IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMERICAN BITUMINOUS POWER PARTNERS, LP,

Petitioners,

v. Case No. 20-0759

HORIZON VENTURES OF WEST VIRGINIA, INC.

Respondent.

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PETITIONER'S SUMMARY REPLY BRIEF

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I. SUMMARY RESPONSE/REPLY STATEMENT

Horizon is obligated to file this Summary Reply pursuant to W. Va. R. App. P. 10(e), as opposed to a full Reply pursuant to W. Va. R. App. P. 10(g). AMBIT's brief addresses the same issues in its Statement of the Case, Summary of Argument, and the Argument itself. Accordingly, Horizon believes it is more efficient to provide a single response to each of those issues than to attempt to restate arguments repeatedly under multiple subheadings. Horizon further stipulates that it does not concede any legal argument set forth in AMBIT's Response, and to the extent any are not addressed here, they are fully briefed in Horizon's initial Appeal Brief.

II. ARGUMENT

AMBIT offers, in its Response, numerous explanations for its tenuous position that the "reasonable judgment" standard applied by the lower court. AMBIT further uses its Response to advance its standard claim that practically everything in this case is barred by *res judicata*, was not raised before the lower court, or is subject to some other procedural issue which would prevent this Court from ruling on the paucity of AMBIT's actual positions in this matter. None of these claims are accurate, as explained herein.

A. AMBIT's continued assertion of *res judicata* in regards to the 2017 Order remains without merit.

It is also notable that across thirteen pages of "Response" to Horizon's statement of the case, and thirty-five total pages, AMBIT apparently cannot bring itself to explain to this Court why bargained-for admissions contained in a settlement agreement would have been eradicated by a court ruling about the applicability of rent calculations.

Instead, it has returned to positing generic statements about Horizon's attempts to allegedly "relitigate" an issue which has never been fully litigated, arguing that "Horizon never questioned, moved to alter/amend, appealed, or otherwise challenged the August 2017 Order." AMBIT Br., p.

7. AMBIT does not even attempt to defend the specifics behind its position regarding those admissions anywhere in its Response, because it cannot. To recap:

> 1. AMBIT filed this lawsuit demanding back rent because it interpreted the 2017 Order as invalidating the agreement it made in 1996, and wanted to seize upon that interpretation to demand money from Horizon.
>
> 2. Every time Horizon brought up the 1996 Agreement as dispositive in this matter, AMBIT responded by broadly claiming *res judicata* applied relating to its position on the 2017 Order, while failing to address the specific, and obvious, incoherence of their position.
>
> 3. The lower court used that Agreement to find summary judgment for Horizon in the case-in-chief, and then gave, at best, confusing and inconsistent rulings as to the applicability of the Agreement to AMBIT's counterclaim.

Put another way, AMBIT's sole basis for its claim for back rent is tied to its belief that the 2017 Order invalidates the 1996 Agreement. When Horizon opposed that contention, AMBIT claimed not only that Horizon was wrong, but that Horizon *could not even make that argument*, ostensibly because of *res judicata*. Plaintiff is not the sole arbiter of the length and breadth of a decision. The claim that somehow Horizon *cannot even argue* that AMBIT is misinterpreting the 2017 Order because it did not appeal the lower court's decision itself is incorrect. It represents an unwarranted expansion of *res judicata* which would require losing parties to consider, and then appeal, every possible interpretation of a ruling, no matter how absurd, or risk harming itself in all related future litigation.

