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

DEBTORS' SEVENTEENTH OMNIBUS OBJECTION TO CLAIMS
(Pettry Litigation Claims)

Patriot Coal Corporation and its affiliated debtors (the "Debtors"), pursuant to 11 U.S.C. § 502 and Fed. R. Bankr. P. 3007, respectfully file this Seventeenth Omnibus Objection to Claims (the "Objection"). In support of this Objection, the Debtors show the Court as follows:

Relief Requested

1. By this Objection, the Debtors object to certain claims listed on Exhibit A attached hereto (the "Claims") because the Claims arise from certain litigation determined adversely to the claimants in West Virginia state court. 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. **Parties receiving this Objection should locate their names on the attached exhibit.** Any response to this Objection should include, among other things, (i) an appropriate caption, including the title and date of this Objection; (ii) the name of the claimant, both the EDMO and GCG claim numbers of the claim that the Debtors are seeking to disallow or modify, and a description of the basis for the amount claimed; (iii) a concise statement setting forth the

reasons why the Court should not sustain this Objection, including, but not limited to, the specific factual and legal bases upon which the claimant relies in opposing this Objection; (iv) copies of any documentation and other evidence which the claimant will rely upon in opposing this Objection at a hearing; and (v) the name, address, telephone number and facsimile number of a person authorized to reconcile, settle or otherwise resolve the claim on the claimant's behalf. A claimant that cannot timely provide such documentation and other evidence should provide a detailed explanation as to why it is not possible to timely provide such documentation and other evidence.

Jurisdiction

3. This Court has jurisdiction over this Objection under 28 U.S.C. § 1334. Venue of this proceeding is proper pursuant to 28 U.S.C. § 1409. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

4. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Background

5. The Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on July 9, 2012 (the "Petition Date") in the United States Bankruptcy Court for the Southern District of New York.

6. On December 19, 2012, the Debtors' cases were transferred to the United States Bankruptcy Court for the Eastern District of Missouri [Dkt. No. 1789].

7. The bar date for filing proofs of claim was December 14, 2012 [Dkt. No. 1388].

8. On March 1, 2013, the Court entered its Order Establishing Procedures for Claims Objections [Dkt. No. 3021].

Objection and Argument

9. Each of the Claims listed on Exhibit A arises from certain litigation filed in the Circuit Court of Marshall County, West Virginia, styled Denver Pettry, et al. v. Peabody Holding Company, et al., Civil Action No. 06-C-124M (the "Litigation"). One Debtor, Eastern Associated Coal Corporation, is among the defendants. Each Claim listed on Exhibit A was filed by a plaintiff in the Litigation.

10. Filed in 2002, the Litigation is centered on the plaintiffs' allegation that they were exposed to a variety of chemical products in their respective workplaces, and that they suffered injuries as a result of such exposures.

11. After a years-long discovery process, the defendants in the Litigation filed various motions for summary judgment. On January 11, 2013, the Marshall County court entered an order granting all of the defendants' motions for summary judgment and dismissing all remaining claims with prejudice. A certified copy of the order is attached hereto as Exhibit B.

12. After entry of the order dismissing all claims, the plaintiffs filed a motion to alter or amend the judgment and a motion for relief from judgment, which the Marshall County court denied on April 22, 2013. A certified copy of the order denying that motion is attached hereto as Exhibit C.

13. By this Objection, the Debtors respectfully request that this Court disallow the Claims. Because the Marshall County court dismissed all claims in the Litigation on the merits,

the claimants have no basis for maintaining the Claims in the Debtors' bankruptcy cases or otherwise pursuing any recovery from the Debtors' estates.

14. Pursuant to 28 U.S.C. § 1738, a federal court must give the same preclusive effect to a state-court judgment that another court in that particular state would give it. The Supreme Court has stated that Section 1738 directs a federal court "to refer to the preclusion law of the state in which the judgment was entered." In re Asbury, 195 B.R. 412, 415 (Bankr. E.D. Mo. 1996) (citing Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985)).

15. Pursuant to the doctrine of res judicata, the claimants are bound by the Marshall County court's determination of the invalidity of their claims, and they cannot seek reconsideration of the claims in this Court. Under West Virginia law, an adjudication by a court having jurisdiction of the subject matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject matter of the action. State ex rel. Richey v. Hill, 603 S.E.2d 177, 183 (W. Va. 2004) (citing Sayre's Administrator v. Harpold, 11 S.E. 16 (W. Va. 1890)). "It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits." Id. Here, because the Litigation has been dismissed, the Claims, which are based entirely on the underlying Litigation, should be disallowed as a matter of res judicata. Even if the plaintiffs believe that the Marshall County decision was erroneous, the state court's order remains final and preclusive. See Burgess v. Corporation of Shepherdstown, No. 3:11-CV-109, 2012 WL 6681875 (N.D. W. Va. Dec. 21, 2012).

16. Moreover, under the Rooker-Feldman doctrine, this Court does not have the power to disagree with the Marshall County court's determination of the Litigation. Under that doctrine, inferior federal courts lack subject-matter jurisdiction over "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." In re Athens/Alpha Gas Corp., 715 F.3d 230, 234 (8th Cir. 2013). See generally Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Thus, in any contested matter involving the validity of the Claims, this Court would not have jurisdiction to reach a conclusion.

17. Here, the Marshall County court's dismissal of the Litigation calls for the application of Rooker-Feldman because the state court made its decision after affording the plaintiffs substantial time for discovery and opportunity to prosecute their claims. Because that court determined that the claims in the Litigation had no merit and that summary judgment in favor of the defendants – including Debtor Eastern Associated Coal Corporation – was appropriate, this Court, pursuant to Rooker-Feldman, is barred from reviewing the merits of the state court's judgment.

WHEREFORE, the Debtors respectfully request that this Court:

(a) disallow the Claims; and

(b) grant such other and further relief as is just and proper.

Dated: September 20, 2013
St. Louis, Missouri

Respectfully submitted,

BRYAN CAVE LLP

/s/ Brian C. Walsh

Lloyd A. Palans, #22650MO
Brian C. Walsh, #58091MO
Laura Uberti Hughes, #60732MO
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
Fax: (314) 259-2020

Local Counsel to the Debtors and Debtors in Possession

-and-

DAVIS POLK & WARDWELL LLP

Marshall S. Huebner
Damian S. Schaible
Brian M. Resnick
Michelle M. McGreal

450 Lexington Avenue
New York, New York 10017
(212) 450-4000
Fax: (212) 607-7983

Counsel to the Debtors and Debtors in Possession

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

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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

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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.

EXHIBIT B

Order of January 11, 2013

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

FILED

2013 JAN 11 PM 4:37

DAVID R. EALY

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.

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[1] 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.

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[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.

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[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).

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[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

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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.'

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.

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[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

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[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.[10] 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[11] 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.

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[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 Harvey 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.

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[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 arc 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

[n] 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

EXHIBIT C

Order of April 22, 2013

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/Stay[1] 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

> 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.

Certified by me this 17th day of Sept, 2013
Marge Kilbraw Deputy