

**IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

**AMERICAN BITUMINOUS POWER
PARTNERS, L.P., a Delaware limited
partnership,**

Plaintiff,

vs.

**Civil Action No.: 18-C-130
Presiding: Judge Lorensen**

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

Defendant.

FINAL JUDGMENT ORDER

CAME the Court this 23 day of February, 2024 following a damages hearing in this civil action. The Plaintiff, American Bituminous Power Partners, L.P. (hereinafter “AMBIT”), appeared by counsel, Roberta F. Green, Esq., and by its corporate representative, Christophe Collet, and Defendant Horizon Ventures of West Virginia, Inc. (hereinafter “Horizon”), appeared by counsel, Mark A. Kepple, Esq., and Joseph G. Nogay, Esq., and by its President, Stanley Sears. The Court received proposed orders from all parties on January 5, 2024. Upon consideration of the testimony of the witnesses presented and exhibits introduced into evidence, the entire record of this case, and pertinent legal authority, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52(a) of the West Virginia Rules of Civil Procedure.

FINDINGS OF FACT

The trial was conducted after this matter was remanded to the West Virginia Business Court by the West Virginia Supreme Court of Appeals, via Order, in *Horizon Ventures of W.*

Virginia, Inc. v. Am. Bituminous Power Partners, L.P., 246 W. Va. 374, 873 S.E.2d 905 (2022).

There, the Court found that factual questions existed about the interaction between the 1989 Lease Agreement, the 1996 Settlement Agreement, and the Admissions within the 1996 Settlement Agreement which were to be resolved by a factfinder:

While the 2017 Order appears to have resolved some issues while creating others, reasonable minds could disagree as to the scope of the 2017 Order and whether it did or did not resolve those apparent ambiguities. Despite the complexity of the positions advanced by AMBIT and Horizon, the solution, while perhaps not expedient, is simple. We find that the answer to the ambiguities contained in these various documents is not ours to give, nor is it the business court's to give – the factfinder must supply the answers to these questions. **There is simply too much ambiguity and too many factual disputes in the Lease Agreement, the 1996 Settlement Agreement, and AMBIT's admissions for this case to be appropriate for summary judgment when viewed through the lens of the 2017 Order and the ostensibly conflicting conclusions reached in the summary judgment orders on appeal to this Court.**

Id. at 386, S.E.2d at 917 (emphasis added).

Following the Supreme Court's remand and directive, a trial on damages was held before the undersigned on October 10-12, 2023. The Court notes the trial was conducted as a bench trial at the agreement of the parties and the damages determination was held at a separate, later damages hearing by the agreement of the parties. To this end, on December 15, 2023, the Court held the agreed upon damages hearing, wherein the Court took evidence to determine the rent due to Horizon from AMBIT and other damages calculations.

Central to this litigation is the Lease Agreement between the parties. The parties entered into an Amended and Restated Lease Agreement in 1989 (hereinafter "Lease"). Section 7 of the lease provides in section (a) as follows: "[a]ll payments of rent shall be paid to Landlord by Tenant without notice or demand...". Section (b) provides: "Subject to the provisions of Section 7A ["Subordination of Rent"], all Percentage Rent earned under Section 6 [rent] shall be paid within

ten (10) days after the date Tenant actually receives the revenue on which such Percentage Rent is based....” Section (c) provides, “Interest at the rate of ten percent (10%) per annum shall accrue on any Percentage Rent....which is due and unpaid commencing on the eleventh day after the same was due and payable until the earlier of (i) the date the same is paid, or (ii), if applicable, the Date of Subordination (as hereinafter defined) and in such latter case shall continue to accrue interest as specified in the following sentence. Interest shall accrue on Subordinated Rent (as defined in Section 7A [Subordination of Rent] which would have been payable to, or collectible by Landlord but for the provisions of Section 7A [Subordination of rent] (“Unpaid Accrued Subordinated Rent”) commencing on the date such rent would have been due, payable and collectible but for the provisions of Section 7A....until the date such rent is paid to Landlord at [the Corporate Bond Rate of 1%].

