

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

C-E Minerals, Inc.,

Plaintiff and Counterclaim
Defendant,

vs.

CARBO Ceramics Inc.,

Defendant and Counterclaim
Plaintiff.

Civil Action No. 1:11-CV-2574-JOF

ANSWER TO FIRST AMENDED COMPLAINT

Defendant CARBO Ceramics Inc. (“CARBO” or “Defendant”) files the following Answer¹ to the First Amended Complaint for Injunctive and Declaratory Relief filed by C-E Minerals, Inc. (“C-E”). Unless specifically admitted, CARBO denies each and every allegation in Plaintiff’s Complaint.

The allegations in the first, unnumbered Paragraph in Plaintiff’s Complaint are not directed at CARBO and require no response from CARBO.

1. Paragraph 1 is admitted only to the extent that Plaintiff purports to seek injunctive and declaratory relief under federal antitrust laws and

¹ CARBO’s counterclaims remain in effect as filed August 25, 2011, although its original answer is superseded by this Answer to the First Amended Complaint.

Georgia and Alabama law. Defendant denies that Plaintiff is entitled to the relief it seeks. The remaining allegations in this paragraph are conclusions of law, to which no response is required, and they are therefore denied. To the extent they are construed as factual, Defendant denies them.

2. On information and belief, CARBO admits the allegations in paragraph 2.

3. In response to the allegations in paragraph 3, CARBO admits that it is a Delaware corporation. CARBO further admits that it is registered to do business in Georgia. CARBO further admits that its registered agent in Georgia is CT Corporation System and that its registered agent is located at 1201 Peachtree Street, N.E., Atlanta, Georgia 30361. CARBO further admits that it owns and operates a facility in Eufaula, Alabama that it uses for, among other things, the production of ceramic proppants. CARBO further admits that ceramic proppants can be used in the hydraulic fracturing process used in the production of oil and natural gas. CARBO denies all other statements and allegations in paragraph 3.

4. The allegations in paragraph 4 assert legal conclusions as to which no response is required. To the extent a response is required, CARBO admits that this Court currently has subject matter jurisdiction over this dispute.

5. CARBO admits the allegations in paragraph 5.

6. CARBO admits that it entered into a Raw Material Requirements Agreement, made as of June 1, 2003 (the "Agreement"), between C-E Minerals Inc. and CARBO. CARBO further admits that Exhibit A to Plaintiff's Complaint includes a copy of the 2003 Agreement between CARBO and C-E but omits subsequent amendments to the Agreement. CARBO denies all other statements and allegations in paragraph 6.

7. CARBO admits that Section 1 of the Agreement states: "The term of this Agreement shall be seven (7) years commencing January 1, 2004 and ending December 31, 2010."

8. CARBO admits that Section 2(A) of the Agreement states: "During the term of this Agreement, C-E shall make available for sale to CARBO each year and CARBO shall have the right to purchase from C-E each year up to 200,000 net tons of the Product." CARBO further admits that the Agreement defines the Product to mean "kaolin, a naturally occurring mineral more particularly described (and meeting the specifications set forth) in Appendix A hereto." CARBO further admits that Section 2(B) of the Agreement states: "In each year during the term of this Agreement, subject to Paragraph 2.A hereof, CARBO shall be obligated to

purchase from C-E, as a minimum, seventy percent (70%) of its actual annual requirements of the Product during such year for its operations in Eufaula, Alabama.” CARBO denies all other statements and allegations in paragraph 8.

9. CARBO admits that Section 2(C) of the Agreement states, in part, that “CARBO may specify that up to 25% of the Product provided pursuant to this Agreement come from the Andersonville local low Alumina ores (approximately 47% Alumina). For the quantity of ores provided from Andersonville from time to time C-E shall provide sufficient quantities of ores from other locations to enable CARBO to blend the ores to achieve the specifications set out on Appendix A.” CARBO further admits that some of the Product that C-E supplied to CARBO’s Eufaula, Alabama facility during the term of the Agreement came from mining facilities owned and operated by C-E in Alabama and some of the Product came from C-E’s Georgia mines. CARBO denies all other statements and allegations in paragraph 9.

