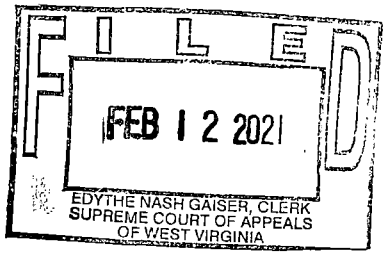
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0759

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

Plaintiff/Counterclaim Defendant Below, Petitioner,



vs.

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

Defendant/Counterclaim Plaintiff Below, Respondent.

BRIEF OF RESPONDENT

Appeal from the Circuit Court of Marion County –
Business Court Division
Civil Action No. 18-C-130

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A. Response to Petitioner's Assignment of Error Number 1: The Circuit Court of Marion County, Business Court Division, correctly granted summary judgment to AMBIT as a matter of law on the basis that Horizon failed to adduce any evidence whatsoever of arbitrary or capricious use by AMBIT of its contractual grant of discretion.

B. Response to Petitioner's Assignment of Error Number 2: Once again, the Circuit Court of Marion County, Business Court Division, correctly granted summary judgment to AMBIT, not by weighing evidence as Horizon alleges, but based upon its finding as a matter of law that Horizon had failed to adduce any evidence whatsoever to suggest that AMBIT had used its contractual grant of discretion in an arbitrary or capricious manner.

C. Response to Petitioner's Assignment of Error Number 3: The Circuit Court of Marion County, Business Court Division, Honorable James H. Young, Jr., appropriately relied upon West Virginia law (including his prior rulings) and written and oral argument by counsel for the parties in Marion County Civil Action No. 18-C-130, as Ohio County Civil Action No. 13-C-196 is a final matter, its rulings, judgments enforceable as West Virginia law.

IV. RESPONSE TO PETITIONER'S STATEMENT OF THE CASE.

In Petitioner's Brief, Horizon Ventures of West Virginia, Inc. (Horizon) argues that the Circuit Court of Marion County, Business Court Division, granted American Bituminous Power Partners, LP's (AMBIT's) Renewed Motion for Summary Judgment on the basis of fact, not law. However, as demonstrated by the express language of the Order Granting AMBIT's Renewed Motion for Summary Judgment, the Circuit Court found that Horizon failed to demonstrate from discovery or elsewhere that it had any evidence whatsoever to present to a jury that would demonstrate or even suggest that AMBIT had used its contractual grant of discretion arbitrarily and/or capriciously as those terms are used under the law, which was the legal test explained to

[1] It appears that Petitioner has listed the assignments of error as above on page 1 of its Brief but has addressed them in inverse order in its Argument section beginning on page 16. Additionally, it appears that Horizon structured its brief around argument topics separate/apart from the assignments of error. AMBIT will address them in the order listed above.

the parties at the pretrial held months before. *Poweridge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. V. 692, 699, 474 S.E.2d 872, 879 (W. Va. 1996). After reviewing the reported decisions available to it on contractual grant of discretion, reviewing the pleadings before it, and considering the arguments of counsel, the Court upheld AMBIT's use of its contractual grant of discretion as a matter of law given AMBIT's undisputed evidence that it had given proper weight to decisional factors, acted rationally, adopted plausible positions, and considered the important factors. At summary disposition, Horizon presented no affirmative evidence that AMBIT had been arbitrary or capricious or had committed plain error in using its contractual grant of discretion. Further, Horizon failed to raise evidence to dispute AMBIT's evidence that it was reasoned and reliable in its fuel selections based upon manufacturer's specs necessary to reach rated output, safety of the Grant Town Plant and its workers, and remaining operational. Far from weighing evidence to reach summary disposition, the Circuit Court found as a matter of law that AMBIT's evidence was expressly undisputed, such that judgment as a matter of law was the necessary outcome. In a nutshell, the Amended and Restated Lease Agreement, which is the contract in dispute, clearly and unambiguously grants AMBIT the decision-making power and discretion to make fuel decisions and use Foreign or Local Fuel at its Grant Town Power Plant, which grant can be challenged by litigation only when arbitrarily or capriciously exercised. The Court gave Horizon every opportunity through discovery and motion response to present evidence to the Court (or the jury) that AMBIT acted arbitrarily or capriciously, but it failed to meet that minimum burden. Judgment as a matter of law was the necessary and proper outcome, and therefore should be upheld on review.

In noting Horizon's failure to raise any evidence whatsoever to dispute AMBIT's assertions,[2] the Circuit Court found that the affirmative evidence Horizon did present was not on the correct issue: 'arbitrary or capricious' as that term is used in the law – all of which is set out in the Order Granting AMBIT's Renewed Motion for Summary Judgment.[3] That is, by example, in response to AMBIT's renewed summary judgment motion, Horizon argued how it and its expert would have handled fuel differently, including that AMBIT was using the CFB Boilers other than as intended or designed, which the Court found went to industry standards and differing opinions – not to arbitrary or capricious. Horizon argued that the waste coal on the premises was usable and that its retained expert would testify that it was, which the Court found was a judgment call and not tied to arbitrary and capricious.[4] Horizon argued that AMBIT's practices create problems in the Grant Town Power Plant operations[5] and complicate AMBIT's reaching rated output, but the Court found that the test was not whether AMBIT was the best operator or whether someone else could operate the Plant differently or better. The test was whether AMBIT had used its contractual grant of discretion arbitrarily and capriciously as that term is used under the law. Horizon argued that no safety issues exist with Plant operations, and while the Court found that little evidence had

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[2] Horizon 02061. Order Granting AMBIT's Renewed Motion for Summary Judgment at ¶ 22, citing *Crum v. Equity Inns, Inc.*, 224 W. Va. 246, 685 S.E.2d 219, 227 (W. Va. 2009), for the proposition that the non-moving party must come forward with **actual evidence** that would create a dispute of material fact or otherwise preclude summary judgment.

[3] Horizon 02061.

[4] Further, the Court found that whether the coal was usable was an 'ultimate issue, which is not an appropriate topic for expert testimony in this matter as cast and further that Horizon's expert would be precluded from addressing ultimate issues, even assuming that the issues were to proceed to a jury. *See, e.g.,* Syl. pt. 10, *France v. Southern Equipment,* 225 W. Va. 1, 689 S.E.2d 1 (2009).

[5] AMBIT owns and operates the Grant Town Power Plant, located in Marion County, WV, as set out further in this Response (below).

been adduced on this issue, nonetheless, the evidence adduced was undisputed and did not go to arbitrary or capricious use of discretion.

As demonstrated by West Virginia law as explained to the parties at length by the Court at motions hearing months before, the remaining issue before the Court on AMBIT's renewed motion for summary disposition was whether AMBIT used its contractual grant of discretion arbitrarily or capriciously, as those terms are used at law. AMBIT had filed an initial dispositive motion, in response to which the Court had found that it was possible reasonable minds could differ. However, finally, at summary disposition, the Court found as a matter of law that Horizon had failed to respond with any evidence whatsoever that a jury could consider relative to whether AMBIT was arbitrary or capricious in Plant operations. Contrary to Petitioner's assertions here, the Circuit Court did not weigh evidence or usurp the jury. AMBIT's motion gave Horizon the opportunity, the mandate, to introduce any evidence whatsoever of arbitrary or capricious operations. Horizon was unable to do so.

At the pretrial held on January 15, 2020, the Court heard cross motions for summary judgment, granting Horizon's[6] dispositive motion and denying AMBIT's.[7] In holding over AMBIT's issues for trial, the Court explained at length that evidence as to whether "AMBIT should have done anything else differently in its design, bad management, negligence, anything of that nature" would not be relevant.[8] The Court also explained the parameters of the remaining case at some length, and Horizon voiced understanding of the Court's rulings, further asserting that it would confine its proof to that legal test and believed it could meet the burden. In the interchange

[6] *See* Docket No. 20-0762.
[7] *See* Horizon 01074.
[8] Horizon 01149-50.

with counsel relative to this ruling, the Court posited that it saw the case at that time in the posture of a declaratory judgment action, which West Virginia Code Section 55-13-1 identifies as "declaring rights, status and other legal relations whether or not further relief is or could be claimed." Indeed, despite its attestation on the record that it understood the narrowing of the issues and agreed with that plan, Horizon failed to adjust its case in any way to the issues for the final motions practice. In response to AMBIT's renewed motion, Horizon produced evidence of its estimation of best practices, of industry norms, of preferred methods – all of which the Court had expressly identified months earlier as irrelevant. Because Horizon failed to cite, produce, rely upon any evidence whatsoever of AMBIT's using its contractual grant of discretion arbitrarily and/or capriciously (simply because none exists), AMBIT's dispositive motion was granted as a matter of law.[9]

It will not have escaped this Honorable Court's attention that these parties have appeared before the Court previously and that matters between them have been pending most recently since 2013. What is new here is Horizon's effort to cross litigate, to relitigate final issues, to challenge final orders – all from prior litigations. West Virginia law on this point is clear: Horizon, "having failed to appeal the final judgment of the circuit court [in Civil Action 13-C-196] has launched a collateral attack on a final judgment in a civil action through the institution of . . . a collateral attack [which] is prohibited."[10] Impermissibly, Horizon moves this Court to opine relative to a final order from a prior litigation between these parties,[11] which order was never appealed, never

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[9] Horizon 01148.

