) before applying it. Thereafter, Plaintiff indicated it had acquired the necessary equipment and would inspect and screen the sand before applying it. In reliance on those representations, YBP sold and delivered Mason Sand to Plaintiff on one subsequent occasion in 2014 for application to Plaintiff's Penn National racetrack. On information and belief, Plaintiff screened the Mason Sand delivered to the Penn National racetrack before it was applied and removed any gravel or other materials found therein. In further reliance on Plaintiff's agreement to screen Mason Sand, YBP sold and delivered three additional orders of Mason Sand to Plaintiff for application at Plaintiff's Charles Town racetrack from the fall of 2014 to the fall of 2015. The sand shipped to the Charles Town racetrack was identical to the sand shipped to the Penn National racetrack. On information and belief, Plaintiff screened the Charles Town shipments in 2014 and 2015 before it was applied to remove any gravel found therein. Based upon the parties' prior course of dealing and course of performance, Plaintiff knew precisely the character, quality, and composition of the Mason Sand. The sand at issue was of the same character and quality as prior shipments and was precisely as warranted.

#### **TENTH AFFIRMATIVE DEFENSE**

Plaintiff sought to purchase the Mason Sand in 2016 because its regular supplier was out of product and it immediately needed a supply. YBP sold Mason Sand to Plaintiff in 2016 on precisely the same basis that it had previously supplied it in 2014 and 2015 – that Plaintiff would inspect and screen the sand to its satisfaction before applying same. However, Plaintiff failed to pre-screen the sand at issue and misled YBP about its intentions in that regard.

**ELEVENTH AFFIRMATIVE DEFENSE**

The standard terms and conditions upon which Plaintiff seeks to rely never became a part of the contract.

**TWELFTH AFFIRMATIVE DEFENSE**

Because those terms changed the parties' bargain in material respects, they were, at most, proposals to contract that YBP did not accept.

**THIRTEENTH AFFIRMATIVE DEFENSE**

The Plaintiff's claims are barred by its own material breaches of contract.

**FOURTEENTH AFFIRMATIVE DEFENSE**

The Plaintiff's claims are barred by the doctrine of estoppel. Plaintiff is estopped to deny that it undertook the duty to inspect and screen the sand and is therefore liable for its failure to do so.

**FIFTEENTH AFFIRMATIVE DEFENSE**

The Plaintiff failed to mitigate its alleged damages.

**COUNTERCLAIM OF YORK BUILDING PRODUCTS CO., INC.  
and YORK BUILDING AGGREGATES, LLC**

COME NOW the Defendant/Counterplaintiff, York Building Products Co., Inc., and for its Counterclaim against the Plaintiff/Counterdefendant, PNGI Charles Town Gaming, LLC, state as follows:

**Parties**

1. Upon information and belief, the Plaintiff/Counterdefendant, PNGI Charles Town Gaming, LLC ("PNGI"), is a West Virginia limited liability company with its principal place of business in Jefferson County, West Virginia. Upon information and belief, the sole member of

Plaintiff is CRC Holdings, Inc., a Florida corporation with its principal place of business in Berks County, Pennsylvania.

2. The Defendant/Counterplaintiff York Building Products Co., Inc. ("YBP") is a Pennsylvania corporation with its principal place of business in York County, Pennsylvania.

#### **Jurisdiction and Venue**

3. The Defendant/Counterplaintiff YBP incorporates and realleges the allegations in Paragraphs 1 through 2 above as if fully repeated herein.

4. This Court has jurisdiction because PNGI has a principal place of business in Jefferson County, West Virginia.

5. Venue is proper pursuant to West Virginia Code § 56-1-1.

#### **Facts**

6. The Defendant/Counterplaintiff YBP incorporates and realleges the allegations in Paragraphs 1 through 5 above as if fully repeated herein.

7. On or about March 25, 2016, PNGI purchased Mason Sand from YBP. PNGI requested YBP sell the Mason Sand because PNGI's regular source of supply was closed down and PNGI needed an immediate supply of sand.

8. The purchase price of the Mason Sand was \$46,930.00, as shown on the invoice attached hereto as **Exhibit A**.

#### **Count One**

9. The Defendant/Counterplaintiff YBP incorporates and realleges the allegations in Paragraphs 1 through 8 above as if fully repeated herein.

10. By accepting the Mason Sand at issue, the Plaintiff/Counterdefendant obligated itself to pay the purchase price of the Mason Sand, in the amount of \$46,930.00.

11. The purchase price of the sand also represented the fair and reasonable value of the sand that Defendant/Counterplaintiff YBP sold and delivered to Plaintiff/Counterdefendant.

12. Despite accepting the sand, installing and failing to revoke their acceptance and return the product, Plaintiff/Counterdefendant has failed, refused, and neglected to pay for the sand.

WHEREFORE, the Defendant/Counterplaintiff York Building Products Co., Inc. requests judgment against the Plaintiff/Counterdefendant PNGI Charles Town Gaming, LLC in the amount of \$46,930.00, plus costs, including attorneys' fees.

Dated: December 7, 2016,  
YORK BUILDING PRODUCTS CO., INC.,  
By Counsel

**YORK BUILDING PRODUCTS CO., INC. and  
YORK BUILDING AGGREGATES, LLC,  
By Counsel**

/s/ Kelsey L. Swaim

Kenneth J. Barton, Jr. (W. Va. Bar No. 6044)

Kelsey L. Swaim (W. Va. Bar No. 12574)

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**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA**

**PNGI CHARLES TOWN GAMING, LLC,  
a West Virginia limited liability company,**

**Plaintiff,**

**y.**

**YORK BUILDING PRODUCTS CO., INC.  
and YORK BUILDING AGGREGATES,  
LLC,**

**Defendants.**

**Civil Action No. 16-C-257  
Judge David H. Sanders**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of December, 2016, I served the foregoing *Answer and Counterclaim* with the Clerk of the Court using the E-Filing system which will send notification of such filing to the following counsel of record:

Charles F. Printz, Jr., Esq.  
J. Tyler Mayhew, Esq.  
BOWLES RICE LLP  
101 South Queen Street  
P.O. Drawer 1419  
Martinsburg, WV 25402

/s/ Kelsey L. Swaim  
Kelsey L. Swaim (W. Va. Bar No. 12574)

PMGI, CHARLES TOWN GAMING, LLC

RP7210: STANDARD PURCHASE ORDER

DATE: 03/25/2016

VENDOR NAME AND ADDRESS:  
 V YORK BUILDING PRODUCTS, INC.  
 E 950 Smile Way  
 N  
 D  
 O York, PA 17404  
 R

P/O NUMBER P/O DATE CXL DATE  
 00135101 03/25/2016  
 SHIP DATE REQUIRED  
 03/25/2016 04/26/2016  
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 P KEARNSVILLE WV 25430

JOB COST NUMBER.....  
 PROJECT NUMBER.....  
 CHARGE DIVISION..... RACING  
 CHARGE DEPARTMENT..... TRACK MAINT.

CONFIRMING ORDER..... N

CREDIT REQUEST: N

LINE	ITEM#	ITEM DESCRIPTION	QUANTITY	U/M	PRICE	EXTENSION
1	5020700002	SAND MS2	400	UNIT	36.85 UNIT	14740.00
2	5020700001	SAND C-144	300	UNIT	39.60 UNIT	11880.00
3	5020700009	SAND FINE	600	UNIT	33.85 UNIT	20310.00

TOTALS - LINES	GROSS AMOUNT	FREIGHT & MISC	TAX AMOUNT	DISCOUNT AMOUNT	NET AMOUNT
3	46930.00	.00	.00	.00	46930.00