10. Admitted.

11. Admitted.

12. CARBO admits the allegations in paragraph 12. CARBO further avers that the market for ceramic proppants is worldwide and in this market, CARBO faces intense competition from various manufacturers,

including Saint-Gobain Proppants, Mineracao Curimbaba, and a growing number of manufacturers in China and around the world. CARBO further avers that its ceramic proppant products compete with sand-based proppants manufactured by a number of companies, including Unimin Corp., Badger Mining Corp., Fairmount Minerals Limited, Inc., Ogelbay-Norton Company, Hexion Specialty Chemicals, Inc., and Santrol. CARBO denies all other statements and allegations in paragraph 12.

13. CARBO admits that market prices for ceramic proppants have sometimes increased as demand and some costs of production have risen. CARBO further admits that it is eventually able to sell through its inventory. CARBO denies that any customer, large or small, is unable to purchase quantities needed to compete for jobs requiring product or has few choices of ceramic proppant suppliers. CARBO denies all other statements and allegations in paragraph 13.

14. Admitted.

15. CARBO admits that, under Section 1 of the Agreement, the term of the Agreement ended on December 31, 2010. CARBO further admits that under Section 5 of the Agreement, CARBO and C-E agreed that the parties' mutual covenants not to compete would continue for three years after expiration of the Agreement. CARBO denies all other statements and

allegations in paragraph 15.

16. CARBO admits that C-E became a potential competitor of CARBO with respect to the sale and manufacture of ceramic proppants after C-E signed the Agreement with CARBO. CARBO denies that C-E was a potential or actual competitor of CARBO with respect to the sale or manufacture of ceramic proppants before C-E and CARBO entered into the Agreement. CARBO admits that C-E has access to kaolin and a kiln, but denies the remaining allegations in paragraph 16 for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations.

17. The allegations in paragraph 17 are not directed at CARBO and require no response from CARBO. In the event a response is required, CARBO denies the allegations in paragraph 17 for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations.

COUNT ONE

18. CARBO admits that Section 5 of the Agreement states:

5. **NON-COMPETE**

Without intending to limit the legal rights of either party, CARBO and C-E agree as follows: that CARBO will not enter into direct competition with C-E in the manufacture of calcined clay for general sale

to refractory or other related industry, and that C-E will not enter into competition with CARBO in the manufacture or sale of ceramic proppants. This agreement will endure for 3 years after the expiration of this contract.

CARBO denies all other statements and allegations in paragraph 18.

19. CARBO denies the allegations of paragraph 19.

20. CARBO admits the Agreement occurs in interstate commerce and, except as so admitted, CARBO denies all other statements and allegations in paragraph 20.

21. CARBO admits that, in a July 15, 2006 letter to Mark Edmunds at CARBO, Bernd Durstberger of C-E stated, in part, “C-E’s position that Paragraph 5 of the current supply agreement as a practical matter is of no consequence and has not been in force since the inception of the supply agreement” and “that C-E Minerals does not intend to abide by the covenant appearing in aforementioned paragraph.” CARBO further admits that, in an August 7, 2006 letter, Durstberger wrote to Edmunds that “we believe 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,” but offered to consider further CARBO’s position that the rights and obligations set forth in Section 5 of the Agreement are valid, legal and enforceable. Answering

further, CARBO avers that C-E, in 2005, sought to invoke and enforce Section 5 against CARBO, which is inconsistent with C-E's position that Section 5 is invalid. CARBO denies all other statements and allegations in paragraph 21.