[10] *Hustead v. Ashland Oil,* 197 W. Va. 55, 57, 475 S.E.2d 55, 57 (1996). *See also Bison Interests, LLC v. Antero Res. Corp.,* 2020 W. Va. Lexis 8426 (19-0527) at *22 n.13, finding in pertinent part that failure to appeal an order does not render it 'non-final.' *See also* Horizon 00025.

[11] Several of the issues raised in Petitioner's Brief arise wholly from prior litigations and did not appear even by reference in this matter. *See, e.g.,* Petitioner's Brief at 4, referencing the Trust Indenture. Accord.

questioned and therefore never open to modification, as follows. The issue of the saliency of the 1996 Agreement and/or the August 31, 2017, Order that construed same were never litigated below.[12] Therefore, even beyond the collateral attack issue, Petitioner is precluded by West Virginia law from raising non-jurisdictional issues for the first time upon appeal.[13]

In Petitioner's Brief,[14] Horizon asserts that the Circuit Court of Marion County, Business Court Division (Young, J.), committed error in relying upon AMBIT's interpretation of an order entered by the Circuit Court of Ohio County, Business Court Division, on August 31, 2017, in a companion suit involving *inter alia* Horizon and AMBIT, appearing before Honorable James H. Young, Jr., sitting as the Circuit Court of Ohio County, Business Court Division, in Civil Action No. 13-C-196 (Young, J.). Several key facts need to be recognized at the outset in addressing Horizon's allegations relative to the August 2017 Order. First, as is evident from the Order itself, the Circuit Court of Ohio County, Business Court Division, drafted its own order without input from any party/counsel and entered it on August 31, 2017, after a hearing held on August 22, 2017.[15] Therefore, as the author of the Order, the Court is the one in the best position to know, understand and apply its rulings accurately and appropriately.[16]

Am. Bituminous Power Partners, L.P. v. Horizon Ventures of W. Virginia, Inc., No. 14-0446, 2015 WL 2261649, at *1 (W. Va. May 13, 2015). Additionally, Petitioner's footnotes concede that some of these issues were addressed and resolved as part of a United States District Court action arising from 1996. *See* Petitioner's Brief at 5.

[12] Ohio County Circuit Court, Business Court Division, Civil Action No. 13-C-196 at Order (August 31, 2017) (Young, J) [referenced in Petitioner's Brief conversely as the "2013 opinion" and the "2015 Order"].

[13] *Tri-State Petroleum Corp. v. Coyne,* 240 W. Va. 542, 556, 814 S.E.2d 205, 220 (2018), *quoting Whitlow v. Board of Education,* 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993); Syl. pt. 1, 2, *Wang-Yu Lin v. Shin YiLin,* 224 W. Va. 620, 687 S.E.2d 403 (2009).

[14] Petitioner's Brief at 16.

[15] Ohio County Circuit Court, Business Court Division, Civil Action No. 13-C-196 at Order (August 31, 2017) (Young, J).

[16] *See, e.g., JTH Tax, Inc. v. H&R Block,* 359 F.3d 699, 705 (4th Cir. 2004), finding that "We review

To the extent that Horizon challenges the meaning/significance of the August 2017 Order, even attempting to relitigate its terms here, it bears noting that Horizon never questioned, moved to alter/amend, appealed, or otherwise challenged the August 2017 Order. In that Order, the Judge Young sitting as the Circuit Court of Ohio County, Business Court Division, identified as one of the pending issues between the parties whether the 1996 [settlement] Agreement was intended to operate prospectively[17] and found that, pursuant to paragraph 14 of the Agreement, the Amended and Restated Lease controls rent payments.[18] Horizon now seeks to enforce provisions that were outside those found extant by the Court in 2017,[19] yet West Virginia law on this point is clear: Horizon, "having failed to appeal the final judgment of the circuit court [in Civil Action 13-C-196] has launched a collateral attack on a final judgment . . . [which] collateral attack is prohibited."[20] Failure to appeal an order does not render it 'non-final.'[21] West Virginia law mandates, then, that the Court and the litigants avoid the siren song of revisiting past litigations and focus instead on the issues rightfully, lawfully before this Court, to the extent that Horizon has raised same.

While both parties and the Circuit Court rely upon that Order, both AMBIT and the Court below recognize it for what it is: a final order, a closed door, a capstone event relative to key

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a district court's grant or denial of a civil contempt motion for abuse of discretion. Id. When a district court's decision is based on an interpretation of its own order, our review is even more deferential because district courts are in the best position to interpret their own orders. See *Vaughns v. Bd. of Educ., 758 F.2d 983, 989 (4th Cir. 1985)*; see also *Anderson v. Stephens*, 875 F.2d 76, 80 n.8 (4th Cir. 1989) ("We are, of course, mindful of the inherent deference due a district court when it construes its own order.")."

[17] Ohio County Circuit Court, Business Court Division, Civil Action No. 13-C-196 at Order (August 31, 2017) (Young, J) at 4.

[18] Ohio County Circuit Court, Business Court Division, Civil Action No. 13-C-196 at Order (August 31, 2017) (Young, J) at 9, 10, also identifying paragraphs 4, 5 in the Agreement as extant.

[19] Petitioner's Brief at 4ff, addressing the Trust Indenture and its 'waterfall' of payments, the admissions in the Agreement to Resolve Pending Litigation (1996 Agreement), subordination of Senior Debt.

[20] *Hustead v. Ashland Oil,* 197 W. Va. 55, 57, 475 S.E.2d 55, 57 (1996). *See also Bison Interests, LLC v. Antero Res. Corp.,* 2020 W. Va. Lexis 8426 (19-0527) at *22 n.13.

[21] *Id.*

portions of a prior suit, the end of issues litigated ultimately for five years between these parties. Horizon is improperly revisiting that and other adverse rulings over the years. Indeed, Horizon even suggests that, if this Honorable Court had not reversed the summary judgment it obtained in 2013 before Hon. Martin J. Gaughan, then we would not be before the Court today.[22] West Virginia law precludes that practice, and Respondent urges this Court to enforce that prohibition here.

To be very clear, all of Horizon's arguments to the Agreement to Resolve Pending Litigation (the 1996 Agreement) have already been litigated in a separate civil action to conclusion and addressed in the unappealed, unchallenged final Order (Aug. 31, 2017) (Young, J.). The Circuit Court of Marion County, Business Court Division, applied prior rulings here on some issues,[23] but it is disingenuous and improper for Horizon to challenge rulings from prior litigations that were never challenged, never appealed and that are final, pursuant to West Virginia law. This includes by example only Horizon's arguments to admissions within provisions in the 1996 Agreement that were found subsumed by the Lease Agreement. This includes by example only the references in Petitioner's Brief to the Trust Indenture, the waterfall, the prior lease agreements. These issues were addressed in the August 2017 Order, which was not litigated below and, therefore, is not rightfully before this Court. Therefore, as a matter of West Virginia law, these

[22] Petitioner's Brief at 7, stating that "Horizon was initially granted summary judgment on its declaratory judgment and breach of contract claims. *Am. Bituminous Power Partners, L.P. v. Horizon Ventures of W. Virginia, Inc.*, No. 14-0446, 2015 WL 2261649, at *1 (W. Va. May 13, 2015). AMBIT appealed to this Court, which reversed the lower court, finding summary judgment was inappropriate and remanded the case, with instructions that it be transferred to the Business Court Division. *Id* at *6." At all times at issue, Horizon has been represented by counsel, who were fully engaged in their defense. At the time of the judgment order, Horizon was represented by Frankovitch, Anetakis, Colantonio & Simon. With the transfer to Business Court, Horizon retained Gregory H. Schillace to represent it, which he did from 2014 until his departure in fall 2020.

