STRANDED COSTS ON AMPGS
MARTINSVILLE CITY COUNCIL
(October 9, 2012)

Council Members – below are AMP's responses to the questions submitted to us. The answers to the specific questions do not, of course, tell the entire story of the AMP projects. Accordingly, our offer to attend a council session to present additional facts associated with these projects and to respond to further questions remains open.

SIZE OF STRANDED COSTS

1. **What is the total amount that AMP has determined as 'stranded costs' for the AMPGS project?**

   The estimated amount of stranded cost for the AMPGS project at the time of cancellation was approximately $144 million.

2. **What is the total amount that AMP has determined as 'stranded costs' that it is seeking to pass on to the participants?**

   Under the AMPGS Power Sales Contract ("PSC"), all AMPGS Participants are responsible for the stranded costs in accordance with their project shares as approved by the AMP Board of Trustees. The final stranded costs will not be fully known until the litigation with Bechtel Corporation is completed and the AMPGS assets are liquidated (e.g. property) and those amounts are netted from the booked costs.

3. **How has AMP settled payment for any 'stranded costs' not currently in the costs to be passed along to participants?**

   AMP reached agreements with certain vendors and a non-member "Participant" which have substantially reduced the potential maximum stranded costs.

4. **Why has AMP settled on this cost allocation method between total stranded costs and stranded costs passed along to participants?**

   We do not understand the reference to the cost allocation method. To be clear, AMP has not invoiced Participants for stranded costs except when requested by the member. The final total stranded costs, when determined, will be allocated in accordance with project shares as approved by the AMP Board as noted above.

5. **Are there any costs which AMP now deems to be 'stranded costs', or which might be reasonably determined 'stranded costs', that could be passed along to participants in the future from the AMPGS project?**

   No, the $144 million maximum estimate at the time of the cancellation included all known AMPGS related stranded costs. The current "maximum" estimate is $121,429,424, carried on AMP's books as of 12/31/2011 as $86,548,349 in regulatory assets and $34,881,075 in plant assets held for future use (principally the site and permits). The only additional items are litigation costs, as approved by the Participants and AMP's Board, and interest (currently on AMP's line of credit at about 1.2%).

6. **Will AMP put in writing that these stranded costs are final and complete with regard to how much it will pass along from AMPGS to Martinsville?**

   The final amount will not be known until completion of the litigation proceedings with Bechtel Corporation and the liquidation of AMPGS assets. When that amount is known, the amount, if any, will be invoiced and all appropriate back up data made available to Participants. The Power Sales Contract provides audit rights to Participants for this data.

7. **Can representatives from Martinsville obtain copies of any supporting documents that outline these costs, including audits, legal opinions, internal memorandum, settlement papers or any other written materials to support a total stranded cost figure and a passalong figure?**

   In addition to information already made available to all Participants at Participants and Participants Committee meetings, City of Martinsville representatives are welcome to review the financial documentation related to the AMPGS stranded costs at AMP's offices. Of course, most documents related to the ongoing litigation with Bechtel are attorney-client privileged and their public release could be highly detrimental to Martinsville's and the other Participants' best interests. In the interim, Martinsville's legal counsel is invited to discuss the litigation with AMP's counsel. When the litigation is over and AMPGS assets are liquidated, invoices would be issued and a full accounting available.

LIQUIDATED DAMAGES AND THE LITIGATION

1. **What is the current status of the case between AMP and Bechtel?**

   On Friday, February 11, 2011 a complaint was filed by AMP against Bechtel Power Corporation. The complaint, which was filed in U.S. District Court, Southern District of Ohio, Eastern Division, stems from cancellation of the proposed AMPGS project. In the complaint, AMP alleges breach of contract, gross negligence and breach of fiduciary duty on the part of Bechtel. The case has been assigned to U.S. District Court Judge Michael Watson and Magistrate Judge Beth Preston Deavers. On April 12, 2011, Bechtel filed a motion to dismiss the complaint. Bechtel also filed an answer denying any liability and a counterclaim seeking $383,566.33 from AMP related to a termination payment that Bechtel alleges it is entitled to as a result of AMP terminating the AMPGS project for convenience. Bechtel's lead counsel is Mike Subak from the Pepper Hamilton firm in Philadelphia and its local counsel is Terry Miller of the Vorys firm in Columbus. A preliminary conference was held with Magistrate Judge Deavers on June 13, 2011. Magistrate Deavers implemented a two-year case schedule with an anticipated trial date some time the first quarter of 2013. Magistrate Deavers denied Bechtel's request to stay discovery during the pendency of Bechtel's motion to dismiss so the parties proceeded with discovery. A discovery conference was held before Magistrate Deavers on August 2, 2011. After the conference, counsel for the parties finalized and filed an agreed protective order with the Court to maintain the confidentiality of any proprietary or trade secret information. Counsel have also completed an electronically stored information (ESI) protocol which governs the production of ESI by both parties. Actual exchange of ESI and hard-copy information was completed at the end of December, 2011. The initial June 1, 2012 discovery deadline was extended by two months until August 3, 2012 to accommodate an unexpected delay in the production of ESI.

   In addition to the exchange of information between AMP and Bechtel, Bechtel has served subpoenas on: AMP member communities Cleveland, Oberlin, Painesville, Danville and Martinsville; AMP vendors: Powerspan, Hitachi and The Andersons; AMP consultants: R.W. Beck (now SAIC), Sargent & Lundy and Burns & Roe (Participants' Consulting Engineer); and AMP counsel for EPC negotiations with Bechtel: Nixon Peabody. Most of the recipients served objections to the subpoenas based upon the

anticipated burden and expense of compliance. Some of the recipients have now produced documents while others continue to negotiate with Bechtel.

