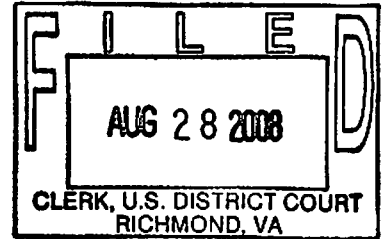


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Richmond Division)



MASSEY COAL SALES COMPANY d/b/a
MASSEY INDUSTRIAL SALES
4 North Fourth Street
Richmond, Virginia 23219

Plaintiff,

v.

BAYER CROPSCIENCE LP
2 T.W. Alexander Drive
Research Triangle Park, NC 27709

Serve on registered agent:
Corporation Service Company
327 Hillsborough Street
Raleigh, NC 27603

Defendant.

Civil Action No. 08-080CV558

JURY TRIAL DEMANDED

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff Massey Coal Sales Company d/b/a Massey Industrial Sales, by and through its undersigned counsel, hereby brings this action against Defendant Bayer CropScience LP seeking declaratory judgment that two coal supply contracts purporting to have been signed by an authorized representative of Massey Coal Sales Company are invalid and unenforceable, averring as follows:

The Parties

1. Plaintiff Massey Coal Sales Company d/b/a Massey Industrial Sales ("MIS") is a corporation organized under the laws of the Commonwealth of Virginia with a principal place of business and headquarters located at 4 North Fourth Street in Richmond, Virginia. MIS is a wholly-owned subsidiary of Massey Energy Company ("Massey Energy"). Massey Industrial Sales

specifically serves customers in the diverse and specialized industrial coal markets.

2. Defendant Bayer Cropscience LP (“Bayer”) is a Delaware limited partnership with a principal place of business and headquarters located at 2 T.W. Alexander Drive, Research Triangle Park, North Carolina, 27709. Defendant Bayer is part of a multi-national conglomerate engaged in the business of researching and developing products for crop protection, non agricultural pest control, and seeds and plant biotechnology. Bayer owns and operates a facility and power plant located in Institute, West Virginia.

Jurisdiction and Venue

3. Jurisdiction is proper pursuant to 28 USC §1332 in that the action is between citizens of different States and the matter in controversy exceeds the sum of \$75,000.00, exclusive of interest and costs.

4. Jurisdiction also is proper pursuant to 28 U.S.C. § 2201, *et seq.*, pursuant to which this Court may enter a declaration determining the rights of the parties as to the subject contracts.

5. Venue is proper pursuant to 28 USC § 1391(a)(2) in that a substantial part of the events or omissions giving rise to Plaintiff’s claims occurred in this judicial district.

Facts Common to All Counts

6. From July 1, 1997 through December 31, 2007, Bayer and certain predecessor companies owning a power plant and research facility located in Institute, West Virginia, purchased coal pursuant to a Coal Supply Agreement (the “1997 Agreement”) from Massey Energy subsidiary Central West Virginia Energy Company (“CWVEC”), a West Virginia corporation with a principal place of business and headquarters located in Richmond, Virginia.

7. The 1997 Agreement was limited to a two-year contract term, subject to renewal for additional two-year terms provided the parties agreed upon the price of coal per ton.

8. Pursuant to the terms of the 1997 Agreement as extended by the parties, CWVEC

would ship coal to Bayer's plant located in Institute, West Virginia, on an inventory consignment basis, such that Bayer would be billed for the coal it actually used each month from CWVEC's stockpile of coal at Bayer's plant.

9. Bayer was responsible under the 1997 Agreement for self-reporting to CWVEC the amount of coal it used each month in a "burn report."

10. The parties renewed the 1997 Contract for successive two-year terms based upon an agreed coal price per ton, with the last extended two-year term expiring on December 31, 2007.

11. Following the expiration of the 1997 Agreement, CWVEC shipped coal to Bayer and continued to sell coal to Bayer by inventory consignment on a month-to-month basis.

12. During the first six months of 2008, Bayer had become substantially in arrears in payments to CWVEC.

13. On or about May 26, 2008, CWVEC advised Bayer that it would stop further shipments of coal to Bayer's Institute, West Virginia, plant until Bayer's account with CWVEC was brought current and Bayer produced a valid contract for the supply of coal effective January 1, 2008, which it represented it had, signed by an authorized representative.

