

NO. E-201894

PORT ARTHUR STEAM ENERGY, L.P.	§	IN THE DISTRICT COURT OF
PLAINTIFF	§	
	§	
V.	§	JEFFERSON COUNTY, TEXAS
	§	
OXBOW CALCINING LLC	§	
DEFENDANT	§	172nd JUDICIAL DISTRICT

**ORDER GRANTING POST-JUDGMENT TURNOVER RELIEF**

On August 21, 28, and 29, 2018, the Court heard testimony and received evidence relating to a Petition and Application for Post-Judgment Enforcement Orders (the “Application”) filed by Port Arthur Steam Energy, Inc. (hereinafter the “Judgment Creditor” or “PASE”). PASE appeared in person and by counsel. Oxbow Calcining LLC, (hereinafter the “Judgment Debtor” or “Oxbow”) appeared by counsel. The Court, having considered the evidence and the arguments of counsel, is of the opinion that post-judgment relief is necessary and proper to assist PASE in obtaining satisfaction of a Judgment which resulted from an Arbitration Award entered in favor of PASE on December 9, 2011, which, after appeal, was confirmed by the 151st Judicial District Court of Harris County, Texas, on January 8, 2015 (hereinafter referred to as the “Judgment”).

Section 31.002(a) Tex. Civ. Prac. & Rem. Code Ann. (the “Turnover Statute”) provides that a judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that is not exempt from attachment, execution, or seizure for the satisfaction of liabilities. There is no venue provision in the Turnover Statute and the Court finds that this District Court has jurisdiction to hear and rule upon the Application. Jefferson County is where the parties do business and where both plants at

issue in the Application are located. Moreover, Jefferson County is where the asset, the waste heat generated by Oxbow that PASE seeks to reach to satisfy its Judgment, is located.

The Court finds from the evidence presented that PASE obtained a Final Judgment on January 8, 2015, against Oxbow Calcining LLC in the amount of \$3,409,781.57, plus pre-judgment and post-judgment interest. The Court finds from the evidence presented that PASE has not collected any of this Judgment and that collection will only be possible through the relief granted in this Order. The Court finds that Oxbow owns and controls property that is not exempt from attachment, execution, or seizure for the satisfaction of liabilities: the coke calcining plant located at 3901 Coke Dock Rd., Port Arthur, Jefferson County, Texas 77640 (the “Calcliner Facility”) and, in particular, the waste heat generated by the Calcliner Facility that is to be delivered by Oxbow to PASE to be used to satisfy the Judgment.

Oxbow’s Calcliner Facility is connected to a steam generation plant that is owned and operated by PASE. Pursuant to a Heat Energy Agreement executed on February 25, 2005, between PASE and Oxbow’s predecessor in interest, Great Lakes Carbon, LLC (the “Heat Agreement”), Oxbow supplies waste heat (sometimes referred to as “flue gas energy”) to PASE. The waste heat is an asset to PASE. It is used by PASE to generate and deliver steam. The steam is sold primarily to an end user, Valero Port Arthur Refinery. The steam is also used to generate electricity for both the PASE and Oxbow plants. The Heat Agreement requires Oxbow to “use Commercially Reasonable Efforts to maximize the production and delivery of Flue Gas Energy” to PASE. PASE’s operations are completely dependent upon Oxbow’s performance under the Heat Agreement to maximize the delivery of flue gas energy to PASE. The 18-year Term of the Heat Agreement runs through December 1, 2023, and the Court received evidence of force majeure extensions that would extend the Term beyond that date.

Oxbow's Calciner Facility generates waste heat through its calcining process that is extremely hot, designed to be discharged at approximately 2000 Degrees Fahrenheit. Oxbow operates four kilns at the Calciner Facility that it identifies as Kiln Nos. 2, 3, 4, and 5. Kiln Nos. 3, 4, and 5 are connected to the steam generation plant owned and operated by PASE. Oxbow's Kiln Nos. 3, 4, and 5 deliver waste heat to PASE Boiler Nos. 3, 4, and 5, respectively. Oxbow's Kiln No. 2 is not connected to PASE's boilers.

After calcined coke is processed through Oxbow's Kiln Nos. 3, 4, and 5, the hot flue gas containing waste heat resulting from that process is discharged into a pyroscrubber attached to each kiln for the removal of particulate. After passing through each pyroscrubber, the flue gas, pursuant to the Heat Agreement, is routed from each of Oxbow's pyroscrubbers to PASE's connected waste heat boilers (i.e. to PASE Boiler Nos. 3, 4, and 5 respectively), then through multi-clones for certain pollution control, and finally, the flue gas is discharged at approximately 400 Degrees Fahrenheit through three "Cold Stacks" associated with PASE's Boiler Nos. 3, 4, and 5 into the atmosphere. Alternatively, Oxbow has the physical ability to circumvent PASE's steam plant altogether by discharging its hot flue gas from Kiln Nos. 3, 4, and 5 directly into the atmosphere through its hot flue gas stacks (each a "Hot Stack") at approximately 2,000 Degrees Fahrenheit. Oxbow controls the dampers to each of its Kiln systems and thus controls whether the waste heat is delivered to each of PASE's connected Boilers to generate steam, ultimately being discharged through the Cold Stacks as provided under the Heat Agreement, or is discharged directly through Oxbow's Hot Stacks, thus bypassing PASE's steam plant completely.

The Court received evidence, argument, and takes judicial notice that the Texas Commission on Environmental Quality ("TCEQ") is presently in the second year of a three year monitoring program to monitor SO<sub>2</sub> in the vicinity of Oxbow's plant relating to an ultimate

determination as to whether Jefferson County is in “attainment” or “non-attainment” under the One Hour National Ambient Air Quality Standard (“NAAQS”) for SO<sub>2</sub> in the atmosphere.

The flue gas generated during Oxbow’s calcining process contains Sulphur Dioxide (“SO<sub>2</sub>”). PASE’s steam generation plant does not generate SO<sub>2</sub>. Whether the flue gas generated by Oxbow is discharged through the Hot Stacks or through the Cold Stacks after delivery to PASE, the volume of SO<sub>2</sub> emitted from the Calciner Facility into the atmosphere is the same.

The Award of the arbitration panel in December of 2011 was “for the lost revenue caused by Oxbow’s breaches of the Heat Agreement.” The arbitration panel concluded that “Oxbow fostered a culture that repeatedly interrupted or reduced delivery of maximum Flue Gas Energy to PASE.” The Judgment, which adopted and incorporated the Arbitration Award, provides that “This is not a cash award requiring Oxbow to write PASE a check. It shall be handled in accordance with the specific provisions of the Heat Agreement regarding the heat bank as an offset.” PASE was not to recover a typical monetary payment for damages directly from Oxbow, but was to recover the damages awarded in the Judgment by offsetting “Heat Payments” over the balance of the Heat Agreement Term from the operation of PASE’s steam generation plant based upon Oxbow’s delivery of the asset, waste heat, to PASE.

The Heat Agreement requires PASE to make Heat Payments to Oxbow equal to 30% of the Energy Revenues that PASE receives from the generation of steam after adjustments are made through a “Heat Bank” formula incorporated into the Heat Agreement. It was uncontested that before the arbitration was decided, PASE paid Oxbow or its predecessor approximately 34 million dollars in Heat Payments from the operation of the steam generation plant. After the Judgment was entered, there has not been a single Heat Payment for PASE to offset to apply towards its

Judgment because of Oxbow's failure or refusal to deliver waste heat to PASE in sufficient quantities to generate Heat Payments.

The Turnover Statute provides that a "judgment creditor is entitled to aid from the court through injunction or other means" and it also allows a court to "otherwise apply the property to the satisfaction of the Judgment." The Court received evidence that since the Judgment was confirmed in January of 2015, Oxbow has hindered PASE's ability to collect its Judgment by depressing the temperature and volume of waste heat delivered to PASE and by intermittently suspending delivery of waste heat to PASE's boilers, sometimes for many months, which reduced PASE's revenues from selling steam to Valero. Oxbow's tactics created a growing deficit in the Heat Bank and thus prevented PASE from having Heat Payments that it could offset to recover its Judgment. The Court concludes that left to its own devices, Oxbow will continue to hinder PASE's ability to collect its Judgment by operating Oxbow's Calciner Facility in a manner that will prevent PASE from generating sufficient steam revenue to owe Heat Payments that PASE can offset to recover its Judgment.

When PASE filed its Application seeking post judgment relief in this Court, Oxbow was venting all of its hot flue gas from Kiln Nos. 3 and 4 directly through its Hot Stacks, rendering PASE's Boiler Nos. 3 and 4 inoperable. On June 25, 2018, Oxbow shut off the only remaining waste heat delivery from its Kiln No. 5 to PASE's Boiler No. 5, thus completely shutting down PASE's steam plant operations. Even though Oxbow has now caused the complete shutdown of PASE's steam generation plant, the evidence received during the hearing supports a finding that if Oxbow restores delivery of waste heat to PASE's Boiler Nos. 3, 4, and 5 (instead of venting its hot flue gas from Kiln Nos. 3, 4, and 5 through the Hot Stacks), PASE, in all likelihood, will receive steam revenues in sufficient quantity to restore the Heat Bank deficit. Further, restoring

delivery of waste heat will likely generate Heat Payments that PASE can offset to satisfy its Judgment, particularly when Oxbow operates in compliance with the Arbitration Award and Judgment and uses “Commercially Reasonable Efforts” (as defined in the Heat Agreement) to maximize the production and delivery of flue gas energy to PASE.

Oxbow produced no witnesses to testify at the hearing. Relying upon various letters and communications introduced into evidence, Oxbow’s counsel argued that Oxbow indefinitely suspended delivery of waste heat to PASE because of SO<sub>2</sub> pollution concerns involving the TCEQ’s SO<sub>2</sub> monitor. Oxbow’s position, expressed through letters the Court received into evidence and through the argument of its counsel, was that Oxbow faces a greater likelihood of registering an exceedance of SO<sub>2</sub> at the monitor and facing possible governmental or regulatory action at some point in the future if waste heat is delivered to PASE and then discharged through the Cold Stacks. Oxbow’s counsel argued that if Oxbow only uses its Hot Stacks and does not deliver waste heat to PASE, Oxbow can avoid registering exceedances at the monitor and can keep Jefferson County in “attainment” under the NAAQS SO<sub>2</sub> standard.

The Court does not find the explanations and suggested extrapolations of admitted evidence offered by Oxbow’s counsel to be persuasive and, in any event, such arguments cannot overcome the language of the Arbitration Award and Judgment, or PASE’s clear and convincing evidence on the matters herein. Oxbow produced no witness to testify at the hearing on any matters. Thus, no testimony was received during the hearing in support of Oxbow’s contentions and the Court received no test data, SO<sub>2</sub> emission modeling, test results, or expert testimony of any kind from Oxbow to support Oxbow’s contentions. It is clear that Oxbow’s actions of shutting off delivery of waste heat to PASE’s three boilers has forced PASE out of operation and, if allowed to continue, will keep PASE from ever being able to recover its Judgment. Notably, there was no

evidence presented of Oxbow taking or planning to take any corrective actions to control SO<sub>2</sub> pollution and restore the delivery of waste heat to PASE. Moreover, Oxbow produced no evidence of litigation or any governmental or regulatory action being pending or imminent against Oxbow for its SO<sub>2</sub> emissions, and Oxbow produced no evidence that it received notice from the TCEQ, the Environmental Protection Agency, or any governmental authority that it was in violation of any presently existing law relating to SO<sub>2</sub> emissions.

The Court received uncontroverted, clear evidence that Oxbow engaged in dispersion techniques to try to avoid SO<sub>2</sub> detection at the TCEQ monitor. The Court concludes that Oxbow intends to continue to try to avoid SO<sub>2</sub> exceedance readings at the TCEQ monitor for the balance of the three-year monitoring program by discharging its flue gas exclusively through its Hot Stacks. It necessarily follows that if PASE remains out of business, it will never collect its Judgment. Meanwhile, Oxbow's intentions are clear: Oxbow intends to remain in business, operate its four kilns at any level it chooses by discharging flue gas through its Hot Stacks, avoid having to purchase or maintain pollution control equipment to control SO<sub>2</sub> emissions, and keep PASE from generating steam revenues to have Heat Payments that PASE can offset to collect its Judgment. Without regard to the terms of the Heat Agreement, the Arbitration Award, or Judgment, this Court is troubled that Oxbow's avoidance of satisfaction of the Judgment is being justified as necessary for Oxbow to avoid detection of SO<sub>2</sub> pollution levels at the TCEQ monitor while Oxbow simply discharges the same pollution to another location.

The Court finds that the Arbitration Award and Judgment addressed Oxbow's duties under the Heat Agreement with regard to pollution control and are determinative with regard to this Turnover Statute proceeding. Oxbow's contentions do not justify shutting down delivery of waste heat to PASE and thus denying PASE the means to recover its Judgment. The Court has

determined that Oxbow's contentions are not a basis to deny PASE relief under the Turnover Statute and, in any event, were not supported by the evidence and cannot overcome the specific findings in the Award that became the Judgment.

The Judgment confirmed the Arbitration Award. All factual findings of the Panel were incorporated into the Court's Judgment. The Heat Agreement was interpreted and the rights of the parties under the Heat Agreement relevant to this proceeding were determined in the Award that became part of the Judgment. The Arbitration Panel made the following findings which the Court believes are central to the issues in this Turnover Proceeding:

- (1) The Panel found "that Oxbow has breached Section 5.1 of the Heat Agreement, which requires it to 'use Commercially Reasonable Efforts to maximize the production and delivery of Flue Gas Energy' to PASE.'" (Award at p. 7);
- (2) The Panel declared "that the Heat Agreement does not obligate PASE...(ii) to install or maintain additional pollution control equipment for the benefit of Oxbow *now or in the future*; or (iii) to ensure that any emissions from the hot stacks or the cold stacks comply with any applicable environmental laws or permits *now or in the future* (Award at p. 8-9, emphasis added);
- (3) The Panel found "that Oxbow, which is contractually and legally responsible for complying with its air permits, *bears the risk of installing and maintaining pollution control equipment that will ensure the Plant's operation in accordance with Oxbow's air permits and any other applicable environmental laws*" (Award at p. 5, emphasis added), with the Panel defining "Plant" in the Award to refer to *both* Oxbow's Calciner Facility and PASE's steam plant (Award at p.1); and



(4) The Panel recognized that “The parties had an obligation of good faith and fair dealing to each other under the terms of the Heat Agreement and New York common law.” (Award at p. 6).

The Arbitration Award is clear: Oxbow’s duties and obligations under the Heat Agreement were determined for the “Plant” and those duties included bearing the risk of installing and maintaining pollution control equipment that will *ensure* the Plant’s operation [i.e., Oxbow’s operation *and* PASE’s operation] in accordance with Oxbow’s air permits and any other applicable environmental laws. If Oxbow has or believes that it has an actual or potential pollution problem, Oxbow is required under the Judgment and Arbitration Award to address the problem. That has already been judicially determined. Shutting off the delivery of waste heat to PASE’s boilers and keeping PASE from operating, selling steam, and generating Heat Payments that may be offset by PASE to collect its Judgment are not actions consistent with the terms of the Arbitration Award and Judgment, particularly when Oxbow continues to operate all of its kilns.

The Court finds that it is proper and appropriate to aid PASE in the collection of its Judgment to ensure that the property owned and controlled by Oxbow, the waste heat asset generated from Oxbow’s Kiln Nos. 3, 4, and 5, be applied in such a way that will allow PASE to recover its Judgment by receiving the asset, the waste heat, that Oxbow is to deliver to PASE’s Boiler Nos. 3, 4, and 5.

IT IS, THEREFORE, ORDERED that Oxbow Calcining LLC shall operate its Calciner Facility located at or near 3901 Coke Dock Rd. in Port Arthur, Jefferson County, Texas 77640, and, in particular, Kiln Nos. 3, 4, and 5, in such a manner so as to deliver all waste heat generated from these kilns to Port Arthur Steam Energy, L.P.’s Boiler Nos. 3, 4, and 5 as specified herein. Oxbow Calcining LLC is hereby enjoined from discharging waste heat from Kiln Nos. 3, 4, or 5

through the Hot Stacks connected to those Kiln systems, and Oxbow Calcining LLC is hereby enjoined from diverting or limiting waste heat received by Port Arthur Steam Energy, L.P. from the Kiln systems associated with Kiln Nos. 3, 4, or 5 to Port Arthur Steam Energy, L.P.'s connected Boiler Nos. 3, 4, or 5, through Oxbow Calcining LLC's manipulation of dampers or otherwise, except in the event of an emergency involving life threatening injuries or property damage at the Calciner Facility or Port Arthur Steam Energy, L.P.'s steam generation plant, or for required maintenance, which, if occurring, shall be addressed by Oxbow Calcining LLC or Port Arthur Steam Energy, L.P., as applicable, with "Commercially Reasonable Efforts" as defined in the Heat Agreement, to restore the delivery of waste heat to Port Arthur Steam Energy, L.P. to the affected Boiler(s) as soon as practical and subject to further orders by this Court.

The injunctive relief described herein is to become effective upon the restoration of waste heat delivery from Kiln Nos. 3, 4, and 5 to Port Arthur Steam Energy, L.P.'s Boiler Nos. 3, 4, and 5 which shall be accomplished as soon as practical and, in any event, on or before ten (10) business days from the date of this Order, with Oxbow Calcining LLP and Port Arthur Steam Energy, L.P. to work together to restore the delivery of waste heat to each of Port Arthur Steam Energy, L.P.'s boilers in a safe, but expeditious manner.

IT IS FURTHER ORDERED that Patrick Zummo is appointed Receiver. The address and contact information for the Receiver are: 3705 St. James Blvd., Beaumont, Texas 77705; (713) 304-5401/phone; and Two Houston Center; 909 Fannin, Suite 3500; Houston, Texas 77010; (713) 651-0590/phone. The Receiver shall be paid a fee of \$750.00 per hour. The Receiver's fees shall be taxed as costs against Oxbow and paid as provided herein.

The Receiver is ordered, authorized and empowered to:

(1) Monitor Oxbow Calcining LLC's operations of Kiln Nos. 3, 4 and 5 to ensure that Oxbow Calcining LLC is complying with this Order. In the event the Receiver determines that Oxbow Calcining LLC is not delivering waste heat to PASE Boiler Nos. 3, 4, and 5 as required above, the Receiver shall submit a report to the Court advising the Court of that determination so that the Court may consider further orders as necessary or appropriate;

(2) Make monthly accounts and reports to this Court, with copies to Oxbow Calcining LLC and Port Arthur Steam Energy, L.P., as to the tonnage of calcined coke produced in each of Oxbow Calcining LLC's Kiln Nos. 3, 4, and 5 and the volume of waste heat delivered to Port Arthur Steam Energy, L.P.'s Boiler Nos. 3, 4, and 5; and

(3) Make one or more applications to the Court for the payment of the fees and expenses incurred by the Receiver, with the Court to review each application for payment and with all approved payments to be made to the Receiver by Oxbow Calcining LLC as directed at that time, with such payments to be taxed against Oxbow Calcining LLC.

IT IS FURTHER ORDERED that Oxbow Calcining LLC shall allow the Receiver to have full and unfettered access to the Oxbow Calcining LLC plant and its operational personnel to perform the Receiver's duties and obligations under this Order.

IT IS FURTHER ORDERED that these Orders shall remain in place until Port Arthur Steam Energy, L.P., after restoring the deficit in the Heat Bank from steam revenues, receives offsets from Heat Payments otherwise payable to Oxbow Calcining LLC under the Heat Agreement equal to the amount, with prejudgment and post-judgment interest, owed to Port Arthur Steam Energy, L.P. under the Judgment. Port Arthur Steam Energy, L.P. shall provide written quarterly reports to Oxbow and the Receiver of adjustments to the Heat Bank to restore the deficit

and, when applicable, of its offset of Heat Payments credited against the Judgment, and the parties shall advise the Court when the Judgment has been recovered in full by Port Arthur Steam Energy, L.P.

IT IS FURTHER ORDERED that Port Arthur Steam Energy, L.P. shall have and recover from Oxbow Calcining LLC reasonable and necessary attorney's fees which the Court will determine and award by separate Order following a hearing in which Port Arthur Steam Energy, L.P. will present evidence and testimony in support of its claim to recover attorney's fees to be awarded under the Turnover Statute and such fees shall be payable in cash by Oxbow Calcining LLC, as opposed to through a Heat Payment offset.

The Court shall retain jurisdiction to monitor and enforce this Order.

SIGNED on September 12<sup>th</sup>, 2018.

Donald J. Heyd  
JUDGE PRESIDING