AMBIT, for its part, never squarely addresses the vast majority of Horizon's specific legal arguments in its Response. Glaringly, AMBIT never actually deals with the fact that the lower court relied upon the admissions in the 1996 Agreement in finding summary judgment in Horizon's favor on the case-in-chief in this matter.[1] AMBIT does this despite the fact that Horizon

[1] In fact, AMBIT has filed a separate appeal due to the fact that, in part, the Court relied on that Agreement in deciding its past rent claim in favor of Horizon. *See generally* Dkt. No. 20-0762, Pet'r's Br.; Appx. 01113.

specifically identified the *exact point* in the record in the instant case where the judge began to take up the admissions, and then *did not*. Horizon Br., p. 29, Appx. 01137-01138. As AMBIT essentially has chosen to avoid meaningfully addressing any of Horizon's specific arguments *vis a vis* the 1996 Agreement, and instead has leaned into repeating its bald assertions of *res judicata* as to an interpretation of the 2017 Order which it itself concocted, there appears to be no reason to find for Respondent in this matter.

B. AMBIT's claim that the applicability of the 1996 Agreement in this case was somehow never raised is false.

In its Summary of Response, AMBIT again tries to claim that despite Horizon raising the issues surrounding the 1996 Agreement numerous times, the applicability of the Admissions was somehow *not* "before the lower court." This is false. The lower court is literally on record stating that it was about to take up the Admissions and then did not. Appx. 01138. Moreover, AMBIT claims that "Horizon raised the admissions, which the Court identified as being from the last litigation and on the wrong issue in any event." For this finding, Horizon cites Appx. 01124 – 01125. AMBIT Resp. Br., p. 20, fn. 39. The full extent of the Court's statements on those pages is as follows:

> up here a few minutes ago. They don't go to really dispositive motions, so, with that, Mr. Schillace, you may proceed.

Hrg. Trans., 3:1-3 at Appx. 01124.

> THE COURT: What was the Court's ruling in 2017, in your other case?

Hrg. Trans. 3:9-10 at Appx. 01124.

THE COURT: Are those admissions, dispositive though of the matter of reasonableness? I mean, are we talking about reasonableness, they use them for foreign fuel?

Hrg. Trans. 4:1-3 at Appx. 01125.

It is unclear where AMBIT believes the Court identified these claims as "being from the last litigation" or "on the wrong issue" in this part, or any other part of the transcript, but it was certainly not at Appx. 01124 – 01125. At any rate, Horizon has no idea how AMBIT intends to go about proving its claim that the 1996 Agreement was not litigated in this case *by citing to the portions of the record where it was demonstrably litigated in front of the judge*. It is further difficult to understand how the admissions were not before the lower court when it relied upon the 1996 Agreement to find against AMBIT in the case-in-chief.

Ultimately, AMBIT retreats to its most basic position, attempting to read into the 2017 Order something that does not make any coherent sense. That Order states, in relevant part:

> In analyzing the 1996 Agreement, the Court finds that paragraph fourteen is clear in limiting the applicability of the agreement as it provides that the agreement did not supersede the Lease Agreement except for two sections, paragraph four – listing the parties closing obligations and paragraph five – Horizon's waiver of a portion of post-April percentage of rent.

Appx. 00108. AMBIT believes this statement turns the 1996 Agreement into a nonsensical two-section agreement that serves no purpose whatsoever. It does not. Paragraph fourteen of the 1996 Agreement, on which the 2017 Order relies, states the following:

> **14. Entire Agreement; Modification; Waiver. This Agreement constitutes the entire agreement between the Parties and supersedes all prior and contemporaneous agreements, representations, warranties, and understandings of the Parties, whether oral, written or implied, as to the subject matter hereof; provided, however, that this Agreement does not supersede the Lease, except only that the provision in paragraph 4 of this Agreement for the dismissal of the Pending Action and the provisions of paragraph 5 of this Agreement for the waiver of the Waived Percentage Rent and related provisions of paragraph 5 shall limit Horizon's rights under the Lease. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing by all Parties affected thereby. No waiver of any of the provisions of this Agreement shall be deemed or constitute a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the Party making the waiver.**

Appx. 00069.

AMBIT never addresses, in its lower court pleadings, in its Response before this Court, or anywhere else, why the judge holding that the agreement did not supersede the lease anywhere but Paragraphs 4 and 5 intended to somehow *invalidate* the bargained-for admissions made *in the agreement itself*. AMBIT similarly does not explain how any court could reasonably read this paragraph to do the same without finding it to create an absurdity and render the Settlement Agreement itself meaningless. AMBIT's position is especially absurd in light of the fact that it is literally appealing the Court's reliance on the court *relying upon those same admissions* in granting summary judgment to Horizon on the case-in-chief. *See, e.g.*, Dkt. No. 20-0762, Horizon Resp., p. 28-29; Appx. 01112 - 01113, 01130-01132. If the lower court intended the Agreement to be invalidated in 2017, it certainly would not act in reliance of the admissions contained therein in granting summary judgment in 2020.

Specifically, the lower court explained in its Order that "[AMBIT] made the same arguments regarding 'Local Fuel' verses 'Foreign Fuel' that it asserted in the 2013 litigation and that it is asserting in this litigation despite the admissions made in Section 2a of the May 29, 1996 Agreement and the express agreement to not make such claims after May 28, 1996," and that

AMBIT "paid and/or acknowledged that the monthly rent was due to be paid based upon the existence of 'Local Fuel' and any use of 'Foreign Fuel' being for a non-operating reason." Appx. 01113, ¶¶ 16, 17.

The lower court also held, expressly, that "[t]he Third Amendment was declared void by the May 28, 1996 Agreement to Resolve Pending Litigation with the express language of [AMBIT] admitting that as long as 'Local Fuel' remained on the 'Leased Premises' the use of 'Foreign Fuel' was for non-operating reasons regardless of the quality of the 'Local Fuel." Appx. 01112. This concession by AMBIT in 1996 was a bargained-for resolution to repeated disputes over what constituted "operating" or "non-operating" fuel. The May 28, 1996 Agreement to Resolve Pending Litigation ("Settlement Agreement") states, in relevant part:

2. Tenant's Admissions

> a. 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.** Tenant further acknowledges and agrees that Tenant has no claim to recover any rents paid to Horizon prior to the date of this Agreement.
>
> Appx. 00064 (emphasis added).

AMBIT never explains, anywhere in its response, why these admissions would have been rendered entirely invalid by either ¶ 14 of the agreement *in which they are contained*, or why a

judge's decision which was explicitly "not determining rents" would, secretly, *been surreptitiously determining rents all along. See* Appx. 001136.

AMBIT claims that ¶ 14 of the Agreement makes ¶ 2 of the Agreement go away, and that the 2017 court agreed with their absurd position. However, the lower court's summary judgment decision in Horizon's favor relying on ¶ 2 cannot be meaningfully reconciled with AMBIT's theory that those admissions were rendered void and inapplicable between the parties back in 2017.

AMBIT has filed forests worth of briefs in this matter, and still has not offered an answer to the simplest question: **Ignoring, for a moment, AMBIT's *res judicata* claims, what legal basis would the 2017 court actually have to invalidate the 1996 Admissions?** Horizon has already detailed the reasons why such an interpretation would be absurd and clearly contrary to the intent of the document. Horizon Brief, pp. 16 – 21. In short, AMBIT conceded, in 1996, that any future use of foreign fuel would be deemed non-operational. AMBIT further explicitly admitted and explained that Horizon would "detrimentally rely on this factual admission, that such reliance is foreseeable by [AMBIT] and reasonable on the part of Horizon, and that such reliance is evidenced by Horizon's execution and delivery of this Agreement." Appx. 00064. AMBIT's belief that Horizon would throw away this concession 12 paragraphs later is unsubstantiated nonsense.

C. AMBIT's claim that it presented the lower court with correct law and facts regarding its "reasonable judgment" standard remains incorrect, and AMBIT fails to actually discuss the issues presented by Horizon's appeal.

AMBIT apparently takes umbrage at the fact that Horizon pointed out the lack of coherent structure in AMBIT's "reasonable judgment" standard. The standard remains incorrect.[2] AMBIT,

[2] Contrary to AMBIT's footnoted assertion, Horizon at no time used, anywhere in its brief, *ad hominem* attacks against counsel. Horizon pointed out that AMBIT's interpretation of case law as presented to the lower court was incorrect and cited specific examples of how and why that was true. Pet'r's Br., pp. 29-25. Horizon is unquestionably allowed to call AMBIT's interpretations of law incorrect and or/misleading.

relying on *Krypton Coal Corp. v. Golden Oak Min. Co.*, 181 W. Va. 405, 408, 383 S.E.2d 37, 40, fn. 2 (1989), offered the Court an "arbitrary and capricious" standard entirely based upon that footnote, a "reasonable judgment" standard bootstrapped to that standard from an entirely irrelevant trustee discretion case[3], and then kludged *that* standard together with a series of arbitration cases to demand AMBIT be granted judgment as a matter of law on its counterclaim. *See, e.g.*, Horizon Br., pp. 29-35.

AMBIT spends three pages of its Response curiously explaining that while it did, in fact, kludge together its "arbitrary and capricious" standard from a series of, charitably, "diverse" sources, it let the Court know it did so. AMBIT Resp. Br., p. 9, ¶ 1. It bizarrely touts, for example, the fact that "at least one (sic) the cases [*Krypton, supra*] was from a strictly analogous field." *Id.* It is unclear how notifying the Court that the applicable standard it proposed was cobbled together out of spare parts is relevant to this appeal, except to highlight the deficiencies in the same. Ultimately, however, the method by which the standard was constructed is irrelevant. West Virginia case law is clear that the determination of whether particular circumstances fit within the definition of a contract is a question of fact, to which the motivations of the participants are critical. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61 - 63, 459 S.E.2d 329, 338 - 340 (1995).

Moreover, AMBIT's *legal* defense of its arbitrary and capricious claim is ultimately meaningless because AMBIT, and ultimately, the Court, *applied the wrong facts* to its own standard. More specifically, AMBIT told the Court that "[t]he only internal standard [defining Operating Reasons for fuel use] appears in Section 6 of the Lease Agreement, where it defines

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Unsurprisingly, *R.J. Reynolds Tobacco v. Gafney*, 188 So.3d 53, 58-59 (Fla. 2016), which AMBIT cites for the position that *ad hominem* attacks are impermissible, dealt with a closing argument that suggested defense counsel was literally in cahoots with tobacco companies and attempting to hide the dangers of smoking from the public, a situation not analogous to this case at all.

[3] *Pollok v. Phillips*, 186 W. Va. 99, 411 S.E.2d 242 (1991).

Operating Reasons within the scope of AMBIT's reasonable judgment – without any external gauge provided or mandated." Appx. 00740. Based on that standard and on *Krypton Coal*, the Court found that AMBIT's authority was basically limitless, and that Horizon could only succeed on its counterclaim by meeting an impossible standard.

This finding, as already explained by Horizon, is demonstrably false. First, the original agreement, on which AMBIT exclusively relies, requires any dispute over whether the use of foreign fuel is for an operating or non-operating reason to be resolved by a consulting engineer. Horizon Br., p. 37, ¶ 1, Appx. 00206.[4] The engineer is clearly, at a minimum, an "external gauge" of which AMBIT was aware. AMBIT Resp. Br., p. 12, ¶ 1. AMBIT, for the first time, also posits that the engineer would also be subject to its manufactured "arbitrary and capricious" standard because the parties disagree often about fuel. *Id.* Of course, this unwarranted limitation of the engineer's authority in the matter is unsupported by any law or fact whatsoever, and AMBIT cites none.

Ironically, we are expected to *read into* the 1989 Agreement that the engineer has undefined restrictions on his authority based on the unsupported theory that AMBIT tacitly *bargained for that restriction*, but seven years later, in 1996, we are also expected to assume that AMBIT's admissions at ¶ 2 of that agreement, which *Horizon expressly bargained for in exchange for settling an expensive lawsuit*, were somehow invalidated by ¶ 14 of that same agreement. This juxtaposition of AMBIT's arguments clarifies the illogic necessary to find for AMBIT in this appeal.

[4] The importance of the engineer is actually enhanced by AMBIT's claim that only the Lease Agreement applies; the 1996 Agreement arguably does away with the need for an engineer since AMBIT admits therein that all use of foreign fuel is non-operational.

Moreover, AMBIT further fails to address the biggest problem with *Krypton Coal*'s applicability to this case entirely. *Krypton* holds, in relevant part, that "[h]ad the parties intended that an objective standard would apply, the contract would not call for the "sole judgment" of Golden Oak, but would state that the contract terminates when the recoverable coal has been mined." *Krypton Coal Corp. v. Golden Oak Min. Co.*, 181 W. Va. 405, 408, 383 S.E.2d 37, 40, fn. 2 (1989).

This holding is critical because AMBIT holds itself out as analogous to Golden Oak, and claims that it has "sole judgment" over the use of foreign fuel. The Amended Lease itself, which AMBIT itself relies upon at all times in this litigation, gives AMBIT "sole" judgment in using foreign fuel for non-operating reasons, *but only "reasonable" judgment in using foreign fuel for operating reasons*. Appx. 01999 – 02003; *see also* Appx. 00204 - 00205. AMBIT explicitly does not, therefore, have "sole" judgment as required by *Krypton Coal* and AMBIT's own theory of the case. As such, AMBIT does not address its inability to actually fit in its *own* "arbitrary and capricious" rubric for parties with "sole" judgment. This alone should render the court's grant of summary judgment void independent of any other issue presented by the parties.

Rather, AMBIT retreats to its tired attempts to win this case by evading all meaningful substantive arguments and engaging in only procedural arguments, claiming that somehow "Horizon never made these issues actionable before the Court below." *Id.* This is, again, false, as Horizon both challenged the applicability of the arbitrary and capricious standard and specifically brought up the appointment of the engineer to the Court, discussed further *infra*. Appx. 00803-00804, 01143, 01149-01150, 01181, 01844-01851, 02047. AMBIT's claim that the applicability of that standard is somehow beyond the reach of this Court is meritless.

D. AMBIT's claim that Horizon's "lack of evidence" supports the Court's decision is incorrect.

As above and as in its initial appeal brief, Horizon disputes that the "arbitrary and capricious" standard offered by the Court is the correct standard, or that it is applicable to the facts of this case. However, AMBIT's contention that Horizon somehow managed to not produce any evidence, or the implication that Horizon was somehow in derogation of its responsibilities to produce evidence, is unsupported by law or fact.

Horizon was stuck with an impossible standard by AMBIT and by the Court. The Court accepted all of AMBIT's "evidence" about the economic viability, or lack thereof, of local fuel. Appx. 2064, ¶¶ 8-10. The lower court then committed reversible error when it disallowed Horizon from presenting evidence or testimony to refute AMBIT's, effectively dooming the claim. Appx. 02072 – 02073, ¶¶ 38-43; *see also* Horizon Br., pp. 36-40. Horizon did not fail to produce evidence. The *lower court* failed to permit Horizon to bring its evidence before a jury, which is clear error.

E. AMBIT cannot pass the responsibility for failing to acquire an engineer to Horizon.

Lastly, in its first Response to Horizon's assignment of error, AMBIT attempts to claim that *Horizon* failed to do anything in regards to acquiring a neutral engineer to decide whether AMBIT's fuel issues were "operating" or "non-operating." AMBIT Resp., p. 26, ¶ 1.

In fact, Horizon explicitly pointed the engineer issue out to the Court, and asked it to appoint one. AMBIT did not, in fact, meaningfully attempt to engage in this process. AMBIT only submitted its own expert engineers as "suitable." Appx. 02048 – 02049. The Court questioned AMBIT specifically on the engineer issue, pointing out that this provision "sounds a lot like arbitration." Appx. 02050. AMBIT, for its part, evaded the question entirely, and then the Court never addressed the issue again. Appx. 02051 – 02058. AMBIT's Response does not, and cannot, explain how this issue was not made "actionable before the Court below," and such an argument appears to be without merit. Horizon asked the Court to appoint an engineer, in accordance with

the Lease Agreement which serves as the basis for all of AMBIT's claims in this matter. The Court did not do so, which is and was clear error. Contrary to AMBIT's attempt to read in an "arbitrary and capricious" standard into the appointment of an engineer, that is not the language in the Lease Agreement. The Lease Agreement states:

> Any 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.

Appx. 00206. The parties have the mutual responsibility to select an engineer to resolve disputes regarding the categorization of the use of fuel, without exception and without application of a *post hoc* standard of responsibility. AMBIT claims that there was an "impasse" and that the contract does not account for an impasse. AMBIT Resp., p. 27. There was no impasse. Horizon is literally on record asking the Court to appoint an engineer. Appx. 02048 – 02049. AMBIT is on record not responding to the judge in any meaningful way. *Id.* This does not somehow make the requirement waivable, or make it Horizon's fault. The parties are equally responsible to comply with their own contract, and AMBIT's half-hearted attempt to present Horizon with its own experts as impartial engineers is cynical compliance, at best. The judge's failure to appoint a neutral engineer in accordance with the contract, or to bind the parties to that engineer's decision, is clear error.

III. CONCLUSION

The vast majority of AMBIT's Response Brief does not helpfully address any specific issue set forth by Horizon in its Appeal Brief. Rather, it chiefly uses its Response to chastise Horizon for pointing out that AMBIT:

1. Filed a claim based entirely on its crabbed misinterpretation of a prior Order;

2. Alleged repeatedly that Horizon was barred from disputing its interpretation of that Order by *res judicata*;

3. Crafted and successfully asked the Court to apply an impossibly high standard in interpreting its "sole authority" which was based, charitably, on very little applicable case law;

4. Applied that standard to itself, despite the fact that the very agreement on which AMBIT bases its case making clear that AMBIT did not, in fact, have "sole authority" on the issues at bar; and

5. Mostly ignored the fact that the agreement it relied upon set forth a specific arbiter of the issue at hand, *i.e.*, the appointment of a neutral engineer.

Frankly, despite AMBIT's hand-wringing, it does not matter whether its missteps were intentionally deceptive or merely error. What matters is that the lower Court ultimately, and improperly, relied upon AMBIT's missteps in granting summary judgment to AMBIT. AMBIT offers, for example, no explanation as to how the "sole authority" rule it fashioned out of *Krypton Coal* applies in the instant case, where AMBIT only had "reasonable" judgment in using foreign fuel for operating reasons. Similarly, AMBIT cannot, and does not, give a single legal reason besides *res judicata* as to why the 1996 Admissions were rendered invalid by the 2017 Order, nor does it address Horizon's contention that such a determination is unsupported by any case law whatsoever and creates an absurd result. Horizon pointed all of this out in its initial appeal brief. However, AMBIT's Response, or lack thereof, to Horizon's arguments underscores the necessity for this Court to overturn the lower court's grant of summary judgment in this matter.

WHEREFORE, Horizon moves this Court to grant its appeal and reverse the lower court's grant of summary judgment to AMBIT, and for any and all other relief this Court deems appropriate.

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AMERICAN BITUMINOUS POWER
PARTNERS, LP,

Petitioners,

v. Case No. 20-0762

HORIZON VENTURES OF
WEST VIRGINIA, INC.

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PETITIONER'S SUMMARY REPLY BRIEF** was mailed to counsel of record at the address shown below by United States Mail, postage prepaid this 5th day of March, 2021:

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