14. On May 28, 2008, CWVEC agreed to permit Bayer to continue to purchase a limited amount of coal from CWVEC by purchase order at a price per ton of \$110 until Bayer either agreed to a new coal supply agreement or Bayer produced a valid contract for the supply of coal effective January 1, 2008, which it represented it had, signed by an authorized representative. **First Purchase Order, Exhibit A.**

15. By the expiration of the First Purchase Order, Bayer requested, and CWVEC agreed, to continue shipping a limited amount of coal to Bayer pursuant to a second purchase order at a price per ton of \$150 to permit Bayer additional time to negotiate a new coal supply agreement or produce a valid contract for the supply of coal effective January 1, 2008, which it represented it had,

signed by an authorized representative. Second Purchase Order, **Exhibit B**.

16. On July 16, 2008, Bayer entered into a new Coal Supply Agreement (the “2008 Agreement”) with CWVEC for a term commencing on July 1, 2008 through December 31, 2010. **Exhibit C**. The 2008 Agreement set a coal price per ton of \$160 payable on or before the tenth (10th) calendar day following the date of invoice by CWVEC.

17. The 2008 Agreement was signed at CWVEC’s offices in Richmond on July 16, 2008, by Robert Norris, Manager of Technical Materials and Services for Bayer, and by Steve Sears, CWVEC’s Vice President and Massey Industrial Sales’ President.

18. Approximately two weeks after coal deliveries resumed under the 2008 Agreement, Bayer entered into arrears in its coal shipment payments in the amount of approximately \$1.48 million. CWVEC suspended further shipments until Bayer brought its account with CWVEC current pursuant to the terms of the 2008 Agreement.

19. Subsequently, Bayer paid the approximately \$1.48 million owed and CWVEC resumed shipping coal to Bayer pursuant to the terms of the 2008 Agreement.

20. Then, on August 14, 2008, Mr. Sears received a telephone call from Mr. Nicholas Crosby, Vice President of Bayer’s Site Operations at Institute, West Virginia, stating that the parties allegedly had entered into a coal supply agreement for 2008 *prior* to the 2008 Agreement that Mr. Norris signed at MIS’s Richmond offices on July 16, 2008, and that this pre-existing coal supply agreement set a coal price per ton of fifty-four dollars (\$54).

21. Before the telephone call ended, Mr. Crosby promised to send a copy of this purported coal supply agreement to Mr. Sears within ten (10) minutes, but did not send Mr. Sears a copy until the following day.

22. Mr. Sears received a copy of a document purporting to be the pre-existing coal supply agreement from Mr. Crosby via e-mail on August 15, 2008 (“Bayer Agreement #1”), **Exhibit D**.

23. Upon reviewing Bayer Agreement #1, Mr. Sears noted that it was not in a form prepared by MIS or CWVEC, that neither MIS nor CWVEC had any record of such contract, that MIS would not have been a party to the contract because MIS (as opposed to CWVEC) is not registered to do business in West Virginia, and that it was not signed by an authorized representative of MIS or CWVEC.

24. Mr. Sears also noted that, if presented with Bayer Agreement #1 to sign, neither CWVEC nor MIS would have signed it because the contract contained one-sided terms in favor of Bayer, and signing it would have contravened CWVEC's and MIS's business practices to use a standard contract form prepared by CWVEC or MIS similar or identical to the 2008 Agreement.

25. After reviewing Bayer Agreement #1, on August 18, 2008, Mr. Sears and MIS Sales Manager Andrew Smolenack met with Mr. Crosby and Mr. Norris in Charleston, West Virginia, to discuss the matter.

26. At the August 18 meeting, Mr. Norris admitted to Messrs. Sears and Smolenack that Bayer Agreement #1 was not, in fact, signed by an authorized MIS representative as he had previously represented, and that there was another contract in Bayer's offices (which he did not bring to the meeting) that bore the signature of an authorized MIS representative.

27. Later that day, Mr. Crosby produced a second document to Mr. Sears via email purporting to be a contract for the supply of coal in 2008 signed by an authorized MIS representative ("Bayer Agreement #2"), **Exhibit E**.

28. Upon reviewing Bayer Agreement #2, Mr. Sears noted that it was identical to Bayer Agreement #1 except for the signatures appearing on page 17 and the notations made on page 18, but that it was not in a form prepared by MIS or CWVEC, that neither MIS nor CWVEC had any record of such contract, that MIS would not have been a party to the contract because MIS (as opposed to CWVEC) is not registered to do business in West Virginia, and that it too was not

WHEREFORE, Plaintiff MIS prays that this Court:

enforceable as a matter of law.

35. Consequently, neither Bayer Agreement #1 nor Bayer Agreement #2 is valid or would have signed; or (c) seen (prior to August 15, 2008), negotiated or agreed to by MIS. an authorized representative of MIS; (b) in a form prepared by MIS or CWVEC that either company
34. Neither Bayer Agreement #1 nor Bayer Agreement #2 was: (a) signed or executed by
- E).
33. A genuine controversy exists between MIS, on the one hand, and Bayer, on the other, as to the validity and enforceability of Bayer Agreement #1 (Ex. D) and Bayer Agreement #2 (Ex. through 31.
32. MIS restates and incorporates by reference the allegations set forth in paragraphs 1

28 U.S.C. § 2201, et seq.
DECLARATORY JUDGMENT

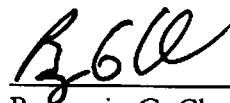
- Agreement #1 nor Bayer Agreement #2 is valid or enforceable.
- Agreement #1 or #2, MIS was compelled to file this action seeking a declaration that neither Bayer Agreement #1 nor Bayer Agreement #2 is valid or enforceable.
31. As a result of the August 25 Letter threatening legal action to enforce Bayer Agreement #1 or #2, MIS was compelled to file this action seeking a declaration that neither Bayer Agreement #1 nor Bayer Agreement #2 is valid or enforceable.
30. Mr. Sears subsequently received a letter dated August 25, 2008, from Bayer Assistant General Counsel George S. Goodridge ("August 25 Letter"). Exhibit F. In the August 25 Letter, Bayer demanded that MIS honor the purported coal supply agreement produced by Mr. Crosby at a price of fifty-four dollars (\$54) per ton, or Bayer would take legal action to enforce its rights against MIS. *Id.* The August 25 Letter did not, however, specify whether the contract Bayer sought to enforce was Bayer Agreement #1 or Bayer Agreement #2. *Id.*
29. Accordingly, CWVEC and MIS refused to honor either Bayer Agreement #1 or Bayer Agreement #2, neither of which was signed by an authorized representative of MIS or CWVEC. signed by an authorized representative of MIS or CWVEC.

- (A) Enter judgment declaring that Bayer Agreement #1 (Ex. D) and Bayer Agreement #2 (Ex. E) are invalid and unenforceable;
- (B) Award Plaintiff MIS its reasonable attorneys' fees and costs; and
- (C) Grant MIS such additional or different relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff MIS respectfully requests a trial by jury of all issues so triable.

Respectfully submitted,



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Andrew Zimmitti
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*Counsel for Massey Industrial Coal Company d/b/a
Massey Industrial Sales*

Dated: August 28, 2008

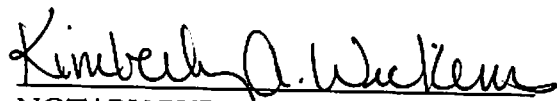
VERIFICATION

Pursuant to 28 U.S.C. § 1746, I do hereby verify under penalty of perjury that I have read the foregoing Verified Complaint and that it is true and correct. Executed this 27th day of August, 2008.



Steve E. Sears
President
Massey Industrial Coal Company
d/b/a Massey Industrial Sales

Subscribed and sworn to before me this 27th day of August, 2008,
by an affiant who is personally known to me or produced identification.



NOTARY PUBLIC 7017497

My commission expires: 3/31/2010



Kimberly A. Wickens
NOTARY PUBLIC
Commonwealth of Virginia
My Commission Expires
March 31, 2010