Section 7A of the lease provides for the subordination of rent to certain other financial obligations of AMBIT. Specifically, section 7A(a) of the lease provides: “All Percentage Rent, any and all interest with respect to Percentage Rent and all Post-Startup Minimum Rent hereinafter collectively called the “Subordinated Rent”) is subordinated and subject in right of payment to the prior payment in full when due of all Senior Debt of Tenant in accordance with the provisions of this Section 7A.” Section 7A(b) provided that if there would happen to be a default in the payment of Senior Debt, rent would simply accrue until the default of the payment of Senior Debt was cured. Section 7A(c) provided that subordinated debt shall be subject to accrual of interest at a corporate bond rate. AMBIT calculated the bond rate at 1%. Horizon did not dispute AMBIT’s bond rate calculation.

Pursuant to Section 7A(c) of the lease, once the Senior Debt has been retired, the total amount of all unpaid accrued subordinated rent becomes payable to and retainable by Landlord (Horizon),

until paid in full. The unpaid accrued subordinated rent and interest is to be paid according to Section 7 in “equal monthly installments equal to the greater of (i) \$33,333 per month or (ii) that amount which will repay all Unpaid Accrued Subordinated Rent plus any interest thereon (whether theretofore or thereafter accrued) in 96 equal monthly installments, commencing on the first day of the month immediately following the date on which such Unpaid Accrued Subordinated Rent becomes payable to and retainable by, Landlord pursuant to Section 7A “(Subordination of Rent”) until paid in full....”.

Subordinated v. Unsubordinated Rent

Horizon’s position is that the first period of unsubordinated rent began in mid February 2013 to September 30, 2013, that on that date, AMBIT had a Senior Debt obligation that subordinated the rent payment, that that period of subordinated rent continued until November 4, 2020, when the Senior Debt was retired or paid in full, and that the period from November 5, 2020 to the present continued as an unsubordinated period. AMBIT, on the other hand, argues that rent only became subordinated as of this Court’s Bench Trial Order entered October 31, 2023 because rent only then became due and payable.

The Court heard testimony from Stanley Sears, President of Horizon, that he had negotiated the Lease, was familiar with the intent of the parties when signing the Lease, and routinely calculated rent and interest due to Horizon pursuant to the Lease.

Mr. Sears testified that there were two periods of unsubordinated rent. The first began after September 30, 2013. Mr. Sears testified that the Senior Debt was to be paid on or around September 30, 2013. The rent payments, however, were to be paid monthly, according to Section 7 of the lease, ten (10) days after the payment from the electric utility was received by AMBIT. Thus, those

monthly rent payments occurring after September 2012 (when the Senior Debt installment payment was made) but before September 30, 2013, when the next annual Senior Debt installment payment would be made, are not subordinated to the debt payment.

Mr. Sears acknowledged receiving a letter from AMBIT indicating that AMBIT would not be paying rent to Horizon due to financial shortfalls¹. However, Mr. Sears testified that the characterization of subordinated rent vs. unsubordinated rent is predicated upon the payable date of the Senior Debt and whether AMBIT, on that date, has a Senior Debt amount that “subordinates” rent. Further, Mr. Sears testified that, on September 30, 2013, a Senior Debt payment was due, and that such obligation “subordinated” the rent payment. Mr. Sears further testified that the default of that payment obligation triggered the accrual of rent pursuant to Section 7A (“Subordination of Rent”). However, the default does not change the characterization of rent that was previously “unsubordinated,” such as the rent due Horizon from approximately the middle of February 2013 through September 30, 2013.

Following this, Mr. Sears testified that rent from October 1, 2013 to October 31, 2020 was subordinated to the Senior Debt and was not paid by AMBIT but accrued to Horizon, per the Lease.

¹ Evidence adduced at the damages hearing was that, on or about February 7, 2013, Tenant wrote to Landlord and advised that:

[p]ursuant to that certain Amended and Restated Lease of American Bituminous Power Partners L.P. (“Tenant”) dated November 29, 1989 as amended and supplemented to the date hereof (“Lease”) with Horizon, this letter constitutes notice pursuant to Section 26 of the Lease that Tenant is currently unable to fully pay Other Lease Rent under paragraph Seventh of the Trust Indenture as Revenues under the Trust Indenture are insufficient to pay such amounts.