22. CARBO admits that the quoted excerpt represents a portion of the text of a letter, dated July 21, 2006, from Mark L. Edmunds, Vice President, Operations for CARBO, to Bernd Durstberger, C-E's Chief Operating Officer. CARBO avers that, in addition to the portion quoted in Plaintiff's Complaint, Edmunds wrote:

Thus, I take your statement in the second paragraph of your letter that C-E Minerals ". . . will of course honor our contractual obligations under the existing supply agreement . . ." at face value and fully expect C-E to honor its commitments. I, too, look forward to C-E performing to both the letter and spirit of the contract for the remainder of the contract term, as will CARBO Ceramics.

I have enjoyed our discussion of these past few months, and look forward to further dialogue in the future.

CARBO denies all other statements and allegations in paragraph 22.

23. CARBO admits that Plaintiff purports to attach copies of correspondence between Bernd Durstberger of C-E and Mark Edmunds of CARBO as Exhibit B to their Complaint.

24. CARBO admits that there is an actual controversy between the parties regarding C-E's non-compliance with its contractual obligations under Section 5 of the Agreement and, except as so admitted, CARBO denies all other statements and allegations in paragraph 24.

25. CARBO denies the allegations of paragraph 25.

26. CARBO denies the allegations of paragraph 26.

27. CARBO admits that Section 5 of the Agreement states, in part: "This agreement will endure for 3 years after the expiration of this contract." CARBO denies all other statements and allegations in paragraph 27.

28. CARBO admits that there is an actual controversy between the parties regarding C-E's non-compliance with its contractual obligations under Section 5. CARBO denies all other statements and allegations in paragraph 28.

29. CARBO denies the allegations of paragraph 29.

COUNT TWO

30. CARBO denies the allegations in paragraph 30 for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations.

31. CARBO admits that paragraph 31 purports to summarize some of the relief sought by C-E, but CARBO denies that C-E is entitled to such

relief.

32. CARBO admits that, in Section 15 of the Agreement, C-E and CARBO agreed that “This Agreement and the language used herein shall be construed and enforced in accordance with the laws of the State of Alabama.” The remaining allegations in paragraph 32 assert legal conclusions to which no response is required. To the extent a response is required, CARBO denies the allegations of paragraph 32.

33. Paragraph 33 asserts legal conclusions to which no response is required. To the extent a response is required, CARBO denies the allegations of paragraph 33.

34. CARBO denies the allegations of paragraph 34.

35. CARBO denies the allegations of paragraph 35.

COUNT THREE

36. CARBO admits that, in Section 15 of the Agreement, C-E and CARBO agreed that “This Agreement and the language used herein shall be construed and enforced in accordance with the laws of the State of Alabama.” CARBO further admits that CARBO and C-E selected Alabama law to apply to the Agreement. CARBO further admits that paragraph 36 purports to summarize some of the relief sought by C-E, but CARBO denies that C-E is entitled to such relief. Except as so admitted, CARBO denies all

other statements and allegations in paragraph 36.

37. CARBO admits that, except for an error in punctuation, the quoted excerpt represents a portion of the current text of Ala. Code § 8-10-1. CARBO denies the remaining allegations in paragraph 37.

38. Paragraph 38 asserts legal conclusions to which no response is required. To the extent a response is required, CARBO denies the allegations of paragraph 38.

39. CARBO admits that it produces, manufactures and sells ceramic proppants in and from Alabama. The remaining allegations in paragraph 39 assert legal conclusions to which no response is required. To the extent a response is required, CARBO denies all other statements and allegations in paragraph 39.

40. CARBO admits that the quoted excerpt represents a small portion of the current text of Ala. Code. § 8-10-3. CARBO denies that Ala. Code § 8-10-3 expressly mentions “contracts.” CARBO denies the remaining allegations of paragraph 40.

41. CARBO denies the allegations of paragraph 41.

42. CARBO denies the allegations of paragraph 42.

43. CARBO denies the allegations of paragraph 43.

COUNT FOUR

44. CARBO admits that the quoted text represents an excerpt from the website cited by C-E, as of September 22, 2011. CARBO avers that C-E similarly describes itself as “a world leader in the manufacture and supply of superior quality industrial minerals.” <http://www.ceminerals.com/scopi/group/CEMINERALS/ceminerals.nsf> (last visited Sept. 22, 2011). CARBO further avers that one of its largest worldwide competitors is Saint-Gobain Proppants, which manufactures a variety of ceramic proppants that it markets in competition with each of CARBO’s products, and that the primary manufacturing facility for Saint-Gobain Proppants is located in Fort Smith, Arkansas. Answering further, CARBO avers that Sintex Minerals and Services, Inc., through its Texas-based distribution center, imports bauxite proppants from Brazilian manufacturer Mineracao Curimbaba and distributes them throughout North America in competition with CARBO and further avers that a new entrant to the ceramic proppants market, Oxane Materials, Inc., has its production facility in Van Buren, Arkansas and recently announced plans to expand capacity and production. CARBO denies all other statements and allegations in paragraph 44.

45. CARBO admits that Sections 4.1 and 4.2 of the Horizontal

Merger Guidelines issued by the U.S. Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) outline analytical techniques, practices, and enforcement policies of the FTC concerning “Product Market Definition” and “Geographic Market Definition.” CARBO denies that the relevant market consists solely of lightweight ceramic proppants. CARBO asserts that all proppant manufacturers compete, whether lightweight, heavyweight or one of the numerous other variations of proppant manufactured. The remaining allegations in paragraph 45 are not directed at CARBO and require no response from CARBO. In the event a response is required, CARBO denies all other statements and allegations in paragraph 45.

46. CARBO admits that production costs for raw materials may vary for different proppant products, and that, depending on market price fluctuations for particular raw materials, these costs may be higher or lower than the price of kaolin. CARBO denies all other statements and allegations in paragraph 46.

47. CARBO avers that demand for proppants depends primarily on the demand for, and price of, natural gas and oil, that in selecting among sand, resin-coated sand, heavy, intermediate or lightweight ceramic proppants, customers make a cost-benefit comparison of yield against cost,

and that proppant customers routinely shift among different types of products based on changes in oil and gas prices and demand. CARBO denies all other statements and allegations in paragraph 47.

48. CARBO admits that proppants vary in strength and composition and are, accordingly, sold at different price points. CARBO also admits that demand for one type of proppant can affect the demand for other types of proppant due to substitution. CARBO denies all other statements and allegations in paragraph 48.

49. CARBO admits that proppants manufactured from sand and resin-coated sand are currently cheaper to purchase than ceramic proppants. CARBO further admits that the use of ceramic proppants in certain well conditions results in an increase in the production rate of oil and gas, which is primarily attributable to the higher strength and more uniform size and shape of ceramic proppant versus sand and resin-coated sand. CARBO further avers that demand for proppants depends primarily on the demand for and price of natural gas and oil, that in selecting among sand, resin-coated sand, heavy, intermediate or lightweight ceramic proppants, customers make a cost-benefit comparison of yield against cost, and that proppant customers routinely shift among different types of products, including substitution of sand or resin-coated sand for ceramic proppants,

based on changes in oil and gas prices and demand. CARBO denies the remaining allegations in paragraph 49.

50. CARBO admits that there is substitution of sand and resin-coated sand for ceramic proppants. Except as so admitted, CARBO denies all other statements and allegations in paragraph 50.

51. CARBO admits that lightweight ceramic proppant is manufactured in such countries as Russia and China, as well as by competitors in the United States and in numerous other countries worldwide. CARBO further avers that it competes with manufacturers and sellers of all types of proppants and that the market for proppants is worldwide. CARBO denies all other statements and allegations in paragraph 51.

52. CARBO denies the allegations in paragraph 52.

53. CARBO admits that the quoted language is an excerpt from a statement made by Gary Kolstad, CARBO's CEO, in a 2008 earnings call made on February 5, 2009. CARBO denies all other statements and allegations in paragraph 53.

54. CARBO admits that lightweight ceramic proppant is imported to the United States from countries worldwide and that U.S. customers purchase such proppant. CARBO further admits that it sells proppants to customers around the world and that the market for proppants, of all kinds, is

global. CARBO denies all other statements and allegations in paragraph 54.

55. CARBO admits the quoted language appeared in its 2005 10-K, filing under the heading “Competition,” as part of a larger discussion, but denies that capital costs are a barrier to entry under the antitrust laws. CARBO further admits that manufacturing know-how and technical expertise is required to compete in the global proppant market, but denies C-E possessed such attributes prior to entering the Agreement. CARBO denies all other statements and allegations in paragraph 55.

56. CARBO admits that kaolin clay is needed for manufacturing lightweight ceramic proppants and avers that kaolin clay may be purchased in the market, just as CARBO has. CARBO denies all other statements and allegations in paragraph 56.

57. CARBO denies the allegations in paragraph 57.

58. CARBO denies the allegations in paragraph 58.

59. CARBO admits that it has a contract with a large purchaser of ceramic proppants and that this purchaser has agreed to purchase a negotiated percentage of its worldwide needs of ceramic proppants from CARBO. CARBO further avers that the contract provides for payments of damages in the event the purchaser breaches its minimum purchase requirements. CARBO denies all other statements and allegations in

paragraph 59.

60. CARBO denies the allegations contained in paragraph 60.

61. CARBO denies the allegations contained in paragraph 61.

62. CARBO denies that Plaintiff is entitled to any relief in this matter, including injunctive or declaratory relief of any kind, costs, fees, or any other relief.

DEFENSES

The following defenses are asserted by CARBO. By asserting these defenses, CARBO does not assume the burden of proof on any issue that it would not otherwise have:

1. Plaintiff fails to state a claim for which relief can be granted.
2. The injuries of which plaintiff complains are not attributable to any unlawful act by CARBO.
3. Plaintiff has unclean hands.
4. Section 5 of the Agreement is an ancillary restraint designed to foster procompetitive activity. But for C-E's assent to Section 5, which was freely given, CARBO would have located another source of kaolin, resulting in, among other things, higher prices for proppant consumers and the loss of C-E jobs in both Alabama and Georgia.
5. Although plaintiff is not entitled to any relief, it is not entitled

to injunctive relief because it has an adequate remedy at law.

6. Any injunctive relief for plaintiff would be inappropriate because of the hardship that it would create for CARBO and for consumers.

7. The award of any equitable relief to plaintiff is inappropriate because it would unjustly enrich plaintiff.

8. Plaintiff's claims are barred by the applicable statute of limitations.

9. Plaintiff is precluded from relief by the doctrine of laches.

10. Plaintiff is estopped from seeking relief by its delay in bringing this claim. It has reaped the benefits of the Agreement for years, asserting its claims which seek to relieve it of its contractual obligation only after benefits to plaintiff from the contract ceased.

11. Because the injunctive relief sought by C-E seeks to prohibit CARBO from exercising its constitutional right to petition the courts to enforce C-E's contractual obligations, it is barred by the First Amendment of the United States Constitution and counterpart provisions of the Georgia Constitution.

12. Because the equitable relief sought by C-E would violate the Anti-Injunction Act, 28 U.S.C. § 2283, C-E is barred from obtaining such relief.

NOTICE OF RESERVATION OF ADDITIONAL DEFENSES

CARBO hereby gives notice that it reserves the right to assert any additional defenses that may become available during the proceedings and reserves its rights to amend its answer to include any such additional defenses.

Respectfully submitted this 29th day of September, 2011.

/s/ Samuel S. Woodhouse
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CARBO Ceramics Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on September 29 2011, I electronically filed Defendant CARBO Ceramics Inc.'s Answer to First Amended Complaint with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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