AMP's counsel has sorted and reviewed the voluminous ESI and other documentation received from Bechtel (over 14 million pages). In addition, expert witnesses have been retained in anticipation of providing testimony with respect to both Bechtel's liability and AMP's damages. On May 8, 2012, the Court issued an Opinion and Order (attached) which denied Bechtel's motion to dismiss AMP's breach of contract claim but granted Bechtel's motion to dismiss AMP's gross negligence and breach of fiduciary duty claims. In its Opinion and Order, the Court found that, if the allegations in AMP's complaint were proven to be true, it is plausible "that Bechtel acted with no care whatsoever in the face of a known great risk of harm (to AMP)" such that the limitation of liability clause in the EPC contract would be rendered unenforceable. Depositions commenced in May, 2012. As of the date of this report, AMP's counsel has deposed multiple Bechtel witnesses. Bechtel's counsel has deposed five R.W. Beck witnesses including Ivan Clark. AMP witnesses who have been deposed include Marc Gerken, Bob Trippe, Pam Sullivan, Scott Kiesewetter, Larry Marquis and Ivan Henderson. Depositions of Bechtel's witnesses by AMP's counsel continue.

On September 25th, at the parties request, the Court extended the discovery schedule and related dates. The new schedule requires all discovery to be completed by December 21, 2012 and dispositive motions to be fully briefed by March 8, 2013. As a result, a trial is not expected to occur before the end of 2013.

2. **What is the calendar established by the court and when can a monetary settlement be expected? How much is AMP claiming?**

   See above. Any discussions of settlement are attorney-client privileged but would be shared with the Participants in Participants meetings in executive session and the release of such information could be highly adverse to the interests of Martinsville and the other AMPGS Participants. The Participants would be asked to approve any settlement, however.

3. **How would this impact either the total stranded costs on the project or the amount passed along to participants?**

   Any settlement or award would be netted against the AMPGS stranded costs.

4. **Is AMP entertaining any counteroffers, if so, what are the counteroffers?**

   See answer 2.

5. **What is the likelihood of success by AMP in this case that 100% costs currently being passed along to the participants will be covered? IF not 100%, what percentage or range of percentage does AMP see accruing to the benefit of the participants from likely settlement outcomes?**

   AMP's counsel's opinions are attorney-client privileged but have been shared with the Participants in Participants meetings in executive session. Public disclosure of this information could adversely affect Martinsville's and the other Participants interests.

6. **What would be the method by which participants would be notified of a final settlement? What would be the method by which any final settlement funds would be passed along to participants? Will there be court supervision of the disbursements?**

   The Participants and the AMP Board would have to approve any settlement. As noted, any settlement or judgment would be netted against total stranded costs for the benefit of Participants in accordance with project share.

ALLOCATION OF COSTS TO PARTICIPANTS

1. **Based upon AMP's calculation of the 'stranded costs' to be passed along to participants, how was the specific allocation set for each community?**

   The allocation is based on each Participant's project share as noted above.

2. **How much lower would the stranded costs be if any lawsuit or contractual liquidated damages discussions were determined now, prior to Martinsville's decision to pay the AMP determined stranded costs?**

   The reference to liquidated damages is confusing. Martinsville has the option to make payments now or wait until after the litigation process is completed. Any amounts paid now would be a credit and there would be no interest accruing on those amounts. If the City overpays their share due to the final netting, then the City will be reimbursed their overpayment.

3. **Can representatives of Martinsville be provided with the accounting presentations used by AMP to establish these amounts and a full list of all participant estimated stranded costs?**

   The methodology and project share has been approved by the Participants and the AMP Board. As stated previously, City of Martinsville representatives are welcome to review the financial documentation related to the overall AMPGS stranded costs at AMP's offices. As a matter of practice, we do not share information concerning other members.

COST OF FREMONT PLANT

1. **What are the operating costs of the Fremont plant on a $MWh basis?**

   The operating cost of the AMP Fremont Energy Center was $27.28/MWh in August 2012 as reflected on Martinsville's invoice from AMP.

2. **What the capital costs of the Fremont plant on a $MWh basis?**

   Capital costs are not typically stated on a $/MWh basis, as this is a function of the overall capacity factor, which varies monthly based on markets. The current debt service cost on a $/kW basis is $1.2222/kW-Mo as reflected on Martinsville's invoice from AMP.

3. **What is the stranded cost impact on payments by Martinsville on a per $MWh?**

   At the time FirstEnergy approached AMP regarding the sale of AFEC, AMP was in the process of developing a natural gas combined cycle plant on the Meigs County site. Approximately $35 million had been identified as the potential value for developing a NGCC on the Meigs County site. The AMP Board approved assessing the AFEC project this same development fee, and reducing the AMPGS stranded cost for those AMPGS Participants that participated in AFEC. This allowed AMPGS Participants with a funding mechanism to finance a portion of the stranded cost long term through the AFEC long term financing. Martinsville received a credit of approximately $479,000 on their AMPGS stranded cost through their participation in AFEC while Martinsville's cost related to the same was only approximately $317,000. The $35 million represents approximately 6%/kW-Mo out of the previously stated debt service.

4. **If the stranded costs were not a consideration, how much would electricity from the Fremont plant cost on a per $MWh?**

   The development fee impacts the AFEC debt service cost as stated above.

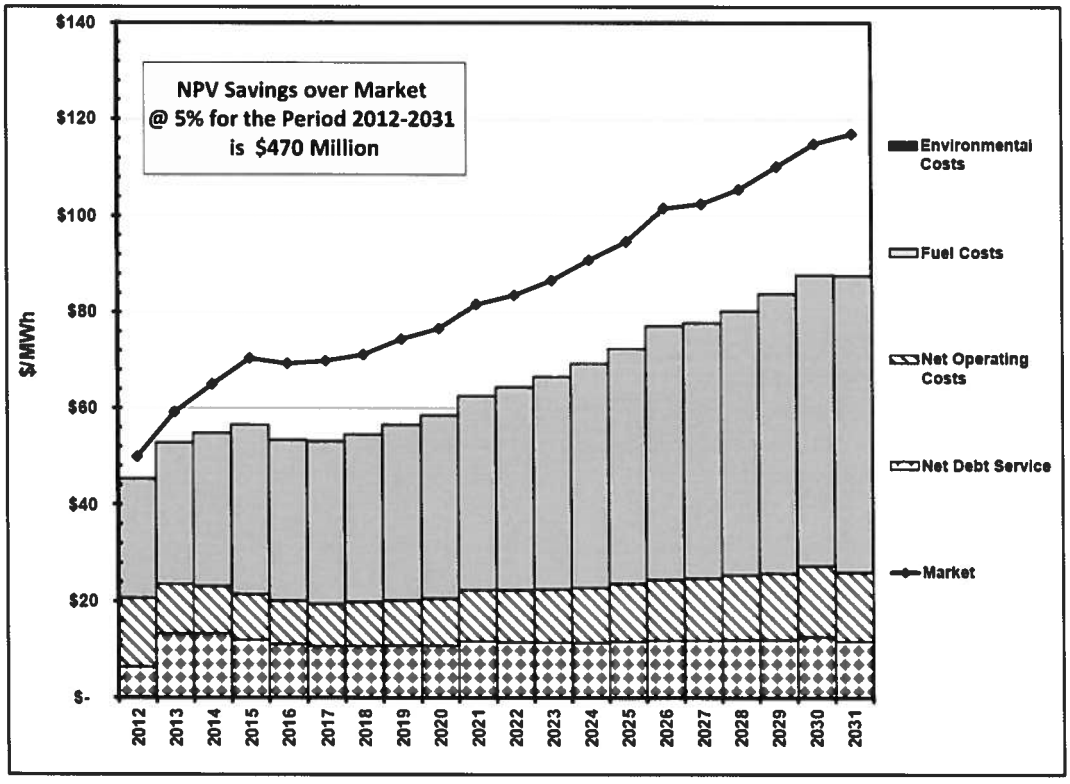
5. **Can representatives of Martinsville be provided with AMP's most current 30 year operating budget for the Fremont plant? Please provide an operating plan that is at least as detailed as those provided in AMP's official statements by its consulting engineer.**

AMP has a five year budget developed for AFEC that can be made available to representatives of Martinsville. We would note, however, that data contained in those budgets could and likely would be used by others in the energy markets to the detriment of the Participants, including Martinsville so making them public record is not in the Participant's best interest.

6. **Given the additional costs of the stranded costs for AMPGS is AMP still confident that Fremont will provide electricity below the current market price of power? Please provide all supporting information including forward looking projections and the basis for those projections?**

Yes to the first question and, as noted above, Martinsville actually received a greater amount of credit than its cost related to the development fee. Below is a chart from the AFEC Financing Official Statement prepared by SAIC showing the comparison of average AFEC costs, which included those costs, to PJM market prices.

Comparison of Average AFEC Costs to PJMAEPD Market Prices



7. **How do the total $MWh costs of the Fremont plant compare with natural gas capacity operating in the MISO and PJM?**

The total costs from the Fremont plant, including demand charge, debt service, working capital, energy charges, etc. was $40.36/MWh for August 2012 as shown on Martinsville's invoice. Further breakdown of this amount is also competitive market information which, if publically released, could be detrimental to the Participants. The information is available at Participants meetings or at AMP should Martinsville desire to review the same. We do not have information on the cost of other natural gas facilities in MISO or PJM, but AFEC's heat rate compares favorably with other existing gas facilities and therefore is expected to remain competitive into the future.

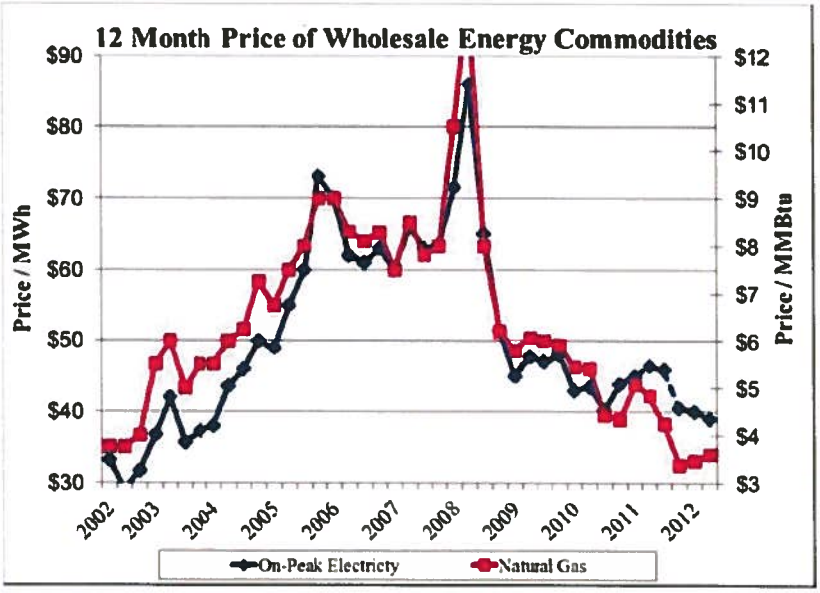
8. **How does the $MWh operating costs of the Fremont plant compare with natural gas capacity operating in the MISO and PJM?**

See above answer.