Tenant will pay all Unpaid Accrued Subordinated Rent to Horizon in accordance with Section 7 of the Lease, subject to the availability of funds pursuant to Section 5.4 of the Trust Indenture. Based upon current projections of Tenant, the Tenant does not believe there will be sufficient funds to pay Horizon until at least after September 30, 2013.

Mr. Sears further testified that the second period of unsubordinated rent began on November 4, 2020, when the Senior Debt was retired or paid in full.

AMBIT argued and presented evidence² that unpaid rent payments from January 2013 to November 3, 2020 constitute subordinated rent. The Court does not agree. After weighing the evidence, including the testimony of Mr. Sears and the language of the Lease, the Court does not find this interpretation convincing. Mr. Collet, AMBIT's witness, testified that not only did he believe that all rent in 2013 was subordinated, but that although Senior Debt was retired and paid in full in November 2020, the rent payments were still subordinated because of AMBIT's interpretation of a Stay Order pending appeal in this matter (and that the rent became unsubordinated following this Court's Bench Trial Order entered October 31, 2023). Further, the Court considers Mr. Collet's testimony, wherein he admitted that the Lease contained no language that would permit AMBIT to characterize rent as subordinated according to this interpretation. The Court further notes that counsel for AMBIT admitted that the Lease is "absolutely silent" as to what happens if there are stay orders in place. The Court considers Mr. Sears testified that the parties' intent in formulating the Lease was contrary to Mr. Collet's theory set forth in his testimony. The Court considers the fact that AMBIT presented no witnesses from the time of the formulation of the Lease and notes that Mr. Collet testified that he was not present when the Lease was negotiated, is not an employee of AMBIT, was not in employee of AMBIT in 2013, and has no direct, first-hand knowledge of the intent behind the Lease. The Court, after weighing the evidence presented by both parties, does not agree with the position outlined by AMBIT.

² For example, AMBIT's witness, Christophe Collet, who did not work for AMBIT in 2013, testified that he believed all rent in 2013 was subordinated rent.

In conclusion, based upon the evidence presented at the damages trial, this Court FINDS that there were three relevant time periods in the calculation of the rent. The Court also finds that these periods should be characterized as having “subordinated rent” or “unsubordinated rent” according to the Lease. These periods are as follows:

Period 1 - February 2013 through September 30, 2013,
UNSUBORDINATED

Period 2 - October 1, 2013, through November 4, 2020,
SUBORDINATED

Period 3 - November 5, 2020, through the present.
UNSUBORDINATED

Finally, the Court notes that relative to any and all payments between the parties at this time, the parties agree that simple interest applies, which is consistent with the Lease Agreement. That is, the Lease Agreement instructs that interest is paid first, over time, making any compounding impossible:

Amounts paid with respect to Unpaid Accrued Subordinated Rent shall first be applied to interest due and payable on such rent and then to such rent. There shall be no penalty for prepayments of any such amounts due. Any prepayment shall first be applied to interest due and payable on such rent and then to such rent in the inverse order of maturity of such rent. (Lease Agreement at Section 7c).

Rent Calculations

Rent has not been paid by AMBIT to Horizon from 2013 until November 2023, after the bench trial in this matter. The Court now determines how much rent is owed. Following the determination of the unsubordinated and subordinated rent periods, the Court examines the rent percentage applied, per the bench trial in this matter. At the damages hearing, Mr. Sears testified as to the calculation of rent. He testified that the

calculation of rent was made based solely upon the information received from AMBIT³ and the Lease. Mr. Sears testified that he utilized the rent percentage rate of 2.5%, in accordance with this Court's Bench Trial Order entered October 31, 2023. Mr. Sears testified that he had, pursuant to the Lease, calculated the interest for the unsubordinated period at 10% per annum, accruing with simple, non-compound interest.

Mr. Sears testified that he calculated the rent based upon his knowledge and experience. Mr. Sears testified that he consulted with Horizon's CPA, Lou Costanzo of Costanzo & Associates, to calculate and verify his methodology and interest computations.⁴ Mr. Sears testified that the following damages were due and owing for each of the respective periods.

Period 1:

	<u>GROSS RENTS</u>	<u>INTEREST AT 10%</u>		
GROSS RENTS AT 1%	<u>\$ 259,463</u>	<u>\$ 274,121</u>	=	<u>\$ 533,584</u>
GROSS RENTS AT 1.5%	<u>\$ 389,190</u>	<u>\$ 411,177</u>	=	<u>\$ 800,367</u>
<u>TOTAL</u>	<u><u>\$ 648,653</u></u>	<u><u>\$ 685,298</u></u>		<u><u>\$ 1,333,951</u></u>

Period 2: Past Missed Installments of the 96 Payments

³ The Court notes AMBIT provided said financial information to Horizon, which was admitted into evidence as Horizon's Damages Exhibit A – 2013 to 2022, which showed its gross revenues for each year. The Court acknowledges and notes these amounts are a part of the record in this case. Further, gross revenue data for the year 2023 was not provided in the form of an Annual Operating Statement; rather, AMBIT provided Horizon the transactional information from the sale of electricity to American Projects Development Corp. for the partial year of 2022 and available records from 2023. These were admitted into evidence as Exhibits D and C, and illustrated the revenues from January 2023 to September 2023.

⁴ Mr. Costanzo was present in the Courtroom and made available for testimony. The Court inquired of the parties whether Mr. Costanzo's testimony was necessary, and it was agreed that it was unnecessary to call Mr. Costanzo as a witness. The Court accepts that Mr. Costanzo was present at the trial, available to testify and that his testimony would be that he agreed with Mr. Sears' calculations. See: Dec. 15, 2023, Tr.Tr. 143:1-143:10.

	1% RENT	1.5% RENT	TOTAL RENT	10% INTEREST ON 1% GROSS RENT	10% INTEREST ON 1.5% GROSS RENT	TOTAL INTEREST	TOTAL RENT AND CALCULATED INTEREST
GROSS RENTS DUE	\$ 2,839,115	\$ 4,258,672	\$ 7,097,787				
DIVIDED BY 96 MONTHS (MONTHLY PAYMENT AMOUNT)	\$ 29,574	\$ 44,361	\$ 73,935				
NUMBER OF MONTHS	X 38	X 38	X 38				
38 MONTHS RENT (NOVEMBER 2020 DUE NOW: DECEMBER 2023)	\$ 1,123,812	\$ 1,685,718	\$ 2,809,530				\$ 2,809,530
INTEREST ON 38 PAYMENTS DUE NOW FOR PERIOD NOVEMBER 4, 2020 THROUGH DECEMBER 15, 2023 AT 10%				\$ 349,767	\$ 524,651	\$ 874,418	\$ 874,418
TOTAL							\$ 3,683,948

Period 2: Remaining Future Installments of the 96 payments:

DUE IN FUTURE:	1% RENT	1.5% RENT	TOTAL RENT	10% INTEREST ON 1% GROSS RENT	10% INTEREST ON 1.5% GROSS RENT	TOTAL INTEREST	TOTAL RENT AND CALCULATED INTEREST
MONTHLY PAYMENT AMOUNT PER ABOVE	\$ 29,574	\$ 44,361	\$ 73,935				
NUMBER OF MONTHS	X 58	X 58	X 58				
58 MONTHS (JANUARY 2024 DUE LATER: THROUGH OCTOBER 2028)	\$ 1,715,303	\$ 2,572,954	\$ 4,288,257				\$ 4,288,257
INTEREST ON 58 PAYMENTS DUE MONTHLY FOR PERIOD NOVEMBER 4, 2020 THROUGH OCTOBER 2028 AT 10%				\$ 1,085,866	\$ 1,628,800	\$ 2,714,666	\$ 2,714,666
TOTAL							\$ 7,002,923

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Period 3:

	GROSS RENTS	INTEREST AT 10%	TOTAL
GROSS RENTS AT 1%	\$ 1,370,467	\$ 227,458	\$ 1,597,925
GROSS RENTS AT 1.5%	\$ 2,055,701	\$ 341,187	\$ 2,396,888
TOTAL	\$ 3,426,168	\$ 568,645	\$ 3,994,813

Mr. Sears testified that all amounts due and owing Horizon, after Senior Debt was retired and paid, are properly characterized as “unsubordinated” because, by definition, the Senior Debt is eliminated, and there is no lease provision which subordinates the rent payment. Thus, Mr. Sears testified that all rents, including the previously subordinated rent payments payable over ninety-six (96) equal installments, is subject to the 10% *per annum* simple interest calculation described in the lease, specifically Section 7A (Subordination of Rents) sub-para. (b), which provides that, “All rental payments shall be paid in accordance with Section 7 (“Rent Payments”). Section 7 provides in sub para. (c). Interest at the rate of ten percent (10%) per annum shall accrue on any Percentage Rent....”.

