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*Attorneys for Plaintiff
Chambers Cogeneration Limited Partnership*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

_____)	
CHAMBERS COGENERATION LIMITED)	
PARTNERSHIP,)	
)	
Plaintiff,)	
v.)	Civil Action No.
)	
CARNEYS POINT TOWNSHIP,)	
)	
Defendant.)	
)	
_____)	

COMPLAINT

Plaintiffs Chambers Cogeneration Limited Partnership (“Chambers” or “Plaintiff”) by its undersigned attorneys, and for their Complaint against Carneys Point Township (the “Township” or “Defendant”) alleges as follows:

NATURE OF THE ACTION

1. This is an action to vindicate Plaintiff’s rights under the Fourth and Fifth Amendments to the Constitution of the United States, 42 U.S.C. §1983, and the Constitution and Laws of the State of New Jersey. Defendant has violated Plaintiff’s federal and state constitutional rights as well as rights arising under the statutes and common law of the State of New Jersey. Chambers seeks declaratory judgment, injunctive relief and damages as well as attorneys’ fees and costs.

2. This action arises from Defendant's actions in coercing Chambers to enter into an illegal, unauthorized *ultra vires* contract on or about January 9, 1991 referred to by Defendant as the host community benefit agreement (the "Agreement") requiring annual, escalating payments from Chambers to the Township for a period of forty years. Through the imposition of the Agreement Defendant has denied the Plaintiff equal protection, and effectuated a continuing series of illegal takings from the Plaintiff violating the takings clauses of the United States and New Jersey Constitution in an amount totaling approximately \$62,000,000 to date. Chambers seeks a declaratory judgment that the Agreement is an unauthorized *ultra vires* unenforceable contract, enjoining the Defendant from seeking to enforce the Agreement in the future, compensatory damages compensating Plaintiff for the illegal taking, punitive damages, costs of suit and attorneys' fees.

THE PARTIES

3. Plaintiff Chambers is a limited partnership organized and existing under the laws of the State of Delaware.
4. On information and belief, Defendant Township is a municipal corporation of the State of New Jersey.

JURISDICTION AND VENUE

5. Jurisdiction in this Court is proper pursuant to 27 U.S.C. §1331, in that Plaintiff raises a federal question by asserting claims herein under 42 U.S.C. §1983 and 28 U.S.C. §2201 and 2203, the Equal Protection Clause of the 14th Amendment of the United States Constitution and the Takings Clause of the Fifth Amendment of the United States Constitution.
6. This Court has supplemental jurisdiction over any state law claims asserted herein as per 28 U.S.C. §1367(a).

7. This Court has personal jurisdiction over Carneys Point Township as it is a government entity, more specifically a municipal corporation incorporated under the laws of the State of New Jersey.
8. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391 because the Defendant and subject Property are all located in New Jersey.

FACTS

9. Chambers owns and operates a 262 MW pulverized-coal-fired, cogeneration facility (the “Cogen Facility” or “subject Property”) located on land in Carneys Point Township, New Jersey that is ground-leased from DuPont.
10. The Cogen Facility sits on land directly adjacent to the DuPont Plant (which division was recently spun off by DuPont and renamed the Chemours Company) and provides steam and electrical power to that chemical plant in a classic cogeneration arrangement.
11. The Cogen Facility is a qualified facility (“QF”) under the Public Utility Regulatory Policies Act of 1978 (“PURPA”), 16 U.S.C.A. §824 *et. seq.*, and as such is not a “public utility” under New Jersey law that is regulated by the Board of Public Utilities (“BPU”) as was determined by the BPU in its Order in In the Matter of the Petition for Approval of Power Purchase Agreement between Atlantic City Electric Company and Chambers Cogeneration Limited Partnership, Docket No. EM88111219 (March 31, 1989).
12. The facility commenced commercial operations in 1994 and utilizes two Foster Wheeler boilers and an Alstom conventional steam turbine generator. It sells approximately 184 MW of its capacity and energy to Atlantic City Electric (“ACE”), pursuant to a 30-year Power Purchase Agreement (“PPA”) that expires in 2024. In addition, it can sell all energy not dispatched by ACE (up to 141 MW) and excess energy (in excess of PPA and ESA up to 55 MW) under a separate Power Sales Agreement (also with ACE). DuPont purchases steam

and electrical power (up to 20 MW) from the facility pursuant to a 30-year Energy Sales Agreement.

13. The Agreement between Plaintiff, Chambers, and Defendant stemmed from the land use approvals for development of the plant. On or about June 27, 1989, the Planning Board of the Township of Carneys Point adopted a resolution memorializing its approval of a conditional use permit, preliminary site plan approval, and the grant of eleven height variances, specifically conditioned upon, among other things, the following three conditions: (1) “Applicant and Township shall agree upon a fund, or a contract for a fund, relative to **future adverse impacts** resulting from the construction and or operation of subject cogeneration facility;” (2) “Applicant shall present to the Carneys Point Township Committee a proposal, which shall be agreeable to the Carneys Point Township Committee, whereby if applicable laws change with respect to gross receipt issues, the Township may obtain any and all benefits from such change in legislation relative to this cogeneration facility;” and (3) “The Carney Point Township Committee shall have the final approval over the taxing standards and rates for subject cogeneration facility.”
14. At some point after the June 27, 1989 Planning Board preliminary approval, it appears that the Township passed Resolution 90-234 addressing the conditions in the June 27, 1989 Planning Board preliminary approval and authorizing an agreement between the Township and Chambers (under prior ownership) to fulfill certain conditions of that Preliminary Planning Board Approval. The Planning Board granted Final Site Plan Review Approval via a resolution adopted at its November 27, 1990 meeting.
15. When the EIF managed funds acquired their ownership interests in the Cogen Facility, it was understood that the Project had in place a formal Payment in Lieu of Tax (“PILOT”)

agreement between Chambers and Carneys Point Township. As is typical with PILOTs, this agreement was completed during the facility's development period (1991) and provided for a stream of defined annual payments to the Township over a defined period of time (1994 to 2033). Each year the Township would send a bill for a "payment due in lieu of taxes pursuant to N.J.S.A. 54:4-3.95", reinforcing ownership's understanding that there as a PILOT in effect for the Cogen Facility.¹

16. In March 2015, Chambers commenced a review of its annual property tax burden as it believed that the annual PILOT payment was far in excess of what the facility would otherwise be paying for a facility of this size and vintage. At that time it appeared that the Chambers "PILOT" bill for 2015 was scheduled at \$3,900,000.
17. During the review, it was discovered that the facility appears to have had a five-year PILOT in place from 1994 through 1998 under authority of N.J.S.A. 54:4-3.95 et. seq. (repealed Law 1991, c. 441 § 22, and replaced by N.J.S.A. 40A:21-1). The five-year PILOT, however, expired at the end of 1998, and from that point to the present the facility has been subject to conventional real estate taxation and Chambers has been paying real estate taxes since that time. Thus, Chambers concluded that the "PILOT" was not a legally authorized payment in lieu of taxes agreement. Instead of a legal PILOT, the Cogen Facility was paying the annual charges based on a seven page document labeled "Agreement" which purports to be a contract between the Township and Chambers. This alleged agreement between Chambers and the Township is dated January 9, 1991.
18. The Agreements contains no reference whatsoever to any statutory authority or other enabling legislation. The only authority recited in the agreement is the Township's

¹ Interestingly, the 2015 bill from Carneys Point for the first time omits the reference to N.J.S.A. 54:4-3.95.

Resolution 90-234 by which the municipal governing body allegedly approved the Agreement. While the Agreement states it is made in “consideration of the mutual covenants and agreements contained herein,” the purported agreement contains absolutely no consideration flowing from the Township to Chambers, nor does it detail any obligations to be performed by the Township. The Agreement is completely one-sided, imposing obligations and requiring consideration solely from Chambers including, amongst other things, (1) a \$500,000 per year payment to the Township during the construction period which payment to Chambers, regardless of the number of years required to complete construction shall not be less than \$1,500,000; (2) the requirement that Chambers purchase a “hook and ladder fire truck and an emergency response vehicle at a cost not to exceed \$800,000 or to pay a sum not to exceed \$800,000 to compensate the Township” for the purchase of the 2 fire trucks to be paid “as soon as all permits and approvals for the Project have been obtained” for the emergency vehicle and at the beginning of the third year of construction for the hook and ladder fire truck; (3) a scheduled amount for years 1 through 5 after project completion beginning at \$3.2 million in year one (1994) and increasing by \$200,000 per year so that the amount due for year 5 (1998) is \$4 million; (4) scheduled annual payments from year 6 after completion (1999) to year 40 (2033) beginning at \$1.6 million and increasing on average \$200,000 per year such that the final annual payment in year 40 would be \$9.4 million. Similar to a traditional PILOT, this Agreement details a fixed schedule of annual payments payable by Chambers to the Township, against which the Project’s regular property taxes are credited.

19. During the review it became evident that execution of the alleged agreement was a requirement imposed on the original developers of the Chambers Cogen Facility by the

Township as a condition precedent to the granting of municipal land use approvals for construction of the project. This understanding was confirmed based on a review of the June 27, 1989 preliminary Planning Board Ordinance and the purported agreement appears tailored to addressing the conditions appearing at paragraph 7, subparagraphs l, r and t. Furthermore, the Township's Resolution 90-234 explicitly states at paragraph 4 that these conditions have been "satisfied and fulfilled."

20. By having imposed the alleged agreement on Chambers, the Township obtained \$2.3 million in payments during construction of the project, and thereafter has imposed what effectively constitutes special, discriminatory annual taxation and/or a recurring unconstitutional exaction on the Cogen Facility for which the Project has already paid a total of approximately \$59.7 million to the Township from 1994 to the present. For the period from 2015 to termination of the alleged agreement in 2033, the Township has Chambers scheduled to pay an additional \$118.6 million.
21. Given the likely magnitude of the discrepancy between what the Township was improperly exacting from the project versus the project's apparent fair share of local taxation, Chambers was obligated to take action to discharge the fiduciary duty owed to its investors, which action started with the filing of a real property tax appeal in March 2015 with the Tax Court of New Jersey contesting the assessed value of Plaintiff's property.
22. After filing the local property tax appeal, Chambers, through its attorney, Michael J. Caccavelli, contacted the Township in early May 2015 via a letter to the Township's Solicitor, Andrea Rhea. The letter outlined Chambers analysis of the January 9, 1991 Agreement with the Township. That letter noted that the parties had sometimes referred to that document as the "Host Fund Agreement" and advised that Chambers would likely not be

making the 2015 payment contemplated by that alleged agreement as the charge provided for appeared to be “an illegal unauthorized tax, an illegal exaction and/or an arbitrary or capricious municipal fee.” The letter then explained in detail Chambers position as to why the Agreement was an illegal, unauthorized and unconstitutional contract, which Chambers will not pay. It seems the Township compelled the original developers of the project to enter the illegal agreement, however, present ownership cannot continue to abide by the alleged agreement and at the same time faithfully discharge its fiduciary duty to its investors.

23. Given the potential economic impact to the Township, however, Chambers immediately requested a meeting with select Township officials to initiate a dialogue regarding a possible multi-year, phased reduction of the payment schedule in the purported agreement. While Chambers was not legally obligated to make any offer to the Township, it nevertheless offered to do so to preserve relations with the Township and to soften the blow from cessation of payments under that unauthorized, void agreement.

24. Chambers representatives met with representatives of the Township on three separate occasions, on July 8, 2015, October 23, 2015, and November 23, 2015. Each meeting was focused on presenting the arguments of its case, both legal and economic, and seeking some type of arrangement with the Township. Following the last meeting, Chambers formally presented the Township with its final settlement proposal. The Township formally rejected this offer on December 1, provided Chambers with no realistic counteroffer and demanded that Chambers provide written assurance that it would make the approximately \$2.5 million payment on December 21.

25. Thereafter, the Township filed a Verified Complaint and Order to Show Cause with the Salem County Chancery Division of the Superior Court of New Jersey under Docket No. C-

19-15 seeking temporary restraints compelling Chambers to make the \$2,497,560 payment due under Agreement for 2015.

26. The matter was assigned to the Honorable Ann McDonnell, P.J.Ch., who conducted a hearing on the Order to Show Cause on December 15, 2015 and issuing an Order Granting Preliminary Injunction compelling Chambers to pay the \$2,497,560 2015 payment under the Agreement by December 21, 2015 pending further Order in the litigation. Chambers complied with the Order and made the full payment on December 21, 2015.
27. Chambers filed a motion to dismiss the Township's Complaint in Lieu of an Answer and the Township cross-moved for summary judgment. The motions were argued on June 3, 2016 before Judge McDonnell who reserved decision on the matter. Judge McDonnell has not yet issued a decision of the motions.

COUNT 1
(Section 1983)

28. Plaintiff repeat and re-alleges the preceding paragraphs as if set forth herein.
29. Plaintiff seeks redress from Defendants for the deprivation of its rights, privileges, and immunities secured by the Fifth and Fourteenth Amendments of the United States Constitution and under Civil Rights Act of 1871, 42 U.S.C. § 1983, said deprivations of Plaintiffs' rights by Defendant being at all times under the color of State law in derogation of Plaintiffs' rights.
30. Defendants acting under color of law and pursuant to official policy, practice, or custom, violated the constitutional and property rights of Plaintiffs by coercing and compelling the developers of the Cogen Facility to enter into the illegal, *ultra vires* Agreement and to compel Chambers to make payment thereunder totaling approximately \$62,000,000 to date

and seeking a to extract an additional \$114,700,000 through the end of the term of the Agreement in 2033.

WHEREFORE, Plaintiff demands judgment against Defendant, as follows:

- a. Declaring the Agreement void ab initio; and
- b. Ordering Defendant to refund to Plaintiff all payments compelled by the agreement for the period 1991 through present; and
- c. Enjoining and restraining Defendant from attempting to collect any future payments under color of the Agreement; and
- d. Order Defendant to compensate Plaintiff for all damages, costs of suit and attorneys' fees, with interest; and
- e. Such other relief as the Court deems fair and equitable.

COUNT 2
(Declaratory Judgment)

31. Plaintiff repeats and re-alleges the preceding paragraphs as if set forth herein.
32. This claim arises under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, based upon an actual controversy between the parties.
33. The Agreement is *ultra vires*, *void ab initio* and unenforceable because the Defendant was without statutory authority to enter into the Agreement at the time of its making.

WHEREFORE, Plaintiff demands judgment against Defendant, as follows:

- a. Declaring the Agreement void ab initio; and
- b. Ordering Defendant to refund to Plaintiff all payments compelled by the agreement for the period 1991 through present; and
- c. Enjoining and restraining Defendant from attempting to collect any future payments under color of the Agreement; and

- d. Order Defendant to compensate Plaintiff for all damages, costs of suit and attorneys' fees, with interest; and
- e. Such other relief as the Court deems fair and equitable.

**COUNT 3
(Illegal Taking and Exaction)**

- 34. Plaintiff repeats and re-alleges the preceding paragraphs as if set forth herein.
- 35. The provisions of the Agreement and the requirement of payment of a host benefit fee as applied to plaintiff's property have no reasonable relation to the public health, safety, morals, and general welfare, are arbitrary, discriminatory, and unreasonable, and deprive plaintiff of property without due process of law, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States and contrary to Article 1, Paragraph 20 of the Constitution of the State of New Jersey.

WHEREFORE, Plaintiff demands judgment against Defendant, as follows:

- a. Declaring the Agreement void ab initio; and
- b. Ordering Defendant to refund to Plaintiff all payments compelled by the agreement for the period 1991 through present; and
- c. Enjoining and restraining Defendant from attempting to collect any future payments under color of the Agreement; and
- d. Order Defendant to compensate Plaintiff for all damages, costs of suit and attorneys' fees, with interest; and
- e. Such other relief as the Court deems fair and equitable.

**COUNT 4
(Due Process)**

- 36. Plaintiff repeat and re-alleges the preceding paragraphs as if set forth herein.

37. The due process clause of the Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, provides inter alia that no person shall be deprived of life, liberty or property without due process of law.
38. Defendant illegally coerced Plaintiff into entering the Agreement as part of the land use approvals process thereby depriving Plaintiff of its property without due process of law in violation of the United States Constitution and the New Jersey Constitution.

WHEREFORE, Plaintiff demands judgment against Defendant, as follows:

- a. Declaring the Agreement void ab initio; and
- b. Ordering Defendant to refund to Plaintiff all payments compelled by the agreement for the period 1991 through present; and
- c. Enjoining and restraining Defendant from attempting to collect any future payments under color of the Agreement; and
- d. Order Defendant to compensate Plaintiff for all damages, costs of suit and attorneys' fees, with interest; and
- e. Such other relief as the Court deems fair and equitable.

COUNT 5
(Equal Protection – United States Constitution)

39. Plaintiff repeat and re-alleges the preceding paragraphs as if set forth herein.
40. The equal protection clause is “essentially a direction that all persons similarly situated should be treated alike.” City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed. 2nd 313 (1985).
41. Defendant has treated Plaintiff differently than other land owners in the Township by requiring Defendant to enter into a host benefit agreement, namely the Agreement that is the subject of this Complaint, and upon information and belief has not required any other

similarly situated land owners or developers to execute such an agreement nor imposed a host benefit fee obligation on any other land owner or developer.

42. Through Defendant's actions as described herein, Defendant has infringed upon and continues to infringe upon Plaintiff's rights to equal protection under the law as secured by the Fourteenth Amendment of the United States Constitution.

WHEREFORE, Plaintiff demands judgment against Defendant, as follows:

- a. Declaring the Agreement void ab initio; and
- b. Ordering Defendant to refund to Plaintiff all payments compelled by the agreement for the period 1991 through present; and
- c. Enjoining and restraining Defendant from attempting to collect any future payments under color of the Agreement; and
- d. Order Defendant to compensate Plaintiff for all damages, costs of suit and attorneys' fees, with interest; and
- e. Such other relief as the Court deems fair and equitable.

COUNT 6
(Equal Protection – New Jersey Constitution)

43. Plaintiff repeat and re-alleges the preceding paragraphs as if set forth herein.

44. Through Defendant's actions as described herein, Defendant has infringed upon and continues to infringe upon Plaintiff's rights to equal protection under the law as secured by the New Jersey Constitution.

WHEREFORE, Plaintiff demands judgment against Defendant, as follows:

- a. Declaring the Agreement void ab initio; and
- b. Ordering Defendant to refund to Plaintiff all payments compelled by the agreement for the period 1991 through present; and

- c. Enjoining and restraining Defendant from attempting to collect any future payments under color of the Agreement; and
- d. Order Defendant to compensate Plaintiff for all damages, costs of suit and attorneys' fees, with interest; and
- e. Such other relief as the Court deems fair and equitable.

**COUNT 7
(Unjust Enrichment)**

- 45. Plaintiff repeat and re-alleges the preceding paragraphs as if set forth herein.
- 46. At all material times relevant hereto and without limitation, by engaging in the unlawful and improper conduct described herein, Defendant has been unjustly enriched to the detriment of Plaintiff through the imposition of the illegal and unauthorized host community benefit fee provided for by the Agreement.
- 47. Defendant has received a monetary benefit at Plaintiff's expense, which would be unjust for Defendant to retain.

WHEREFORE, Plaintiff demands judgment against Defendant, as follows:

- a. Declaring the Agreement void ab initio; and
- b. Ordering Defendant to refund to Plaintiff all payments compelled by the agreement for the period 1991 through present; and
- c. Enjoining and restraining Defendant from attempting to collect any future payments under color of the Agreement; and
- d. Order Defendant to compensate Plaintiff for all damages, costs of suit and attorneys' fees, with interest; and
- e. Such other relief as the Court deems fair and equitable.

**COUNT 8
(Conversion)**

48. Plaintiff repeat and re-alleges the preceding paragraphs as if set forth herein.
49. Defendant has knowingly received payment from Plaintiff for the host community benefit fee provided for in the Agreement to which payments Plaintiff was not entitled to receive as the Agreement was void, illegal and unenforceable.
50. Defendant has appropriated to itself the use of Plaintiff's funds that were improperly collected and received.
51. Plaintiff has been harmed by Defendant's refusal to return Plaintiff's funds and Plaintiff is likewise harmed by Defendant's continued asserted demand for payment of additional improper charges.

WHEREFORE, Plaintiff demands judgment against Defendant, as follows:

- a. Declaring the Agreement void ab initio; and
- b. Ordering Defendant to refund to Plaintiff all payments compelled by the agreement for the period 1991 through present; and
- c. Enjoining and restraining Defendant from attempting to collect any future payments under color of the Agreement; and
- d. Order Defendant to compensate Plaintiff for all damages, costs of suit and attorneys' fees, with interest; and
- e. Such other relief as the Court deems fair and equitable.

**COUNT 9
(UNIFORMITY CLAUSE OF THE NEW JERSEY CONSTITUTION)**

52. Plaintiff repeat and re-alleges the preceding paragraphs as if set forth herein.
53. Through Defendant's actions as described herein, Plaintiff has violated the Uniformity Clause of the New Jersey Constitution, *N.J. Const.* art. VIII, § 1, ¶ 1, by imposing an illegal

unauthorized tax by virtue of the Agreement against Plaintiff's property effectively taxing Plaintiff's property by special laws and non-uniform rules.

WHEREFORE, Plaintiff demands judgment against Defendant, as follows:

- a. Declaring the Agreement void ab initio; and
- b. Ordering Defendant to refund to Plaintiff all payments compelled by the agreement for the period 1991 through present; and
- c. Enjoining and restraining Defendant from attempting to collect any future payments under color of the Agreement; and
- d. Order Defendant to compensate Plaintiff for all damages, costs of suit and attorneys' fees, with interest; and
- e. Such other relief as the Court deems fair and equitable.

COUNT 10
(New Jersey Civil Rights Act)

54. Plaintiff repeat and re-alleges the preceding paragraphs as if set forth herein.
55. Plaintiff seeks redress from Defendants for the deprivation of their rights, privileges, and immunities secured by the Fifth and Fourteenth Amendments of the United States Constitution and the Jersey Constitution in violation of the New Jersey Civil Rights Act, N.J.S.A. 10:6-2, said deprivations of Plaintiffs' rights by Defendant being at all times under the color of State law in derogation of Plaintiffs' rights.
56. Defendants acting under color of law and pursuant to official policy, practice, or custom, violated the constitutional and property rights of Plaintiffs by coercing and compelling the developers of the Cogen Facility to enter into the illegal, *ultra vires* Agreement and to compel Chambers to make payment thereunder totaling \$62,000,000 to date and seeking a to extract an additional \$114,700,000 through the end of the term of the Agreement in 2033.

WHEREFORE, Plaintiff demands judgment against Defendant, as follows:

- f. Declaring the Agreement void ab initio; and
- g. Ordering Defendant to refund to Plaintiff all payments compelled by the agreement for the period 1991 through present; and
- h. Enjoining and restraining Defendant from attempting to collect any future payments under color of the Agreement; and
- i. Order Defendant to compensate Plaintiff for all damages, costs of suit and attorneys' fees, with interest; and
- j. Such other relief as the Court deems fair and equitable.

COUNT 11
(New Jersey Declaratory Judgment Act)

57. Plaintiff repeat and re-alleges the preceding paragraphs as if set forth herein.

58. The Agreement is *ultra vires*, *void ab initio* and unenforceable because at the time the Defendant was without statutory authority to enter into the Agreement at the time of its making. Plaintiff seeks a declaratory judgment under the New Jersey Declaratory Judgment Act, N.J.S.A. 2A:16-50 et. seq., invalidating the Agreement as there is an actual dispute between the parties concerning that Agreement.

WHEREFORE, Plaintiff demands judgment against Defendant, as follows:

- k. Declaring the Agreement void ab initio; and
- l. Ordering Defendant to refund to Plaintiff all payments compelled by the agreement for the period 1991 through present; and
- m. Enjoining and restraining Defendant from attempting to collect any future payments under color of the Agreement; and

- n. Order Defendant to compensate Plaintiff for all damages, costs of suit and attorneys' fees, with interest; and
- o. Such other relief as the Court deems fair and equitable.

July 1, 2016

RESPECTFULLY SUBMITTED,

By: s/ Michael J. Caccavelli
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