BASIC QUESTIONS

1. **Given that the two newest capacity additions to Martinsville's portfolio mix are Fremont and Prairie State can AMP explain how Martinsville residents will be benefiting from lower power prices currently driven by low natural gas prices?**

Martinsville's power supply mix includes 6,037 kW in Fremont and 5,772 kW in Prairie State. The remaining needs for the City are supplied by energy from the market (other than the City's allotment in SEPA) which provides benefits of today's lower market rates. The market purchases consist of some longer term energy blocks, as well as spot market energy. This type of diverse portfolio reduces risk to Martinsville and other AMP members. Since AFEC gas is purchased from the market (with some Participant approved hedging), Martinsville has and will continue to benefit from the low gas market. Through July, AFEC had already provided about $20M in savings between operating costs and market to the Participants. Both projects are long term projects to help protect from the kind of market volatility, noted on the chart below.



2. **Had AMP not gone forward with AMPGS and incurred the stranded costs and had it not gone forward with Prairie State -- what would be the likely cost of electricity from a Fremont Plant unencumbered by AMPGS stranded costs and other the generation sources used by AMP to provide electricity to Martinsville?**

As stated above, the development fee assessed to AFEC represents $0.289/kW-Mo of the debt service. The question also misunderstands the facts, there is no connection between Prairie State and Fremont other than both are AMP projects which are part of a diverse, balanced portfolio that lowers risks for participating AMP members.

3. **Please provide the last five years of all AMP independent audits for the parent American Municipal Power and its predecessors and all subsidiary corporations. Provide those audits and reviewed paid for by AMP or its subsidiaries and any external audits performed by a public or quasi-public oversight agency?**

   AMP's audits and annual reports are publicly accessible on its website, www.amppartners.org, which also contains audits of its affiliates. The joint venture audits are performed by a CPA firm under the supervision of the Ohio Auditor of State.

4. **Please provide any external or internal evaluations in AMP's possession that were prepared by, for or about AMP regarding the AMPGS and the response by AMP officials to these reports, studies, evaluations.**

   The AMPGS Feasibility Study and Beneficial Use Analysis have been previously supplied to the City of Martinsville. We are unsure of what else is meant by this question.

5. **Please explain why AMP cancelled the Meigs County plant in November 2009, but then continued with the same developer Bechtel and subjected itself and supporting communities to significant cost overruns in the Prairie State plant? Why was the market argument for Meigs County different from Prairie State?**

   The AMPGS Participants cancelled the AMPGS coal fired plant due to a substantial increase in the EPC cost from Bechtel. When AMP entered into the Prairie State project on behalf of the Prairie State Participants, the EPC contract had already been executed with Bechtel. AMP was not involved in the selection process for the EPC contractor at Prairie State. After AMP did become involved in Prairie State it led the effort to convert that target price EPC contract with Bechtel to the fixed price contract that is now providing benefits to the Participants and, in any event, as an owner of less than 25% of the project, AMP had no independent authority to change EPC contractor at Prairie State even if it believed that to be prudent.

Attachment

4832-5028-7633, v. 10

ATTACHMENT

May 8, 2012 Opinion and Order re: AMP v. Bechtel,
Case No. 2:11-cv-131, Judge Michael H Watson,
U.S. District Court, Southern District of Ohio, Eastern Division

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

American Municipal Power, Inc.,

Plaintiff,

-v- **Case No. 2:11–cv–131**

Bechtel Power Corporation, **Judge Michael H. Watson**

Defendant.

OPINION AND ORDER

Plaintiff American Municipal Power, Inc. ("AMP" or "Plaintiff") sues Defendant Bechtel Power Corporation ("Bechtel" or "Defendant") under the Court's diversity jurisdiction, alleging breach of contract, negligent misrepresentation, and breach of fiduciary duty under Ohio common law. Defendant moves to limit Plaintiff's potential recovery under Count One and to dismiss Counts Two and Three in their entirety, ECF No. 9. For the reasons that follow, the Court denies Defendant's motion as to Count One and grants Defendant's motion as to Counts Two and Three.

I. FACTS

AMP is a nonprofit corporation organized under the laws of and with its principal place of business in Ohio. AMP is a wholesale supplier for municipal power systems which purchases, generates, and distributes power for 128 publically-owned AMP member utilities.

Bechtel is a corporation organized under the laws of Nevada with its principal place of business in Maryland.

In the complaint, Plaintiff alleges the following. In 2007 and 2008, AMP commissioned feasibility studies for the development of a coal-fired supercritical power

plant. The studies included a comparison of the projected costs of purchasing power from third-party electric suppliers and the costs of developing, owning, and operating a coal-fired supercritical power plant and generating the needed power. AMP determined that it would be most economical to build and own its own coal-fired supercritical plant. This project became known as the AMP Generating Station.

In October 2007, AMP issued a request for proposals to several contractors regarding the engineering, procurement, and construction related to the AMP Generating Station. In January 2008, several contractors, including Bechtel, submitted a proposal. After consideration of all the proposals, AMP selected Bechtel as the contractor for the AMP Generating Station.

In August 2008, AMP and Bechtel entered into a Technical Services Agreement in which Bechtel agreed to perform preliminary tasks, including project development activities, engineering and pre-engineering, procurement, and construction services. On August 11, 2008, Bechtel submitted to AMP an update of its indicative price which reflected increases of $22 million from the Bechtel proposal of about eight months earlier.

On or about January 1, 2009, AMP entered into an engineering, procurement, and construction contract ("EPC contract") with Bechtel. As part of the initial phase of the contract, Bechtel would develop a target price estimate between January 20 and November 2, 2009 in accordance with professional standards. The EPC contract defines the term "professional standards" as "those standards and practices used by, and the degree of skill and judgment exercised by, recognized United States engineering and/or construction firms, when performing high quality services on power

plants similar to the [AMP Generating Station project]." Compl. ¶ 22, ECF No. 1.

The parties agree Bechtel compiles cost and productivity information from its projects and generates various reports on a periodic basis and considers such information proprietary. Bechtel's proprietary information is part of what Bechtel considers when estimating the costs of future and ongoing power projects.

From November 2008 to December 2009, Bechtel sent AMP monthly progress reports. AMP alleges that throughout the months of November 2008 to September 2009, Bechtel represented to AMP that the expected EPC cost from August 2008 was sound and reliable.

In April 2009, AMP entered into a $5.06 million Bechtel-managed agency contract with Powerspan Corporation for preliminary engineering required to develop a full-price proposal on an air quality control system for the AMP Generating Station.

In May 2009, AMP informed Bechtel that due to the lowering cost of energy, it was reevaluating whether to build a power plant. On May 5, 2009, Bechtel met with AMP and updated elements of its indicative price, reporting that the estimated cost had declined by $157 million. On May 28, 2009, AMP's members met and decided to move forward with building the AMP Generating Station.

AMP then entered into contracts to facilitate the progress of the AMP Generating Station. AMP issued a purchase order of over $270 million to Hitachi for the design and fabrication of the boilers for the AMP Generating Station and a purchase order of over $129 million to Hitachi for the design and fabrication of the steam turbine generators for the AMP Generating Station. AMP also purchased land and, through Bechtel, made improvements to that land totaling $14.6 million. Finally, AMP expended nearly $4

million for the services of consultants on the AMP Generating Station and paid Bechtel approximately $16.5 million for its services.

On October 30, 2009, Bechtel advised AMP that the EPC cost of the AMP Generating Station would be more than $1 billion dollars greater than Bechtel's August 2008 and May 2009 estimates. On November 11, 2009, Bechtel made a presentation to AMP's representatives confirming that the estimated overall EPC cost of the AMP Generating Station project would be $1.06 billion more than Bechtel's August 2008 and May 2009 estimates. On November 17, 2009, Bechtel made another presentation to AMP's representatives incorporating possible cost reductions which could result from eliminating or reducing various elements of the project. With these reductions, the estimated price remained $846 million more than Bechtel's August 2008 and May 2009 estimates.[1]

Based on this change in price, AMP decided to cancel the project. By a letter dated November 24, 2009, AMP terminated Bechtel's EPC contract for default. That same day, AMP also terminated contracts with Hitachi, Powerspan Corporation, and other contractors and vendors on the AMP Generating Station project.

II. STANDARD OF REVIEW

A claim survives a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more

[1] It is not clear from the complaint whether the $1 billion increase was measured from August 2008 or May 2009. Those two price estimates themselves differed by $157 million.

than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the complaint's allegations are true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) (internal citations omitted).

A court must also "construe the complaint in the light most favorable to the plaintiff." *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir. 2002). In doing so, however, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555; *see also Iqbal*, 129 S. Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007). "[A] naked assertion . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility . . . ." *Twombly*, 550 U.S. at 557. Thus, "something beyond the mere possibility of [relief] must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Id.* at 557–58 (internal citations omitted).

III. DISCUSSION

In Count One, Plaintiff seeks damages for breach of the EPC contract. In Count Two, Plaintiff alleges Defendant owed a duty to Plaintiff to exercise reasonable care, skill, and ability; that duty was breached through gross negligence and negligent misrepresentations; and Plaintiff was damaged. In Count Three, Plaintiff alleges

Defendant breached its fiduciary duty to Plaintiff. All three claims seek damages of not less than $97 million.

Defendant argues its liability under Count One should be limited to $500,000, the contractual limitation of liability appropriate to the stage of the contract performance at the time the project was cancelled. Defendant also argues Counts Two and Three should be dismissed in their entirety because they do not state a tort claim separate from the breach of contract claim in Count One.

A. Breach of Contract

Bechtel argues the Court should bar recovery beyond the limitation of liability clause.

> Article 16 of the EPC agreement limits Bechtel's liability as follows:
>
> Contractor's . . . cumulative monetary liability to AMP-Ohio and owners arising under or in relation to the EPC agreement will in no event exceed a) an amount equal to the earned fee component paid to contractor but in no event less than five hundred thousand US dollars ($500,000) and in no event more than the amount specified in Section 6.1 of Appendix T-3, as such amount specified in Section 6.1 of Appendix T-3 may be adjusted in accordance with Section 5.1.3 and Appendix T-3.

Bechtel states it was never paid an earned fee on the project and, accordingly, Article 16 limits Bechtel's liability to $500,000.

Plaintiff argues that the limitation of liability clause cannot be enforced because Defendant acted willfully, wantonly, recklessly, or with gross negligence. Under Ohio law, a limitation of liability clause is not enforced where the party to the contract seeking protection has engaged in willful or wanton misconduct. *Superior Integrated Solutions, Inc. v. Reynolds and Reynolds Co.*, No. 3:09–cv–314, 2009 WL 4135711, at *3–4 (S.D. Ohio Nov. 23, 2009) (citing *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.*, 54 Ohio

St. 2d 147, 157–58 (1978)); *see also Peitsmeyer v. Jackson Twp. Bd. of Trs.*, No. 02AP-1174, 2003 WL 21940713, at *4 (Ohio Ct. App. 10th Dist. Aug. 14, 2003).

Willful misconduct "implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposely doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. *Thompson v. Smith*, 187 Ohio App. 656, 665 (Ohio Ct. App. 11th Dist. 2008). Wanton misconduct is "a degree greater than negligence" and "is characterized by the failure to exercise any care toward one to whom a duty of care is owed when the failure occurs under circumstances for which the probability of harm is great and when the probability of harm is known to the tortfeasor." *Hunter v. Columbus*, 139 Ohio App. 3d 962, 969 (Ohio Ct. App. 10th Dist. 2000).

Plaintiff submits that in addition to willful or wanton conduct, grossly negligent and reckless conduct render a limitation of liability clause unenforceable. Some Ohio cases discuss gross negligence and recklessness as a bar to the limitation of liability. *See, e.g.*, *Thompson v. McNeill*, 53 Ohio St. 3d 102, 104 (1990); *Harsh v. Lorain Cty. Speedway*, 111 Ohio App. 3d 113, 118 (Ohio Ct. App. 8th Dist. 1996). Those cases, however, equate gross negligence and recklessness with wanton conduct. Therefore, the controlling standard on when to enforce a limitation of liability remains whether the party that breached the contract did so intentionally or failed to exercise any care whatsoever. *Ohio Cas. Ins. Co. v. D & J Distrib. & Mfg. Inc.*, No. L-08-1104, 2009 WL 2356849, at *8, *10 (Ohio Ct. App. 6th Dist. July 31, 2009).

At oral argument, Defendant argued that no Ohio court has ever held that sophisticated parties who contracted to limit their liability were released from their

agreement because of wanton conduct. In so arguing, Defendant suggests that a different standard applies to the limitation of liability clauses created by sophisticated parties. This position finds some traction in authority outside of Ohio. Corbin on Contracts, citing New York law, notes that limitation of liability provisions in contracts created by sophisticated parties are enforced even in the face of an allegation of intentional breach. Corbin on Contracts § 58.16 (citing *Dynacorp v. GTE Corp.*, 215 F. Supp. 2d 308, 318 (S.D.N.Y. 2002)).

Ohio law, however, does not make such a distinction. Ohio cases have time and again held that limitation of liability clauses are not enforceable in regards to willful or wanton conduct, even between commercial parties with equal bargaining power. *See, e.g., Berjian*, 54 Ohio St. 2d at 155,158 (applying willful and wanton standard to contract between a surgeon and telephone company where court held "no more disparity in bargaining power than may be found generally to exist"); *Motorists Mut. Ins. Co. v. ADT Sec. System*, Nos. 14799, 14803, 1995 WL 461316, at *4 (Ohio Ct. App. 2d Dist. Aug. 4, 1995) ("Courts enforce limitation of liability clauses between commercial parties [business and alarm company] based on the freedom of contract . . . unless the breaching party is shown to be grossly negligent . . . or the contract is shown to be unconscionable").

In addition, federal courts applying Ohio law have applied the willful and wanton standard to sophisticated commercial entities. In *Transcontinental Ins. Co. v. SimplexGrinnell LP*, the court explicitly found that a country club and a sprinkler system inspector were "sophisticated entities engaged in a commercial contract where no unequal bargaining position existed" and that there was a factual issue as to whether

the inspector was "grossly negligent," and therefore declined to enforce the limitation of liability clause at the motion to dismiss stage. No. 3:05–cv–7012, 2006 WL 2035571, at *5–7 (N.D. Ohio July 18, 2006). In *Superior Integrated Solutions, Inc. v. Reynolds and Reynolds Co.*, this Court held that a software company had pleaded enough facts suggesting willful breach by another software company that a limitation of liability clause could not be enforced in a motion to dismiss. No. 3:09–cv–314, 2009 WL 4135711, at *3–4 (S.D. Ohio Nov. 23, 2009). The *Superior Integrated Solutions* court cited *Berjian* for the proposition that the limitation of liability clause at issue was "ineffective where the party to the contract seeking protection has engaged in willful or wanton misconduct." *Id.* at *3.

Finally, in *Purizer Corp. v. Battelle Memorial Ins.*, a plaintiff alleged a defendant had negligently misrepresented the properties of the product it was hired to research contrary to defendant's agreement to "provide a high standard of professional services on a best efforts basis." No. 01–c–6360, 2002 WL 22014, at *5 (N.D. Ill. Jan. 7, 2002). The Northern District of Illinois, applying Ohio law, held the plaintiff had properly alleged willful and reckless conduct and therefore could overcome a motion to dismiss based on a limitation of liability. *Id.* In light of these decisions, Ohio law does not apply a different test to sophisticated commercial entities with equal bargaining power and if AMP pleaded facts to support willful or wanton conduct, the limitation of liability cannot be enforced at this motion to dismiss stage.[2]

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[2] The one case that even suggests otherwise is *Wheel Specialities, Ltd. v. Starr Wheel Group, Inc.*, 4:10–cv–2460, 2012 WL 160203, at * 6 (N.D. Ohio Jan. 19, 2012). The court in *Wheel* stated that *Berjian* and *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St. 3d 367 (1998), "involve limitation of liability clauses, which were not contained in settlement agreements between sophisticated commercial entities and are, therefore, not applicable to the facts in this case." *Id.* The Court reads *Wheel Specialities, Ltd.*

In its briefs, Defendant argues that inaction cannot demonstrate wanton conduct and that although Plaintiff included the words "willful" and "wanton," Plaintiff has not pleaded facts which make the allegations plausible as required by *Twombly* and *Iqbal*.

Defendant's argument that inaction cannot demonstrate wanton conduct because wantonness is positive in nature and requires "perversity" is inaccurate. In *Hawkins v. Ivy*, the case both parties cite for Ohio's definition of wanton, the Ohio Supreme Court held the evidence supported the jury's conclusion that a motorist was wanton when he failed to take precautions—such as turning on hazard lights or moving his car—despite an awareness that he was putting other motorists at great risk. 50 Ohio St. 2d 114, 116 (Ohio 1977). Also in *Hawkins*, the Ohio Supreme Court eliminated perversity as part of the requirement for wanton conduct. *Id.* Although wanton behavior has been characterized as "positive in nature," *see Tighe v. Diamond*, 149 Ohio St. 520, 526 (1948), the cases demonstrate that it is the failure to act in the face of knowledge of significant risk that elevates wanton conduct above mere negligence. *See, e.g.*,*Ohio Cas. Ins. Co. v. D & J Distrib. & Mfg. Inc.*, 2009 WL 2356849, at *8 (wanton conduct where employer failed to ground machines to avoid static electricity and train employees in fire safety at incense factory).

Defendant's final argument, that AMP failed to plead enough facts to make willful or wanton conduct plausible, also fails. Plaintiff alleges Defendant had information on other Bechtel projects that showed Bechtel's price estimate would increase; Bechtel had a contractual duty to use the information from other projects in updating its

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as drawing a distinction between the specific facts of the cases, not between all limitation of liability clauses involving sophisticated parties and those clauses involving at least one unsophisticated party.

estimates to AMP; Bechtel did not apply the data to the AMP Generating Station project estimate or tell AMP about it in a timely manner; Bechtel represented that AMP could rely on Bechtel's previous estimates; and Bechtel knew that not incorporating this data in a timely manner would harm AMP. Compl. ¶¶ 34, 52. Plaintiff specifically alleges Bechtel gathers and compiles information for all Bechtel projects on a daily basis and generates weekly and monthly reports on the information and the information is monitored and used by Bechtel's estimating department, project management and senior management for, among other things, projecting costs of building projects. Compl. ¶ 30.

As to Bechtel's duty to use the information and communicate the results to AMP, Plaintiff alleges that under the EPC contract, Bechtel had a duty to engage in "Escalation Management" with respect to EPC costs; there is a specific procedure for Bechtel and AMP to confer as a team to achieve the lowest cost; Bechtel was to establish and maintain a detailed project control and budgeting system and report to AMP on a regular basis on this system; and the target price was to be developed through an "open book" process. *Id.* ¶¶ 24, 27, 32. Finally, during the early stages of the Preliminary Phase, Bechtel was to implement a trend program so that Bechtel and AMP would have timely knowledge and early warning of development or changes to the estimated cost. As trends were identified, Bechtel was to document and review the trends with AMP team members on a periodic basis but not less than monthly. *Id.* ¶ 35. AMP states that Bechtel provided the detailed monthly reports but did not indicate that the August 2008 and May 2009 estimates were unrealistic. *Id.* ¶ 38.

Plaintiff alleges at several times prior to October 30, 2009, Bechtel represented to AMP through telephone conferences and meetings that Bechtel's "EPC Cost was sound, that costs on other ongoing Bechtel coal-fired EPC projects were tracking in line with expectations, and that Bechtel's advice to AMP with respect to the expected EPC Cost could be relied upon by AMP for decision-making with regard to the [AMP project]." *Id.* ¶ 40.

In addition, AMP alleges Bechtel knew underestimating the cost would significantly harm AMP because the May 2009 letter expressed AMP's concern about the viability of the project and Bechtel was aware and involved in AMP's decision to enter into millions of dollars of contracts based on the May 2009 price update. *Id.* ¶¶ 41–42.

These facts may not support an inference that Bechtel was willful in its failure to use the data from other projects in their estimates to AMP; indeed there is no allegation Bechtel made an intentional choice not to use the data from other projects in its price estimates to AMP.

The facts do, however, support a plausible inference that by not appropriately using its experience on other projects, Bechtel was wanton. Taking Plaintiff's allegations as true—as the Court must do at this stage—it is plausible that Bechtel completely failed in its duty to use the proprietary information and knew there was a significant risk that AMP would lose millions of dollars in reliance on Bechtel's price estimate. It is also plausible that Bechtel used the propriety information and knew there was a chance the EPC cost would be significantly higher than the May 2009 estimate long before AMP was told about the $1 billion increase, but failed to disclose that fact to

AMP. Especially in light of the detailed mechanisms in the contract for the use of Bechtel's proprietary information and frequent updates to AMP on the estimated price, it is reasonable to infer that had Bechtel been using any care, the increase in price would have come to light earlier than October 2009.

Although it is possible that Bechtel was simply negligent, or not negligent at all, a plaintiff does not need to rule out every possible alternative to state a plausible claim under another explanation. *See Anderson News, LLC v. American Media, Inc.*, No. 10–4591–cv, slip op. at 28 (2nd Cir. Apr. 3, 2012) ("Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible."); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596–97 (8th Cir. 2009) (holding *Twombly* only required plaintiffs to rule out "obvious alternative explanations" that render the plaintiff's own theory implausible). It is plausible that Bechtel acted with no care whatsoever in the face of a known great risk of harm and, therefore, acted wantonly. Accordingly, the Court denies Plaintiff's motion to limit the liability in Count One to $500,000.

B. Tort Claims

Bechtel argues AMP has not properly pleaded tort claims in addition to its breach of contract claim because a contract does not create a separate tort duty and AMP has not pleaded separate damages. Bechtel's argument relies on the line of cases derived from *Textron Financial Corporation v. Nationwide Mutual Insurance Company*, 115 Ohio App. 3d 137 (Ohio Ct. App. 9th Dist. 1996). In *Textron*, the court held that under Ohio law,

[a] tort claim based upon the same actions as those upon which a claim of

> contract breach is based will exist independently of the contract action only if the breaching party also breached a duty owed separately from that created by the contract, that is, a duty owed even if no contract existed . . . In addition to containing a duty independent of that created by contract, an action arising out of contract which is also based upon tortious conduct must include actual damages attributable to the wrongful acts of the alleged tortfeasor which are in addition to those attributable to the breach of contract.

Id. at 151. Accordingly, to plead a tort claim separate from a breach of contract claim, a party must plead a separate duty and separate damages.

Textron was decided in the context of a motion for a directed verdict, but this Court applied it the context of a motion to dismiss in *Ruggles v. Bulkmatic Transport Co.*, No. C2–03–617, 2004 WL5376213 (S.D. Ohio June 23, 2004). In *Ruggles*, then Chief Judge Graham dismissed a negligent misrepresentation and fraud claim because the plaintiff had not alleged duties separate from the contract or damages separate from the breach of contract damages. *Id.* at *9.

Plaintiff argues that *Ruggles* was wrongly decided because it applied *Textron* in the context of a motion to dismiss. Plaintiff cites the fact that *Textron* itself was decided on the evidence presented and argues that by applying *Textron* in a motion to dismiss *Ruggles* foreclosed the possibility to plead in the alternative.

The Court finds Plaintiff's arguments unpersuasive and will follow the well-reasoned opinion in *Ruggles* by applying *Textron* in the context of a motion to dismiss. Although *Textron* was decided on the evidence, it set forth the elements necessary to make a tort claim separate from a contract claim. Therefore, by applying *Textron* in a motion to dismiss, the *Ruggles* court did not reject the basic premise that claims can be pleaded in the alternative. *See* Fed. R. Civ. P. 8(a)(3). Rather, the *Ruggles* court held in failing to identify a duty and damages separate from the breach of contract claim, the

plaintiffs had failed to state a claim for the torts at issue.

Similarly, Bechtel argues that AMP has not stated claims for the torts alleged because it did not plead separate duties or separate damages. In its first argument, Bechtel delves into the complicated relationship between contract and tort duties in Ohio law, which was most recently touched on by the Ohio Supreme Court in *Jones v. Centex Homes*, No. 2012-Ohio-1001, slip op. (Ohio March 14, 2012). The Court, however, does not need to address Bechtel's argument on separate duties. Even if AMP has pleaded a legal duty separate from the breach of contract for Counts Two and Three, AMP has failed to plead separate damages. AMP alleges the same $97 million in damages in each of the three counts and has not alleged any facts to show that the different causes of action caused different damages.

AMP argues it has pleaded separate damages because it seeks punitive damages which are unavailable under a contract claim. *Textron*, however, requires that a plaintiff show "*actual damages* attributable to the wrongful acts of the alleged tortfeasor which are in addition to those attributable to the breach of the contract." 115 Ohio App. at 1271 (emphasis added). "Punitive damages are not actual damages." *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St. 3d 177, 183 (2006). Punitive damages, therefore, cannot be the separate damages which support a tort claim under the *Textron* rule. *Everstaff, L.L.C. v. Sansai Env. Tech., L.L.C.*, No. 96108, 2011 WL 4390083, at *6 (Ohio Ct. App. 8th Dist. Sept. 22, 2011).

Despite AMP's argument to the contrary, the cases it cites do not undermine that rule. *See Koehler v. PepsiAmericas, Inc.*, 268 F. App'x 396 (6th Cir. 2008); *Lake Ride Academy v. Carney*, 66 Ohio St. 3d 376 (1993). The courts in *Koehler* and *Lake Ride*

Academy did not consider whether the plaintiffs had stated separate claims under the *Textron* rule. The decisions in those cases stand merely for the proposition that where there is a properly pleaded tort separate from a contract claim, punitive damages are available. *Koeler*, 268 F. App'x at 407; *Lake Ride Academy*, 66 Ohio St. 3d at 381.

Finally, the Court is aware of this Court's 2008 decision in *Eggert Agency, Inc. v. NA Management Corp.*, No. 2:07–cv–1011, 2008 WL 3474148, at *7 (S.D. Ohio Aug. 12, 2008), which suggested the allegation of punitive damages in the complaint could support separate damages. The decision in *Eggert*, however, also relied on the fact that plaintiffs implied they would be seeking damages in excess of their contractual damages, so the punitive damages language was not essential to the holding. In light of the recent Ohio precedent in *Everstaff*, the Court declines to follow the dicta in *Eggert* and holds punitive damages cannot support the separate actual damages required by *Textron*.

Accordingly, AMP has failed to identify actual damages separate from the breach of contract claim and has failed to state a claim under Counts Two and Three.

V. DISPOSITION

For the above stated reasons, the Court **DENIES** Defendant's motion to dismiss to the extent it seeks to limit liability in Count One and **GRANTS** the motion as to Counts Two and Three.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT