

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C-E Minerals, Inc.,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION FILE
)	
CARBO Ceramics, Inc.,)	NO.: 1:11-cv-02574-JOF
)	
Defendant.)	

ANSWER TO COUNTERCLAIM

C-E Minerals, Inc. (“C-E”) answers the numbered allegations of defendant’s counterclaim as follows.

1. C-E admits that CARBO seeks the described relief, but denies that CARBO is entitled to any relief.
2. Admitted.
3. Admitted, except that C-E notes that it maintains sales personnel outside of King of Prussia as well.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.

8. Admitted, so long as the term “kaolin” is used by CARBO in a broad sense to encompass raw clays that have not been calcined. If CARBO is using “kaolin” in a narrow sense to refer only to calcined or partially calcined clay, then C-E denies Paragraph 8.

9. C-E admits the first sentence. As to the second sentence, C-E admits that CARBO agreed to purchase from C-E at least 70 percent of its actual requirements of the Product (as defined in the Agreement) each year for its operations in Eufaula, Alabama and that C-E was obligated to make available to CARBO up to 200,000 net tons of Product each year. Except as specifically admitted, C-E denies Paragraph 9.

10. Denied.

11. As to the first sentence, C-E admits that Appendix A to the contract contains certain specification ranges for the Product, as defined in the Agreement. Except as specifically admitted, C-E denies Paragraph 11.

12. C-E admits that the indented, single-spaced quote comes from Paragraph 5 of the parties’ Agreement. Except as specifically admitted, C-E denies Paragraph 12.

13. Denied.

14. Denied as stated, but C-E admits that Paragraph 15 of the Agreement states: “This Agreement and the language used herein shall be construed and enforced in accordance with the laws of the State of Alabama.”

15. C-E admits that the purchase and supply obligations of the Agreement are supported by valid consideration. C-E denies that any of the obligations set forth in Paragraph 5 constitute or are supported by valid consideration. Except as specifically admitted, C-E denies Paragraph 15.

16. C-E denies that the first sentence is an accurate or complete characterization of its position, which instead is set forth in its letters of July 15 and August 8, 2006, attached to the Complaint as Exhibit B. C-E admits the second sentence.

17. Admitted.

18. Denied. C-E’s August 7, 2006 letter states that “Paragraph 5 is unenforceable, has not been in force as a practical matter since the inception of the agreement, and as such we do not intend to abide by the covenant contained in this particular paragraph.” Consistent with that letter, C-E subsequently took actions purportedly prohibited by Paragraph 5 and ultimately filed this suit to obtain a judicial decree of its invalidity and unenforceability.

19. Admitted.

20. Admitted, so long as the term “kaolin” is used by CARBO in a broad sense to encompass raw clays that have not been calcined. Otherwise, C-E denies Paragraph 20.

21. Admitted, except to the extent that this allegation is intended to imply that Paragraph 5 imposes a valid obligation, which C-E denies.

22. C-E denies that it has demanded that CARBO perform “its continuing obligations under Section 5 of the Agreement.” C-E admits that it has brought this action to obtain a declaration that Paragraph 5 imposes no valid obligations, in light of federal antitrust law, as well as Georgia and Alabama law, and for injunctive relief to prevent CARBO from enforcing or threatening to enforce that provision. Except as specifically admitted, C-E denies Paragraph 22.

23. C-E denies that it has breached Paragraph 5, since it is not possible to breach an invalid and unenforceable contract provision. But C-E unequivocally admits that it does not intend to abide by the terms of Paragraph 5. C-E denies the second sentence to the extent that it asserts (a) that C-E caused an affiliate to enter into advance supply agreements or (b) that proppant supply agreements between another Imerys company and a customer constitute a breach of Paragraph 5, both of which C-E denies. Except as specifically admitted, C-E denies Paragraph 23.

24. C-E incorporates its responses to Paragraphs 1-23 above.

25. C-E admits that the parties selected Alabama law in Paragraph 15 of the Agreement, as quoted above, but avers that Paragraph 5 of the Agreement is not enforceable unless it is valid under federal and Georgia law, in addition to Alabama law. Georgia courts (and federal courts sitting in Georgia) apply Georgia law and public policy to determine the enforceability of agreements to restrain trade.

26. Denied.

27. Admitted, so long as the term “kaolin” is used by CARBO in a broad sense to encompass raw clays that have not been calcined. Otherwise, C-E denies Paragraph 27.

28. C-E denies that the first sentence is an accurate account of Paragraph 5, but admits that Paragraph 5 reads as quoted in Paragraph 12 of CARBO’s counterclaim. C-E admits the second sentence.

29. C-E admits that an affiliated company owned by the same ultimate parent has entered advance agreements with customers to sell proppants to be manufactured by C-E. C-E otherwise denies Paragraph 29.

30. Denied.

31. Denied.

32. C-E incorporates its responses to Paragraphs 1-32 above.

33. C-E admits that CARBO seeks the described relief, but denies that CARBO is entitled to any relief.

34. C-E admits that the quoted material comes from its letter of July 21, 2006, which is attached to the Complaint under Exhibit B, but otherwise denies all allegations of Paragraph 34.

35. Denied.

36. C-E admits that it intends to profit from the manufacture of ceramic proppants and the transfer of those proppants to a sister company for consideration. C-E otherwise denies all allegations of Paragraph 36.

37. Denied.

38. C-E denies all allegations of Paragraph 38 on the ground that CARBO will not suffer any damages, whether definite or indefinite.

39. Denied.

40. C-E incorporates its responses to Paragraphs 1-39 above.

41. Admitted.

42. C-E denies that it has demanded that CARBO perform “its continuing obligations under Section 5 of the Agreement.” C-E admits that it has brought this action to obtain a declaration that Paragraph 5 imposes no valid obligations, in light of federal antitrust law, as well as Georgia and Alabama law, and for

injunctive relief to prevent CARBO from enforcing or threatening to enforce that provision. C-E admits that it has built a production line within an existing facility to manufacture lightweight ceramic proppants, that it is prepared to compete immediately with CARBO in the manufacture of those proppants and that a sister company has entered contracts to sell those proppants. Except as specifically admitted, C-E denies Paragraph 42.

43. Denied.

44. Denied.

45. Except as expressly admitted above, C-E denies every allegation contained in CARBO's counterclaim and denies that CARBO is entitled to any relief thereon.

DEFENSES

1. The counterclaim fails to state a claim on which relief may be granted.
2. Paragraph 5 of the Agreement is unenforceable under federal, Georgia and Alabama law, as alleged in greater detail in the Complaint, and so can sustain no relief at law or in equity.
3. C-E reserves the right to assert any additional defenses that may become available or apparent during the proceedings.

This 15th day of September, 2011.

Respectfully submitted,

/s/ Frank M. Lowrey IV

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***Counsel for Plaintiff C-E Minerals,
Inc.***

CERTIFICATE OF SERVICE

I hereby certify that on this day, a true and correct copy of the foregoing **ANSWER TO COUNTERCLAIM** was electronically filed with the Clerk of Court using the Court's electronic filing system which will automatically send e-mail notification of such filing to the following attorneys of record:

Samuel S. Woodhouse, swoodhouse@woodhouselawfirm.com
James R. Eiszner, jeiszner@shb.com

This 15th day of September, 2011.

/s/ Frank M. Lowrey IV
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Georgia Bar No. 410310