[23] Horizon 01125 at 4-8, finding the admissions irrelevant here and finding that fuel decisions are governed by the Lease Agreement.

arguments may not be addressed here – first, as they challenge final law from another litigation (which law was not challenged in that litigation) and because they were not addressed before the Court in Civil Action 18-C-130.[24]

Horizon further has alleged that AMBIT provided the Court with the law and facts underlying its decisions in this case, all of which was improper and incorrect.[25] However, the pleadings below demonstrate that through proper pleadings and motions practice, AMBIT presented authority from this jurisdiction and at least one other relative to contractual grants of discretion, specifically identifying the parameters of 'reasonable judgment.' While the cases were drawn from a number of disciplines and at least one other jurisdiction, AMBIT identified those variables clearly. For instance, at least one the cases was from a strictly analogous field. Through motions practice, AMBIT provided the Circuit Court with this Court's decision in *Krypton Coal Corp. v. Golden Oak Mining Co.*, 181 W. Va. 403, 383 S.E.2d 37 (1989), expressly outlining the facts including what Krypton Coal alleged was a contractual grant of discretion to determine whether merchantable coal remained to be mined. AMBIT expressly referenced the Court's determinant -- whether the mining company employed its discretion in good faith and had used its contracted-for discretion "arbitrarily or capriciously."[8]

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[24] Further, of note, to clarify, whereas Horizon is still arguing whether Local Fuel remains at the site, the determinant is not Local Fuel, but usable Local Fuel: "usable waste coal material on the demised premises." Amended and Restated Lease Agreement at 166. *See also* Renewed Motion for Summary Judgment at 16ff.

[25] "Comments by counsel must be directed to the strength of the evidence, and not amount to an ad hominem attack on opposing counsel for being part of a purported scheme to mislead. . . . ('[A]d hominem attacks on one's opposing counsel are anathema to the profession of lawyering') . . . "[A]ttorneys must 'confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence.'" *R.J. Reynolds Tobacco v. Gafney,* 188 So.3d 53, 58-59 (Fla. 2016) (internal citations omitted). "Trying to win an argument by calling your opponent names ('Jane, you ignorant etcetera') only shows the paucity of your own reasoning." *Huntington Beach City Council v. Superior Court,* 94 Cal. App. 4th 1417, 1430 (2002).

AMBIT's submissions to the Court also included guidance from other disciplines, including trusts, wills and estates. In citing *Pollock v. Phillips,* 186 W. Va. 99. 101, 411 S.E.2d 242, 244 (1991), AMBIT described the case as "determining whether a trustee used reasonable judgment *vis a vis* duty under the trust."[26] AMBIT provided the Business Court with the list of five circumstances that may be relevant in determining reasonable judgment per *Pollock*, leaving the quote complete with the original nomenclature of "trust" and "trustee":

> (1)the extent of discretion intended to be conferred upon the trustee by the terms of the trust; (2) the existence or nonexistence, the definiteness or indefiniteness, of an internal standard by which the reasonableness of the trustee's conduct can be judged; (3) the circumstances surrounding the exercise of the power; (4) the motives of the trustee in exercising or refraining from exercising the power; (5) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.[27]

AMBIT also provided the Court below with other authority relative to contractual grants of discretion and 'arbitrary and capricious.' By example, in its filings with the Circuit Court, AMBIT cited *Bender v. Alderson-Broaddus College*, 212 W.Va. 502, 507, 575 S.E.2d 112, 117 (2002) (citing *State ex rel Eads v. Duncil*, 196 W.Va. 604, 614 (1996)), in which this Court held that "an action is 'arbitrary and capricious' when it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." AMBIT disclosed and analyzed the facts in *Bender*, including the parties, the 'contract,' and the discretion at issue: changing the academic requirements for graduation.[28]

Through that same motions practice, AMBIT also relied upon this Court's guidance in *Gomez v. Kanawha County Comm'n,* 237 W. Va. 451, 787 S.E.2d 904 (2016) and *In re Queen,* 196 W. Va. 442, 473 S.E.2d 483 (1996) in presenting analogously the factors this Court has

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[26] Horizon 00740.
[27] Horizon 00740.
[28] Horizon 00174ff.

identified for analyzing and determining whether the use of discretion has been arbitrary and capricious. AMBIT relied upon the same authorities in asserting that 'arbitrary and capricious' is a legal determination for the Circuit Court. Citing as well beyond this jurisdiction, AMBIT noted that "arbitrary and capricious" has been defined to include *inter alia* whether the decisionmaker assigned the proper weight to the necessary decisional factors. *Banknote Corp. of Am., Inc., v. United States,* 365 F.3d 1345, 1357-58 (2004). AMBIT noted that the *Banknote* Court further held that the decision made pursuant to a grant of discretion "must be upheld unless it was 'clear error' or not 'rational'." *Id.* (internal citations omitted).

In sum, AMBIT provided both the Court and Horizon with the full complement of authorities available to it relative to contractual grants of discretion. Horizon had full and fair opportunity to oppose the bases and to counter the arguments. Finally, the fact that Horizon's arguments were unsuccessful or misguided or non-existent does not mean and should not suggest or imply that the Court was misled or confused or misapprehended the issues. Petitioner should direct its arguments to the strength of the evidence, if any, relative to its position on the contractual grant of authority and not to any purported scheme to mislead.

In contravention of West Virginia law, Horizon invites this Court to consider non-jurisdictional issues that Petitioner failed to raise below; invites this Court to consider tales of intrigue whereby the Circuit Court of Marion County, Business Court Division, has been misled relative to its own rulings, that is, an order that the Court itself drafted – in a different litigation (which order was never appealed or otherwise challenged); and invites this Court to consider decades of discord between landlord and tenant, the vast majority of which is unrelated and irrelevant to the determinations before this Court and, per West Virginia law, inadmissible for the

purposes intended. Respondent urges this Court to uphold the Circuit Court's reasoned analysis of the complex and enduring issues between this Landlord and Tenant relative to the contractual grant of discretion, the true issue behind the dispositive motion.

Horizon has argued that the Amended and Restated Lease Agreement at Section 6a references a consulting engineer to consider operating reasons relative to fuel selection. Horizon imprecisely equates the engineer to an arbitration provision that was never enforced. Of note, the issues between the parties were mediated repeatedly as part of Business Court protocols and otherwise. Additionally, the record reflects and Horizon admits that AMBIT indeed did attempt to activate the consulting engineer provisions, which efforts ended unsuccessfully. The provision is silent on how to resolve disputes relative to selecting the engineer and as to the costs associated with the engineer. Regardless, however, the consulting engineer's review must by logical necessity be limited to weighing 'arbitrary and capricious' or the contractual grant of discretion has no value whatsoever. And, as the Circuit Court recognized, the bar must be set exceedingly high as to what qualifies as arbitrary or capricious. Landlord and Tenant do disagree about fuel usage, potentially because Landlord's rent payment varies significantly with the choice. If the consulting engineer provision could be activated each time Landlord challenged Tenant's selection on more than 'arbitrary or capricious,' then each fuel decision could result in review, and the discretion AMBIT negotiated and paid for would be meaningless, worthless. Also key in this determination, however, is that Horizon never made these issues actionable before the Court below, such that their consideration here is outside West Virginia law and improper. That is, Petitioner is precluded by West Virginia law from raising non-jurisdictional issues for the first time at appeal.[29] Beyond all

[29] *Tri-State Petroleum Corp. v. Coyne,* 240 W. Va. 542, 556, 814 S.E.2d 205, 220 (2018), *quoting Whitlow v. Board of Education,* 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993); Syl. pt. 1, 2, *Wang-Yu*

of that, however, Horizon retained its own consulting engineer in defense of its claim, Donald J. Koza, PE, who was unable to identify a single instance of arbitrary or capricious behaviors so as to help Horizon survive summary disposition.

