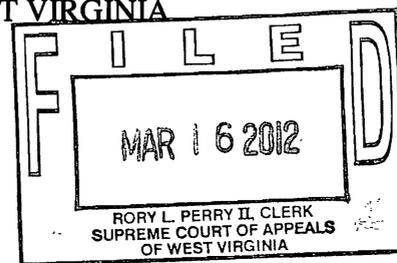


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

OHIO POWER COMPANY and  
AMERICAN ELECTRIC POWER  
SERVICE CORPORATION,

Petitioners,



v.

Docket No. 11-1512

PULLMAN POWER, LLC, STRUCTURAL,  
GROUP, INC., and ERSHIGS, INC.,

Respondents.

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**RESPONDENTS PULLMAN POWER, LLC, STRUCTURAL GROUP, INC., AND  
ERSHIGS, INC.'S JOINT RESPONSE TO PETITIONERS' BRIEF  
FROM THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA  
Civil Action No. 06-C-153**

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

Did the Circuit Court act within its discretion in sanctioning Petitioners for supplementing discovery responses by producing hundreds of thousands of pages of documents less than one week before trial, with more production to follow, without just reason or excuse, when these documents had been in the care, custody and control of the Petitioners and counsel for years?

### **STATEMENT OF THE CASE**

Petitioners' description of the proceedings below omitted facts that are crucial to this Honorable Court's analysis of the issue presented on appeal. An examination of these facts should lead this Honorable Court to affirm the Circuit Court's decision to dismiss the Petitioners' cross-claims against the Respondents for Petitioners' late supplementation of its discovery responses. Thus, pursuant to Rule 10(d) of the Revised Rules of Appellate Procedure, Respondents submit the following recitation of relevant facts below.

On March 4, 2006, a catastrophic fire occurred inside a flue gas desulphurization stack under construction at the Mitchell plant of American Electric Power in Marshall County, West Virginia, killing Pullman Power employee Gerald Talbert and injuring his coworkers Timothy Wells and David Earley. The stack was being constructed by Pullman Power and Ershigs for owner American Electric Power Service Corporation (hereinafter "AEP"). Two contracts governed the work at issue; a general contract between AEP and Pullman Power and a subcontract between Pullman Power and Ershigs.<sup>1</sup>

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<sup>1</sup>Defendants Structural Group, Inc and Pullman Power LLC's Response to Defendants Ohio Power Company and American Electric Power Service Corporation's Motion for Summary Judgment with Regard to Cross Claim for Contractual Indemnity against Structural Group, Inc. and Pullman Power, LLC (hereinafter "Pullman Power's Response to AEP Indemnity MSJ") at Docket No. 551.

On June 30, 2006, Plaintiffs filed a civil action against numerous entities, including Ohio Power Company (“Ohio Power”) and American Electric Power Service Corporation (“AEP”), Structural Group, Inc., Pullman Power, LLC, Ershigs, Inc. (“Ershigs”)<sup>2</sup> and Fiberglass Structural Engineering. Defendants filed Answers to the Complaint and asserted cross claims for contractual and implied indemnity against each other. *See SCT000018-SCT000037; SCT000038-SCT000054; SCT000055-SCT000069.*

The parties engaged in extensive discovery, including more than thirty (30) depositions and multiple sets of Interrogatories and Requests for Production of Documents.<sup>3</sup> Plaintiffs served seven (7) sets of Interrogatories and one set of Requests for Admissions upon Defendant AEP as follows:

- Interrogatories and Requests for Production of Documents (first set) October 2, 2006
- Interrogatories and Requests for Production of Documents (second set) January 5, 2009
- Interrogatories and Requests for Production of Documents (third set) March 3, 2009
- Interrogatories and Requests for Production of Documents (fourth set) May 22, 2009
- Interrogatories and Requests for Production of Documents (fifth set) July 10, 2009
- Interrogatories and Requests for Production of Documents (sixth set) September 10, 2009
- Interrogatories and Requests for Production of Documents (seventh set) September 25, 2009
- Requests for Admissions: September 25, 2009

Defendant Fiberglass Structural Engineering served one set of Interrogatories, Request for Admissions and Request for Production of Documents upon Defendant AEP on or about

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<sup>2</sup>The Plaintiffs’ Complaint originally named Ershigs, Inc. as a named defendant. The misnomer was corrected by an Order entered by the Circuit Court on October 24, 2006 correcting the defendant’s name to Ershigs, Inc. *SCT000074-SCT000075.*

<sup>3</sup>West Virginia Rule of Civil Procedure 5(a): requires that discovery requests and responses be served upon all of the parties to a suit, thereby discouraging the service of duplicative discovery by multiple parties.

December 3, 2007. Defendant Ershigs served one set of Interrogatories and Request for Production of Documents upon Defendant AEP on or about January 11, 2010. In initial responses to these discovery requests, Defendant AEP produced several bankers' boxes containing over fourteen thousand (14,000) pages of documents.

Several motions to compel were filed against Defendant AEP during the course of the litigation. For instance, on July 31, 2009, Plaintiffs filed a Motion to Compel Discovery against Ohio Power and AEP. *SCT000156-SCT000172*. The Circuit Court granted the motion. *SCT 000173-SCT000175*. A second motion to compel against Defendant AEP was served by Plaintiffs on July 16, 2010. *SCT 000182-SCT000332*. The Circuit Court also granted this motion. *SCT000462-SCT000464*. Moreover, the Circuit Court, by Order entered on or about June 7, 2010, granted a motion to compel discovery responses from Defendants Ohio Power and AEP filed by Ershigs. *SCT000176-SCT000177*.

Among the issues which came to light through discovery and depositions were: (1) whether a valid hot work permit was in place on the night of the fire; (2) whether and to what extent the Defendant(s) had knowledge of the flammable propensities of the fiberglass liner and its components prior to the construction; (3) whether safety procedures were followed or enforced; and (4) whether a proper investigation had been conducted post fire to determine the cause of the fire and the role each participant played in the tragedy.<sup>4</sup> Accordingly, depositions and discovery focused on answering these questions and gathering documents which could shed light on what occurred before, during, and after the fire.

The import of document requests and documents produced in this matter cannot be understated. For example, during the course of construction, Defendant AEP required a hot work permit when work involving an ignition source was to be conducted in the stack.

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<sup>4</sup>Pretrial Memorandum of Defendants Structural Group, Inc. and Pullman Power, LLC at Docket No. 761.

Accordingly, the Pullman Power Defendants were to complete a hot work permit and obtain a signature from onsite representatives of Defendant AEP before hot work could begin. A central issue in this matter was whether a hot work permit had been obtained and signed by Defendant AEP on the night of the fire.<sup>5</sup> Witnesses offered conflicting testimony on this issue: Pullman Power employees testified that a hot work permit had been signed by an AEP employee but that it had burned in the fire; employees from Defendant AEP denied this and testified that no hot work permit had been requested.<sup>6</sup> No document could be located to substantiate either version of events.

Following the fire, Defendant AEP took control of the investigation and assigned primary responsibility to its own employee, Clark Vanderniet (“Vanderniet”). Vanderniet, who had experience in root cause analysis with the Nuclear Regulatory Commission, eventually prepared an initial report which he submitted to corporate executives with Defendant AEP. Vanderniet testified in deposition that AEP executives were unhappy with the original report, which cast significant blame on AEP, and directed him to refocus his investigation on anyone other than AEP. Several subsequent versions of the “root cause report” were generated, each of them having significantly less focus on the actions of Defendant AEP than the original report. Vanderniet was so uncomfortable with AEP’s directives that he changed the name to an *assessment* rather than a *root cause analysis* as the latter term is commonly used to describe a comprehensive, objective examination of the causes of an event. SCT000205-SCT000206.

Vanderniet testified that he took notes during the numerous meetings conducted by the root cause team, mostly on his AEP issued laptop computer which was part of the AEP internal network. He created thirty (30) to forty (40) versions of reports, all with various degrees of

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<sup>5</sup>Pretrial Memorandum of Defendants Structural Group, Inc. and Pullman Power, LLC, p. 5.

<sup>6</sup>Pullman Power’s Response to AEP Indemnity MSJ at p. 5

information gleaned from investigative interviews and inspections, which he saved to the AEP network. He testified that he would frequently print off versions of reports and kept these hard copies in a filing cabinet in his office at AEP until the time of his resignation.<sup>7</sup>

Vanderniet eventually resigned from his position with Defendant AEP sometime in 2007. He was no longer an employee when he was deposed in this case on April 18, 2009. He testified that AEP had possession of all the hard copies of notes and drafts of the *assessment*, as well as his AEP laptop, when he left. He took nothing with him.<sup>8</sup>

Following the deposition, counsel for the Plaintiffs immediately began requesting documents referenced by Vanderniet from Defendant AEP. Defendant AEP advised it was unable to find the documents. AEP never produced the documents, which failure gave rise to a spoliation motion filed by Plaintiffs. *SCT000721-SCT00023*. Plaintiffs identified attorney Michael Leahey as a witness for the spoliation allegation, on the basis that he was a part of the AEP defense team while employed by Swartz Campbell, and thereafter became a part of the defense team at Jackson & Kelly. *SCT000721*.

On June 25, 2010, the Circuit Court entered a Pretrial Order setting a trial date for April 19, 2011. In the Order, the Court also mandated that all discovery be served and supplemented by January 14, 2011. *SCT000501*. Defendant AEP voiced no objections to this schedule. Counsel for AEP, both in house and outside, would have been aware of the duty to supplement.

In July 2010, less than a year before trial, Defendant AEP chose to terminate Edward Smallwood and Swartz Campbell as counsel and transferred the defense to Brian Swiger, Larry Blalock and Michael Leahey of Jackson & Kelly. Attorney Leahey was an associate at Swartz Campbell while the firm was defending AEP. He resigned from Swartz Campbell to join Jackson

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<sup>7</sup>Deposition of Vanderniet, pp. 46, 47, 51, 53, 61. Plaintiffs filed the deposition on 4/13/11 at Docket No. 748.

<sup>8</sup>Deposition of Vanderniet, p. 51. Filed by Plaintiffs April 13, 2011 at Docket No. 748.

& Kelly at the same time that AEP transferred the defense. *SCT000721*. As an attorney with Jackson & Kelly, Mr. Leahey entered his appearance for Defendants AEP on July 19, 2010.<sup>9</sup>

The parties filed motions for summary judgment on the indemnity claims. The motions were denied.<sup>10</sup> With respect to AEP's motion seeking summary judgment against Pullman Power on its claim for contractual indemnity, the Court denied AEP's motion, ruling that Pullman is not obligated to indemnify AEP for AEP's own negligence or other culpable conduct. Furthermore, the court ruled, the contract expressly excluded punitive damages from any obligation to indemnify. Docket No. 620. Defendant AEP has not challenged that ruling in this appeal from the order dismissing its cross-claims.

On March 10, 2011, approximately five (5) weeks before trial, AEP's counsel advised counsel for the Pullman Power defendants that AEP's counsel had discovered an additional seven hundred and fifty thousand (750,000) to one million five hundred thousand (1,500,000) pages of electronic information that were in possession of AEP (and/or AEP's prior counsel Edward A. Smallwood) and that were potentially responsive to discovery requests. Counsel for Ershigs was also subsequently advised of the discovery of this electronic information that had not previously been produced.<sup>11</sup>

On April 13, 2011, just six (6) days before the scheduled trial, Defendant AEP produced one hundred seven thousand five hundred forty (107,540) pages of documents to the parties.<sup>12</sup> On April 14, 2011, counsel for AEP produced another one hundred eighty thousand one hundred

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<sup>9</sup>By letter dated January 6, 2012, counsel for the Pullman Power Defendants requested that the Entry of Appearance for Michael Leahey referenced herein be included in the Appendix. Defendant AEP did not include the document in the appendix it provided to this Honorable Court on January 31, 2012. The document appears at Docket No. 542. Mr. Leahey was an attorney at Schwartz Campbell until he assumed a position with Jackson & Kelly in July 2010.

