

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

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

Plaintiff,

vs.

Civil Action No. 13-C-196
Judge Martin J. Gaughan

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

Defendants.

**ANSWER AND AMENDED COUNTER-CLAIM OF DEFENDANTS
TO PLAINTIFF'S COMPLAINT**

Now come Defendants American Bituminous Power Partners, L.P. ("AMBIT"); Pleasant Valley Energy Company ("Pleasant Valley"); and American Hydro Power Partners, L.P. ("American Hydro") (collectively referred to as "Defendants"), through counsel, Steptoe & Johnson PLLC and William D. Wilmoth and Kristen Andrews Wilson, and submit their Answer to Plaintiff's Complaint:

FIRST DEFENSE

Plaintiff's Complaint fails to state a claim or cause of action upon which relief may be granted.

SECOND DEFENSE

1. Upon information and belief, Defendants admit the allegations in paragraph 1 of Plaintiff's Complaint.

2. Defendants admit the allegations in paragraph 2 of Plaintiff's Complaint.
3. Defendants admit the allegations contained in paragraph 3 of Plaintiff's Complaint.
4. Defendants admit the allegations contained in paragraph 4 of Plaintiff's Complaint.
5. Defendants admit the allegations in paragraph 5 of Plaintiff's Complaint.
6. Paragraph 6 constitutes a legal conclusion to which no response is necessary. To the extent a response is required, those allegations are denied.
7. Defendants generally admit the allegations contained in paragraph 7 of Plaintiff's Complaint and affirmatively state that the Lease Agreement speaks for itself.
8. Defendants generally admit the allegations contained in paragraph 8 of Plaintiff's Complaint and affirmatively state that the Lease Agreement speaks for itself.
9. Defendants generally admit the allegations contained in paragraph 9 of Plaintiff's Complaint and affirmatively state that the Lease Agreement speaks for itself.
10. Defendants generally admit the allegations contained in paragraph 10 of Plaintiff's Complaint and affirmatively state that the attached Lease Agreement speaks for itself.

COUNT I
Declaratory Judgment

11. Defendants incorporate all their responses and defenses to the claims asserted in paragraphs 1-10 of Plaintiff's Complaint as if fully restated.
12. Defendants generally admit the allegations contained in paragraph 12 of Plaintiff's Complaint and affirmatively state that the Lease Agreement speaks for itself.
13. Defendants generally admit the allegations contained in paragraph 13 of Plaintiff's Complaint and affirmatively state that the Lease Agreement speaks for itself.

14. Defendants deny the allegations contained in paragraph 14 of Plaintiff's Complaint.

15. Defendants deny the allegations contained in paragraph 15 of Plaintiff's Complaint.

16. Defendants admit that AMBIT has failed to pay certain rent to Horizon. However, AMBIT asserts that this failure is because of its duty to satisfy other obligations listed in the Lease Agreement and AMBIT's duty to pay rent to Horizon is subordinate to these other obligations. Therefore, Defendants deny the remaining allegations contained in paragraph 16 of Plaintiff's Complaint.

17. Defendants admit the allegations contained in paragraph 17 of Plaintiff's Complaint that AMBIT received the letter described therein, but deny the remainder of the allegations contained therein.

18. Defendants admit that the rent owed was subordinated to other payments, but deny the remaining allegations contained in paragraph 18 of Plaintiff's Complaint.

19. Paragraph 19 states a legal conclusion to which no response is necessary.

20. Paragraph 20 states a legal conclusion to which no response is necessary.

21. Paragraph 21 states a legal conclusion to which no response is necessary.

COUNT II

Breach of Contract

22. Defendants incorporate all their responses and defenses to the claims asserted in paragraphs 1-21 of Plaintiff's Complaint as if fully restated.

23. Defendants deny the allegations contained in paragraph 23 of Plaintiff's Complaint.

24. Defendants admit the allegations contained in paragraph 24 of Plaintiff's Complaint, but deny any wrongdoing on their part.

25. Defendants admit that AMBIT has failed to pay certain rent to Horizon. Defendants assert the AMBIT's duty to pay rent to Horizon is subordinate to its other obligations under the Lease Agreement. Therefore, Defendants deny the remaining allegations contained in paragraph 25 of Plaintiff's Complaint.

26. Defendants deny the allegations contained in paragraph 26 of Plaintiff's Complaint.

27. Defendants deny the allegations contained in paragraph 27 of Plaintiff's Complaint.

28. Defendants deny the allegations contained in paragraph 28 of Plaintiff's Complaint.

29. Paragraph 29 states a legal conclusion to which no response is necessary. To the extent a response is deemed necessary, those allegations are denied.

COUNT III Injunctive Relief

30. Defendants incorporate all their responses and defenses to the claims asserted in paragraphs 1-29 of Plaintiff's Complaint as if fully restated.

31. Defendants deny the allegations contained in paragraph 31 of Plaintiff's Complaint.

32. Defendants deny the allegations contained in paragraph 32 of Plaintiff's Complaint.

33. Defendants deny the allegations contained in paragraph 33 of Plaintiff's Complaint.

34. Defendants deny the allegations contained in paragraph 34 of Plaintiff's Complaint.

35. Defendants deny the allegations contained in paragraph 35 of Plaintiff's Complaint.

COUNT IV
Specific Performance

36. Defendants incorporate all their responses and defenses to the claims asserted in paragraphs 1-35 of Plaintiff's Complaint as if fully restated.

37. Defendants admit the allegations contained in paragraph 37 of Plaintiff's Complaint and state the Lease Agreement speaks for itself.

38. Defendants admit that Plaintiff made demands for AMBIT's records, but deny the remaining allegations contained in paragraph 38 of Plaintiff's Complaint.

39. Defendants admit that AMBIT has failed to make some its records available. However, Defendants deny that this failure was contrary to the language of the Lease Agreement. Defendants deny the remaining allegations contained in paragraph 39 of Plaintiff's Complaint.

40. Defendants deny the allegations contained in paragraph 40 of Plaintiff's Complaint.

41. Defendants deny any allegations of fact contained in the *ad damnum* clause, including subparts (1)-(5).

42. Defendants deny any allegations of fact in Plaintiff's Complaint which are not specifically admitted above.

43. Defendants deny that they, or either of them, are liable to Plaintiff for any of the relief claimed in Plaintiff's Complaint, or for any other relief.

THIRD DEFENSE

Plaintiff's claims are barred by the doctrine of unclean hands.

FOURTH DEFENSE

All or a portion of Plaintiff's claims may be barred by its failure to mitigate damages.

FIFTH DEFENSE

All or a portion of Plaintiff's claims may be barred by the doctrines of laches, estoppel, waiver, res judicata, collateral estoppel, or assumption of the risk.

SIXTH DEFENSE

The claims in the Complaint are barred by failure to comply with any necessary conditions precedent.

SEVENTH DEFENSE

To the extent Plaintiff relies upon any oral representations outside the Lease Agreement which is the subject of this action, its complaint may be barred by the statute of frauds.

EIGHTH DEFENSE

To the extent Plaintiff relies upon facts that are contrary to representations made by its representatives and/or predecessors in interest, its claims may be barred by fraud if misrepresentations were relied upon by Defendants to their detriment.

NINTH DEFENSE

Defendants reserve the right to raise additional affirmative defenses, which may be applicable, in whole or in part, to Plaintiff's claims as the evidence is developed in discovery.

WHEREFORE, having answered Plaintiff's Complaint, Defendants respectfully request that judgment be entered in their favor and against Plaintiff and that they be further awarded their

costs and expenses in and about the defense of this action, and all other relief that this Court deems appropriate.

