

COMMONWEALTH OF KENTUCKY
22nd JUDICIAL DISTRICT
FAYETTE COUNTY CIRCUIT COURT
DIVISION 9th

KNOX CREEK COAL CORPORATION,

THE BLACK DIAMOND COMPANY,

and

A.T. MASSEY COAL COMPANY, INC.,

Plaintiffs,

v.

Civ. Action No.: 07-CI-3229

WYATT, TARRANT & COMBS, LLP
Serve via certified mail return receipt requested:
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JURY DEMAND REQUESTED

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MCGUIRE WOODS LLP

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Thomas E. Spahn

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Defendants.

COMPLAINT

Plaintiffs Knox Creek Coal Corporation, successor-in-interest to the United Coal Company ("Knox Creek"), The Black Diamond Company, successor-in-interest to the Wellmore Coal Corporation ("Black Diamond"), and A.T. Massey Coal Company, Inc., corporate parent of Knox Creek ("Massey") (collectively, the "Plaintiffs"), by and through their undersigned counsel, hereby file their claims for negligence (legal malpractice), breach of contract and breach of fiduciary duty against the law firms ("Law Firm Defendants") and attorneys who represented Plaintiffs in the lawsuit styled *Harman Mining Corporation, et al. v. Wellmore Coal Corporation*, (the "Virginia Action"),

filed in the Circuit Court of Buchanan County, Virginia, and state as follows:

I. Parties

1. Plaintiff Massey is a corporation organized under the laws of the Commonwealth of Virginia with a principal place of business located at 4 North Fourth Street, Richmond, Virginia. Massey is the fourth-largest coal producer by revenues in the United States and the corporate parent of Plaintiff Knox Creek, formerly the United Coal Company.

2. Plaintiff Knox Creek is a corporation organized under the laws of the Commonwealth of Virginia with a principal place of business located at the intersection of U.S. Route 460 West and State Route 687, Red Ash, Virginia 24640. Knox Creek is a wholly-owned subsidiary of Plaintiff Massey and successor-in-interest to the United Coal Company, the former owner and indemnitor of certain liabilities of the Wellmore Coal Corporation.

3. Plaintiff Black Diamond is a corporation organized under the laws of the Commonwealth of Virginia with a principal place of business located at 2700 Lee Highway, Bristol, Virginia 24202. Black Diamond is the successor-in-interest to the Wellmore Coal Corporation ("Wellmore"). Wellmore, formerly owned by Massey through corporate intermediaries, was reorganized as Black Diamond after Massey sold it to the Rapoca Group, LLC, in February 1998.

4. Defendant Wyatt, Tarrant & Combs LLP ("Wyatt Tarrant") is a limited liability partnership organized under the laws of Kentucky, with an office and principal place of business located at 250 West Main Street, Suite 1600, Lexington, Kentucky. Wyatt Tarrant represented Plaintiffs as lead counsel in the Virginia Action, though Wellmore was the named as the sole defendant.

5. Defendants Richard Ward and Jeff Woods, together with any as yet unnamed present or former Wyatt Tarrant attorneys (hereinafter the "Wyatt Tarrant John Doe Attorneys 1-10"), were attorneys-at-law at Wyatt Tarrant in its Lexington, Kentucky office, and represented Plaintiffs in the

Virginia Action (collectively, the “Individual Wyatt Tarrant Defendants”; together with Wyatt Tarrant, the “Wyatt Tarrant Defendants”). Upon information and belief, the Individual Wyatt Tarrant Attorneys reside in or around Fayette County, Kentucky.

6. At all relevant times, while Wyatt Tarrant represented Plaintiffs in the Virginia Action, it also represented Massey and certain of its corporate subsidiaries and affiliates¹ (the “West Virginia Defendants”) in a related case styled *Caperton, et al., v. A.T. Massey et al.*, filed in the Circuit Court of Boone County, West Virginia (the “West Virginia Action”).

7. Defendant McGuireWoods, LLP (“McGuireWoods”) is a limited liability partnership organized under the laws of the Commonwealth of Virginia with a main office and principal place of business located at One James Center, 901 East Cary Street, Richmond, Virginia 23219. Defendant Wyatt Tarrant retained McGuireWoods to serve as Plaintiffs’ local counsel for the appeal of the Virginia Action. At all relevant times, McGuireWoods acted as an agent of Wyatt Tarrant in connection with its representation of Plaintiffs in the Virginia Action.

8. Defendants Duncan Getchell and Thomas Spahn, together with any as yet unnamed present or former McGuireWoods attorneys (hereinafter the “McGuireWoods John Doe Attorneys 1-10”), were attorneys-at-law at McGuireWoods in its Richmond and McLean, Virginia, offices, respectively, and were retained by Wyatt Tarrant to represent Plaintiffs in the appeal of the Virginia Action (collectively, the “Individual McGuireWoods Attorneys”; together with McGuireWoods, the “McGuireWoods Defendants”). Upon information and belief, the Individual McGuireWoods Attorneys are residents of the Commonwealth of Virginia.

9. Plaintiffs do not know the true names and capacities of the defendants named herein as Wyatt Tarrant John Doe Attorneys 1 through 10 or McGuireWoods John Doe Attorneys 1 through

¹ Massey’s wholly-owned affiliates and subsidiaries named in the West Virginia Action were the Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Performance Coal Company, and Massey Coal Sales Company, Inc.

10, and therefore sue such John Doe Attorneys by fictitious names. The fictitiously-named defendants were at all relevant times attorneys-at-law at the respective Law Firms and took part in the representation of Plaintiffs in the Virginia Action. Plaintiffs will amend this Complaint to add their true names and capacities when they become known.

II. Jurisdiction and Venue

10. Personal jurisdiction is proper over the Wyatt Tarrant Defendants because they are citizens of, or reside in, the Commonwealth of Kentucky.

11. Personal jurisdiction is proper over the McGuireWoods Defendants based on Kentucky's long-arm statute, K.R.S. § 454.210(2)(a)(1), (2) & (9). The McGuireWoods Defendants transacted business in Kentucky with the Wyatt Tarrant Defendants upon being retained as Plaintiffs' local counsel in the Virginia Action, and/or contracted to supply legal services in Kentucky with the Wyatt Tarrant Defendants. Upon information and belief, the McGuireWoods Defendants, individually and through their agents, also regularly conduct or solicit business, engage in other persistent courses of conduct, or derive substantial revenues from legal services rendered in Kentucky.

12. Pursuant to K.R.S. §§ 454.210(4), 452.460, and/or 452.480, venue is proper in this Court because the Wyatt Tarrant Defendants work or reside in Fayette County, Kentucky, and, as to the McGuireWoods Defendants, part of Plaintiff's cause of action for legal malpractice arose in Lexington, Kentucky.

III. Facts Common to All Counts

A. Background of the Virginia Action

13. Wellmore (now Black Diamond) was, at all relevant times, a coal company owned by Massey through Knox Creek (formerly, the United Coal Company).

14. Since the 1980s, Wellmore supplied coal to LTV Steel Company ("LTV"), primarily for use at its Pittsburgh coke plant (the "Plant"). The coal supplied to LTV was produced by Wellmore's coal mines as well as the mines of third-party suppliers, including Sovereign Coal Sales, Inc., and the Harman Mining Corporation (together, "Harman" or the "Virginia Action Plaintiffs").

15. On April 15, 1992, Harman and Wellmore entered into a coal supply agreement ("1992 Agreement") whereby Wellmore agreed to purchase coal mined by Harman. The coal supplied to Wellmore was used to provide for contracts including, *inter alia*, those with LTV.

16. In 1997 Harman and Wellmore renegotiated the 1992 Agreement, and a new agreement ("1997 Agreement") was signed March 6, 1997.

17. Unknown at the time of the 1997 Agreement, the U.S. Environmental Protection Agency ("EPA") had issued a Notice of Violation, also dated March 6, 1997, to LTV for excessive air emissions at the Plant. As a result of EPA's actions, LTV announced on July 14, 1997, that it intended to close the Plant.

18. On August 5, 1997, Wellmore notified Harman that if LTV indeed shut down the Plant, this would constitute a force majeure event under the 1997 Agreement, and Wellmore would be excused from purchasing a portion of the predetermined supply of coal.

19. Article 8.1 of the 1997 Agreement excused both parties from their contractual obligations under a number of circumstances, such as labor disputes, material shortages, floods, and plant breakdowns. The clause went beyond the usual terms of force majeure and also provided that the parties could suspend shipments when customers were affected by actions of third parties, such as EPA's actions which forced LTV to close the Plant.

20. On December 1, 1997, once the LTV Pittsburgh operation was conclusively set to close due to EPA's actions, Wellmore expressly declared force majeure and notified Harman that, beginning January 1, 1998, it would reduce the annual tonnage it accepted from Harman.

21. Harman continued to ship coal to Wellmore until January 21, 1998.

22. In May 1998, Harman filed for bankruptcy and brought the Virginia Action against Wellmore in the Circuit Court of Buchanan County, Virginia. Massey, through Knox Creek, retained the Wyatt Tarrant Defendants to represent Plaintiffs as lead counsel in the Virginia Action.

23. In the Virginia Action, Harman alleged breach of contract and bad faith, centering around whether Wellmore's decision to stop purchasing coal from Harman was properly excused by a force majeure event. Harman voluntarily withdrew the bad faith claim in January 2000.

24. In October 1998, Harman and related parties initiated the West Virginia Action against the West Virginia Defendants. In contrast to the Virginia Action, which was a direct action against Wellmore for allegedly breaching the 1997 Agreement, the West Virginia Action sought to hold the West Virginia Defendants liable for allegedly conspiring to cause Wellmore to breach the 1997 Agreement with Harman.

25. In 1998, Massey, through Knox Creek, engaged Wyatt Tarrant and its agents, partners and/or employees to represent Massey and Wellmore as lead counsel in the Virginia Action. Massey also engaged Wyatt Tarrant, its agents, partners and/or employees to represent Massey and the other West Virginia Defendants as lead counsel in the West Virginia Action, and to do so in a coordinated manner with the Virginia Action.

26. Part or all of the contract negotiations between Plaintiffs and Wyatt Tarrant pertaining to Wyatt Tarrant's engagement as lead counsel in the Virginia and West Virginia Actions occurred in Lexington, Kentucky.

27. As lead counsel in the Virginia Action, Wyatt Tarrant retained McGuireWoods to serve as local counsel for the appeal. Thus, even though there was an attorney-client relationship between Plaintiffs and McGuireWoods, McGuireWoods was controlled and directed by Wyatt Tarrant as its agent. A principal-agent relationship therefore existed between Wyatt Tarrant and McGuireWoods.

B. Trial in the Virginia Action

28. The Virginia Action was bifurcated into separate liability and damages phases.

29. In March 2000, a five-day trial took place on the subject of liability.

30. The trial court found that the key issue in determining liability was whether or not a true force majeure event had occurred.

31. Despite both parties' stipulation to the contrary, the trial court determined that force majeure was a fact issue to be presented to the jury as opposed to a legal issue to be decided by the trial court.

32. During the liability phase, the trial court erroneously permitted Harman management to testify as to whether they believed force majeure had in fact occurred.

33. In the jury instructions, the trial court also erroneously provided a definition of "force majeure" that conflicted with the definition specified in the 1997 Agreement.

34. Consequently, due to these errors, at the end of the liability portion of the trial, the jury found that no force majeure event had occurred, and Wellmore had improperly breached the 1997 Agreement.

35. The damages trial began in August 2000 and lasted eight days.

36. Previously, the trial court had ruled that lost profits for a single year would be the proper measure of damages for the breach of contract with Harman. Accordingly, to be entitled to damages, Harman had to show that the supply of coal to Wellmore under the 1997 Agreement would have generated a profit.

37. During the damages phase, Harman provided an inaccurate and flawed assessment of its financial health suggesting that, even though it had experienced significant financial difficulty in successive prior years, it would have turned a significant profit in 1998 under the 1997 Agreement.

38. The Wyatt Tarrant Defendants, representing Plaintiffs, therefore prepared to present evidence, including certain documentary evidence, rebutting Harman's inaccurate and flawed damages assessment.

39. In preparing rebuttal evidence, the Wyatt Tarrant Defendants retained Professor James Freeman, a tenured economics professor at the Gatton College of Business & Economics at the University of Kentucky, to testify as Wellmore's damages expert.

40. Professor Freeman was prepared to testify to a number of specific factual inconsistencies and illogical conclusions to aid the jury in their understanding of Harman's expert reports.

41. Taken together, this evidence would have directly refuted Harman's position that its business was improving and would have turned a profit at the time the force majeure notice was issued.

42. The trial court, however, erroneously excluded all of Wellmore's rebuttal evidence and refused to qualify and permit Wellmore's expert to testify allegedly because he was not "licensed" in Virginia.

43. The court also erroneously denied Wellmore's request to recall its expert CPA, Thomas Hicok, to testify in lieu of Professor Freeman.

44. As a result of the court's erroneous rulings during the damages phase of the trial, Wellmore was left with little evidence to rebut Harman's damages case, and Harman's damages expert testified virtually un rebutted.

45. The jury ultimately returned a \$6 million verdict in favor of Harman, and the trial court entered final judgment on May 7, 2001.

C. Appeal to the Virginia Supreme Court

46. Pursuant to Rule 1A:4 of the Rules of the Supreme Court of Virginia, any attorney signing a notice of appeal must be a member of the Virginia Bar.

47. Pursuant to Rule 5:9(a) of the Rules of the Supreme Court of Virginia, the Defendants had 30 days from the date of the final court order to file a Notice of Appeal.

48. On June 5, 2001, Defendants filed Wellmore's Notice of Appeal with the Clerk for the Circuit Court of Buchanan County. However, only Defendant Woods, a Kentucky lawyer unlicensed in Virginia, signed the Notice.

49. The Notice of Appeal, which was not signed by a Virginia attorney, did not comply with the Rules of the Supreme Court of Virginia and therefore was invalid.

50. Subsequently, on April 2, 2002, Defendants submitted Wellmore's Petition for Appeal, in which they requested that the Virginia Supreme Court "reverse and remand" the decision of the Circuit Court.

51. In prior drafts of Wellmore's Petition for Appeal, however, Defendants had requested that, in addition to "reverse and remand," the Supreme Court "reverse and render final judgment."

52. Defendants changed the relief sought in Wellmore's Petition for Appeal that was actually filed without informing Plaintiffs and did so in bad faith with the intention of making it more difficult for Plaintiffs to assert a legal malpractice claim against them.

53. On April 30, 2002, counsel for Harman filed its Brief in Opposition to Wellmore's Petition for Appeal asking the Virginia Supreme Court to dismiss Wellmore's appeal on the basis of the invalid Notice of Appeal.

54. On September 13, 2002, the Virginia Supreme Court dismissed Wellmore's appeal due to the Defendants' failure to file a valid notice of appeal within the time required under Rule 5:9(a) of the Virginia Supreme Court Rules.

55. On November 1, 2002, the Virginia Supreme Court denied Wellmore's motion for rehearing.

56. Massey, by and through Knox Creek, has since paid the \$6 million judgment in the Virginia Action to Harman, in addition to approximately \$1 million in pre-judgment interest.

D. The West Virginia Action and Tolling Agreement

57. On June, 17, 2002, with Defendant Wyatt Tarrant as lead counsel representing Massey and its related parties, the West Virginia Action went to trial.

58. The jury ultimately rendered a verdict against Massey and its related parties on August 1, 2002, in an amount of just over \$50 million.

59. The Virginia verdict on Harman's breach of contract claim in the Virginia Action had a direct and preclusive effect on the West Virginia verdict.

60. Wyatt Tarrant filed post-trial motions on August 30, 2002. On March 15, 2005, the trial court in the West Virginia Action overruled these motions, and upheld the judgment.

61. With judgment in the West Virginia Action pending, effective July 15, 2003, Plaintiffs and Defendants entered into an agreement to toll any applicable statutes of limitations ("Tolling Agreement").

62. Although not a signing party, Plaintiff Massey was an intended third-party beneficiary of the Tolling Agreement.

63. The express purpose of the Tolling Agreement was to toll applicable statutes of limitation governing Plaintiffs' claims against the Law Firms for the shorter of three years or until after the appeal in West Virginia Action was resolved because the parties understood that the outcome of the West Virginia Action was relevant to the Plaintiffs' claims concerning the malpractice that occurred in the Virginia Action.

64. In 2006, with the West Virginia Action appeal still pending, Plaintiffs and Defendants entered into an extension of the Tolling Agreement for an additional year, or until July 15, 2007. Plaintiff Massey also was an intended third party beneficiary of the extension to the Tolling Agreement.

65. On April 5, 2007, the West Virginia Supreme Court, by a vote of five to none, agreed to hear the appeal in the West Virginia Action and has set the matter for oral argument on October 10, 2007.

**COUNT I: NEGLIGENCE/LEGAL MALPRACTICE
(All Defendants)**

66. The allegations contained in paragraphs 1 through 65 are incorporated by reference as if fully set forth herein.

67. An attorney-client relationship existed between Plaintiffs and Defendants with regard to the Virginia Litigation.

68. An attorney-client relationship existed between Massey and the Wyatt Tarrant Defendants because the Wyatt Tarrant Defendants agreed to, and in fact did, provide Massey with legal advice and coordinated representation in both the Virginia and the West Virginia Actions.

69. An attorney-client relationship also existed between Knox Creek and Black Diamond, on the one hand, and the Wyatt Tarrant Defendants, on the other hand.

70. The Wyatt Tarrant Defendants were lead counsel for Plaintiffs in the Virginia Action.

71. The Wyatt Tarrant Defendants retained the McGuireWoods Defendants to represent Plaintiffs in the Virginia Action as local counsel for the appeal. An attorney-client relationship therefore also existed between Plaintiffs and the McGuireWoods Defendants.

72. At all relevant times, the McGuireWoods Defendants were acting in an agency capacity for the Wyatt Tarrant Defendants in the Virginia Action.

73. As a result of the attorney-client relationships between Plaintiffs and Defendants, each of the Defendants owed a duty of care and skill to Plaintiffs.

74. An attorney exercising the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances would have timely filed a valid Notice of Appeal in the Virginia Action by ensuring that a Virginia-licensed attorney signed the Notice in compliance with the Rules of the Supreme Court of Virginia.

75. Defendants negligently failed to timely and properly file the Wellmore Notice of Appeal.

76. Had Defendants timely and properly filed the Wellmore Notice of Appeal, and had Defendants not changed the relief requested from "final judgment" to "remand," which Defendants changed in bad faith in an attempt to insulate themselves from a malpractice claim, the Virginia Supreme Court would have reversed the judgment of the trial court due to its erroneous rulings at trial and entered final judgment in Wellmore's favor.

77. As a direct and proximate result of Defendants' failure to timely and properly file the Wellmore Notice of Appeal, Plaintiffs incurred a final judgment of \$6 million in the Virginia Action.

78. With Defendant Wyatt Tarrant as lead counsel in both the Virginia and West Virginia Actions, it also was reasonably foreseeable to Defendant Wyatt Tarrant that the outcome of the Virginia Action would have had a direct and preclusive effect upon the West Virginia Action.

79. As a direct and proximate result of the Wyatt Tarrant Defendants' failure to ensure that the Wellmore Notice of Appeal was timely and properly filed by their agents, the McGuireWoods Defendants, Plaintiff Massey also incurred a judgment of just over \$50 million in the West Virginia Action.

80. Consequently, for the foregoing reasons, the Law Firm Defendants are jointly and severally liable to Plaintiffs for their negligence in an amount of not less than \$56 million, plus post-judgment interest of approximately \$26 million, for their failure to timely and properly file

Wellmore's Notice of Appeal.

81. Plaintiffs also incurred substantial attorneys' fees and costs in the Virginia and West Virginia Actions, which Plaintiffs are entitled to recover in damages from the Law Firm Defendants.

82. Acting in a willful, wanton and malicious manner, Defendants changed the relief sought in Wellmore's Petition for Appeal without informing Plaintiffs.

83. Defendants did so in bad faith with the intention of making it more difficult for Plaintiffs to assert a legal malpractice claim against them.

84. Plaintiffs therefore are entitled to punitive damages against Defendants to the fullest extent permitted under the laws of this Commonwealth.

COUNT II: BREACH OF CONTRACT
(Law Firm Defendants)

85. The allegations contained in paragraphs 1 through 84 are incorporated by reference as if fully set forth herein.

86. Plaintiffs entered into an agreement with Wyatt Tarrant, whereby Wyatt Tarrant and its respective partners, agents, and employees would represent Plaintiffs in the Virginia Action.

87. Plaintiffs also entered into an agreement with McGuireWoods, whereby McGuireWoods and its respective partners, agents, and employees would represent Plaintiffs in the Virginia Action.

88. Implicit in the Law Firm Defendants' contractual undertaking to represent Plaintiffs is that the Law Firm Defendants, their respective partners, agents, and employees would exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances.

89. Pursuant to Rules 1A:4 and 5:9(a) of the Supreme Court of Virginia, Defendants had 60 days in which to properly file the Notice of Appeal in the Virginia Action.

90. The Law Firm Defendants, however, breached their implied obligation because they failed to file a valid and timely Notice of Appeal in the Virginia Action.

91. Had the Law Firm Defendants timely and properly filed the Wellmore Notice of Appeal, and had the Law Firm Defendants not changed the relief requested from “final judgment” to “remand,” which they changed in bad faith the Virginia Supreme Court would have reversed the judgment of the trial court due to its erroneous rulings at trial and entered final judgment in Wellmore’s favor.

92. As a direct and proximate result of the Law Firm Defendants’ failure to timely and properly file the Wellmore Notice of Appeal, Plaintiffs incurred a final judgment of \$6 million in the Virginia Action, plus post-judgment interest on the Virginia judgment of \$1 million, in addition to consequential damages in an amount of just over \$50 million on the West Virginia judgment, plus approximately \$25 million in post-judgment interest accrued to date.

93. Plaintiffs also incurred substantial attorneys’ fees and costs in the Virginia and West Virginia Actions, which Plaintiffs are entitled to recover in damages from the Law Firm Defendants.

94. Consequently, for the foregoing reasons, the Law Firm Defendants are jointly and severally liable to Plaintiffs for breach of contract in an amount of not less than \$82 million for their failure to timely and properly file Wellmore’s Notice of Appeal, in addition to the attorneys’ fees and costs incurred in the Virginia and West Virginia Actions.

**COUNT III: BREACH OF FIDUCIARY DUTY/CONFLICT OF INTEREST
(All Defendants)**

95. The allegations contained in paragraphs 1 through 94 are incorporated by reference as if fully set forth herein.

96. At all relevant times Defendants acted in a fiduciary relationship to the Plaintiffs as their attorneys.

97. Defendants’ fiduciary duty to Plaintiffs included the duty of loyalty to ensure they were free of conflicts of interest in representing Plaintiffs.

98. In Wellmore's Petition for Appeal, Defendants requested that the Virginia Supreme Court "reverse and remand" the decision of the Circuit Court. In prior drafts of Wellmore's Petition for Appeal, however, Defendants had requested that, in addition to "reverse and remand," the Supreme Court "reverse and render final judgment."

99. Election of such remedy was intended to insulate Defendants from a possible subsequent legal malpractice action brought by Plaintiffs.

100. Defendants neither advised Plaintiffs of the conflict of interest, nor presented them with an opportunity to consent to waiving such conflict, nor sought to withdraw from the representation.

101. Defendants changed the relief sought in Wellmore's Petition for Appeal in a willful, wanton and malicious manner with the intention of making it more difficult for Plaintiffs to assert a legal malpractice claim against them.

102. Plaintiffs therefore are entitled to punitive damages against Defendants to the fullest extent permitted under the laws of this Commonwealth.

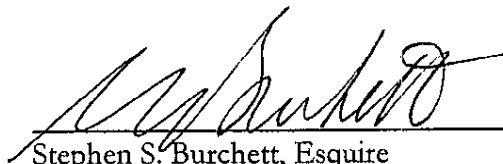
WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, as follows:

- a. Compensatory damages in the amount of no less than eighty-two million dollars (\$82,000,000.00) in judgments and post-judgment interest in the Virginia and West Virginia Action, in addition to recovery of the attorneys' fees and costs incurred in the Virginia and West Virginia Actions;
- b. Punitive damages to the fullest extent permitted by the laws of this Commonwealth;
- c. Attorneys' fees and costs incurred by Plaintiffs in connection with prosecuting this action;
- d. Prejudgment interest as permitted by law; and
- e. Such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury on all issues so triable.

Respectfully submitted,



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