

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA
WHEELING

By: Cheryl Dean Riley
I certify that the annexed instrument
is a true and correct copy of the document filed
in my office.

ATTEST: Cheryl Dean Riley
Clerk, U.S. District Court
Northern District of West Virginia

By: Rita J. Sedosky
Deputy Clerk

WILLIAM FROHNAPFEL, et al.,

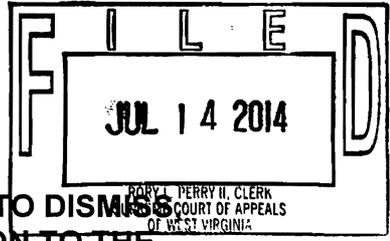
Plaintiffs,

v.

Civil Action No. 5:14-CV-45
(BAILEY)

ARCELORMITTAL WEIRTON LLC, et al.,

Defendants.



**ORDER DEFERRING DEFENDANTS' MOTION TO DISMISS
STAYING CASE, AND CERTIFYING QUESTION TO THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

Presently pending before this Court is Defendants ArcelorMittal Weirton LLC ("AM Weirton") and ArcelorMittal USA LLC's Motion to Dismiss [Doc. 7], filed April 11, 2014. Plaintiffs William and Mary Lou Frohnapfel, husband and wife, filed their Response in Opposition [Doc. 9] on April 24, 2014. Defendants filed their Reply [Doc. 19] on May 12, 2014. This matter is now ripe for decision. For the reasons set forth below, this Court **DEFERS** ruling upon defendants' Motion and **STAYS** this action pending final decision of the Supreme Court of Appeals of West Virginia, to whom this Court will **CERTIFY** a question of law.

I. Background

This action arises from plaintiff¹ William Frohnapfel's allegedly unlawful termination

¹ Throughout this opinion, this Court's use of the word "plaintiff" refers to Mr. Frohnapfel.

from his employment with AM Weirton, a tin plate manufacturer located in Weirton, West Virginia.² At the time of his termination, plaintiff's employment was governed by a collective bargaining agreement between his union, the United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, and defendant ArcelorMittal USA, AM Weirton's parent company. See [Doc. 8-1].

Prior to his termination, plaintiff worked as a Technician II Operator in AM Weirton's Environmental Control/Utilities Department. Plaintiff's department was charged with overseeing B-Outfall, a portion of AM Weirton's manufacturing operation located on the Ohio River. B-Outfall discharges hazardous byproducts from its manufacturing process directly into the Ohio River. As such, B-Outfall is governed by a permit issued under the West Virginia Water Pollution Control Act ("WPCA"), W.Va. Code §§ 22-11-1 *et seq.*, which regulates the discharge of hazardous materials at B-Outfall, imposes environmental monitoring obligations upon defendants, and requires defendants to report to the West Virginia Department of Environmental Protection ("WVDEP") regarding discharges at B-Outfall.

According to plaintiff, defendants "viewed him as a watch dog for environmental compliance and a potentially dangerous whistleblower in regard to environmental violations." Plaintiff alleges he repeatedly brought violations of defendants' WPCA permit to defendants' attention and on one occasion reported a violation to the WVDEP, causing defendants to take increasingly punitive adverse actions against him and ultimately resulting in his termination. Specifically, plaintiff alleges that:

² The following facts are summarized from plaintiff's Complaint. See [Doc. 1-1].

- In February 2009, plaintiff complained to management after being instructed to “scrape labels off barrels and replace them with new labels due to expiration issues”;
- In March 2009, plaintiff informed management that a probe was being placed in a buffer in order to conceal certain PH issues;
- In June 2010, plaintiff truthfully responded to an inquiry from the WVDEP concerning the dumping of hazardous waste and was thereafter “summoned to the Office of the Defendants’ highest ranking management official located in Weirton”;
- In November 2010, plaintiff complained regarding the inadequacy of hazardous material incident training, and was thereafter “chastised,” “disciplined,” and disqualified from receiving a promotion;
- In January 2011, plaintiff expressed concern regarding the lack of a containment area for “Prussian Blue,” a hazardous waste; and
- In June 2012, plaintiff questioned a third-party vendor’s practices associated with the removal of hazardous waste and was thereafter harshly disciplined and temporarily suspended from work.

The events immediately preceding plaintiff’s termination occurred in April 2013. Early that month, a piece of machinery used at B-Outfall broke down. Because the unusable machinery was causing hazardous waste to accumulate at B-Outfall, a group of employees, including plaintiff, developed a plan to repair the piece of machinery. The group asked plaintiff to present their plan to management. Plaintiff did so, but was informed by management that a different plan to fix the machinery was already in place. Later, while telling the other employees what had transpired, plaintiff remarked, apparently in reference to management, that “opinions are like assholes, everybody has one, some

people have two.” Unbeknownst to plaintiff, a nearby open microphone broadcast his remark throughout the entire Environmental Control/Utilities Department. Following the accidental broadcast, defendants suspended plaintiff, and a few days later, on April 18, 2013, terminated plaintiff’s employment.

Plaintiff filed a grievance contesting his termination in accord with procedures set forth in the collective bargaining agreement governing his employment. The grievance, which does not pursue the cause of action asserted in this lawsuit, is presently scheduled for arbitration.

On February 26, 2014, plaintiff and his wife initiated this action by filing their Complaint in the Circuit Court of Hancock County, West Virginia, alleging one count of state-law retaliatory discharge and one count of loss of consortium.³ Defendants thereafter removed the case to this Court, invoking this Court’s diversity jurisdiction. See 28 U.S.C. § 1332. The instant Motion to Dismiss followed.

II. Legal Standard

A. Fed. R. Civ. P. 12(b)(1)

In general, a defendant’s jurisdictional challenge under Rule 12(b)(1) can take one of two forms: factual or facial. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). A factual challenge attacks the truth-in-fact of the plaintiff’s jurisdictional allegations. *Id.* A facial challenge, by contrast, attacks the legal sufficiency of the plaintiff’s jurisdictional

³ A loss of consortium claim is derivative of the underlying tort claim; thus, if Mr. Frohnapfel’s retaliatory discharge claim fails, Mrs. Frohnapfel’s loss of consortium claim fails as well. See *State ex rel. Smalls v. Clawges*, 231 W.Va. 301, 745 S.E.2d 192 (2013) (explaining that a loss of consortium claim is merely incidental to a primary cause of action).

allegations. *Id.* Where the defendant—as defendants have done in this case⁴—mounts a facial challenge under Rule 12(b)(1), the plaintiff is afforded the same procedural protections he would receive under Rule 12(b)(6): all facts alleged in the complaint are taken as true, and all reasonable inferences are drawn in the plaintiff’s favor. See *id.* (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). Consequently, to avoid dismissal on a facial Rule 12(b)(1) challenge, plaintiff’s complaint must contain “sufficient factual matter . . . to ‘state a claim to relief that is plausible on its face.’” See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

B. Fed. R. Civ. P. 12(b)(2)

To state a claim for relief, a pleading must contain “a short and plain statement of the claim showing the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court accepts all well-pled facts in the complaint as true and construes those facts in the light most favorable to the plaintiff. *Iqbal*, 556 U.S. at 678–79; *Adcock v. Freightliner LLC*, 550 F.3d 369, 374 (4th Cir. 2008). Legal conclusions, recitations of the elements of a cause of action, and bare

⁴ Defendants bring their Motion to Dismiss exclusively pursuant to Rule 12(b)(6). See [Doc. 7 at 1]. Defendants’ claim that plaintiff’s cause of action is subject to *Garmon* preemption, however, is a challenge to this Court’s subject matter jurisdiction, as where a claim is preempted under *Garmon*, federal courts must defer to the exclusive jurisdiction of the National Labor Relations Board. See, e.g., *Lontz v. Tharp*, 413 F.3d 435, 442 (4th Cir. 2005) (citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)). Defendants’ motion is therefore properly characterized as raising both Rule 12(b)(1) and Rule 12(b)(6) grounds for dismissal, and this Court will construe it accordingly. See, e.g., *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 606 (6th Cir. 2004) (defendant moved to dismiss under Rule 12(b)(1), arguing *Garmon* preemption).

assertions devoid of further factual enhancement do not constitute well-pled facts for Rule 12(b)(6) purposes. See *Iqbal*, 556 U.S. at 678.

Ultimately, a complaint must contain “sufficient factual matter . . . to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570). Facial plausibility is established where the facts alleged in the complaint “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This context-specific test does not require “detailed factual allegations,” but the complaint must produce an inference of liability strong enough to nudge the plaintiff’s claims “across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 555, 570. A court ruling on a motion to dismiss may consider any documents integral to and relied on in the complaint, regardless of whether those documents are actually attached to the complaint. See *Am. Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004).

III. Discussion

Defendants argue that plaintiff’s Complaint must be dismissed for three reasons: first, because this Court lacks subject matter jurisdiction⁵ as plaintiff’s claim is subject to preemption by the National Labor Relations Act (“NLRA”), 29 U.S.C. §§ 151 *et seq.*, also known as *Garmon* preemption; second, because plaintiff’s claim is preempted by § 301 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185(a), and, properly characterized as a § 301 claim, must be dismissed for failure to exhaust; and third, because plaintiff has failed to state a claim for retaliatory discharge as defined by *Harless v. First National Bank*, 162 W.Va. 116, 246 S.E.2d 270 (1978), as plaintiff’s Complaint

⁵ See *supra* note 3.

neither satisfies federal pleading standards nor alleges a substantial West Virginia public policy upon which his *Harless* claim may be predicated.

Plaintiff responds that neither form of preemption applies, and that his *Harless* claim is properly founded upon the substantial West Virginia public policy set forth in the WPCA. As this matter presents a novel question of West Virginia law—whether West Virginia recognizes a claim for *Harless* retaliatory discharge founded upon the WPCA—this Court respectfully certifies the question to the Supreme Court of Appeals of West Virginia. As briefly discussed below, this Court further finds that adjudicating the applicability of either preemption doctrine would be premature, as both preemption analyses require a close examination of the underlying cause of action. As such, this Court defers ruling upon defendants' Motion and stays this action pending final decision on the certified question.

A. *Garmon* Preemption

Garmon preemption, which takes its name from the Supreme Court's explanation of the doctrine in *San Diego Building Trades Council v. Garmon*, divests both state and federal courts of jurisdiction over labor disputes involving employee conduct arguably protected or prohibited by the NLRA. 359 U.S. 236, 245 (1959); *Lontz v. Tharp*, 413 F.3d 435, 442 (4th Cir. 2005). Jurisdiction over such disputes is vested exclusively in the National Labor Relations Board, with the goal of ensuring uniformity in the construction of federal labor law and preventing the frustration of national labor policy. *Garmon*, 359 U.S. at 242.

Garmon preemption is inapplicable, however, when the employee conduct at issue "is only a peripheral concern of the NLRA" or "touches on interests so deeply rooted in local

feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the State of the power to act.” *Richardson v. Kruchko & Fries*, 966 F.2d 153, 156 at n.* (4th Cir. 1992) (quoting *Local 926, Int’l Union of Operating Eng’rs, AFL-CIO v. Jones*, 460 U.S. 669, 676 (1983)). The question whether a state’s regulation of conduct should be allowed because of the deeply rooted nature of the state interest “involves a sensitive balancing of any harm to the regulatory scheme established by Congress . . . and the *importance of the asserted cause of action to the state as a protection to its citizens.*” *Jones*, 460 U.S. at 676 (emphasis added).

Because a complete analysis of the applicability of *Garmon* preemption to this case involves a careful balancing of the regulatory scheme created by the NLRA with the importance of plaintiff’s cause of action to West Virginians—and, particularly with respect to the potential applicability of the “deeply rooted” exception, necessitates an examination of the public policy supporting plaintiff’s claim—this Court finds that a ruling on the *Garmon* issue at this time would be premature. This Court therefore **DEFERS** resolution of the *Garmon* preemption question until such time as the Supreme Court of Appeals of West Virginia renders a final decision on the question of law certified in section IV, *infra*.

B. Labor Management Relations Act § 301 Preemption

Section 301 of the LMRA preempts state law wherever resolution of a state-law employment claim turns upon construction of a CBA or is “inextricably intertwined with consideration of [its] terms.” *Foy v. Giant Food Inc.*, 298 F.3d 284, 287 (4th Cir. 2002) (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985)). Because “it is the legal

character of a claim, as 'independent' of rights under the collective-bargaining agreement (and not whether a grievance arising from precisely the same set of facts could be pursued)" that determines whether a claim is preempted, *Livadas v. Bradshaw*, 512 U.S. 107, 123–24 (1994) (internal citations omitted), "the preemptive effect of § 301 depends upon the elements of the purported state-law claim." *Childers v. Chesapeake & Potomac Tel. Co.*, 881 F.2d 1259 (4th Cir. 1989). Stated differently, "a colorable state-law cause of action is a predicate to a § 301 preemption claim." *Washington v. Union Carbide Corp.*, 870 F.2d 957, 959 (4th Cir. 1989).

Here, it is not yet clear whether plaintiff has alleged a colorable state-law cause of action. This Court therefore finds it would be speculative to rule on the applicability of § 301 preemption at this juncture. *Cf. Childers*, 881 F.2d at 1262 (holding that where a complaint plainly fails to state a cause of action under state law, it is within the district court's discretion to dismiss the cause of action entirely). Accordingly, this Court DEFERS resolution of the § 301 preemption question until such time as the Supreme Court of Appeals of West Virginia renders a final decision on the question of law certified in section IV, *infra*.

C. Viability of Plaintiff's *Harless* Retaliatory Discharge Claim

Defendants argue that plaintiff's retaliatory discharge claim must be dismissed for two reasons: first, because plaintiff's Complaint fails to satisfy federal pleading standards, and second, because plaintiff's *Harless* claim cannot be predicated upon the WPCA. This Court finds that plaintiff's Complaint meets federal pleading standards, and certifies the question whether the WPCA can support plaintiff's *Harless* claim to the Supreme Court of

Appeals of West Virginia.

i. Plaintiff's Complaint Meets Federal Pleading Standards

Defendants first argue that plaintiff's *Harless* claim is inadequately pled because (1) the Complaint fails to identify the source of legal authority for the requisite substantial public policy, and (2) even if the Complaint identifies the WPCA, plaintiff has failed to allege a connection between defendants' alleged violations of the WPCA and plaintiff's allegedly protected activity. This Court rejects defendants' argument.

While plaintiff's Complaint is not a model of careful drafting, this Court finds that the Complaint fairly alleges that defendants violated the provisions of their WPCA permit; that the WPCA is the source of the required substantial public policy; that plaintiff's allegedly protected activities concerned defendants' WPCA permit violations; and that plaintiff was terminated in retaliation for those protected activities. The Complaint alleges that "Defendants' operation at B-Outfall is governed by a [Permit], issued under the Water Pollution Control Act, West Virginia Code Chapter 22, Article 11," which "imposes certain limitations and requirements concerning the discharge of hazardous materials into the Ohio River" and "provides for monitoring and reporting obligations upon the Defendants." [Doc. 1-1 at ¶ 10]. Plaintiff specifically alleges that "Defendants' failure to comply with [their] obligations under the provisions of the Permit . . . is not only unlawful, but also endangers the health and safety of its employees and the citizens residing along the Ohio River, which is the sole significant water supply for tens of thousands of people." *Id.* at ¶ 13. The Complaint states that plaintiff's "vigilance" in monitoring defendants' adherence to the requirements of their permit is "protected activity" "favored [by] substantial public policy"

and “mandated by law,” *id.* at ¶ 16, and thereafter sets forth a laundry list of plaintiff’s allegedly protected activities.⁶ These allegations, taken together, are sufficient to state a plausible claim. Accordingly, plaintiff’s Complaint is not subject to dismissal for failure to meet federal pleading standards.

ii. **May the West Virginia Water Pollution Control Act Undergird a *Harless* Retaliatory Discharge Claim?**

West Virginia’s tort of retaliatory discharge evolved as an exception to the rule that an employer may terminate an at-will employee⁷ at any time. *Swears v. R.M. Roach & Sons, Inc.*, 225 W.Va. 699, 703–04, 696 S.E.2d 1, 5–6 (2010) (citing *Wright v. Standard Ultramarine & Color Co.*, 141 W.Va. 368, 90 S.E.2d 459 (1955)) (describing the evolution of the tort). The tort was first carved out in *Harless v. First National Bank*, where the Supreme Court of Appeals of West Virginia held that “where the employer’s motivation for the discharge is to contravene *some substantial public policy principle*, then the employer may be liable to the employee” notwithstanding the general at-will termination rule. Syl., 162 W.Va. 116, 246 S.E.2d 270 (1978) (emphasis added).

Thus, a *Harless* retaliatory discharge claim cannot lie absent a substantial West Virginia public policy allegedly violated in terminating the employee. The determination whether a substantial public policy exists is a question of law for the court. *Page v.*

⁶ See section I, *supra*.

⁷ There appears to be no dispute as to whether plaintiff is an at-will employee. This Court notes that at least one circuit court has found that an employee whose employment is governed by a collective bargaining agreement that provides a “proper cause” termination guarantee and arbitral remedies is not an at-will employee, and is thus not entitled to maintain a retaliatory-discharge tort claim. See *Lamb v. Briggs Mfg., a Div. of Celotex Corp.*, 700 F.2d 1092, 1093–94 (7th Cir. 1983) (construing Illinois law). This Court has found no West Virginia authority addressing the question.

Columbia Natural Res., 198 W.Va. 378, 384, 480 S.E.2d 817, 823 (1996). Although courts may look to “established precepts in [the West Virginia] constitution, legislative enactments, legislatively approved regulations, and judicial opinions” in determining whether a substantial public policy exists, **Birthisel v. Tri-Cities Health Servs. Corp.**, 188 W.Va. 371, 377, 424 S.E.2d 606, 612 (1992), **Harless** retaliatory discharge claims “are generally based on a public policy articulated by the legislature.” **Swears**, 225 W.Va. at 704 (citing **Shell v. Metro. Life Ins. Co.**, 183 W.Va. 407, 413, 396 S.E.2d 174, 180 (1990)).⁸ Importantly, the public policy relied upon must not only exist—it must be *substantial*. **Feliciano v. 7-Eleven, Inc.**, 210 W.Va. 740, 745, 559 S.E.2d 713, 718 (2001).

Additionally, “[i]nherent in the term ‘substantial public policy’ is the concept that the policy will provide specific guidance to a reasonable person”: the public policy must provide fair notice as to what conduct is or is not prohibited. **Kanagy v. Fiesta Salons**, 208 W.Va. 526, 530, 541 S.E.2d 616, 620 (2000) (quoting Syl. pt. 3, **Birthisel**, 188 W.Va. at 377). In other words, “[a]n employer should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations.” **Birthisel**, 188 W.Va. at 377.

Here, plaintiff contends that the requisite substantial public policy is established by the WPCA. Specifically, plaintiff points to § 22-11-2 of the Act, which states:

(a) It is declared to be the public policy of the state of West Virginia to

⁸ Courts may look, however, to “established precepts in [the West Virginia] constitution, legislative enactments, legislatively approved regulations, and judicial opinions” in determining whether a substantial public policy exists. **Birthisel v. Tri-Cities Health Servs. Corp.**, 188 W.Va. 371, 377, 424 S.E.2d 606, 612 (1992).

maintain reasonable standards of purity and quality of the water of the state consistent with (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, aquatic and plant life; and (3) the expansion of employment opportunities, maintenance and expansion of agriculture, and the provision of a permanent foundation for healthy industrial development.

(b) It is also the public policy of the state of West Virginia that the water resources of this state with respect to the quantity thereof be available for reasonable use by all of the citizens of this state.

W.Va. Code § 22-11-2. Plaintiffs do not specifically identify any other provisions of the Act which may be applicable. This Court, however, takes judicial notice of several related provisions of the Act, see *Tritle v. Crown Airways, Inc.*, 928 F.2d 81, 84 (4th Cir. 1990) (taking judicial notice of other relevant provisions in statute cited by plaintiff in analyzing existence of substantial public policy), which read in relevant part:

It is unlawful for any person⁹ . . . to . . . [i]ncrease in volume or concentration any sewage, industrial wastes or other wastes in excess of the discharges or disposition specified or permitted under any existing permit

W.Va. Code § 22-11-8(b)(4).

Any person who violates any provision of any permit issued under or subject to the provisions of this article . . . is subject to a civil penalty not to exceed

⁹ “Person” means “any industrial user, public or private corporation, institution, association, firm or company organized or existing under the laws of this or any other state or country . . . or any legal entity whatever.” W.Va. Code § 22-11-3(14).

\$25,000 per day

W.Va. Code § 22-11-22(a).

Any person who . . . fails or refuses to comply with any term or condition of
[a] permit, is guilty of a misdemeanor

W.Va. Code § 22-11-24(a).

In the opinion of this Court, there is a strong argument that the WPCA articulates a public policy sufficient to support a *Harless* retaliatory discharge claim. The WPCA sets forth a specific public policy: maintaining “reasonable standards of purity and quality” of West Virginia water. W.Va. Code § 22-11-2. That public policy was articulated by the West Virginia legislature. See *Swears*, 225 W.Va. at 704 (noting that most West Virginia retaliatory discharge cases are predicated upon a statement of public policy by the West Virginia legislature). In furtherance of that public policy, the Act regulates manufacturers’ ability to discharge hazardous material into West Virginia waterways by issuing permits, and noncompliance with a permit subjects a violator to heavy civil fines and potential criminal penalties. See *id.* at §§ 22-11-8(b)(4), -22(a), -24(a). Moreover, while the statement of public policy is itself broad, the requirements imposed upon employers who hold permits issued pursuant to the WPCA provide specific guidance as to permitted and prohibited conduct. See *Kanagy*, 208 W.Va. at 530 (citing *Birthisel*, 188 W.Va. at 377) (recognizing that an employer should not be exposed to liability where a public policy standard is vague). Finally, the purpose of the Act could be frustrated if employees who reported violations of the Act to environmental authorities and were terminated for doing so were left without a remedy.

The Fourth Circuit, however, has specifically declined to expand the *Harless* cause of action by recognizing novel theories of substantial public policy absent a clear statement from the Supreme Court of Appeals of West Virginia. See *Trittle*, 928 F.2d at 84–85 (refusing to recognize plaintiff’s novel theory and noting that the case “illustrates one of the tremendous drawbacks of federal diversity jurisdiction”). In dismissing the *Trittle* plaintiff’s *Harless* claim, the Fourth Circuit noted that no West Virginia court had recognized the novel theory, professed that it had no authority to surmise or suggest the expansion of West Virginia law, and held that “a state claim which has not been recognized by that jurisdiction’s own courts constitutes a settled question of law, which will not be disturbed by this court absent the most compelling of circumstances.” *Id.*

Since *Trittle*, several courts in this Circuit have certified questions concerning novel bases for *Harless* retaliatory discharge claims to the Supreme Court of Appeals of West Virginia. See, e.g., *Kanagy*, 208 W.Va. at 527 (answering certified question from the United States District Court for the Southern District of West Virginia); *Lilly v. Overnight Transp. Co.*, 188 W.Va. 538, 538–39, 425 S.E.2d 214, 214–15 (1992) (answering certified question from the Fourth Circuit). As the Supreme Court of Appeals of West Virginia has not yet confronted the question whether the WPCA articulates a substantial public policy such that it may form the basis of a *Harless* retaliatory discharge claim, this Court believes that certification of a question is appropriate.

IV. Certified Question

As the question of law below may be determinative of an issue in this action, and no decision of the Supreme Court of Appeals of West Virginia addresses same, the Supreme

Court of Appeals of West Virginia has jurisdiction to answer a certified question from this Court. See W.Va. Code § 51-1A-3. Consequently, this Court certifies the following question:

Whether the West Virginia Water Pollution Control Act, W.Va. Code §§ 22-11-1 *et seq.*, establishes a substantial public policy of West Virginia such that it may undergird a *Harless* claim for retaliatory discharge where an employee is allegedly discharged for reporting violations of a permit issued under the Act and complaining to his employer about such violations?

V. Acknowledgement

This Court acknowledges that the Supreme Court of Appeals of West Virginia may reformulate the question raised herein. W.Va. Code § 51-1A-4.

VI. The Names and Addresses of Counsel of Record for the Parties

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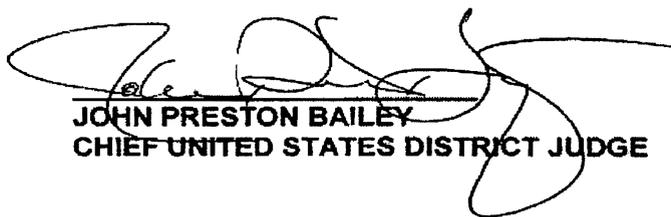
CONCLUSION

Accordingly, it is hereby **ORDERED** that:

- (1) Pursuant to the privilege made available by the West Virginia Uniform Certification of Questions of Law Act, the question stated in section IV, *supra*, is hereby **CERTIFIED** to the Supreme Court of Appeals of West Virginia;
- (2) The Clerk forward to the Supreme Court of Appeals of West Virginia, under the official seal of this Court, a copy of this Order and, to the extent requested by the Supreme Court of Appeals of West Virginia, the original or a copy of the record in this Court;
- (3) Any request for all or part of the record be fulfilled by the Clerk simply upon notification from the Clerk of the Supreme Court of Appeals of West Virginia;
- (4) A ruling upon Defendants' Motion to Dismiss [**Doc. 7**] is hereby **DEFERRED**;
and
- (5) This action is hereby **STAYED** until such time as the Supreme Court of Appeals of West Virginia has rendered a final judgment on the question certified in section IV, *supra*.

It is so **ORDERED**.

DATED: July 11, 2014.



JOHN PRESTON BAILEY
CHIEF UNITED STATES DISTRICT JUDGE