**AMENDED COUNTER-CLAIM OF AMERICAN
BITUMINOUS POWER PARTNERS, L.P.**

1. Plaintiff and AMBIT entered into a Lease Agreement and various amendments as fully described in Plaintiff's Complaint (hereinafter referred to as "Lease Agreement").

COUNT I: RECLAMATION

2. As part of the Lease Agreement, Horizon is responsible for, and is required to bear the cost of, all Reclamation Obligations other than Tenant's Continuing Obligations. Section 9.b. of the Lease Agreement states that:

During the time from the Commencement Date [which was 12/1/87] until the expiration or termination of this lease the responsibility for, and cost of, all Reclamation Obligations other than Tenant's Continuing Obligations, but including Reclamation Obligations existing as of the date of this Lease shall be borne by Landlord.

3. Horizon continues to be responsible for its Reclamation Obligations after expiration or termination of the Lease.

4. AMBIT complied with its Reclamation Obligations referred to in the Lease Agreement as to the Joanna Parcel.

5. Despite AMBIT's reclamation efforts, the Joanna Parcel continues to experience Acid Mine Drainage (hereinafter referred to as "AMD") due to preexisting conditions.

6. AMBIT has put in place a system to collect this AMD, but the upcoming expiration of the current Underground Injection Control permit will require that additional measures be installed to collect the AMD.

7. Pursuant to the Lease Agreement, Horizon is responsible for collecting and treating the groundwater seepage from the Joanna Parcel.

8. Although AMBIT has requested that Horizon take over these obligations, Horizon has refused.

WHEREFORE, AMBIT prays for relief and judgment against Horizon as follows:

- (a) A declaration that Horizon is responsible pursuant to the Lease Agreement for collecting and treating the groundwater seepage from the Joanna Parcel.
- (b) Damages in the amount AMBIT expended in treating this AMD from the time AMBIT requested Horizon honor its obligations.
- (c) Such other relief as the Court deems just and proper.

COUNT II: OVERPAYMENT OF RENT

9. AMBIT restates and incorporates herein Paragraphs 1-8 of the Counter-Claim.

10. Pursuant to Section 6(c) of the Lease Agreement, the Percentage Rent due to Horizon is defined as three percent (3%) of all gross revenues received by the Tenant through the use of Local Fuel, together with one percent (1%) of all gross revenues received by the Tenant through the use of Foreign Fuel. This provision was amended when Horizon waived the right to any payment which is in excess of two and one half percent (2.5%) pursuant to the Agreement to Resolve Pending Litigation between AMBIT and Horizon dated May 28, 1996.

11. The Lease Agreement also defines Operating Reasons that Foreign Fuel is required. One reason is “due to the exhaustion of usable waste coal material on the Demised Premises.”

12. The last of the usable waste coal material on the Demised Premises was consumed in November 2003.

13. AMBIT has been required to operate solely on Foreign Fuel since that time.

14. As of December 2003, the Percentage Rent due to Horizon was one percent (1%) of all gross revenues actually received by Tenant.


15. Contrary to the amount of Percent Rent actually owed, AMBIT continued to pay two and one half percent (2.5%) of all gross revenues actually received.

16. Pursuant to the terms of the Lease Agreement, AMBIT is entitled to the amount it overpaid in Percentage Rent.

WHEREFORE, AMBIT prays for relief and judgment against Horizon as follows:

- (a) A declaration that the Percentage Rent owed to Horizon should have been reduced to one percent (1%) beginning in December 2003.
- (b) Damages in the amount AMBIT overpaid in Percentage Rent.
- (c) Such other relief as the Court deems just and proper.

STEPTOE & JOHNSON PLLC
Of Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 2013, I served the foregoing *Answer and Amended Counter-Claim of Defendants to Plaintiff's Complaint* upon all counsel of record, by United States Mail, postage prepaid, to the following address:

Carl N. Frankovitch, Esq.
Kevin M. Pearl, Esq.
Frankovitch, Anetakis, Colantonio & Simon
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Weirton, WV 26062
Counsel for Plaintiff