Mr. Sears testified that the interest to be charged is (10%) on all unsubordinated rent, as described above, and that charging of this interest rate was consistent with the parties’ intent in forming the contract, so the interest would not be punitive to Horizon.⁵ It was evident from Sears’ testimony that during the period of time that AMBIT was in default of its Senior Debt obligation, Horizon was accruing interest at a relatively low corporate bond rate, in this case approximately 7 years. If this would continue through the period of repayment of 96 months, AMBIT would have a windfall of a very low interest rate loan for 8 years when it had no senior debt obligation. Horizon, on the other hand, would be penalized by essentially loaning money to AMBIT at a rate significantly below-market rate.

The Court considers that AMBIT failed to offer any position in response to Mr. Sears’s aforementioned testimony, other than to assert that the previously subordinated rent payments

⁵ See Dec. 15, 2023 Tr. 114:21-115:4.

remain under the category of subordinated, and despite the elimination of senior debt, they do not become unsubordinated. This Court has rejected that position.

Therefore, Mr. Sears summarized all amounts due and owing and payable to Horizon as of December 15, 2023 as follows:

	<u>1% GROSS RENT</u>	<u>1.5% GROSS RENT</u>	<u>TOTAL GROSS RENT</u>	<u>10% INTEREST ON 1% GROSS RENT</u>	<u>10% INTEREST ON 1.5% GROSS RENT</u>	<u>TOTAL INTEREST</u>	<u>TOTAL RENT AND INTEREST COMBINED</u>
TOTAL PERIOD 1 (FEBRUARY 15, 2013- SEPTEMBER 30, 2013)	\$ 259,463	\$ 389,190	\$ 648,653	\$ 274,121	\$ 411,177	\$ 685,298	\$ 1,333,951
TOTAL PERIOD 2 (PORTION DUE NOW) (OCTOBER 1, 2013-NOVEMBER 3, 2020)	\$ 1,123,812	\$ 1,685,718	\$ 2,809,530	\$ 349,767	\$ 524,651	\$ 874,418	\$ 3,683,948
TOTAL PERIOD 3 (NOVEMBER 4, 2020 THROUGH SEPTEMBER 30, 2023)	\$ 1,370,467	\$ 2,055,701	\$ 3,426,168	\$ 227,458	\$ 341,187	\$ 568,645	\$ 3,994,813
	<u>\$ 2,753,742</u>	<u>\$ 4,130,609</u>	<u>\$ 6,884,351</u>	<u>\$ 851,346</u>	<u>\$ 1,277,015</u>	<u>\$ 2,128,361</u>	<u>\$ 9,012,712</u>

Mr. Sears further calculated the remaining payments for the unsubordinated period (2) as follows:

	<u>1% RENT</u>	<u>1.5% RENT</u>	<u>TOTAL RENT</u>	<u>10% INTEREST ON 1% GROSS RENT</u>	<u>10% INTEREST ON 1.5% GROSS RENT</u>	<u>TOTAL INTEREST</u>	<u>COMBINED RENT AND INTEREST</u>
AMOUNTS DUE FOR PERIOD OCTOBER 1, 2013 THROUGH NOVEMBER 3, 2020 (PERIOD 2) 58 PAYMENTS AT \$29,574 AND \$44,361 RESPECTIVELY	\$ 1,715,303	\$ 2,572,954	\$ 4,288,257				\$ 4,288,257
INTEREST ON 58 PAYMENTS DUE MONTHLY FOR PERIOD NOVEMBER 4, 2020 THROUGH 2028				\$ 1,085,866	\$ 1,628,800	\$ 2,714,666	\$ 2,714,666
BALANCE OF PAST PERIOD AMOUNTS PAYABLE IN FUTURE	<u>\$ 1,715,303</u>	<u>\$ 2,572,954</u>	<u>\$ 4,288,257</u>	<u>\$ 1,085,866</u>	<u>\$ 1,628,800</u>	<u>\$ 2,714,666</u>	<u>\$ 7,002,923</u>

The Court considers AMBIT offered no competing calculations. Further, AMBIT does not dispute that at least \$11,319,464.88 in rent and \$251,446.36 in interest is due.

Having considered the above-referenced evidence and testimony, and having reviewed the exhibits admitted in evidence at the damages portion of the trial, the Court FINDS that the calculations of rent due and payable to Horizon, as offered by Mr. Sears, as being the appropriate calculation of rent owed by AMBIT to Horizon.

Additionally, having considered the above-referenced evidence and testimony and having reviewed the exhibits admitted in evidence at the damages hearing, particularly the 1989 Lease, the Court FINDS the interest calculations, by period, as offered by Mr. Sears are proper and accepts the same.

In conclusion, the Court finds AMBIT shall pay a total of Nine Million One Hundred Sixty-Eight Thousand Dix Hundred and Eight Dollars (\$9,168,608.00) for Periods 1, 2, and 3 as referenced above. This amount includes the 2.5% rent payments due from February 15, 2013 to September 2023 including contractual interest and AMBIT's corporate bond rate interest pro-rated for period 2. This amount also includes the first Thirty-Eight (38) payments of the subordinated rent that was to be paid over Ninety-Six (96) monthly payments. Horizon shall credit AMBIT Two Hundred Eleven Thousand Eight Hundred Twelve and 68/100 Dollars (\$211,812.68)⁶ toward this judgment and shall credit any subsequent payment made by AMBIT to Horizon in this regard.

Tax Reimbursement

⁶ The Court received evidence that this amount was paid in December 2023. AMBIT argued that AMBIT paid a rental payment to Horizon after the bench trial, wherein it argued the 2.5% for October 2023 was paid in the amount of \$86,113.22 and a subordinated rent accrual payment of 125,702.46 was paid, all of which AMBIT argued was attributed to the interest due and owing on the subordinated amount calculated, which AMBIT calculated at the 1% bond rate. The Court has rejected AMBIT's argument that all rents were subordinated until this Court's Bench Trial Order entered October 31, 2023. Horizon accepted this \$211,812.68 as payment toward the judgment amount.

AMBIT proffered that it was entitled to a reimbursement of advanced real estate taxes in the amount of One Hundred One Thousand Sixty-Eight and 42/100 Dollars (\$101,068.42). Horizon agreed that a certain amount of real estate tax payments was due to AMBIT once rent was paid, as per the Lease, and that upon proper submission of this information, reimbursement would be made.

Pre-Existing Conditions

AMBIT further proffered that it was entitled to treatment of what it termed as “pre-existing conditions on the Demised Properties” in the amount of One Million One Hundred Sixty-Four Thousand Four Hundred Sixty-Two and 76/100 Dollars (\$1,164,462.76) for alleged remediation expenses. The Court’s review of the Complaint in this matter reveals this claim was not part of this case. The Court FINDS that this claim was not litigated or part of this case, and therefore, the Court shall not reduce any amount of recovery issued by this Court in this manner.

Annoyance and Inconvenience

Horizon sought damages for annoyance and inconvenience caused by AMBIT’s failure to pay rent, and Mr. Sears testified as to this issue. Plaintiff and Defendant in this matter are both corporate entities. The Court considers that under West Virginia law, a corporation may not recover damages for emotional distress or outrage. Syl. Pt. 3, *Chamberlain & Flowers v. Smith Contracting*, 176 W. Va. 39, 341 S.E.2d 414 (1986). Likewise, this Court, as factfinder, declines to award damages for annoyance and inconvenience to corporate party Horizon.

When Rent is Due and Payable

AMBIT’s main theory proffered at the damages hearing that was pursuant to the Lease and 1996 Settlement Agreement, rent payments are ordered only when rent is due and payable,

and that rent only became due and payable after this Court's Bench Trial Order was entered on October 31, 2023. This theory is the basis for AMBIT's contention that rent was subordinated until October 31, 2023. Although this was not an issue set for the damages hearing, this was the main theory AMBIT proffered at said hearing, and the Court addresses it now. The Court heard argument from counsel regarding this theory, and testimony from Mr. Collet that rent payments due to Horizon were still subordinated because of AMBIT's interpretation of a Stay Order pending appeal. But as noted earlier in this Order, Mr. Collet offered that opinion on the advice of counsel and admitted that the Lease contained no language that would permit AMBIT to characterize rent as subordinated according to this interpretation. Additionally, counsel for AMBIT admitted that the lease is "absolutely silent as to what happens if there are stay orders in place."

After receiving the evidence, the Court does not agree with this position. In his testimony, Mr. Collett argued AMBIT was "prohibited" by the stay order from paying rent. The Court notes the language of the Stay Order provides that "rent, payments, repayments, and/or setoffs, as well as any and all other aggrieved judgments, interest commensurate with this Subordinated Rent, and other issues...are not to be executed upon until the appeals of the same are concluded." AMBIT offered no case or statutory authority that a stay constitutes a prohibition from payment or accrual of debt by a contract. The Lease does not impose a prohibition from payment of rent.

The Court finds that the Agreed Order to Stay Judgments has no impact on the computation of contractual interest as the parties have agreed that the Contract does not contemplate any effect from a Stay Order. Because this Agreed Order to Stay Judgments only relates to execution of a judgment, it is not a consideration in the calculation of rent or interest due as per the lease language.

Bond

Finally, the Court addresses the issue of an appellate bond. On December 15, 2023, Horizon filed a Motion to Condition AMBIT's Appeal Upon Filing an Appeal Bond, seeking an appeal bond on any verdict amount reached herein, due to AMBIT's statements that it would appeal the verdict. On January 5, 2024, AMBIT filed American Bituminous's Response to Horizon's Bond Motion and Alternative Resolution, arguing that to the extent Horizon seeks a bond from AMBIT, then a stay should be entered, holding the judgment in abeyance until the appeal is resolved. Further, AMBIT argues that to the "extent that AMBIT is paying contested moneys every month that Horizon may not be able to repay depending on the course of appeal, AMBIT would be the party rightfully due security from Horizon." *See* Pl's Resp., p. 2.

West Virginia Code § 58-5-14 governs an appeal bond generally. West Virginia Code § 58-5-14(b) provides that "an appeal bond required by a court...may not exceed the amount of the total judgment, which includes the actual judgment, plus costs, interest, and fees...". W. Va. Code § 58-5-14.

Finding good cause has not been shown, the Court declines AMBIT's request for a stay to be entered. Under this Court's discretion pursuant to West Virginia Code § 58-5-14, the Court finds the posting of an appeal bond by AMBIT is appropriate, and sets the appeal bond amount at Nine Million One Hundred Sixty Five Thousand Dollars and No Cents (\$9,165,000.00). AMBIT is required to post this appeal bond within fifty (50) days of entry of this Order by depositing the bond amount with the Circuit Clerk of Marion County to be held in trust.

The Court, in its discretion, finds this is an appropriate appeal bond amount, as it consists of substantially all of the principal judgment, and is adequate to protect Horizon's interests.

CONCLUSION

Wherefore, it is hereby ADJUDGED and ORDERED AMBIT shall pay a total of Nine Million One Hundred Sixty-Eight Thousand Six Hundred and Eight Dollars (\$9,168,608.00) for Periods 1, 2, and 3 as referenced above. This amount includes the 2.5% rent payments due from February 15, 2013 to September 2023 including contractual interest and AMBIT's corporate bond rate interest pro-rated for period 2. This amount also includes the first Thirty-Eight (38) payments of the subordinated rent that was to be paid over Ninety-Six (96) monthly payments. Horizon shall credit AMBIT Two Hundred Eleven Thousand Eight Hundred Twelve and 68/100 Dollars (\$211,812.68) toward this judgment and shall credit any subsequent payment made by AMBIT to Horizon in this regard. Horizon shall be entitled to pre-judgment interest on the amounts owed to it by AMBIT from the date of the filing of Horizon's Counterclaim, calculated at the rate designated by the Administrative Office of the West Virginia Supreme Court of Appeals for judgments rendered in 2024, which is eight (8) percent. See W. Va. Code § 56-6-31. Post-judgment interest shall accrue from the date of the entry of this Order. THIS IS A FINAL ORDER. There being nothing further to accomplish in this matter, the Clerk is directed to retire this matter from the active docket. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

2/23/2024

date of entry



JUDGE MICHAEL D. LORENSEN
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION