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JUDICIAL DISTRICT COURT
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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

<p>WHITEFISH ENERGY HOLDINGS LLC, Plaintiff, vs. ARC AMERICAN INC., Defendant</p>	<p>Cause No. DV-17- <u>11890</u> DAN WILSON COMPLAINT AND DEMAND FOR TRIAL BY JURY</p>
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COMES NOW the above-named Plaintiff, Whitefish Energy Holdings LLC, and for its complaint against Defendant Arc American, Inc. states and alleges as follows:

1. Plaintiff Whitefish Energy Holdings LLC (hereinafter "Whitefish Energy") is a Montana limited liability company with its principal place of business in Flathead County, Montana.
2. Defendant Arc American, Inc. is a Florida for-profit corporation.
3. Whitefish Energy entered into a contract with the Puerto Rico Electric Power Authority ("PREPA") for electrical grid reconstruction after hurricane Maria.
4. On or about September 30, 2017, Whitefish Energy entered into a subcontract with Arc American, Inc. (hereinafter "Arc"). A true and accurate copy of the subcontract, without exhibits, is attached hereto as Exhibit A (hereinafter the "Subcontract").

5. The Subcontract is a “pay-when-paid” contract, calling for Arc to be paid within seven days of Whitefish Energy being paid by PREPA. A condition precedent to Arc being paid is Whitefish Energy being first paid. The Subcontract states:

10.2 Progress and Final Payments. Receipt of payment by Contractor from Owner for Subcontract Work is a condition precedent to payment by Contractor to Subcontractor. Subcontractor acknowledges that it relies on the credit of Owner, not Contractor, for payment of Subcontract Work. Progress payments, shall be made to Subcontractor, for Subcontract Work satisfactorily performed, no later than seven (7) days after receipt by Contractor of payment from Owner for Subcontract Work...

(Ex. A, pg. 2; emphasis added.)

6. Whitefish Energy has timely paid all subcontractors, including Arc, for all work which Whitefish Energy has received payment from PREPA.

7. There are outstanding invoices issued by Arc to Whitefish Energy, for work which Whitefish Energy has not received payment from PREPA. The invoiced amounts, therefore, are not yet due and owing. The condition precedent for payment – “receipt of payment by Contractor from Owner for Subcontract Work” – has not been fulfilled.

8. By letter dated November 16, 2017, Arc advised PREPA, “This is to inform PREPA that Whitefish has failed to pay monies due and owing Arc under the Subcontract in an amount exceeding \$8,736,054.03.” (Ex. B, pg. 2.)

9. Whitefish Energy has not been paid by PREPA for any of the amounts allegedly owed. Arc’s statement the money is “due and owing” is false.

10. In the same letter, Arc requested “PREPA forebear from paying to Whitefish the current amount owed by Whitefish to Arc ... and instead pay those moneys directly to, or hold them in escrow for, Arc...” (Ex. B, pg. 2.)

11. Arc's request for direct payment from PREPA is contrary to and in breach of the unambiguous payment provisions of the Subcontract, and constitutes improper interference in the contractual relationship between Whitefish Energy and PREPA.

12. Upon information and belief, Arc's November 16, 2017 letter has caused PREPA to withhold millions of dollars owed to Whitefish Energy under the prime contract, which has damaged Whitefish Energy and caused and is contributing to Whitefish Energy being forced to suspend operations in Puerto Rico.

13. Whitefish Energy is agreeable to PREPA paying Arc directly for any unpaid, approved invoices, contemporaneously with the payment of the balance of approved invoices to Whitefish Energy. Arc, however, refuses to cooperate in good faith in this regard, except on terms that amount to leveraging.

14. Arc is improperly attempting to leverage the current payment issue to obtain benefits and releases to which Arc is not contractually or legally entitled.

15. To withdraw the November 16, 2017 letter, Arc demands Whitefish Energy release it from a Non-Compete Agreement and release all legal claims under the entire Subcontract, which would include any performance and indemnity issues. Arc is leveraging Whitefish Energy for a release of any and all claims against Arc, while ignoring the plain and unambiguous terms of payment and conditions in the Subcontract to which it previously agreed, including the condition precedent that Whitefish Energy be paid before Arc receives payment.

16. Whitefish Energy has in good faith attempted to resolve the current dispute without the need for court involvement. Unfortunately, court involvement is now necessary as Arc is insisting on different terms than that to which it originally agreed.

17. Pursuant to the Subcontract, Montana law applies, and venue is properly in Flathead County, Montana. By its consent to venue in Montana in the subcontract, Arc is subject to the jurisdiction of this Court.

COUNT I – DECLARATORY JUDGMENT

18. Plaintiff realleges the preceding paragraphs and incorporates those allegations herein.

19. An actual controversy exists between the parties regarding the contractual payment obligations under the subcontract, including (a) whether there are any amounts due and owing to Arc at this time, and (b) whether Arc's November 16, 2017 letter is a false and inaccurate representation in contravention of the contract and Montana law.

20. By reason of the foregoing, a declaratory judgment is both necessary and proper in order to set forth and determine the rights, obligations and liabilities, if any, which exist under the Subcontract pursuant to Montana's Uniform Declaratory Judgment Act.

21. Whitefish Energy requests the Court to issue a judgment, declaring there are no amounts due Arc under the Subcontract and Arc's November 16, 2017 letter contains misrepresentations, is improper and contravenes or constitutes an unreasonable interference with the payment provisions of the Subcontract and Montana law, as well as with Whitefish Energy's contract with PREPA.

22. Whitefish Energy further requests an award of attorney fees under the Subcontract, as well as pursuant to Section 28-2-2105, MCA.

COUNT II – NEGLIENT MISREPRESENTATION

23. Plaintiff realleges the preceding paragraphs and incorporates those allegations herein.

24. Arc made representations of material fact to PREPA, related to the status of payments due and owing from Whitefish Energy. Arc represented millions of dollars were “due and owing” from Whitefish Energy under the subcontract.

25. The above representation was untrue, and Arc made the representation without any reasonable grounds for believing it to be true.

26. Arc made the representations with the intent to induce PREPA to rely on them.

27. PREPA has in fact relied on the false representations by withholding payment from Whitefish Energy.

28. As a result of Arc’s negligent misrepresentations, Whitefish Energy has been damaged in an amount to be proven at trial.

**COUNT III – BREACH OF CONTRACT / VIOLATION OF
CONVENANT OF GOOD FAITH AND FAIR DEALING**

29. Plaintiff realleges the preceding paragraphs and incorporates those allegations herein.

30. Every contract contains an implied covenant of good faith and fair dealing, a breach of which constitutes a breach of contract.

31. Arc has a covenant of good faith and fair dealing as a result of its Subcontract with Whitefish Energy, including to act with honesty in fact and the observance of reasonable commercial standards of fair dealing in trade.

32. Arc, by virtue of the above alleged conduct, has acted in violation of the covenant of good faith and fair dealing, and in breach of contract.

33. By virtue of Arc’s conduct, Whitefish Energy has been damaged, in an amount to be proven at trial.

COUNT IV – TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

34. Plaintiff realleges the preceding paragraphs and incorporates those allegations herein.

35. Arc's above-described conduct was intentional, willful, and calculated to cause damage to Whitefish Energy in its business relations with PREPA.

36. Arc's conduct was done for the unlawful purpose of causing damage or loss to Whitefish Energy, without right or justifiable cause.

37. As a result of Arc's conduct, Whitefish Energy has been damaged, in an amount to be proven at trial.

COUNT V – NEGLIGENCE

38. Plaintiff realleges the preceding paragraphs and incorporates those allegations herein.

39. Arc had a duty to act as a reasonable and prudent manner.

40. Arc breached its duty through the above described conduct.

41. As a result of Arc's negligent, Whitefish Energy has been damaged, in an amount to be proven at trial.

COUNT VI – BREACH OF NON-COMPETE AGREEMENT

42. Plaintiff realleges the preceding paragraphs and incorporates those allegations herein.

43. On or about September 30, 2017, Whitefish Energy and Arc entered into a Non-Compete Agreement, a copy of which is attached hereto as Exhibit C.

44. As part of the Non-Complete Agreement, Arc agreed to a non-solicitation clause which states:

Non-Solicitation. From the date of execution hereof and up until and including one year after the last scope of work completion, Subcontractor shall not: (i) solicit the business of any person or entity who is Contractor's client or customer for the purpose of providing any services to such person or entity (whether Non-Compete Business, as hereinafter defined, or otherwise); (ii) cause, induce or attempt to cause or induce any client, customer, supplier, licensee, licensor, franchisee, employee, consultant or other business relation of Contractor or its business to cease doing business with Contractor, to deal with any competitor of Contractor or in any way interfere with his, her or its relationship with Contractor; or (iii) hire, retain or attempt to hire or retain any employee of Contractor or in any way interfere with the relationship between Contractor and any of its employees or independent contractors.

(Ex. C, pg. 2, Section 2(b); emphasis added).

45. Arc's demand for direct payment from PREPA, for amounts which are not yet due and owing under the Subcontract, has interfered with the relationship between Whitefish Energy and PREPA, in violation of the above non-solicitation clause.

46. Arc has breached the terms of the Non-Compete Agreement, resulting in substantial damages to Whitefish Energy, in an amount to be proven at trial.

47. Whitefish Energy further requests an award of attorney fees and contractual liquidated damages, as well as injunctive relief barring and preventing Arc from interfering with its business relationship with PREPA.

COUNT VII- PRELIMINARY AND PERMANENT INJUNCTION

48. Plaintiff realleges the preceding paragraphs and incorporates those allegations herein.

49. If Arc were to continue to make misrepresentations regarding the status of payments under the Subcontract, and continue to demand payment from PREPA in violation of the Subcontract and Montana law, it would cause great and irreparable injury to Whitefish Energy.

50. Whitefish Energy requests the Court to issue a preliminary injunction pursuant to §27-19-201 MCA et seq. (a) requiring Arc to withdraw its November 16, 2017 letter to PREPA, (b) ordering Arc to comply with the payment provisions in the Subcontract, (c) prohibiting Arc from misrepresenting there are any amounts due and owing under the Subcontract from Whitefish Energy.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. For declaratory and injunctive relief as described above;
2. For compensatory and liquidated damages, in an amount to be proven at trial;
3. For attorney fees under the Subcontract, Non-Compete Agreement and Section 28-2-2105, MCA;
4. For costs and disbursements expended herein;
5. For such other and further relief as may be appropriate under the circumstances.

Dated this 22nd day of November, 2017.

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DEMAND FOR TRIAL BY JURY

Plaintiff demands a trial by jury on all issues so triable.

Dated this 22nd day of November, 2017.

HAMMER, QUINN & SHAW PLLC

A handwritten signature in black ink, appearing to read 'THS', is written over a horizontal line.

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Attorneys for Plaintiff