IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

In re:	**Chapter 11**
PATRIOT COAL CORPORATION, *et al.*,	**Case No. 12-51502-659** **(Jointly Administered)**
Debtors.	Hearing Date: October 22, 2013 Hearing Time: 10:00 a.m. Central Location: Courtroom 7-N, St. Louis

CLAIMANTS' OMNIBUS RESPONSE IN OPPOSITION TO DEBTORS' SEVENTEENTH OMNIBUS OBJECTION TO CLAIMS (Filed September 20, 2013, Objecting to Pettry Litigation Claims)

Pettry Litigation Claimants (the "Pettry Claimants"), pursuant to 28 U.S.C. §§ 157, 1334, 1408 and 1409; 11 U.S.C. §§ 105 and 1109; and Fed. R. Bankr. P. 7001 and 9014, respectfully file this Omnibus Response in Opposition (the "Response") to the "Debtors' Seventeenth Omnibus Objection to Claims" (the "Objection") [Docket 4670]. In support of their Response, the Pettry Claimants state as follows:

Preliminary Response to Debtors' Objection

1. In their Objection, the Debtors object to certain claims filed by the Pettry Claimants (the "Claims"), contending that the Claims have already been decided adversely to the Pettry Claimants by a West Virginia state court, that the West Virginia state court decision is final and preclusive, and, as a result, the Claims are barred by the doctrine of *res judicata.* [Docket 4670; Ex. A attached thereto and attached here, lists the Claims and the Pettry Claimants.] The Debtors request entry of an order, pursuant to Section 502 of the Bankruptcy Code and Fed. R. Bankr. P. 3007, disallowing the Claims.

2. As an initial matter, Debtors have sought improper relief in their Objection. Essentially, they seek a declaratory judgment that the Pettry Claimants are barred from pursing their claims by *res judicata.* However, declaratory relief is a form of equitable relief that falls under Rule 7001 and, as such, it can only be pursed in an adversary proceeding. Declaratory relief cannot be sought by way of an objection standing alone, as Rule 3007(b) makes clear:

> (b) Demand for relief requiring an adversary proceeding
>
> A party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim, but may include the objection in an adversary proceeding.

Fed. R. Bankr. P. 3007(b). Debtors must file an adversary proceeding and the court must establish a briefing schedule on the declaratory judgment issues raised by Debtors' Objection.

3. Additionally, Debtors' Objection does not constitute a proper objection that is permitted to be made as an Omnibus Objection and must be denied for that reason, as well. There are only 8 types of objections that are proper to raise in an Omnibus Objection:

> (d) Omnibus objection
>
> Subject to subdivision (e), objections to more than one claim may be joined in an omnibus objection if all the claims were filed by the same entity, or the objections are based solely on the grounds that the claims should be disallowed, in whole or in part, because:
>
> **(1)** they duplicate other claims;
> **(2)** they have been filed in the wrong case;
> **(3)** they have been amended by subsequently filed proofs of claim;
> **(4)** they were not timely filed;
> **(5)** they have been satisfied or released during the case in accordance with the Code, applicable rules, or a court order;
> **(6)** they were presented in a form that does not comply with applicable rules, and the objection states that the objector is unable to determine the validity of the claim because of the noncompliance;
> **(7)** they are interests, rather than claims; or

> **(8)** they assert priority in an amount that exceeds the maximum amount under § 507 of the Code.

Fed. R. Bankr. P. 3007(d). The Debtors' Objection, which seeks a declaration that the doctrine of *res judicata* bars the Claims of the Pettry Claimants, does not fit within any of the 8 objections listed in Rule 3007(d) that are permitted to be raised in an Omnibus Objection. For that reason alone, the Debtors' Objection must be denied in its current form and pursued as part of an adversary proceeding for declaratory relief under Rule 7001.

4. Even if the court refuses to overrule the Debtors' Objection because of the two procedural flaws previously set forth, the court should overrule the Objection because the West Virginia state court knowingly violated this court's automatic stay when it dismissed the Claims of the Pettry Claimants against the Debtors in the state court action; acknowledged on the record in that state court action that it had acted improperly in doing so and reversed itself, initially, but then, in that same hearing, chose to reverse itself again and let the improper dismissal stand, sarcastically stating that by leaving the improper ruling in place, it might help the Pettry Claimants on appeal. (Ex. B, Excerpts of Tx. of Hrg. of 3/26/13.) As a result, the actions of the West Virginia state court in dismissing the Claims of the Pettry Claimants against the Debtors are void *ab initio* and of no effect for violating the automatic stay of this court.

5. Finally, since only this court has the authority to determine the scope of its automatic stay order in this Chapter 11 proceeding, as opposed to a state court judge, this court must closely examine the facts and issues operative in the subject West Virginia state court action in an adversary proceeding in order to issue a declaration as to whether or not the West Virginia state court also acted beyond its authority in ruling that this court's automatic stay did not require the remainder of that state court litigation to be stayed, even though the Pettry

Claimants alleged that the Debtor and non-debtors were joint venturers, co-conspirators and agents of each other, making the Debtor an indispensable party to the litigation, without whom the civil action and claims brought by the Pettry Claimants could not properly proceed. Moreover, since each of the three non-debtor chemical companies pled crossclaims against the Debtor, putting the Debtors assets potentially at risk, the automatic stay necessarily extended to those non-debtors until such time as the stay is lifted by the bankruptcy court.

Jurisdiction

6. The Pettry Claimants agree with the Debtors in so far as: (a) this Court has jurisdiction over their Objection under 28 U.S.C. § 1334; (b) venue of this proceeding is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and (c) this is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), but the Pettry Claimants disagree that the Debtors' Omnibus Objection is proper, based upon a plain reading of Rule 3007(b) and (d) when read in *pari materia* with Rule 7001 and against the backdrop of the facts at issue here.

7. Further, as explained previously, inasmuch as the Debtors seek equitable relief in the form of a legal declaration from this court that the Claims of the Pettry Claimants are barred by the doctrine of *res judicata,* this contested matter must be resolved by way of an adversary proceeding under Part VII, Fed. R. Bankr. P. 7001, so that it can be fully presented to the court and properly addressed pursuant to the bankruptcy procedures and rules established specifically for resolving declaratory judgment matters, and so this court can rightfully declare the scope of its automatic stay is it pertains to the civil action brought by the Pettry Claimants in the Circuit Court of Marshall County, West Virginia. This court cannot reach the *res judicata* issue until it first declares whether or not the West Virginia state court had jurisdiction to declare the scope and effect of the automatic stay on the Pettry Claimants' civil action in West Virginia.

Relevant Procedural and Factual Background

8. The Pettry Claimants filed the Pettry Litigation in the Circuit Court of Boone County, West Virginia, on March 28, 2002, and an Amended Complaint on April 17, 2002, as a putative class action for medical monitoring and personal injuries, on behalf of coal preparation plant workers in West Virginia and their spouses, alleging, among other things, a class action for product liability-based claims and fraudulent concealment against three (3) non-debtor, chemical manufacturers and individual deliberate intent claims against two of the Debtors here (Eastern Associated Coal Corporation and Peabody Holding Company), as well as, five (5) non-debtor coal companies. (Ex. C, Am. Compl.) However, the Pettry Claimants also alleged that the harms they suffered were brought about by the actions and omissions of Debtors and non-debtors acting as part of a joint venture, and/or as co-conspirators, and/or as agents of one another, including in their concealment of the harms caused to them by the chemicals used in the coal preparation plant work environment. *Id.* at 1-2 and at ¶¶ 46, 56, 90-93.

9. The Pettry Claimants sought a mixture of equitable and monetary relief in the Pettry Litigation, including the establishment of a medical monitoring program to monitor them for risks of serious latent diseases believed to be caused by exposure to workplace chemicals used by the Debtor coal companies, as well as, monetary damages for the physical and mental harm caused by peripheral neuropathies and central nervous system damage, lost income from an impairment of their earning capacity, loss of enjoyment of life, pain and suffering, medical expenses, other compensatory damages and punitive damages for the intentional conduct of all defendants, including fraudulently concealing the serious risk of harm caused by chronic, daily exposure to the chemicals used in the coal preparation plant work environment. (Ex. C, Am. Compl. generally, and at ¶¶ 46, 56, 64, 90-93

and at pp. 1-2 and 23.)[1]

10. Approximately a year after the Pettry Litigation was filed, a similar class action lawsuit was filed in the Circuit Court of Marshall County, West Virginia (the "Stern Litigation"), alleging only medical monitoring claims, against eight chemical manufacturers, three of whom were also defendants in the Pettry Litigation.

11. After significant procedural fighting and delays lasting two years, including appeals to the West Virginia Supreme Court of Appeals, the Pettry Claimants were permitted to intervene in the Stern Litigation and the Pettry Litigation was transferred to the Circuit Court of Marshall County for management of both cases by one court. *See generally, Stern v. Chemtall, Inc.,* 217 S.E.2d 329 (W. Va. 2005).

12. After intervention and transfer, the Circuit Court of Marshall County stayed the Pettry Litigation, based upon the request and agreement of all counsel involved, until resolution of the Stern Litigation. (Ex. D, ″Nunc Pro Tune Order″ of 2/20/11, confirming stay that had been in effect in Pettry for over 5 years, "pending disposition of the *Stem* class action matter.") Thereafter, discovery was stayed with respect to the Pettry Litigation for approximately 8 years.

13. At a status conference hearing conducted in the Stern Litigation on October 18, 2011, the Circuit Court of Marshall County, West Virginia, without giving any prior notice to the parties in the Pettry Litigation, lifted the stay in the Pettry Litigation, *sua sponte,* despite the fact that the Stern Litigation was far from being resolved, contrary to its earlier "Nunc Pro Tunc Order" of 2/20/11. (Ex. E; Order of November 23, 2011.)

14. On January 20, 2012, again *sua sponte,* and five days before any scheduling order

[1] Additional claims have arisen for some of the Pettry Claimants that did not exist on the date the original Complaint was filed on March 28, 2002. For example, Denver Pettry died on December 16, 2008, and his wife, Debra Pettry, Executrix of his estate, substituted for him to pursue both his personal injury claims and a wrongful death claim. Danny Gunnoe, who was asymptomatic when the case was initially filed, was diagnosed with cancer of the tongue in January of 2008, demonstrating the need for medical monitoring.

had yet been entered in the Pettry Litigation, the Circuit Court of Marshall County set a hearing for March 30, 2012, on 6 motions for summary judgment that had been filed approximately two years earlier in the Stern Litigation, not the Pettry Litigation, by non-debtor chemical companies and other parties not defendants in the Pettry Litigation, against 6 of the 10 Pettry Claimants named as putative class representatives, and in contravention of the stay in effect in the Pettry Litigation. (*cf.* Ex. F; Orders of 1/20/2012.)

15. When the court entered its Scheduling Order five days later, on January 25, 2012, it set a fact discovery deadline for September 28, 2012, even though it had already set a hearing on several motions for summary judgment for March 30, 2012, six (6) months prior to the end of that fact discovery deadline and thirteen (13) months prior to April 19, 2013, the date established for filing dispositive motions. (*cf.* Ex. F, Orders of 1/20/12 to Ex. G; Sch. Order of 1/25/12.)

16. On February 23, 2013, Debtor Eastern Associated Coal served a notice in the Pettry Litigation titled "Withdrawal of Motion," wherein the Debtor withdrew its previously-filed Motion for Summary Judgment and the hearing on said motion, but noted that it considered itself still joined in the 6 other motions for summary judgment filed by non-debtors, all of which the Pettry Claimants contend in the prior paragraph are procedurally flawed. (Ex. H, "Withdrawal of Motion" by the Debtor, dated 2/23/12.)

17. At the hearing of March 30, 2012, Judge Hummel granted the request of the Pettry Claimants for more time to respond to the pending motions for summary judgment, but refused to grant their request to adhere to the deadlines established in the Scheduling Order for discovery and the filing of dispositive motions. The court granted only 3.5 additional months for discovery time to respond to the pending motions for summary judgment filed by non-debtors. (*cf.* Ex. I, Order of 4/12/12, to Ex. G, Sch. Order of 1/25/12.)

18. The Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on July 9, 2012 (the ñPetition Dateò) in the United States Bankruptcy Court for the Southern District of New York. By operation of bankruptcy law, the automatic stay immediately went into effect with respect to any and all claims and processes against the Debtors, including any and all direct claims and cross claims alleged against the Debtors in the Pettry Litigation.

19. On July 13, 2012, the Debtors appearing in the Pettry Litigation filed a "Notice of Automatic Stay."

20. On July 16, 2012, the Circuit Court of Marshall County, issued a "Notice of Intent to Proceed" in the Pettry Litigation, wherein Judge Hummel recognized the filing of the "Notice of Automatic Stay" and stated, in part, that "the Court is of the reasoned opinion that **the instant civil action is stayed only as relates to Defendant, Patriot Coal Corp. and its affiliated companies,**" and that it was the court's "**EXPRESS INTENT**" to proceed with the Pettry Litigation except for claims alleged against Patriot Coal:

> As to Defendant, Patriot Coal Corp. and its affiliated companies, if any, 11 U.S.C. Section 362 provides, *inter alia,* for an automatic stay that enjoins and retrains [sic] certain acts and proceedings against any of the aforementioned debtors or their property, absent an order from the Bankruptcy Court otherwise.
>
> Based upon the foregoing, as well as the West Virginia Supreme Court of Appeal's analysis in *Belington Bank v. Masketeers* Co., 185 W.Va. 564, 408 S.E.2d 316 (1991) quoting *Johns-Manville Sales Corp, 26 B.R. 405, 410 (Bkrtcy.S.D.N.Y.1983)* citing *Royal Trucks & Trailer v. Armadors Meritina Salvadoreana, 10 B.R. 488, 491 (N.D. III. 1981),* the Court is of the reasoned opinion that **the instant civil action is stayed only as relates to Defendant, Patriot Coal Corp. and its affiliated companies.**
>
> In making its determination, the Court **FINDS** that "unusual circumstances", as was found in *Belington Bank, supra.,* do not exist in the instant civil action.

> Accordingly, it is the **EXPRESS INTENT** of this Court to proceed in the instant civil action relative to all parties and all causes of action, with the exception of any which may relate to Defendant, Patriot Coal Corp. and its affiliated companies.

(Ex. J, "Notice of Intent to Proceed" at 1-2)(bold emphasis in original; underline emphasis added). Judge Hummel also ordered that any objections and exceptions to his "**EXPRESS INTENT**" to proceed as stated in the notice were to be filed on or before July 24, 2012. *Id.* at 2.

21. On July 24, 2012, the Pettry Claimants filed their objections to Judge Hummel's "**EXPRESS INTENT**" to proceed with the Pettry Litigation except as against Patriot Coal Corp. and its affiliated companies. (Ex. K, "Plaintiffs Objection to the Court's Notice of Intent to Proceed.")

22. Since Judge Hummel had relied only on a West Virginia state court case for his authority behind his "**EXPRESS INTENT**" to permit the Pettry Litigation to proceed against non-debtors, and since counsel for the Pettry Claimants had practically no experience in bankruptcy law, counsel limited his analysis and argument in support of his objections to the one West Virginia case cited by Judge Hummel:

> First, Plaintiffs note that one of the reasons the Court in *Belington Bank* found it persuasive that the Automatic Stay was applicable to all defendants was the fact that there were cross-claims filed against all defendants. *Belington Bank*, 408 S.E.2d at 319-320 and n.5. That fact is also present here, where cross-claims have been filed against the bankrupt defendant, Eastern.
>
> Second, the Court in Belington Bank expressed concern about ñthe lack of feasibility in according full relief in the absence of all partiesò being in the case. *Id.* at 320. That is particularly important here where all defendants, including bankrupt defendant, Eastern, are alleged to be co-conspirators and engaged in a joint venture with the other defendants.
>
> Third, Plaintiffs should be permitted to explore in the bankruptcy proceeding whether or not bankrupt defendant, Eastern, has any liability insurance to cover Plaintiffsô claims. If there is any such liability insurance, Plaintiffs could

> then seek permission from the Bankruptcy Court in New York to lift the Automatic Stay for the purposes of proceeding with their claims up to the available limits of any applicable liability insurance. However, that takes time and cannot be done within the deadlines that exist in the current Scheduling Order.
>
> Fourth, this civil action was stayed for years, by agreement of the parties until resolution of the companion, *Stern* case, as reflected in the courtôs ñNunc Pro Tunc Orderò entered in *Stern* on February 20, 2011, but the court lifted that stay over Plaintiffsô objections despite the fact that *Stern* is not yet resolved. Now, with the filing of the "Notice of Automatic Stay," the court has more than a sufficient legal basis for reinstating the stay that was in effect in this civil action until *Stern* is resolved and the stay is either lifted as to defendant, Eastern, or the bankruptcy case is dismissed.
>
> WHEREFORE, for all the reasons set forth herein and any others appearing to the court, Plaintiffs respectfully request that the court reconsider its prior "intent to proceed" and Order that the "Notice of Automatic Stay" with respect to the filing of Chapter 11 bankruptcy by Patriot Coal Corporation and its affiliated companies, including defendant, Eastern, applies to all parties and all claims in this civil action until further notice of the court, and that the court grant Plaintiffs whatever further relief it deems just and proper.

(Ex. K, "Plaintiffs Objection to the Court's Notice of Intent to Proceed" at 2-3.)

23. On August 16, 2012, Judge Hummel entered an "Order Confirming Intent to Proceed" and denied the Objections of the Pettry Claimants to stay the entire civil action. (Ex. L, " Order Confirming Intent to Proceed.")

24. On December 14, 2012, the Pettry Claimants timely filed their proofs of claim. (Ex. A.)

25. On December 19, 2012, the Debtorsô cases were transferred to the United States Bankruptcy Court for the Eastern District of Missouri. [Docket 1789.]

26. On January 11, 2013, Judge Hummel entered ñOrder Granting Defendantsô Motions for Summary Judgment and Dismissing all Remaining Claims with Prejudiceò in the Pettry Litigation. [Docket 4670 at Ex. B.]

27. On January 28, 2013, the Pettry Claimants filed a timely motion and memorandum

of law, asking the court to alter or amend its order of January 11, 2013, because, among other things, it contained serious erroneous findings based upon false information and legal errors, not the least of which was its improper dismissal of the Claims of the Pettry Claimants brought against the Debtors in the Pettry Litigation, which violated the bankruptcy court's automatic stay in this Chapter 11 case. (Ex. M, ***"Plaintiffs' Memorandum of Law in Support of Plaintiffs' Rule 59 Motion to Alter or Amend Judgment and Rule 60 Motion for Relief from Judgment"*** at 20-22.)

28. On March 26, 2013, Judge Hummel conducted a hearing on the motion filed by the Pettry Claimants. At the outset of that hearing, Judge Hummel openly admitted that he had made a mistake by dismissing the Claims of the Pettry Claimants against the Debtors because of the existence of the bankruptcy stay and stated that those claims were to be reinstated. (Ex. B.) However, near the end of the hearing he inexplicably reversed his earlier reinstatement decision and decided to let the dismissal of the claims against the Debtors stand, stating rather sarcastically that he thought it might help the Petty Claimants on an appeal to the West Virginia Supreme Court. (Ex. B.)

29. Following that hearing, on April 22, 2013, Judge Hummel entered an order denying the Pettry Claimants' motion to alter or amend and disposed of the Pettry Litigation in its entirety. [Docket 4670 at Ex. C.]

30. On May 22, 2013, the Pettry Claimants timely filed a "Notice of Appeal" with the Supreme Court of Appeals of West Virginia. (Ex. O, "Notice of Appeal.") That appeal is still pending.

Legal Arguments in Opposition to Debtors' Objection on *Res Judicata* Grounds

A. Judge Hummel Violated This Court's Automatic Stay By Dismissing The Claims Of The Pettry Claimants Against The Debtor While The Stay Was In Effect, Rendering The Dismissal Of Those Claims Void *Ab Initio* And Without Effect.

The 8th Circuit aligns itself with the overwhelming majority position among the Circuit Courts of Appeal in holding that violations of automatic stays are "void ab initio." ***In re Vierkant,* 240 B.R. 317, 322-23 (8th Cir. Bk. App. Panel 1999).** In the *Vierkant* decision, the Bankruptcy Appellate Panel reversed the bankruptcy court's decision giving collateral estoppel effect to a state court's entry of default judgment against a debtor after the debtor had filed his Chapter 7 case. ***In re Vierkant,* 240 B.R. at 325.** The court further explained how the automatic stay takes effect immediately upon the filing of the petition for relief, that it can only be lifted by the bankruptcy court and that violations of the stay must not be taken lightly:

> The stay springs into being immediately upon the filing of a bankruptcy petition: ó[b]ecause the automatic stay is exactly what the name impliesð ñautomaticòð it operates without the necessity for judicial intervention.ôò *Soares,* 107 F.3d at 975 (citation omitted). The automatic stay ñis triggered upon the filing of a bankruptcy petition regardless of whether the other parties to the stayed proceeding are aware that a petition has been filed.ò *Constitution Bank v. Tubbs,* 68 F.3d 685, 691 (3d Cir.1995). ñThe automatic stay cannot be waived. Relief from the stay can be granted only by the bankruptcy court having jurisdiction over a debtor's case.ò *Id.* ñIn order to secure the[ ] important protections [of the stay], courts must display a certain rigor in reacting to violations of the automatic stay.ò *Soares,* 107 F.3d at 975ï 76.

***In re Vierkant*, 240 B.R. 317, 320-21 (B.A.P. 8th Cir. 1999).**

Neither Judge Hummel nor any party to the Pettry Litigation in West Virginia sought relief from the bankruptcy court with respect to lifting the automatic stay prior to Judge Hummel's post-petition rulings of January 11, 2013, dismissing all of the claims of the Pettry Claimants, both those against the Debtor and non-debtors alike. As a result, according to the well-established rule in the 8th Circuit, as articulated in the ***Vierkant*** decision, the West Virginia state court's order is void *ab initio* and has no preclusive effect on the Claims of the Pettry Claimants filed in the Pettry Litigation.

While the decision that was reversed in ***Vierkant*** was an adverse action taken against the debtor and here, the decision by Judge Hummel was an adverse action taken against the Pettry Claimants, and in aid of the Debtors, the result should be the same. To conclude otherwise would leave creditors with too much uncertainty and at the mercy and whims of state court judges all across the country, undermining the uniformity and predictability that is so highly prized in the operation of bankruptcy law. The importance of applying the automatic stay uniformly, so that it protects both creditors and debtors and is predictable, was perhaps expressed most clearly in the case of ***Dean v. Trans World Airlines, Inc.*, 72 F.3d 754 (9th Cir. 1995).**

In the ***Dean*** case, the 9th Circuit was faced with a factual situation similar to this one, where summary judgment motions had been filed prior to the petition for relief being filed but no decision was reached on the motions until after the filing of the petition. The 9th Circuit explained that since a court cannot know how a motion is ultimately going to be resolved, for a court to think about the issues and consider them on any level after the filing of the petition is improper and a violation of the automatic stay. ***Dean*, 72 F.3d at 756** ("post-filing dismissal in favor of the bankrupt of an action that falls within the purview of the automatic stay violates the stay where the decision to dismiss first requires the court to consider other issues presented by or related to the underlying case. In other words, thinking about the issues violates the stay").

The 3rd Circuit, 10th Circuit and the Southern District of New York (where this Chapter 11 bankruptcy case originated), have concluded like the 9th Circuit did in the ***Dean*** case - violations of the automatic stay are void whether or not they favor the debtor. ***Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1206 (3d Cir.1991)**(ñ[t]he automatic stay's effect on judicial proceedings against the debtor does not depend upon whether the court finds *for* or *against* the debtorò**); *Ellis v. Consol. Diesel Elec. Corp.*, 894 F.2d 371, 373 (10th**

Cir.1990)(summary judgment entered in favor of debtor after filing of bankruptcy petition was void *ab initio*, irrespective of fact ruling was in favor of debtor); *In re Best Payphones, Inc.*, 279 B.R. 92 (Bankr.S.D.N.Y.2002)(citing *Ellis, supra*).

The principle applied in ***Dean, Maritime Elec., Ellis,*** and ***In re Best Payphones*** should be applied here, as well. Judge Hummel's order should be declared void *ab initio* and of no effect with respect to dismissing the Claims of the Pettry Claimants against the Debtors, particularly when Judge Hummel has even admitted on the record of the Pettry Litigation that he had committed error and violated the automatic stay, but he inexplicably permitted his erroneous rulings to stand. (Ex. B.)

B. The *Rooker-Feldman* Doctrine Does Not Apply Here Because Judge Hummel Did Not Have Jurisdiction In The First Instance To Consider Dismissal Of The Claims Of The Pettry Claimants Against The Debtor, Nor Did He Have Jurisdiction To Determine The Scope Of The Automatic Stay As To Non-debtors.

The Debtors are correct that the *Rooker-Feldman* doctrine generally prohibits collateral attacks on the decisions of state courts and federal courts will generally give preclusive effect to those decisions as a matter of federal-state comity, but only where a state court has jurisdiction over both the subject matter and the parties. ***Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486-87 (1983).** However, state courts do not have jurisdiction to decide the reach of a bankruptcy court's automatic stay and when they overreach and make such determinations, as Judge Hummel did here, those state court rulings are not entitled to preclusive effect because the decisions are void *ab initio,* erroneous, without effect and subject to collateral attack. ***In re Gruntz,* 166 F.3d 1020, 1024-26 *opinion amended and superseded,* 177 F.3d 728 (9th Cir. 1999) *reh'g granted, opinion withdrawn,* 177 F.3d 729 (9th Cir. 1999) *opinion after grant of reh'g,* 202 F.3d 1074**

(9th Cir. 2000); *see also, In re James,* 940 F.2d 46, 52 (3d Cir.1991)(recognizing the exception to *Rooker-Feldman*)(citation omitted).

The Debtors are simply wrong with respect to their assertion that the *Rooker-Feldman* doctrine applies with respect to Judge Hummel's decisions that were adverse to the Claims of the Pettry Claimants in the Pettry Litigation pending in the Circuit Court of Marshall County, West Virginia. Congress has granted original and exclusive jurisdiction over bankruptcy matters to the federal district courts, which in turn exercises that jurisdiction through the federal bankruptcy courts. ***In re Gruntz,* 166 F.3d at 1024(citations omitted); *see also In re Raboin,* 135 B.R. 682, 684 (Bankr.D.Kan.1991)("[T]his court has exclusive jurisdiction to determine the extent and effect of the stay, and the state court's ruling to the contrary does not bar the debtor's present motion").**

This line of authority demonstrates that Judge Hummel acted beyond his jurisdictional authority when he decided the reach of the automatic stay and that it did extend to the claims alleged against the non-debtors in the Pettry Litigation (despite the fact that the non-debtor chemical companies had each pled crossclaims against the Debtors). As the 9th Circuit explained when it declared that the state court had no jurisdiction to determine the reach of the automatic stay, the state court should have sought relief from the bankruptcy court prior to rendering its decision, and as it did not, its decision was void *ab initio*. ***In re Gruntz,* 166 F.3d at 1024-25.** Similarly, here, since neither Judge Hummel nor any of the parties to the Pettry Litigation sought declaratory relief from the automatic stay, it remains in effect as to all parties to the Pettry Litigation, including non-debtors who have pled crossclaims against the Debtor, until such time as this court declares the scope and reach of the stay in that state court action. Therefore, all actions occurring in the Pettry Litigation after the filing of the Debtors' Petition for

Relief on July 9, 2012, should be declared null and void and of no effect as being in violation of the automatic stay.

Issuing such a declaration would seem particularly appropriate here, where the non-debtors in the Pettry Litigation have pled crossclaims against the Debtor, which puts the property of the bankruptcy estate at risk. ***See, In re Way*, 229 B.R. 11, 14 (B.A.P. 9th Cir. 1998)(noting need to seek relief from stay where counterclaim pending because counterclaim is independent cause of action)(citation omitted).** Where the Pettry Claimants have alleged that the Debtor and non-debtors in the Pettry Litigation are co-conspirators, joint venturers, and agents of each other and intentionally concealed the harms of the chemicals used in the Debtor's workplace, and where the non-debtor chemical companies each pled crossclaims against the Debtor, then the automatic stay should be declared to extend to non-debtors and Debtor alike in the Pettry Litigation, inasmuch as the crossclaims put the Debtors' assets at risk. ***In re Nat. Century Fin. Enterprises, Inc.*, 423 F.3d 567, 578 (6th Cir. 2005)(citations omitted).** As the 3rd, 9th and 10th Circuits have made clear, as well as, the Bankruptcy Court of the Southern District of New York, when the assets of the debtor are at risk, as they would be based upon the posture of all claims alleged in the Pettry Litigation (including crossclaims alleged by non-debtors against the Debtor), a court should not engage in guesswork as to whether or not the eventual outcome will benefit the debtor to determine if the matter should proceed, but should, instead, apply a bright line rule that the matter must be stayed. ***See, Maritime Elec. Co., 959 F.2d at 1204 ("[T]he dispositive question is whether a proceeding was 'originally brought against the debtor')(citation omitted); Dean, supra; Ellis, supra; In re Best Payphones, supra.*** Here, Judge Hummel simply had no jurisdiction to determine what reach the automatic stay

should have in the Pettry Litigation, Rather, he should have sought a declaration in that regard from the bankruptcy court, which at the time, was in the Southern District of New York.

The automatic stay is intended to be broad and equitable and to protect not only the debtor, but the assets of the bankrupt estate and the creditors, as well. ***In re Brooks*, 871 F.2d 89, 90 (9th Cir.1989)("Congress devised the stay to protect the debtor and creditors and to assure the orderly distribution of the estate. It did not intend to confer rights on other parties"); *see also,* H.R.Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), reprinted in (1978) U.S.Code Cong. & Ad. News 6296–97(purpose of automatic stay is to protect debtor, creditors and bankruptcy estate, preserve the status quo and maximize the ultimate distribution to all creditors).**

Where, as here, Judge Hummel had no jurisdiction to decide the scope of the stay and determine if the stay applied to the entire Pettry Litigation or only part of it, his decision with respect to ordering the litigation to proceed except as it pertained to the Debtor was beyond his authority, in violation of the automatic stay and void *ab initio,* and all actions taken afterwards in the Pettry Litigation are void and of no effect, including his dismissal of all of the Claims alleged by the Pettry Claimants in his order of January 11, 2013. At a minimum, considering applicable bankruptcy law, Judge Hummel's decision to dismiss the Claims of the Pettry Claimants against the Debtor is not entitled to any preclusive effect because it was made in direct violation of the automatic stay and void *ab initio*.

WHEREFORE, for the reasons set forth herein, and any others appearing to the court, the Objection of the Debtors should be denied and the Claims of the Pettry Claimants permitted to stand and move forward to resolution.

Respectfully submitted,

/s/ Thomas F. Basile
Thomas F. Basile
Law Office of Thomas F. Basile
P.O. Box 2149
Charleston, WV 25328-2149
(304) 925-4490 (office)
(866) 587-2766 (fax)
e-mail: *basilelaw@suddenlink.net*

Counsel for the Pettry Claimants

Certificate of Service

I, Thomas F. Basile, hereby certify that on the 15th day of October, 2013, a true and exact copy of the foregoing ***"Claimants' Omnibus Response In Opposition To Debtors' Seventeenth Omnibus Objection To Claims"*** was filed with the Court using the CM-ECF system, which will electronically serve the same to all parties registered with the system, including the Core Parties set forth below:

Leonora S. Long, Esq.
U.S. Trustee
Office of the U.S. Trustee
111 S. Tenth Street, Suite 6353
St. Louis, MO 63102
Via Fax: 314-539-2990

Davis Polk and Wardwell LLP
450 Lexington Avenue
New York, NY 10017
Attn: Brian M. Resnick and Michelle McGreal
Via Fax 212-607-7983
Counsel for Debtors

Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
Attn: Thomas Moers Mayer, Adam C. Rogoff
and Gregory G. Plotko
Counsel for Official Committee of Unsecured Creditors
Via Fax: 212-715-8000

Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019
Attn: Margot B. Schonholtz and Ana Alfonso
Counsel for Administrative Agents for Proposed Posipention Lenders
Via Fax: 212-728-8111

Patriot Coal Corporation
c/o GCG, Inc.
P.O. Box 9898
Dublin, OH 43017-5798
Via Fax 855-687-2627
Claims and Noticing Agent for Debtors

Bryan Cave LLP
211 N. Broadway, Suite 3600
St. Louis, MO 63102
Attn: Laura Uberti Hughes, Lloyd A. Palans
and Brian C. Walsh
Counsel for Debtors
Via Fax: 314-259-2020

Carmody MacDonald P.C.
120 S. Central Avenue, Suite 1800
St. Louis, MO 63105
Attn: John D. McAnnar
Counsel for Official Committee of Unsecured Creditors
Via Fax: 314-854-8660

Weil Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
Attn: Marcia Goldstein and Joseph Smolinsky
Counsel for Administrative Agents for
Proposed Postpeinion Lenders _
Via Fax: 212-310-8007

/s/ Thomas F. Basile
Thomas F. Basile, Esq. (WVSB # 6116)

Exhibit A

Omnibus Objection to Claims

Patriot Coal Corporation
12-51502 (KSS)

Note: Claims on the exhibit are sorted in alphabetical order based on the creditor name as listed on proof of claim form.

SEQ NO.	CLAIM(S) TO BE DISALLOWED			
	NAME	GCG CLAIM NO.	ED MO CLAIM NO.	CLAIM AMOUNT
1	ALFRED PRICE & WILLA PRICE C/O THE LAW OFFICE OF THOMAS F. BASILE ATTN THOMAS F. BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: EASTERN ASSOCIATED COAL, LLC	2624	3014-1	Unsecured: $550,000.00
2	ALFRED PRICE AND WILLA PRICE C/O LAW OFFICE OF THOMAS F BASILE ATTN THOMAS F BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: PATRIOT COAL CORPORATION	2615	2602-1	Unsecured: $550,000.00
3	DANNY GUNNOE & CAROL GUNNOE PO BOX 763 MACARTHUR, WV 25873 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: EASTERN ASSOCIATED COAL, LLC	2628	2606-1	Unsecured: $550,000.00
4	DANNY GUNNOE & CAROL GUNNOE C/O THE LAW OFFICE OF THOMAS F. BASILE ATTN THOMAS F. BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: PATRIOT COAL CORPORATION	2619	3018-1	Unsecured: $550,000.00

Omnibus Objection to Claims

Patriot Coal Corporation
12-51502 (KSS)

Note: Claims on the exhibit are sorted in alphabetical order based on the creditor name as listed on proof of claim form.

SEQ NO.	CLAIM(S) TO BE DISALLOWED			
	NAME	GCG CLAIM NO.	ED MO CLAIM NO.	CLAIM AMOUNT
5	DAVID EVANS & KATHY EVANS C/O THE LAW OFFICE OF THOMAS F. BASILE ATTN THOMAS F. BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: PATRIOT COAL CORPORATION	2621	3016-1	Unsecured: $260,000.00
6	DAVID EVANS & KATHYE EVANS C/O LAW OFFICE OF THOMAS F BASILE ATTN THOMAS F BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: EASTERN ASSOCIATED COAL, LLC	2630	2604-1	Unsecured: $260,000.00
7	DEBRA M. PETTRY ATTN THOMAS F BASILE, ATTORNEY AT LAW PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/25/13 Debtor: EASTERN ASSOCIATED COAL, LLC	2626	1298-1	Unsecured: $200,000.00
8	DEBRA PETTRY C/O THE LAW OFFICE OF THOMAS F. BASILE ATTN THOMAS F. BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: PATRIOT COAL CORPORATION	2618	3020-1	Unsecured: $200,000.00

Exhibit A

Omnibus Objection to Claims

Patriot Coal Corporation
12-51502 (KSS)

Note: Claims on the exhibit are sorted in alphabetical order based on the creditor name as listed on proof of claim form.

SEQ NO.	CLAIM(S) TO BE DISALLOWED			
	NAME	GCG CLAIM NO.	ED MO CLAIM NO.	CLAIM AMOUNT
9	DENVER PETTRY (DECEASED) C/O LAW OFFICE OF THOMAS F BASILE ATTN THOMAS F BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: PATRIOT COAL CORPORATION	2616	2608-1	Unsecured: $2,000,000.00
10	FRANKLIN STUMP & MARSHA STUMP C/O THE LAW OFFICE OF THOMAS F. BASILE ATTN THOMAS F. BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: EASTERN ASSOCIATED COAL, LLC	2622	3015-1	Unsecured: $550,000.00
11	FRANKLIN STUMP AND MARSHA STUMP LAW OFFICE OF THOMAS F BASILE ATTN THOMAS F BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: PATRIOT COAL CORPORATION	2613	2603-1	Unsecured: $550,000.00
12	KERMIT MORRIS & KATHY MORRIS C/O THE LAW OFFICE OF THOMAS F. BASILE ATTN THOMAS F. BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: EASTERN ASSOCIATED COAL, LLC	2627	3017-1	Unsecured: $250,000.00

Exhibit A

Omnibus Objection to Claims

Patriot Coal Corporation
12-51502 (KSS)

Note: Claims on the exhibit are sorted in alphabetical order based on the creditor name as listed on proof of claim form.

SEQ NO.	CLAIM(S) TO BE DISALLOWED			
	NAME	GCG CLAIM NO.	ED MO CLAIM NO.	CLAIM AMOUNT
13	KERMIT MORRIS AND KATHY MORRIS C/O LAW OFFICE OF THOMAS F BASILE ATTN THOMAS F. BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: PATRIOT COAL CORPORATION	2617	2605-1	Unsecured: $250,000.00
14	PETTRY, DENVER (DECEASED) C/O THE LAW OFFICE OF THOMAS F. BASILE ATTN THOMAS F. BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/28/13 Debtor: EASTERN ASSOCIATED COAL, LLC	2625	3608-1	Unsecured: $2,000,000.00
15	ROBERT SCARBRO & THERESA SCARBRO C/O LAW OFFICE OF THOMAS F BASILE ATTN THOMAS F BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: EASTERN ASSOCIATED COAL, LLC	2623	2607-1	Unsecured: $350,000.00
16	ROBERT SCARBRO AND THERESA SCARBRO C/O THE LAW OFFICE OF THOMAS F. BASILE ATTN THOMAS F. BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: PATRIOT COAL CORPORATION	2614	3019-1	Unsecured: $350,000.00

Exhibit A

Omnibus Objection to Claims

Patriot Coal Corporation
12-51502 (KSS)

Note: Claims on the exhibit are sorted in alphabetical order based on the creditor name as listed on proof of claim form.

SEQ NO.	CLAIM(S) TO BE DISALLOWED			
	NAME	GCG CLAIM NO.	ED MO CLAIM NO.	CLAIM AMOUNT
17	WESTLEY & JUDY FRALEY C/O LAW OFFICE OF THOMAS F BASILE ATTN THOMAS F BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: PATRIOT COAL CORPORATION	2620	3252-1	Unsecured: $350,000.00
18	WESTLEY & JUDY FRALEY C/O LAW OFFICE OF THOMAS F BASILE ATTN THOMAS F BASILE PO BOX 2149 CHARLESTON, WV 25328 Date Filed: 12/14/12 ED MO Date Filed: 02/27/13 Debtor: EASTERN ASSOCIATED COAL, LLC	2629	3251-1	Unsecured: $350,000.00

* Denotes an unliquidated component.

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, et al,

PLAINTIFFS,

VS. //CIVIL ACTION NO. 06-c-124

PEABODY HOLDING COMPANY,
et al,

DEFENDANTS.

* * *

Transcript of hearing held in the above-styled case before the HONORABLE DAVID W. HUMMEL, JR., on the 26th day of March, 2013.

* * *

APPEARANCES:

On behalf of the Plaintiffs:

THOMAS F. BASILE, Esquire
Attorney at Law
P. O. Box 2149
Charleston, WV 25328-2149

On behalf of the Defendant Cytec Industries:

HEATHER HEISKELL-JONES, Esquire
KELLY B. GRIFFITH, Esquire
Spilman, Thomas & Battle, PLLC
P. O. Box 273
Charleston, WV 25321-0273

On behalf of the Defendant Bandytown Coal Company, et al:

MICHAEL J. FARRELL, Esquire
Farrell, White & Legg, PLLC
P. O. Box 6457
Huntington, WV 25772-6457

On behalf of the Defendant BASF:

MARK P. FITZSIMMONS, Esquire
Steptoe & Johnson, PLLC

Holly A. Kocher
Certified Court Reporter
Marshall County Courthouse
Seventh Street
Moundsville, WV 26041
(304) 845-3505

EXHIBIT B

1330 Connecticut Avenue, NW
Washington, DC 20036

HARRY G. SHAFFER, III, Esquire
Shaffer & Shaffer, PLLC
P. O. Box 38
Madison, WV 25310

On behalf of Defendant Nalco Company:

C. JAMES ZESZUTEK, Esquire
Dinsmore & Shohl, LLP
One Oxford Centre
301 Grant Street, Suite 2800
Pittsburg, PA 15219

DENISE D. PENTINO, Esquire
Dinsmore & Shohl, LLP
Bennett Square
2100 Market Street
Wheeling, WV 26003

P R O C E E D I N G S

* * *

(March 26, 2013)

THE COURT: Thank you, Tom. Good afternoon. Please have a seat.

Matter comes on this afternoon; Circuit Court of Marshall County, West Virginia; Denver Pettry, et al, Plaintiffs, vs. Peabody Holding Company, et al, Defendants, Civil Action Number 06-C-124.

This was a transfer from Boone County, although in Marshall it's an `06 case. I believe it was filed originally in `03.

MS. JONES: `02.

THE COURT: `02. Oh, okay, `02.

Beginning with Mr. Basile, off to my left, go around the room and please give me your appearances.

MR. BASILE: Thomas F. Basile for the Plaintiffs.

MS. JONES: Good afternoon, Your Honor. Heather Heiskell Jones and my partner Kelly Griffith on behalf of Cytec Industries, Inc.

MR. FARRELL: Michael J. Farrell; Farrell, White & Legg, on behalf of Bandytown Coal Company, Goals Coal Company, Masey Coal Services, Inc., Performance Coal Company and Elk Run Coal Company.

MR. BASILE: That's correct, Your Honor. As far as I know, yes.

MS. JONES: Correct.

THE COURT: Very good. There was something in a footnote about me having a conversation with Mr. Hartley and Hendrickson, and I don't know how it affected Pettry, but I thought it affected the Stern.

Okay. I'm not going to summarize all 20 volumes of this case. I want to eliminate some red herrings here today. You got me, Mr. Basile, on Patriot Coal, okay? Let me see. Actually Patriot Coal Corporation. You made a good point.

At this time I probably had -- at the time I entered the order, I probably had 720 to 740 actions in Marshall, Wetzel and Tyler County, and in one case I had one Defendant stayed as a result of bankruptcy. Plum forgot about it. So you win on that point. Patriot Coal Company is resurrected in this civil action. So you don't need to debate that one anymore. I'll confess mistake. Under Rule 60 -- is it B? Although, I do believe in the order, which I just reread in preparation for today's hearing, I'd probably be affirmed, but no sense doing that.

So I'll go ahead and resurrect Patriot Coal

Corporation in the civil action as the Defendant. The case is still stayed with regard to them.

In preparation I reviewed --

MR. BASILE: Thank you, Your Honor.

THE COURT: You're most welcome. I reviewed my Notice of Intent to Proceed. That's when Patriot Coal Company was proceeding under the umbrella. They filed bankruptcy, and I sent out a Notice of Intent to Proceed regarding the automatic stay out of bankruptcy court. My Intent to Proceed was not as to Patriot Coal Corp., but as to the balance of the civil action.

With that Notice of Intent, I allowed counsel an opportunity to brief and educate the Court as to why it should or should not.

Plaintiffs objected to the Court's Intent to Proceed and filed written pleading to the -- to that effect. The Defendant collectively filed a motion supporting the aforementioned, the Court's Intent to Proceed.

The Court later -- let's see. The original Notice of Intent was July 16th, 2012. The Court entered an order confirming Intent to Proceed. On August 16th, 2012, the matter proceeded forward.

Under the scheduling order entered January of 2012, at the time the order that's the subject of this hearing

the presumption that the Court would consider it. So I filed the motion; as I believe one of the chastisements in the order was that I had sought relief for a continuance on one occasion by way of a letter without filing a motion. So I filed the motion, and I was waiting for the Court's ruling on the motion.

So -- so the record is clear on that, that -- that is why I did not do anything; because I was waiting for the Court to rule.

THE COURT: Any chastisements to any counsel always come from the Rules. I mean, so under 24.01-D, I would not have chastised you for following the Rule, but you may proceed.

MR. BASILE: Thank you. I had presumed that Your Honor is very -- very familiar with the issues that I've set forth in the Rule 59 and Rule 60 Motion, and I don't wish to cover every single one of them. I merely wish to highlight and summarize what I consider to be the major arguments, and I appreciate Your Honor already conceding the issue with respect to the inappropriateness of dismissing the claims against Patriot Coal.

THE COURT: I confess mistake.

MR. BASILE: We all make them. I certainly wish to address the -- what I find to be disturbing in the order,

and that is with respect to numerous findings with respect to my alleged pattern of delay, misconduct, apparently not heeding warnings from the Court.

And on top of that -- first of all, to deal with that, I am aware of no warnings from this Court with respect to any order directing me to do something because I had done something, you know, bad, wrong, and the Court needed to inform me that I needed to correct my behavior. That was a shock to me; to hear it for the first time at a hearing at which I wasn't present to defend myself nor had notice that that would be an issue that I would have to defend against.

As I cited to case law, it -- in my reply brief, May vs. Pep Boys, Manny, Moe and Joe; kind of a funny name for a case, but, you know, the Court was very strong that -- in -- it it's direction that if a party or a counsel is going to be sanctioned, they should be given due notice of what the issues are so that the party can appear and defend oneself.

With respect to the other issues related to the sanction, there's certainly a number of chastisements in the order with respect to being, apparently, wholly responsible for the continuance of the hearing on October 30, that got continued to November 9th, 2012, when I was

merely one of several counsel in the case; three of which I could clearly document, by way of e-mails and attached as exhibits, who were unable to attend the hearing on October 30th due to a national disaster known as Hurricane Sandy.

It was appalling to me that in the order there's not a word mentioned of Hurricane Sandy. There's not a word mentioned of the severe nature of the natural disaster that struck the East Coast; killed some people; caused millions of damage -- of dollars of damage. And yet the order seems to suggest that I was unable to attend because of weather conditions, as if perhaps I was over -- overstating the severity of the situation.

Other counsel did as well. I merely was the first to notify the Court in the morning of October 30th, and due to the weather conditions in Charleston, it did not appear it would be safe to drive to the Court, three hours away.

Following that was e-mails from Miss Potterfield, Mr. Hendrickson and -- and -- and Miss Heiskell Jones, who, of course, was in Morgantown, but had to turn back from where she was because she was unable to attend.

There was no reference in the order to anyone else not being able to attend for those reasons. It was as if

I simply canceled the hearing because of some unilateral decision, and the Court was left with no options or choices because of what I had done.

At no time did the Court inform me that between October 30th and November the 9th that, "Mr. Basile, this hearing had to be continued because of you, and because you could not be there, we all had to accommodate you." There was no such finding. There was no such information conveyed to me.

Now, I find it a little disingenuous that in the -- the response brief to my motion, Defense counsel begins for the first time, not in the order, but in the response, to address the issue of an acknowledgement that there was this storm that occurred that actually did affect at least three other defense lawyers; again, Mr. Hendrickson, Miss Potterfield and Mrs. Heather Heiskell Jones.

THE COURT: Mr. Hendrickson's not in this case, sir.

MR. BASILE: Mr. Hendrickson was responsible for continuing the Pettry matter as well as the Stern matter by way of a conversation with Your Honor with respect to he and Mr. Hartley having a discussion with Your Honor ex-parte that -- I've been criticized for sending a letter ex-parte. Apparently they had an ex-parte

conversation with Your Honor on the morning of October 30th -- .

THE COURT: I'm sorry. There --

MR. BASILE: -- and found out that the hearing --

THE COURT: Excuse me.

MR. BASILE: Your Honor, I --

THE COURT: They are liaison counsel in the Stern Case, sir. We were discussing the Stern Case.

You may proceed.

MR. BASILE: Your Honor, the hearings were continued. That is the message that I got from Miss Harbison that day. "The Court has continued the hearings." That's all it said, and it was --

THE COURT: I've heard enough about October 30th. Move on.

MR. BASILE: I'm sorry?

THE COURT: I've heard enough about October 30th. Move on.

MR. BASILE: Your Honor, I would appreciate to be able to make a record since this will likely go to the Supreme Court.

THE COURT: And it will. Proceed. You have three minutes.

MR. BASILE: Three minutes for what, Your Honor?

THE COURT: On this issue.

MR. BASILE: On the October?

THE COURT: Sure.

MR. BASILE: Yeah. And that's what I wish to address, Your Honor.

Mr. Hendrickson -- Your Honor, I would like the record to reflect that it is inappropriate for a judge to make hand motions to someone making an argument in a -- in a belittling way, and it's not the first time Your Honor has done this.

In court, when I was before the Court on March the 30th of last year, trying to make an argument, Your Honor reached across the bench, grabbed a box of tissues, presented it to me as if, "I'm sorry. Here, Mr. Basile. You're having a hard time." I wasn't crying, Your Honor, but yet Your Honor engaged in a most belittling demeanor towards me making a serious argument to the Court; to reach across the bench, grab a box of tissues, and present it to me as if I needed comforted. Very disrespectful.

Doesn't reflect on the record in the testimony. I'm making it known now, but it sure was a -- a message to send to all counsel, and I believe it's highly inappropriate.

THE COURT: I was giving you the floor back, sir.

MR. BASILE: I understand and appreciate that.

Now, with respect to Mr. Hendrickson and Mr. Hartley; they were involved in continuing two hearings on October 30th, Your Honor, because you had scheduled both Pettry and Stern. Pettry was scheduled first that morning; Stern was scheduled later. You flipped that on November 9th, and put Stern first and Pettry second. So when Mr. Hendrickson and -- tells all of us that the hearings are continued, there was no specific reference to only Stern and was -- Miss Harbison communicated to all of counsel. She did not say, "This is only Stern."

So the hearings were continued, and that needs to be clear on the record. Why Mr. Hendrickson and Mr. Hartley were appointed to be able to speak to all of us about Pettry, since they're not in Pettry, I don't know because I wasn't a party to the conversation that they had with the Court that day.

With respect to other matters, Your Honor, it is clear to me that on the record from November the 9th, that the Court, for whatever reason, found it worth questioning or at least raising suspicions about my motivation for not appearing here on November the 9th, by referring to an alleged disabled child that I had to care

for.

Your Honor knows, from past communications with this Court, about the need for a continuance; that it's just not an alleged disabled child, but a severely disabled child of which, I informed the Court, suffers from Wolf-Hirschorn Syndrome, a very rare disorder, and I was burdened with the care of that child due to an emergency to my wife that morning having to deal with an abscess in a root canal discovered late the day before. And I -- I personally find it unfortunate that the Court would find it necessary to suggest on the record, when I wasn't here, that there might be perhaps some disingenuousness to my excuse offered to the Court that morning.

I note that the prior week when we had the continuance on October 30th, when several defense counsel couldn't attend, as well as me, nobody was chastised. It was a continuance. When I had an emergency that affected only me, I was chastised in the most severe manner that one could be chastised; sanctioned without an opportunity to defend oneself and having his client's claims thrown out completely from court.

So I believe that the findings made by the Court are, for the most part, in many of them, based upon misinformation or based upon false information.

With respect to the Motions to Compel, it is clear in the Court's record of November the 9th that the Court considered them moot, except with respect to Harvey Jericho, and then addressed those, but yet there's all kinds of findings in an order that the Court did not make on November the 9th, 2012. There is a -- numerous findings that the Court did not make with respect to Summary Judgment. There's false findings with respect to no discovery was done. It doesn't say in the order that only there was no discovery done in the last few months. It embraces what the Court said at the hearing, which defense counsel permitted the Court to operate under, and that was a false understanding that no discovery had been done; that there was nothing that the defense lawyers had at their disposal to defend this case.

If the Court would look back at the hearing transcript from March 30th, 2012, the Court would find that Mrs. Pentino represented to this Court that there was all kinds of discovery that they had at their disposal. They didn't really think they needed anymore. Yet the basis of my sanction and being chastised by this Court is that I prohibited the Defendants from being able to defend themselves. That flies in the face of Miss Pentino's own admission that they didn't think they

needed to do anything else; this case was ripe for Summary Judgment a year ago, in her opinion.

But yet the basis of sanctions and my chas -- chastisement from the Court in its order of January 11th, 2013, is that I somehow prohibited the Defendants from being able to defend themselves whatsoever against these claims, when the record is clear that there is quite a bit of evidence in the record from discovery exchanged from both sides before the stay was lifted, and there was evidence after the stay was lifted, because I did address some discovery. I did answer some discovery, and I also provided numerous updated medical authorizations.

Miss Pentino and I have worked together for ten years doing that. Even when Pettry was stayed there would be times when I would receive from her office requests, further updates. Even though it was stayed I would still provide them.

So did I miss a few updates most recently? Yes, I did, but in comparison to ten years of updating for 19 Plaintiffs, it pales in comparison to what was provided. There was plenty of information that Defendants had in their possession, and it's a red herring for sure to not only allege, but to find in an order that I somehow had abused the Civil Justice System or the discovery process

by prohibiting the Defendants from being able to properly engage in a defense of this case.

So my request, Your Honor, is that the order be set aside because it is rife with mistakes. It's rife with inaccuracies. It is in error with respect to procedure by having not given any fair warning to me with respect to the sanctions that the Court laid down on a date when I wasn't here, and I would request that the Court set it aside; reconsider. If the Court wishes to draft another order or set it, under another hearing, on the matters of November 9th for which I was not able to attend and argue.

THE COURT: Greatly appreciated. Thank you so much for the very articulate argument.

Defense counsel? Anyone?

MS. JONES: Yes, Your Honor. Thank you. I will attempt --

THE COURT: If you want to --

MS. JONES: I'd rather be on my feet if that's all right with Your Honor?

THE COURT: That's fine, yes.

MS. JONES: I'm going to attempt to address Mr. Basile's arguments in the order in which he made them.

THE COURT: Certainly.

the Summary Judgment matters, how does 59-E and 60-B help you out?

MR. BASILE: Well, the other arguments that I would have made in appearance that day, Your Honor, is that this case has a history of a number of issues that have, I believe, undermined my ability as a solo practitioner to be able to proceed adequately with the -- the prosecution of these cases. That's why, of course, I involved the big boys when I got this case; given to Mr. Segal years ago.

The Court knows a little bit about that fallout. I believe that there were a number of bases for which this case should never have been allowed to proceed, and I believe that those are worthy of reconsideration by this Court with respect to why they ever got to this point, given my on-the-record objections about the *nunc pro tunc* order being set aside; given the class action issues that have been ignored; given the ethical issues --

THE COURT: Have you filed a motion under Rule 23?

MR. BASILE: No, Your Honor.

THE COURT: Oh, okay.

MR. BASILE: Discovery is intended to be provided solely for class certification, and that has not been provided for. Okay?

You've got the Patriot Coal bankruptcy, which obviously I still object to the -- to the Court's order. I don't believe I can immediate -- perhaps immediately appeal that, but we have --

THE COURT: If I dismissed them you could.

MR. BASILE: Sure. Yeah.

THE COURT: If I just kept the order as is, you could appeal me.

MR. BASILE: Right. There are so many procedural problems, I believe, with the way the case has been allowed to move forward when it should have been, and not the least of which is the Stern Case is still not resolved, and it's been a matter of contention all since the last two years or two and a half years since it's been announced as a settlement.

And Your Honor, I'm sure, is astute and insightful enough to know that the -- having the issues that have existed in Stern while the Pettry Case is going forward has made it a little difficult for me to secure the type of legal help I could use in this case to prosecute the Pettry claims.

So there are a number of reasons that I believe the case should never have been permitted to go forward.

THE COURT: Sure. It hasn't proceeded because

were.

MS. JONES: Yeah.

THE COURT: Okay. Okay. Miss Jones, you're at that table because Denise Pentino probably figures if she sits there, she does an order, as has been my history.

Everything good, Tom?

MR. TENNANT: Pardon me?

THE COURT: Are you good?

MR. TENNANT: Yeah.

THE COURT: Okay. Okay. The Court, having considered the written filings of counsel, review of the pertinent portion of the 20-volume case in the Circuit Clerk's office, again, the litigation handbook, Newberg, on class actions, Fourth Edition, Trial Court Rules pertinent, and the West Virginia Rules of Civil Procedure pertinent -- shoot. I'm going to be a cat bird on this one.

Motion under 59-E and 60-B denied *en toto* as having not met the legal criteria, and I'm going to reverse my previous decision not to dismiss Patriot Coal Corp. so that, when I'm taken up on appeal, that will be a vehicle for Mr. Basile to challenge my not staying the case due to the bankruptcy. So that will give him the vehicle to appeal that issue.

Miss Jones, you'll do the order, please?

MS. JONES: Yes, Your Honor. Could we have ten days from receipt of the transcript to submit it?

THE COURT: Sure.

MS. JONES: Thank you.

THE COURT: Very good. Safe travels everybody. Good to see you all.

MR. BASILE: Thank you, Your Honor.

MS. JONES: Thank you, Your Honor.

THE COURT: So Patriot is dismissed --

MS. JONES: Is dismissed.

MR. BASILE: That -- oh, wait a minute. I'm not understanding correctly. Let me hear that again, Your Honor. I thought you were reversing --

THE COURT: Well, I reversed my reversal.

MR. BASILE: Oh, okay. I didn't --

THE COURT: This will give --

MR. BASILE: Would you please say that again then?

THE COURT: This will give you a vehicle by which you can challenge my proceeding with the case.

MR. BASILE: Oh, when you -- okay. You're reversing the reversal from earlier in the hearing.

THE COURT: Correct, sir.

MR. BASILE: Okay. Okay. I'm glad you clarified

IN THE CIRCUIT COURT OF MARSHALL COUNT, WEST VIRGINIA

WILLIAM K. STERN, *et al.*,

Plaintiffs,

v. **Civil Action No. 03-C-49M**

CHEMTALL INC., *et al.*,

Defendants.

NUNC PRO TUNC ORDER

A review of the Court's multi-volume file in this matter demonstrates that the parties had proposed that the individual claims of the *Pettry* plaintiffs be stayed pending disposition of the *Stern* matter. *See* Proposed Amended Case Management Order submitted by Nalco Company on May 2,2006; Agreed Motion of Defendants, Peabody Holding Company, Bandytown Coal Company, Eastern Associated Coal Corporation, Goals Coal Company, Massey Coal Services, Inc., Performance Coal Company and Elk Run Coal Company submitted May 11, 2006 (requesting a stay of all *Pettry* personal injury claims against the coal operators); Transcript of July 7, 2006 Proceedings in this matter at pp. 14-15 and 38; Order entered January 16, 2007 (mistakenly designated as "2006"); Order entered March 26, 2008; and the various Case Management Orders entered in this matter scheduling only the *Stern* class action issues. However, the Court could find no order entered staying the personal injury claims of the *Pettry* plaintiffs.

Therefore, the Court orders *nunc pro tunc* that the personal injury matters of the various *Pettry* plaintiffs are stayed pending disposition of the *Stern* class action matter.

It is so **ORDERED.**

The Clerk shall transmit a copy of this Order to all counsel of record.

Dated this 20th day of February, 2011.

EXHIBIT D

David W. Hummel, Jr., Chief Judge

FAX

DAVID W. HUMMEL, JR., JUDGE
Marshall County Courthouse
Seventh Street
Moundsville, WV 26041
Phone (304) 845-3505
Fax (304) 845-2522

TO: Thomas F. Basile; Basile & Ford LLP
Joseph S. Beeson; Robinson & McElwee, PLLC
Joseph M. Farrell, Jr.; Farrell, Farrell, Farrell, LC
Mark P. Fitzsimmons; Steptoe & Johnson, LLP
R. Dean Hartley; Hartley & O'Brien, PLLC
E. William Harvit; Harvit & Schwartz, LC
David K. Hendrickson; Eckert Seamans Cherin & Mellot, LLC
Jeffrey A. Holmstrand; Flaherty Sensabaugh & Bonasso, PLLC
Heather Heiskell Jones; Spilman Thomas & Battle, PLLC
Robert P. Martin; Bailey & Wyant, PLLC
Bradley R. Oldaker; Wilson & Bailey, PLLC
Robb W. Patryk; Hughes Hubbard & Reed, LLP
Denise Pentino; Dinsmore & Shohl, LLP
Phyllis Potterfield; Bowles Rice McDavid Graff & Love, PLLC
David Rodes; Goldberg, Persky, Jennings & White
Scott S. Segal; The Segal Law Firm
Joseph W. Selep; Zimmer & Kunz, PLLC
Harry G. Shaffer, III; Shaffer & Shaffer, PLLC
James W. Spink; Sheehey Furlong & Behm, P.C.
C. James Zeszutek; Dinsmore & Shohl, LLP

RE: **Stern, et al. v. Chemtall, et al. - 03-C-49 H (Circuit Court of Marshall County)**
Counsel - If there are any questions or comments, please contact my law clerk, Annie Harbison.

PAGES (including cover page):

If you do not receive all the pages, please call as soon as possible, (304) 845-3505.

TELECOPIER OPERATOR: DWH

DATE: 11.23.11

4:26 pm

EXHIBIT E

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

WILLIAM STERN, et al.,

Plaintiffs,

v. **CIVIL ACTION NO. 03-C-49M**
Judge Hummel

CHEMTALL INCORPORATED, et al.,

Defendants.

DENVER PETTRY, et al.,

Plaintiffs,

v. **Civil Action No. 06-C-124M**

PEABODY HOLDING COMPANY, et al.,

Defendants.

ORDER

On October 18, 2011, came the parties by counsel pursuant to proper notice of a status conference in the matter of William K. Stern, et al. v. Chemtall Incorporated, et al. As a result of the conference, the Court entered the following rulings:

1. This Court's Nunc Pro Tunc Order dated February 20, 2011 is hereby vacated;

2. The Stay of the matter styled Denver Pettry, et al. v. Peabody Holding Company, et al., Civil Action No: 06-C-124M is hereby lifted;

3. The parties are hereby ordered to confer to attempt to reach agreement on submission to the Court of a joint Scheduling/Case Management Order; and

4. In the event the parties cannot reach agreement on submission of a joint Scheduling/Case Management Order, counsel for Plaintiff shall contact the Court to obtain a date for a scheduling conference.

The Circuit Clerk is hereby directed to send a certified copy of this Order to all counsel of record. It is so ORDERED.

ENTER: November 23, 2011.

David W. Hummel, Jr., Chief Judge

FAX

DAVID W. HUMMEL, JR., JUDGE
Marshall County Courthouse
Seventh Street
Moundsville, WV 26041
Phone (304) 845-3505
Fax (304) 845-2522

TO: Thomas F. Basile; Basile & Ford LLP
Joseph S. Beeson; Robinson & McElwee, PLLC
Joseph M. Farrell, Jr.; Farrell, Farrell, Farrell, LC
Mark P. Fitzsimmons; Steptoe & Johnson, LLP
David K. Hendrickson; Eckert Seamans Cherin & Mellot, LLC
Jeffrey A. Holmstrand; Flaherty Sensabaugh & Bonasso, PLLC
Heather Heiskell Jones; Spilman Thomas & Battle, PLLC
Robert P. Martin; Bailey & Wyant, PLLC
Robb W. Patryk; Hughes Hubbard & Reed, LLP
Denise Pentino; Dinsmore & Shohl, LLP
Phyllis Potterfield; Bowles Rice McDavid Graff & Love, PLLC
Joseph W. Selep; Zimmer & Kunz, PLLC
Harry G. Shaffer, III; Shaffer & Shaffer, PLLC
James W. Spink; Sheehey Furlong & Behm, P.C.
C. James Zeszutek; Dinsmore & Shohl, LLP

RE: **Pettry, et al. v. Peabody Holding Company, et al. - 03-C-49 H (Circuit Court of Marshall County)**
Counsel - If there are any questions or comments, please contact my law clerk, Annie Harbison.

PAGES (including cover page): 7

If you do not receive all the pages, please call as soon as possible, (304) 845-3505.

TELECOPIER OPERATOR: Annie

DATE: January 20, 2012

EXHIBIT F

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,
PLAINTIFFS,

VS. **// CIVIL ACTION NO. 03-C-49H**

PEABODY HOLDING COMPANY, *et al.*,
DEFENDANTS.

ORDER

On January 8, 2010, the Defendant, Nalco Company, by counsel, filed "*Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, Danny Gunnoe,*" along with a memorandum of law and exhibits in support thereof. Defendant Ciba Corporation joined in Nalco's motion by filing "*Defendant Ciba Corporation's Adoption and Joinder in Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, Danny Gunnoe,*" along with exhibits in support of its motion. Defendants Chemtall Incorporated; G.E. Betz, Incorporated; Stockhausen, Incorporated; Zinkan Enterprises, Incorporated; and Hychem Incorporated also joined in Nalco's motion by filing "*Defendants Chemtall Incorporated, G.E. Betz, Incorporated, Stockhausen, Incorporated, Zinkan Enterprises, Incorporated, and Hychem, Incorporated's Joinder in Nalco Company's Motion for Summary Judgment Against Plaintiff, Danny Gunnoe.*"

These motions have been fully briefed and are ripe for hearing. The pending motions shall come on for hearing, before the undersigned, on **Friday, March 30, 2012, at 1:30 p.m.**, in the courtroom of the Marshall County Courthouse, Moundsville, West Virginia.

It is so ORDERED.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered this 20th day of January, 2012.

DAVID W. HUMMEL, JR., CHIEF JUDGE

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,
PLAINTIFFS,

VS. **// CIVIL ACTION NO. 03-C-49H**

PEADBODY HOLDING COMPANY, *et al.*,
DEFENDANTS.

ORDER

On January 5, 2010, the Defendant, Nalco Company, by counsel, filed "*Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, Franklin Stump,*" along with a memorandum of law and exhibits in support thereof. Following Nalco's motion, Defendants Chemtall Incorporated; G.E. Betz, Incorporated; Stockhausen, Incorporated; Zinkan Enterprises, Incorporated; and Hychem Incorporated filed "*Defendants Chemtall Incorporated, G.E. Betz, Incorporated, Stockhausen, Incorporated, Zinkan Enterprises, Incorporated, and Hychem, Incorporated's Joinder in Nalco Company's Motion for Summary Judgment Against Plaintiff, Franklin Stump.*" Defendant Ciba Corporation later joined in Nalco's motion by filing "*Defendant Ciba Corporation's Adoption and Joinder in Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, Franklin Stump,*" along with exhibits in support of its motion.

These motions have been fully briefed and are ripe for hearing. The pending motions shall come on for hearing, before the undersigned, on **Friday, March 30, 2012, at 1:30 p.m.**, in the courtroom of the Marshall County Courthouse, Moundsville, West Virginia.

It is so ORDERED.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered this 20th day of January, 2012.

DAVID W. HUMMEL, JR., CHIEF JUDGE

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,
PLAINTIFFS,

VS. **// CIVIL ACTION NO. 03-C-49H**

PEABODY HOLDING COMPANY, *et al.*,
DEFENDANTS.

ORDER

On April 12, 2010, the Defendant, Nalco Company, by counsel, filed *"Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, David Evans,"* along with a memorandum of law and exhibits in support thereof.

All counsel of record in this matter that are in opposition to the present motion may respond within the time period allotted by the Court.

A response may be filed on or before February 24, 2012.

A reply may be filed on or before March 16, 2012.

A single courtesy copy shall be provided to the Court in accordance with **Rule 6.03** of the **West Virginia Trial Court Rules.**

This motion shall come on for hearing on **Friday, March 30, 2012, at 1:30 p.m.**, in the courtroom of the Marshall County Courthouse, Moundsville, West Virginia.

It is so ORDERED.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered this 20th day of January, 2012.

DAVID W. HUMMEL, JR., CHIEF JUDGE

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,
PLAINTIFFS,

VS. **// CIVIL ACTION NO. 03-C-49H**

PEABODY HOLDING COMPANY, *et al.*,
DEFENDANTS.

ORDER

On April 12, 2010, the Defendant, Nalco Company, by counsel, filed "*Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, Kermit Evans,*" along with a memorandum of law and exhibits in support thereof.

All counsel of record in this matter that are in opposition to the present motion may respond within the time period allotted by the Court.

A response may be filed on or before February 24, 2012.

A reply may be filed on or before March 16, 2012.

A single courtesy copy shall be provided to the Court in accordance with **Rule 6.03** of the **West Virginia Trial Court Rules.**

This motion shall come on for hearing on **Friday, March 30, 2012, at 1:30 p.m.**, in the courtroom of the Marshall County Courthouse, Moundsville, West Virginia.

It is so ORDERED.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered this 20th day of January, 2012.

DAVID W. HUMMEL, JR., CHIEF JUDGE

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,
PLAINTIFFS,

VS. **// CIVIL ACTION NO. 03-C-49H**

PEABODY HOLDING COMPANY, *et al.*,
DEFENDANTS.

ORDER

On April 12, 2010, the Defendant, Nalco Company, by counsel, filed "*Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, Debra Pettry, Executrix of the Estate of Denver Pettry,*" along with a memorandum of law and exhibits in support thereof.

All counsel of record in this matter that are in opposition to the present motion may respond within the time period allotted by the Court.

A response may be filed on or before February 24, 2012.

A reply may be filed on or before March 16, 2012.

A single courtesy copy shall be provided to the Court in accordance with **Rule 6.03** of the **West Virginia Trial Court Rules.**

This motion shall come on for hearing on **Friday, March 30, 2012, at 1:30 p.m.**, in the courtroom of the Marshall County Courthouse, Moundsville, West Virginia.

It is so ORDERED.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered this 20th day of January, 2012.

DAVID W. HUMMEL, SR., CHIEF JUDGE

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,
PLAINTIFFS,

VS. **// CIVIL ACTION NO. 03-C-49H**

PEABODY HOLDING COMPANY, *et al.*,
DEFENDANTS.

ORDER

On April 12, 2010, the Defendant, Nalco Company, by counsel, filed "*Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, Alfred Price,*" along with a memorandum of law and exhibits in support thereof.

All counsel of record in this matter that are in opposition to the present motion may respond within the time period allotted by the Court.

A response may be filed on or before February 24, 2012.

A reply may be filed on or before March 16, 2012.

A single courtesy copy shall be provided to the Court in accordance with **Rule 6.03** of the **West Virginia Trial Court Rules.**

This motion shall come on for hearing on **Friday, March 30, 2012, at 1:30 p.m.**, in the courtroom of the Marshall County Courthouse, Moundsville, West Virginia.

It is so ORDERED.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered this 20th day of January, 2012.

DAVID W. HUMMEL, JR., CHIEF JUDGE

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, et al.,

Plaintiffs,

v. Civil Action No. 06-C-124M

PEABODY HOLDING COMPANY, et al.,

Defendants.

SCHEDULING CONFERENCE ORDER

On the 23rd day of January, 2012, came the parties, by counsel and pursuant to the Rule 16(b) of the West Virginia Rules of Civil Procedure have agreed upon the following deadlines which shall control this case.

1. MEDICAL AUTHORIZATIONS – Shall be provided to counsel for Defendants no later than **February 6, 2012.**

2. MEDICAL EXAMINATIONS AND **September 20, 2012**

   (This date is dependent upon Plaintiffs' timely providing medical authorizations as set forth herein. Counsel shall petition the Court for an extension of this deadline in the event medical authorizations are not received in sufficient time to allow Defendants to collect Plaintiffs' medical records.)

   EXPERT EVIDENTIARY INSPECTIONS
   COMPLETED BY: **September 20, 2012**

   In conjunction with the scheduling of medical examinations, pursuant to W. Va. Rule of Civ. Pro. 35, counsel scheduling the examination shall provide to all counsel, in writing, the following:

   - The identity of the proposed examiner;

55928v2

EXHIBIT G

- The proposed scope of the examination (e.g. including, but not limited to, part(s) of body to be examined, and modalities and tests to be utilized);
- The proposed examiner's most recent curriculum vitae; and
- The proposed examiner's current and complete fee schedule.

After being apprised of the intended examination and the required information, counsel is to advise, in writing, any objection to the proposed examination or proposed examiner. Counsel is to work in GOOD FAITH to resolve any disagreements BEFORE the examination is noticed. If counsel cannot resolve their disagreements, after first making a good faith effort, the Court will address the same upon the filing of a proper motion. Without counsel attesting to such an effort, this Court will not entertain any motion concerning the disagreements.

All Rule 35 examiners that are out of the Court's jurisdiction, must agree to appear at trial without the issuance of a subpoena.

3. FACT WITNESS DISCLOSURE: **June 20, 2012**

4. FACT DISCOVERY COMPLETION DATE: September 28, 2012

5. PLAINTIFF'S EXPERTS DISCLOSED PURSUANT TO RULE 26(b) **October 1, 2012**

6. DEFENDANT'S EXPERTS DISCLOSED PURSUANT TO RULE 26(b) **November 30, 2012**

Note: What, if any, objection(s) any party has to the sufficiency of any other party's Expert Disclosure are deemed waived if not made the subject of an appropriate motion within 30 days of the filing of such disclosure.

7. EXPERT DISCOVERY COMPLETION DATE: MARCH 8, 2013

Note: All written discovery shall be served such that it is due to be responded to on or before the Discovery Completion Date.

At the conclusion of discovery, Plaintiff's counsel shall write to the Court confirming that discovery is complete and the number of days anticipated for trial. If discovery isn't complete, Plaintiff's counsel shall inform the Court and provide an estimate of how much time is required to complete discovery. If

there is need for an intermediate status conference, the Court, upon request of counsel, shall establish one at an appropriate time during the discovery process.

ALL LAWYERS ARE REMINDED OF THE MANDATORY LANGUAGE IN RULE 26(e) REQUIRING THE SUPPLEMENTATION OF RESPONSES TO INTERROGATORIES. THE CUT-OFF DATE ESTABLISHED IN THIS SCHEDULING ORDER DOES NOT EXCUSE THE FAILURE TO COMPLY WITH THE PROVISIONS OF RULE 26(e).

8. DISPOSITIVE MOTIONS: **April 19, 2013**

PRETRIAL CONFERENCE DATE: **May 20, 2013**

TIME: **11:00 a.m.**

LOCATION: Marshall County Courthouse

Lead counsel trying the case MUST appear at the Pretrial Conference.

Mediation in this case shall take place on or before **May 10, 2013**. If the parties cannot afford to participate in meditation, they may contact the Court to schedule a settlement conference.

All parties are directed to exchange and deliver their respective pretrial conference memoranda to the Court's Marshall County office no later than two days preceding the conference.

Plaintiff will have made and Defendant will have responded to bona fide settlement demands.

Pretrial memoranda are to contain the following:

9. Statement of the Case

10. Issues of Fact

11. Issues of Law

12. Proposed Stipulations

13. Pending Motions

WVRE 103(c) requires that all Motions in Limine should, where practicable, be determined prior to trial. Accordingly, this Court will not consider Motions in Limine on the day of trial without good cause shown.

At the pretrial conference, the Court will schedule a trial date and provide dates for the following:

a. CHARGE CONFERENCE WHERE PARTIES SHALL MEET AND/OR CONFER TO COMPLETE JURY CHARGE, VOIR DIRE AND VERDICT FORM;

b. Supplementing discovery;

c. Exchanging exhibits;

d. Filing objections to exhibits;

e. Filing motions in limine (numbered);

f. Filing final witness list;

g. Objections to motions in limine (corresponding numbers).

Unless authorized by the Court, the above dates and requirements of this Scheduling Conference Order are FINAL.

The Clerk shall transmit a copy of this order to all counsel of record .

It is so ORDERED.

Dated this 25 day of January, 2012

DAVID W. HUMMEL, JR., CHIEF JUDGE

ROBINSON &McELWEE PLLC
attorneys at law

JOSEPH S. BEESON
ATTORNEY AT LAW

P.O. BOX 1791
CHARLESTON, WV 25326

DIRECT DIAL: (304) 347-8326
E-MAIL: jsb@ramlaw.com

February 23, 2012

David R. Ealy, Clerk
Marshall County Circuit Court
600 7th Street
Post Office Drawer B
Moundsville, West Virginia 26041

Re: **Denver Pettry, *et al.* v. Peabody Holding Company, *et al.***
Civil Action No. 06-C-124M
Circuit Court of Marshall County, West Virginia

Dear Mr. Ealy:

Please find enclosed the **"Withdrawal of Motion"** of Eastern Associated Coal, LLC for filing in the above-referenced civil action. A copy of the enclosed document has this day been served upon counsel of record.

Should you have questions regarding the filing of this document, please feel free to contact me at (304) 347-8355.

Sincerely yours,

Joseph S. Beeson

CSB:pak
Enclosure
cc: Honorable David W. Hummel, Judge (w/enclosure) – via E-Mail to Anne Harbison (anne.harbison@courtswv.gov)
Counsel of Record (w/enclosure)

EXHIBIT H

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,

Plaintiffs,

v.

CIVIL ACTION NO. 06-C-124M
(Transferred from Boone County)
Judge David W. Hummel

PEABODY HOLDING COMPANY,
***et al.*,**

Defendants.

WITHDRAWAL OF MOTION

Defendant Eastern Associated Coal, LLC hereby withdraws its Motion for Summary Judgment previously filed and served in this action and set for hearing on March 30, 2012. Said defendant reserves the right to refile this action in the future if necessary. The hearing scheduled on this action may be cancelled. However, the hearings on various other summary judgment motions filed by other defendants, and in which this defendant has joined, will go forward as scheduled.

Respectfully submitted this 23d day of February, 2012.

EASTERN ASSOCIATED COAL, LLC
By Counsel

ROBINSON & McELWEE PLLC

Joseph S. Beeson (WV Bar No. 0292)
Mark H. Hayes (WV Bar No. 4258)
Craig S. Beeson (WV Bar No. 10907)
P. O. Box 1791
Charleston, West Virginia 25326
304-344-5800

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,

Plaintiffs,

v.

CIVIL ACTION NO. 06-C-124M
(Transferred from Boone County)
Judge David W. Hummel

PEABODY HOLDING COMPANY,
***et al.*,**

Defendants.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true and exact copies of "**Eastern Associated Coal LLC's Withdrawal of Motion**" have been served upon counsel of record this 23d day of February, 2012, by placing copies in the United States Mail, postage prepaid, in an envelope addressed as follows:

Thomas F. Basile, Esquire
Basile & Ford, LLP
P. O. Box 4006
Charleston, WV 25364
Counsel for Plaintiffs

Kris N. Kostenko, Esq.
129 Main Street, Suite 609
Beckley, WV 25801
Counsel for Plaintiffs

Joseph M. Farrell, Jr., Esq.
Farrell, White & Legg PLLC
914 Fifth Avenue
P. O. Box 6457
Huntington, WV 25772-6457
Counsel for Bandytown Coal Company, Goals Coal Company, Massey Coal Services, Inc., Performance Coal Company and Elk Run Company, Inc.

Harry G. Shaffer, III, Esquire
Shaffer and Shaffer, PLLC
330 State Street
Post Office Box 38
Madison, WV 25130
Counsel for CIBA Specialty Chemicals Corporation

Mark P. Fitzsimmons, Esquire
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
Counsel for CIBA Specialty Chemicals Corporation

Heather Heiskell Jones, Esquire
Corey T. Zurbuch, Esquire
Spilman, Thomas & Battle PLLC
300 Kanawha Boulevard, East
Post Office Box 273
Charleston, WV 25321-0273
Counsel for Cytec Industries, Inc.

C. James Zeszutek
Dinsmore & Shohl LLP
One Oxford Centre
301 Grant Street, Suite 2800
Pittsburgh, PA 15219
Counsel for Nalco Company

Denise Klug Pentino, Esquire
Dinsmore & Shohl, LLP
Bennett Square
2100 Market Street
Wheeling, WV 26003
Counsel for Nalco Company

Joseph S. Beeson (WV Bar No. 292)

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, et al.,

Plaintiffs,

v. **Civil Action No. 06-C-124M**

PEABODY HOLDING COMPANY, et al.,

Defendants.

ORDER

This matter came on for hearing on March 30, 2012 upon Defendant Nalco Company's Motions for Summary Judgment against Plaintiffs Stump, Gunnoe, Morris, Price, Evans and Debra Pettry, Executrix of the Estate of Denver Pettry; Defendant Cytec Industries, Inc.'s Motion for Summary Judgment against Intervenor/Plaintiff Stump; Defendant Cytec Industries, Inc.'s Motion for Summary Judgment against Intervenor/Plaintiff Gunnoe; BASF Corporation's Adoption and Joinder in Motions for Summary Judgment filed by Nalco Company; Defendant Cytec Industries, Inc.'s Joinder In and Supplemental Memorandum In Support of Defendant Nalco Company's Motion for Summary Judgment against Plaintiff, Debra Pettry, Executrix of the Estate of Denver Pettry; Eastern Associated Coal, LLC's Joinder in the Summary Judgment Motions filed by Nalco Company, and on Plaintiff's Motion to Continue Hearing on Defendants' Motions for Summary Judgment and For Stay of Rulings on Said Motions Pending Plaintiffs' Right to Have an Adequate Opportunity to Engage in the Discovery Period Established in the Court's Scheduling Conference Order; Defendant, Nalco Company's Response in Opposition to Plaintiffs' Motion to Continue Hearing on Defendants' Motions for Summary Judgment and For Stay of Rulings on Said Motions Pending Plaintiffs' Right to Have an Adequate Opportunity to

EXHIBIT I

Engage in the Discovery Period Established in the Court's Scheduling Order; Plaintiffs' Reply to Defendant, Nalco Company's Response in Opposition to Plaintiffs' Motion to Continue Hearing on Defendants' Motions for Summary Judgment and For Stay of Rulings on Said Motions Pending Plaintiffs' Right to Have an Adequate Opportunity to Engage in the Discovery Period Established in the Court's Scheduling Order; Eastern Associated Coal's Joinder in Defendant, Nalco Company's Response in Opposition to Plaintiff's Motion to Continue Hearing on Defendants' Motions for Summary Judgment and For Stay of Rulings on Said Motions Pending Plaintiffs' Right to Have an Adequate Opportunity to Engage in the Discovery Period Established in the Court's Scheduling Conference Order; and BASF Corporation's Adoption and Joinder in Defendant Nalco Company's Response in Opposition to Plaintiffs' Motion to Continue Hearing on Defendants' Motions for Summary Judgment and For Stay of Rulings on Said Motions Pending Plaintiffs' Right to Have an Adequate Opportunity to Engage in the Discovery Period Established in the Court's Scheduling Order. Having heard the arguments of counsel on behalf of the various parties, and based upon the Motions, Memoranda in Support thereof and opposition thereto, the Court FINDS and hereby ORDERS as follows:

1. Plaintiff's Motion to Continue Hearing on Defendants' Motions for Summary Judgment and For Stay of Rulings on Said Motions Pending Plaintiffs' Right to Have an Adequate Opportunity to Engage in the Discovery Period Established in the Court's Scheduling Conference Order is hereby granted, in part and denied, in part;

2. The parties shall have until **July 14, 2012** in which to conduct discovery relevant to the pending Motions for Summary Judgment and Joinder Motions;

3. Plaintiffs shall have until **July 30, 2012** to file responsive briefs to the Motions for Summary Judgment and Joinder Motions; and

4. Defendants shall have until **August 14, 2012** to file any reply briefs with respect to the Motions for Summary Judgment and Joinder Motions.

All objections and exceptions of the respective parties to the Court's findings and rulings herein are duly noted and preserved.

The Circuit Clerk is hereby directed to send a certified copy of this Order to all counsel of record. It is so **ORDERED**.

ENTERED: April 12, 2012.

David W. Hummel, Jr., Chief Judge

Prepared by:

Denise D. Pentino, Esq.
DINSMORE & SHOHL, LLP
Bennett Square
2100 Market Street
Wheeling, WV 26003
304-230-1700
denise.pentino@dinsmore.com

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,

Plaintiffs,

v.

CIVIL ACTION NO. 06-C-124M
(Transferred from Boone County)
Judge David W. Hummel

PEABODY HOLDING COMPANY, *et al.*,

Defendants.

NOTICE OF INTENT TO PROCEED

The Court is in receipt of the ***Notice of Automatic Stay*** filed by counsel for Defendant, Patriot Coal Corp. and its affiliated companies, relative to the above-styled civil action, as a result of a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") with the United States Bankruptcy Court for the Southern District of New York.

As to Defendant, Patriot Coal Corp. and its affiliated companies, if any, 11 U.S.C. Section 362 provides, *inter alia*, for an automatic stay that enjoins and retrains certain acts and proceedings against any of the aforementioned debtors or their property, absent an order from the Bankruptcy Court otherwise.

Based upon the foregoing, as well as the West Virginia Supreme Court of Appeal's analysis in *Belington Bank v. Masketeers Co.*, 185 W.Va. 564, 408 S.E.2d 316 (1991) quoting *Johns-Manville Sales Corp, 26 B.R. 405, 410 (Bkrtcy.S.D.N.Y.1983)* citing *Royal Trucks & Trailer v. Armadors Meritina Salvadoreana, 10 B.R. 488, 491 (N.D. Ill. 1981)*, the Court is of the reasoned opinion that **the instant civil action is stayed only as relates to Defendant, Patriot Coal Corp. and its affiliated companies.**

EXHIBIT J

In making its determination, the Court **FINDS** that "unusual circumstances", as was found in *Belington Bank, supra.,* do not exist in the instant civil action.

Accordingly, it is the **EXPRESS INTENT** of this Court to proceed in the instant civil action relative to all parties and all causes of action, with the exception of any which may relate to Defendant, Patriot Coal Corp. and its affiliated companies.

It is the **ORDER** of this Court that written objections and exceptions to the foregoing, if any, shall be made on or before Tuesday, July 24, 2012, with copies forwarded directly to the undersigned, via facsimile @ (304) 845-2522.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered: July 16, 2012.

DAVID W. HUMMEL, JR.
Chief Judge

LAW OFFICE OF THOMAS F. BASILE
1432 NOTTINGHAM ROAD
CHARLESTON, WV 25314

Office Phone - 304-925-4490
Office Fax – 866-587-2766
Mobile - 304-610-5764
E-mail – basilelaw@suddenlink.net

MAILING ADDRESS:
P.O. BOX 2149
CHARLESTON, WV 25328-2145

July 24, 2012

Via U. S. Mail and Fax: 304-845-5891
David R. Ealy, Clerk
Circuit Court of Marshall County
600 – 7th Street
Moundsville, WV 26041

Re: **Pettry, et al., v. Peabody Holding Co., et al.,**
Civil Action No. 06-C-124H

Dear Mr. Ealy:

Please find enclosed for filing in the above-referenced matter the original of **"Plaintiffs' Objection To The Court's Notice Of Intent To Proceed."** Service is being made according to the Certificate of Service attached to same.

A courtesy copy is being forwarded to Judge Hummel's office.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to call me.

Sincerely,

Thomas F. Basile

Enclosure: as stated

cc: Hon. David W. Hummel, Jr. ***(fax: 304-845-2522)***
Counsel of Record
Pettry Plaintiffs

EXHIBIT K

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, et al.,

Plaintiffs,

v. **Civil Action No. 06-C-124**
Judge Hummel

PEABODY HOLDING COMPANY, et al.,

Defendants.

PLAINTIFFS' OBJECTION TO THE COURT'S NOTICE OF INTENT TO PROCEED

Come now Plaintiffs, by and through their counsel, Thomas F. Basile, and respectfully serve notice of their objection to the court's "Notice of Intent to Proceed" with the above-styled civil action, notwithstanding the filing of a "Notice of Automatic Stay" by counsel for defendant, Eastern Associated Coal, LLC, reflecting that Eastern filed for relief under Chapter 11 of the Bankruptcy Code on July 9, 2012, in the U.S. Bankruptcy Court for the Southern District of New York. The court stated its intent to stay this proceeding only as to Patriot Coal Corporation and its affiliated companies (one of which is defendant, Eastern) and to proceed with this civil action relative to all other parties and causes of action.

The court specifically noted that it relied upon the analysis set forth by the West Virginia Supreme Court of Appeals in *Belington Bank v. Masketeers Company*, 408 S.E.2d 316 (W.Va. 1991), as legal authority for its intent to proceed with this civil action as to all parties and claims except those against Patriot Coal and any of its affiliates. The court further stated that it "**FINDS** that 'unusual circumstances', as was found in *Belington Bank, supra,* do not exist in the instant civil action." ("Notice of Intent to Proceed" at 2.) However, the court also permitted any party to file objections or exceptions to the court's **"EXPRESS INTENT"** as long as they were forwarded to the court on or before July 24, 2012.

Notwithstanding the court's conclusory finding with respect to "unusual circumstances," Plaintiffs respectfully point out to the court that some of the same "unusual circumstances" that were present in the *Belington Bank* case are present in this case, as well, and, therefore, should result in the court's reconsideration of its intent to proceed and application of the Bankruptcy Court's Automatic Stay to all defendants and all claims in this civil action.

First, Plaintiffs note that one of the reasons the Court in *Belington Bank* found it persuasive that the Automatic Stay was applicable to all defendants was the fact that there were cross-claims filed against all defendants. *Belington Bank*, 408 S.E.2d at 319-320 and n.5. That fact is also present here, where cross-claims have been filed against the bankrupt defendant, Eastern.

Second, the Court in Belington Bank expressed concern about "the lack of feasibility in according full relief in the absence of all parties" being in the case. *Id.* at 320. That is particularly important here where all defendants, including bankrupt defendant, Eastern, are alleged to be co-conspirators and engaged in a joint venture with the other defendants.

Third, Plaintiffs should be permitted to explore in the bankruptcy proceeding whether or not bankrupt defendant, Eastern, has any liability insurance to cover Plaintiffs' claims. If there is any such liability insurance, Plaintiffs could then seek permission from the Bankruptcy Court in New York to lift the Automatic Stay for the purposes of proceeding with their claims up to the available limits of any applicable liability insurance. However, that takes time and cannot be done within the deadlines that exist in the current Scheduling Order.

Fourth, this civil action was stayed for years, by agreement of the parties until resolution of the companion, *Stern* case, as reflected in the court's "Nunc Pro Tunc Order" entered in *Stern* on February 20, 2011, but the court lifted that stay over Plaintiffs' objections despite the

fact that *Stern* is not yet resolved. Now, with the filing of the "Notice of Automatic Stay," the court has more than a sufficient legal basis for reinstating the stay that was in effect in this civil action until *Stern* is resolved and the stay is either lifted as to defendant, Eastern, or the bankruptcy case is dismissed.

WHEREFORE, for all the reasons set forth herein and any others appearing to the court, Plaintiffs respectfully request that the court reconsider its prior "intent to proceed" and Order that the "Notice of Automatic Stay" with respect to the filing of Chapter 11 bankruptcy by Patriot Coal Corporation and its affiliated companies, including defendant, Eastern, applies to all parties and all claims in this civil action until further notice of the court, and that the court grant Plaintiffs whatever further relief it deems just and proper.

Respectfully Submitted,

DENVER PETTRY, et al.,
Plaintiffs

By Counsel

Thomas F. Basile (WVSB #6116)
Law Office of Thomas F. Basile
P.O. Box 2149*
Charleston, West Virginia 25328-2149
(304) 925-4490; (866) 587-2766 *facsimile*
Counsel for Plaintiffs

*Please note new P.O. Box address and zip code as of 7/23/12

CERTIFICATE OF SERVICE

I, Thomas F. Basile, do hereby certify that a true and exact copy of ***"Plaintiffs' Objection To The Court's Notice Of Intent To Proceed"*** was served this 24th day of July, 2012, upon counsel of record in this matter by facsimile and email attachment, as set forth on the attached Service List:

Thomas F. Basile

Thomas F. Basile (WVSB #6116)

PETTRY, et al., v. PEABODY HOLDING COMPANY, et al., CIVIL ACTION NO. 06-C-124H **SERVICE LIST**		
Denise D. Pentino, Esquire Jacob A. Manning, Esquire Dinsmore & Shohl, LLP Bennett Square 2100 Market Street Wheeling, WV 26003 Fax: 304-230-1610 Email: denise.pentino@dinsmore.com Email: jacob.manning@dinsmore.com ***Counsel for Ondeo Nalco Company***	C. James Zeszutek, Esquire Dinsmore & Shohl, LLP One Oxford Center 301 Grant Street Pittsburgh, PA 15219-1425 Fax: 412-281-5055 Email: james.zeszutek@dinsmore.com ***Counsel for Ondeo Nalco Company***	Mark P. Fitzsimmons, Esquire Steptoe & Johnson, LLP 1330 Connecticut Avenue, NW Washington, DC 20036 Fax: 202-429-3902 Email: mfitzsimmons@steptoe.com ***Counsel for Ciba Specialty Chemicals Corporation***
Harry G. Shaffer, III, Esquire Shaffer & Shaffer, PLLC P.O. Box 38 Madison, WV 25130 Fax: 304-369-5431 Email: hshaffer@shafferlaw.net ***Counsel for Ciba Specialty Chemicals Corporation***	Heather Heiskell Jones, Esquire Andrew P. Arbogast, Esquire Spilman, Thomas & Battle, PLLC P.O. Box 273 Charleston, WV 25321-0273 Fax: 304-340-3801 Email: hheiskell@spilmanlaw.com Email: aarbogast@spilmanlaw.com ***Counsel for Cytec Industries, Inc.***	
Joseph M. Farrell, Jr., Esquire Farrell, White & Legg PLLC P.O. Box 6457 Huntington, WV 25772-6457 Fax: 304-522-9162 Email: jmf@farrell3.com ***Counsel for Bandytown Coal Co., Goals Coal Co., Massey Coal Services, Inc., Performance Coal Co. and Elk Run Coal Co.***		

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

DENVER PETTRY and DEBRA PETTRY, his wife;
FRANKLIN STUMP and MARSHA STUMP, his wife,
ALFRED PRICE and WILLA PRICE, his wife;
ROBERT SCARBRO and THERESA SCARBRO, his wife;
DAVID EVANS and KATHYE EVANS, his wife;
CHARLES SINGLETON and JENCIE SINGLETON, his wife;
WESTLEY FRALEY and JUDY FRALEY, his wife;
DANNY GUNNOE and CAROL GUNNOE, his wife;
KERMIT MORRIS and KATHY MORRIS, his wife; and
HARVEY CARICO; on behalf of themselves individually
and all others similarly situated,

Plaintiffs,

v.

Civil Action No. 02-C-58
A Class Action

PEABODY HOLDING COMPANY;
BANDYTOWN COAL COMPANY;
EASTERN ASSOCIATED COAL CORPORATION;
GOALS COAL COMPANY;
MASSEY COAL SERVICES, INC.;
PERFORMANCE COAL COMPANY;
ELK RUN COAL COMPANY, INC.;
CIBA SPECIALTY CHEMICALS CORPORATION;
CYTEC INDUSTRIES, INC.;
ONDEO NALCO COMPANY; and
JOHN DOE CHEMICAL COMPANY,

Defendants.

FIRST AMENDED COMPLAINT

This action is brought for individual claims by all plaintiffs against all defendants and, pursuant to West Virginia Rule of Civil Procedure 23, as a class action on behalf of the named plaintiffs and all West Virginia residents, their spouses, and others similarly situated, who have worked in and around coal preparation plants in West Virginia, and have suffered exposures as alleged herein, as a result of any acts or omissions of the defendant chemical companies, their agents, servants, employees, co-conspirators

EXHIBIT C

and/or joint venturers and any member of a class of defendant chemical companies as hereinafter alleged.

The Parties

1. Plaintiffs, Denver Pettry and Debra Pettry, his wife, are residents and citizens of Raleigh County, West Virginia. Denver Pettry was formerly employed by Peabody Coal Company, believed to be a predecessor to defendant Peabody Holding Company ("Peabody").

2. Plaintiffs, Franklin Stump and Marsha Stump, his wife, are residents and citizens of Raleigh County, West Virginia. Defendant Peabody formerly employed Franklin Stump.

3. Plaintiffs, Alfred Price and Willa Price, his wife, are residents and citizens of Raleigh County, West Virginia. Defendant Peabody formerly employed Alfred Price.

4. Plaintiffs, Robert Scarbro and Theresa Scarbro, his wife, are residents and citizens of Raleigh County, West Virginia. Defendant Performance Coal Company ("Performance") formerly employed Robert Scarbro.

5. Plaintiffs, David Evans and Kathye Evans, his wife, are residents and citizens of Wyoming County, West Virginia. Defendant Eastern Associated Coal Corporation ("Eastern") formerly employed David Evans.

6. Plaintiffs, Charles Singleton and Jencie Singleton, his wife, are residents and citizens of Boone County, West Virginia. Defendant Bandytown Coal Company ("Bandytown") formerly employed Charles Singleton.

7. Plaintiffs, Westley Fraley and Judy Fraley, his wife, are residents and citizens of Wyoming County, West Virginia. Defendant Eastern formerly employed Westley Fraley.

8. Plaintiffs, Danny Gunnoe and Carol Gunnoe, his wife, are residents and citizens of Raleigh County, West Virginia. Defendant Goals Coal Company ("Goals") currently employs Danny Gunnoe.

9. Plaintiffs, Kermit Morris and Kathy Morris, his wife, are residents and citizens of Raleigh County, West Virginia. Defendant Peabody and defendant Massey Coal Services, Inc formerly employed Kermit Morris.

10. Plaintiff, Harvey Carico, is a resident and citizen of Raleigh County, West Virginia. Defendant Elk Run Coal Company, Inc formerly employed Harvey Carico.

11. Defendant, Peabody Holding Company, Inc., is a New York corporation with its principal place of business in St. Louis, Missouri. Peabody operates coal preparation plants throughout West Virginia, including Boone County.

12. Defendant, Bandytown Coal Company, is a West Virginia corporation with its principal place of business in Madison, Boone County, West Virginia. Bandytown owns and operates a coal preparation plant in Boone County, West Virginia.

13. Defendant, Eastern Associated Coal Corporation is a West Virginia corporation with its principal place of business in Charleston, Kanawha County, West Virginia. Eastern owns and operates coal preparation plants throughout West Virginia, including Boone County.

14. Defendant, Goals Coal Company, is a West Virginia corporation. Goals operates a coal preparation plant in Raleigh County, West Virginia.

15. Defendant, Massey Coal Services, Inc. is a Virginia corporation with its principal place of business in Charleston, West Virginia. Massey owns and operates coal preparation plants throughout West Virginia, including Boone County.

16. Defendant, Performance Coal Company, is a Virginia corporation with its principal place of business in Whitesville, Boone County, West Virginia.

17. Defendant, Elk Run Coal Company, Inc. is a Virginia corporation with its principal place of business in Sylvester, Boone County, West Virginia. Elk Run owns and operates a coal preparation plant in Boone County, West Virginia.

18. Defendant, CIBA Specialty Chemicals Corporation ("CIBA"), successor in interest to Allied Colloids, Inc., is a Delaware corporation with its principal place of business in Tarrytown, New York. Allied and CIBA, as its successor in interest, sold chemicals to one or more of defendant coal companies and other, unnamed coal companies, for use in coal preparation plants in West Virginia.

19. Defendant, Cytec Industries, Inc. ("Cytec"), is a New Jersey corporation with its principal place of business in West Patterson, New Jersey. Cytec sold chemicals to one or more of defendant coal companies and other, unnamed coal companies, for use in coal preparation plants in West Virginia.

20. Defendant, Ondeo Nalco Company ("Nalco"), is a Delaware corporation with its principal place of business in Naperville, Illinois. Nalco sold chemicals to one or more of defendant coal companies and other, unnamed coal companies, for use in coal preparation plants in West Virginia.

21. Defendant, John Doe Chemical Company, represents those unnamed chemical companies that manufacture, market, distribute and/or sell chemicals for use

in the coal preparation plants in West Virginia owned and operated by defendant coal companies and by other unnamed coal companies.

Jurisdiction

22. Jurisdiction is proper in this matter because some of the defendants are West Virginia corporations, destroying federal diversity jurisdiction, nearly all of the defendants have conducted business in Boone County, the amount in controversy satisfies the minimum jurisdictional amount, and the claims do not arise out of federal law. The plaintiffs and the class they seek to represent seek no relief under any federal laws or regulations, assert no federal claims, and withdraw any asserted state claim that is preempted by federal law. The claims herein are brought solely under state common and state statutory law.

Venue

23. Venue is appropriate in Boone County because one or more of the defendants reside in Boone County, a significant portion of the matters in controversy occurred in Boone County, and it is believed that all defendants conduct business in Boone County.

Class Action Allegations

24. Plaintiffs adopt and incorporate by reference the allegations of all relevant preceding paragraphs as if fully set forth herein.

25. This civil action is an appropriate case to be brought and prosecuted as individual actions by plaintiffs against the named defendant coal companies and as a

class action against the defendant chemical companies pursuant to West Virginia Rule of Civil Procedure 23.

26. There exists a class of individuals who were excessively exposed to the chemicals used in the West Virginia coal preparation plants of the defendant coal companies and manufactured by defendant chemical companies. This class includes all persons (and their spouses) who worked in and around said coal preparation plants for defendant coal companies and who are residents of West Virginia.

27. The claims of plaintiffs are typical of the claims of the class against the defendant chemical companies. Plaintiffs will fairly and adequately protect the interests of the class with respect to the appropriate common issues of fact and law and they have hired counsel competent to prosecute said action for and on behalf of the plaintiffs and the class of individuals they represent.

28. The prosecution of this civil action by all plaintiffs in separate actions would create a risk of varying adjudications with respect to individual members of the class, could be dispositive of interests of other members of the class not parties and/or they may impair or impede their ability to protect their interests and/or the defendant chemical companies have acted or refused to act on grounds generally applicable to the class making declaratory or injunctive relief appropriate for the whole class.

29. Upon information and belief, the class includes hundreds of West Virginia citizens who currently are employed by defendant coal companies or were previously employed by defendant coal companies at numerous coal preparation plants in West Virginia and is therefore so numerous that joinder of all members is impracticable.

30. There are questions of law and fact common to the class, including, but not limited to, the following:

(a) Whether any of the chemicals manufactured by defendant chemical companies and sold for use in the West Virginia coal preparation plants of defendant coal companies, individually or in combination with other chemicals or processes thereof, including residual by-products and/or the by-products of degradation, based on the allegations herein, were and are defective and whether the defendant chemical companies or any of them are strictly liable to plaintiffs and the class.

(b) Whether the plaintiffs and class may be entitled to medical monitoring damages.

(c) Whether the defendant chemical companies or any of them are liable to plaintiffs and the class for punitive damages and the amount thereof.

(d) Whether the defendant chemical companies failed to warn the plaintiffs of the dangers associated with the use of their chemicals.

(e) Whether the defendant chemical companies failed to warn the plaintiffs of the existence of residual by-products present in their chemical products and the known dangers of excessive exposure to said residual by-products.

(f) Whether the defendant chemical companies failed to warn the plaintiffs of the degradation of their chemicals and the known dangers of excessive exposure to the by-products of said degradation.

(g) Such other factual and legal issues as are apparent from the allegations and causes of action alleged above.

31. The interests of members of the class, as to common questions of law and fact, in individually controlling the prosecution of separate actions do not outweigh the benefits of a class action as to those issues.

32. The difficulties in management of this case as a class action are outweighed by the benefits it has with respect to disposing of common issues of law and fact as to the large number of litigants, and it is desirable to concentrate the litigation in

one forum for the management of this civil action due to the number of cases that could be filed around the State.

33. The questions of law and fact common to the members predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this civil action.

34. There are subclasses of individuals whose claims may be more efficiently and appropriately adjudicated by class action.

35. Jurisdiction and venue are proper in Boone County, West Virginia, pursuant to West Virginia law and the West Virginia Rules of Civil Procedure as the defendants, upon information and belief, all do business in Boone County, West Virginia, and one or more defendants have their principal place of business in Boone County, West Virginia.

36. Plaintiffs bring this action, individually, and as representatives of the class of all current and former coal preparation plant workers of the defendant coal companies living in West Virginia, against the defendant chemical companies that manufactured, distributed, marketed and/or sold chemicals for use in and around coal preparation plants of the named coal company defendants throughout the State of West Virginia. Excluded from the defendant chemical companies are any chemical companies who were insured by any insolvent insurer or other insurer that has declared insolvency for the acts alleged herein.

37. The individually named plaintiffs are members of the class they seek to represent. The members of the class are so numerous that joinder is impracticable and would involve thousands of litigants and the individuals in the class in all other ways are

similarly situated as required under Rule 23 of the West Virginia Rules of Civil Procedure and complies with the requirements thereof.

Factual Background

38. Defendant coal companies, acting through their agents, servants and employees, instructed and directed each of the coal preparation plant workers with respect to his duties and responsibilities at each coal preparation plant operated by the defendant coal companies.

39. While carrying out his job duties, each coal preparation plant worker was repeatedly exposed, on a daily basis, to chemicals manufactured by defendant chemical companies that were either individually, or in combination with other chemicals or processes thereof, including residual by-products and/or the by-products of degradation, harmful, and which presented a high degree of risk and strong probability of serious injury or death to each of them from these repeated exposures.

40. During their employment with the defendant coal companies as coal preparation plant workers, each worker was frequently exposed, on a daily basis, to chemicals manufactured by defendant chemical companies that cause serious health problems from excessive exposure to the chemicals themselves, or their by-products present from degradation, or residual by-products present from the chemical manufacturing process.

41. Defendant coal companies never provided any of the plaintiff coal preparation plant workers with adequate safety instructions or warnings with respect to the ill health effects and dangers from excessive exposure to the subject chemicals or

processes thereof, including residual by-products and/or the by-products of degradation that were present in and around the coal preparation plant.

42. Defendant coal companies never provided any of the plaintiff coal preparation plant workers with adequate protective clothing or gear to protect them from exposure to the subject chemicals or processes thereof, including residual by-products and/or the by-products of degradation that were present in and around the coal preparation plant.

43. Defendant chemical companies designed, manufactured, marketed, and/or distributed and/or sold one or more of the subject chemicals that the plaintiff coal preparation plant workers were exposed to in their jobs with defendant coal companies.

44. Each of the plaintiff coal preparation plant workers either exhibits varying degrees of peripheral neuropathy problems and central nervous system problems or fears that such problems may develop or worsen, consistent with excessive exposure to the hazardous chemicals he worked with in the coal preparation plant, including, but not limited to the monomer form of acrylamide, present as residual monomer or a by-product of degradation from polyacrylamide.

45. Each of the plaintiff coal preparation plant workers is fearful of the risk that he may contract cancer from his exposure to the hazardous chemicals he worked with in the coal preparation plant, including, but not limited to the monomer form of acrylamide.

46. At all times complained of herein, defendants were acting for and on their own behalf and as agents, ostensible agents, servants and/or employees, one of the other, in the course and scope of their employment, agency and/or ostensible agency.

47. The chemicals used in the coal preparation plants and manufactured by defendant chemical companies have a deleterious effect on the health of human beings, including damaging their peripheral and central nervous systems, posing a risk of cancer, and other related and unrelated damages, both temporary and permanent.

48. Defendant chemical manufacturers knew or should have known that the chemicals used in and around West Virginia's coal preparation plants were dangerous and defective and that their acts and/or omissions would cause injury and damage to persons who were exposed to them, including plaintiffs and the class that they seek to represent. Upon information and belief, defendant chemical companies failed to use safer alternatives to the chemicals, notwithstanding that safer alternatives existed and were economically feasible to use.

49. Defendant chemical manufacturers negligently, carelessly, and recklessly, or wrongfully, knowingly and intentionally, designed, formulated, tested, manufactured, labeled, distributed, advertised, marketed, and placed the chemicals at issue, including polyacrylamide, in the stream of commerce for sale in the United States, including the State of West Virginia for use in and around coal preparation plants, and sold the subject chemicals to defendant coal companies which employed plaintiffs and the class that they seek to represent.

50. Defendant chemical manufacturers knew or should have known of the dangers of their chemicals and/or combination of their chemicals and/or the residual and degradation by-products of their chemicals and owed a duty to provide information to the plaintiffs and the class of people they represent as to these dangers and the proper and appropriate warnings which would clearly advise plaintiffs and others in the

class plaintiffs seek to represent of the dangers of the use of these chemicals individually or in combination thereof.

51. Defendant chemical manufacturers intentionally and knowingly or recklessly and negligently failed or refused to advise plaintiffs and the class of people they seek to represent of the dangers of their chemicals and/or combination of their chemicals and/or the residual and degradation by-products of their chemicals.

52. Defendant chemical companies negligently and recklessly, or knowingly and intentionally failed or refused to use due care in conceiving, designing, researching, testing, formulating, packaging, advertising, marketing, selling, and placing their chemicals used in and around coal preparation plants in the stream of commerce.

53. Defendant chemical companies negligently and recklessly, or knowingly and intentionally failed or refused to properly supervise, instruct and inform by warnings, instructions, training and publication, the plaintiffs and the class they seek to represent of the dangers associated with the use of their chemicals and/or combination of their chemicals and/or the residual and degradation by-products of their chemicals

54. Defendant chemical companies negligently and recklessly, or knowingly and intentionally withheld information from the plaintiffs and the class of individuals they seek to represent who had a right to know of information which would have prevented the plaintiffs and the class they seek to represent from being exposed in dangerous fashion to said chemicals and/or combination of their chemicals and/or the residual and degradation by-products of their chemicals

55. Defendant chemical companies negligently and recklessly or knowingly and intentionally encouraged the widespread use of said chemicals which they knew or should have known would reasonably harm plaintiffs and others similarly situated by

exposure to said chemicals and/or the combination of them and/or the residual and degradation by-products of said chemicals.

56. All of the defendants have deliberately withheld information from the public with respect to the dangers associated with excessive exposure to the chemicals and/or combination of their chemicals and/or the residual and degradation by-products of their chemicals used by the plaintiff coal preparation plant workers and the class they seek to represent.

57. As a direct and proximate result of the actions and/or omissions of the defendants and each of them acting for and on their own behalf and as agents, ostensible agents, employees, conspirators, joint venturers, aiders and abettors of others, including the other defendants named herein, each of the plaintiff coal preparation plant workers, individually and on behalf of the class they seek to represent, has suffered serious health problems or fears that serious health problems will develop or worsen due to exposure to the said chemicals and/or combination of said chemicals and/or the residual and degradation by-products of said chemicals used in and around the West Virginia coal preparation plants of the named coal company defendants.

58. Plaintiff spouses of each coal preparation plant worker and the class of spouses they seek to represent have suffered a loss of consortium, loss of services and damage to their marital relationship due to the injuries suffered by their coal preparation plant husbands.

59. Plaintiff spouses of each coal preparation plant worker and the class of spouses they seek to represent have suffered mental anguish and emotional distress due to the fear created by their husbands' injuries and the potential that they, their

children or their husbands may contract future illnesses or suffer a worsening of current illnesses.

COUNT I
DELIBERATE INTENT
(Coal Company Defendants)

60. Plaintiffs adopt and incorporate by reference the relevant allegations of all preceding paragraphs as if fully set forth herein.

61. The deliberate intent claims are not class claims, but are brought only for the named plaintiffs against the named defendant coal companies.

62. Each plaintiff coal preparation plant worker has been severely injured as a direct and proximate result of the wrongful conduct of the defendant coal companies, which wrongful conduct constitutes "deliberate intention" as that term is defined in West Virginia Code, §23-4-2, as amended, in that:

(a) A specific unsafe working condition existed in each of the defendant coal companies' coal processing plants, which presented a high degree of risk and a strong probability of serious injury or death; namely, the exposure of each of the plaintiff coal preparation plant workers, on a daily basis, to chemicals that either individually or in combination with other chemicals were harmful to them.

(b) The defendant coal companies had a subjective realization and an appreciation of the existence of the aforesaid specific unsafe working condition in their respective plants and an appreciation of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition.

(c) The aforesaid specific unsafe working conditions were in violation of state statutes, rules and regulations governing the safety of persons employed in and around coal preparation plants and/or work areas where there is frequent exposure to the chemicals in controversy and/or the residual and degradation by-products of these chemicals. Such specific unsafe working conditions were also in violation of commonly accepted and well-known safety standards within the mining industry and/or industries that use the chemicals in controversy.

(d) Notwithstanding the existence of the facts set forth in subparagraphs (a) through (c) hereof, defendant coal companies nevertheless, thereafter exposed each of the plaintiff coal preparation plant workers to such specific unsafe working conditions with notice and knowledge of the specific unsafe working conditions.

(e) As a direct and proximate result of the aforesaid specific unsafe working conditions, the plaintiff coal preparation plant workers each suffered physical and mental injuries and damages, as more fully set forth in this complaint.

63. That the injuries sustained by the plaintiff coal preparation plant workers were the proximate result of the "deliberate intent" of defendant coal companies to injure the plaintiffs as that term is defined under the relevant statutory law of West Virginia's Workers' Compensation Act.

64. That as a further proximate result of the "deliberate intent" of defendant coal companies to injure the plaintiff coal preparation plant workers identified in this count each of them has suffered serious and permanent injury, including, but not limited to some or all of the following:

(a) Problems associated with peripheral neuropathy and the central nervous system;

(b) Pain and suffering, past and future;

(c) Loss of the ability to enjoy life;

(d) Emotional distress and mental anguish;

(e) Loss of income past and future;

(f) Impairment of earning capacity;

(g) Medical expenses, past and future, for known injuries;

(h) Fear of contracting cancer or other illnesses or deterioration of their health;

(i) Humiliation, embarrassment and fear; and

(j) Annoyance and inconvenience.

COUNT II
STRICT LIABILITY IN TORT
(A Class Claim)

65. Plaintiffs adopt and incorporate by reference the relevant allegations of all preceding paragraphs as if fully set forth herein.

66. That during the relevant time periods of employment for plaintiff coal preparation plant workers, and the class they seek to represent, defendant chemical manufacturers designed, manufactured, packaged, inspected or failed to inspect, marketed and\or sold in a defective condition to defendant coal companies, one or more of the chemicals used in the West Virginia coal preparation plants owned, operated or controlled by defendant coal companies.

67. That as a direct and proximate result of the defective condition of one or more of the chemicals provided by the defendant chemical companies to defendant coal companies for use in their coal preparation plants in West Virginia, the plaintiffs and the class they seek to represent suffered serious and permanent injuries as set forth herein.

COUNT III
BREACH OF WARRANTIES
(A Class Claim)

68. Plaintiffs adopt and incorporate by reference the relevant allegations of all preceding paragraphs as if fully set forth herein.

69. That defendant chemical companies, by and through the manufacture, marketing, distribution and sale of their chemicals to defendant coal companies for use in their coal preparation plants in West Virginia, impliedly warranted to each of the plaintiffs and the class they seek to represent that the chemicals were fit for their

intended purpose and would not injure the plaintiffs by exposure to said chemicals. The plaintiffs relied upon said implied warranties to their detriment.

70. That said implied warranties were breached by defendant chemical companies when exposure to one or more of their chemicals and/or the residual and degradation by-products of their chemicals proximately caused serious and permanent injuries to plaintiffs and the class they seek to represent as set forth herein.

COUNT IV
NEGLIGENT FAILURE TO WARN
(A Class Claim)

71. Plaintiffs adopt and incorporate by reference the relevant allegations of all preceding paragraphs as if fully set forth herein.

72. That defendant chemical companies negligently and carelessly failed to warn, inform, instruct and apprise the plaintiff coal preparation plant workers and class members they seek to represent of the defective nature of the chemicals to which plaintiffs and the class they seek to represent were exposed and/or any dangers associated with exposure to one or more of their chemicals and/or the residual and degradation by-products of their chemicals and the need to take any precautions against exposure to the subject chemicals.

73. That as a direct and proximate result of the negligent and careless failure to warn by defendant chemical companies, the plaintiffs and class members they represent have suffered serious and permanent injuries as set forth herein.

COUNT V
INTENTIONAL FAILURE TO WARN
(A Class Claim)

74. Plaintiffs adopt and incorporate by reference the relevant allegations of all preceding paragraphs as if fully set forth herein.

75. That defendant chemical companies willfully, wantonly, maliciously, knowingly and intentionally failed to warn, inform, instruct and apprise the plaintiff coal preparation plant workers and the class they seek to represent of the defective nature of the chemicals to which plaintiffs and the class they seek to represent were exposed and/or any dangers associated with exposure to one or more of the subject chemicals and/or the residual and degradation by-products of these chemicals and/or the need to take any precautions against exposure to the same.

76. That as a direct and proximate result of the willful, wanton, malicious, knowing and intentional failure of defendant chemical companies to warn the plaintiff coal preparation plant workers and the class they seek to represent, the plaintiffs and the class they seek to represent have suffered serious and permanent injuries as set forth herein.

COUNT VI
MEDICAL MONITORING
(A Class Claim)

77. Plaintiffs adopt and incorporate by reference the relevant allegations of all preceding paragraphs as if fully set forth herein.

78. Plaintiff coal preparation plant workers and the class members they seek to represent have, relative to the general population, been significantly exposed to proven hazardous substances in the coal preparation plant work environment in West

Virginia owned, operated or controlled by defendant coal companies, including but not limited to monomer acrylamide, present as a residual by-product in polyacrylamide and as a degradation by-product from polyacrylamide.

79. The deliberate and tortious conduct of defendant chemical companies have caused plaintiff coal preparation plant workers and the class members they seek to represent to suffer exposure to hazardous chemical substances in the coal preparation plant work environment, including monomer acrylamide, present as a residual by-product in polyacrylamide and as a degradation by-product from polyacrylamide.

80. As a direct and proximate result of exposure to said chemical hazardous substances, plaintiff coal preparation plant workers and the class they seek to represent have suffered an increased risk of contracting serious latent diseases, including peripheral nerve damage, central nervous system disorders and cancers.

81. The increased risk of diseases that plaintiff coal preparation plant workers and the class they seek to represent have incurred make it reasonably necessary for these plaintiffs and the class they seek to represent to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposures plaintiffs and the would be class have had to the subject chemical hazardous substances.

82. Periodic medical examinations required for early detection of the diseases caused by the subject hazardous chemical substances exist, and are available to plaintiff coal preparation plant workers and the class they seek to represent.

83. Plaintiffs, for themselves and the class they seek to represent, request judgment against all defendant chemical companies, jointly and severally, with respect

to paying for the costs of a medical monitoring plan and the future costs of treatment for any diseases actually contracted by any of the plaintiffs as a proximate result of the actions of one or more of the defendant chemical companies.

COUNT VII
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
(A Class Claim)

84. Plaintiffs adopt and incorporate by reference the relevant allegations of all preceding paragraphs as if fully set forth herein.

85. Defendant chemical companies are manufacturers and/or suppliers and/or distributors of chemicals used in the coal preparation plants owned by defendant coal companies throughout West Virginia.

86. The acts and conduct of these chemical company defendants as alleged above were intentional, knowing, reckless, willful, wanton, malicious and wrongful and, as a proximate result, plaintiffs and the class they seek to represent were exposed excessively to their chemicals and/or combination of their chemicals and/or the residual and degradation by-products of their chemicals, which exposures were harmful.

87. The defendant chemical companies, and each of them, acting as alleged above, intentionally inflicted emotional distress on plaintiffs and the class they seek to represent.

88. The acts and conduct of these defendant chemical companies were outrageous in that they offended the generally accepted standards of decency and morality of the community.

89. As a direct and proximate result of the acts and omissions of the defendant chemical companies, plaintiffs and the class they seek to represent have

suffered and are suffering severe emotional distress and were otherwise damaged as alleged above.

COUNT VIII
FRAUDULENT CONCEALMENT
(A Class Claim)

90. Plaintiffs adopt and incorporate by reference the relevant allegations of all preceding paragraphs as if fully set forth herein.

91. Defendant chemical companies have engaged in a pattern of deliberate and intentional concealment and misrepresentation with respect to the presence of dangerous residual by-products in their chemicals, including monomer acrylamide in poylacrylamide, and the degradation of their chemicals into dangerous by-products, including the degradation of polyacrylamide into monomer acrylamide.

92. Defendant chemical companies have engaged in a pattern of deliberate and intentional concealment and misrepresentation with respect to the dangers associated with exposure to the hazardous chemicals to which plaintiff coal preparation plant workers and the class they seek to represent have been exposed, including exposure to the residual and degradation by-products of said chemicals.

93. Defendants fraudulent concealment has proximately caused injury to plaintiffs and the class they represent by giving them a false sense of safety and security, by prohibiting them from taking necessary precautionary and safety actions, and prevented plaintiffs and the class they seek to represent from learning sooner of the cause of their present injuries.

COUNT IX
PUNITIVE DAMAGES
(All Defendants)

94. Plaintiffs adopt and incorporate by reference the relevant allegations of all preceding paragraphs as if fully set forth herein.

95. The actions of each of the defendants, and all of them, as set forth hereinabove, were done intentionally, maliciously, willfully, wantonly, knowingly and/or with a reckless disregard for the rights of the plaintiffs and others, including the class they seek to represent, entitling the plaintiffs and the class the seek to represent to punitive damages.

COUNT X
LOSS OF CONSORTIUM
(All Defendants)

96. Plaintiffs adopt and incorporate by reference the relevant allegations of all preceding paragraphs as if fully set forth herein.

97. Plaintiff spouses, and the class of spouses they seek to represent, have suffered a loss of consortium, services and companionship as a direct and proximate result of the acts and/or omissions of one or more of the defendants, for which each plaintiff's spouse, and the class they seek to represent, is entitled to recover damages as the law permits.

PRAYER

WHEREFORE, plaintiffs and the class they seek to represent demand that they be awarded damages, as identified above, and equitable and affirmative relief as follows:

1. Compensatory damages and punitive damages in an amount to be determined by the Court and jury;

2. An amount for medical monitoring expenses as determined by the Court or a jury;

3. The costs and disbursements of this action, including attorney fees;

4. Pre-judgment and post-judgment interest;

5. Equitable and injunctive relief for providing notice and medical monitoring relief to plaintiffs and the class;

6. That the Court find that this is an appropriate action to be prosecuted as a class action pursuant to West Virginia Rule of Civil Procedure 23, and that the Court find that plaintiffs, and their counsel, are appropriate representatives and appropriate counsel for the class and that this action shall proceed as a class action on the common issues of law and fact, all as this Court deems just and proper;

7. That the Court finds the defendant chemical companies liable pursuant to market share, shared risk and alternative shared liability, for those plaintiffs who cannot identify the chemical companies of said chemicals; and

8. For such other further and general relief, including compensatory, punitive, equitable or injunctive, as the Court deems just and proper.

PLAINTIFFS DEMAND A JURY TRIAL.

Respectfully Submitted,
DENVER PETTRY and
DEBRA PETTRY, his wife, et al.
Plaintiffs,
By Counsel

Brian A. Glasser (WVSB#6597)
Thomas F. Basile (WVSB#6116)
BAILEY & GLASSER, LLP
227 Capitol Street
Charleston, West Virginia 25301
(304) 345-6555
(304) 342-1110 *facsimile*

FAX

DAVID W. HUMMEL, JR., JUDGE
Marshall County Courthouse
Seventh Street
Moundsville, WV 26041
Phone (304) 845-3505
Fax (304) 845-2522

TO: Pethry Counsel

FAX NUMBER:

COMMENTS:

3-Pages

If you do not receive all the pages, please call back as soon as possible. Office Phone - (304) 845-3505.

TELECOPIER OPERATOR: [redacted]

DATE: 8.16.12

EXHIBIT L

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,

Plaintiffs,

v.

CIVIL ACTION NO. 06-C-124M
(Transferred from Boone County)
Judge David W. Hummel

PEABODY HOLDING COMPANY, *et al.*,

Defendants.

ORDER CONFIRMING INTENT TO PROCEED

On July 16, 2012, this Court entered its ***Notice of Intent to Proceed*** relative to the above-styled civil action. Same said notice was entered by this Court following its receipt and review of a ***Notice of Automatic Stay*** filed by counsel for Defendant, Patriot Coal Corp. and its affiliated companies (i.e. Eastern Associated Coal, LLC) herein.

In the notice, the Court advised, in pertinent part, as follows:

> Accordingly, it is the **EXPRESS INTENT** of this Court to proceed in the instant civil action relative to all parties and all causes of action, with the exception of any which may relate to Defendant, Patriot Coal Corp. and its affiliated companies.
>
> It is the **ORDER** of this Court that written objections and exceptions to the foregoing, if any, shall be made on or before Tuesday, July 24, 2012, with copies forwarded directly to the undersigned, via facsimile @ (304) 845-2522.

On July 24, 2012, Plaintiffs, by counsel, filed a pleading setting forth their collective objections to the ***Notice of Intent to Proceed.*** Thereafter and in response to Plaintiffs' filing, Defendants Nalco, Cytec and BASF filed their respective pleadings setting forth their collective support and affirmation of the Court's intent to proceed.

Oral argument would not substantially assist the Court in its decisional process.

The Court has studied and reviewed all memoranda in opposition to as well as in favor of proceeding with the litigation of the instant civil action; any and all exhibits submitted by the parties; considered all papers of record; and reviewed the pertinent legal authorities. As a result of these deliberations, and for the reasons set forth in the ***Notice of Intent to Proceed*** as well as Defendants' filings, it is the considered opinion of this Court that the instant civil action should only be stayed as it relates to Defendant, Patriot Coal Corp. and its affiliated companies and proceed as to all others.

Accordingly, it is the **ORDER** of this Court that the ***Notice of Intent to Proceed*** be and hereby is **CONFIRMED.** Furthermore, that the instant civil action relative to all parties and all causes of action, with the exception of any which may relate to Defendant, Patriot Coal Corp. and its affiliated companies (i.e. Eastern Associated Coal, LLC) shall proceed.

The Clerk of this Court shall, in accord with W.Va. R.Civ.P. 77(d), transmit a copy of this Order to all counsel of record.

Entered: August 16, 2012.

DAVID W. HUMMEL, SR.
Chief Judge

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, et al.,

Plaintiffs,

v. **Civil Action No. 06-C-124**
Judge Hummel

PEABODY HOLDING COMPANY, et al.,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF RULE 59 MOTION TO ALTER OR AMEND JUDGMENT AND RULE 60 MOTION FOR RELIEF FROM JUDGMENT

Come now Plaintiffs, by and through their counsel, Thomas F. Basile, and respectfully submit this memorandum of law in support of their Rule 59(e) motion to alter or amend judgment or Rule 60(b) motion for relief from judgment with respect to the ***"Order Granting Defendants' Motions For Summary Judgment And Dismissing All Remaining Claims With Prejudice"*** ("the Order") entered on January 11, 2013. Plaintiffs respectfully request that the court set aside the Order due to the numerous factual and legal errors contained therein which are so numerous as to not be capable of correction and, if left to stand in its present form, amounts to a clear abuse of the court's discretion by: a) dismissing all claims as a sanction that is founded on false premises: b) ignoring a bankruptcy stay without any legal analysis or basis expressed for doing so and c) dismissing claims filed as a class action without fulfilling its fiduciary duties to protect the due process rights of putative class members. In the alternative, the court should correct the grave errors in the Order to accurately reflect the true facts that underlie the issues addressed.

Both Rule 59 and Rule 60 Provide a Sound Legal Basis for the Court to Alter or Amend its Order so that it Might Correct the Numerous Errors Set Forth Therein or to Simply Set the Order Aside and Begin Anew.

EXHIBIT M

Rule 59(e) of the West Virginia Rules of Civil Procedure specifically provides that: "Any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment." W. Va. R. Civ. P. 59(e) (1998, as amended.) This motion is timely filed by being filed on January 28, 2013, which is within 10 days of entry of the Order of January 11, 2013, according to the method for computing time under W. Va. R. Civ. P. 6(a) (1998, as amended.) Plaintiffs respectfully request that, at a minimum, the court use the discretion available to it under Rule 59(e) to alter or amend those numerous portions of its Order that are in error, factually and legally, as set forth below in greater detail. However, given the substantial degree of factual and legal error in the Order, the better course is to set aside the Order completely under Rule 60(b) and begin again.

In contrast to the broad, terse language of Rule 59(e), Rule 60(b) provides the court with far more guidance as to the scope of the court's discretion to alter or amend a judgment or provide whatever relief to a moving party that the court deems just and proper:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Unavoidable Cause; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. . . .

W. Va. R. Civ. P. 60 (1998, as amended).

Rule 60(b) provides the statutory basis for the court to provide a party with substantive relief from an order or final judgment for a variety of reasons that are present here: not the least of which are mistakes, misrepresentations, misconduct of an adverse party and "any other reason justifying relief," including setting aside a judgment. *Id.*

Here, as will be demonstrated below, there are a multitude of mistakes and a substantial number of serious misrepresentations that must be addressed because they form the foundation of the court's decision to sanction Plaintiffs. These errors simply cannot stand. Numerous portions of the Order are in error due to either inadvertence, omission, lack of factual support, assertions that are not grounded in any credible evidence or misrepresentations. They are set forth and discussed in detail below, identified by both **Page number** and ¶ **number**.

1. **Page 1, ¶ 2** – The Order sets forth an alleged pattern of egregious misconduct by plaintiffs' counsel being the basis for dismissing all of plaintiffs' claims, even those alleged against a bankrupt entity that has not moved for dismissal due to a federal bankruptcy stay and this court's prior Order staying those claims.

This paragraph of the Order is replete with negative adjectives describing the alleged misconduct of plaintiffs' counsel that purportedly has delayed the progress of the instant civil action. The Order further sets forth, in error and without any factual support, that plaintiffs' counsel has refused to adjust his behavior after allegedly having been provided with numerous opportunities to do so by the court. There have been no warnings by the court to plaintiffs' counsel "to adjust his behavior" as the Order suggests. Presumably, this allegedly "egregious" behavior is what is set forth in greater detail later in the Order, at pages 23-30, ¶¶ 80–105, purported to be "Findings of Facts" on plaintiffs' counsel's supposed pattern of "litigation

misconduct." However, for a pattern to exist, the predicate acts must actually exist, but here, they do not.

2. **Pages 23-25, ¶¶ 80–88** – The first sub-heading in this section of the Order is styled: *"Failure to Defend Against Dispositive Motions and Related Misrepresentations to the Court."* The facts, however, are actually otherwise.

As the Order states at ¶ 80, the first hearing that the court conducted on any motions for summary judgment filed against the plaintiffs was a hearing that it conducted on March 30, 2012. However, the Order is inaccurate in ¶ 86, where it states, in error, that Plaintiffs failed to "respond to Defendants' statute of limitations arguments in any manner." To the contrary, at the hearing of March 30, 2012, in support of Plaintiffs' motion to continue, Plaintiffs' counsel put evidence into the record at that hearing specifically undermining the statute of limitations arguments made against both Plaintiff Danny Gunnoe and Plaintiff Debra Pettry, as Executrix of the Estate of Denver Pettry, arguing to the court that, at a minimum, the evidence put forth at the hearing demonstrated that after the filing of the original lawsuits, new medical problems emerged for these individuals that would necessarily survive any statute of limitations arguments, particularly in medical monitoring cases like these where the cause of action for those personal injury claims arose after the filing of suit and helps demonstrate why medical monitoring is needed for the alleged workplace exposures.[1] Had the court continued the hearing on November 9, as it did when several defense counsel could not make it on October 30, Plaintiffs' counsel could at least have argued against the motions and also defendant his own conduct rather than permit misrepresentations stand as fact on the record.

[1] Moreover, the *Stern* settlement agreement specifically preserves the rights of class members, like the *Pettry* plaintiffs, to pursue personal injury claims.

Furthermore, Plaintiffs' counsel is on record, on more than one occasion and at more than one hearing, as objecting to the court lifting the stay in the *Pettry* matter that had been in place for years, ever since the West Virginia Supreme Court reversed this court's Order denying intervention by the *Pettry* Plaintiffs in the *Stern* class action and transferred the *Pettry* case from the Circuit Court of Boone County to this court for management. The court's "*Nunc Pro Tunc* Order" of February 20, 2011, made it clear that the *Pettry* case had been so stayed by agreement of the parties for years and should remain "stayed pending disposition of the *Stern* class action matter." Yet, over Plaintiffs' counsel's objections, the court lifted the stay at the hearing of October 18, 2011 and entered an Order to that effect on November 23, 2011. As Plaintiffs' counsel warned the court on October 18, 2011, the *Stern* matter would continue to require a great deal of time and attention by the undersigned, a solo practitioner, due to the significant disputes that have continued to exist between the undersigned and all other counsel, regarding the settlement of the *Stern* class claims for medical monitoring that the undersigned has repeatedly criticized for not being medical monitoring at all, but only a one-time medical exam that amounts to a physical, at best, and the benefit of which is highly suspect for those who regularly see physicians for a variety of medical ailments already.

Plaintiffs' counsel also objected to the *Pettry* case moving forward once defendant, Patriot Coal Corporation, filed for bankruptcy protection in July, 2012, contending that the bankruptcy court's automatic stay should have caused the court to stay the entire matter, particularly in view of the fact that the factual development in the case necessarily involves the employer because of workplace exposures. See, "Plaintiffs' Objection to the Court's Notice of Intent to Proceed," served on July 24, 2012. In fact, 8 of the 10 male plaintiffs in this case

have claims against Patriot Coal, which claims this court stayed in its "Order Confirming Intent to Proceed," entered on August 16, 2012.

Finally, the opening paragraphs of this section of the Order suggest, in error, that there was somehow something inappropriate about Plaintiffs' counsel seeking a continuance of the hearing set for March 30, 2012, and staying the court's ruling on motions for summary judgment due to the court's failure to provide Plaintiffs with anywhere near the full time period set for discovery in the court's own Scheduling Order of January 25, 2012. However, the transcript of that hearing clearly reflects that the court was concerned it would be reversed by the Supreme Court if it did not at least permit more time for discovery, thereby, necessarily confirming that Plaintiffs' motion to continue was well-founded. The court made it clear that if felt compelled to grant the relief requested by Plaintiffs' counsel. Thus, this first continuance was not based upon some inappropriate actions of Plaintiffs' counsel, but the court's recognition that ruling on motions for summary judgment prior to providing Plaintiffs with even the period for discovery it set forth in its own Scheduling Order was likely reversible error.

What was also apparent on the record of that hearing held on March 30, 2012, is that the court expressed open dislike and criticism for Plaintiffs' counsel, characterizing as disingenuous Plaintiffs' counsel's criticism of his prior co-counsel's failure to file responses to some of the same motions for summary judgment (previously noticed for hearing in 2010) that the court now finds to be a sufficient basis for misconduct on the part of Plaintiffs' counsel, though it did not find that, or other ethical issues raised with the court to be sufficient for misconduct on the part of Plaintiffs' prior co-counsel.

3. **Page 25, ¶ 89 and fns. 9 and 13** – This paragraph and these footnotes are full of multiple misrepresentations and factual errors, both overt and by omission, that are astounding

in view of the clear evidence readily available to the court and to defense counsel who prepared the Order.

The paragraph grossly misstates the facts surrounding the court's decision to cancel the hearing scheduled for October 30, 2012, asserting, contrary to the plain facts readily available and apparent to the court that: (1) Plaintiffs' counsel's email communication with the court's law clerk early that morning, informing her of his inability to attend the hearing that day due to severe weather was an "impermissible, informal communication with the Court;" (2) the only reason for rescheduling the hearing that had been set for that day was Plaintiffs' counsel's failure to appear "due to inclement weather" and (3) the court accommodated Plaintiffs' counsel and continued the hearing, despite Plaintiffs' counsel's "failure to even request a continuance."

As everyone in the Eastern part of the United States well remembers, in the late evening hours of October 29, 2012, and continuing into mid-day, October 30, 2012, Hurricane Sandy struck the eastern seaboard of the United States. It brought about unique winter weather conditions for late October and caused severe winter weather conditions (ice, snow and below-freezing temperatures) as far west as the western border of West Virginia. When Plaintiffs' counsel awoke on Tuesday, October 30, 2012, the morning of the hearing in this matter, there was snow, ice and dangerous road conditions in the Charleston area. The public was advised to stay off the roads unless absolutely necessary. At 7:06 a.m., Plaintiff's counsel sent an email to the court's law clerk and copied it to counsel for all parties in the case, informing the court and counsel that the severe winter weather conditions made it inadvisable to risk what was normally a 3-hour drive from Charleston to Moundsville. (Ex. 1; Basile Email of 10/30/12, 7:06 a.m.)

Far from being what the Order describes as an "impermissible, informal communication with the Court," Plaintiffs' counsel's email was a reply to an email request sent to all counsel in the case by the court's law clerk the previous day, who, at the court's request, asked counsel to let her know if anyone's travel plans would be affected by the approaching storm brought on by Hurricane Sandy:

> **From:** Harbison, Anne [mailto:Anne.Harbison@courtswv.gov]
> **Sent:** Monday, October 29, 2012 9:56 AM
> **To:** daveh@handl.com; denise.pentino@dinslaw.com; hshaffer@shafferlaw.com; Heather Heiskell Jones; james.zeszutek@DINSLAW.com; JMF@farrell3.com; jsb@ramlaw.com; jspink@sheeheyvt.com; MFitzsimmons@steptoe.com; ppotterfield@bowlesrice.com; selep@zklaw.com; Thomas F. Basile
> **Subject:** Pettry Hearing set for Tuesday, October 31, 2012
>
> Counsel –
> Judge Hummel has asked that I check in to see if anyone's travel plans have been affected by the inclement weather brought by Hurricane Sandy.
> This Court understands that this is a unique situation, so if anyone is unable to make it to this hearing as a result of cancelled flights, and the like, due to the weather, please let me know at your earliest convenience.
> Thanks.
> Annie Harbison
> Law Clerk to the Hon. David W. Hummel, Jr.

(Ex. 2; copy of Harbison email.) In her email, the law clerk specifically makes a request to all counsel in the case to "please let me know at your earliest convenience" if Hurricane Sandy will cause anyone travel problems for the next day's hearing. *Id.*

The next morning, at 7:06 a.m., Plaintiffs' counsel responded to that request from the court's law clerk of the previous day and informed her by email, as well as, defense counsel, of the severe weather conditions that had developed through the night in the Charleston area as a result of Hurricane Sandy, and that it was not possible to travel that day to get to the hearing. (Ex. 1; TFB email.) At 8:31 a.m., defense counsel David Hendrickson, who lives in the Charleston area like Plaintiffs' counsel, also informed the law clerk and other counsel by email that "several of us just can't make the trip today do [sic] to the weather." (Ex. 3; Hendrickson

email.) At 8:39 a.m., defense counsel Phyllis Potterfield, who lives in the Charleston area like Plaintiffs' counsel, also informed the law clerk and other counsel by email that due to the quality of the roads, she was "reluctant to drive" to the hearing. (Ex. 4; Potterfield email.) At 8:47 a.m., Mr. Hendrickson replied to Ms. Potterfield's email and copied the law clerk, stating "I think it is not worth risking it." (Ex. 5; Hendrickson email.) At 8:58 a.m., defense counsel Heather Heiskell-Jones, like Plaintiffs' counsel, Mr. Hendrickson and Ms. Potterfield before her, also informed the law clerk and other counsel by email that she was also unable to attend the hearing due to poor road conditions caused by snow. (Ex. 6; Heiskell-Jones email.) At 9:28 a.m., Mr. Hendrickson sent an email to all counsel and the court's law clerk informing everyone that he and Dean Hartley (counsel for the *Stern* Plaintiffs but NOT counsel in the *Pettry* case) had just spoken with the court and that the Judge had reset the hearing for 11 a.m. on November 9. (Ex. 7; Hendrickson email.)[2]

These facts demonstrate that the court cancelled the hearing in this matter due to severe winter weather conditions caused by Hurricane Sandy that caused several counsel in the case to be unable to attend the hearing in person, not just Plaintiffs' counsel. The court did this despite the fact that several lawyers requested that the hearing go forward by phone and despite the fact that several lawyers were present in the courtroom, ready to proceed with the hearing. (Ex. 8; emails on these matters.) The court clearly did not cancel the hearing on October 30, 2012, "[i]n light of Mr. Basile's failure to appear," as the language in ¶ 89 of the Order misleadingly states. It is disturbing that the harsh criticisms levied at Plaintiffs' counsel for unauthorized email communications and failure to appear at the hearing on October 30

[2] Plaintiffs' counsel is unaware of how only Mr. Hendrickson and Mr. Hartley came to be on the phone with the court on the morning of October 30, discussing continuance of the *Pettry* hearing, inasmuch as Plaintiffs' counsel is the only lawyer for *Pettry* plaintiffs and did not receive any calls or email requests from the court to join in such a call. Mr. Hartley is not even counsel of record in *Pettry.*

were written by Heather Heiskell-Jones, who engaged in the same conduct and failed to appear on October 30 for the same reason that Plaintiffs' counsel did not make it – snow and ice on the roads.

Further, there was nothing "impermissible" about Plaintiffs' counsel's email communication with the court's law clerk that morning informing her of the dangerous weather conditions and inability to attend the hearing, just as several defense attorneys had also done that morning, all in response to her email request of the previous day asking counsel to inform her if anyone encountered any travel problems brought on by Hurricane Sandy. Not only is the Order misleading by ignoring the full factual context within which Plaintiffs' counsel's email was sent to the court's law clerk, but the Order is also misleading in footnote 9, where it is stated that the reason why Plaintiff's counsel's email was "particularly inappropriate" was because the court had previously warned all counsel in the case, in letters of June 2011 and July 2012, about "informal, unauthorized" correspondence. However, as the facts clearly demonstrate, this was not such a case. Rather, Plaintiffs' counsel, as well as, several defense counsel, merely followed the law clerk's directive from the previous day to inform her and the court of any travel problems.[3]

Similarly misleading is footnote 13, on page 33 of the Order, where it is falsely stated that the court continued the hearing in this matter to November 9, 2012, "in an effort to accommodate Plaintiffs' counsel's claimed inability to appear at the October 30, 2012, hearing." The various emails from defense counsel regarding the severe weather conditions

[3] There appears to be a double-standard applicable to Plaintiffs' counsel and other counsel when it comes to "informal, unauthorized" communications with the court. For example, after the court's "warning letters" of June 2011 and July 2012, the same Mr. Hendrickson who, along with Mr. Hartley, but without Plaintiffs' counsel, had a phone call with the court on the morning of October 30, 2012, about continuing the *Pettry* hearing when it did not even involve Mr. Hartley, had some type of "informal, unauthorized" correspondence with the court to move the time of the hearing up from 1 p.m. to 11:30 a.m. on August 30, 2012, to accommodate his schedule alone and for his own convenience, without even consulting with Plaintiffs' counsel beforehand, as the emails regarding that time change make clear. (Ex. 9, Staun and Fitzsimmons emails.)

that prohibited several of them from attending the hearing on October 30 clearly demonstrate the absurdity of that finding by the court. At least three defense lawyers – Mr. Hendrickson, Ms. Heiskell-Jones (who drafted the court's Order) and Ms. Potterfield – also informed the court of their "claimed inability to appear at the October 30, 2012, hearing" due to the winter weather conditions that made road travel dangerous for them, as well as, for Plaintiffs' counsel.

These false statements in the Order appear to originate from the hearing of November 9, 2012, where the court set forth statements of an unknown origin, or that at the very least, are inconsistent with well-known and easily ascertainable facts. For instance, the court mistakenly stated at the hearing that Plaintiff's counsel's email of October 30, 2012, sent to the court's law clerk and to all counsel regarding the bad weather caused by Hurricane Sandy was sent at 9:29 a.m., even though a copy of the email clearly demonstrates that it was sent at 7:06 a.m. *Cf.,* Ex.10, Hrg. Transcript of 11/9/12 at 2; to Ex.1. The court stated at the hearing that it was that specific email from Plaintiffs' counsel that caused the court to cancel the hearing on October 30, 2012. (Ex. 10, Tr. of 11/9/12 at 4-6.) However, the actual facts already set forth above clearly demonstrate that Plaintiffs' counsel merely communicated the same message that at least 3 defense lawyers also reported that same morning to the court, by way of the same type of informal, email communication that the court's law clerk invited from all counsel in the case: that they could not attend due to the dangerous road conditions caused by snow and ice from Hurricane Sandy. Although the court mistakenly stated at the hearing of November 9th that it was Plaintiffs' counsel's email sent at 9:29 a.m. on October 30, 2012, that caused the court to cancel the hearing that morning, an email from Mr. Hendrickson that was sent one minute before the court said it had received Plaintiffs' counsel's email, at 9:28 a.m., stated that he had already spoken with the court and had already been informed that the

Judge was continuing the hearing to November 9 (Ex. 7; Hendrickson email), presumably because Mr. Hendrickson, Ms. Potterfield and Ms. Heiskell-Jones, just like Plaintiffs' counsel, informed the court's law clerk by email that the severe winter weather conditions prohibited them from attending the hearing. Thus, this second continuance from October 30, 2012, was not based upon any misconduct engaged in by Plaintiffs' counsel, as the court inaccurately stated at the hearing of November 9, 2012, and set forth again in the Order. What is clear is that the court expressed its strong dislike towards' Plaintiffs' counsel at the beginning of the hearing of November 9 even before it entertained any arguments on the pending motions.

4. **Pages 25-26, ¶¶ 91-92 and fn. 10** – These two paragraphs and footnote ignore the truthfulness and seriousness of the reasons why Plaintiffs' counsel was unable to attend the hearing of November 9, 2012: an emergent medical situation that developed abruptly and affected Plaintiffs' counsel's wife late in the day of November 8, 2012, and required emergency oral surgery for her on the morning of November 9, also required Plaintiffs' counsel to miss the *Pettry* hearing that day so his wife could have that surgery while he took care of their severely, mentally and physically disabled, 20-year old daughter, who suffers from Wolf-Hirschorn Syndrome. (Ex. 11; Basile email of 11/9/12.) For these reasons, Plaintiffs' counsel was simply unable to either travel 3 hours by car that morning to attend the 11:00 a.m. hearing in person or to participate in the hearing by telephone. Yet, the Order suggests improper motive for Plaintiffs' counsel not appearing, ignoring the expressed explanation given by Plaintiffs' counsel's for his non-appearance that was communicated to the court's law clerk by way of email early that morning, not unlike what several defense counsel had done when they informed the court's law clerk by email early in the morning of October 30, 2012, that they would not be attending the hearing that day due to bad weather. Defense counsel's reasons

for not appearing at the previously-scheduled hearing and method of communicating with the court to inform the court of those reasons were found acceptable by the court on October 30th, but not those of Plaintiffs' counsel expressed on November 9th. Then, in footnote 10, the court misstates the facts, by wrongly suggesting that Plaintiffs' counsel knew "on the afternoon of November 8, 2012, at the latest" of the complicating personal circumstances that prohibited his attendance at the hearing of November 9, and somehow failed to inform the court or opposing counsel until the next morning. However, that is in direct conflict with the information conveyed to the court's law clerk by Plaintiffs' counsel in the email sent at 7:51 a.m. on November 9. That email clearly states that Plaintiffs' counsel did not learn of the details surrounding his wife's medical condition and need for emergency root canal surgery until after 5 p.m. on November 8. By the time Plaintiffs' counsel had a complete understanding of the situation and how it had to be handled, it was long after business hours. (Ex. 11.)

There is no "pattern" of improper behavior or misconduct by Plaintiffs' counsel or any credible evidence in the record that demonstrates Plaintiffs' counsel engaged in some type of "delay tactics" that caused the court to have to continue the hearing on motions for summary judgment twice prior to the hearing of November 9, 2012. First, the court continued the hearing of March 30, 2012, based upon a well-founded Motion for Continuance filed by Plaintiffs' counsel. The court admitted as much on the record of that hearing when it said it was granting the motion to avoid being reversed. Second, the hearing of October 30, 2012, was continued to November 9, 2012, due to adverse winter weather conditions caused by Hurricane Sandy that prohibited several lawyers from attending the hearing, not just Plaintiffs' counsel. The court continued that hearing, *sua sponte,* not at the request of Plaintiffs' counsel, nor pursuant to any motion or specific request of which Plaintiffs' counsel has been made

aware, and only after the court conducted a phone conversation that involved only Mr. Hendrickson and Mr. Hartley, the former being one of the lawyers who was unable to attend due to bad weather. None of the lawyers who were unable to attend that hearing on October 30 due to the severe weather conditions was chastised, except for Plaintiffs' counsel, and then only after Plaintiffs' counsel informed the court's law clerk and defense counsel of his inability to attend the hearing of November 9.

5. **Pages 26-30, ¶¶ 94–105** – The sub-heading in this section of the Order is styled: *"Plaintiffs' Other Delay Tactics and Misconduct."* This heading and section builds on the numerous mischaracterizations and falsehoods set forth in the previous section of the Order, which inaccurately assigned blame for the continuances of the March 30 and October 30 hearings on the alleged improper behavior of Plaintiffs' counsel. However, as the facts set forth above demonstrate, Plaintiffs' counsel did not engage in any "delay tactics" or "misconduct" that caused those continuances. With no evidence of any predicate acts of "delay" or "misconduct" it is improper to characterize the actions of Plaintiffs' counsel as "misconduct" subject to any sanctions, let alone the most severe sanction that can be levied against a party: dismissal. A proper foundation for sanctions is simply absent, inasmuch as there is no basis in fact for the premise that Plaintiff's counsel engaged "delay tactics" or "misconduct."

This entire section, which purports to set forth an additional basis for sanctioning Plaintiffs' counsel due to alleged failures to co-operate in discovery is without foundation and improper, inasmuch as it is based on Motions to Compel that the court specifically ruled to be moot at the early stages of the hearing on November 9, 2012. After granting Motions for Summary Judgment on behalf of those defendants who filed them (except Eastern Associated

Coal, which is in bankruptcy), against all plaintiffs (except plaintiff Harvey Carico), the court stated: "Okay. Very good. Okay. That renders the Motions to Compel moot, I would believe. Are there any relative to Harvey?" (Ex. 10; Tr. at 12.) Thus, the court made no specific findings with respect to the various Motions to Compel filed against any Plaintiffs, except for Motions to Compel filed against Harvey Carico. The court explicitly stated that the other motions to compel were moot, contrary to the "facts" that now appear in the Order regarding Plaintiffs other than Harvey Carico.[4]

However, in a discussion with defense counsel about the court's Scheduling Order deadlines and discovery in general, at the beginning of the hearing of November 9, the court was misled by defense counsel and led to mistakenly believe that Plaintiffs' counsel had provided no discovery whatsoever to defendants, nor provided them with any information whatsoever in discovery:

THE COURT: I didn't - - I did not welcome the - - even the joint motion [to amend the Scheduling Order], but the joint motion was based upon the fact that you could not have done discovery because there - - Mr. Basile was so intransigent - - I don't know if that's the word - - he's not given you anything. Okay. And you had nothing. None of the Defendant had any information upon which they could conduct discovery in the defense of their case, correct?

MRS. PENTINO: That's correct, and that's why we filed the Motions to Compel.

THE COURT: Okay. Very good. While it is the most drastic of all sanctions to dismiss a case, this is the poster child of cases upon which this sanction most harmoniously shall be made, *sua sponte* and not pursuant to any request by counsel.

I really hate to burn my first reversal with the Supreme Court with this, but frankly, there's going to be a very comprehensive Order prepared by the defense, which will articulate

[4] This fact is later confirmed by the court when, in an effort to be sure that it was not leaving out of its dismissal rulings on any possible claims by spouses "over and above a consortium claim," the court stated, in conclusory fashion, that "those are also dismissed with prejudice, based upon the intransigent finding by the Court, similar identical as to the Carico cause of action." (Ex. 10; Tr. at 18.) Thus, it was only with respect to the Carico claims (and any claims that might possibly have been alleged by spouses other than loss of consortium claims) that the Court made any finding of intransigence by Plaintiffs' counsel that it believed to be an adequate basis for dismissal. However, as explained below, the Court's presumption that Plaintiffs' counsel had done nothing in discovery was not based upon the facts.

and set forth each of the factual basis [sic] of how Plaintiffs' counsel has done absolutely nothing to prosecute this case.

It is an abuse of the civil justice system. It is an abuse of his clients' potential claims; the manner in which he has not prosecuted the case. It will not remain on my docket and shall be dismissed with prejudice.

(Ex. 10; Tr. at 15-16)(underline emphasis added). A cursory review of the docket, however, demonstrates that the Court's belief that Plaintiffs' counsel had provided nothing to defendants in discovery that would permit them to prepare a defense in the case was not only in error, but reliance on misrepresentations from defense counsel, despite having been the recipients of, and participants in, extensive discovery with Plaintiffs' counsel. For example, the following discovery responses have been provided to Defendants (in reverse chronological Order):

1) *"Plaintiff Harvey Carico's Answers And Responses To Defendant BASF Corporation's First Set Of Interrogatories And Requests For Production Of Documents"* - served 6/29/12;
2) *"Plaintiff Judy Fraley's Answers And Responses To Defendant BASF Corporation's First Set Of Interrogatories And Requests For Production Of Documents"* - served 6/29/12;
3) *"Plaintiff Westley Fraley's Answers And Responses To Defendant BASF Corporation's First Set Of Interrogatories And Requests For Production Of Documents"* - served 6/29/12;
4) *"Plaintiff Robert Scarbro's Answers And Responses To Defendant BASF Corporation's First Set Of Interrogatories And Requests For Production Of Documents"* - served 6/29/12;
5) *"Plaintiff Theresa Scarbro's Answers And Responses To Defendant BASF Corporation's First Set Of Interrogatories And Requests For Production Of Documents"* - served 6/29/12;
6) *"Plaintiff Charles Singleton's Answers And Responses To Defendant BASF Corporation's First Set Of Interrogatories And Requests For Production Of Documents"* - served 6/29/12;
7) *"Plaintiff Jencie Singleton's Answers And Responses To Defendant BASF Corporation's First Set Of Interrogatories And Requests For Production Of Documents"* - served 6/29/12;
8) *"Plaintiff Harvey Carico's Answers To Defendant, Ondeo Nalco Company's (n/k/a Nalco Company) Second Set Of Interrogatories And Requests For Production Of Documents" – served 6/29/12;*
9) "*Plaintiff Kathye Evans' Answers To Defendant, Ondeo Nalco Company's (n/k/a Nalco Company) Second Set Of Interrogatories And Requests For Production Of Documents" – served 6/29/12;*

10) *"Plaintiff Judy Fraley's Answers To Defendant, Ondeo Nalco Company's (n/k/a Nalco Company) Second Set Of Interrogatories And Requests For Production Of Documents" – served 6/29/12;*
11) *"Plaintiff Westley Fraley's Answers To Defendant, Ondeo Nalco Company's (n/k/a Nalco Company) Second Set Of Interrogatories And Requests For Production Of Documents" – served 6/29/12;*
12) *"Plaintiff Carol Gunnoe's Answers To Defendant, Ondeo Nalco Company's (n/k/a Nalco Company) Second Set Of Interrogatories And Requests For Production Of Documents" – served 6/29/12;*
13) *"Plaintiff Debra Pettry's Answers To Defendant, Ondeo Nalco Company's (n/k/a Nalco Company) Second Set Of Interrogatories And Requests For Production Of Documents" – served 6/29/12;*
14) *"Plaintiff Willa Price's Answers To Defendant, Ondeo Nalco Company's (n/k/a Nalco Company) Second Set Of Interrogatories And Requests For Production Of Documents" – served 6/29/12;*
15) *"Plaintiff Robert Scarbro's Answers To Defendant, Ondeo Nalco Company's (n/k/a Nalco Company) Second Set Of Interrogatories And Requests For Production Of Documents" – served 6/29/12;*
16) *"Plaintiff Theresa Scarbro's Answers To Defendant, Ondeo Nalco Company's (n/k/a Nalco Company) Second Set Of Interrogatories And Requests For Production Of Documents" – served 6/29/12;*
17) "*Plaintiff Charles Singleton's Answers To Defendant, Ondeo Nalco Company's (n/k/a Nalco Company) Second Set Of Interrogatories And Requests For Production Of Documents" – served 6/29/12;*
18) *"Plaintiff Jencie Singleton's Answers To Defendant, Ondeo Nalco Company's (n/k/a Nalco Company) Second Set Of Interrogatories And Requests For Production Of Documents" – served 6/29/12;*
19) "*Plaintiff Marsha Stump's Answers To Defendant, Ondeo Nalco Company's (n/k/a Nalco Company) Second Set Of Interrogatories And Requests For Production Of Documents" – served 6/29/12;*
20) *"Answers of Intervenor Plaintiff Danny Gunnoe to Defendant Nalco Company's Third Set of Interrogatories and Requests for Production of Documents" –served 5/21/08 (this discovery was cross-noticed and served for use in both the Stern and Pettry cases);*
21) *"Answers of Intervenor Plaintiff Gunnoe to Defendant Nalco Company's Request for Supplementation" –served 5/22/08 (this discovery was cross-noticed and served for use in both the Stern and Pettry cases);*
22) *Deposition of Danny Gunnoe, Day 1 – 3/31/08 (cross-noticed for use in both the Stern and Pettry cases);*
23) *Deposition of Danny Gunnoe, Day 2– 5/27/08 (cross-noticed for use in both the Stern and Pettry cases);*
24) *Deposition of Franklin Stump – 6/6/08 (cross-noticed for use in both the Stern and Pettry cases);*
25) *Deposition of Kostenko??? Stump Day 2 ????*

26) *"Plaintiffs Robert And Theresa Scarbro's Answers And Responses To Defendant Performance Coal Company's First Set Of Interrogatories And Requests For Production Of Documents" – served 5/28/04;*
27) *"Plaintiffs Charles And Jencie Singleton's Answers And Responses To Defendant Bandytown Coal Company's First Set Of Interrogatories And Requests For Production Of Documents" – served 5/28/04;*
28) *"Plaintiff, Harvey Carico's Answers And Responses To Defendant Elk Run Coal Company, Inc.'s First Set Of Interrogatories And Requests For Production Of Documents" – served 5/28/04;*
29) *"Plaintiffs Danny And Carol Gunnoe's Answers And Responses To Defendant Goals Coal Company's First Set Of Interrogatories And Requests For Production Of Documents" – served 5/28/04;*
30) *"Plaintiff, Kermit Morris' Answers And Responses To Defendant Massey Coal Services, Inc.'s First Set Of Interrogatories And Requests For Production Of Documents" – served 5/28/04;*
31) *Plaintiffs' Supplemental Discovery Responses to Peabody Holding Company's and Eastern Associated Coal – served 3/7/03;*
32) *"Plaintiff, Harvey Carico's Answers And Responses To Defendants Cytec Industries, Inc.'s First Set Of Interrogatories And Requests For Production Of Documents To Plaintiffs" – served 12/18/02;*
33) *"Plaintiff, David Evans' Answers And Responses To Defendants Cytec Industries, Inc.'s First Set Of Interrogatories And Requests For Production Of Documents To Plaintiffs" – served 12/18/02;*
34) *"Plaintiff, Westley Fraley's Answers And Responses To Defendants Cytec Industries, Inc.'s First Set Of Interrogatories And Requests For Production Of Documents To Plaintiffs" – served 12/18/02;*
35) *"Plaintiff, Danny Gunnoe's Answers And Responses To Defendants Cytec Industries, Inc.'s First Set Of Interrogatories And Requests For Production Of Documents To Plaintiffs" – served 12/18/02;*
36) *"Plaintiff, Kermit Morris' Answers And Responses To Defendants Cytec Industries, Inc.'s First Set Of Interrogatories And Requests For Production Of Documents To Plaintiffs" – served 12/18/02;*
37) *"Plaintiff, Denver Pettry's Answers And Responses To Defendants Cytec Industries, Inc.'s First Set Of Interrogatories And Requests For Production Of Documents To Plaintiffs" – served 12/18/02;*
38) *"Plaintiff, Alfred Price's Answers And Responses To Defendants Cytec Industries, Inc.'s First Set Of Interrogatories And Requests For Production Of Documents To Plaintiffs" – served 12/18/02;*
39) *"Plaintiff, Robert Scarbro's Answers And Responses To Defendants Cytec Industries, Inc.'s First Set Of Interrogatories And Requests For Production Of Documents To Plaintiffs" – served 12/18/02;*
40) *"Plaintiff, David Evans' Answers And Responses To Defendants Cytec Industries, Inc.'s First Set Of Interrogatories And Requests For Production Of Documents To Plaintiffs" – served 12/18/02;*

41) *"Plaintiff, Charles Singleton's Answers And Responses To Defendants Cytec Industries, Inc.'s First Set Of Interrogatories And Requests For Production Of Documents To Plaintiffs" – served 12/18/02;*
42) *"Plaintiff, David Evans' Answers To First Set Of Interrogatories Of Defendants Peabody Holding Company And Eastern Associated Coal Corporation" – served 11/4/02;*
43) *"Plaintiff, Westley Fraley's Answers To First Set Of Interrogatories Of Defendants Peabody Holding Company And Eastern Associated Coal Corporation" – served 11/4/02;*
44) *"Plaintiff, Kermit Morris' Answers To First Set Of Interrogatories Of Defendants Peabody Holding Company And Eastern Associated Coal Corporation" – served 11/4/02;*
45) *"Plaintiff, Denver Pettry's Answers To First Set Of Interrogatories Of Defendants Peabody Holding Company And Eastern Associated Coal Corporation" – served 11/4/02;*
46) *"Plaintiff, Alfred Price's Answers To First Set Of Interrogatories Of Defendants Peabody Holding Company And Eastern Associated Coal Corporation" – served 11/4/02;*
47) *"Plaintiff, Robert Scarbro's Answers To First Set Of Interrogatories Of Defendants Peabody Holding Company And Eastern Associated Coal Corporation" – served 11/4/02;*
48) *"Plaintiff, Franklin Stump's Answers To First Set Of Interrogatories Of Defendants Peabody Holding Company And Eastern Associated Coal Corporation" – served 11/4/02;*
49) *"Plaintiff, Kathye Evans' Answers To First Set Of Interrogatories Of Defendants Peabody Holding Company And Eastern Associated Coal Corporation" – served 11/25/02;*
50) *"Plaintiff, Judy Fraley's Answers To First Set Of Interrogatories Of Defendants Peabody Holding Company And Eastern Associated Coal Corporation" – served 11/25/02;*
51) *"Plaintiff, Debra Pettry's Answers To First Set Of Interrogatories Of Defendants Peabody Holding Company And Eastern Associated Coal Corporation" – served 11/25/02;*
52) *"Plaintiff, Willa Price's Answers To First Set Of Interrogatories Of Defendants Peabody Holding Company And Eastern Associated Coal Corporation" – served 11/25/02;*
53) *"Plaintiff, Theresa Scarbro's Answers To First Set Of Interrogatories Of Defendants Peabody Holding Company And Eastern Associated Coal Corporation" – served 11/25/02;*
54) *"Plaintiff, Marsha Stump's Answers To First Set Of Interrogatories Of Defendants Peabody Holding Company And Eastern Associated Coal Corporation" – served 11/25/02.*

In addition to answering 50 sets of discovery, Plaintiffs Danny Gunnoe and Franklin Stump were made available for many hours of deposition in the *Stern* case for 3 full days

and Plaintiffs' counsel provided dozens and dozens and dozens of updated medical authorizations to the defense (dating back to 2002 and continuing through 2012), that permitted defendants to obtain all of Plaintiffs' medical records. Plaintiffs' counsel also produced over 5,400 documents to defendants and served individual discovery requests, as well, upon each and every defendant back in 2002 (which, of course, carries with it the duty to supplement under the Rules of Civil Procedure) and granted defendants several requests for extensions to answer that discovery. On a record such as this, it can hardly be said that Plaintiffs' counsel has been "intransigent" with respect to discovery or failed to provide Defendants with "any information whatsoever in discovery" or somehow prohibited them from developing their respective defenses. Nor can it be fairly said that Plaintiffs' counsel did nothing to prosecute the *Pettry* cases in any fashion. That is simply inaccurate and misleading in light of the extensive discovery and record in this case and it demonstrates that there is an inadequate basis for sanctions, findings of misconduct or dismissal of all of Plaintiffs' claims. What is more, Plaintiffs' counsel has never refused to produce a Plaintiff or anyone else for deposition, having already produced Mr. Gunnoe and Mr. Stump. Plaintiffs' counsel has not engaged in any type of discovery misconduct that would merit the most severe sanction that can be issued: dismissal of Plaintiffs' claims entirely.

6. Dismissal Claims Stayed by Bankruptcy and Class Action Claims – In addition to the numerous factual errors set forth in the Order that do not form the basis for sanctions, the court erred, as well, as a matter of law, in at least two substantially prejudicial ways: a) dismissing claims stayed by federal bankruptcy law that all plaintiffs have against Eastern Associated Coal and/or Patriot Coal and b) dismissing class action claims without protecting the rights of class members. With respect to the former, this court specifically

acknowledged the existence of the automatic bankruptcy stay in its "Order Confirming Intent to Proceed," entered on August 16, 2012, and made it clear in that Order that all claims alleged against Patriot or Eastern were stayed while they were in bankruptcy. Even were all the misconduct alleged against Plaintiffs' counsel actually true, which has been shown not to be the case, it would likely be reversible error for the court to dismiss the claims that each and every plaintiff has alleged against Eastern when: 1) those claims have been stayed, 2) Eastern has not pursued dismissal of those claims (nor could it due to the bankruptcy stay) and 3) there is absolutely no allegations made by Eastern of improper conduct by Plaintiffs' counsel that could be the basis for sanctions of any type, let alone dismissal of the claims alleged against Eastern.

With respect to the dismissal of class action claims in the *Pettry* case, the court has a fiduciary duty to protect the rights of absent class members and is required by statute to give them notice of both the settlement of class claims or dismissal of those claims: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." W.V.R.Civ.P. 23(e). However, before the court can dismiss the claims of an entire class, it must rule on whether or not a class should be certified. W.V.R.Civ.P. 23(c). There has yet to be any briefing period established on the class certification issues, let alone a hearing held on such issues.

The court's fiduciary duties toward class members also include the duty to provide adequate notice to class members that they have a right to intervene in the action to protect their rights. W.V.R.Civ.P. 23(d). Here, where the court appears intent upon dismissing the entire civil action, based primarily upon the alleged misconduct of Plaintiffs' counsel, thereby

dismissing the claims of all class members, the court must first provide notice to all class members of their right to intervene and protect their interests, which would include, at a minimum, the right of any class member to substitute as a class representative for any of the currently-named class representatives. *Id.* As our Supreme Court has previously held: "'The fact that a defense may be asserted against the named representatives, as well as some other class members, but not the class as a whole, does not destroy the representatives' status.'" *In re W. Virginia Rezulin Litig.,* 585 S.E.2d 52, 68 (WV 2003) (*quoting Shutts v. Phillips Petroleum Co.,* 679 P.2d 1159, 1172 (KS 1984), *aff'd in part and rev'd in part on other grounds,* 472 U.S. 797 (1985). Thus, even if the court dismisses the claims of one or more of the current *Pettry* class representatives, the court has the statutory duty to provide notice to class members of their right to intervene and maintain the action if they so wish. Notice must first be provided before dismissal can occur in this class action. Indeed, in a case such as this, where the court has actually stated in the Order that Plaintiffs' counsel has failed to properly develop the claims of the Plaintiff Class representatives, the court certainly has a duty to notify those class representatives and permit them the option of hiring new counsel, not simply dismissing their claims outright.

In summary, with an Order riddled with so many substantive errors, both factual and legal, there is no basis in fact or law for it to stand. Moreover, there certainly is no proper basis for findings of misconduct on the part of Plaintiffs' counsel or wrongdoing of a type or degree that would merit dismissal of all of Plaintiffs' claims, particularly when the court ignored a federal bankruptcy stay and its own stay to dismiss claims that were not even the subject of motions to dismiss or for summary judgment, and further still where the court filed to abide by its fiduciary duties to a putative class by dismissing class action allegations

without following the proper procedural processes required by W. V. R. Civ. P. 23 and relevant case law applying Rule 23. The Order must be set aside and the matters rescheduled for hearing and proper disposition by the court.

WHEREFORE, Plaintiffs respectfully request that the court grant the relief requested herein and grant whatever further relief the court deems just and proper.

Respectfully Submitted,

DENVER PETTRY, et al.,
Plaintiffs

By Counsel

Thomas F. Basile (WVSB #6116)
Law Office of Thomas F. Basile
P.O. Box 2149
Charleston, West Virginia 25328-2149
(304) 925-4490; (866) 587-2766 *facsimile*
Counsel for Plaintiffs

From: Thomas F. Basile [mailto:basilelaw@suddenlink.net]
Sent: Tuesday, October 30, 2012 7:06 AM
To: 'Harbison, Anne'
Cc: 'daveh@handl.com'; 'denise.pentino@dinslaw.com'; 'hshaffer@shafferlaw.com'; 'Heather Heiskell Jones'; 'james.zeszutek@DINSLAW.com'; 'JMF@farrell3.com'; 'jsb@ramlaw.com'; 'jspink@sheeheyvt.com'; 'MFitzsimmons@steptoe.com'; 'ppotterfield@bowlesrice.com'; 'selep@zklaw.com'
Subject: RE: Pettry Hearing set for Tuesday, October 31, 2012

Ms. Harbison,

There is a winter weather advisory in effect until 2 p.m. for Kanawha County and a wind advisory in effect until 5 p.m. School has been cancelled in the county today, as a result. We are advised to stay off the roads. The wind chill is 22. There is snow and ice on the roads, trees and power lines. My power has already gone off once this morning. With the wind advisory in effect and the significant number of trees surrounding the power lines in my neighborhood, I am greatly concerned that my area is soon going to lose power for at least the rest of the day. In view of these conditions, I believe it would be unsafe to attempt to drive (what normally takes 3 hours in ideal weather conditions) to try and get to the hearings today.

Of equal concern to me is leaving my wife and disabled daughter alone to face the threat of no power or heat alone. Having lived through 10 days without power this past summer when the "super derecho" hit our area, it was a severe strain on all of us taking care of my daughter in those conditions. I am needed here to operate the generator and contend with the challenges that will present themselves in the likelihood of losing power.

My apologies, but these are the conditions I faced upon awaking this morning.

Sincerely,

Tom Basile

Law Office of Thomas F. Basile
P.O. Box 2149
Charleston, WV 25328-2149
Phone: 304-925-4490; Fax: 866-587-2766
Cell: 304-610-5764; email: basilelaw@suddenlink.net

FedEx and Hand Deliveries:
1432 Nottingham Road
Charleston, WV 25314

From: Harbison, Anne [mailto:Anne.Harbison@courtswv.gov]
Sent: Monday, October 29, 2012 9:56 AM
To: daveh@handl.com; denise.pentino@dinslaw.com; hshaffer@shafferlaw.com; Heather Heiskell Jones; james.zeszutek@DINSLAW.com; JMF@farrell3.com; jsb@ramlaw.com; jspink@sheeheyvt.com; MFitzsimmons@steptoe.com; ppotterfield@bowlesrice.com; selep@zklaw.com; Thomas F. Basile
Subject: Pettry Hearing set for Tuesday, October 31, 2012

Counsel –

Exhibit 1

Judge Hummel has asked that I check in to see if anyone's travel plans have been affected by the inclement weather brought by Hurricane Sandy.
This Court understands that this is a unique situation, so if anyone is unable to make it to this hearing as a result of cancelled flights, and the like, due to the weather, please let me know at your earliest convenience.
Thanks.
Annie Harbison
Law Clerk to the Hon. David W. Hummel, Jr.

From: Harbison, Anne [mailto:Anne.Harbison@courtswv.gov]
Sent: Monday, October 29, 2012 9:56 AM
To: daveh@handl.com; denise.pentino@dinslaw.com; hshaffer@shafferlaw.com; Heather Heiskell Jones; james.zeszutek@DINSLAW.com; JMF@farrell3.com; jsb@ramlaw.com; jspink@sheeheyvt.com; MFitzsimmons@steptoe.com; ppotterfield@bowlesrice.com; selep@zklaw.com; Thomas F. Basile
Subject: Pettry Hearing set for Tuesday, October 31, 2012

Counsel –
Judge Hummel has asked that I check in to see if anyone's travel plans have been affected by the inclement weather brought by Hurricane Sandy.
This Court understands that this is a unique situation, so if anyone is unable to make it to this hearing as a result of cancelled flights, and the like, due to the weather, please let me know at your earliest convenience.
Thanks.
Annie Harbison
Law Clerk to the Hon. David W. Hummel, Jr.

EX. 2

From: David K. Hendrickson [mailto:daveh@handl.com]
Sent: Tuesday, October 30, 2012 8:31 AM
To: Harbison, Anne
Cc: denise.pentino@dinslaw.com; hshaffer@shafferlaw.com; Heather Heiskell Jones; james.zeszutek@DINSLAW.com; JMF@farrell3.com; jsb@ramlaw.com; jspink@sheeheyvt.com; MFitzsimmons@steptoe.com; ppotterfield@bowlesrice.com; selep@zklaw.com; Thomas F. Basile
Subject: Re: Pettry Hearing set for Tuesday, October 31, 2012

Anne, several of us just can't make the trip today do to the weather... One alternative would be a call in number or move hearing until tomorrow ... Whatever suits the court

Dave Hendrickson's iPhone Message

On Oct 29, 2012, at 9:55 AM, "Harbison, Anne" <Anne.Harbison@courtswv.gov> wrote:

Counsel –
Judge Hummel has asked that I check in to see if anyone's travel plans have been affected by the inclement weather brought by Hurricane Sandy.
This Court understands that this is a unique situation, so if anyone is unable to make it to this hearing as a result of cancelled flights, and the like, due to the weather, please let me know at your earliest convenience.
Thanks.
Annie Harbison
Law Clerk to the Hon. David W. Hummel, Jr.

EX. 3

From: David K. Hendrickson [mailto:daveh@handl.com]
Sent: Tuesday, October 30, 2012 7:35 AM
To: Taylor, Justin
Cc: Holmstrand, Jeff A.; Chip Shaffer; R. Dean Hartley; Clines, Kevin; Fitzsimmons, Mark; ppotterfield@bowlesrice.com; Heather Heiskell Jones; Joseph W. Selep; hall@zklaw.com; james.zeszutek@DINSLAW.com; denise.pentino@dinsmore.com; jspink@sheeheyvt.com; Barbie Samples; Tom Basile; Bill Harvit; Brad Oldaker; Scott S. Segal; Mark R. Staun; drodes@gpwlaw.com
Subject: Re: Stern - SENT TO ALL COUNSEL

I am stuck at my house for now... I suggested maybe a call in number

Dave Hendrickson's iPhone Message

On Oct 30, 2012, at 7:31 AM, "Taylor, Justin" <jtaylor@baileywyant.com> wrote:

Is it still on? Will the courthouse be open? We got hit hard down here with snow and power outages.

Sent from my iPhone

On Oct 29, 2012, at 9:56 AM, "Holmstrand, Jeff A." <JHolmstrand@fsblaw.com> wrote:

All:

Judge Hummel's office just called (and I understand they have spoken with Dean already this morning as well). She said that the Judge had asked her to check on the status of counsel from the East Coast and their ability to get to the hearing. I told her that I understood Mark was already here and that while Kevin was not going to be able to make it, Chemtall's view was that the hearing could proceed.

I told her I would send this email advising that if there are counsel who believe that they cannot appear for weather-related issues, they would need to get hold of her to discuss it.

Thanks.

Jeff

Jeffrey A. Holmstrand
Flaherty Sensabaugh Bonasso PLLC
1225 Market Street
Wheeling, WV 26003
T. 304-230-6600
F. 304-230-6610
jholmstrand@fsblaw.com
www.fsblaw.com

From: Phyllis Potterfield [mailto:ppotterfield@bowlesrice.com]
Sent: Tuesday, October 30, 2012 8:39 AM
To: 'daveh@handl.com'; 'Anne.Harbison@courtswv.gov'
Cc: 'denise.pentino@dinslaw.com'; 'hshaffer@shafferlaw.com'; 'hheiskell@spilmanlaw.com'; 'james.zeszutek@DINSLAW.com'; 'JMF@farrell3.com'; 'jsb@ramlaw.com'; 'jspink@sheeheyvt.com'; 'MFitzsimmons@steptoe.com'; 'selep@zklaw.com'; 'basilelaw@suddenlink.net'
Subject: Re: Pettry Hearing set for Tuesday, October 31, 2012

Given the quality of the roads here and the fact that it is still snowing I am reluctant to drive -- and if I do would need to leave in about 40 minutes. I would request a call-in number if at all possible so the hearing can proceed.

Thank you.

Phyllis

Bowles Rice
ATTORNEYS AT LAW
Bio | vCard

Phyllis M. Potterfield
ppotterfield@bowlesrice.com

600 Quarrier Street
Charleston, WV 25301
(304) 347-1122

From: David K. Hendrickson [mailto:daveh@handl.com]
Sent: Tuesday, October 30, 2012 08:30 AM Eastern Standard Time
To: Harbison, Anne <Anne.Harbison@courtswv.gov>
Cc: denise.pentino@dinslaw.com <denise.pentino@dinslaw.com>; hshaffer@shafferlaw.com <hshaffer@shafferlaw.com>; Heather Heiskell Jones <hheiskell@spilmanlaw.com>; james.zeszutek@DINSLAW.com <james.zeszutek@DINSLAW.com>; JMF@farrell3.com <JMF@farrell3.com>; jsb@ramlaw.com <jsb@ramlaw.com>; jspink@sheeheyvt.com <jspink@sheeheyvt.com>; MFitzsimmons@steptoe.com <MFitzsimmons@steptoe.com>; Phyllis Potterfield; selep@zklaw.com <selep@zklaw.com>; Thomas F. Basile <basilelaw@suddenlink.net>
Subject: Re: Pettry Hearing set for Tuesday, October 31, 2012

Anne, several of us just can't make the trip today do to the weather... One alternative would be a call in number or move hearing until tomorrow ... Whatever suits the court

Dave Hendrickson's iPhone Message

On Oct 29, 2012, at 9:55 AM, "Harbison, Anne" <Anne.Harbison@courtswv.gov> wrote:

Counsel –

EXHIBIT 4

Judge Hummel has asked that I check in to see if anyone's travel plans have been affected by the inclement weather brought by Hurricane Sandy.
This Court understands that this is a unique situation, so if anyone is unable to make it to this hearing as a result of cancelled flights, and the like, due to the weather, please let me know at your earliest convenience.
Thanks.
Annie Harbison
Law Clerk to the Hon. David W. Hummel, Jr.

From: David K. Hendrickson [mailto:daveh@handl.com]
Sent: Tuesday, October 30, 2012 8:47 AM
To: Phyllis Potterfield
Cc: Anne.Harbison@courtswv.gov; denise.pentino@dinslaw.com; hshaffer@shafferlaw.com; hheiskell@spilmanlaw.com; james.zeszutek@DINSLAW.com; JMF@farrell3.com; jsb@ramlaw.com; jspink@sheeheyvt.com; MFitzsimmons@steptoe.com; selep@zklaw.com; basilelaw@suddenlink.net
Subject: Re: Pettry Hearing set for Tuesday, October 31, 2012

I think it is not worth risking it

Dave Hendrickson's iPhone Message

On Oct 30, 2012, at 8:39 AM, "Phyllis Potterfield" <ppotterfield@bowlesrice.com> wrote:

Given the quality of the roads here and the fact that it is still snowing I am reluctant to drive -- and if I do would need to leave in about 40 minutes. I would request a call-in number if at all possible so the hearing can proceed.

Thank you.

Phyllis

EX. 5

-----Original Message-----
From: Heather Heiskell Jones [mailto:hheiskell@spilmanlaw.com]
Sent: Tuesday, October 30, 2012 8:58 AM
To: Phyllis Potterfield
Cc: daveh@handl.com; Anne.Harbison@courtswv.gov;
denise.pentino@dinslaw.com; hshaffer@shafferlaw.com;
james.zeszutek@DINSLAW.com; JMF@farrell3.com; jsb@ramlaw.com;
jspink@sheeheyvt.com; MFitzsimmons@steptoe.com; selep@zklaw.com;
basilelaw@suddenlink.net
Subject: Re: Pettry Hearing set for Tuesday, October 31, 2012

I am in Morgantown. I set out at 7:30 a.m., but the roads were so bad I returned to my hotel. Snowing steadily here. I, too, can participate by phone, but will not likely be able to make it in person. This was not predicted. My apologies.

Heather Heiskell Jones
Spilman Thomas & Battle, PLLLC

On Oct 30, 2012, at 8:49 AM, "Phyllis Potterfield" <ppotterfield@bowlesrice.com<mailto:ppotterfield@bowlesrice.com>> wrote:

Given the quality of the roads here and the fact that it is still snowing I am reluctant to drive -- and if I do would need to leave in about 40 minutes. I would request a call-in number if at all possible so the hearing can proceed.

Thank you.

Phyllis

EX. 6

From: David K. Hendrickson [mailto:daveh@handl.com]
Sent: Tuesday, October 30, 2012 9:28 AM
To: Thomas F. Basile
Cc: Harbison, Anne; denise.pentino@dinslaw.com; hshaffer@shafferlaw.com; Heather Heiskell Jones; james.zeszutek@DINSLAW.com; JMF@farrell3.com; jsb@ramlaw.com; jspink@sheeheyvt.com; MFitzsimmons@steptoe.com; ppotterfield@bowlesrice.com; selep@zklaw.com
Subject: Re: Pettry Hearing set for Tuesday, October 31, 2012

Dean and I had a conversation with the court just now and the judge reset the hearing for November 9 at 930 for Stern and 1100 for Petry... I have told by the court to notice the same

Dave Hendrickson's iPhone Message

EX. 7

From: Harbison, Anne [mailto:Anne.Harbison@courtswv.gov]
Sent: Tuesday, October 30, 2012 9:35 AM
To: daveh@handl.com; denise.pentino@dinslaw.com; hshaffer@shafferlaw.com; Heather Heiskell Jones; james.zeszutek@DINSLAW.com; JMF@farrell3.com; jsb@ramlaw.com; jspink@sheeheyvt.com; MFitzsimmons@steptoe.com; ppotterfield@bowlesrice.com; selep@zklaw.com; Thomas F. Basile
Subject: Pettry and Stern hearings vacated for today

Counsel –
The hearings set for today in the Pettry and Stern matters are vacated. I will follow-up with the new dates in little bit, but I wanted to let you all know first. My apologies for the delay.
If you have any questions, don't hesitate to give me a call.
Thanks,
Annie Harbison
(304) 845-3505

From: Joseph Farrell Jr. [mailto:jmf@farrell3.com]
Sent: Tuesday, October 30, 2012 9:24 AM
To: Thomas F. Basile
Cc: Harbison, Anne; daveh@handl.com; denise.pentino@dinslaw.com; hshaffer@shafferlaw.com; Heather Heiskell Jones; james.zeszutek@DINSLAW.com; jsb@ramlaw.com; jspink@sheeheyvt.com; MFitzsimmons@steptoe.com; ppotterfield@bowlesrice.com; selep@zklaw.com
Subject: Re: Pettry Hearing set for Tuesday, October 31, 2012

I have arrived at the courthouse and I am in the hallway.

Joseph M. Farrell, Jr., Esquire
Farrell, White & Legg, Inc.
P.O. Box 6457
914 Fifth Avenue
Huntington, WV 25772-6457
Direct: (304) 781-1848
Phone: (304) 522-9100
Fax: (304) 522-9162

Sent from my iPhone

EX. 8

From: Mark Staun [mailto:mark.staun@segal-law.com]
Sent: Wednesday, August 29, 2012 2:13 PM
To: Thomas F. Basile; Scott Segal; 'R. Dean Hartley'; 'E. William Harvit'; 'Brad Oldaker'; 'David Rodes'
Cc: Becky Tincher; Earlena Titta
Subject: RE: Acrylimide

Why? David Hendrickson needs to get back to Charleston, so the Court accommodated him.

How? Dean called and told me. I immediately sent the e-mail.

Mark

From: Thomas F. Basile [mailto:basilelaw@suddenlink.net]
Sent: Wednesday, August 29, 2012 1:55 PM
To: Mark Staun; Scott Segal; 'R. Dean Hartley'; 'E. William Harvit'; 'Brad Oldaker'; 'David Rodes'
Cc: Becky Tincher; Earlena Titta
Subject: RE: Acrylimide

Why?

How did you receive notice?

Tom

Law Office of Thomas F. Basile
P.O. Box 2149 **(New P.O. Box as of 7/23/12)**
Charleston, WV 25328-2149
Phone: 304-925-4490; Fax: 866-587-2766
Cell: 304-610-5764; email: basilelaw@suddenlink.net

FedEx and Hand Deliveries:
1432 Nottingham Road
Charleston, WV 25314

EXHIBIT 9

From: Mark Staun [mailto:mark.staun@segal-law.com]
Sent: Wednesday, August 29, 2012 1:45 PM
To: Scott Segal; R. Dean Hartley; E. William Harvit; 'Brad Oldaker'; David Rodes; basilelaw@suddenlink.net
Cc: Becky Tincher; Earlena Titta
Subject: Acrylimide

Gentlemen:

Tomorrow's hearing has been moved by the Court to 11:30am. Thank you.

Sincerely,

Mark

Mark R. Staun
THE SEGAL LAW FIRM
810 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 344-9100 - Phone
(304) 344-9105 - Fax

From: Fitzsimmons, Mark [mailto:MFitzsimmons@steptoe.com]
Sent: Thursday, August 30, 2012 7:48 AM
To: 'Thomas F. Basile'
Subject: RE: schedule change

All the defendants got an email from dave hendrickson's office.

Hope to see you there.

From: Thomas F. Basile [mailto:basilelaw@suddenlink.net]
Sent: Thursday, August 30, 2012 7:43 AM
To: Fitzsimmons, Mark
Subject: RE: schedule change

Mark,

Thank you, but how did you find out about it?

Tom

Law Office of Thomas F. Basile
P.O. Box 2149 **(New P.O. Box as of 7/23/12)**
Charleston, WV 25328-2149
Phone: 304-925-4490; Fax: 866-587-2766
Cell: 304-610-5764; email: basilelaw@suddenlink.net

FedEx and Hand Deliveries:
1432 Nottingham Road
Charleston, WV 25314

From: Fitzsimmons, Mark [mailto:MFitzsimmons@steptoe.com]
Sent: Thursday, August 30, 2012 7:41 AM
To: Thomas Basile (basilelaw@suddenlink.net)
Subject: schedule change

Hi. It just occurred to me that I hope you got the message that the conf with Judge Hummel was moved from 1pm up to 11:30am this morning. Hope to see you there.

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY and DEBRA PETTRY, his wife; FRANKLIN STUMP and MARSHAL STUMP, his wife; ALFRED PRICE and WILLA PRICE, his wife; ROBERT SCARBRO and THERESA SCARBRO, his wife; DAVID EVANS and KATHYE EVANS, his wife; CHARLES SINGLETON and JENCIE SINGLETON, his wife; WESTLEY FRALEY and JUDY FRALEY, his wife; DANNY GUNNOE and CAROL GUNNOE, his wife; KERMIT MORRIS and KATHY MORRIS, his wife; and HARVEY CARICO; on behalf of themselves individually and all others similiarly situated,

Plaintiffs,

VS. //Civil Action No. 06-C-124

PEABODY HOLDING COMPANY; BANDYTOWN COAL COMPANY; EASTERN ASSOCIATED COAL CORPORATION; GOALS COAL COMPANY; MASSEY COAL SERVICES, INC.; PERFORMANCE COAL COMPANY; ELK RUN COAL COMPANY, INC.; CIBA SPECIALTY CHEMICALS CORPORATION; CYTEC INDUSTRIES, INC.; ONDEO NALCO COMPANY; and JOHN DOE CHEMICAL COMPANY,

Defendants.

* * *

Transcript of proceedings held in the above-styled case before the HONORABLE DAVID W. HUMMEL, JR., on the 9th day of November, 2012.

* * *

Holly A. Kocher
Certified Court Reporter
Marshall County Courthouse
Seventh Street
Moundsville, WV 26041
(304) 845-3505

EXHIBIT 10

APPEARANCES:

On behalf of the Defendant Nalco:

DENISE D. PENTINO, Esquire
Thorp Reed & Armstrong, LLP
1233 Main Street
Wheeling, WV 26003-2839

JAMES C. ZUSZUTEK, Esquire
Thorp Reed & Armstrong, LLP
One Oxford Centre
301 Grant Street, 14th Floor
Pittsburgh, PA 15219-1425

JASON P. POCKL, Esquire
Dinsmore & Shohl, LLP
Bennett Square
2100 Market Street
Wheeling, WV 26003

On behalf of the Defendant BASF:

MARK P. FITZSIMMONS, Esquire
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036

HARRY G. SHAFFER, III, Esquire
Shaffer & Shaffer, PLLC
330 State Strett
P. O. Box 38
Madison, WV 25130

On behalf of the Defendant Cytec:

HEATHER HEISKELL JONES, Esquire
Spilman, Thomas & Battle, PLLC
300 Kanawha Boulevard, East
P. O. Box 273
Charleston, WV 25321-0273

On behalf of the Coal Defendants:

JOSEPH M. FARRELL, JR., Esquire
Farrell, White & Legg, PLLC
914 Fifth Avenue
P. O. Box 6457
Huntington, WV 25772-6457

P R O C E E D I N G S

* * *

(November 9, 2012)

THE COURT: Good morning again. Please have a seat.

Matter comes on this morning in the Circuit Court of Marshall County, West Virginia, Denver Pettry, et al, Plaintiffs, vs. Peabody Holding Company, et al, Action Number 06-C-124.

Plaintiffs' counsel, please give me your appearance. Court reporter notes the silence.

A sign-in sheet was previously circulated in the Stern matter. I believe, in speaking with Annie, that also indicated whether you were here for the Pettry as well. Have those who -- has everybody signed into the sign-in sheet?

(Defense attorneys respond in the affirmative.)

THE COURT: Okay. Because of the likelihood that this transcript will be requested, yet again, I'm going to ask at this time, Miss Pentino, if you would notice your appearance. Go around the room, please. Just your name and your client.

MRS. PENTINO: Denise Pentino on behalf of Nalco Company, Your Honor.

MR. FITZSIMMONS: Mark Fitzsimmons on behalf of

BASF, Your Honor.

MRS. JONES: Heather Jones on behalf of Cytec Industries, and I have a list that you asked for.

MR. SHAFFER: Harry Shaffer on behalf of BASF.

MR. ZESZUTEK: Jim Zeszutek on behalf of Nalco.

MR. POCKL: Jason Pockl on behalf of Nalco.

MR. FARRELL: Joseph Farrell on behalf of Bandytown Coal Company, Performance Coal Company, Massey Coal Services, Elk Run Coal Company and Goals Coal Company.

THE COURT: Thank you. Tom, please?

The time is now 12 after 11. This matter was continued from last Tuesday. Last Tuesday was the 20 or 22 motions set for hearing.

The Court's going to utilize the Notice of Hearing as basically the agenda for today's purposes. All these same said motions, 20 of them, were set last Tuesday for hearing. The Court last week -- let me see. At 9:29 a.m. there was an e-mail copied to the Court's Law Clerk, Annie Harbison; again October 30th at 9:29 a.m. from a Thomas Basile. I believe it was copied to all counsel.

Not to read it at this point, but all counsel acknowledge receiving that last week?

(Defense counsel responds in the affirmative.)

THE COURT: And that would have been within a half

an hour before the regular scheduled hearing was.

In short, Plaintiffs' counsel, Thomas Basile -- no other counsel have made an appearance on behalf of the Plaintiffs in the Pettry matter. So as far as the Court knows, Mr. Basile is the only Plaintiffs' counsel.

In short, Mr. Basile advises, "Due to weather conditions, Judge" -- actually, Miss Harbison -- "you will not see me in attendance."

Based on that, the Court was compelled on that time to -- I'm sorry. The hearing was actually October 31st, I think.

MRS. PENTINO: It was the 30th, I believe.

THE COURT: Was it?

MRS. JONES: Yeah.

THE COURT: The only -- the only question I had was in the subject matter it says: "Pettry hearing set for Tuesday, October 31."

MR. FITZSIMMONS: Tuesday is October -- was October 30th, Your Honor.

THE COURT: Okay.

MR. FITZSIMMONS: And you set Stern and Pettry consecutive on that day.

THE COURT: Very good. Okay. We got this moments before the hearing was scheduled to kick off.

Mr. Basile, the only Plaintiffs' attorney, did not appear. The Court was -- could not proceed forward and decided not to proceed forward, although several counsel were in attendance, including, but not limited to, Mr. Fitzsimmons and some other counsel who were here.

The Court was ready and prepared. As an aside -- well, as further, today the Court received again through Annie Harbison, the Law Clerk, an e-mail from -- the Court canceled last week's hearing on Tuesday, reset it at that time for today at 11 o'clock. The Court's waited a few minutes after 11 to begin to give Mr. Basile an opportunity to appear.

I received this morning, by and through my Law Clerk Annie Harbison -- again, I believe all counsel in the Pettry Case received an e-mail from, again, Mr. Thomas Basile this morning advising, in short -- I'll make a copy of the e-mail part of the record. In short, "My wife has a toothache. I have to deal with a child who's allegedly disabled, and, Judge, I'm not going to be there."

There's -- this Court has, time and again in this case and with particular emphasis on Mr. Basile, this Court has emphasized that it does not deal with ex parte letters, e-mails; that things shall be done by way of

proper and formal motions.

No where in Mr. Basile's ex parte e-mail -- although it's sent to other counsel, it's still considered an ex parte communication -- does he request either attendance by telephone, a continuance, or otherwise.

In addition to e-mailing and letters, one, being ex parte, I don't know that there's -- I do not believe they're subject to Rule 11. So that becomes problematic when dealing with things.

But anyway, he has not requested that the case not proceed.

The Court had its secretary, Sharon May, this morning, contact Mr. Basile at one of the phone numbers located on his e-mail. Left a message for him that he may -- may and is invited to attend the Stern hearing, which was previous this morning, by way of telephone, and that he shall be here for the Pettry motions hearings.

At the conclusion of the Stern hearing, Mr. Basile had not contacted my office. I was standing there as Sharon made the call. Our phone number was clearly given to him over his message machine. I confirmed, after the hearing in Stern, that he did not make any attempts to contact our office. Phone still works. I have a phone on the bench where he may attend.

I did tell him to be here for this hearing. Left a message for him to be here for this hearing.

Insofar as he's not communicated back to the Court that he -- when he may show up today, we shall proceed in a timely fashion, although I did delay about ten minutes just to give him an opportunity to communicate with the Court his travel plans.

Okay. So I continued it last Tuesday because he says he couldn't show up because of the snow. I now have an e-mail moments before this hearing, and, in short, it also -- I'm not beating a dead horse. I'm just making a nice record, I think. From the context of the e-mail, he knew yesterday afternoon, at the latest, that he would not be here today.

He did not send this e-mail, ex parte, improper e-mail, to the Court and counsel until this morning.

I have counsel from the eastern seaboard here, up and down the coast, who have made plans, who have actually made their way here to the Court and have signed in and made their Notice of Appearance. I'm not going to wait around for Mr. Basile.

The motions pending are 20; dispositive motions primarily, but there's also then Motions to Compel Discovery. There has not been a single piece of paper or

e-mail or letter filed in opposition to any of the 20 motions. There was briefing schedules as to each of the motions. I consider that the motions, all dispositive as well as Motions to Compel, fully briefed and ripe for decision.

Any objection to moving forward, those who have motions pending today?

MRS. PENTINO: No, Your Honor.

MR. FITZSIMMONS: No objection, Your Honor.

MRS. JONES: No objection, Your Honor.

THE COURT: Very well. The Court having -- would you like to speak to the motions at all?

MRS. PENTINO: Just very briefly, Your Honor.

THE COURT: Please go ahead. Miss Pentino?

MRS. PENTINO: Just for record purposes as well. I'm sure you recall, we were here on March 30, 2012, ready to proceed on the same Summary Judgment motions.

THE COURT: The majority of them, yes.

MRS. PENTINO: The majority of them.

THE COURT: Some have been filed since, yes.

MRS. PENTINO: Correct. And at that time Plaintiffs' counsel, Mr. Basile, asked the Court for a continuance to do some discovery for purposes of responding.

THE COURT: Uh-huh. And I set a sub-discovery --

MRS. PENTINO: Correct.

THE COURT: -- schedule with -- there'd already been a scheduling conference order entered, and then in particular, as to these dispositive motions, I set a sub-set discovery, correct?

MRS. PENTINO: That's correct.

THE COURT: What discovery has taken place since that time?

MRS. PENTINO: Zero.

THE COURT: Oh, come on. How many depositions have been taken?

MRS. PENTINO: How many depositions? Zero.

THE COURT: Okay. How many depositions has Plaintiffs' counsel requested that have been rebuffed by the defense?

MRS. PENTINO: None.

THE COURT: Okay. How many re -- how many sets of written discovery has the Plaintiffs' counsel sent out since that March date which -- how many have been sent out?

MRS. PENTINO: Zero.

THE COURT: Okay. Proceed.

MRS. PENTINO: I think you made the point. So you

gave him the opportunity. He did absolutely nothing.

There was a deadline of July 30 to file responsive briefs, and as you've indicated, he's filed nothing.

THE COURT: And he was in attendance at that March hearing.

MRS. PENTINO: That is correct. He's the one that asked for the discovery in order to respond. And so he did nothing after you generously gave him that additional time.

THE COURT: Over your objections, yes.

MRS. PENTINO: Yes. That's right.

THE COURT: Your strenuous objections.

MRS. PENTINO: Correct, Your Honor. So if you'd like us to make a record on each of the pending motions, we're prepared to do so.

THE COURT: Sure.

MRS. PENTINO: Would you like that?

THE COURT: I believe them to be fully briefed and ripe for decision.

MRS. PENTINO: Yes.

THE COURT: They are part of the record; the motions themselves. The Court, having reviewed each and every of the dispositive motions, including the "me too" motions. "Me too" motions are, "I join in that motion for

dispositives." Those go -- relate to the individuals who worked at the facilities, as well as to many of their spouses; consortium-type case.

MRS. PENTINO: Yes.

THE COURT: Okay. And most of the dispositive motions, if not actually all the dispositive motions, are based on the Statute of Limitations?

MRS. PENTINO: Correct.

THE COURT: Okay. And that they clearly blew by him with -- with -- with no discovery rule or other type of an exception.

MRS. PENTINO: That's correct.

THE COURT: Okay. All motions dispositive are well founded, supported by the record, and are granted.

And Miss Pentino, if you could tell me then -- I was -- have a list here, I believe, of the individuals. Denver Pettry's estate. Debra as the executrix of the estate of Denver Pettry would be one that was dismissed? Is that accurate?

MRS. PENTINO: That is accurate.

THE COURT: Okay. Franklin Stump and his wife, Marsha Stump?

MRS. PENTINO: Yes, Your Honor.

THE COURT: Hers would be the consortium claim?

MRS. PENTINO: Yes.

THE COURT: Alfred Price and Willa Price?

MRS. PENTINO: Yes.

THE COURT: David Evans and a Kathye Evans, with an E at the end, Evans?

MRS. PENTINO: Correct.

THE COURT: Danny Gunnoe and Carol Gunnoe?

MRS. PENTINO: Yes, Your Honor.

THE COURT: Kermit Morris and Kathy Morris?

MRS. PENTINO: Yes.

THE COURT: Westley Fraley and Judy Fraley?

MRS. PENTINO: Yes.

THE COURT: Robert Scarbro and Theresa Scarbro?

MRS. PENTINO: Yes.

THE COURT: And a Charles Singleton and Jencie Singleton?

MRS. PENTINO: Yes.

THE COURT: Okay. And that narrows the Plaintiffs' side down to, I believe, a Harvey Carico, C-A-R-I-C-O?

MRS. PENTINO: That's correct.

THE COURT: That would be the only remaining Plaintiff? Is that accurate?

MRS. PENTINO: That is right.

THE COURT: Okay. As mentioned earlier, there was

-- so with regard to those aforementioned persons, with the exception of Harvey Carico, those individuals are dismissed with prejudice, both the employee person alleged, and each of these are alleged to have personal injuries, correct? Okay.

MRS. PENTINO: Yes.

THE COURT: As well as their consortium. Those are all dismissed.

Okay. Now, Harvey Carico; who does he have claims against?

MRS. PENTINO: All of the Defendants, Your Honor.

THE COURT: Oh, he does?

MRS. PENTINO: Yes.

THE COURT: All the employers too?

MRS. PENTINO: Yes.

THE COURT: Okay. Very good. Okay. That renders the Motions to Compel moot, I would believe. Are there any relative to Harvey?

MR. FARRELL: I have one pending for Harvey Carico, Your Honor.

THE COURT: Very good.

MR. FARRELL: On behalf of the Massey Defendants.

THE COURT: Okay.

MRS. PENTINO: We do, as well, on behalf of Nalco.

THE COURT: Okay. Very good.

MRS. JONES: As do we on behalf of Cytec.

THE COURT: Okay.

MR. FITZSIMMONS: Same, Your Honor.

THE COURT: BASF?

MR. FITZSIMMONS: Yes, sir.

THE COURT: Gotcha. I liked that guy. Okay. Wow. Between midnight and three this morning, I was researching an issue of sanctions; sanctions for, boy. Dilatory is a very polite adjective to describe the manner within which Plaintiffs' actions have been prosecuted in this case.

And before I get any further, though, Miss Pentino, there was a -- currently there's a scheduling order in place relative to Harvey Carico's -- not just him, but I mean the whole group and him as well. He being the remaining Plaintiff in the action.

When is discovery set to expire in his case or the case?

MRS. PENTINO: Your Honor, there is a current scheduling order, and we were -- just give me one minute.

THE COURT: Uh-huh.

MRS. PENTINO: Fact discovery completion date was

September 28th.

THE COURT: 2012?

MRS. PENTINO: Yes. And we filed an amended -- a proposed amended scheduling order for your consideration at the beginning of October.

THE COURT: Did I enter it?

MRS. PENTINO: No. We filed a joint motion of the Defendants to modify the scheduling order.

THE COURT: Uh-huh.

MRS. PENTINO: And at that time Mr. Basile had actually agreed to the mod -- the proposed modified scheduling order. However, his one issue of concern is that we did not include an additional date for him to disclose fact witnesses because he had failed to disclose, per your prior order, and did not ask for any extensions or a continuance, and therefore, we refused to give him another opportunity to disclose fact witnesses.

THE COURT: Sure.

MRS. PENTINO: Other than that, we had agreed on the -- on the order. However, there's been, you know, a little bit of a -- of a delay in time since we submitted this with the continuance last week.

THE COURT: Uh-huh.

MRS. PENTINO: But currently the deadline has

passed.

THE COURT: Okay. And at the -- at the -- near the last page of the original order, and perhaps that amended one as well proposed, I recite something to the effect that all deadlines are truly that, deadlines, unless modified by the Court, correct?

MRS. PENTINO: Yes.

THE COURT: They've not been modified by the Court, correct?

MRS. PENTINO: Right.

THE COURT: I didn't -- I did not welcome the -- even the joint motion, but the joint motion was based upon the fact that you could not have done discovery because there -- Mr. Basile was so intransigent -- I don't know if that's the word -- he's not given you anything. Okay. And you had nothing. None of the Defendants had any information upon which they could conduct discovery in the defense of their case, correct?

MRS. PENTINO: That's correct, and that's why we filed the Motions to Compel.

THE COURT: Okay. Very good. While it is the most drastic of all sanctions to dismiss a case, this is the poster child of cases upon which this sanction most harmoniously shall be made, *sua sponte* and not pursuant

to any request by counsel.

I really hate to burn my first reversal with the Supreme Court with this, but frankly, there's going to be a very comprehensive order prepared by the defense, which will articulate and set forth each of the factual basis of how Plaintiffs' counsel has done absolutely nothing to prosecute this case.

It is an abuse of the civil justice system. It is an abuse of his clients' potential claims; the manner in which he has not prosecuted the case. It will not remain on my docket and shall be dismissed with prejudice.

MRS. PENTINO: Thank you, Judge.

THE COURT: Very good. Any objections?

MRS. JONES: No, Your Honor.

MR. FITZSIMMONS: No, Your Honor.

THE COURT: Very good. Anything else that you would like to bullet proof this transcript with?

MR. FITZSIMMONS: I -- I'm sorry to complicate things, Your Honor. Mark Fitzsimmons for BASF.

We were the author of the derivative motion -- what we're calling the derivative motion, the Motions to Dismiss against the spouses of -- of the direct workers.

THE COURT: Uh-huh.

MR. FITZSIMMONS: And I feel constrained to tell the

Court that those motions sought the dismissal of the loss of consortium claims that the -- that the spouses, all of whom are wives, that the wives -- just to make it easy -- made in their complaint.

I -- I must say it is possible, Your Honor, from the complaint that Mr. Basile, on behalf of the wives, may have been making other claims that would not necessarily be derivative, and thus may have survived -- may survive your order with regard to the derivative claims as we briefed it.

THE COURT: Okay.

MR. FITZSIMMONS: That's why we were seeking the extra discovery to -- to -- to see if that was, in fact, the case, which Mr. Basile basically chose never -- never to respond to.

THE COURT: He filed claims, causes of action, on behalf of spouses over and above consortium?

MR. FITZSIMMONS: It's not clear to me, Your Honor, from reading the complaint --

THE COURT: Okay.

MR. FITZSIMMONS: -- that he did. It's not clear to me, from reading the complaint, that he did not.

THE COURT: Okay.

MR. FITZSIMMONS: That's what my discovery was --

THE COURT: Sure.

MR. FITZSIMMONS: -- designed to elucidate.

THE COURT: Sure. With regard to any hanging chads on the ballot; that is, anything over and above a consortium claim, if one is alleged or could possibly be fathomed to have been pled -- and that would be as to the female spouses -- those -- if those exist, those are also dismissed with prejudice, based upon the intransigent finding by the Court, similar identical as to the Carico cause of action.

Matter is stricken entirely from the Court's docket.

If counsel would be so kind as to put your noggins together and send me a 42-page order, I would appreciate it.

Have a nice day.

MRS. JONES: Thank you, Your Honor.

MR. FITZSIMMONS: Thank you, Your Honor.

MRS. PENTINO: Thank you, Your Honor.

* * *

I, Holly A. Kocher, hereby certify that this transcript within is true and correct as recorded by me stenographically and meets the requirements of the Code of the State of West Virginia, 51-7-4, and all rules pertaining thereto, as promulgated by the West Virginia Supreme Court of Appeals.

SIGNED: Holly A. Kocher

DATED: 11-14-12

From: Thomas F. Basile [mailto:basilelaw@suddenlink.net]
Sent: Friday, November 09, 2012 7:51 AM
To: 'Harbison, Anne'
Cc: 'R. Dean Hartley'; 'ewh@harvitschwartz.com'; 'Brad Oldaker'; 'drodes@gpwlaw.com'; 'jmansell@gpwlaw.com'; 'scott.segal@segal-law.com'; 'mark.staun@segal-law.com'; 'dhendrickson@handl.com'; 'ppotterfield@bowlesrice.com'; 'Zeszutek, James'; 'Pentino, Denise'; 'jacob.manning@dinsmore.com'; 'patryk@HughesHubbard.com'; 'Kevin Clines (clines@hugheshubbard.com)'; 'jholmstrand@fsblaw.com'; 'selep@zklaw.com'; 'Fitzsimmons, Mark'; 'hshaffer@shafferlaw.com'; 'jspink@sheeheyvt.com'; 'Heather Heiskell Jones'; 'Andrew P. Arbogast'; 'bmartin@baileywyant.com'; 'jtaylor@baileywyant.com'
Subject: Stern and Pettry Hearings today - medical emergency

Dear Ms. Harbison -

A medical emergency developed late in the afternoon yesterday regarding my wife that will prohibit me from attending the hearings today. My apologies to you, the court and all counsel involved in the Stern and Pettry cases. Like Hurrican Sandy last week, sometimes life throws curves at us that we cannot control.

On Tuesday of this week, my wife began experiencing pain in one of her molars. The pain continued, non-stop, thru yesterday (Thursday) morning. She was unable to get an appointment with her dentist until 4 p.m. yesterday afternoon. When she returned home after 5 p.m., she informed me that the dentist told her she had a root canal problem with the molar and he wanted her to go through root canal surgery as soon as possible, first thing in the morning (today). He arranged for the root canal surgery to be performed this morning by an endodontist in Charleston. She is now at the endodontist's office and the procedure is expected to take at least two hours.

Given the sudden onset of this medical emergency, we were not in a position to arrange for alternative care for our disabled daughter. I am at home caring for her while my wife is in surgery.

Tom Basile

Law Office of Thomas F. Basile
P.O. Box 2149
Charleston, WV 25328-2149
Phone: 304-925-4490; Fax: 866-587-2766
Cell: 304-610-5764; email: basilelaw@suddenlink.net

FedEx and Hand Deliveries:
1432 Nottingham Road
Charleston, WV 25314

EX. 11

CERTIFICATE OF SERVICE

I, Thomas F. Basile, do hereby certify that a true and exact copy of ***"Plaintiffs' Memorandum of Law in Support of Plaintiffs' Rule 59 Motion to Alter or Amend Judgment and Rule 60 Motion for Relief from Judgment"*** was served this 28th day of January, 2013, upon counsel of record in this matter by U.S. Mail, postage pre-paid, addressed as set forth on the attached Service List:

Thomas F. Basile (WVSB #6116)

PETTRY, et al., v. PEABODY HOLDING COMPANY, et al., CIVIL ACTION NO. 06-C-124H **SERVICE LIST**		
Denise D. Pentino, Esquire Jacob A. Manning, Esquire Dinsmore & Shohl, LLP Bennett Square 2100 Market Street Wheeling, WV 26003 Fax: 304-230-1610 Email: denise.pentino@dinsmore.com Email: jacob.manning@dinsmore.com ***Counsel for Ondeo Nalco Company***	C. James Zeszutek, Esquire Dinsmore & Shohl, LLP One Oxford Center 301 Grant Street Pittsburgh, PA 15219-1425 Fax: 412-281-5055 Email: james.zeszutek@dinsmore.com ***Counsel for Ondeo Nalco Company***	Mark P. Fitzsimmons, Esquire Steptoe & Johnson, LLP 1330 Connecticut Avenue, NW Washington, DC 20036 Fax: 202-429-3902 Email: mfitzsimmons@steptoe.com ***Counsel for Ciba Specialty Chemicals Corporation***
Harry G. Shaffer, III, Esquire Shaffer & Shaffer, PLLC P.O. Box 38 Madison, WV 25130 Fax: 304-369-5431 Email: hshaffer@shafferlaw.net ***Counsel for Ciba Specialty Chemicals Corporation***	Heather Heiskell Jones, Esquire Andrew P. Arbogast, Esquire Spilman, Thomas & Battle, PLLC P.O. Box 273 Charleston, WV 25321-0273 Fax: 304-340-3801 Email: hheiskell@spilmanlaw.com Email: aarbogast@spilmanlaw.com ***Counsel for Cytec Industries, Inc.***	Joseph M. Farrell, Jr., Esquire Farrell, White & Legg PLLC P.O. Box 6457 Huntington, WV 25772-6457 Fax: 304-522-9162 Email: jmf@farrell3.com ***Counsel for Bandytown Coal Co., Goals Coal Co., Massey Coal Services, Inc., Performance Coal Co. and Elk Run Coal Co.***
Joseph S. Beeson, Esquire Robinson & McElwee P.O. Box 1791 Charleston, WV 25326 Fax: 304-344-9566 Email: jsb@ramlaw.com ***Counsel for Eastern Associated Coal Corporation***		

SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL

Use this form only for an appeal from a final judgment of a Circuit Court.

ATTACH COPIES OF ALL ORDERS BEING APPEALED

1. **COMPLETE CASE TITLE AND CASE NUMBERS IN CIRCUIT COURT**

   (Include all party designations, such as plaintiff, intervenor, etc. Use an extra sheet if necessary.)

   Short form: PETTRY, et al., v. PEABODY HOLDING COMPANY, et al., Civil Action No. 06-C-124M

   See attached extra sheet for Section 1 for the complete case title and case numbers.

2. **COUNTY APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)**

   (If the presiding judge was appointed by special assignment, include an explanation of the circumstances on an extra sheet.)

   Circuit Court of Marshall County

   Hon. David W. Hummel, Jr.

3. **PETITIONER(S) (List all parties who join in the petition for appeal and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number.)**

   Petitioners are all represented by:

   Thomas F. Basile; Law Office of Thomas F. Basile; P.O. Box 2149; Charleston, WV 25328-2149;

   304-925-4490; e-mail: basilelaw@suddenlink.net

   See attached extra sheet for Section 3 for the list of Petitioners.

4. **RESPONDENT(S) (List all parties against whom the appeal is taken and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number.)**

   EASTERN ASSOCIATED COAL CORPORATION-Joseph S. Beeson; Robinson & McElwee, PLLC; P.O. Box 1791

   Charleston, WV 25326; 304-347-8326; e-mail: jsb@ramlaw.com

   CYTEC INDUSTRIES, INC. - Heather Heiskell Jones; Spilman, Thomas & Battle, PLLC; P.O. Box 273;

   Charleston, WV 25321-0273; 304-340-3800; e-mail: hheiskell@spilmanlaw.com (List continues on extra sheet.)

5. **NON-PARTICIPANT(S) (List any parties to the lower court action that will not be involved in the appeal and provide the name, firm name, address, telephone number and e-mail address of counsel of record for each non-participant. Provide the name, address and telephone number of any self-represented litigant who was a party to the lower court action but is not participating in the appeal.)**

   PEABODY HOLDING COMPANY - Joseph S. Beeson; Robinson & McElwee, PLLC; P.O. Box 1791;

   Charleston, WV 25326; 304-347-8326; e-mail: jsb@ramlaw.com;

EXHIBIT O

SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL

Use this form only for an appeal from a final judgment of a Circuit Court.

ATTACH COPIES OF ALL ORDERS BEING APPEALED

1. **COMPLETE CASE TITLE AND CASE NUMBERS IN CIRCUIT COURT**

   (Include all party designations, such as plaintiff, intervenor, etc. Use an extra sheet if necessary.)

   Short form: PETTRY, et al., v. PEABODY HOLDING COMPANY, et al., Civil Action No. 06-C-124M

   See attached extra sheet for Section 1 for the complete case title and case numbers.

2. **COUNTY APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)**

   (If the presiding judge was appointed by special assignment, include an explanation of the circumstances on an extra sheet.)

   Circuit Court of Marshall County

   Hon. David W. Hummel, Jr.

3. **PETITIONER(S) (List all parties who join in the petition for appeal and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number.)**

   Petitioners are all represented by:

   Thomas F. Basile; Law Office of Thomas F. Basile; P.O. Box 2149; Charleston, WV 25328-2149;

   304-925-4490; e-mail: basilelaw@suddenlink.net

   See attached extra sheet for Section 3 for the list of Petitioners.

4. **RESPONDENT(S) (List all parties against whom the appeal is taken and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number.)**

   EASTERN ASSOCIATED COAL CORPORATION-Joseph S. Beeson; Robinson & McElwee, PLLC; P.O. Box 1791

   Charleston, WV 25326; 304-347-8326; e-mail: jsb@ramlaw.com

   CYTEC INDUSTRIES, INC. - Heather Heiskell Jones; Spilman, Thomas & Battle, PLLC; P.O. Box 273;

   Charleston, WV 25321-0273; 304-340-3800; e-mail: hheiskell@spilmanlaw.com (List continues on extra sheet.)

5. **NON-PARTICIPANT(S) (List any parties to the lower court action that will not be involved in the appeal and provide the name, firm name, address, telephone number and e-mail address of counsel of record for each non-participant. Provide the name, address and telephone number of any self-represented litigant who was a party to the lower court action but is not participating in the appeal.)**

   PEABODY HOLDING COMPANY - Joseph S. Beeson; Robinson & McElwee, PLLC; P.O. Box 1791;

   Charleston, WV 25326; 304-347-8326; e-mail: jsb@ramlaw.com;

SHORT CASE NAME: **Pettry, et al., v. Peabody Holding Company, et al.,**

6. Date of Entry of Judgment: January 11, 2013

Date of Entry of Judgment on Post-Trial Motions, if any:

(1) April 22, 2013 (2) _____ (3) _____

7. CRIMINAL CASES: Bail Status: _____

Defendant's Sentence: _____

8. ABUSE AND NEGLECT CASES: On an extra sheet, provide a list of the names, ages, and parent's names of all minor children, a brief description of the current status of the parental rights of each parent as of the filing of the notice of appeal, a description of the proposed permanent placement of each child, and the name of each guardian *ad litem* appointed in the case.

9. Is the order or judgment appealed a final decision on the merits as to all issues and all parties? ☑ YES / ☐ NO

If your answer is no, was the order or judgment entered pursuant to R. Civ. P. 54(b)? ☐ YES / ☐ NO

If your answer is no, you must attach a brief explanation as to why the order or judgment being appealed is proper for the Court to consider.

10. Has this case previously been appealed? ☑ YES / ☐ NO

If yes, provide the case name, docket number and disposition of each prior appeal.

11. Are there any related cases currently pending in the Supreme Court or in a lower tribunal? ☑ YES / ☐ NO

If yes, cite the case, provide the status, and provide a description of how it is related.

12. Is any part of the case confidential? ☑ YES / ☐ NO

If yes, identify which part and provide specific authority for confidentiality.

13. If an appealing party is a corporation, an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable to the appealing party, please so indicate below.

☐ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

SHORT CASE NAME: **Pettry, et al., v. Peabody Holding Company, et al.,**

14. Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case?

☑ YES / ☐ NO If yes, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.

15. Is a transcript of proceedings necessary for the Court to fairly consider the assignments of error in the case?

☑ YES / ☐ NO **If yes, you must complete the appellate transcript request on page 4 of this form.**

16. NATURE OF CASE, RELIEF SOUGHT, and OUTCOME BELOW (Limit to two double-spaced pages; please attach.)

17. ASSIGNMENTS OF ERROR

Express the assignments in the terms and circumstances of the case, but without unnecessary detail. Separately number each assignment of error and for each assignment:

(1) state the issue;

(2) provide a succinct statement as to why the Court should review the issue.

Limit to eight pages double-spaced; please attach.

18. ATTACHMENTS

Attach to this notice of appeal the following documents in order:

(1) extra sheets containing supplemental information in response to sections 1 - 14 of this form;

(2) a double-spaced statement of the nature of the case, not to exceed two pages, as material required by section 16 of this form;

(3) a double-spaced statement of the assignments of error not to exceed eight pages as required by section 17 of this form;

(4) a copy of the lower court's decision or order from which you are appealing;

(5) a copy of any order deciding a timely post-trial motion; and

(6) a copy of any order extending the time period for appeal.

(7) the statutory docket fee of $200; or a copy of the lower court's granting of the application for fee waiver in this case. The statutory docket fee does not apply to criminal cases, appeals from the Worker's Compensation Board of Review or original jurisdiction actions.

NOTICE:

You must file a separate affidavit and application anytime your financial situation no longer meets the official guidelines or anytime the court orders you to do so.

SHORT CASE NAME: **Pettry, et al., v. Peabody Holding Company, et al.,**

CERTIFICATIONS

STATE OF WEST VIRGINIA

I hereby certify that I have performed a review of the case that is reasonable under the circumstances and I have a good faith belief that an appeal is warranted.

May 22, 2013
Date

Thomas F. Basile
Counsel of record or unrepresented party

I hereby certify that on or before the date below, copies of this notice of appeal and attachments were served on all parties to the case, and copies were provided to the clerk of the circuit court from which the appeal is taken and to each court reporter from whom a transcript is requested.

May 22, 2013
Date

Thomas F. Basile
Counsel of record or unrepresented party

SHORT CASE NAME: **Pettry, et al., v. Peabody Holding Company, et al.,**

SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPELLATE TRANSCRIPT REQUEST FORM

INSTRUCTIONS

(1) If a transcript is necessary for your appeal, you must complete this form and make appropriate financial arrangements with each court reporter from whom a transcript is requested.

(2) Specify each portion of the proceedings that must be transcribed for purposes of appeal. *See* Rule of Appellate Procedure 9(a).

(3) A separate request form must be completed for each court reporter from whom a transcript is requested. If you are unsure of the court reporter(s) involved, contact the circuit clerk's office for that information.

(4) Failure to make timely and satisfactory arrangements for transcript production, including necessary financial arrangements, may result in denial of motions for extension of the appeal period, or may result in dismissal of the appeal for failure to prosecute.

Name of Court Reporter, ERO, or Typist: Holly A. Kocher

Address of Court Reporter: Marshall County Courthouse, 7th Street, Moundsville, WV 26041

Civil Action No.: 06-C-124M **County:** Marshall **Date of Final Order:** 04/22/2013

Date of Proceeding	Type of Proceeding	Length of Proceeding	Name of Judge(s)	Portions Previously Prepared
03/26/2013	Hearing	1 hr.	David W. Hummel, Jr.	All of it
11/09/2012	Hearing	30 min.	David W. Hummel, Jr.	All of it
02/11/2011	Hearing	2 hrs.	David W. Hummel, Jr.	All of it

CERTIFICATIONS

I hereby certify that the transcripts requested herein are necessary for a fair consideration of the issues set forth in the Notice of Appeal.

I hereby further certify that I have contacted the court reporter and satisfactory financial arrangements for payment of the transcript have been made as follows:

☐ Private funds. (Deposit of $0 enclosed with court reporter's copy.)

☐ Criminal appeal with fee waiver (Attach order appointing counsel or order stating defendant is eligible.)

☐ Abuse & neglect or delinquency appeal with fee waiver (Attach order appointing counsel.)

☐ Advance payment waived by court reporter (Attach documentation.)

N/A - The transcripts have already been obtained & paid for. Thomas F. Basile

Date mailed to court reporter **Counsel of record or ~~unrepresented party~~**

SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL - EXTRA SHEET

SHORT CASE NAME: **Pettry, et al., v. Peabody Holding Company, et al.,**

LOWER COURT CASE NO: **06-C-124M**

This is a response to **SECTION 1:** **COMPLETE CASE TITLE AND CASE NUMBERS IN CIRCUIT COURT**

(Include all party designations, such as plaintiff, intervenor, etc.)

DEBRA PETTRY, Executrix of the Estate of DENVER PETTRY; DEBRA PETTRY; FRANKLIN STUMP and MARSHA STUMP, his wife; ALFRED PRICE and WILLA PRICE, his wife; ROBERT SCARBRO and THERESA SCARBRO, his wife; DAVID EVANS and KATHYE EVANS, his wife; CHARLES SINGLETON and JENCIE SINGLETON, his wife; WESTLEY FRALEY and JUDY FRALEY, his wife; DANNY GUNNOE and CAROL GUNNOE, his wife; KERMIT MORRIS and KATHY MORRIS, his wife; and HARVEY CARICO; on behalf of themselves individually and all others similarly situated,

Plaintiffs,

v. Civil Action No. 06-C-124M (transferred from Boone County as Civil Action No. 02-C-58)

A Class Action

PEABODY HOLDING COMPANY; BANDYTOWN COAL COMPANY; EASTERN ASSOCIATED COAL CORPORATION; GOALS COAL COMPANY; MASSEY COAL SERVICES, INC.; PERFORMANCE COAL COMPANY; ELK RUN COAL COMPANY, INC.; CIBA SPECIALTY CHEMICALS CORPORATION; CYTEC INDUSTRIES, INC.; ONDEO NALCO COMPANY; and JOHN DOE CHEMICAL COMPANY,

Defendants.

☐ ***Check here if the section above is continued on the next page.***

SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL - EXTRA SHEET

SHORT CASE NAME: **Pettry, et al., v. Peabody Holding Company, et al.,**

LOWER COURT CASE NO: **06-C-124M**

This is a response to **SECTION 3:** **PETITIONER(S) (List all parties who join in the petition for appeal and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number.)**

DEBRA PETTRY, Executrix of the Estate of DENVER PETTRY; DEBRA PETTRY; FRANKLIN STUMP; MARSHA STUMP; ALFRED PRICE; WILLA PRICE; ROBERT SCARBRO; THERESA SCARBRO; DAVID EVANS; KATHYE EVANS; CHARLES SINGLETON; JENCIE SINGLETON; WESTLEY FRALEY; JUDY FRALEY; DANNY GUNNOE; CAROL GUNNOE; KERMIT MORRIS; KATHY MORRIS; HARVEY CARRICO, on behalf of themselves and all others similarly situated.

☐ ***Check here if the section above is continued on the next page.***

SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL - EXTRA SHEET

SHORT CASE NAME: **Pettry, et al., v. Peabody Holding Company, et al.,**

LOWER COURT CASE NO: **06-C-124M**

This is a response to **SECTION 4:** **RESPONDENT(S) (List all parties against whom the appeal is taken and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number.)**

BANDYTOWN COAL COMPANY; GOALS COAL COMPANY; MASSEY COAL SERVICES, INC.; PERFORMANCE COAL COMPANY; ELK RUN COAL COMPANY, INC. -

Joseph M. Farrell, Jr.; Farrell, White & Legg, PLLC; P.O. Box 6457, Huntington, WV 25772-6457; 304-522-9100; e-mail: jmf@farrell3.com.

CIBA SPECIALTY CHEMICALS CORPORATION -

Mark P. Fitzsimmons; Steptoe & Johnson, LLP; 1330 Connecticut Avenue, NW, Washington, DC 20036; 202-429-8068; e-mail: mfitzsimmons@steptoe.com;

LOCAL COUNSEL in WV for CIBA -

Harry G. Shaffer, III; Shaffer & Shaffer, PLLC; P.O. Box 38, Madison, WV 25130; 304-369-0511; e-mail: hshaffer@shafferlaw.net.

ONDEO NALCO COMPANY -

Denise D. Pentino; Dinsmore & Shohl, LLP; Bennett Square, 2100 Market Street, Wheeling, WV 26003; 304-230-1601; e-mail: denise.pentino@dinsmore.com;

CO-COUNSEL for ONDEO NALCO -

C. James Zeszutek; Dinsmore & Shohl, LLP; One Oxford Center, 301 Grant Street, Pittsburgh, PA 15219-1425; 412-288-5863; e-mail: james.zeszutek@dinsmore.com.

☐ ***Check here if the section above is continued on the next page.***

SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL - EXTRA SHEET

SHORT CASE NAME: **Pettry, et al., v. Peabody Holding Company, et al.,**

LOWER COURT CASE NO: **06-C-124M**

This is a response to **SECTION 10: PROVIDE THE CASE NAME, DOCKET NUMBER AND DISPOSITION OF EACH PRIOR APPEAL OF THIS CASE.**

Stern, et al., v. Chemtall, Inc., et al., 217 W. Va. 329, 617 S.E.2d 876 (2005)

Docket No. 31776, Decided May 31,2005

The Pettry case (a putative class action for medical monitoring and personal injuries, filed in the Circuit Court of Boone County against Respondent coal companies and Respondent chemical manufacturers) was joined with the Stern case (a putative class action for medical monitoring only, filed in the Circuit Court of Marshall County against 8 chemical manufacturers only, three of whom are also in the Pettry case) for appeal of an order by the Circuit Court of Marshall County denying a Motion to Intervene filed by two of the Pettry Petitioners, Danny Gunnoe and Franklin Stump, and a third individual, Teddy Joe Hoosier, (neither a Petitioner here, nor a plaintiff in the Pettry case below). This Court reversed the denial of the Motion to Intervene by the Circuit Court of Marshall County and ordered that Petitioners Gunnoe and Stump, as well as, non-Petitioner, Hoosier, were to be permitted to intervene in Stern as putative class members for their respective putative classes as set forth in their Complaint for Intervention. This Court also exercised its supervisory authority over the Pettry case and transferred it to the Circuit Court of Marshall County for management along with the Stern case.

☐ ***Check here if the section above is continued on the next page.***

SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL - EXTRA SHEET

SHORT CASE NAME: **Pettry, et al., v. Peabody Holding Company, et al.,**

LOWER COURT CASE NO: **06-C-124M**

This is a response to **SECTION 11: FOR ALL RELATED CASES CURRENTLY PENDING IN THE SUPREME COURT OR IN A LOWER TRIBUNAL, CITE THE CASE(S), PROVIDE THE STATUS OF EACH CASE AND PROVIDE A DESCRIPTION OF HOW EACH CASE IS RELATED.**

Stern, et al., v. Chemtall, Inc., et al., Civil Action No. 03-C-49H (Circuit Court of Marshall County)

Hon. David W. Hummel, Jr., presiding

The instant Pettry case is related to the Stern case as follows:

1. The Pettry case was filed in March, 2002, as a putative class action for medical monitoring and personal injuries in the Circuit Court of Boone County, against the 6 Respondent coal companies and 3 Respondent chemical manufacturers.

2. The Stern case was filed in the Circuit Court of Marshall County in April, 2003, also as a putative class action, but only for medical monitoring against 8 chemical manufacturers, three of whom are Respondents here.

3. Two Petitioners here, Danny Gunnoe and Franklin Stump, for themselves and other coal preparation plant workers similarly situated, along with non-Petitioner, Teddy Joe Hoosier, for himself and other water treatment plant workers similarly situated, sought to intervene in Stern, but the Circuit Court of Marshall County denied the Motion to Intervene.

4. Gunnoe, Stump, and Hoosier appealed the order denying intervention and this Court reversed in Stern v. Chemtall, Inc., 217 W.Va. 329 (2005), ordering that Gunnoe, Stump and Hoosier could intervene in Stern as putative class members for their respective putative classes as set forth in their Complaint for Intervention. The Court also exercised its supervisory authority over the two cases and transferred the entire Pettry case to the Circuit Court of Marshall County for management along with the Stern case.

5. Thereafter, the Circuit Court of Marshall County entered several CMOs for the purpose of resolving the Stern case first and stayed the Pettry case until the resolution of Stern. That court signed a "Nunc Pro Tunc Order" in Stern on 2/20/2011, confirming the stay in Pettry "pending dispostion of the Stern class action matter," but lifted that stay prior to the disposition of Stern, over the objections of Stern Intervenors Gunnoe, Stump and Hoosier and all Petitioners here.

6. Although Stern Intervenors Gunnoe and Stump (Petitioners here), and Stern Intervenor Hoosier, were ordered by this court in Stern v. Chemtall, Inc., 217 W.Va. 329 (2005) to be permitted to intervene in Stern, and had been active participants in Stern, Class Counsel in Stern (with the assistance of former counsel for Stern Intervenors who became

☑ ***Check here if the section above is continued on the next page.***

SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL - EXTRA SHEET

SHORT CASE NAME: **Pettry, et al., v. Peabody Holding Company, et al.,**

LOWER COURT CASE NO: **06-C-124M**

This is a response to **SECTION 11: FOR ALL RELATED CASES CURRENTLY PENDING IN THE SUPREME COURT OR IN A LOWER TRIBUNAL, CITE THE CASE(S), PROVIDE THE STATUS OF EACH CASE AND PROVIDE A DESCRIPTION OF HOW EACH CASE IS RELATED.**

co-counsel with Class Counsel after being fired) removed Stern Intervenors from final settlement negotiations and the final settlement agreement that was presented to the court in Stern for approval, over the objections of Stern Intervenors. The court below approved the removal of the Stern Intervenors, who were also putative class representatives, without any hearing or due process protections for said Intervenors. Removal of Petitioners/Stern Intervenors, Gunnoe and Stump, as putative class members in Stern, works a prejudice upon, and negatively binds the rights of, the class of coal preparation plant workers they represented and on whose behalf this court permitted intervention in Stern v. Chemtall, Inc., 217 W.Va. 329 (2005).

7. On May 1, 2013, the court below conducted a Fairness Hearing regarding a class-wide settlement in Stern, at which time Petitioners/Stern Intervenors Gunnoe and Stump, as well as, Petitioner Alfred Price, appeared personally to testify and object to the Stern settlement as unfair, inadequate and unreasonable. Counsel for Petitioners also informed the court that 35 others objected to the settlement, including Petitioners Robert Scarbro, David Evans, Charles Singleton, Westley Fraley, Kermit Morris and Harvey Carico.

8. The circuit court in Stern overruled all objections to the Stern settlement in conclusory fashion in its "Order Granting Final Approval" that was filed and entered with the circuit clerk on May 9, 2013.

9. On May 20, 2013, Petitioners/Stern Intervenors, Gunnoe and Stump (along with Petitioners Price, Scarbro, Evans, Singleton, Fraley, Morris and Carico), filed a combined motion under Rules 59(e) and 60(b) with respect to the "Order Granting Final Approval" of the class-wide settlement in Stern because the Stern settlement, if left standing, will have a pre-clusive and substantially prejudicial effect on Petitioners and their claims, should they prevail on this appeal.

10. Issues in this Pettry appeal and the Stern case overlap on many substantive fronts, not the least of which involves serious conflict-of-interest issues involving law firms that were former counsel for all Petitioners here, who, over the strenuous objections of all Petitioners, became Class Counsel in Stern and worked against the expressed legal interests of Petitioners, their former clients. The Stern court ignored these ethical issues completely and refused to address them.

☐ ***Check here if the section above is continued on the next page.***

SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL - EXTRA SHEET

SHORT CASE NAME: **Pettry, et al., v. Peabody Holding Company, et al.,**

LOWER COURT CASE NO: **06-C-124M**

This is a response to **SECTION 12: CITE ALL PARTS OF THE CASE WHICH ARE CONFIDENTIAL AND PROVIDE SPECIFIC AUTHORITY FOR CONFIDENTIALITY.**

The confidential matters involve the conflict of interest/ethics issues surrounding the two law firms that formerly were co-counsel with Petitioners' counsel and formerly represented all Petitioners in this case and all three Stern Intervenors in the Stern case (Petitioners Gunnoe and Stump and non-Petitioner, Hoosier): 1) The Segal Law Firm and 2) Goldberg, Persky & White, PC (hereafter, "Goldberg Firm") from Pittsburgh. The court below sealed the transcript of the lengthy, en camera hearing it conducted on these matters on February 11, 2011, a hearing which, by the agreement of all counsel, was attended only by plaintiffs' lawyers in both the Stern and Pettry cases. The court also ordered during the en camera hearing that the sealed transcript was NOT to be placed in the court files in either the Stern or Pettry cases. The court also sealed competing expert opinions on the conflict of interest/ethics issues; one that was submitted in support of the position advocated by Petitioners' counsel (authored by Sherri D. Goodman, former Chief Lawyer for The WV Office of Disciplinary Counsel) and one that was submitted jointly by The Segal Law Firm and Goldberg Firm. In addition, at least one brief submitted by Petitioners' counsel on the appointment of Stern class counsel, but which addresses the conflict of interest/ethics issues that are relevant here, was submitted under seal because it incorporated material from the sealed transcript and sealed expert opinions. Although the court set a hearing on the conflict of issue/ ethics issues for May 13, 2011, it canceled the hearing by a "Sua Sponte Order" entered on May 2, 2011. Thereafter, the court simply ignored the conflict of interest/ethics issues, but the hearing transcript, expert opinions and one brief filed under seal remain under seal.

☐ ***Check here if the section above is continued on the next page.***

SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL - EXTRA SHEET

SHORT CASE NAME: **Pettry, et al., v. Peabody Holding Company, et al.,**

LOWER COURT CASE NO: **06-C-124M**

This is a response to **SECTION 14: LIST ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES SHOULD BE DISQUALIFIED FROM THIS CASE. (Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.)**

Justice Brent D. Benjamin should voluntarily recuse himself, inasmuch as five (5) Respondents are subsidiaries of Massey Energy and Justice Benjamin has, since May 6, 2010, voluntarily recused himself from appeals involving Massey companies. In his Memo of May 6, 2010, to Rory L. Perry, II, Clerk of the Court, Justice Benjamin stated that he intended to recuse himself from all cases "involving Massey Energy, any of its subsidiaries and/or Don Blankenship, currently pending or pending in the future, until further direction from me." Based upon Justice Benjamin's own words, his prior recusals from appeals involving Massey companies, and the implication that his participation in such cases could be a violation of Canon 3(E) of the Code of Judicial Conduct, he should recuse himself from this appeal, as well.

Justice Robin Davis should voluntarily recuse herself also, because the conflict of interest/ethics issues raised in this matter involve allegations against her husband, Scott Segal. Due to the serious nature of these allegations, Petitioners believe that Justice Davis' "impartiality might reasonably be questioned," requiring disqualification under Canon 3(E) of the Code of Judicial Conduct. Petitioners would expect Justice Davis to have a natural bias towards her husband and that would likely translate into a negative bias towards Petitioners' counsel who must take an adversarial position towards her husband in this appeal to vigorously represent his clients. The marital relationship between Justice Davis and Mr. Segal reasonably creates a far greater likelihood for bias on the part of Justice Davis than the relationship that exists between Justice Benjamin and Massey companies.

☐ ***Check here if the section above is continued on the next page.***

Short Case Name: Pettry, et al., v. Peabody Holding Company, et al.,
Lower Court Case No: 06-C-124M

SECTION 16: NATURE OF THE CASE, RELIEF SOUGHT & OUTCOME BELOW

The *Pettry* case was filed in the Circuit Court of Boone County in March, 2002, as a putative class action for medical monitoring and personal injuries, on behalf of 10 coal preparation plant workers in West Virginia and their spouses, grounded in theories of product liability and deliberate intent, against Respondent coal companies and Respondent chemical manufacturers. The putative class sought recovery for past harms and potential future harms caused by exposure to workplace chemicals used in and around the coal preparation plant, particularly in the coal-cleaning process. Approximately a year after *Pettry* was filed, other lawyers who had previously represented the putative class representatives in the *Pettry* case, filed a multi-state, putative class action for coal preparation plant workers for medical monitoring only, the *Stern* case, in the Circuit Court of Marshall County, against eight chemical manufacturers, three of whom were also sued in the *Pettry* case and are Respondents here.

Petitioners' counsel brought The Segal Law Firm ("Segal") and Goldberg, Persky & White ("Goldberg") into the *Pettry* case to be lead counsel. Those two firms pursued a Motion to Intervene in the *Stern* class action case on behalf of Danny Gunnoe and Franklin Stump, Petitioners here, and non-Petitioner, Teddy Joe Hoosier, seeking representation for putative class members in the coal preparation plant workforce, including the *Pettry* plaintiffs themselves, not being adequately represented by the *Stern* putative class representatives, and also for an entirely new class of water treatment workers (represented by Mr. Hoosier). The Circuit Court of Marshall County denied the Motion to Intervene, but this court reversed in *Stern v. Chemtall, Inc.,* 217 S.E.2d 329 (2005). This Court ordered that Petitioners, Gunnoe and Stump, as well as, non-Petitioner, Hoosier, be permitted to intervene in *Stem* as putative class members ("*Stern* Intervenors") for their respective putative classes as set forth in their Complaint for Intervention. This Court also transferred *Pettry* to Marshall County to be managed in the same court with *Stern.*

After intervention and transfer, the Circuit Court of Marshall County stayed the *Pettry* case, with the

agreement of all counsel involved, until resolution of *Stem.* The court signed a *"Nunc Pro Tune Order"* on February 20, 2011, confirming the stay that had been in effect in *Pettry* for over 5 years, "pending disposition of the *Stem* class action matter." However, on October 18, 2011, several months after permitting Segal and Goldberg to withdraw as co-counsel for Petitioners in *Pettry* and as co-counsel for *Stern* Intervenors, the court, *sua sponte,* over the objections of *Stem* Intervenors and all Petitioners here, lifted the stay in *Pettry,* prior to the disposition of *Stern*, despite being made well-aware that the conflict-of-interest/ethics issues that brought about the withdrawal of Segal and Goldberg and that the court had not yet addressed, had become serious impediments to resolving *Stern*, even though a tentative settlement of *Stern* had been announced since early July, 2011.

In addition to the substantially prejudicial ruling lifting the stay in *Pettry,* the court took other adverse actions toward Petitioners and their counsel in an apparent attempt to destroy the *Pettry* case and punish Petitioners and their counsel for challenging the *Stern* class-wide settlement as unfair. The court's negative bias towards Petitioners and their counsel "came to a head" with the court's rulings set forth in the final order that triggers this appeal, entered on January 11, 2013, "Order Granting Defendants' Motions for Summary Judgment and Dismissing all Remaining Claims with Prejudice," which contains findings based upon false information and contains legal errors even admitted to by the court in a subsequent hearing on March 26, 2013, on Petitioners' Rule 59 motion (e.g, the court acknowledge it should not have dismissed claims against a bankrupt entity – Eastern Associated Coal – where a bankruptcy stay was in effect and no motions for summary judgment were being pursued by Eastern). Sanctions resulting in dismissal of all claims were also entered against Petitioners' counsel that were grounded on falsehoods, without any prior notice given to counsel to defend himself.

Petitioners seek a reversal of summary judgment, a reversal of the harsh sanctions issued against them and their counsel, a remand of this case for a new scheduling order, and disqualification of the sitting Judge below due to his negative bias taken against Petitioners' and their counsel.

Short Case Name: Pettry, et al., v. Peabody Holding Company, et al.,
Lower Court Case No: 06-C-124M

SECTION 17: ASSIGNMENTS OF ERROR

1. **The circuit court erred as a matter of law in its order of 1/11/2013, by dismissing the claims of 15 of the 18 Petitioners against Respondent Eastern, where all claims against Eastern were subject to an automatic bankruptcy stay, acknowledged by the court's own order of 8/16/2012.**

a) The circuit court had no legal authority to dismiss claims against Respondent Eastern as a sanction against Petitioners' counsel where all claims against Eastern were stayed due to a bankruptcy stay; where no relief had been sought by any party from the bankruptcy court to lift the stay; where there were no pending motions for summary judgment that Eastern was pursuing; where Eastern had not been active in the case since the stay went into effect in the summer of 2012; where there was no prior notice that the court would even be considering sanctions or such rulings; and where Petitioners were not even represented at the hearing when the court announced the sanctions and rulings.

b) The court needs to review this issue to provide bright line guidance to lower courts with respect to the limitations that are placed upon them when parties that are before them in litigation are subject to bankruptcy stays.

2. **The court erred as a matter of law in its order of 1/11/2013, by dismissing the claims of 15 of the 18 Petitioners against Respondent Eastern where there were no dispositive motions either filed by or being pursued by Eastern in violation of the due process rights of Petitioners and their legal counsel.**

a) Even if Respondent Eastern were not subject to the bankruptcy stay at the time of the hearing of 11/9/2012, the court erred by dismissing all claims against Eastern as a sanction against Petitioners' counsel where Eastern had not moved for summary judgment; where no notice was provided before the hearing of disposing of these claims; where Petitioners were not even represented at the hearing and where Petitioners' counsel

had no prior warning that sanctions were being considered for that hearing.

b) The court needs to review this issue to provide clear guidance to lower courts with respect to the limitations that are placed upon them when they consider sanctions so severe as this and the due process rights of litigants and their counsel to have prior notice of such severe actions by the court in order to properly defend themselves.

3. **The circuit court abused its discretion by failing to address the substantial conflict of interest/ethics issues that Petitioners raised with the court in an *en camera* hearing of 2/11/2011, involving former legal counsel in both the Pettry case and companion Stern case and that negatively impacted Petitioners in this case and in the Stern case.**

a) The conflict of interest/ethics issues in this matter are substantial and were plainly stated in a lengthy 20+ page opinion letter written on behalf of Petitioners by former Chief Lawyer of the WV Office of Disciplinary Counsel Sherri Goodman. That opinion and the request for the court to address those serious issues was put before the court below in March, 2011. The court failed to address the issues, resulting in multiple prejudicial actions taken by Petitioners' former counsel, the Segal and Goldberg firms, working against Petitioners' interests in Stern in a way that directly and negatively impacted Petitioner's rights in Pettry and always with the blessing of the lower court.

b) The court needs to review this issue in order to provide guidance to the lower courts about the serious harm involved when conflict of interest issues go unresolved and to deter court-sanctioned bias towards litigants who raise such serious issues.

4. **The court abused its discretion by lifting the stay in the Pettry case while the Stern case was still pending, contrary to its own prior ruling, and to the detriment of Petitioners, who had relied on that stay until the resolution of Stern to give them the opportunity to obtain new co-counsel to help prosecute their claims.**

a) The Pettry case was stayed for almost six years while Stern was being prosecuted and was to remain dormant until Stern was resolved, largely due to the overlapping issues in both cases. Indeed, resolution of Stern's class issues always had the potential to affect class issues in Pettry and its resolution. After Petitioners' objected to several aspects of the tentative settlement in Stern, the court, for seeming punitive reasons, lifted the stay in Pettry over the plain language of its own prior order of 2/20/2011, severely prejudicing Petitioners ability to obtain new counsel to help prosecute Pettry during the testy disputes about resolving Stern's tentative settlement.

b) The court should review this issue to provide lower court's with guidance about taking punitive actions towards litigants who rely on the court's own prior orders in a case to their detriment, which reduces the public's trust in the courts.

5. **The court erred as a matter of law by dismissing the Pettry case without ever addressing the class action aspects of the case, such as providing for a hearing on class certification or providing proper notice to putative class members about its dismissal, all the while planning to approve Stern's class-wide settlement that would have negative impacts on the class claims alleged in Pettry.**

a) Pettry was pled as a class action. The court ignored that fact and treated it as a multi-plaintiff tort case, avoiding all duties a judge has with respect to overseeing class actions and then dismissing it without providing proper notice to putative class members.

b) The court should review this issue in order to provide guidance to lower courts handling complex class action matters about their duties under WVRCP 23.

6. **The court abused its discretion at the hearing of 11/9/2012 by issuing harsh sanctions against Petitioners and their legal counsel without any prior notice and without any legal representation at the hearing and by making up a number of facts as predicate acts to base the sanction on that were not established on actual facts.**

a) The court issued the most severe type of sanction that could be issued against a

party and its counsel by dismissing all claims in Pettry as a sanction for conduct that was based largely on manufactured facts. Even after pointing this out to the court in a Rule 59 motion, the court made no changes to the facts that were the predicate acts for sanctions and gave no explanation as to why false facts should stand on the record on appeal.

b) The court should review this issue in order to deter lower courts from abusing their power over litigants in the face of clear facts that court's have the power to ignore and then force litigants to spend countless hours and money and effort attempting to save their reputation and claims. This causes the public to lose trust in the civil justice system.

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, et al.,

Plaintiffs,

v. **Civil Action No. 06-C-124M**

PEABODY HOLDING COMPANY, et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DISMISSING ALL REMAINING CLAIMS WITH PREJUDICE

This matter was brought before the Court on a number of summary judgment and other motions filed by the various defendants in this case. Considering the arguments set forth by the defendants in their dispositive motions and supporting memoranda, and in light of Plaintiffs' failure to respond to such arguments (either in writing or orally at the November 9, 2012 hearing), the Court after due consideration grants all pending motions for summary judgment. In arriving at these rulings, the Court made the Findings of Fact and Conclusions that are outlined in Section I of this Order.

Further, after careful deliberation and in light of Plaintiffs' counsel's systemic, egregious, and willful misconduct in connection with their prosecution of this case, the Court also dismisses with prejudice all remaining claims in this matter and deems all other pending motions moot. As outlined in the Findings of Fact and Conclusions of Law in Section II of this Order, Plaintiffs' counsel has engaged in a consistent pattern of dilatory and obstructionist conduct with the apparent sole purpose of delaying this action. The Court has provided Plaintiffs' counsel numerous opportunities during the past year to adjust his behavior, fully engage in this litigation, and remedy the prejudice that his conduct has reaped. Plaintiffs' counsel failed to avail himself

of these opportunities. After much consideration, the Court issues this sanction using its inherent authority to manage the cases before it and enforce standards of conduct.

I. DISPOSITIVE MOTIONS

A. FINDINGS OF FACT

1. Alfred Price, Willa Price, David Evans, Kathy Evans, Denver Pettry, Debra Pettry, Franklin Stump, Marsha Stump, Kermit Morris, Kathy Morris, Robert Scarbro, Theresa Scarbro, Charles Singleton, Jencie Singleton, Danny Gunnoe, Carol Gunnoe, Harvey Carico, Westley Fraley, and Judy Fraley (collectively, "Plaintiffs") filed this civil action in March 2002.[1]

2. In the Complaint, Plaintiffs allege that certain Plaintiffs were exposed to a variety of chemical products in their respective workplaces, including polyacrylamide products, and that all Plaintiffs suffered injury as a result of such exposures. On the basis of such allegations, Plaintiffs assert personal injury and medical monitoring claims on behalf of themselves and:

> a class of individuals who were excessively exposed to the chemicals used in the West Virginia coal preparation plants of the defendant coal companies and manufactured by defendant chemical companies[, including] all persons (and their spouses) who worked in and around said coal preparation plants for defendant coal companies and who are residents of West Virginia.

First Am. Compl. 26.

3. Plaintiffs' theories of liability include strict liability in tort, breach of warranty, negligent and intentional failure to warn, intentional infliction of emotion distress, fraudulent concealment, and loss of consortium. Certain Plaintiffs also assert claims arising under West Virginia Code § 23-4-2.

This case was originally filed in the Circuit Court of Boone County, West Virginia, but was transferred to this Court by order of the West Virginia Supreme Court of Appeals in May 2005 to be administered in connection with a related matter already pending in Marshall County and styled *William K. Stern, et al. v. Chemtall, et al.*, Civil Action No. 03-C-49M *("Stern* Litigation").

4. In addition to medical monitoring and compensatory damages, Plaintiffs also seek punitive damages.

5. Defendants in this case include coal companies that allegedly employed one or more Plaintiffs *(i.e.,* Peabody Holding Company, Bandytown Coal Company, Eastern Associated Coal Corporation, Goals Coal Company, Massey Coal Services, Inc., Performance Coal Company, and Elk Run Coal Company, Inc.) and certain manufacturers of polyacrylamide products allegedly used in Plaintiffs' respective workplaces *(i.e.,* Ciba Specialty Chemicals Corporation,[2] Cytec Industries Inc., and Ondeo Nalco Company (N/K/A Nalco)) (collectively, "Defendants").

6. Early in this litigation *(i.e.,* between 2002 and 2005), the parties conducted discovery. While some Plaintiffs responded to discovery served on them by various Defendants, other Plaintiffs failed to serve any responses whatsoever.

7. Since January 2010,[3] several dispositive (and other) motions have been filed in this case. Specifically, the following dispositive motions were filed:

a. *Defendant Nalco Company's Motion for Summary Judgment against Plaintiff Franklin Stump* seeks summary judgment on statute of limitations grounds and was filed January 4, 2010. BASF (filed on January 7, 2010) and Eastern Associated Coal {filed on January 24, 2012) later adopted and joined in this motion.

---

[2] BASF Corporation is the successor in interest to Ciba Corporation and has appeared in this case since January 2011.

[3] In 2006, several parties moved for a stay of the litigation pending the resolution of the class medical monitoring claims asserted in the *Stern* Litigation. Despite Plaintiffs' representation in their March 20, 2012 filing that this case "was stayed for all purposes for approximately seven (7) years while [Stern] worked toward resolution[,]" no stay was ordered in this case until February 2011. *See* Nunc Pro Tunc Order, Feb. 20, 2011. The February 2011 stay was lifted just nine (9) months later. *See* Order, Nov. 23, 2011.

b. Defendant Nalco Company's Motion for Summary Judgment against Plaintiff; Danny Gunnoe seeks summary judgment on statute of limitations grounds and was filed January 6, 2010. BASF (filed on January 7, 2010), Eastern Associated Coal (filed January 24, 2012), and Goals Coal (filed August 29, 2012) later adopted and joined in this motion.

c. Defendant Nalco Company's Motion for Summary Judgment against Plaintiff Kermit Morris seeks summary judgment on statute of limitations grounds and was filed April 12, 2010. Eastern Associated Coal (filed on January 24, 2012), BASF (filed on February 24, 2012), Cytec (filed on May 1, 2012), and Massey Coal Services (filed on August 29, 2012) later adopted and joined in this motion.

d. Defendant Nalco Company's Motion for Summary Judgment against Plaintiff Debra Pettry, Executrix of the Estate of Denver Pettry seeks summary judgment on statute of limitations grounds and was filed April 12, 2010. Eastern Associated Coal (filed on January 24, 2012), Cytec (filed on February 13, 2012), and BASF (filed on February 24, 2012) later adopted and joined in this motion.

e. Defendant Nalco Company's Motion for Summary Judgment against Plaintiff Alfred Price seeks summary judgment on statute of limitations grounds and was filed April 12, 2010. Eastern Associated Coal (filed on January 24, 2012), BASF (filed on February 24, 2012), and Cytec (filed on May 1, 2012), later adopted and joined in this motion.

f. Defendant Nalco Company's Motion for Summary Judgment against Plaintiff; David Evans seeks summary judgment on statute of limitations grounds and was filed April 12, 2010. Eastern Associated Coal (filed on January 24, 2012), BASF (filed on February 24, 2012), and Cytec (filed on May 1, 2012) later adopted and joined in this motion.

g. Defendant Cytec Industries Inc. 's Motion for Summary Judgment against Intervenor/Plaintiff Franklin Stump seeks summary judgment on statute of limitations grounds and was filed August 18, 2010.

h. Defendant Cytec Industries Inc. 's Motion for Summary Judgment against Intervenor/Plaintiff Danny Gunnoe seeks summary judgment on statute of limitations grounds and was filed August 18, 2010.

i. Defendant BASF Corporation's Motion for Summary Judgment against Plaintiffs Debra Pettry, Willa Price, Marsha Stump, Kathy Evans, Carol Gunnoe, and Kathy Morris (also filed on behalf of Cytec, Nalco, Eastern Associated Coal, Peabody, and Massey Coal Services) seeks summary judgment on the grounds that their personal injury claims are derivative of their respective spouses' claims, which are barred by the statute of limitations. The motion was filed June 14, 2012.

j. Defendants BASF Corporation and Cytec Industries Inc. 's Motion for Summary Judgment against Plaintiff's Westley Fraley, Robert Scarbro, and Charles Singleton seeks summary judgment on collateral and/or judicial estoppel grounds and was filed June 22, 2012. Nalco (filed on June 27, 2012), Bandytown

(filed on August 29, 2012), and Performance Coal (filed on August 29, 2012) later adopted and joined in this motion.

k. *Defendants BASF Corporation's, Cytec Industries Inc. 's, and Nalco Company's Motion for Summary Judgment against Plaintiffs' Theresa Scarbro, Jencie Singleton, and Judy Fraley* seeks summary judgment on the grounds that their personal injury claims are derivative of their respective spouses' claims, which are barred by estoppel. This motion was filed June 28, 2012. Bandytown (filed on August 29, 2012) and Performance Coal (filed on August 29, 2012) later adopted and joined in this motion.

8. All such motions were set for hearing on November 9, 2012.[4]

Facts Relevant to Dispositive Motions Against Plaintiffs Franklin Stump & Marsha Stump

9. On March 28, 2002, Franklin Stump asserted claims for medical monitoring and personal injury in connection with his alleged exposure to various chemicals in the workplace, including polyacrylamide products.

10. As discussed at length in the *Memorandum of Law in Support of Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff Franklin Stump* filed on January 4, 2010 and in the *Memorandum of Law in Support of Defendant Cytec Industries Inc. 's Motion for Summary Judgment Against Intervenor/Plaintiff Franklin Stump* filed on August 18, 2010, as well as in the joinder pleadings referenced above and specifically identified in the Court's *Order Regarding Notices of Hearing and Briefing Schedules,* Mr. Stump's medical records, prior workers compensation claim file, responses to a medical questionnaire, and history of attending meetings at which the potential health impacts of acrylamide were discussed all indicate that Mr.

---

[4] Details regarding the scheduling of the subject hearing and Plaintiffs' counsel's conduct in connection therewith are addressed subsequently in this Order.

Stump, his attorneys, and his health care providers attributed Mr. Stump's alleged physical ailments to workplace exposure to chemicals — specifically including polyacrylamide products and acrylamide — on many occasions during the 1990s.

11. Further, Mr. Stump's workers compensation claim file reveals that, in March 1999, Mr. Stump knew the identity of the manufacturers of at least some of the polyacrylamide flocculant and other chemicals with which he worked.

12. Mr. Stump's employment records indicate that his last possible date of workplace exposure to polyacrylamide flocculant and other chemicals was October 1995.

13. Mr. Stump's wife, Marsha Stump, is also a Plaintiff in this case. As a "Plaintiff spouse[,]" Marsha Stump claims loss of consortium, mental anguish, and emotional distress. *See* First Am. Compl. 11158-9, 96-7.

14. These findings of fact pertaining to Mr. and Mrs. Stump are supported by the record and undisputed by Plaintiffs, as Plaintiffs failed to provide any response in opposition to Defendants' motions and supporting memorandum filed against Mr. and Mrs. Stump either in writing or orally at any of the hearings scheduled on the same.

Facts Relevant to Dispositive Motions Against Plaintiffs Danny Gunnoe & Carol Gunnoe

15. On March 28, 2002, Danny Gunnoe asserted claims for medical monitoring and personal injury in connection with his alleged exposure to various chemicals in the workplace, including polyacrylamide products.

16. As discussed at length in the *Memorandum of Law in Support of Defendant Cytec Industries Inc. 's Motion for Summary Judgment Against Intervenor/Plaintiff Danny Gunnoe* filed on August 18, 2010 and *Memorandum of Law in Support of Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff Danny Gunnoe* filed on January 6, 2010, as well as in

the joinder pleadings referenced above and specifically identified in the Court's *Order Regarding Notices of Hearing and Briefing Schedules,* Mr. Gunnoe's prior deposition testimony, medical records, and correspondence with the United States Mine Safety and Health Administration reveal that he became aware of an injury that he attributed to his work with polyacrylamide flocculant no later than December 1999.

17. Further, Mr. Gunnoe's deposition testimony and Mine Safety and Health Administration correspondence reveal that, in 1998 and 1999, Mr. Gunnoe knew the identity of the manufacturers of at least some of the polyacrylamide flocculant and other chemicals with which he worked.

18. Mr. Gunnoe's wife, Carol Gunnoe, is also a Plaintiff in this case. As a "Plaintiff spouse[,]" Carol Gunnoe claims loss of consortium, mental anguish, and emotional distress. *See* First Am. Compl. 111158-9, 96-7.

19. These findings of fact pertaining to Mr. and Mrs. Gunnoe are supported by the record and undisputed by Plaintiffs, as Plaintiffs failed to provide any response in opposition to Defendants' motions and supporting memorandum filed against Mr. and Mrs. Gunnoe either in writing or orally at any of the hearings scheduled on the same.

Facts Relevant to Dispositive Motions Akainst Plaintiffs Kermit Morris & Kathy Morris

20. On March 28, 2002, Kermit Morris asserted claims for medical monitoring and personal injury in connection with his alleged exposure to various chemicals in the workplace, including polyacrylamide products.

21. As discussed at length in the *Memorandum of Law in Support of Defendant Nalco Company's Motion for Summary Judgment against Plaintiff; Kermit Morris* filed on April 12, 2010, as well as in the joinder pleadings referenced above and specifically identified in the

Court's *Order Regarding Notices of Hearing and Briefing Schedules,* Mr. Morris's medical records and prior workers compensation claim file reveal that Mr. Morris was diagnosed with a condition in October 1999 that both he and his physicians attributed to workplace chemical exposure, and that he and his physicians began investigating the details of the injury and the cause thereof at that time.

22. Also, at some point during the years 1997 to 1999, Mr. Morris attended meetings hosted by his physician at which the alleged potential health effects of exposure to polyacrylamide flocculants and other chemicals (and the presence of polyacrylamide flocculants and other chemicals in coal preparation facilities) were explicitly discussed.

23. Further, Mr. Morris previously testified under oath in his workers compensation proceeding that he believed as far back as 1992 that he was suffering from symptoms caused by alleged exposure to chemicals in his workplace.

24. Mr. Morris's medical records reveal that, in 1992, Mr. Morris knew the identity of the manufacturer of at least some of the polyacrylamide flocculant and other chemicals with which he worked.

25. Mr. Morris's employment records indicate that his last possible date of workplace exposure to polyacrylamide flocculant was October 1994.

26. Mr. Morris's wife, Kathy Morris, is also a Plaintiff in this case. As a "Plaintiff spouse[,]" Kathy Morris claims loss of consortium, mental anguish, and emotional distress. *See* First Am. Compl. 58-9, 96-7.

27. These findings of fact pertaining to Mr. and Mrs. Morris are supported by the record and undisputed by Plaintiffs, as Plaintiffs failed to provide any response in opposition to

Defendants' motions and supporting memorandum filed against Mr. and Mrs. Morris either in writing or orally at any of the hearings scheduled on the same.

Facts Relevant to Dispositive Motions Against Plaintiff Debra Pettry, Individually and as Executrix of the Estate of Denver Pettry

28. On March 28, 2002, Denver Pettry[5] asserted claims for medical monitoring and personal injury in connection with his alleged exposure to various chemicals in the workplace, including polyacrylamide products.

29. As discussed at length in the *Memorandum of Law in Support of Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff Debra Pettry, Executrix of the Estate of Denver Pettry* filed on April 12, 2010, as well as in the joinder pleadings referenced above and specifically identified in the Court's *Order Regarding Notices of Hearing and Briefing Schedules,* Mr. Pettry's medical records, records and correspondence related to Mr. Pettry's prior workers compensation claim, and Mr. Pettry's prior deposition testimony reveal that he, his family, his physicians, and his then-attorney attributed his medical conditions to workplace exposure to chemicals repeatedly beginning in October 1990 and continuing through at least 1993.

30. Mr. Pettry's workers compensation claim file reveals that, in 1990, Mr. Pettry knew the identity of the manufacturer of at least some of the chemicals with which he worked and had access to such chemicals for investigation and testing.

31. Mr. Pettry's employment records indicate that his last possible date of workplace exposure to polyacrylamide flocculant was October 1990.

[5] Mr. Pettry died on December 16, 2008. His widow, Debra Pettry, is a Plaintiff in this case and has also been substituted as Plaintiff as Executrix of the Estate of Denver Pettry.

32. Mr. Pettry's widow, Debra Pettry, is also a Plaintiff in this case. As a "Plaintiff spouse[,]" Debra Pettry claims loss of consortium, mental anguish, and emotional distress. *See* First Am. Compl. ¶¶ 58-9, 96-7.

33. These findings of fact pertaining to Mr. and Mrs. Pettry are supported by the records and undisputed by Plaintiffs, as Plaintiffs failed to provide any response in opposition to Defendants' motions and supporting memorandum filed against Mr. and Mrs. Pettry either in writing or orally at any of the hearings scheduled on the same.

Facts Relevant to Dispositive Motions Against Plaintiffs Alfred Price & Willa Price

34. On March 28, 2002, Alfred Price asserted claims for medical monitoring and personal injury in connection with his alleged exposure to various chemicals in the workplace, including polyacrylamide products.

35. As discussed at length in the *Memorandum of Law in Support of Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff Alfred Price* filed on April 12, 2010, as well as in the joinder pleadings referenced above and specifically identified in the Court's *Order Regarding Notices of Hearing and Briefing Schedules,* Mr. Price's medical records and workers compensation claim file reveal that Mr. Price was aware of physical ailments that he and his physicians ascribed to workplace exposure to chemicals as early as June 1997 and no later than September 1999.

36. Records related to Mr. Price's workers compensation claim reveal that Mr. Price knew the identity of the manufacturer of at least some of the polyacrylamide flocculant and other chemicals with which he worked in September 1999.

37. Mr. Price's employment records indicate that his last possible date of workplace exposure to polyacrylamide flocculant was June 1997.

38. Mr. Price's wife, Willa Price, is also a Plaintiff in this case. As a "Plaintiff spouse(,]" Willa Price claims loss of consortium, mental anguish, and emotional distress. *See* First Am. Compl. r 58-9, 96-7.

39. These findings of fact pertaining to Mr. and Mrs. Price are supported by the records and undisputed by Plaintiffs, as Plaintiffs failed to provide any response in opposition to Defendants' motions and supporting memorandum filed against Mr. and Mrs. Price either in writing or orally at any of the hearings scheduled on the same.

Facts Relevant to Dispositive Motions Against Plaintiffs David Evans & Kathy Evans

40. On March 28, 2002, David Evans asserted claims for medical monitoring and personal injury in connection with his alleged exposure to various chemicals in the workplace, including polyacrylamide products.

41. As discussed at length in the *Memorandum of Law in Support of Defendant Nalco Company's Motion for Summary Judgment against Plaintiff David Evans* filed on April 12, 2010, as well as in the joinder pleadings referenced above and specifically identified in the Court's *Order Regarding Notices of Hearing and Briefing Schedules,* Mr. Evans's medical records and workers compensation claim file reveal that he began experiencing symptoms that he attributed to workplace chemical exposure no later than 1998, and that he and his physicians continued to suspect that workplace chemicals (including, specifically, flocculant) caused his medical ailments throughout the late 1990s.

42. Mr. Evans's workers compensation claim file reveals that, Mr. Evans knew the identity of the manufacturer of at least some of the polyacrylamide flocculant and other chemicals with which he worked when he filed the claim in 1999.

43. The record also indicates that Mr. Evans's last possible date of workplace exposure to polyacrylamide flocculant was May 1998.

44. Mr. Evans's wife, Kathy Evans, is also a Plaintiff in this case. As a "Plaintiff spouse[,]" Kathy Evans claims loss of consortium, mental anguish, and emotional distress. *See* First Am. Compl. 58-9, 96-7.

45. These findings of fact pertaining to Mr. and Mrs. Evans are supported by the record and undisputed by Plaintiffs, as Plaintiffs failed to provide any response in opposition to Defendants' motions and supporting memorandum filed against Mr. and Mrs. Evans either in writing or orally at any of the hearings scheduled on the same.

Facts Relevant to Dispositive Motions Against Plaintiffs Westley Fraley & Judy Fraley

46. On March 28, 2002, Westley Fraley asserted claims for medical monitoring and personal injury in connection with his alleged exposure to various chemicals in the workplace, including polyacrylamide products.

47. As discussed in detail in the *Defendants BASF Corporation and Cytec Industries Inc. 's Memorandum of Law in Support of Their Motion jrO Summary Judgment Against Plaintiffs Westley Fraley, Robert Scarbro and Charles Singleton* filed on June 22, 2012, Mr. Fraley filed a workers compensation claim in July 2001 in which he alleged that he suffered from a number of medical conditions as a result of workplace exposure to "magnetite acrylamide" and "polymer acrylamide[.]"

48. Mr. Fraley's workers compensation claim was fully adjudicated and denied by the West Virginia Workers' Compensation Division in November 2001.

49. Mr. Fraley has presented alternative theories of causation, in multiple judicial pleadings before various tribunals in West Virginia, for the same injuries that he alleges in this

matter. In 2003, Mr. Fraley pled before the West Virginia Workers' Compensation Commission that his alleged toxic encephalopathy was caused by exposure to perchloroethylene and related "float-sink" chemicals. Several years later in August 2010, Mr. Fraley filed suit in *Bias v. Arkema, Inc.* in the Circuit Court of Boone County, West Virginia. Civil Action No. 10-C-197, Circuit Court of Boone County, W.Va. (filed Aug. 9, 2010). In that matter, Mr. Fraley alleged damage to his central and peripheral nervous system due to exposure to "float-sink" lab chemicals, which were defined primarily to include perchloroethylene and ethylene dibromide. In his January 2003 submission to the Workers' Compensation Commission and his 2010 lawsuit in *Bias,* Mr. Fraley alleged injuries identical to those alleged in this matter, but presented theories of causation different from what he has claimed here. In the present case, Mr. Fraley claims that his alleged injuries were caused by exposure to polyacrylamide and other coal preparation chemicals. Mr. Fraley has presented inconsistent theories of causation before multiple judicial panels in West Virginia for the same injuries.

50. Mr. Fraley's wife, Judy Fraley, is also a Plaintiff in this case. As a "Plaintiff spouse[,]" Judy Fraley claims loss of consortium, mental anguish, and emotional distress. *See* First Am. Compl. 1158-9, 96-7.

51. These findings of fact pertaining to Mr. and Mrs. Fraley are supported by the record and undisputed by Plaintiffs, as Plaintiffs failed to provide any response in opposition to Defendants' motions and supporting memorandum filed against Mr. and Mrs. Fraley either in writing or orally at any of the hearings scheduled on the same.

Facts Relevant to Dispositive Motions Against Plaintiffs Robert Scarbro & Theresa Scarbro

52. On March 28, 2002, Robert Scarbro asserted claims for medical monitoring and personal injury in connection with his alleged exposure to various chemicals in the workplace, including polyacrylamide products.

53. As discussed in detail in the *Defendants BASF Corporation and Cytec Industries Inc. 's Memorandum of Law in Support of Their Motion for Summary Judgment Against Plaintiffs Westley Fraley, Robert Scarbro and Charles Singleton* filed on June 22, 2012, Mr. Scarbro filed a workers compensation claim in March 2002 in which he alleged that he suffered from a number of medical conditions as a result of workplace exposure to chemicals used to clean and process coal.

54. Mr. Scarbro's workers compensation claim was fully adjudicated and denied by the West Virginia Workers' Compensation Commission in April 2002. In March 2005, following Mr. Scarbro's appeal of the April 2002 decision, the West Virginia Workers' Compensation Office of Judges ordered that the April 2002 decision be affirmed. The West Virginia Workers' Compensation Board of Review affirmed the Office of Judges' decision in March 2006.

55. Mr. Scarbro's wife, Theresa Scarbro, is also a Plaintiff in this case. As a "Plaintiff spouse[d" Theresa Scarbro claims loss of consortium, mental anguish, and emotional distress. *See* First Am. Compl. 158-9, 96-7.

56. These findings of fact pertaining to Mr. and Mrs. Scarbro are supported by the record and undisputed by Plaintiffs, as Plaintiffs failed to provide any response in opposition to Defendants' motions and supporting memorandum filed against Mr. and Mrs. Scarbro either in writing or orally at any of the hearings scheduled on the same.

Facts Relevant to Dispositive Motions Against Plaintiffs Charles Singleton & Jencie Singleton

57. On March 28, 2002, Charles Singleton asserted claims for medical monitoring and personal injury in connection with his alleged exposure to various chemicals in the workplace, including polyacrylamide products.

58. As discussed in detail in the *Defendants BASF Corporation and Cytec Industries Inc. 's Memorandum of Law in Support of Their Motion for Summary Judgment Against Plaintiffs Westley Fraley, Robert Scarbro and Charles Singleton* filed on June 22, 2012, Mr. Singleton filed a workers compensation claim in January 2001 in which he alleged that he suffered from a number of medical conditions as a result of workplace exposure to chemicals, including polyacrylamide.

59. Mr. Singleton's workers compensation claim was fully adjudicated and denied by the West Virginia Workers' Compensation Division in April 2002. The April 2002 decision was reversed on appeal by the West Virginia Workers' Compensation Office of Judges in May 2003 and remanded for further consideration. Upon such consideration, in July 2005, the West Virginia Workers' Compensation Commission Office of Medical Management recommended that Mr. Singleton's claim be denied. Later in July 2005, the West Virginia Workers' Compensation Commission formally denied Mr. Singleton's claim.

60. Mr. Singleton's wife, Jencie Singleton, is also a Plaintiff in this case. As a "Plaintiff spouse[,]" Jencie Singleton claims loss of consortium, mental anguish, and emotional distress. *See* First Am. Compl. ¶¶ 58-9, 96-7.

61. These findings of fact pertaining to Mr. and Mrs. Singleton are supported by the record and undisputed by Plaintiffs, as Plaintiffs failed to provide any response in opposition to

Defendants' motions and supporting memorandum filed against Mr. and Mrs. Singleton either in writing or orally at any of the hearings scheduled on the same.

B. CONCLUSIONS OF LAW

62. Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R.C.P. 56. The West Virginia Supreme Court of Appeals has held that:

> Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trial worthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party.

Syl. Pt. 5, *Jividen v. Law,* 194 W.Va. 705, 461 S.E.2d 451 (1995).

63. To defeat a motion for summary judgment, the opposing party must point to one or more material facts that will sway the outcome of the litigation. *Id.; see also* Syl. Pt. 1, *Tiernan v. Charleston Area Med. Cir., Inc.,* 203 W.Va. 135, 506 S.E.2d 578 (1998).

64. Further, under West Virginia law:

> If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Syl. Pt. 2, *Lovell v. State Farm Mut. Ins. Co.,* 213 W.Va. 697, 698, 584 S.E.2d 553, 554 (2003) (citing *Williams v. Precision Coil, Inc.,* 194 W.Va. 52, 459 S.E.2d 329 (1995)); *see also Payne's Hardware & Bldg. Supply, Inc. v. Apple Valley Trading Co. of West Virginia,* 200 W.Va. 685,

490 S.E.2d 772 (1997); *Crain v. Lightner,* 178 W.Va. 765, 364 S.E.2d 778 (1987). Should a moving party satisfy its burden, and should the non-moving party fail to meet the shifting burden of production, summary judgment is warranted.

Analysis of Statute of Limitations Arguments

65. The West Virginia Supreme Court of Appeals established the following test for evaluating whether a claim is time-barred under the statute of limitations:

> First, the court should identify the applicable statute of limitation for each cause of action.
>
> Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred [i.e., when the cause of action accrued].
>
> Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hasp., Inc.,* 199 W.Va. 706, 487 S.E.2d 901 (1997).
>
> Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled.
>
> And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine.

Syl. Pt. *5, Dunn v. Rockwell,* 225 W.Va. 43, 689 S.E.2d 255 (2009). While parts two through five invoke questions of fact, the West Virginia Supreme Court of Appeals approves of basing summary judgment on a statute of limitations argument where the material facts surrounding the application of the statute of limitations are undisputed. *See, e.g., Goodwin v. Bayer Corp.,* 218 W. Va. 215, 220, 624 S.E.2d 562, 567 (citations omitted).

66. In this case, Plaintiffs have asserted claims for medical monitoring and personal injury based theories of (1) strict products liability, (2) breach of warranties, (3) negligent failure to warn, (4) intentional failure to warn, (5) medical monitoring, (6) intentional infliction of emotional distress, and (7) fraudulent concealment. All such claims are governed by the two-year statute of limitations contained in W. Va. Code § 55-2-12(b). *See, e.g., Goodwin v. Bayer Corp.*, 218 W. Va. 215, 624 S.E.2d 562 (2005); *Bennett v. Asco Services, Inc.*, 218 W.Va. 41, 50, 621 S.E.2d 710, 719 (2005); *Trafalgar House Const., Inc. v, ZMM, Inc.*, 211 W.Va. 578, 567 S.E.2d 294 (2002); *Vorholt v. One Valley Bank,* 201 W.Va. 480, 498 S.E.2d 241 (1997); *Chancellor v. Shannon,* 200 W. Va. 1, 3, 488 S.E.2d 1, 3 (1997); *DeRocchis v. Matlack, Inc.*, 194 W. Va. 417, 460 S.E.2d 663 (1995); *Courtney v. Courtney,* 190 W.Va. 126, 437 S.E.2d 436 (1993); Syl. Pt. 1, *Taylor v. Ford Motor Co.,* 185 W.Va. 518, 408 S.E.2d 270 (1991).

67. Accordingly, because this case was filed on March 28, 2002, any Plaintiff who, prior to March 28, 2000:

> [knew], or by the exercise of reasonable diligence, should [have known] (1) that [he or she] has been injured, (2) the identity of the entity who owed [him or her] a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury

is barred from bringing such claims by the applicable statute of limitations.[6] Syl. Pt. 4, *Gaither v, City Hosp., Inc.,* 199 W.Va. 706, 708, 487 S.E.2d 901, 903 (1997).

---

[6] In the context of medical monitoring claims, the West Virginia Supreme Court of Appeals has phrased this legal standard as follows:

> [A] medical monitoring cause of action accrues when a plaintiff knows, or by the exercise of reasonable diligence should know, that he or she has a significantly increased risk of contracting a particular disease due to significant exposure to a proven hazardous substance and the identity of the party that caused or contributed to the plaintiffs exposure to the hazardous substance.

68. In cases involving allegations of both known injuries and latent or undiscovered injuries, "the statute of limitations begins to run when a plaintiff has knowledge . . that something is wrong and not when he or she knows of the particular nature of the injury." *Goodwin v. Bayer Corp.,* 218 W. Va. 215, 221, 624 S.E.2d 562, 568 (2005). The West Virginia Supreme Court of Appeals has stated that "[w]here a plaintiff knows of his injury, and the facts surrounding that injury place him on notice of the possible breach of a duty of care, that plaintiff has an affirmative duty to further and fully investigate the facts surrounding that potential breach." *Goodwin* at 221, 568 (quoting *McCoy v. Miller,* 213 W.Va. 161, 165, 578 S.E.2d 355, 360 (2003)). Accordingly, when a plaintiff first becomes aware of an injury, the discovery rule will not further toll the running of the statute of limitations period even though the plaintiff may not yet be aware of the full scope or nature of all injuries. *See* Syl. Pt. 3, *Jones v. Trustees of Bethany College,* 177 W.Va. 168, 351 S.E.2d 183 (1986).

69. With respect to the claims alleged by Franklin Stump, Danny Gunnoe, Denver Pettry, Kermit Morris, Alfred Price, and David Evans, the undisputed record is clear that each such plaintiff knew or should have known, prior to March 28, 2000, of his injuries and the alleged cause thereof and, thus, knew or should have known of his own ability to pursue claims related to his alleged exposure to chemicals (including polyacrylamide flocculant) against employers and polyacrylamide manufactures and suppliers at that time.

70. Defendants' motions for summary judgment against Mr. Stump, Mr. Gunnoe, Mr. Pettry, Mr. Morris, Mr. Price, and Mr. Evans were properly supported by the record and established the lack of any genuine issue of material fact with respect to the untimeliness of these Plaintiffs' claims. These Plaintiffs, in turn, utterly failed to meet their resulting burden of

---

State ex eel Chemtall Inc. v. Madden, 216 W. Va. 443, 456, 607 S.E.2d 772, 785 (2004). The evidence presented in this case reveals that, for each Plaintiff against whom a statute of limitations argument has been asserted, his or her personal injury and medical monitoring claims accrued simultaneously.

production, as none of them even attempted to produce any additional evidence showing the existence of a genuine issue for trial,or submit so much as an affidavit suggesting that additional discovery is needed.[7]

71. Accordingly, Mr. Stump's, Mr. Gunnoe, Mr. Pettry's, Mr. Morris's, Mr. Price's, and Mr. Evans's respective claims are barred by the statute of limitations as a matter of law, and summary judgment is appropriate for Defendants.

Analysis of Collateral and Judicial Estoppel Arguments

72. The West Virginia Supreme Court of Appeals has identified four required elements for collateral estoppel: (1) the issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *State v. Miller,* 194 W. Va. 3, 9, 459 S.E.2d 114, 120 (1995).

73. In light of Westley Fraley's, Robert Scarbro's, and Charles Singleton's respective prior workers compensation claims and the undisputed, related documents contained in the record: (a) each such plaintiff was a party to a prior workers compensation proceeding; (b) each such plaintiff had a full and fair opportunity to litigate his own claim in the proceeding; (c) each such plaintiff's claim in the prior proceeding is identical to the claim he has presented in this litigation; and (d) each such plaintiffs claim was previously adjudicated on the merits.

---

[7] The Court is aware that, generally, a non-moving party also has the option of meeting the burden of production that results from the filing of a properly-supported motion for summary judgment by rehabilitating evidence attacked by the moving party. In this case, however, Defendants' diapositive motions did not attack evidence and, thus, this option for satisfying the burden of production is inapplicable.

74. Plaintiff Fraley's claims are also barred by the doctrine of judicial estoppel. "The doctrine of 'judicial estoppel is a common law principle which precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation.'" *West Virginia Dep't of Transp. v. Robertson,* 217 W.Va. 497, 504, 618 S.E.2d 506, 513 (2005) (citations omitted). The doctrine "seeks to protect courts, not litigants, from individuals who would play 'fast and loose' with the judicial system." *Id.* at n.17 (citations omitted). Mr. Fraley alleged in judicial proceedings before the West Virginia Workers' Compensation Commission that injuries identical to those alleged by him in this matter were caused by exposure to perehloroethylene. He then alleged in *Bias v. Arkema, Inc.,* before the Circuit Court of Boone County, that damage to his central and peripheral nervous system was caused by exposure to "float-sink" chemicals including perchloroetlaylene and ethylene dibromide. In this matter Mr. Fraley has alleged that damage to his nervous system was caused by exposure to polyacrylamide or coal preparation chemicals.

75. In light of Mr. Fraley's unequivocal prior statements in other judicial proceedings attributing the same injuries to a wholly separate set of chemicals, Mr. Fraley is estopped from alleging inconsistent claims here.

76. Defendants' dispositive motions against these Plaintiffs were properly supported by the record. Plaintiffs, however, failed to respond to Defendants' estoppel motions and, thus, failed to raise a genuine issue of material fact or otherwise meet the burden of production that resulted from the filing of Defendants' properly-supported motions.

77. Accordingly, Mr. Fraley's, Mr. Scarbro's, and Mr. Singleton's respective claims are barred by the doctrine of collateral estoppel, and summary judgment is appropriate with respect to the same.

Analysis of Derivative Claim Arguments

78. The spouse Plaintiffs *(Le.,* Willa Price, Kathy Evans, Debra Pettry, Marsha Stump, Kathy Morris, Theresa Scarbro, Jencie Singleton, Carol Gunnoe, and Judy Fraley) have asserted claims for loss of consortium, mental anguish, and emotional distress. *See* First Am. Compl. 111 58-9, 96-7. Under West Virginia law, loss of consortium claims are derivative of the exposed party's claim. Thus, if an employee Plaintiffs claims fail, so too does the derivative claim asserted by his spouse. *See Marlin v. Bill Rich Construction, Inc.,* 198 W.Va. 635, 656, 482 S.E.2d 620, 641 (1996).

79. Because the claims asserted by Alfred Price, David Evans, Denver Pettry, Franklin Stump, Kermit Morris, Robert Scarbro, Charles Singleton, Danny Gunnoe, and Westley Fraley are barred by either the statute of limitations or collateral estoppel for the reasons set forth herein, and because the spouse Plaintiffs utterly failed to even attempt to meet their burden of production that resulted from Defendants' filing of properly supported dispositive motions against the spouse Plaintiffs, the spouse Plaintiffs' loss of consortium claims fail as a matter of law and summary judgment is appropriate with respect to the same.

II. SANCTIONS FOR LITIGATION MISCONDUCT

A. FINDINGS OF FACT

Failure to Defend Against Dispositive Motions and Related Misrepresentations to the Court

80. All of the motions for summary judgment filed by Defendants between January 2010 and January 2012 and based on statute of limitations grounds *(i.e.,* those identified in Paragraph 7.a. through 7.h., herein) were originally set for hearing on March 30, 2012.

81. Plaintiffs failed to provide any response whatsoever to any of the statute of limitations motions prior to the hearing.

82. Rather, just days prior to the hearing, Plaintiffs filed their *Motion to Continue Hearing on Defendants' Motions for Summary Judgment and for Stay of Rulings on Said Motions Pending Plaintiffs' Right to Have an Adequate Opportunity to Engage in the Discovery Period Established in the Court's Scheduling Conference Order.* In the Motion, Plaintiffs repeatedly represented to the Court that they sought a delay of the hearing and a ruling on the dispositive motions because they desired and required additional time to conduct discovery relevant to the motions.

83. Over several Defendants' opposition and after hearing argument at the March 30, 2012 hearing (at which Plaintiffs' counsel was present), the Court granted Plaintiffs until July 14, 2012 "to conduct discovery relevant to the pending Summary Judgment and Joinder Motions" and "until July 30, 2012 to file responsive briefs" to the same. *See* Order (Apr. 12, 2012).

84. Subsequently, the Court set a hearing on the statute of limitations motions (and related joinder motions, as well as other pending motions identified below) for October 30, 2012. *See* Order Regarding Notices of Hearing and Briefing Schedules (Sept. 18, 2012).

85. Despite Plaintiffs' specific request for additional time and explicit representations regarding their intention to conduct discovery during such time, during the three-month period Plaintiffs were given to conduct additional discovery, Plaintiffs failed to serve a single interrogatory, request for production, or request for admission, and Plaintiffs failed to take a single deposition. If fact, Plaintiffs conducted no discovery whatsoever.

86. Further, Plaintiffs failed to file responses to the subject motions by the July 30, 2012 deadline or otherwise respond to Defendants' statute of limitations arguments in any manner.

87. Three additional motions for summary judgment filed in June 2012 and based on collateral estoppel and the derivative nature of certain claims *(i.e.,* those motions identified in Paragraph 7.i. through 7.k., herein) were also set for hearing on October 30, 2012. *Id.* Plaintiffs also failed to file any response to the arguments set forth in these motions.

88. In fact, despite the fact that the motions set for hearing on October 30, 2012 collectively sought the dismissal, with prejudice, of the claims asserted by 18 of the 19 named Plaintiffs, Plaintiffs failed to offer any argument whatsoever in opposition.

89. The morning of the hearing scheduled for October 30, 2012, Plaintiffs' counsel,[8] Thomas Basile, sent an e-mail to the Court's law clerk and opposing counsel in which he stated that he would not attend the hearing due to inclement weather. In light of Mr. Basile's failure to appear — and despite Mr. Basile's failure to even request a continuance in his impermissible, informal communication with the Court[9] — the Court rescheduled the hearing (for the second time) for November 9, 2012.

90. Between October 30, 2012 and November 9, 2012, Plaintiffs still did not provide any response to the arguments advanced in any of the pending dispositive motions.

91. On November 9, 2012, just hours prior to the rescheduled hearing, Mr. Basile again sent an e-mail to the Court and opposing counsel in which he stated that he would not

---

[8] While The Segal Law Firm and Goldberg, Persky & White, P.C. previously served as co-counsel of record for Plaintiffs in this litigation, both such firms withdrew from such representation in February 2011. *See* Order, Feb. 22, 2011. Since that time, Mr. Basile has been the only attorney representing Plaintiffs in this matter.

[9] Mr. Basile's October 30, 2012 e-mail to the Court (as well as his later November 9, 2012 e-mail) was particularly inappropriate in light of the Court's prior admonition of "informal, unauthorized" correspondence with the Court. Specifically, the Court reminded all counsel in June 2011 *and* June 2012 of the impermissible nature of such communications and directed counsel to raise any future issues through the filing of a motion (as opposed to an "unauthorized letter writing campaign").

appear at the hearing due to his wife's emergency oral surgery and related childcare needs.[j°] And, again, Mr. Basile failed to even request permission to attend by telephone or seek a (third) continuance.

92. In response to Mr. Basile's November 9, 2012 e-mail, the Court's secretary, in the presence of this Judge, attempted to contact Mr. Basile by telephone on the morning of November 9, 2012. The Court's secretary left a message advising Mr. Basile that he could attend the hearing in the *Stern* Litigation (which was scheduled for 9:30 a.m. on November 9, 2012) by telephone. The Court's secretary also instructed Mr. Basile to appear in person for the November 9, 2012 hearing in this case (which was scheduled for 11:00 a.m. on November 9, 2012).

93. Mr. Basile did not respond to the Court's message or instruction in any manner[s I] and, as Mr. Basile made no request that the case not proceed, the November 9, 2012 hearing proceeded as properly noticed and scheduled. As the Court-ordered briefing schedules established for the motions had passed, all pending motions noticed for the hearing were fully briefed and ripe for decision. Based on the arguments presented and the existing record, the Court granted all pending dispositive motions.

Plaintiffs' Other Delay Tactics and Misconduct

94. In addition to the foregoing failure to defend against Defendants' summary judgment motions, Plaintiffs' counsel also failed to participate in court-ordered discovery.

The Court notes that, from the context of Mr. Basile's November 9, 2012 e-mail, it appears that he was aware of his complicating personal circumstances on the afternoon of November 8, 2012, at the latest. Mr. Basile, however, failed to apprise the Court or opposing counsel of the same until the morning of November 9, 2012.

95. Specifically, on January 25, 2012, the Court issued a Scheduling Conference Order (which had been jointly-developed by Plaintiffs and Defendants) in which the following deadlines were established:

a. February 6, 2012 — Plaintiffs provide medical authorizations to Defendants;

b. September 30, 2012 — Medical examinations (dependent on Plaintiffs providing medical authorizations);

c. June 20, 2012 — fact witness disclosures;

d. September 28, 2012 — completion of fact discovery;

e. October 1, 2012 — Plaintiffs' expert disclosures; and

f. November 30, 2012 — Defendants' expert disclosures.

96. Despite having received notice of these deadlines and despite having been asked for medical authorizations in November 2011, Plaintiffs failed to meet the February 6, 2012 deadline for the provision of medical authorizations for Robert Scarbro, Theresa Scarbro, Kathy Evans, and Carol Gunnoe. [2] Defendant Nalco's Motion to Compel noted numerous good faith attempts to address the outstanding authorizations without involving the Court. Plaintiffs' attorney failed to respond to Defendants' numerous entreaties.

97. Further, despite having almost five (5) months notice of the June 20, 2012 fact witness disclosure deadline, Plaintiffs failed to disclose even a single fact witness either prior to or after the deadline.

---

[2] While a deadline was not specifically provided in the January 25, 2012 Scheduling Order, Plaintiffs also failed to timely provide additional authorizations requested by Defendants for Robert Scarbro (Social Security Administration authorization requested February 6, 2012), Westley Fraley (provider-specific medical authorization requested February 16, 2012), Charles Singleton (employment record authorization requested February 23, 2012), Harvey Carico (provider-specific medical authorization requested February 28, 2012), and Judy Fraley (provider-specific medical authorization requested February 29, 2012). Nalco's undisputed account of its efforts to secure such authorizations are addressed at length in *Defendant Nalco Company's Motion to Compel Discovery* (filed on March 28, 2012) and remains undisputed by Plaintiffs.

98. Despite the September 28, 2012 deadline for the completion of fact discovery, Plaintiffs failed to serve a single discovery request on any defendant between the entry of the Scheduling Order and the deadline, and Plaintiffs' rare attempts to respond to discovery served on them resulted in a number of discovery disputes that, despite Defendants' good faith efforts to resolve the same, have resulted in at least eight (8) of ten (10) Defendants filing motions to compel against Plaintiffs. While not inclusive of all motions to compel filed against Plaintiffs in this litigation, the following motions to compel were also set for hearing on November 9, 2012:

a. Cytec filed a motion to compel on June 14, 2012 to compel Theresa Scarbro, Jencie Singleton, and Judy Fraley to file responses to discovery requests served on October 3, 2002. Neither the record nor Plaintiffs contest any of the allegations set forth in Cytec's motion.

b. BASF filed a motion to compel on July 12, 2012 to compel Harvey Carico, Charles Singleton, Jencie Singleton, Robert Scarbro, Theresa Scarbro, Westley Fraley, and Judy Fraley to file responses to discovery requests served on May 3, 2012. Neither the record nor Plaintiffs contest any of the allegations set forth in BASF's motion.

c. Nalco filed a motion on August 13, 2012 to compel Robert Scarbro, Harvey Carico, Westley Fraley, and Charles Singleton to file adequate responses to discovery requests served earlier in 2012. Neither the record nor Plaintiffs contest any of the allegations set forth in Nalco's motion.

d. Cytec filed a motion on August 21, 2012 to compel Charles Singleton, Robert Scarbro, Westley Fraley, and IIarvey Carico to file complete

responses to discovery requests served on October 3, 2002. Neither the record nor Plaintiffs contest any of the allegations set forth in Cytec's motion.

e. Cytec filed a motion to compel on September 5, 2012 to compel Harvey Carico, Westley Fraley, Judy Fraley, Robert Scarbro, Theresa Scarbro, Charles Singleton, and Jencie Singleton to file responses to a second set of discovery requests served on June 8, 2012. Neither the record nor Plaintiffs contest any of the allegations set forth in Cytec's motion.

f. Bandytown, Performance, Massey Coal Services, Elk Run, and Goals Coal filed a motion on September 19, 2012 to compel Harvey Carico, Charles Singleton, Danny Gunnoc, Robert Scarbro, David Evans, Kermit Morris, Alfred Price, Franklin Stump, Denver Pettry, and Westley Fraley to file responses to discovery requests served on June 21, 2012. Neither the record nor Plaintiffs contest any of the allegations set forth in Defendants' motion.

99. Plaintiffs also completely failed to abide by the October 1, 2012 deadline for the disclosure of expert witnesses. To date, Plaintiffs have failed to disclose a single expert witness in support of any of their claims.

100. Importantly, the Scheduling Conference Order provides that "[u]nless authorized by the Court, the above dates and requirements of this Scheduling Conference Order and FINAL." (Emphasis in original.) With respect to each missed deadline, Plaintiffs failed to even request an extension of the subject deadline from either Defendants or the Court.

101. Plaintiffs' delinquencies so disrupted the case schedule that Defendants were compelled to file the *Joint Motion of Defendants to Modify Scheduling Order* ("Joint Motion") on October 12, 2012. In the Joint Motion, Defendants outlined Plaintiffs' counsel's general

failure to participate in the development of a proposed alternative schedule, save Plaintiffs' counsel's single request that the proposed schedule afford him an additional future opportunity to disclose fact witnesses. Upon Defendants' refusal to propose the same to the Court and Defendants' subsequent filing of the Joint Motion *without* a request for an additional fact witness disclosure deadline, Plaintiffs' counsel declined to make any such request to the Court or otherwise object to the Joint Motion and/or the alternative schedule proposed therein.

102. Plaintiffs' failures have significantly delayed discovery and the general progress of this case, and have precluded Defendants from developing complete defenses, conducting depositions, and/or identifying witnesses necessary to counter Plaintiffs' claims.

103. With the exception of deadlines that could not be met due to Plaintiffs' delinquencies, Defendants have met every deadline imposed by the Court.

104. Notably, the Court has accommodated Plaintiffs' scheduling conflicts on numerous occasions, both at Plaintiffs' request and *sua sponte. See, e.g.,* Order (Feb. 17, 2012) (granting Plaintiffs' request for additional time to respond to Eastern Associated Coal Company's Motion for Summary Judgment); Order (Apr. 12, 2012) (granting Plaintiffs' request for additional time to conduct discovery related to pending dispositive motions).

105. Plaintiffs' conduct during this litigation, through their counsel, has consistently demonstrated that they will only act in this case when such action seeks to delay this litigation, and never to actually develop or advance the merits of the case.

B. CONCLUSIONS OF LAW

106. Under West Virginia law:

> [B]efore issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article 111 of the West Virginia Constitution requires

> that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct.
>
> In formulating the appropriate sanction, a court shall be guided by equitable principles[.] Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.

State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 226 W.Va. 103, 1112, 697 S.E.2d 139, 147-8 (2010) (quoting Syl. Pts. 1-2, *Bartles v. Hinkle,* 196 W.Va. 381, 472 S.E.2d 827 (1996)).

107. The Court's "inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction" includes the authority to dismiss the litigation as a sanction for litigation misconduct. *Id.* at 111, 147 (2010) (quoting Syl. Pt. 3, *Shields v. Romine,* 122 W.Va. 639, 13 S.E.2d 16 (1940)). The imposition of the sanction of dismissal for serious litigation misconduct is proper when the subject party acted willfully, in bad faith, and/or with fault. *Id.* As long as the Court's dismissal sanction is supported by specific and delineated facts indicating the applicable level of misconduct, the Court has acted within its discretion. *See Drumheller v. Fillinger,* 2012 WL 5290168 (W. Va. 2012) (upholding trial Court's default judgment, and resulting denial of jury trial demand where Petitioner failed to comply with discovery requests and appear for a pre-trial conference).

108. Plaintiffs' sanctionable misconduct in this case includes:

a. Plaintiffs' failure to provide medical authorizations in compliance with the Court's January 2012 Scheduling Conference Order, coupled with Plaintiffs' failure to even request an extension of time to do so;

b. Plaintiffs' failure to disclose fact or expert witnesses, as required by the Court's January 2012 Scheduling Conference Order (or at any other time), coupled with Plaintiffs' failure to even request an extension of time to do so;

c. Plaintiffs' history of obstructionist discovery conduct and refusal to meet and confer in good faith regarding the same, such that at least eight (8) defendants found it necessary to file motions to compel in an effort to gain information necessary to prepare a defense to Plaintiffs' claims;

d. Plaintiffs' March 2012 request for a continuance to conduct additional discovery relevant to statute of limitations arguments asserted against them, followed by an absolute failure to conduct any discovery whatsoever in the three-month discovery period granted by the Court;

e. Plaintiffs' failure to provide any response, either written or oral, to any of the dispositive motions filed against them in 2010 and 2012, despite having months (and, in some cases, years) in which to do so; and

f. Plaintiffs' repeated, eleventh-hour pronouncements that they would not be appearing at hearings scheduled for October 30, 2012 and

November 9, 2012, without even a request for a continuance[13] to afford Plaintiffs the opportunity to defend their claims.

109. The conduct enumerated herein constitutes an abuse of the civil justice system. Plaintiffs' conduct does nothing to further the interests of justice, fairness, and/or efficiency. Rather, Plaintiffs' conduct serves to only to thwart such goals, as it robs Defendants of their right to develop their respective defenses, demonstrates a complete disregard for the Court's authority and Defendants' rights, and needlessly prolongs already-protracted litigation. And, while Plaintiffs' dilatory conduct likely does not consume much of Plaintiffs' own resources, such conduct comes at great expense to Defendants and to this Court.

110. The Court has no reason to believe that Plaintiffs' approach to this litigation would improve if a lesser sanction was issued and they were permitted to proceed. The Court has previously made concessions to afford Plaintiffs' additional opportunities to prosecute their claims — both in response to Plaintiffs' requests and *sua sponte* — yet Plaintiffs have failed to make any effort to litigate this case in good faith. Plaintiffs' conduct reveals their complete disregard for this Court's authority, Defendants' rights to defend against Plaintiffs' allegations, and all other parties' time and resources.

111. Plaintiffs' misconduct in this litigation is egregious, systemic and unquestionably intentional and willful, and it could not occur in the absence of bad faith. Accordingly, it is within the Court's authority to sanction the same.

112. In light of the nature and extent of Plaintiffs' misconduct and the absence of alternatives that could be expected to curtail Plaintiffs' misconduct, the dismissal of all remaining claims,[14] with prejudice, is within the Court's authority and warranted in this case.

---

[13] The Court did, however, issue a continuance *sua sponte* in an effort to accommodate Plaintiffs' counsel's claimed inability to appear at the October 30, 2012 hearing on a number of dispositive (and other) motions.

Based on the findings of fact and conclusions of law set forth herein and the underlying record, it is therefore ORDERED, ADJUDGED and DECREED that all of Defendants' pending motions for summary judgment and identified herein are GRANTED, all remaining claims are DISMISSED, WITH PREJUDICE, as a sanction for the dilatory manner in which Plaintiffs' claims have been prosecuted in this litigation, and all of Defendants' pending motions to compel are deemed MOOT. Plaintiffs' objections are duly noted.

This Order is a final judgment and, thus, the Parties are specifically directed that West Virginia Rule of Appellate Procedure 5(b) requires, in part, that any party seeking to appeal all or part of this Order file a "notice of appeal and the attachments required in the notice of appeal form contained in Appendix A of [the West Virginia Rules of Appellate Procedure]" within thirty (30) days of the entry of this Order. A full copy of the current West Virginia Rules of Appellate Procedure can be accessed at http://w\vw.courtswv.gov/legal-community/court-rules/appellate-procedure/contents.html.

ENTERED: January 11, 2013.

HONORABLE DAVID HUMMEL

[1] Following the Court's rulings set forth herein on the pending motions for summary judgment, it is the Court's understanding that the only remaining claims are: (1) Plaintiff Harvey Carico's claims; and (2) any non-derivative claims asserted by the spouse Plaintiffs. The Court acknowledges that there is some ambiguity in the First Amended Complaint regarding the nature of the claims being asserted by the spouse Plaintiffs. The precise nature of the spouse Plaintiffs' claims is immaterial, however, as the Court clarifies that *all* claims that that remain pending following the Court's rulings on the dispositive motions are dismissed with prejudice as a sanction for Plaintiffs' litigation misconduct.

PREPARED BY:

Heather Heiskell Jones (WV Bar # 4913)
Kelly B. Griffith (WV Bar # 9684)
Matthew D. Haydo (WV Bar # 11114)
SPILMAN THOMAS & BATTLE, PLLC
300 Kanawha Boulevard, East / P.O. Box
273 Charleston, WV 25321
(304) 340-3800 / (304) 340-3801 *(facsimile)*
Email: hheiskellgspilmanlaw.com Email:
kgriffith (sspilmanlaw.com Email:
mhaydo@spilmanlaw.com

> judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

21. Importantly, "[a] circuit court is not required to grant a Rule 60(b) motion unless a moving party can satisfy one of the criteria enumerated under it." *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.* 196 W.Va. 692, 706, 474 S.E.2d 872, 886 (1996).

22. Plaintiffs correctly note that the West Virginia Supreme Court of Appeals held:

> A court, in the exercise of discretion given it by the remedial provisions of Rule 60(b), should recognize that the rule is to be liberally construed for the purpose of accomplishing justice. The rule is also designed to facilitate the desirable legal objective that cases are to be decided on the merits.

Toler v. Shelton, 157 W.Va. 778, 785, 204 S.E.2d 85, 89 (1974) (internal citations omitted).

23. The West Virginia Supreme Court of Appeals has also (and more recently) held that:

> Rarely is relief granted under [Rule 60(b)] because it provides a remedy that is extraordinary and is only invoked upon a showing of exceptional circumstances. Because of the judiciary's adherence to the finality doctrine, relief under this provision is not to be liberally granted.

Rose v. Thomas Memorial Hosp. Foundation, Inc., 208 W.Va. 406, 413, 541 S.E. 2d 1 (2000). The West Virginia Supreme Court of Appeals continued on in *Rose* to state that:

> In establishing the bounds of such motion, the weight of authority supports the view that Rule 60(b) motions which seek merely to relitigate legal issues heard at the underlying proceeding are without merit." "[A] Rule 60(b) motion to reconsider is simply not an opportunity to reargue facts and theories upon which a court has already ruled."

Id. (internal citations omitted).

Application of Rule 59(b) and Rule 60(b) Standards to Plaintiffs' Allegations

24. Despite the myriad of criticisms Plaintiffs have offered in their Motions, their memorandum in support thereof, their reply brief in support of their Motions, and oral argument, Plaintiffs have failed to: (1) demonstrate that there was "an intervening change in the controlling

law[;]" (2) present "new evidence not previously available[;]" or (3) demonstrate that the alteration or amendment of the Court's January 11, 2013 Order is necessary to remedy a clear error of law or prevent obvious injustice.

25. Similarly, the errors alleged by Plaintiffs fail to establish:

> (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) [that] the judgment is void;
>
> (5) [that] the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.

26. Rather, Plaintiffs have primarily used their pending Motion as a vehicle to offer legal arguments, factual contentions, or claims that they failed to advance prior to the issuance of the Court's January 11, 2013 Order, despite their numerous opportunities to do so.

27. In light of Plaintiffs' counsel's insistence at the March 26, 2013 hearing regarding the existence of a pre-sanction notice requirement, the Court also specifically notes that none of the cases cited by Plaintiffs in support of the proposition[3] impose a specific requirement that a party sanctioned under the Court's inherent authority be provided with any particular type of pre-sanction

[3] In *Plaintiffs' Reply to Defendants' Response in Opposition to Plaintiff's Rule 59 Motion to Alter or Amend Judgment and Rule 60 Motion for Relief from Judgment* and during Plaintiffs' counsel's argument at the March 26, 2013 hearing, Plaintiffs' counsel pointed to the following cases in support of his position that West Virginia law imposed a pre-sanction notice requirement: *Mey v. Pep Boys – Manny, Moe &* Jack, 228 W. Va. 48, 717 S.E.2d 235 (2011); *State ex rel. Richmond American Homes of West Virginia v. Sanders*, 226 W. Va. 103, 697 S.E.2d 139 (2010); *State ex rel. Rees v. Hatcher*, 214 W. Va. 746, 591 S.E.2d 304 (2003); and *Czaja v. Czaja*, 208 W. Va. 62, 537 S.E.2d 908 (2000).

notice. What certain (but by no means all) of these cases may require is that a sanctioned party be afforded an opportunity to refute the basis for the subject sanctions and/or the nature of the sanctions. As the facts set forth herein demonstrate, in this case, Plaintiffs have been afforded such an opportunity through the procedures established in (a) Trial Court Rule 24.01 (to which Plaintiffs only partially availed themselves); (b) Rule 59; and (c) Rule 60. Through these processes, Plaintiffs have had the full opportunity to defend their actions and oppose the imposition of the sanctions.

28. After due consideration, this Court reaffirms the findings contained in its January 11, 2013 Order and affirms its findings that Plaintiffs have engaged in a pattern of misconduct in this litigation that interferes with this Court's ability to bring this case to a conclusion and otherwise control and manage its docket. Plaintiffs' conduct constitutes an abuse of the civil justice system and rises to the level of intentional, willful conduct, and is in bad faith. After due and additional consideration of all the circumstances, this Court finds Plaintiffs' partial attempts to explain some of its dilatory conduct unavailing and unpersuasive.

Accordingly, and based on the findings of fact and conclusions of law set forth herein, in its January 11, 2013 Order, and in the underlying record, it is hereby **ORDERED, ADJUDGED and DECREED** that *Plaintiffs' Rule 59 Motion to Alter or amend Judgment and Rule 60 Motion for Relief from Judgment* is **DENIED** under both Rule 59(e) and Rule 60(b). Upon entry of this Order, both this Order and the Court's January 11, 2013 *Order Granting Defendants' Motions for Summary Judgment and Dismissing All Remaining Claims with Prejudice* are deemed final judgments and, thus, the Parties are specifically directed that West Virginia Rule of Appellate Procedure 5(b) requires, in part, that any party seeking to appeal all or part of either Order file a "notice of appeal and the attachments required in the notice of appeal form contained in Appendix A of [the West Virginia Rules of Appellate Procedure]" within thirty (30) days of the entry of this Order. A full

copy of the current West Virginia Rules of Appellate Procedure can be accessed at http://www.courtswv.gov/legal-community/court-rules/appellate-procedure/contents.html.

It is all so **ORDERED**.

The Clerk of this Court shall, in accord with W.Va. R.Civ.P. 77(d), transmit a copy of this Order to all counsel of record.

Dated this 22nd day of April, 2013.

The Honorable David W. Hummel, Jr.

Prepared by:

Heather Heiskell Jones (WV Bar # 4913)
Andrew P. Arbogast (WV Bar # 8505)
Kelly B. Griffith (WV Bar # 9684)
Matthew D. Haydo (WV Bar # 11114)
Post Office Box 273
Charleston, WV 25321-0273
(304) 340-3800 / (304) 340-3801 – *facsimile*
Email: hheiskell@spilmanlaw.com
Email: aarbogast@spilmanlaw.com
Email: kgriffith@spilmanlaw.com
Email: mhaydo@spilmanlaw.com

- Entered per T.C.R. 24.01, after Plaintiffs' counsel, Thomas F. Basile, Esq., advised the Court by written correspondence dated April 18, 2013, of his express refusal to contact defense counsel in an attempt to address objections he had to the proposed order.

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

WILLIAM K. STERN, *et al.*,

Plaintiffs,

v. Civil Action No. 03-C-49M

CHEMTALL INC., *et al.*,

Defendants.

ORDER

By Order entered February 20, 2011, the Court directed all counsel wishing to be appointed Putative Class Counsel to file motions for appointment as the same by March 18, 2011. Responses in opposition to Putative Class Counsel were due March 31, 2011. Defendants filed a Joint and Consolidated Response to the various motions of those firms seeking Putative Class Counsel appointment. Defendants suggest that the Court appoint "Liaison Counsel" for settlement purposes instead of Putative Class Counsel.

After due consideration of Defendants' suggestion, the Court appoints R. Dean Hartley, Esq. as Liaison Counsel for Settlement Purposes for the coal preparation plant workers, water treatment workers, and Intervenors.

The objection and exception of Thomas F. Basile, Esq. is noted.

It is so **ORDERED**.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered: April 7, 2011.

David W. Hummel, Jr.
Chief Judge

IN THE CIRCUIT COURT OF MARSHALL COUNT, WEST VIRGINIA

WILLIAM K. STERN, *et al.*,

Plaintiffs,

v. Civil Action No. 03-C-49M

CHEMTALL INC., *et al.*,

Defendants.

SUA SUPONTE ORDER

This matter is presently scheduled for a hearing on Friday, May 13, 2011 at 10:30 a.m. to hear argument on all motions for appointment as putative class counsel. The Court by Order entered April 7, 2011 appointed "Liaison Counsel" for settlement purposes. For reasons appearing to the Court, the hearing scheduled for May 13, 2011 is **VACATED**.

It is so **ORDERED**.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered: May 2, 2011.

David W. Hummel, Jr.
Chief Judge

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

WILLIAM STERN, et al.,

Plaintiffs,

v. **CIVIL ACTION NO. 03-C-49M**
Judge Hummel

CHEMTALL INCORPORATED, et al.,

Defendants.

DENVER PETTRY, et al.,

Plaintiffs,

v. **Civil Action No. 06-C-124M**

PEABODY HOLDING COMPANY, et al.,

Defendants.

ORDER

On October 18, 2011, came the parties by counsel pursuant to proper notice of a status conference in the matter of William K. Stern, et al. v. Chemtall Incorporated, et al. As a result of the conference, the Court entered the following rulings:

1. This Court's Nunc Pro Tunc Order dated February 20, 2011 is hereby vacated;

2. The Stay of the matter styled Denver Pettry, et al. v. Peabody Holding Company, et al., Civil Action No: 06-C-124M is hereby lifted;

3. The parties are hereby ordered to confer to attempt to reach agreement on submission to the Court of a joint Scheduling/Case Management Order; and

4. In the event the parties cannot reach agreement on submission of a joint Scheduling/Case Management Order, counsel for Plaintiff shall contact the Court to obtain a date for a scheduling conference.

The Circuit Clerk is hereby directed to send a certified copy of this Order to all counsel of record. It is so ORDERED.

ENTER: November 23, 2011.

David W. Hummel, Jr., Chief Judge

FAX

DAVID W. HUMMEL, JR., JUDGE
Marshall County Courthouse
Seventh Street
Moundsville, WV 26041
Phone (304) 845-3505
Fax (304) 845-2522

TO: Thomas F. Basile; Basile & Ford LLP
Joseph S. Beeson; Robinson & McElwee, PLLC
Joseph M. Farrell, Jr.; Farrell, Farrell, Farrell, LC
Mark P. Fitzsimmons; Steptoe & Johnson, LLP
David K. Hendrickson; Eckert Seamans Cherin & Mellot, LLC
Jeffrey A. Holmstrand; Flaherty Sensabaugh & Bonasso, PLLC
Heather Heiskell Jones; Spilman Thomas & Battle, PLLC
Robert P. Martin; Bailey & Wyant, PLLC
Robb W. Patryk; Hughes Hubbard & Reed, LLP
Denise Pentino; Dinsmore & Shohl, LLP
Phyllis Potterfield; Bowles Rice McDavid Graff & Love, PLLC
Joseph W. Selep; Zimmer & Kunz, PLLC
Harry G. Shaffer, III; Shaffer & Shaffer, PLLC
James W. Spink; Sheehey Furlong & Behm, P.C.
C. James Zeszutek; Dinsmore & Shohl, LLP

RE: **Pettry, et al. v. Peabody Holding Company, et al. - 03-C-49 H (Circuit Court of Marshall County)**
Counsel - If there are any questions or comments, please contact my law clerk, Annie Harbison.

PAGES (including cover page): 7

If you do not receive all the pages, please call as soon as possible, (304) 845-3505.

TELECOPIER OPERATOR: Annie

DATE: January 20, 2012

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,
PLAINTIFFS,

VS. **// CIVIL ACTION NO. 03-C-49H**

PEABODY HOLDING COMPANY, *et al.*,
DEFENDANTS.

ORDER

On January 8, 2010, the Defendant, Nalco Company, by counsel, filed "*Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, Danny Gunnoe,*" along with a memorandum of law and exhibits in support thereof. Defendant Ciba Corporation joined in Nalco's motion by filing "*Defendant Ciba Corporation's Adoption and Joinder in Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, Danny Gunnoe,*" along with exhibits in support of its motion. Defendants Chemtall Incorporated; G.E. Betz, Incorporated; Stockhausen, Incorporated; Zinkan Enterprises, Incorporated; and Hychem Incorporated also joined in Nalco's motion by filing "*Defendants Chemtall Incorporated, G.E. Betz, Incorporated, Stockhausen, Incorporated, Zinkan Enterprises, Incorporated, and Hychem, Incorporated's Joinder in Nalco Company's Motion for Summary Judgment Against Plaintiff, Danny Gunnoe.*"

These motions have been fully briefed and are ripe for hearing. The pending motions shall come on for hearing, before the undersigned, on **Friday, March 30, 2012, at 1:30 p.m.**, in the courtroom of the Marshall County Courthouse, Moundsville, West Virginia.

It is so ORDERED.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered this 20th day of January, 2012.

DAVID W. HUMMEL, JR., CHIEF JUDGE

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,
PLAINTIFFS,

VS. **// CIVIL ACTION NO. 03-C-49H**

PEADBODY HOLDING COMPANY, *et al.*,
DEFENDANTS.

ORDER

On January 5, 2010, the Defendant, Nalco Company, by counsel, filed "*Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, Franklin Stump,*" along with a memorandum of law and exhibits in support thereof. Following Nalco's motion, Defendants Chemtall Incorporated; G.E. Betz, Incorporated; Stockhausen, Incorporated; Zinkan Enterprises, Incorporated; and Hychem Incorporated filed "*Defendants Chemtall Incorporated, G.E. Betz, Incorporated, Stockhausen, Incorporated, Zinkan Enterprises, Incorporated, and Hychem, Incorporated's Joinder in Nalco Company's Motion for Summary Judgment Against Plaintiff, Franklin Stump.*" Defendant Ciba Corporation later joined in Nalco's motion by filing "*Defendant Ciba Corporation's Adoption and Joinder in Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, Franklin Stump,*" along with exhibits in support of its motion.

These motions have been fully briefed and are ripe for hearing. The pending motions shall come on for hearing, before the undersigned, on **Friday, March 30, 2012, at 1:30 p.m.**, in the courtroom of the Marshall County Courthouse, Moundsville, West Virginia.

It is so ORDERED.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered this 20th day of January, 2012.

DAVID W. HUMMEL, JR., CHIEF JUDGE

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,
PLAINTIFFS,

VS. **// CIVIL ACTION NO. 03-C-49H**

PEABODY HOLDING COMPANY, *et al.*,
DEFENDANTS.

ORDER

On April 12, 2010, the Defendant, Nalco Company, by counsel, filed *"Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, David Evans,"* along with a memorandum of law and exhibits in support thereof.

All counsel of record in this matter that are in opposition to the present motion may respond within the time period allotted by the Court.

A response may be filed on or before February 24, 2012.

A reply may be filed on or before March 16, 2012.

A single courtesy copy shall be provided to the Court in accordance with **Rule 6.03** of the **West Virginia Trial Court Rules.**

This motion shall come on for hearing on **Friday, March 30, 2012, at 1:30 p.m.**, in the courtroom of the Marshall County Courthouse, Moundsville, West Virginia.

It is so ORDERED.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered this 20th day of January, 2012.

DAVID W. HUMMEL, JR., CHIEF JUDGE

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,
PLAINTIFFS,

VS. **// CIVIL ACTION NO. 03-C-49H**

PEABODY HOLDING COMPANY, *et al.*,
DEFENDANTS.

ORDER

On April 12, 2010, the Defendant, Nalco Company, by counsel, filed "*Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, Kermit Evans,* "along with a memorandum of law and exhibits in support thereof.

All counsel of record in this matter that are in opposition to the present motion may respond within the time period allotted by the Court.

A response may be filed on or before February 24, 2012.

A reply may be filed on or before March 16, 2012.

A single courtesy copy shall be provided to the Court in accordance with **Rule 6.03** of the **West Virginia Trial Court Rules.**

This motion shall come on for hearing on **Friday, March 30, 2012, at 1:30 p.m.,** in the courtroom of the Marshall County Courthouse, Moundsville, West Virginia.

It is so ORDERED.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered this 20th day of January, 2012.

DAVID W. HUMMEL, JR., CHIEF JUDGE

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,
PLAINTIFFS,

VS. **// CIVIL ACTION NO. 03-C-49H**

PEABODY HOLDING COMPANY, *et al.*,
DEFENDANTS.

ORDER

On April 12, 2010, the Defendant, Nalco Company, by counsel, filed "*Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, Debra Pettry, Executrix of the Estate of Denver Pettry,*" along with a memorandum of law and exhibits in support thereof.

All counsel of record in this matter that are in opposition to the present motion may respond within the time period allotted by the Court.

A response may be filed on or before February 24, 2012.

A reply may be filed on or before March 16, 2012.

A single courtesy copy shall be provided to the Court in accordance with **Rule 6.03** of the **West Virginia Trial Court Rules.**

This motion shall come on for hearing on **Friday, March 30, 2012, at 1:30 p.m.**, in the courtroom of the Marshall County Courthouse, Moundsville, West Virginia.

It is so ORDERED.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered this 20th day of January, 2012.

DAVID W. HUMMEL, SR., CHIEF JUDGE

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,
PLAINTIFFS,

VS. **// CIVIL ACTION NO. 03-C-49H**

PEABODY HOLDING COMPANY, *et al.*,
DEFENDANTS.

ORDER

On April 12, 2010, the Defendant, Nalco Company, by counsel, filed "*Defendant Nalco Company's Motion for Summary Judgment Against Plaintiff, Alfred Price,*" along with a memorandum of law and exhibits in support thereof.

All counsel of record in this matter that are in opposition to the present motion may respond within the time period allotted by the Court.

A response may be filed on or before February 24, 2012.

A reply may be filed on or before March 16, 2012.

A single courtesy copy shall be provided to the Court in accordance with **Rule 6.03** of the **West Virginia Trial Court Rules.**

This motion shall come on for hearing on **Friday, March 30, 2012, at 1:30 p.m.**, in the courtroom of the Marshall County Courthouse, Moundsville, West Virginia.

It is so ORDERED.

The Clerk shall transmit a copy of this Order to all counsel of record.

Entered this 20th day of January, 2012.

DAVID W. HUMMEL, JR., CHIEF JUDGE

FAX

DAVID W. HUMMEL, JR., JUDGE
Marshall County Courthouse
Seventh Street
Moundsville, WV 26041
Phone (304) 845-3505
Fax (304) 845-2522

TO: Pethry Counsel

FAX NUMBER:

COMMENTS:

3-Pages

If you do not receive all the pages, please call back as soon as possible. Office Phone - (304) 845-3505.

TELECOPIER OPERATOR: [redacted]

DATE: 8.16.12

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

DENVER PETTRY, *et al.*,

Plaintiffs,

v.

CIVIL ACTION NO. 06-C-124M
(Transferred from Boone County)
Judge David W. Hummel

PEABODY HOLDING COMPANY, *et al.*,

Defendants.

ORDER CONFIRMING INTENT TO PROCEED

On July 16, 2012, this Court entered its ***Notice of Intent to Proceed*** relative to the above-styled civil action. Same said notice was entered by this Court following its receipt and review of a ***Notice of Automatic Stay*** filed by counsel for Defendant, Patriot Coal Corp. and its affiliated companies (i.e. Eastern Associated Coal, LLC) herein.

In the notice, the Court advised, in pertinent part, as follows:

> Accordingly, it is the **EXPRESS INTENT** of this Court to proceed in the instant civil action relative to all parties and all causes of action, with the exception of any which may relate to Defendant, Patriot Coal Corp. and its affiliated companies.
>
> It is the **ORDER** of this Court that written objections and exceptions to the foregoing, if any, shall be made on or before Tuesday, July 24, 2012, with copies forwarded directly to the undersigned, via facsimile @ (304) 845-2522.

On July 24, 2012, Plaintiffs, by counsel, filed a pleading setting forth their collective objections to the ***Notice of Intent to Proceed.*** Thereafter and in response to Plaintiffs' filing, Defendants Nalco, Cytec and BASF filed their respective pleadings setting forth their collective support and affirmation of the Court's intent to proceed.

Oral argument would not substantially assist the Court in its decisional process.

The Court has studied and reviewed all memoranda in opposition to as well as in favor of proceeding with the litigation of the instant civil action; any and all exhibits submitted by the parties; considered all papers of record; and reviewed the pertinent legal authorities. As a result of these deliberations, and for the reasons set forth in the ***Notice of Intent to Proceed*** as well as Defendants' filings, it is the considered opinion of this Court that the instant civil action should only be stayed as it relates to Defendant, Patriot Coal Corp. and its affiliated companies and proceed as to all others.

Accordingly, it is the **ORDER** of this Court that the ***Notice of Intent to Proceed*** be and hereby is **CONFIRMED.** Furthermore, that the instant civil action relative to all parties and all causes of action, with the exception of any which may relate to Defendant, Patriot Coal Corp. and its affiliated companies (i.e. Eastern Associated Coal, LLC) shall proceed.

The Clerk of this Court shall, in accord with W.Va. R.Civ.P. 77(d), transmit a copy of this Order to all counsel of record.

Entered: August 16, 2012.

DAVID W. HUMMEL, SR.
Chief Judge