

In the Circuit Court of Marion County, West Virginia

American Bituminous Power Partners,)
LP,)
Plaintiff,)
vs.))
Horizon Ventures of West Virginia, Inc.,)
Defendant)

Case No. CC-24-2018-C-130

Order Granting AMBIT's Renewed Motion for Summary Judgment

Came American Bituminous Power Partners, L.P. (AMBIT), Tenant, by counsel, John F. McCuskey, Roberta F. Green and Shuman McCuskey & Slicer, PLLC, and Horizon Ventures of West Virginia, Inc. (Horizon), Landlord, by counsel, Gregory H. Schillace and Schillace Law Office, on AMBIT's Renewed Motion for Summary Judgment (6.25.20), seeking summary disposition of the final issue before the Court: whether AMBIT used its contracted-for independent discretion arbitrarily and capriciously **as that term is used in the law** in using Foreign Fuel for Operating Reasons from December 2012 to the present.[\[1\]](#) This Court issued a schedule for motions practice, and with Horizon's Response of the Defendant to Renewed Motion for Summary Judgment (7.7.20) and AMBIT's Reply to Horizon's Response to Renewed Motion for Summary Judgment (7.8.20), the matter was ripe for hearing on July 9, 2020.

WHEREFORE, upon the Court's mature consideration of the pleadings and argument of counsel; for all of the reasons set forth herein; and for good cause shown, AMBIT's Renewed Motion for Summary Judgment is hereby GRANTED. In support thereof, the Court hereby provides the following Findings of Fact and Conclusions of Law.

Findings of Fact.

1. The history of the relationship between these parties has been provided by Orders of this

Court and the Supreme Court of Appeals of West Virginia. For purposes of this determination, the parties will be identified as Landlord (Horizon) and Tenant (AMBIT) relative to the Demised Premises located in Marion County, West Virginia.[2] The rate of rent between Landlord and Tenant is set according to provisions in the Amended and Restated Lease Agreement, entered between the parties in November 1989.[3]

2. 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
8 be a pretty high standard to me that they were arbitrary, I
9 mean, as that term is used in the law.[4]

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." [5]

3. Horizon's sole mandate was to prove arbitrary and capricious behaviors (as that term is defined at law) in AMBIT's selection of Foreign Fuel for Operating Reasons. In identifying that sole remaining issue, this Court found that whatever industry standards might be, what Horizon or its expert's preferences would be, or what Horizon might have done if the decision were its to make would not be relevant to this sole remaining determination.[6]

4. In support of its Renewed Motion, AMBIT argued that it weighed decisional factors aptly, maximized efficiency, reduced costs and extended the life of the Grant Town Plant and the project by giving the key factors proper weight. AMBIT asserted that it acted rationally in selecting Foreign Fuel for Operating Reasons, factoring in key determinants, all within the plain language of the contract: the Amended and Restated Lease Agreement.
5. AMBIT argued that Horizon's admissions against interest have included recognition and approval of AMBIT's decisional factors and accolades for its leadership in running the Plant successfully over time. In point of fact, the express evidence before the Court was that Horizon has admitted that the Local Fuels are of 'lower quality,' that AMBIT uses Foreign Fuels because they are 'economically better for them,' that the Foreign Fuel has more carbon in it, less sulfur in it, produces less ash.^[7] The evidence before this Court is that Horizon has admitted that economically, Foreign Fuel "is much better fuel for [AMBIT]."^[8]
6. AMBIT argued that, inherent in Horizon's admissions is the fact that AMBIT's decision making rationally relates to a valid plan of keeping the plant operating safely and efficiently. AMBIT placed further evidence before the Court of Horizon's understanding, appreciating, and admitting AMBIT's accomplishments relative to fuel and plant operations:

**11 Q. Do you believe that AMBIT is doing a good job
12 with the Grant Town Power Plant?**

13 A. I believe that I -- I believe that Steve Friend
14 operating that plant has done an excellent job. I've had
15 a lot of discussions with Steve about issues down there,
16 failures on the steam turbine generator, on the -- on the
17 actual generator itself and other issues -- piping,
18 tubing, and so on -- and I have very good understanding
19 of the improvement that's gone on down there.

20 And I think that over time that plant has become
21 more efficient. Sometimes it has run as high as over
22 100 percent capacity. And I think he's done an absolute
23 fabulous job down there.^[9]

7. Further, AMBIT presented evidence that, through its contractually granted discretion, it has used Foreign Fuel based upon its direct experience, the input it received from consultants and

suppliers, and its own metrics, all of which demonstrates repeatedly that Foreign Fuel is the best way, perhaps even the only way, to minimize operational errors and losses, and maximize efficiency and safety.

8. Also AMBIT presented evidence that, through its contractual grant of discretion, it has tried and determined that it cannot through the use of the remaining Local Fuel support power generation to rated output.
9. AMBIT presented evidence that it has determined through trial and error, observation of metrics, and retention of consultants that the use of the remaining Local Fuel introduces additional operating and safety issues that place the business at risk.
10. Finally, AMBIT presented evidence that its operational experience has taught it that the attendant risks, excesses and direct and indirect costs make Local Fuel an unreasonable fuel choice, complicating power production unnecessarily and making the Plant economically unviable in the process.
11. In support of these assertions, AMBIT presented evidence including the mandates of its Power Purchase Agreement (PPA) with First Energy (Mon Power), pursuant to which AMBIT must maintain and provide 80 megawatts of power, which is ‘full load’ for the Grant Town Plant.^[10] The discovery adduced in this matter is that, while AMBIT initially followed the fuel plan set out in the Walter Heine Comprehensive Mining Plan, it became apparent that the Grant Town Plant could not maintain full load as necessary to fulfill the PPA using Local Fuels because the quality of local waste coal was significantly lower than predicted in the Comprehensive Mining Plan.^[11]

11. Further, AMBIT presented the testimony of fact witnesses Brian Miller, principal of Miltech Engineering, who performed consulting work at the Grant Town Plant in the early 1990s. Specifically, Mr. Miller explained that his objective as consultant in the 1990s was to “supply the power plant with a fuel quality that meets the requirements of the power plant so that

power plant can maintain full load.”[\[12\]](#)

6 they could not
7 maintain full load by using only the Grant Town and
8 Barrackville course material, so they had to go to a
9 combination of purchased fuels, Grant Town course
10 material, Barrackville course material and fines.
11 So the whole thing became an optimization between
12 all of those fuel sources with a bunch of
13 constraints on it. You had to maintain heat content
14 above a certain level, and the other constraint on
15 the thing was that you could only burn so many fines
16 in the boiler because we had trouble getting it
17 through the system. The stuff was wet and sticky
18 so we had trouble getting it in the hoppers and
19 inside of the boiler.

* * *

2. One of the attributes of the fines was
3 that it was the lowest cost material in terms of its
4 cost versus the heat that it provided for producing
5 steam. So what we wanted to do was to maximize the
6 amount of fines that were used in the boiler, and
7 that’s what they did, maximized the amount of fines
8 because the purchased fuels were more expensive than
9 the fines. So we had to try to optimize this whole
10 complicated linear programming problem.[\[13\]](#)

12. AMBIT relied upon the series of reports[\[14\]](#) written by Mr. Miller and Miltech that found inter alia that poor fuel quality/quantity located on the demised premises (Local Fuel) impaired AMBIT’s ability to reach rated output, impaired AMBIT’s ability to operate within manufacturer’s guidelines, in part because the power plant’s ash handling system was not designed to handle this lower quality fuel. In consulting with AMBIT on its fuel issues, Miltech further found that, in addition to impeding production to rated output and overloading the plant’s ash handling system, this lower quality fuel in conjunction with commensurate underestimation of costs drove “[a]ctual fuel costs, including mining, transportation, loading, preparation, limestone addition and ash disposal about 293% higher than anticipated for HORIZON fuel[.]”[\[15\]](#)

13. In support of its position that it used its contractual grant of discretion without being arbitrary or capricious, AMBIT provided evidence of higher costs attendant in the use of Local Fuel

including in the “mining, transportation, blending, processing, combustion in the boilers, disposal of the ash . . . engineering, permitting and reclamation,” all of which add significant unnecessary economic burden to the business.[16] AMBIT further relied on Horizon’s admissions against interest in recognizing that AMBIT uses Foreign Fuel because it is ‘economically better for them,’ that the Foreign Fuel has more carbon in it, less sulfur in it, produces less ash.[17] Horizon has admitted that economically, Foreign Fuel “is much better fuel for [AMBIT].”[18]

14. AMBIT further argued that it had used its contractual grant of discretion without being arbitrary or capricious in that it considered the all-in cost of all fuels and found that the Grant Town Plant could not remain operational taking on the huge additional expense attendant in Local Fuel:

13 Q [Attorney Green]. So in each of your expert disclosures, I

14 believe you start out by saying that fuel at Grant

15 Town is and always has been selected and used for

16 operating reasons only. Did I read that accurately?

17 A. That's accurate.

18 Q. What does the use of "only" mean?

19 A. Just, decisions from day one have been

20 such that fuel economics, because we're a business,

21 fuel economics on an all-in cost basis are relevant

22 to which fuels we can use and which fuels we cannot

23 use.

24 Q. Do you only apply that rationale to

1 Horizon? I mean, you've identified a whole series

2 of other fuel sources. Are you only, like, watching

3 the bottom line when it comes to the landlord?

4 A. No. We use that criteria for every fuel

5 we use, including natural gas.

6 Q. So is AmBit perpetually watching the costs

7 of the various fuels?

8 A. Yes, we have to.

15. AMBIT further argued that, from the viewpoint of fuel supervision and in an effort to rationally evaluate the problem and potential solutions, its Manager of Support Services Herb Thompson calculated the relative “all-in” fuel costs with Foreign and Local Fuels, and found an average “all-in” cost of \$2.22 per million BTU for Foreign Fuels and a \$3.33 per

million BTU average cost for Local Fuels.[\[19\]](#) Extrapolating further to the Plant's annual BTU requirements in order to fulfill the electrical generation requirements of the PPA (approximately 1,100 million BTUs per hour[\[20\]](#)), Mr. Thompson's calculations demonstrated the total cost differential is \$9.1 million annually. AMBIT argued that its experience with the use of Foreign Fuel had been so compelling that, even when the selection of fuel was unrelated to rent calculations, it still made fuel decisions based on economics, output, and safety. Once again, rationally, with an eye on all of the key decisional factors, AMBIT's fuel decisions have consistently based on keeping the plant running safely, economically, and to rated output, which AMBIT argued is never accomplished arbitrarily nor capriciously.[\[21\]](#)

16. With the evidence adduced in discovery, AMBIT demonstrated that its use of Foreign Fuel for Operating Reasons has been for non-arbitrary and un-capricious reasons in that it is unable to achieve full load or rated output without the use of Foreign Fuel. Specifically, AMBIT presented sworn testimony of Grant Town's Plant Manager Steve Friend that full load from each boiler is 400,000 pounds per hour of steam flow output,[\[22\]](#) and to achieve that the plant needs to use fuel that has a minimum heat content of 7250 BTUs per pound.[\[23\]](#)

17. AMBIT further relied on the Grant Town Plant's consideration of sulfur content, given that the higher the sulfur content, the more limestone has to be added, which addition produces more ash, overloading the ash-handling system and introducing additional wear on the boilers, thereby increasing maintenance costs, plant outage frequency, and placing the plant's workers at increased risk.[\[24\]](#) The evidence AMBIT placed before the Court demonstrated that, based upon the fuel quality identified for Horizon's Local Fuel in Walter Heine's Comprehensive Mining Plan and upon the additional sampling data obtained in the early years of facility operations as confirmed by the initial Miltech studies, the Grant Town Plant "cannot feed enough limestone into the boilers to maintain full load and meet permit limitations" if it uses Local Fuel.[\[25\]](#) .

17. AMBIT further relied upon Mr. Friend's testimony related to his calculations and review of the pertinent data and metrics as to the fuels recommended by the boiler manufacturer, including focusing on five design criteria to determine what fuel input would be required to maintain full-load production:

9 Q [Attorney Schillace]. So the Pyropower manual says that it can
10 be operated with fuel with 6.1 percent sulfur and
11 6400 BTUs per pound?

12 MS. GREEN: Object to the form.

13 A. That was the original fuel specification.

14 Q. But it's your testimony that it won't work
15 with that?

16 A. That's correct.

17 Q. So the designers of the boilers were
18 wrong?

19 A. Yes.

20 Q. Why were they wrong?

21 A. Several items were wrong with the boiler.
22 First of all, the bottom ash amount that was created
23 from burning the fuel that low greatly exceeded what
24 our capability for removing bottom ash [sic] was and is.

1 Q. What else?

2 A. We would have had a difficult, if not
3 impossible, time controlling SO₂ emissions at that
4 level of sulfur input as well.

5 Q. Any of that because of the difference in
6 the height of the stack?

7 A. Stack has absolutely no bearing on that
8 whatsoever. This is all controlled directly in the
9 combustion process, not post combustion. So it's a
10 function of what the boiler capabilities are, not a
11 function of the stack.

12 Q. What else?

13 A. That's it.

14 Q. So it's your testimony that as far as the
15 boiler capabilities of this Pyropower boiler, you
16 have greater information than the engineers that
17 constructed it and designed it?

18 A. Absolutely. I have 28 years of operating
19 experience at this place.[\[26\]](#)

Based upon boiler specifications and bottom ash removal specifications, and the manufacturer's guidance, Mr. Friend was able to determine that "the remaining unusable waste coal had insufficient heat content and excessive sulfur content, which would mandate the introduction of

limestone in amounts exceeding the maximum bottom ash load specified by Pyropower's guidelines."[\[27\]](#)

18. AMBIT argued that it had used its contractual grant of discretion non-arbitrarily and un-capriciously in that it considered the safety of Plant personnel integral to any solution of fuel issues. The evidence before the Court was that the boiler itself introduces the very real possibility of injury or death, which risk was one of the key decisional factors in AMBIT's fuel selection. Plant Manager Steve Friend testified that the two most serious injuries in the history of the Grant Town Plant occurred "trying to switch out the (ash) screws, trying to react to upset conditions from the (ash) screws[.]"[\[28\]](#) The ash handling system includes four screws on the bottom of each boiler that take ash from approximately 1750 degrees and transition it out at 350 degrees.[\[29\]](#) Per Mr. Friend, the repair and replacement process even now is low tech, cumbersome and involves sending personnel to manually change out the screws, in the face of the heat, the ash transfer and, potentially, cracking, leaking water, "full combustion air temperature coming down that screw." AMBIT's evidence was that, when the screws in particular wear out, Grant Town "has to put personnel in there to repair them. . . . There is inherent danger there with the heat, with the ash exposure that goes on with that. The safest operating strategy is to run the system in a slow, controlled fashion, which is only possible with high quality fuels; the quality of the fuel is key to safe operations." Indeed, rationally, based on his analysis of the key decisional factors, Mr. Friend confirmed that the "plant selects waste fuels that are best for the safe and economic operation of the plant."[\[30\]](#)

19. AMBIT's evidence before the Court was that, through its use of its contractual grant of discretion, it can place a priority on reducing or eliminating the unnecessary risk by using Foreign Fuels; based upon AMBIT's experience in operating the Grant Town Plant, the use Foreign Fuel is integral to its efficiency, its ability to reach rated output, and its ability to do both safely.

15. In opposition to AMBIT's Renewed Motion for Summary Judgment, Horizon argued that the actual determination before the Court was whether AMBIT, in its reasonable judgment, used Foreign Fuel for Operating Reasons.[\[31\]](#)

16. In particular, Horizon responded in opposition to AMBIT's dispositive motion, placing before the Court six arguments raised by its retained expert Larry Koza, PE, suggesting that the following factors were determinant:[\[32\]](#)

- (1) AMBIT is not operating the CFB boilers as intended or designed.
- (2) the waste coal located on the leased property is usable and the refusal to use this waste coal as fuel is for a non-operating reason.
- (3) the way the Grant Town Power Plant has been and is currently operated creates fuel source problems and difficulty which [AMBIT] is unable, unprepared or unwilling to overcome, however, Mr. Koza believes that these problems are correctable.
- (4) There are no safety concerns with respect to the use of waste coal as fuel from this lease property.
- (5) It is unreasonable for the plaintiff to assert that the waste coal on the leased property is not usable.
- (6) The waste coal located on the leased property can be used and still permit the Grant Town Power Plant to achieve and maintain the rated output of the manufacturer if the plant was operated in a proper manner.

17. In reply, AMBIT argued that Horizon's response fails to acknowledge or address the final issue before the Court, that is, whether AMBIT used its contracted-for independent discretion arbitrarily and capriciously as that term is used in the law in using Foreign Fuel for Operating Reasons from December 2012 to the present.[\[33\]](#) AMBIT renewed its case that the test still is not whether AMBIT was Right or Wrong (assuming those apply to fuel selection) in its estimation of the facts, circumstances, rules or procedures, but rather whether AMBIT specifically looked at and weighed the facts relative to fuel selection (mining, transportation, blending, processing, combustion, ash disposal), regardless of whether Horizon or Mr. Koza or the industry would have looked at or weighed the facts differently.[\[34\]](#) AMBIT replied

that the test is not whether AMBIT considered the same circumstances as Horizon or Mr. Koza or the industry would have considered or even whether Horizon or Koza or the industry would have looked at those circumstances and reached a different result. AMBIT further argued that the test is not whether AMBIT could have, should have, or might have selected different fuels for different purposes.^[35] Finally, AMBIT argued that the test is whether AMBIT used its contracted-for independent discretion arbitrarily and capriciously, and the evidence before the Court is that AMBIT used its contractual grant of discretion systematically in making fuel decisions over the decades of the Plant's operations.

18. On a procedural note, Horizon has argued that AMBIT's Renewed Motion for Summary Judgment is more aptly termed a motion to alter or amend this Court's February 2020 grant of summary disposition to Horizon on a different issue, which horizon argued would be untimely filed and should be denied on that basis.^[36]
19. This Court denied Horizon's informal motion to dismiss AMBIT's motion, finding that the issues before the Court were clarified and narrowed, and the parties realigned at the pretrial held on January 15, 2020, such that the motion for summary judgment was properly and timely filed, and ripe for resolution by this Court.

Conclusions of Law.

20. Summary judgment is the necessary and appropriate resolution where the non-moving party has failed to make a sufficient showing on essential elements of the case that it has the burden to prove. Syl. pt. 3, *Burless v. West Virginia Univ. Hospitals*, 601 S.E.2d 85 (W. Va. 2004). Where the totality of the evidence adduced could not lead a rational trier of fact to find for the nonmoving party, summary disposition is the necessary and proper result. *Craddock v. Watson*, 197 W. Va. 62, 475 S.E.2d 62 (1996).
21. West Virginia law provides that, in ruling on summary judgment, the trial court is to focus on the facts that it "finds relevant, determinative of the issues and undisputed." *Ayersman v.*

West Virginia DEP, 208 W. Va. 544, 542 S.E.2d 58, 61 (2000), citing Syl. pt. 3, Fayette County Nat. Bank v. Lilly, 199 W. Va. 349, 484 S.E.2d 232 (1997). “[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” Williams v. Precision Coal, Inc., 194 W. Va. 52, 459 S.E.2d 329, 338 (1995).

22. In order to defeat a properly supported and salient dispositive motion, the non-moving party must do more than state what its beliefs or opinions are, but must come forward with actual evidence that would create a dispute of material fact or otherwise preclude summary judgment. Crum v. Equity Inns, Inc., 685 S.E.2d 219, 227 (W. Va. 2009).
23. The party opposing summary judgment must satisfy the burden of proof by offering more than a mere “scintilla of evidence.” Painter v. Peavy, 451 S.E.2d 755, 758-59 (W. Va. 1994) (citation omitted). In order to defeat this Motion, the non-moving party must have “concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . [its] favor” or other “significant probative evidence tending to support the complaint.” Id. at 759 (citations omitted). “[T]he nonmoving party cannot create a genuine issue of material fact through mere speculation or building of one inference upon another.” Crum v. Equity Inns, Inc., 685 S.E.2d 219, 227 (W. Va. 2009).
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).
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,”^[37] both of which the Supreme Court further found are questions of law for

this Court.^[38] 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.

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.2d 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.

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-Broadus 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'sLawDictionary (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'sLawDictionary (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 be have 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.[\[39\]](#)

33. Pursuant to West Virginia law, [“\[a\]ny statement made by a party to a civil action which constitutes an admission against his interest, and which tends to establish or to disprove any material fact in the case is competent evidence against him.”](#)[\[40\]](#)

34. For all of the reasons set forth herein and upon mature consideration of the evidence adduced by the parties and the law of West Virginia, the Court FINDS that Horizon has failed to adduce actual evidence of AMBIT’s using its contractual grant of discretion arbitrarily and capriciously. Poweridge Unit Owners Ass’n v. Highland Properties, Ltd., 474 S.E.2d 872, 879 (W. Va. 1996).

35. Considering all of the source materials available to date on ‘arbitrary and capricious’ leads to a finding under the law that AMBIT’s use of its contractual grant of discretion must be upheld as a matter of law because AMBIT as a matter of law has given proper weight to decisional factors, acted rationally, adopted plausible positions, and considered the important

factors. Horizon produced no evidence that AMBIT committed plain error in selecting and using Foreign Fuel for Operating Reasons.

36. In support of this Ruling, the Court further FINDS as follows.

37. The Landlord's pleadings filed relative to AMBIT's Renewed Motion focused in pertinent part on reasonableness and that being an objective standard, which issues were before the Court previously and that to prevail, the Landlord would have to show that there was unreasonable judgment, which the Court takes to be arbitrary and capricious, bad faith. The Court finds that Tenant raised several issues that it believes point to the fact that it was not arbitrary and capricious, that it has been within its standard pursuant to the contract. The Court finds that the Tenant's assertions are undisputed in the pleadings before the Court at this time.

38. In its response in opposition to the Renewed Motion, the Landlord raised six issues. The first one is that the Tenant was not operating within the CFB Boilers or as intended or designed, which the Court finds arises in negligence or bad design. The Court finds that it does not show arbitrary and capriciousness, and that reasonable minds could not differ on that issue.

39. The second issue raised by the Landlord was that the waste coal located on the demised premises was usable and that the Tenant's use of Foreign Fuel therefore was for Nonoperating Reasons. The Court finds that whether the Local Fuel is usable or not usable is not an issue -- it may be intertwined within the reasonableness, but it does not raise an issue that would create or let a jury base its decision relative to arbitrary or capriciousness.

40. Landlord's third issue goes to problems that Landlord argues are created in the operation of the Plant and that the Tenant is unwillingness or unprepared to overcome those problems. Again, the Court finds that this issue would not be relevant to the issue of whether there was an arbitrary or capricious decision made by the Tenant relative to the use of Foreign Fuel for Operating Reasons.

41. Landlord's fourth issue, safety concerns, has been addressed less fully in discovery except as

relates to ash handling, but the Court finds that any arguments relative to safe operations in and of itself would not create a finding arbitrary or capricious decision making relative to the use of Foreign Fuel for Operating Reasons.

42. Landlord's fifth issue is that Landlord's expert witness Donald Koza would testify about the unreasonableness of the Tenant to assert that the waste coal was not usable. The Court finds that, even though the Rules of Evidence do allow some experts to testify about the ultimate issue, the ultimate issue to be determined here would be for the jury based upon the Court's instructions and the circumstances that it heard – not the expert's estimation of the waste coal. The Court would not allow an expert to render an opinion on what must be the ultimate findings of the jury.

43. Landlord's issue number six is that the waste coal located on the leased premises should permit and achieve output if the plant were operated properly. Again, the Court finds that the issue is not whether the Tenant is the best operator in the world. The issue is has the Tenant been unreasonable and arbitrary and capricious.

44. WHEREFORE, based on all of the evidence adduced before this Court, the pleadings pending before this Court and the arguments of counsel, the Court FINDS as a matter of law that no rational trier of fact could find that there was any arbitrary or capricious action of the Tenant. The Court GRANTS the motion for summary judgment on those issues in favor of the tenant. The Court ORDERS that any resulting damages issues (rent calculations) will be accomplished at further hearing of this Court to be held on **August 17, 2020, at 1:00**, with that final resolution to be reflected by subsequent Order of this Court.

The exceptions and objections of any aggrieved party are noted and preserved.

Entered this ____ day of _____, 2020.

[\[1\]](#) Order (1.27.20) (emphasis in the original).

- [2] Order Granting, In Part, Motion for Summary Judgment of Horizon Ventures of West Virginia, Inc. (2.6.20). *See , e.g., American Bituminous Power Partners, LP, et al. v. Horizon Ventures of West Virginia*, 14-0446 (MemD) at 2.
- [3] Order Granting, In Part, Motion for Summary Judgment of Horizon Ventures of West Virginia, Inc. (2.6.20) at 2-3.
- [4] Transcript of Proceedings (1.15.20), attached to Renewed Motion for Summary Judgment (6.25.20) as Exh. A, at 29, 31, 44, holding, e.g., that “[w]ith regard to . . . industry-standard, I would find that matter to be irrelevant[.]”
- [5] Order (1.27.20).
- [6] Transcript of Proceedings (1.15.20) at 44.
- [7] Order (July 11, 2019). *See also* Sears Dep. (Exh. C) at 97.
- [8] Order (July 11, 2019). *See also* Sears Dep. (Exh. D) at 97.
- [9] Dep. of Stanley Sears (9.13.18) (CAN 18-C-76), appended to Renewed Motion for Summary Judgment as Exh. C, at 103.
- [10] Dep. of Brian Miller (10.22.19), as Exh. D to Renewed Motion for Summary Judgment at 72. *See also* American Bituminous Power Partners, LP’s Disclosure of Potential Expert Witnesses (9.23.19) at Exh. C; Dep. of Steve Friend (11.8.19), appended to Renewed Motion for Summary Judgment as Exh. E, at 26, identifying full load as 400,000 pounds per hour of steam flow output.
- [11] Dep. of Brian Miller (10.22.19), appended to Renewed Motion for Summary Judgment as Exh. D, at 70, 86.
- [12] Dep. of Brian Miller (10.22.19), appended to Renewed Motion for Summary Judgment as Exh. D, at 61.
- [13] Dep. of Brian Miller (10.22.19), appended to Renewed Motion for Summary Judgment as Exh. D, at 70-71.
- [14] Dep. of Brian Miller (10.22.19), appended to Renewed Motion for Summary Judgment as Exh. D, at Exh. 4.
- [15] American Bituminous Power Partners, L.P.’s Disclosure of Potential Expert Witnesses (9.23.19) at Exh. D.
- [16] Dep. of Herb Thompson (10.12.19), appended to Renewed Motion for Summary Judgment as Exh. F at 49.
- [17] Order (July 11, 2019, hearing on Amended Renewed Motion to Compel) (8.8.19). *See also* Sears Dep. at 97.
- [18] Order (July 11, 2019, hearing on Amended Renewed Motion to Compel) (8.8.19). *See also* Sears Dep. at 97.
- [19] Dep. of Herb Thompson (10.12.19), appended to Renewed Motion for Summary Judgment as Exh. F at 159.
- [20] Dep. of Brian Miller (10.22.19), appended to Renewed Motion for Summary Judgment as Exh. D, at 55, Exh. 7.
- [21] Dep. of Herb Thompson (10.12.19), appended to Renewed Motion for Summary Judgment as Exh. F at 48-49.
- [22] Dep. of Steve Friend (11.8.19), appended to Renewed Motion for Summary Judgment as Exh. E), at 26.
- [23] Dep. of Steve Friend (11.8.19), appended to Renewed Motion for Summary Judgment as Exh. E, at 27
- [24] Dep. of Steve Friend (11.8.19), appended to Renewed Motion for Summary Judgment as Exh. E, at 107.
- [25] Dep. of Steve Friend (11.8.19), appended to Renewed Motion for Summary Judgment as Exh. E, at 33.
- [26] Dep. of Steve Friend (11.8.19), appended to Renewed Motion for Summary Judgment as

Exh. E at 52-53

[27] Dep. of Steve Friend (11.8.19), appended to Renewed Motion for Summary Judgment as Exh. E, at 60-61.

[28] Dep. of Steve Friend (11.8.19), appended to Renewed Motion for Summary Judgment as Exh. E, at 109.

[29] Dep. of Steve Friend (11.8.19), appended h to Renewed Motion for Summary Judgment as Exh. E, at 107.

[30] Dep. of Steve Friend (11.8.19), appended to Renewed Motion for Summary Judgment as Exh. E, at 110.

[31] Response of the Defendant to Renewed Motion for Summary Judgment (7.7.20).

[32] Response of the Defendant to Renewed Motion for Summary Judgment (7.7.20) at [7].

[33] Transcript of Skype Hearing (7.9.20) at 16.

[34] Reply to Horizon's Response to Renewed Motion for Summary Judgment (7.8.20) at 2-3.

[35] Reply to Horizon's Response to Renewed Motion for Summary Judgment (7.8.20) at 2-3.

[36] Response of the Defendant to Renewed Motion for Summary Judgment (7.7.20).

[37] 181 W. Va. 403, 409 n.2, 383 S.E.2d 37, 41 n.2 (1989).

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

[39] See, by analogy, *Schroederv.Adkins*, 149W.Va.400,141 S.E.2d352(1965), where 'reasonably prudent' is not synonymous with perfection.

[40] Syl. pt. 2, *Thornsbury v. Thornsbury*, 147 W. Va. 771, 131 S.E.2d 713 (1963).

/s/ James H Young Jr.

Circuit Court Judge

16th Judicial Circuit

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