

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

In re:

PATRIOT COAL CORPORATION, *et al.*,

Debtors.

Chapter 11

Case No. 12-51502-659

(Jointly Administered)

Hearing Date: October 22, 2013

Hearing Time: 10:00 a.m. Central

Location: Courtroom 7-N, St. Louis

**NOTICE OF FILING SUPPLEMENTAL EXHIBITS THAT FAILED TO LINK TO
CLAIMANTS' OMNIBUS RESPONSE IN OPPOSITION TO DEBTORS'
SEVENTEENTH OMNIBUS OBJECTION TO CLAIMS AND
NOTICE OF INABILITY TO LOCATE DEBTORS' SEVENTEENTH OMNIBUS
OBJECTION TO CLAIMS TO LINK TO ON THE CM-ECF SYSTEM
(Debtors' Objection Filed September 20, 2013, Objecting to Pettry Litigation Claims)**

Petry Litigation Claimants (the "Pettry Claimants"), respectfully file this notice to accompany the filing of two exhibits that would not link to their earlier-filed Omnibus Response in Opposition (the "Response") [Dkt. 4791] to the "Debtors' Seventeenth Omnibus Objection to Claims" (the "Objection") [Dkt. 4670]. In addition, Pettry Claimants give notice that their counsel was unable to link the Response to the Debtors' Objection on the CM-ECF system because the Objection and its associated document number did not appear on the list of docket entries as an option for linkage at approximately 3:00 p.m., prevailing Central time, on October 15, 2013. In order to be sure the Response was filed timely in opposition to the Objection, and in light of the fact that the Response could not be filed without being linked to a document then showing on the list of docket entries, counsel for the Pettry Claimants opted to link the Response to the Order [Dkt. 4667] that granted counsel's "Verified Motion For Admission *Pro Hac Vice*" [Dkt. 4658]. That action permitted counsel to timely file the Response at 3:04 p.m., prevailing Central time.

A few minutes later, at approximately 3:15 p.m., prevailing Central time, counsel for the Pettry Claimants discussed the above-referenced issues and problems with Mr. Steve Cruse, who works in the office of Case Initiation & Administration at the USBC-EDMO. Mr. Cruse opined that the Objection [Dkt. 4670] might have mistakenly been removed. He also stated that it would be permissible for counsel to file the exhibits that would not attach as supplemental filings, with a short memorandum/notice accompanying the filing. This notice is intended to explain these matters for the benefit of the parties involved, the court and its staff, and the CM-ECF clerical staff who might be otherwise confused about the Omnibus Response filed in opposition to the Debtors' Objection. Counsel stands ready and willing to take whatever further action may be necessary to rectify any filing errors related to this matter and apologizes to all for the confusion.

By way of further explanation, the two exhibits being filed today are Exhibit G and some missing pages from Exhibit O. Exhibit O is a 78-page document. The five missing pages should be inserted as pages 56-60 in the page sequence of Exhibit O.

Respectfully submitted,

/s/ Thomas F. Basile
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Counsel for the Pettry Claimants

Certificate of Service

I, Thomas F. Basile, hereby certify that on the 16th day of October, 2013, a true and exact copy of the foregoing "***Notice Of Filing Supplemental Exhibits That Failed To Link To Claimants' Omnibus Response In Opposition To Debtors' Seventeenth Omnibus Objection To Claims And Notice Of Inability To Locate Debtors' Seventeenth Omnibus Objection To Claims To Link To On The CM-ECF System***" 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:

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

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;

- 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

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 DENYING PLAINTIFFS' RULE 59 MOTION TO ALTER OR AMEND
JUDGMENT AND RULE 60 MOTION FOR RELIEF FROM JUDGMENT**

Pending before this Court is *Plaintiffs' Rule 59 Motion to Alter or Amend Judgment and Rule 60 Motion for Relief from Judgment* ("Plaintiffs' Motions"). Upon the Court's consideration of the parties' written and oral arguments and the record in this case, the Court has made the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. Between January 2010 and 2012, Defendants BASF Corporation, Cytec Industries Inc., Nalco Company, Eastern Associated Coal Corporation, Goals Coal Company, Massey Coal Services, Peabody Coal, Performance Coal Company, and Bandytown Coal Company filed various motions for summary judgment pertaining to the Plaintiffs identified in Paragraph 7 of the Court's January 11, 2013 *Order Granting Defendants' Motions for Summary Judgment and Dismissing All Remaining Claims with Prejudice* ("Court's January 11, 2013 Order").

2. Many of these motions were set for hearing on March 30, 2012, yet Plaintiffs filed no written responses. Rather, Plaintiffs filed on March 20, 2012, 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 Order ("Motion to Continue/Stay") asking the Court to delay ruling on the dispositive motions.

3. At the March 30, 2012 hearing, the Court heard argument on Plaintiffs' Motion to Continue/Stay¹ and, over Defendants' objections, the Court: (a) declined to rule on the then pending dispositive motions (the Court later set a hearing on the dispositive motions for October 30, 2012, which was later continued to November 9, 2012); (b) afforded Plaintiffs the time they sought to conduct additional, related discovery (with a deadline of July 12, 2012 established for discovery related to the dispositive motions); and (c) set a July 30, 2012 deadline for the filing of written responses to the dispositive motions.

4. Defendants subsequently filed and/or joined in additional motions for summary judgment against additional plaintiffs on a number of additional substantive legal grounds in June and August, 2012. These motions were also set for argument October 30, 2012, and continued to November 9, 2012.

5. **Plaintiffs again failed to file any written responses to any of the pending dispositive motions**, and Plaintiffs failed to appear at the November 9, 2012 hearing, without adequate notice or excuse to the Court, and without filing a motion for an additional continuance.

6. At the November 9, 2012 hearing, the Court found that all the dispositive motions were "well founded [and] supported by the record" and, accordingly, granted the same.

7. Also at the November 9, 2012 hearing, the Court dismissed all remaining claims as a sanction for Plaintiffs' history of litigation misconduct. The Court took this later action *sua sponte* and pursuant to its "inherent power to do all things that are reasonably necessary for the

¹ Also at the March 30, 2012 hearing, Plaintiffs' counsel offered some oral argument about injuries/diagnoses received by two particular plaintiffs (Mr. Pettry and Mr. Gunnoe) after the filing of this litigation. While no effort was made to authenticate or admit the medical evidence discussed by Plaintiffs' counsel at the March 30, 2012 hearing, in light of the West Virginia Supreme Court of Appeals' ruling in *Goodwin v. Bayer Corp.*, 218 W.Va. 215, 624 S.E.2d 562 (2005), Plaintiffs' failure to offer any properly admissible evidence on the issue is of no consequence.

administration of justice within the scope of its jurisdiction,” which includes the authority to dismiss the litigation as a sanction for litigation misconduct. In so doing, the Court through innocent oversight inadvertently dismissed claims against Defendant Patriot Coal Corp as such had previously been stayed in or about July 2012 as a result of a bankruptcy proceeding. In light of the totality of the facts and circumstances, such dismissal, while initially erroneous, is certainly justified.

8. Per the Court’s instructions, and pursuant to Trial Court Rule 24.01, Defendants submitted a proposed order to the Court (providing for the granting of the dispositive motions and the dismissal of all remaining claims as a sanction) on December 4, 2012, and Defendants served Plaintiffs’ counsel with a copy of the same by electronic-mail and U.S. Mail.

9. Plaintiffs’ counsel sought to discuss his concerns with the proposed order with Defendants’ counsel on the fifth day of the five-day period provided by Trial Court Rule 24.01 (*i.e.*, December 11, 2012). Counsel for the parties, however, were unable to resolve their disagreements during the December 11, 2012 consultation.

10. Later on December 11, 2012, Plaintiffs’ counsel filed *Plaintiffs’ Notice of Objections to Proposed Order and Motion for Stay of Entry of Said Order Until the Process Provided for Trial Court Rule 24 Regarding the Airing of Objections Can Be Completed* (“Plaintiffs’ Notice of Objections”).

11. Despite Trial Court Rule 24.01’s directive that “if the [non-drafting party’s] conflict cannot be resolved [by conferring with the drafting party], counsel having an objection shall promptly submit a proposed order to the judicial officer and opposing counsel as set forth in [Trial Court Rule 24.01(c)] along with a letter to the judicial officer, indicating the reason for the change(s)[.]” *and* despite the absence of any opposition from Defendants, Plaintiffs’ counsel did not file an alternative order at any time.

12. After waiting one full month from Plaintiffs' counsel's filing of their Notice of Objections and not receiving an alternative proposed order as required by the Trial Court Rule, the Court entered its January 11, 2013 Order.

13. On January 28, 2013, Plaintiffs filed their *Rule 59 Motion to Alter or Amend Judgment and Rule 60 Motion for Relief from Judgment*.² The Court promptly set a briefing schedule and hearing for the Motions. Am. Order (Feb. 5, 2013).

14. Consistent with the deadlines established by the Court, Defendants filed a response brief in opposition to Plaintiffs' Motions on March 13, 2013, and Plaintiffs filed a reply in support of their Motions on March 22, 2013.

15. A hearing on Plaintiffs' Motions was held on March 26, 2013, at which time both Plaintiffs and Defendants were provided with an opportunity to present oral argument in support of their respective positions.

16. Plaintiffs had the further opportunity to raise all issues or concerns they had with the Court's January 11, 2013 Order through their Rule 59 and Rule 60 Motions, the multiple written briefs submitted in support thereof, and oral argument presented at the March 26, 2013 hearing.

17. Each issue raised by Plaintiffs has been fully considered by the Court, including Plaintiffs' contention that West Virginia law affords them a right to notice and opportunity to respond before the imposition of sanctions.

II. CONCLUSIONS OF LAW

Standard for Relief under Rule 59(e)

18. Rule 59(e) of the West Virginia Rules of Civil Procedure provides that "[a]ny motion to alter or amend the judgment shall be filed no later than 10 days after entry of the judgment." The West Virginia Supreme Court of Appeals has elaborated that:

² The Court's January 11, 2013 Order has been stayed during the entirety of the time that Plaintiffs' Motion has been pending.

A Rule 59(e) motion may be used to correct manifest errors of law or fact, or to present newly discovered evidence. A motion under Rule 59(e) is not appropriate for presenting new legal arguments, factual contentions, or claims that could have previously been argued. While Rule 59(e) does not itself provide a standard under which a circuit court may grant a motion to alter or amend, other courts and commentators have set forth the grounds for amending earlier judgments. For instance, the *Litigation Handbook on West Virginia Rules of Civil Procedure* states that a Rule 59(e) motion should be granted where: “(1) there is an intervening change in the controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice.” . . . Under Rule 59(e), the reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.

Mey v. Pep Boys-Manny, Moe & Jack, 228 W. Va. 48, 717 S.E.2d 235, 243-4 (2011) (internal citations omitted).

19. The West Virginia Supreme Court of Appeals has further noted that “Rule 59(e) is not a vehicle for a party to undo his/her own procedural failures or to advance arguments that could have been presented to the trial court prior to judgment.” *Corporation of Harpers Ferry v. Taylor*, 227 W. Va. 501, 506, 711 S.E.2d 571, 576 (2011), citing Franklin D. Cleckley, Robin J. Davis, Louis J. Palmer, Jr., *Litigation Handbook on the West Virginia Rules of Civil Procedure*, § 59(e), at 1179 (3rd ed. 2008).

Standard for Relief under Rule 60(b)

20. West Virginia Rule of Civil Procedure 60(b) provides, in relevant part:

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; (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) the judgment is void; (5) 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