Horizon and AMBIT have litigated the Amended and Restated Lease Agreement (1989), on more than one occasion, and more than one of those litigations have found their way to this Court. However, repeated and prolonged litigation between the same parties runs the recognized risk of varying outcomes over time, absent precautions such as continuity in the judicial officer at the helm and strong use of *res judicata,*[30] both of which have been operable here, until Petitioner's current attempt to re-litigate issues back to 1996. As this Court has recently held,

> """[a]n adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata.*" Point 1, Syllabus, *Sayre's Adm'r v. Harpold, 33 W.Va. 553 [11 S.E. 16].*' Syllabus Point 1, *In re Estate of McIntosh, 144 W.Va. 583, 109 S.E.2d 153 (1959).*" Syl. Pt. 1, *Conley v. Spillers, 171 W. Va. 584, 301 S.E.2d 216 (1983).*

Syl. pt. 2, *Bison Interests, LLC, v. Antero Resources Corp.,* 2020 W. Va. Lexis (Docket No. 19-0527) (November 10, 2020). "The doctrine of res judicata reflects the refusal of the law to tolerate a multiplicity of litigation.'" *Id.* at *26, quoting *Franklin Collection Serv., Inc., v. Stewart,* 863 So.2d 925, 929 (Miss. 2003).[31]

Lin v. Shin YiLin, 224 W. Va. 620, 687 S.E.2d 403 (2009).

[30] *See, e.g., Merial, Inc. v. Sergeants Pet Care Prods.,* 806 Fed. Appx. 398, 405 (6th Cir. 2020).

[31] Horizon expressly runs afoul of judicial estoppel as well, given that its Counterclaim references and seeks rent at the rate of 2.5 percent of gross revenues, while for the first time in this litigation, Petitioner's Brief seeks 3 percent. "Judicial estoppel precisely prohibits gamesmanship. The policies underlying the doctrine include precluding litigants from playing fast and loose with the courts, and prohibiting parties

For all of the reasons set forth herein, the Circuit Court of Marion County, Business Court Division's consideration and granting of AMBIT's Renewed Motion for Summary Judgment must be upheld as a reflection of West Virginia law and of the full and fair discovery and motions practice conducted at length, all as overseen and ruled upon by Honorable James H. Young, Jr., below, who has considered these issues and worked with these parties across more than one litigation since 2014.

VI. SUMMARY OF RESPONSE.

The Circuit Court of Marion County, Business Court Division, granted AMBIT's renewed motion for summary judgment as a matter of law on the basis that, in response to AMBIT's dispositive motion, Horizon failed to raise any evidence whatsoever upon which a reasonable mind could find that AMBIT used its contractual grant of discretion arbitrarily or capriciously. Far from weighing the evidence or taking evidentiary issues from a jury, the Circuit Court found as a matter of law that no rational trier of fact could find that there was arbitrary or capricious action by AMBIT. Far from reversing and contradicting its positions, the Circuit Court worked with the parties on the remaining issues, allowed for discussion at a hearing before the Court in January, and gave Horizon months (January to July) to assemble its evidence. Yet, at summary disposition, the Court found as a matter of law that no rational trier of fact could find that AMBIT's actions were arbitrary or capricious. Specifically, "[t]he Court [found] that the Tenant's assertions **are undisputed** in the pleadings before the Court at this time." (emphasis added).

In its presiding over Horizon and AMBIT's litigations since 2014, the Circuit Court has

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from deliberately changing positions according to the exigencies of the moment." *Bison Interests, LLC, v. Antero Resources Corp.*, 2020 W. Va. Lexis (Docket No. 19-0527) (November 10, 2020) at *34 (internal citations omitted).

ruled on a number of issues based upon West Virginia law, the vast majority of which issues are final at this time and, as a matter of law, must remain final, to be applied by the Court similarly to any other West Virginia law. When a court's decision is based on an interpretation of its own prior order in another matter, reviewing courts have found that the lower courts are in the best position to interpret their own orders.

The Lease Agreement controls fuel issues and provides AMBIT a grant of discretion to use its reasonable judgment in fuel selection limited from arbitrary and/or capricious behaviors. The Lease Agreement includes as well provisions that suggest a consulting engineer to provide insights into fuel disputes. However, that engineer's input must be limited to identifying 'arbitrary and/or capricious' behaviors in order to maintain any value in AMBIT's discretion. Beyond that, Horizon failed to address the issue below, instead retaining its own consulting engineer Donald Koza, PE, who failed to identify any arbitrary or capricious behaviors so as to help Horizon survive summary disposition.

Any effort to make every litigation about every litigation over a thirty-year period is antithetical to West Virginia law, as is addressing non-jurisdictional issues for the first time upon appeal. Both are precluded. Arguments to intrigue and efforts to mislead are unfounded, unsupported, and do a disservice to the Circuit Court that has worked with the same parties over multiple litigations over now seven years. The law directs counsel to focus on the law and the evidence to prove its case.

AMBIT appears before the Court in support of the summary disposition of its claims pursuant to the Circuit Court's recognition of AMBIT's contractual grant of discretion from Horizon.

VI. RESPONSE TO PETITIONER'S STATEMENT REGARDING ORAL ARGUMENT.

Respondent AMBIT questions whether this matter is suitable for oral argument in that the assignments of error either arise from unappealed final orders in a prior litigation, arise from arguments not raised below, or constitute attacks upon the integrity of the process. Whereas the appellate rules allow for oral argument of cases with assignments of error relative to the application of established law or matters of first impression, the instant appeal fails to raise true issues relative to the underlying litigation, transgresses into maligning the process generally, and attempts to re-litigate what Petitioner failed to appeal from a prior litigation. Argument will not elucidate the issues any further than the pleadings themselves. AMBIT will defer to the Court's judgment on this issue.

VII. RESPONSE TO PETITIONER'S ARGUMENT.

A. Introduction.

In order to aid this Honorable Court in understanding the issues more clearly, AMBIT provides the following chart, drawn from a parallel appeal:

DATE	EVENT
May 28, 1996	Agreement to Resolve Pending Litigation Between American Bituminous Power Partners, LP, and Horizon Ventures of West Virginia, Inc. (a settlement agreement addressed in Civil Action No. 13-C-196 and whose applicability here was largely resolved by the August 31, 2017, Order).
2003	Usable waste coal (Local Fuel) exhausted on the demised premises, such that the remaining Local Fuel is unusable to AMBIT in generating power.
June 17, 2013	Horizon files suit against AMBIT relative to subordinated rent. Ohio County Civil Action No. 13-C-196.
July 29, 2013	AMBIT files its crossclaim against Horizon, seeking repayment of overpaid rent.
August 31, 2017	Court rules that the Amended and Restated Lease controls rate of rent, not the 1996 Agreement. Horizon never challenged or appealed

	this Order.
August 31, 2017	Court dismisses AMBIT's overpaid rent claim without prejudice
May 29, 2018	Court enters final judgment order in Ohio County Civil Action No. 13-C-196.
August 27, 2018	AMBIT refiles its overpaid rent claim as Marion County Circuit Court, Business Court Division, Civil Action No. 18-C-130
December 2, 2019	Pursuant to Court's scheduling order, the parties file cross motions for summary judgment

AMBIT owns and operates the Grant Town Power Plant in Marion County, West Virginia, which Plant was constructed using $150 million in Solid Waste Disposal Revenue Bonds issued by the Marion County Commission. The contractual relationship between Horizon and AMBIT began on or about November 29, 1989, when Horizon leased certain parcels of land to AMBIT for the construction of the Grant Town Power Plant, which parcels included waste coal and waste coal fines, referenced in the lease as "Local Fuel."[32] Pursuant to the Amended and Restated Lease Agreement ("Lease" or "Lease Agreement"), the amount of the monthly lease payment is a percentage of gross revenue received *inter alia* from power generation, with that percentage varying with whether AMBIT used Local or Foreign Fuel to generate the power and with the reasoning behind the fuel selection. Specifically, when AMBIT in its reasonable judgment determines that it is necessary to use Foreign Fuel for Operating Reasons (as defined in the Lease), it pays a lower percentage of gross revenue as rent in recognition of the costs incurred in purchasing, transportation and handling. Relative to fuel selection, the Lease gives AMBIT a contractual grant of discretion, such that the determinant expressly is AMBIT's reasonable judgment.[33] Specifically, once again, if AMBIT **in its reasonable judgment** decides it is

[32] Horizon 00726.

[33] Horizon 00740; Syl. pt. 1, *Art's Flower Shop v. Chesapeake & Potomac Tel. Co.,* 186 W. Va. 613, 413

necessary to use Foreign Fuel for any one of six Operating Reasons, then the rent rate of 1 percent is applied to gross revenues arising from power generated using that Foreign Fuel. The higher percent rent rate, 2.5 percent, applies to power generated using Foreign Fuel only when AMBIT uses Foreign Fuel arbitrarily and capriciously for Non-Operating Reasons as defined in the Lease Agreement. Pursuant to West Virginia law, that "reasonable judgment" constitutes a contractual grant of discretion, such that AMBIT's discretion prevails unless it acts arbitrarily and capriciously with that discretion. In support of that assertion, the Circuit Court relied upon West Virginia law in finding as follows:[34]

> 24. The West Virginia Supreme Court has recognized that the interpretation and enforcement of contracts is within the province of this Court's authority, further finding it appropriate that the Court, where indicated, uphold and enforce contract provisions as a matter of law. *See* Syl. pt. 1, *Art's Flower Shop v. Chesapeake & Potomac Tel. Co.,* 186 W. Va. 613, 413 S.E.2d 870 (1991).
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> 25. West Virginia's Supreme Court in *Krypton Coal Corp. v. Golden Oak Mining Co.,* identified as the key determinations whether the company used its contracted-for discretion "arbitrarily or capriciously,"[35] both of which the Supreme Court further found are questions of law for this Court.[36] Pursuant to *Krypton Coal*, the determination before this Court is law in the context of facts in contract construction – that is, is there any evidence that AMBIT did not truly believe that the use Foreign Fuel was required for Operating Reasons.
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> 26. Further, in terms of standards of review, West Virginia's Supreme Court has held that the 'arbitrary and capricious' standard is a deferential one, which presumes actions are valid "as long as the decision is supported by substantial evidence or a rational basis." Syl. pt. 3, *In re Queen,* 196 W. Va. 442, 473 S.E.2dd 483 (1996). Specifically, the Court further defined the standard as whether the defendant misapplied the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence or offered an implausible explanation that could not be ascribed to a difference in viewpoint. *In re Queen,* 196 W. Va. at 446, 473 S.E.2d at 487.

S.E.2d 870 (1991).

[34] Horizon 02072ff.

[35] Horizon 02072ff., citing *Krypton Coal,* 181 W. Va. 403, 409 n.2, 383 S.E.2d 37, 41 n.2 (1989).

[36] Horizon 02072ff., citing *See* Syl. pt. 1, *Art's Flower Shop v. Chesapeake & Potomac Tel. Co.,* 186 W. Va. 613, 413 S.E.2d 870 (1991).

27. Per West Virginia's Supreme Court, "an action is 'arbitrary and capricious' when it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Bender v. Alderson-Broaddus College*, 212 W.Va. 502, 507 (2002) (citing *State ex rel Eads v. Duncil*, 196 W.Va. 604, 614 (1996)).

28. This Court noted as well that other jurisdictions have defined "arbitrary and capricious" to include *inter alia* assigning proper weight to the necessary decisional factors. *Banknote Corp. of Am., Inc., v. United States,* 365 F.3d 1345, 1357-58 (2004.) Found the *Banknote* Court, the discretionary decision "must be upheld unless it was 'clear error' or not 'rational'.'" *Id., quoting Gillis*, 4 F.3d at 1141 (quoting *Shiffler v. Equitable Life Assurance Soc'y*, 838 F.2d 78, 83 (3d Cir. 1988)).

29. This Court acknowledged that other jurisdictions have refused to uphold discretionary decisions when the decisionmaker "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence . . ., or is so implausible that it could not be ascribed to a difference in view or the product of . . . expertise." *Matter of Hilbertz v. City of New York,* 64 Misc. 3d 697, 712, 98 N.Y.S.3d 776, 790 (2019).

30. In reaching its decision in this matter, this Court noted that Black's Law Dictionary (11th ed. 2019) defines 'arbitrary' to include "Depending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures."

31. Further, the Court noted that Black's Law Dictionary (11th ed. 2019) defines 'capricious' to include (as relates to a person -- in this instance, a business entity) "characterized by or guided by unpredictable or impulsive behavior; likely to change one's mind suddenly or to behave in unexpected ways."

32. Pursuant to West Virginia law, exercise of discretion is not open to any objective test of reasonableness, not open to comparison against an industry standard, not even subject to an assessment of 'right' or 'wrong' in its judgment.[37]

Using these bases for its findings relative to contractual grant of discretion, which were identified in motions practice on the renewed motion, the Circuit Court provided Horizon the forum to present any evidence it had of AMBIT's use of its discretion in an arbitrary and/or capricious manner. Horizon produced no such evidence. As demonstrated repeatedly in Petitioner's Brief,

[37] Horizon 02072ff, citing, *by analogy, Schroeder v. Adkins,* 149 W.Va.400, 141 S.E.2d 352 (1965), where 'reasonably prudent' is not synonymous with perfection.

Horizon is stuck in several past litigations and has failed to advance its thinking and its arguments to the current litigation. Of particular note, Horizon alleges that "[t]he lower court erred in **suddenly, and confusingly, disregarding the 1996 Settlement Agreement between the parties** and subsequently accepting AMBIT's 'arbitrary and capricious' standard in pushing this case to resolution" (emphasis added).[38] Of note, even assuming the issue were viable (which it is not), Horizon did not raise this issue below,[39] such that its interest now, raised for the first time, in addressing a final order from a previous litigation, which order was never challenged or appealed, nor its application addressed in this litigation violates legal precepts from *res judicata* to raising non-jurisdictional issues for the first time on appeal to failing to appeal a final judgment of the circuit court [in Civil Action 13-C-196] by launching a collateral attack – all of which are precluded by West Virginia law. Whereas a considerable portion of Petitioner's Brief is dedicated to its efforts to resuscitate that issue, to revisit the last litigation that it failed to challenge in any way, finally West Virginia law prohibits collateral attack of an order that a litigant failed to challenge properly. Whereas Horizon has dedicated no less than ten pages of its Argument to the improper collateral attack,[40] finally, the litigation of the 1996 Agreement ended in May 2018, without Horizon's appealing any of the rulings. Whereas ***now,*** too late, in the wrong litigation, in

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[38] Petitioner's Brief at 16.

[39] Whereas Horizon alleges that it explained these issues to the lower court numerous times (Petitioner's Brief at 19), this express issues was never before the Court. For example, Horizon raised the admissions, which the Court identified as being from the last litigation and on the wrong issue in any event. Horizon 01124-25. Horizon never litigated the 1996 Agreement in Civil Action 18-C-130. AMBIT addressed the last litigation as *res judicata* and cited paragraph 14, which the Court did as well. Horizon 01129-30. Because it was not raised below, West Virginia precludes its inclusion here. That is, Petitioner is precluded by West Virginia law from raising non-jurisdictional issues for the first time at appeal. *Tri-State Petroleum Corp. v. Coyne,* 240 W. Va. 542, 556, 814 S.E.2d 205, 220 (2018), *quoting Whitlow v. Board of Education,* 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993); Syl. pt. 1, 2, *Wang-Yu Lin v. Shin YiLin,* 224 W. Va. 620, 687 S.E.2d 403 (2009).

[40] Petitioner's Brief at 16-26.

direct derogation of West Virginia law, Horizon attempts to revisit the saliency of the 1996 Agreement, the propriety of the August 2017 Order – both of which were the centerpiece of Circuit Court of Ohio County, Business Court Division, Civil Action No. 13-C-196, nothing changes the fact that Horizon never questioned, moved to alter/amend, appealed, or otherwise challenged the Order other than, in violation of West Virginia law, attempting to relitigate its terms here. West Virginia law on this point is clear: Horizon, "having failed to appeal the final judgment of the circuit court [in Civil Action 13-C-196] has launched a collateral attack on a final judgment in a civil action [which] is prohibited."[41] Failure to appeal an order does not render it 'non-final.'[42]

In its filings with this Court, Petitioner addresses alleged admissions by AMBIT that arise from the 1996 [settlement] Agreement, largely struck down by the August 2017 Order. However, pointedly, the instant Circuit Court advised the parties as follows:

> Just let me make sure so the record's clear, my findings then were not based on -- I was not determining rents then. My sole issue was determining the settlement agreement of '96, is what you're speaking of, and basically what the Court found was that the lease applied except for those provisions as contained in Paragraph 14.[43]

In that Order, the Circuit Court expressly held in pertinent part as follows:

> 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.[44]

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[41] *Hustead v. Ashland Oil,* 197 W. Va. 55, 57, 475 S.E.2d 55, 57 (1996). *See also Bison Interests, LLC v. Antero Res. Corp.,* 2020 W. Va. Lexis 8426 (19-0527) at *22 n.13.

[42] *Id.*

[43] Horizon 01132.

[44] Ohio County Circuit Court, Business Court Division, Civil Action No. 13-C-196 at Order (August 31, 2017) (Young, J).

It is difficult to demonstrate this any more clearly than the Circuit Court has accomplished in its final order from August 2017 and in its clarification from the bench (both above): these issues have been fully, finally litigated in an unchallenged final order in a prior litigation. Any issues relative to the 1996 Agreement were resolved when that document was litigated in Civil Action No. 13-C-196, resulting in final orders that Horizon never challenged. The issues relative to the 1996 Agreement were resolved in the August 31, 2017, Order, which Horizon never challenged in any way: no motion to alter or amend, no Rule 59 or 60 motion, no appeal. It is a final order, in a litigation that ended on May 31, 2018.[45]

Therefore, as a matter of law, the Amended and Restated Lease Agreement governs fuel and rent determinations. Indeed, the contractual grant of discretion at the heart of fuel selection appears in Section 6a of the Lease Agreement: "As used herein, the term 'Operating Reason' means that Tenant, in its reasonable judgment, has determined that a percentage (partial or total) if required for any one or more of the following reasons[.]" It is the phrase "in its reasonable judgment" that provides AMBIT discretion to determine when Foreign Fuel is necessary except when it behaves arbitrarily and capriciously in making that determination.

B. *De Novo* Standard of Review.

Respondent agrees that the standard for this Court's review of a circuit court's entry of summary judgment is *de novo.* Syl. pt. 1, *Painter v. Peavy,* 192 W. Va. 189, 451 S.E.2d 755 (1994).

C. Response to Petitioner's Assignment of Error Number 1: The Circuit Court of Marion County, Business Court Division, correctly granted summary judgment to AMBIT as a matter of law on the basis that Horizon failed to adduce any evidence whatsoever of arbitrary or capricious use by AMBIT of its contractual grant of discretion

[45] Ohio County Circuit Court, Business Court Division, Civil Action No. 13-C-196 at Order Denying AMBIT's Motion to Alter, Amend, Vacate (5.31.18).

Over the six-plus years that West Virginia's Business Court Division has guided Horizon and AMBIT through litigation, it has determined unequivocally, literally undisputedly that, as a matter of law, Section 6 of the Amended and Restated Lease Agreement governs the calculation of rent.[46] Pursuant to Section 6 of the Lease Agreement as construed by the Business Court Division in August 2017, then, the amount of the monthly lease payment is a percentage of gross revenue received by AMBIT, with that percentage varying depending on whether Local or Foreign Fuel was used and the reason for the use of Foreign Fuel.[47] Specifically, when AMBIT uses Foreign Fuel for Non-Operating Reasons, it pays a higher percent of gross revenue as rent, specifically, 2.5 percent, in recognition of the fuel savings.[48] If AMBIT in its reasonable judgment decides to use Foreign Fuel for any one of six Operating Reasons, then the lower rent rate is applied to gross revenues arising from power generated using that Foreign Fuel.[49]

Section 6 of the Lease Agreement, then, recognizes that both Operating and Non-Operating Reasons may influence fuel selection, but, by the express terms of the Lease itself, the determination as to which fuel is necessary and the rationale behind that selection is left to AMBIT's reasonable judgment. This express statement of the parties' willingness to be bound by AMBIT's determination as to the suitability of fuels was negotiated and contracted for on or before November 28, 1989. This contractual grant of discretion is different and apart from the 'reasonableness' standards that Horizon placed before this Court.[50] That is, by the express terms

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[46] Ohio County Circuit Court, Business Court Division, Civil Action No. 13-C-196 at Order (August 31, 2017).
[47] Horizon 00743.
[48] Horizon 00743.
[49] Horizon 00743.
[50] Specifically, Horizon cites sections on promissory estoppel/enforcement of promises (§90), unjustified reliance (§172), satisfactory performance (citing a 'reasonable person' standard) (§228), discharge by frustration (§ 263), an open price term in a *sales* contract (§2-305), output/requests/exclusive dealings in a

of *Krypton Coal, Bender, Gomez, In re Queen,* discretion is termed 'reasonable judgment,' which is not the same as the 'reasonable person' standard. Nonetheless, the fact remains as recognized by the Business Court Division, through the Lease, Horizon contractually granted to AMBIT the right to use its reasonable judgment in determining Operating Reasons: a contractual grant of discretion.

Horizon has referenced the consulting engineer provision in the Amended and Restated Lease Agreement at Section 6 and has admitted that AMBIT attempted to activate that mechanism prior to the designation of experts in the matter below.[51] Specifically, as reflected in its Designation of Potential Expert Witnesses (9.23.19), AMBIT recounted as follows:

> In designating said experts, AMBIT notes correspondence from the Lenders (appended hereto as Exhibit A), sent in compliance with the Amended and Restated Lease Agreement but declining to retain a consulting engineer to whom the parties can submit this "dispute[] between Tenant and Landlord with regard to whether the use of Foreign Fuel is for an Operating Reason or a Non-Operating Reason."[52]
>
> Further in designating said experts, AMBIT notes correspondence sent in compliance with the Amended and Restated Lease Agreement (Section 6(a)) to Horizon (9.17.19), initiating the process of locating "any qualified, competent engineer acceptable to Landlord and Tenant" (Exhibit B). Upon Horizon's response, declining to share engineers acceptable to AMBIT (Exhibit B), plaintiff complies with the Court's Scheduling Order and designates as follows.[53]

As demonstrated in that Disclosure, neither the Lenders nor Horizon participated in the process. Further, the Amended and Restated Lease Agreement is silent on how to proceed given an impasse on that issue, and, of note, Horizon never invoked the provision below nor moved to enforce the provision. Where Petitioner alleges that AMBIT produced only one letter of an effort to work with

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sales contract (§ 2-306), reasonable time in a *sales* contract (§ 2-309) and reasonable time, reasonable grounds in a *sales* contract (§ 2-609).

[51] Horizon 00749.

[52] Horizon 00536.

[53] Horizon 00536.

Horizon, the Lease Agreement does not make this engineer Tenant's responsibility. The record is silent relative to any effort Horizon made to activate this provision. By Horizon's own admission, the "Court directly identified this issue, directly questioning Horizon's counsel."[54] Therefore, AMBIT contacted the lenders, who declined. AMBIT contacted Horizon, who declined AMBIT's selection. And, once again, the Lease Agreement provides no remedy for an impasse between Landlord and Tenant, which are legion, as this Court is aware.

Conversely, even after the Circuit Court raised the issue, Horizon never brought it to motion, never contacted AMBIT at any time to attempt to work on this issue, never referenced it before or after that moment – until this appeal. Horizon designated its own expert and, as demonstrated below and in Petitioner's Brief, provided opinions from that expert relative to fuels. Of note, even Horizon's retained consulting engineer could not identify any arbitrary or capricious decision making or behaviors after review and analysis of the issues, as reflected in the Order Granting AMBIT's Renewed Motion for Summary Judgment. Petitioner is precluded by West Virginia law from raising non-jurisdictional issues for the first time at appeal,[55] and this consulting engineer issue was never before the Circuit Court – and thus was not open to review or consideration. Of note, however, the parties did mediate these issues more than once as part of the Business Court protocols and underwent settlement discussions as part of the January 15, 2020, pretrial. All efforts to reach consensus on any issue failed.

Paramount here, however, is the logical necessity that any consulting engineer cannot review anything beyond whether AMBIT used its contractual grant of discretion arbitrarily or

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[54] Petitioner's Brief at 35.

[55] *Tri-State Petroleum Corp. v. Coyne,* 240 W. Va. 542, 556, 814 S.E.2d 205, 220 (2018), *quoting Whitlow v. Board of Education,* 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993); Syl. pt. 1, 2, *Wang-Yu Lin v. Shin YiLin,* 224 W. Va. 620, 687 S.E.2d 403 (2009).

capriciously without undermining the contractual grant itself. That is, in order for AMBIT's discretion to have value, it cannot be supplanted by the consulting engineer whenever Landlord and Tenant disagree. Instead, the test must be of that discretion alone – so, as a matter of law, looking for arbitrary or capricious behaviors and decisions – and must be a high bar to limit its application. After all, history demonstrates repeated disputes. The remedy must be available only in instances of decisions and practices that are, by example (per *Bender*), unreasonable, without consideration, and in disregard of facts and circumstances of the case.

Beyond Horizon's failure to activate or litigate the consulting engineer provision, Horizon also raises for the first time here its argument that the consulting engineer is an objective standard that undercuts discretion, all per *Krypton Coal.*[56] The consulting engineer is not an 'objective standard' so as to undercut AMBIT's discretion. The consulting engineer is a remedy that provides a 'remedy' that is of limited scope and application – only to consider whether AMBIT exceeded its contractual grant by behaving arbitrarily or capriciously. The determinant for whether Foreign Fuel is necessary for an Operating Reason is AMBIT's reasonable judgment. AMBIT contracted at some considerable expense for that grant of discretion, for the right to exercise its reasonable judgment. Any other reading or understanding of these provisions runs contrary to West Virginia law and also is anathema to operating any business, let alone a power plant, where fuel decisions are made many times a day. The consulting engineer is a remedy that AMBIT investigated with Horizon unsuccessfully. The Lease Agreement is silent as to any remedy for an impasse – and Horizon was aware of the provision, aware of the Court's questioning about the provision, and did absolutely nothing relative to pursuing a joint consulting engineer or enforcing any contractual

[56] Petitioner's Brief at 32.

remedy, even limited as it is to detecting arbitrary or capricious behaviors.

Further, whereas Horizon extrapolates to reasonable person standard generally under the law, each of the cases cited by the Court expressly cites "reasonable judgment" as a term of art relative to discretion, not to be confused with reasonable person (a negligence standard).

In sum, consistent with good motions practice, AMBIT provided both the Court and Horizon with the full complement of authorities available to it relative to contractual grants of discretion. Horizon had full and fair opportunity to oppose the bases and to counter the arguments. Horizon had full and fair opportunity – and at least two reminders – of other contract provisions. Finally, the fact that Horizon's arguments were unsuccessful does not mean and should not suggest or imply that the Court was misled or confused or misapprehended the issues. Finally, the fact that the remedy in the contract was introduced and discarded by Horizon (who never pursued it again) should not suggest or imply that the Court was misled or confused or misapprehended the standard. Petitioner should direct its arguments to the strength of the evidence, if any, relative to the contractual grant of authority, and not to any purported scheme to mislead. Further, Horizon's failure to raise this issue below, to pursue any contractual remedy or any ambiguity in the Lease Agreement precludes it raising it for the first time upon appeal, as a matter of West Virginia law.

D. Response to Petitioner's Assignment of Error Number 2: Once again, the Circuit Court of Marion County, Business Court Division, correctly granted summary judgment to AMBIT, not by weighing evidence as Horizon alleges, but based upon its finding as a matter of law that Horizon had failed to adduce any evidence whatsoever to suggest that AMBIT had used its contractual grant of discretion in an arbitrary or capricious manner.

Horizon has alleged that AMBIT, Svengali-like, provided the Court with the law and facts underlying its decisions in this case, all of which was improper and incorrect.[57] However, the

[57] "Comments by counsel must be directed to the strength of the evidence, and not amount to an ad hominem

pleadings below demonstrate that through proper pleading and motions practice, AMBIT presented authority from this jurisdiction and at least one other relative to contractual grants of discretion, specifically identifying the parameters of 'reasonable judgment.' While the cases were drawn from a number of disciplines and at least one other jurisdiction, AMBIT identified those variables clearly. Through motions practice, AMBIT provided the Circuit Court with this Court's decision in *Krypton Coal Corp. v. Golden Oak Mining Co.,* 181 W. Va. 403, 383 S.E.2d 37 (1989), expressly outlining the facts including what Krypton Coal alleged was a contractual grant of authority to determine whether merchantable coal remained to be mined. AMBIT expressly referenced the Court's determinant -- whether the mining company employed its discretion in good faith or had used its contracted-for discretion "arbitrarily or capriciously."[8]

Further, AMBIT submitted to the Circuit Court guidance from other disciplines, including *Pollock v. Phillips,* 186 W. Va. 99. 101, 411 S.E.2d 242, 244 (1991), and described the case as "determining whether a trustee used reasonable judgment *vis a vis* duty under the trust,"[58] including as well this Court's list of five circumstances that may be relevant in determining reasonable judgment:

> (1)the extent of discretion intended to be conferred upon the trustee by the terms of the trust; (2) the existence or nonexistence, the definiteness or indefiniteness, of an internal standard by which the reasonableness of the trustee's conduct can be judged; (3) the circumstances surrounding the exercise of the power; (4) the motives of the trustee in exercising or refraining from exercising the power; (5) the existence or nonexistence of an

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attack on opposing counsel for being part of a purported scheme to mislead. . . . ('[A]d hominem attacks on one's opposing counsel are anathema to the profession of lawyering') . . . "[A]ttorneys must 'confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence.'" *R.J. Reynolds Tobacco v. Gafney,* 188 So.3d 53, 58-59 (Fla. 2016) (internal citations omitted). "Trying to win an argument by calling your opponent names ('Jane, you ignorant etcetera') only shows the paucity of your own reasoning." *Huntington Beach City Council v. Superior Court,* 94 Cal. App. 4th 1417, 1430 (2002).

[58] Horizon 01191.

interest in the trustee conflicting with that of the beneficiaries.[59]

Also, AMBIT cited *Bender v. Alderson-Broaddus College*, 212 W.Va. 502, 507, 575 S.E.2d 112, 117 (2002) (citing *State ex rel Eads v. Duncil*, 196 W.Va. 604, 614 (1996)), in which this Court held that "an action is 'arbitrary and capricious' when it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." AMBIT analyzed the facts, including the parties, the 'contract,' and the discretion at issue: changing the academic requirements for graduation.[2]

AMBIT also relied in motions practice upon this Court's guidance in *Gomez v. Kanawha County Comm'n,* 237 W. Va. 451, 787 S.E.2d 904 (2016) and *In re Queen,* 196 W. Va. 442, 473 S.E.2d 483 (1996), thereby presenting analogously the factors considered in analyzing whether the use of discretion has been arbitrary and capricious. AMBIT relied upon the same authorities in asserting that 'arbitrary and capricious' is a legal determination for the Circuit Court.

Citing beyond this jurisdiction, AMBIT noted that "arbitrary and capricious" has been defined to include *inter alia* whether the decisionmaker assigned the proper weight to the necessary decisional factors. *Banknote Corp. of Am., Inc., v. United States,* 365 F.3d 1345, 1357-58 (2004). AMBIT noted that the *Banknote* Court further held that the decision made pursuant to a grant of discretion "must be upheld unless it was 'clear error' or not 'rational'."' *Id.* (internal citations omitted).

Whereas Horizon challenges the disciplines from which these cases arise, *Krypton Coal* arises from a similar factual scenario and provides guidance from this Court that is consistent with

[59] *Pollock v. Phillips,* 186 W. Va. 99. 101, 411 S.E.2d 242, 244 (1991), leaving the quote complete with the original nomenclature of "trust" and "trustee."

this Court's guidance from trusts, political subdivisions, education. Whereas Horizon cites Black's Law Dictionary as somehow determinative,[60] it stops short of admitting that the Circuit Court considered and cited those same provisions as well in its order.[61] The Court found that it was expressly the kind of evidence referenced in Black's – unpredictable or impulsive behavior, disregard of fact or procedure – that Horizon failed to adduce. As demonstrated by the record below and its recounting here, the parties litigated for years, completed discovery and then engaged in motions practice. At the end of it all and as a matter of law, Horizon failed to focus on the contractual grant of discretion and failed to identify even a scintilla of evidence that AMBIT acted beyond its rightful bounds. The Circuit Court did not weigh Horizon's evidence. The Circuit Court found that Horizon had adduced no evidence of arbitrary or capricious behaviors and resolved this matter accordingly, as a matter of law.

E. Response to Petitioner's Assignment of Error Number 3: The Circuit Court of Marion County, Business Court Division, Honorable James H. Young, Jr., appropriately relied upon West Virginia law (including his prior rulings) and written and oral argument by counsel for the parties in Marion County Civil Action No. 18-C-130, as Ohio County Civil Action No. 13-C-196 is a final matter, its rulings, judgments enforceable as West Virginia law.

Horizon has alleged that AMBIT mislead the Court with the law and facts underlying its decisions in this case.[62] However, the pleadings below demonstrate that through proper pleadings

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[60] Petitioner's Brief at 30.

[61] Horizon 02074.

[62] "Comments by counsel must be directed to the strength of the evidence, and not amount to an ad hominem attack on opposing counsel for being part of a purported scheme to mislead. . . . ('[A]d hominem attacks on one's opposing counsel are anathema to the profession of lawyering') . . . "[A]ttorneys must 'confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence.'" *R.J. Reynolds Tobacco v. Gafney,* 188 So.3d 53, 58-59 (Fla. 2016) (internal citations omitted). "Trying to win an argument by calling your opponent names ('Jane, you ignorant etcetera') only shows the paucity of your own reasoning." *Huntington Beach City Council v. Superior Court,* 94 Cal. App. 4th 1417, 1430 (2002).

and motions practice, AMBIT presented authority from this jurisdiction and at least one other relative to contractual grants of discretion, specifically identifying the parameters of 'reasonable judgment.' While the cases were drawn from a number of disciplines and at least one other jurisdiction, AMBIT identified those variables clearly. For instance, AMBIT provided the Circuit Court with this Court's decision in *Krypton Coal Corp. v. Golden Oak Mining Co.,* 181 W. Va. 403, 383 S.E.2d 37 (1989), expressly outlining the facts including what Krypton Coal alleged was a contractual grant of authority to determine whether merchantable coal remained to be mined. AMBIT expressly referenced the Court's determinant -- whether the mining company employed its discretion in good faith and had used its contracted-for discretion "arbitrarily or capriciously."[8] Further, AMBIT's submissions to the Court relied upon guidance from other disciplines, including *Pollock v. Phillips,* 186 W. Va. 99. 101, 411 S.E.2d 242, 244 (1991), and described the case as "determining whether a trustee used reasonable judgment *vis a vis* duty under the trust."[63] Also, AMBIT cited in motions practice a variety of other case law relative to contractual grants of discretion and 'arbitrary and capricious.' For further instance, AMBIT cited *Bender v. Alderson-Broaddus College*, 212 W.Va. 502, 507, 575 S.E.2d 112, 117 (2002) (citing *State ex rel Eads v. Duncil*, 196 W.Va. 604, 614 (1996)), in which this Court held that "an action is 'arbitrary and capricious' when it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." AMBIT analyzed the facts, including the parties, the 'contract,' and the discretion at issue: changing the academic requirements for graduation. AMBIT also cited *Gomez v. Kanawha County Comm'n,* 237 W. Va. 451, 787 S.E.2d 904 (2016) and *In re Queen,* 196 W. Va. 442, 473 S.E.2d 483 (1996) in presenting analogously the factors considered in

[63] Horizon 01191.

analyzing whether the use of discretion has been arbitrary and capricious. AMBIT relied upon the same authorities in asserting that 'arbitrary and capricious' is a legal determination for the Circuit Court. Citing beyond this jurisdiction, AMBIT noted that "arbitrary and capricious" has been defined to include *inter alia* whether the decisionmaker assigned the proper weight to the necessary decisional factors. *Banknote Corp. of Am., Inc., v. United States,* 365 F.3d 1345, 1357-58 (2004). AMBIT noted that the *Banknote* Court further held that the decision made pursuant to a grant of discretion "must be upheld unless it was 'clear error' or not 'rational'." *Id.* (internal citations omitted).

In sum, AMBIT provided both the Court and Horizon with the full complement of authorities available to it relative to contractual grants of discretion. Horizon had full and fair opportunity to oppose the bases and to counter the arguments. Finally, the fact that Horizon's arguments were unsuccessful does not mean and should not suggest or imply that the Court was misled or confused or misapprehended the issues. Petitioner should direct its arguments to the strength of the evidence, if any, relative to the contractual grant of authority, and not to any purported scheme to mislead.

The Circuit Court went to considerable lengths to ensure that the parties understood the remaining issues and had a chance to question the Court's reasoning. In the Order Granting AMBIT's Renewed Motion for Summary Judgment, the Circuit Court recounted as follows:

> At the previous pretrial hearing held on January 15, 2020, this Court identified the sole remaining issue between the parties:
>
> 23 I don't consider any -- any evidence that goes to the way of
> 24 they should've designed it differently, they should have done,
> 1 you know, AMBIT should have done anything else differently in
> 2 its design, bad management, negligence, anything of that
> 3 nature. I think this case now is down to the sole issue of is

4 it arbitrary and capricious for AMBIT to use foreign fuel as
5 it relates to the operating reasons. Does anybody disagree
6 with that? I mean, you may not disagree with my rulings, but
7 given the rulings, where we stand now.

* * *

1 And, I mean, I'm going to,
2 you know, letting somebody get on the stand and just talk
3 about how bad AMBIT was at managing this company or that, I
4 don't think that's relevant, I don't think that gets you
5 anywhere. I think -- you know, I take it to be -- this is not
6 a case about were they negligent or somebody misdesigned it,
7 this is what we had on the ground. And to me, it's going to
7 be a pretty high standard to me that they were arbitrary, I
8 mean, as that term is used in the law.

> This sole issue was translated through the Court's Order into "whether AMBIT used its contracted-for independent discretion arbitrarily and capriciously **as that term is used in the law** in using Foreign Fuel from December 2012 to the present."[64]

At the January 14, 2020, motions hearing, the Court further asked, "Does anybody disagree, think I'm off tangent?", to which Horizon responded, "I understand your rulings, Judge," followed by "I understand the Court's rulings, and I think that we can – I think we'll obviously, we'll confine the proof to that, and I think we'll meet the burden. But I understand the narrowing of the issues[.]"[65]

In its Renewed Motion for Summary Judgment, AMBIT relied upon West Virginia law on contractual grants of discretion, as well as support arising from other jurisdictions. Conversely, Horizon raised procedural objections, conceded that the issue was contractual grant of discretion, and finally argued in favor of an objective standard at the heart of the issue, presenting retained expert Donald J. Koza's analysis of industry standards, manufacturer's recommendations, and his

[64] Horizon 02062.
[65] Horizon 01235, 01237.

own ideas of how to manage the Grant Town Plant.[66] Horizon presented no evidence that AMBIT selected fuels arbitrarily or capriciously. The Court found that Horizon had failed to produce **actual evidence** of arbitrary or capricious decision-making and had failed to provide concrete evidence of failure of discretion. *See Crum v. Equity Inns, Inc.*, 685 S.E.2d 219, 227 (W. Va. 2009); *Poweridge Unit Owners Ass'n v. Highland Properties, Ltd.*, 474 S.E.2d 872, 879 (W. Va. 1996). The Court found that Horizon failed to present "'concrete evidence from which a reasonable ... [finder of fact] could return a verdict in ... [its] favor'" or other "'significant probative evidence tending to support'" its defense. *Id.* at 759 (citations omitted).

Conclusion.

The Circuit Court of Marion County, Business Court Division, applied West Virginia law in its determination that Horizon Ventures of West Virginia had failed to adduce any evidence whatsoever that American Bituminous Power Partners, LP, used its contractual grant of discretion arbitrarily or capriciously as those terms are used at law. The Circuit Court's resolution of this matter addressed all of the issues before it and appropriately failed or declined to address those resolved at previous litigations and those the parties failed to place before it. Petitioner's failure to survive summary disposition of its claim is not related to misdeeds or misapprehensions or mistake. Petitioner failed to produce **actual evidence** of arbitrary or capricious decision-making and failed to provide concrete evidence of failure of discretion, such that the motion for summary judgment was rightfully and lawfully granted. Respondent urges this Court to resolve this appeal

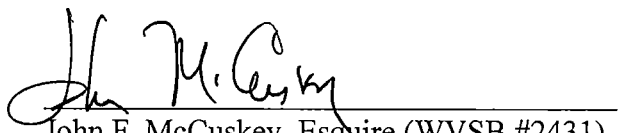
[66] Horizon 01993.

by upholding the Order Granting AMBIT's Renewed Motion for Summary Judgment as lawful, accurate and complete. Respondent seeks the relief the Court deems just.

Respectfully submitted,

AMERICAN BITUMINOUS POWER PARTNERS, L.P.,

By counsel.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0762

AMERICAN BITUMINOUS POWER PARTNERS, L.P.,
a Delaware limited partnership,
Plaintiff/Counterclaim Defendant Below, Petitioner,

vs.

HORIZON VENTURES OF WEST VIRGINIA, INC.,
A West Virginia corporation,
Defendant/Counterclaim Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, John F. McCuskey/Roberta F. Green, counsel for Petitioner/Plaintiff/Counterclaim Defendant, do hereby certify that we served a true and exact copy of the foregoing **"BRIEF OF RESPONDENT"** on counsel of record via the United States Postal Service (with electronic copy served via Marion County electronic service) by placing the same in a stamped envelope addressed as follows:

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