<sup>10</sup>Pullman Power's motion for summary judgment on Plaintiffs' punitive damages claims was granted, on the basis that punitive damages are not recoverable against an employer defendant in a deliberate intent action.

<sup>11</sup>Order Granting Motion for Sanctions, *SCT000655*.

<sup>12</sup>Order Granting Motion for Sanctions, *SCT000656*.

fifteen (180,115) pages of documents to Defendants Pullman Power and Ershigs and advised that two additional productions of “similar size and scope” would be produced.

Defendants Pullman Power/Structural Group and Ershigs filed motions for sanctions against AEP, seeking, among other remedies, the dismissal of AEP’s cross-claims against them. *SCT000487-SCT000507*; *SCT000518-SCT000533*. The Circuit Court heard argument on Pullman’s initial motion for sanctions during the pre-trial conference conducted on April 14, 2011. *SCT000715-SCT000731*; *SCT000873-000874*. Giving the parties the opportunity to further address the request for sanctions against AEP, the Circuit Court also conducted additional hearings on April 19, 2011 and April 20, 2011. *SCT000982-SCT000985*. During those proceedings, counsel for each party was given the opportunity to advise the Court of the full detail and history of the circumstances surrounding this belated discovery and its consequences.

Defendant AEP’s production of two hundred eighty-seven thousand six hundred fifty-five (287,655) pages of documents less than one week before a complex multi-week trial, and the timing of the production, did not allow the parties to review these documents in any meaningful way. In fact, AEP admits it took a team of fifty (50) lawyers reviewing the data to even produce them in the general fashion in which they were eventually provided—AEP merely produced batches of documents on searchable computer discs without reference to specific discovery requests to which the documents were responsive.<sup>13</sup> *SCT000718*.

Most telling, while explaining the process by which AEP personnel initially provided documents to Edward Smallwood for this suit, Attorney Brian Swiger said that a paralegal within AEP had completed a mass cloning of documents, emails and correspondence within the AEP computer system relating to the construction project and gave these to Mr. Smallwood. This

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<sup>13</sup>The documents were provided to the parties on CDs which were searchable within each individual pdf document, but not searchable across the entire batch of documents within a CD. *SCT 000625*.

forensic capture of documents was transferred to Mr. Smallwood on hundreds of individual computer discs (“CDs”). *SCT000726*. Attorney Leahey said that the original CDs contained the entire forensic image of the custodians that were identified. These custodians included individuals as well as common mailboxes, work spaces, and internet work forums. *SCT000983*.

According to Attorney Swiger, Attorney Smallwood decided that a review of this vast amount of information would be of no use to him. Instead, Attorney Smallwood went to individual witnesses within AEP who had worked on the subject construction project, and obtained documents from them which were then reviewed and produced. *SCT000727*. If indeed Mr. Vanderniet prepared his initial reports and notes on his AEP computer, and if indeed a sweeping forensic capture was done for the records custodians as explained by Attorney Leahey, the question becomes whether the missing Vanderniet documents would have been found within that batch of documents and subsequently produced to all parties if found. In essence, if Attorney Swiger’s representations are correct, by virtue of deciding not to review this documentation, AEP’s counsel most likely withheld documents which were material to the liability issues in this case, documents relevant both to the Plaintiffs’ case-in-chief and the cross-claims between the Defendants.

Larry Blalock, counsel for AEP, suggested at the Pretrial Conference on April 14, 2011 that the Court defer ruling on the sanctions motion and allow the parties to proceed to trial in the midst of continuing document production to “see how the story develops.” Counsel for AEP further represented that “...evidence surrounding the indemnity claims is fairly minimal. There are more complex issues. It is not going to take a lot of the Court’s time to hear whatever evidence there is on the indemnity claims.” *SCT000558*.

The statements of counsel for AEP during these proceedings reflect their failure to realize the import of their eleventh hour massive document production and its impact on Defendants Pullman and Ershigs' ability to mount an adequate defense to the liability claims and contribution and indemnity claims. The indemnity clause in the contract between Defendant AEP and the Pullman Power Defendants sets forth in general that the Contractor (Pullman Power) would be responsible for indemnification only to the extent of its proportionate share of liability for Contractor's own negligence. By way of example, Defendant AEP created an oversight program for the construction project which was the subject of intense scrutiny during the discovery phase of the litigation.<sup>14</sup> If AEP was determined to have been negligent in failing to provide oversight, or negligent in any respect, that conduct would fall outside the scope of Pullman Power's limited indemnity obligation.<sup>15</sup> With regard to the late produced documents, Defendants Pullman Power and Ershigs did not have time to conduct a proper review of the documents to determine whether evidence of inadequate oversight, or evidence of any other culpable conduct on the part of AEP, was contained within.<sup>16</sup> Unfortunately, a fair and accurate assessment of liability by the jury could not be possible in light of the monolithic number of documents withheld until a week before trial. The indemnity issues, like the liability issues, were not "minimal."

Defendant AEP's desire to minimize the significance of the failure to review these documents in responding to the parties' timely discovery requests is evidenced within its Pretrial Statement, served upon all counsel on April 12, 2011. In the midst of preparation for the late

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<sup>14</sup>A copy of the oversight program was attached to Pullman Power's Response to AEP Indemnity MSJ as Exhibit D.

<sup>15</sup>Pullman Power's Response to AEP Indemnity MSJ, p. 5, at Docket No. 551.

<sup>16</sup>It is important to note that Defendant AEP settled with the Plaintiffs just after jury selection for \$18,000,000.00, which represented its agreed upon payment of the liability claims against them, including any claims for punitive damages. Because AEP chose not to buy the entire case, obviously it was settling the case on its behalf with respect to its own negligence or other culpable conduct and potential punitive damages. With the settlement, any claims for contribution or common law indemnity were extinguished.

document production and with thousands more documents reportedly to be produced, Defendant AEP represented to the Circuit Court in its Pretrial Statement that “all written and oral discovery has been completed.” SCT000470.

A review of discovery requests served upon Defendant AEP shows that counsel for AEP had no less than ten (10) opportunities to review the documents when responding to discovery. Each time, counsel for AEP made the decision not to review the approximately one hundred (100) CDs containing some one million five hundred thousand (1,500,000) pages of documents. Moreover, counsel for the Plaintiffs repeatedly requested the Vanderniet documents and made these documents the subject of a spoliation motion. In response to the request for these documents, Attorney Smallwood advised that he had been searching for the documents and that they no longer existed. SCT000898.

In fact, counsel for AEP made numerous representations that diligent searches had been conducted in response to discovery requests when, Defendant AEP now admits, these diligent searches did not include even a cursory review of the one million five hundred thousand (1,500,000) pages of documents within the CDs. For example, in Defendant AEP’s response to Plaintiff’s fifth set of discovery requests, AEP’s counsel represented: “*After a diligent effort, Defendants have been unable to locate a roster of attendees who attended the December 9, 2004 presentation...*” SCT000420; Attorney Smallwood’s letter of June 24, 2010 letter to Robert Fitzsimmons: “*...after a search of our records, my clients and I were unable to locate the modified drawing...*” SCT0000288; and Attorney Smallwood’s July 27, 2009 letter to attorney Fitzsimmons: “*...my client has produced all documents in its possession related to the bid requests and bid submissions, thus any documents it possesses related to what your inquiries appear to seek would already have been produced.*” SCT000170.

On September 30, 2011, the Circuit Court of Marshall County issued its Order Granting the Motions for Sanctions Filed By Defendants Ershigs, Inc., Pullman Power, LLC and Structural Group, Inc. Against Defendants Ohio Power Company and American Electric Power Service Corporation.<sup>17</sup> The Court made specific findings of fact, including:

13. Less than one week before trial, on April 13, 2011, counsel for AEP produced 107,540 pages of documents to the Pullman Power Defendants and to Ershigs.
14. Just five days before trial, on April 14, 2011, counsel for AEP produced another 180,115 pages of documents to the Pullman Power Defendants and to Ershigs.
15. Counsel for AEP represented that two additional productions of “similar size and scope” would be produced.<sup>18</sup>
21. On April 20, 2011, counsel for AEP told the Court and other parties in this case that an additional “12,122 documents” would be produced to counsel shortly.” Counsel for AEP did not identify how many pages of information would be contained in the 12,122 documents.<sup>19</sup>

The Court found that “AEP’s production of hundreds of thousands of pages of documents less than one week before trial and the complete failure to produce another 12,122 documents (of an unknown number of pages) at all before trial constituted unjustified noncompliance with the West Virginia Rules of Civil Procedure regarding the production of documents, was in contravention of the deadlines imposed by the Court’s Pre-Trial Conference Order and violated Rule 37(b)(2) of the West Virginia Rules of Civil Procedure.”<sup>20</sup> Despite the numerous representations made by counsel for AEP explaining the “inadvertent nature” of the non-

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<sup>17</sup> In their brief, Petitioners assert that, on April 19, 2011, the Circuit Court struck their answers, affirmative defenses and cross claims, “bringing the litigation to a close.” (Petitioner’s Brief, p. 5). This is not accurate. In fact, the Court heard argument on the sanctions motion (along with other motions ) on April 19, 2011 but did not rule at that time. Instead, a jury was selected and seated on April 19, 2011, and the Court heard further argument regarding the sanctions motion on April 20, 2011, at which time the motion was granted. *SCT 001001*. The parties each settled with the Plaintiffs sometime between the selection of the jury and the final hearing of April 20, 2011. *SCT 000993*.

<sup>18</sup>Order Granting Motion for Sanctions, *SCT000656*.

<sup>19</sup>Order Granting Motion for Sanctions, *SCT000657*.

<sup>20</sup>Order Granting Motion for Sanctions, *SCT000657-SCT000658*.

production at the Pretrial Hearing and in chambers before jury selection, the Circuit Court concluded that no just reason existed for the AEP Defendants' violation of the West Virginia Rules of Civil Procedure and the Court's prior Pre-Trial Orders.<sup>21</sup>

The Circuit Court concluded, *inter alia*, that "AEP failed to timely respond to discovery sent years ago and that its noncompliance with the Court's Pre-Trial Conference Order was willful and cannot be disputed."<sup>22</sup> The Circuit Court specifically referenced the Pre-Trial Conference Order of June 25, 2010 which provided: "(6) Discovery – all expert witness discovery shall be completed on or before January 14, 2011. All other discovery shall be supplemented by the same date."<sup>23</sup>

The Circuit Court granted Pullman and Ershigs' request that AEP's cross-claims be dismissed with prejudice, and struck AEP's answers and affirmative defenses to Pullman's and Ershigs' cross-claims. *SCT000663*.

### **SUMMARY OF ARGUMENT**

The Honorable David W. Hummel, Jr.'s Order dated September 30, 2011, granting the Motions for Sanctions filed by the Respondents against the Petitioners, should be affirmed by this Honorable Court. Petitioners' late supplementation/disclosure of hundreds of thousands of pages of documents less than one week before the trial date of April 19, 2011, with the representation that more documents would yet be produced, was in direct defiance of the Circuit Court's June 25, 2010 Order, which mandated that all discovery be supplemented by January 14, 2011. Petitioners' prejudicial supplementation of its discovery responses was in violation of Rule 26(e) of the West Virginia Rules of Civil Procedure, as the documents were in the

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<sup>21</sup>Order Granting Motion for Sanctions, *SCT000658*.

<sup>22</sup>Order Granting Motion for Sanctions, *SCT000660*.

<sup>23</sup>Order Granting Motion for Sanctions, *SCT000660*.

possession of the Petitioners' counsel for years before their late disclosure. Petitioners must bear the consequence of their counsels' actions and the prejudicial nature of the same.

Furthermore, Petitioners' characterization that the Circuit Court did not conduct an 'evidentiary hearing' is misplaced. Indeed, the Circuit Court conducted two hearings wherein Petitioners had an opportunity to oppose the imposition of sanctions for failure to seasonably supplement discovery responses with documents that were in the possession of Petitioners' in-house and litigation counsel. Petitioners were given an opportunity to make a complete and full evidentiary record at both hearings before the Circuit Court properly exercised its discretion to strike the Petitioners' pleadings. The Petitioners failed to do the same.

In their brief, Petitioners request a drastic departure from the West Virginia Rules of Civil Procedure and West Virginia case law with respect to discretionary powers of the Circuit Courts to issue the sanction of dismissal under Rule 37 of the West Virginia Rules of Civil Procedure. Petitioners contend that the Circuit Court abused its discretion in granting the sanction of dismissal for Petitioners' late supplementation/disclosure of documents. Contrary to the Petitioners' contention, the Circuit Court had the evidentiary basis to determine that the Petitioners and their counsel, had acted willfully and without just reason or excuse by failing to seasonably supplement with documentation that was in their possession at all times. The Circuit Court properly found that the Petitioners' belated supplementation was prejudicial to all parties to the underlying civil action.

Any departure from the Circuit Court's ruling would contradict the West Virginia Rules of Civil Procedure and the jurisprudence of this Honorable Court. In fact, the weight of authority of this Court demonstrates that the circuit courts of this State have the inherent power to do all things that are reasonably necessary for the administration of justice within the scope of their

jurisdiction. Accordingly, the Circuit Court properly exercised its discretion in dismissing the Petitioners' cross-claims against the Respondents.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rule 18(a) of the Revised Rules of Appellate Procedure, Respondents submit that oral argument is unnecessary as the record below is clear, the question presented has been authoritatively decided by this Honorable Court, and the facts and legal arguments on behalf of the Respondents in upholding the Circuit Court's rulings have been adequately presented in Respondents' Brief and the record below. Furthermore, affirmance by memorandum decision pursuant to W.Va.R.A.P. 21(c) would be appropriate. If the Court in its discretion determines that oral argument would be appropriate and will be held, however, Respondents would suggest that this case would be suitable for Rule 19 argument, as a case involving a claim of unsustainable exercise of discretion where the law governing that discretion is settled. W.Va.R.A.P. 19(a)(1)-(2).

### **ARGUMENT**

A court "has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction." Syl. Pt. 3, *State ex rel. Richmond Am. Homes of W.Va. v. Sanders*, 226 W. Va. 103, 697 S.E.2d 139 (2010). "Imposition of sanctions of dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld upon review as a proper exercise of discretion when trial court findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party." *Id.* at Syl. Pt. 7.

This Honorable Court has suggested that the sanction of dismissal under Rule 37(b) is harsh and should be used sparingly. *See State ex rel. McDowell County Sheriff's Dep't v.*

*Stephens*, 192 W. Va. 341, 343, 452 S.E.2d 432, 434 (1994). At the same time, this Honorable Court has emphasized that where counsel, acting in grossly negligent fashion, “fails to obey an order of a circuit court to provide or permit discovery, **the full range of sanctions under W. Va. R. Civ. P. 37(b) is available to the court** and the party represented by that counsel must bear the consequences of counsel’s actions.” Syl. Pt. 4, *Bell v. Inland Mut. Ins. Co.*, 175 W. Va. 165, 332 S.E.2d 127 (1985)(**emphasis added**). This Honorable Court does not generally condone an attorney’s inexcusable disobedience of court orders. *Michael v. Henry*, 177 W. Va. 494, 499, 354 S.E.2d 590, 595 (1987).

“Although Rules 11, 16, and 37 of the West Virginia Rules of Civil Procedure do not formally require any particular procedure, before 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 III 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.” Syl. Pt. 5, *State ex rel. Richmond Am. Homes of W. Va. v. Sanders*, *supra* (citing Syl. Pt. 1, *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996)).

“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.” *Id.* at Syl. Pt. 6 (*citing* Syl. Pt. 2, *Bartles v. Hinkle, supra*).

In their brief, Petitioners argue that the Circuit Court abused its discretion by striking Petitioners’ cross-claims against the Respondents as a sanction for the late supplementation of its discovery responses. Petitioners submit four (4) grounds in support of their argument on appeal that the Circuit Court abused its discretion in dismissing their cross-claims against the Respondents. As more fully set forth below, Respondents respectfully submit that the Circuit Court properly exercised its discretion in dismissing the Petitioners’ cross-claims.

**I. PETITIONERS’ LATE SUPPLEMENTATION OF DISCOVERY WARRANTS THE SANCTION OF DISMISSAL AS PETITIONERS WERE IN VIOLATION OF A COURT ORDER AND DID NOT SEASONABLY SUPPLEMENT IN ACCORDANCE WITH THE WEST VIRGINIA RULES OF CIVIL PROCEDURE.**

Petitioners submit that the underlying matter did not involve circumstances wherein the Petitioners had been ordered by the lower court to produce documents and failed to comply with that order. *See Petitioners’ Brief at 16.* Petitioners would have this Court believe that the circumstances underlying this matter simply involved the Petitioners timely answering the parties’ discovery requests, but then later discovering, after the discovery cut-off and on the eve of trial, that the answers were incomplete and required supplementation in accordance with the West Virginia Rules of Civil Procedure. *Id.* Petitioners’ argument that they were not in violation of a court order and that they properly supplemented under the Rules of Civil Procedure is in direct defiance of the record below and established precedent of this Court.

Rule 16(f) of the West Virginia Rules of Civil Procedure permits the sanction of dismissal for a party’s failure to obey a court’s pretrial order, as parties are subject to the sanctions provided for in Rule 37(b)(2)(B)-(D). Rule 16(f) specifically provides that:

**“If a party or party’s attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party’s attorney is substantially unprepared to participate in the conference, or if a party or party’s attorney fails to participate in good faith, the judge, upon motion or the judge’s own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), and (D)...”**

*See* W. Va. R. Civ. P. 16(f) (emphasis added).

There is no question that a circuit court has the authority to impose sanctions, including dismissal of an action, if a party fails to comply with a circuit court’s order regarding discovery. *Cox v. State*, 194 W. Va. 210, 217, 460 S.E.2d 25, 32 (1995)(Cleckley, J., concurring)(citing *Smallwood v. Raleigh Gen. Hosp.*, 194 W. Va. 48, 459 S.E.2d 159 (1995)). Importantly, this Court has stated that “[c]alendars are simply too crowded for parties to treat scheduling and discovery orders as optional and to conduct preparations at their own convenience.” *Bartles*, 196 W. Va. at 392, 472 S.E.2d at 838. Moreover, this Court has declared that because “...case management is a fact-specific matter with the ken of the trial court, reviewing courts have reversed only for a clear abuse of discretion.” *Id.* at 835.

In the case *sub judice*, the Circuit Court of Marshall County, on June 25, 2010, entered its Pre-Trial Conference Order. In its Order, the Circuit Court mandated the following:

**“(6) Discovery – all expert witness discovery shall be completed on or before January 14, 2011. All other discovery shall be supplemented by the same date.”**

*See* SCT000501. (emphasis added).

Prior counsel (Edward Smallwood of Swartz Campbell, PLLC) and current counsel (Jackson & Kelly, PLLC) for the Petitioners were aware of the duty and obligation under the Circuit Court’s June 25, 2010 Order to supplement Petitioners’ discovery responses on or before January 14, 2011. Yet, on April 13, 2011, just six (6) days before the scheduled trial and nearly

five (5) years after the institution of the underlying civil action, Petitioners deposited upon counsel of record one hundred seven thousand five hundred forty (107,540) pages of documents that had been in the custody of the Petitioners' counsel for years but had not previously been reviewed. *SCT000527-SCT000528*. Additionally, a second set of one hundred eighty thousand one hundred and fifteen (180,115) pages was produced on April 14, 2011. Counsel for the Petitioners represented that production would be ongoing, most likely throughout the trial. *SCT000529-SCT000530*.

Petitioners' supplementation was in violation of the Circuit Court's June 25, 2010 entered Order. The Circuit Court specifically mandated that all discovery be supplemented by January 14, 2011. Petitioners failed to comply with the mandate of the Circuit Court. Accordingly, the failure of the Petitioners to timely supplement their discovery responses within the timeframe established by the Circuit Court warranted sanctions pursuant to Rule 37(b) of the West Virginia Rules of Civil Procedure.

Not only did the Petitioners violate the Circuit Court's June 25, 2010 Pre-Trial Conference Order mandating that all supplementation be completed by January 14, 2011, the Petitioners also failed to seasonably supplement their discovery responses pursuant to the West Virginia Rules of Civil Procedure. Nevertheless, Petitioners submit that there is no specific time period prescribed in Rule 26 when supplemental responses must be made. (Petitioners' Brief, footnote 8). Petitioners argue that their late supplement to discovery was in compliance with Rule 26 as the supplementation was "seasonable" in that they could not supplement sooner as they only learned of the documents on March 9, 2011. *See Petitioners' Brief at 16*. Because Petitioners' counsel were in possession of the documents years prior to its supplementation and chose not to review or produce them, the Petitioners' supplementation, and the magnitude thereof, cannot be considered "seasonable" under West Virginia Rules of Civil Procedure.

Rule 37 is designed to permit the use of sanctions against a party who refuses to comply with the discovery rules, *i.e.* Rules 26 through 36. Syl. Pt. 1, *Shreve v. Warren Assoc. Inc.*, 177 W. Va. 600, 355 S.E.2d 389 (1987). Rule 37(b)(2) provides, in pertinent part, “[i]f a party or an officer, director, or managing agent of a party [ . . . fails to obey an order to provide or permit discovery, . . . or if a party fails to supplement as provided for under Rule 26(e) . . . ], the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

**(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;**

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in subparagraphs (A), (B), and (C) of this paragraph, unless the party failing to comply shows that that party is unable to produce such person for examination. . . .

*See* W. Va. R. Civ. Pro. 37(b)(2)(**emphasis added**).

In *Karpacs-Brown v. Murthy*, this Court declared that “Rule of Civil Procedure 26(e) relates to the duty to supplement discovery responses in certain specified circumstances and provides that ‘[i]f supplementation is not made as required by this Rule, the court, upon motion or upon its own initiative, may impose upon the person who failed to make the supplementation

an appropriate sanction as provided for under Rule 37.” 224 W. Va. 516, 525 n.7, 686 S.E.2d 746, 755 n.7 (2009). See also *McDougal v. McCammon*, 193 W. Va. 229, 238, 455 S.E.2d 788, 797 (1995)(stating that the trial court possesses the inherent authority to impose sanctions for failure of a party to supplement discovery as required by Rule 26(e) of the Rules of Civil Procedure)).

The case that succinctly states the law regarding the requirement that a party supplement discovery is *McDougal v. McCammon*, *supra*. *McDougal* is a case involving a video tape of a plaintiff that was not produced during discovery, despite a request for production that clearly covered the video tape. *Id.* at 233, 792. The *McDougal* court held that the tape should have been produced in supplementation of discovery. *Id.* at 237-238, 796-797. However, this Court held that the failure to produce the tape was not prejudicial, but only because the admission of the video tape affected the claim for damages and the jury found for the defendants on liability. *Id.* at 239, 798.

The *McDougal* court also discussed the proper application of sanctions for failure to supplement material in discovery:

[T]he trial court possesses the inherent authority to impose sanctions for failure of a party to supplement discovery as required by Rule 26(e) of the Rules of Civil Procedure. One such sanction authorized by this Court is the exclusion of evidence. In Syllabus Point 5, in part, of *Prager v. Meckling*, *supra*, we stated factors to be considered in determining whether the failure to supplement discovery requests should require the exclusion of evidence relating to the supplementary material. These factors include: ...

(1) the prejudice or surprise in fact of the party against whom the evidence is to be admitted; (2) the ability of the party to cure the prejudice; (3) the bad faith or willfulness of the party who failed to supplement discovery requests; and (4) the practical importance of the evidence excluded." (Citations omitted).

*McDougal* at 238, 797. Additionally, in *Prager*, this Court explicitly held: “Despite the lack of any express provision in Rule 26(e) of the Rules of Civil Procedure authorizing the imposition of

sanctions for failure to supplement previous discovery responses that are incorrect in light of current information, a trial court has inherent power to impose sanctions as a part of its obligation to conduct a fair and orderly trial.” Syl. Pt. 4, *Prager v. Meckling*, 172 W. Va. 785, S.E.2d 852 (1983).

As set forth above in the Respondents’ Statement of the Case section of their brief, seven (7) sets of discovery requests were served on the Petitioners from 2006-2010. Yet, Petitioners failed to produce/supplement documents responsive to these discovery requests until April 13, 2011 even though these documents were in the care, custody and control of Petitioners’ counsel at all times relevant to the underlying civil action. *SCT000727-SCT000728*.

In fact, in July 2010, less than a year before trial, Petitioners transferred the defense of the underlying matter to Brian Swiger, Larry Blalock and Michael Leahey of Jackson & Kelly. Attorney Leahey was an associate at Swartz Campbell while the firm was defending Petitioners and resigned from Swartz Campbell to join Jackson & Kelly at the same time that Petitioners transferred the defense. *SCT000721*. These documents were in the possession of Swartz Campbell while Attorney Leahey was an associate defending the underlying matter. *SCT000727*.

Petitioners’ counsels’ decision to supplement discovery responses with hundreds of thousands of documents on the eve of trial was in direct defiance of the Circuit Court’s June 25, 2010 Order and contravenes the underlying significance of Rule 26(e) of the West Virginia Rules of Civil Procedure. Such circumstances warrant the sanction of dismissal of the Petitioners’ cross-claim pursuant to the Circuit Court’s authority under Rule 37.

## **II. THE CONDUCT OF PETITIONERS’ COUNSEL WARRANTED THE SANCTION OF DISMISSAL.**

Petitioners submit that they did not engage in a pattern of wrongdoing during the litigation process in litigation. *See Petitioners’ Brief at 18*. Petitioners argue that the first so

called discovery violation was a routine matter and did not entail any litigation misconduct by Petitioners or their prior or current counsel. *Id. at 19*. In particular, Petitioners deem the only discovery violation was their failure to respond fully to certain interrogatories, which prompted a motion to compel filed by the Plaintiffs against them. *Id. at 18*. Petitioners submit that there has to be a showing of a pattern of wrongdoing before the sanction of dismissal can be awarded, and that the record is deficient of such pattern. However, Petitioners have failed to recognize the full record below, as well as the ongoing acts and omissions of their counsel throughout the course of litigation.

The imposition of sanctions of dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld upon review as a proper exercise of discretion when trial court findings adequately demonstrate and establish **willfulness, bad faith or fault of the offending party**. Syl. Pt. 7, *State ex rel. Richmond Am. Homes of W. Va. v. Sanders*, 226 W. Va. 103, 697 S.E.2d 139 (2010)(**emphasis added**). This Court has further elaborated:

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.

Syl. Pt. 2, *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996).

This Court has also declared that where counsel, acting in grossly negligent fashion, “fails to obey an order of a circuit court to provide or permit discovery, **the full range of sanctions under W. Va. R. Civ. P. 37(b) is available to the court** and the party represented by

that counsel must bear the consequences of counsel's actions." Syl. Pt. 4, *Bell v. Inland Mut. Ins. Co.*, 175 W. Va. 165, 332 S.E.2d 127 (1985)(**emphasis added**).

In the present case, it is apparent that the Circuit Court did not abuse its discretion in dismissing the Petitioners' cross-claims, as the Petitioners and their counsel exhibited a pattern of wrongdoing during the course of the underlying litigation. First, several motions to compel were filed against Defendant AEP during the course of the litigation. On July 31, 2009, Plaintiffs filed a Motion to Compel Discovery against Ohio Power Company and American Electric Power Service Corporation. *SCT000156-172*. The Court granted the motion. *SCT000173-SCT000175*. A second motion to compel against Defendant AEP was served by Plaintiffs on July 16, 2010. *SCT000182-SCT000332*. The Court also granted this motion. *SCT000462-SCT000464*. Finally, the Circuit Court also granted a motion to compel on behalf of Ershigs. *SCT000176-SCT000177*.

Second, Petitioners and their counsel failed to properly respond to numerous discovery requests by failing to "seasonably" supplement their discovery requests during the course of litigation. The Petitioners, by and through their in-house counsel and litigation counsel, had care, custody and control over the documents that were produced on the eve of trial. *SCT000727-SCT000728*. Nevertheless, on April 13, 2011, just six (6) days before the scheduled trial, Defendant AEP deposited upon counsel an additional one hundred seven thousand five hundred and forty (107,540) pages of documents from the database of documents that had been in the custody of AEP's counsel for years but had not previously been reviewed. *SCT000527-SCT000528*. The Petitioners' supplementation clearly violates the Circuit Court's June 25, 2010 Pre-Trial Conference Order and the West Virginia Rules of Civil Procedure.

Moreover, Petitioners and their counsel had knowledge of the documents' existence during the entire course of litigation and failed to produce the same to the parties. Petitioners' counsel represented that a paralegal within AEP had completed a mass cloning of documents, emails and correspondence within the AEP computer system relating to the construction project and produced these to Petitioners' prior counsel, Edward Smallwood. It was represented that Attorney Smallwood decided that a review of this vast amount of information would be of no use to him so he went to individual witnesses within AEP who had worked on the subject construction project and obtained documents from them which were then reviewed and produced. *SCT000727*.

Petitioners' counsel decided not to review this documentation, and as such, withheld documents which were material to the liability issues in this case for all parties. Less than a week before trial, Petitioners' counsel began to produce, in limited fashion, these documents to the parties. *SCT000527-SCT000528*. The record makes it clear that motions to compel were granted against the Petitioners, that Petitioners failed to properly respond to discovery requests by failing to include the documents and/or "seasonably" supplement their discovery responses during the course of litigation, and that Petitioners, by and through their in-house counsel/litigation counsel, had actual knowledge of these documents as they were in their care, custody and control.

The Circuit Court properly observed that the Petitioners were responsible for the failure to produce those documents, because Petitioners chose counsel. *SCT000729*. Counsel for the Petitioners, in-house and outside, acted willfully and with gross negligence by failing to provide these documents when they had actual knowledge of the existence of the same. Accordingly, the full range of sanctions under Rule 37(b) was available to the Circuit Court and it did not abuse its

discretion in dismissing the Petitioners' cross-claims. Petitioners must bear the consequences of their counsel's actions." Syl. Pt. 4, *Bell*, 175 W. Va. 165, 332 S.E.2d 127 (1985).

In opposition to sanctions, Petitioners cite to this Court's decision in *Kiser v. Caudill* to support their argument that the late disclosure was an isolated occurrence, and therefore, there is no evidence of a pattern of wrongdoing with respect to discovery matters. In *Kiser*, the appellant had failed to timely disclose its expert witness in the matter. 210 W. Va. 191, 197, 557 S.E.2d 245, 251 (2001). The lower court excluded the appellant's expert witness at the pre-trial conference. *Id.* at 194, 248.<sup>24</sup> A few days after pre-trial, the lower court continued the matter. *Id.* On appeal, the Court overturned the decision to exclude the expert. However, this Court did not base its reversal of the lower court's ruling in *Kiser* upon the fact that it was a single isolated occurrence, but rather, on the fact that the trial in the matter was continued for two (2) years. *Id.* at 197, 251. While it is evident that the conduct of Petitioners' counsel was not isolated, the trial in the underlying matter was not continued and the parties were substantially prejudiced by the late disclosure. Thus, Petitioners' reliance on *Kiser* is misplaced.

### **III. THE CIRCUIT COURT'S SANCTION OF DISMISSAL OF PETITIONERS' CROSS-CLAIMS WAS PROPERLY FASHIONED TO ADDRESS THE PETITIONERS' LATE SUPPLEMENTATION OF ITS DISCOVERY RESPONSES.**

This Court has declared that "...the Due Process Clause of Section 10 of Article III 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." Syl. Pt. 5, *State ex rel. Richmond Am. Homes of W.Va. v. Sanders*, *supra*. Petitioners argue that a case should not be dismissed for

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<sup>24</sup> This Honorable Court found that the late disclosure of the expert alone warranted the circuit court's ruling to exclude despite being an isolated occurrence on behalf of the appellant. *Id.* at 197, 251.

failing to produce documents when those documents allegedly have no significant bearing on the merits of the case. *See Petitioners Brief at 20*. Petitioners submit that the Circuit Court abused its discretion by not examining the criticality of any of the documents to determine whether they pertained to the claims between the Petitioners and the Respondents. *Id. at 20*. Respondents submit that Petitioners' argument is simply misguided.<sup>25</sup>

For example, at the April 14, 2011 hearing, counsel for the Petitioners said that approximately twenty-one thousand (21,000) documents of three hundred thousand (300,000) had been identified initially as being potentially responsive to discovery. *SCT000718*. It is undisputed that documents existed among the late productions that were responsive to discovery. Thus, any argument by the Petitioners that that the documents produced on the eve of trial had no significant bearing on the merits of the case is simply disingenuous.

Petitioners further argue that the proper course was to continue trial in the matter to give the Respondents time to review the documents, not to dismiss the case, due to the fact that the Plaintiffs' claims against the Petitioners and Respondents had settled. *Id. at 21*. Petitioners state that there would be no prejudice to the Respondents in continuing the trial. *Id.* In fact, Petitioners contend that no prejudice would exist in providing additional time to the Respondents to review the hundreds of thousands of documents that were produced belatedly, and then prepare for trial a second time. This argument is simply unfounded and fails to recognize the prejudice, undue burden and expense on the Respondents.

Petitioners suggest that the hundreds of thousands of pages of documents that were produced on the eve of trial would not contain any pertinent new information, as many of the

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<sup>25</sup>As discussed *supra*, it is undisputed that Petitioners' late disclosure of numerous documents on the eve of trial was in violation of Rule 16 (failure to comply with the Circuit Court's June 25, 2010 Pre-Trial Conference Order) and Rule 26 (failure to supplement its prior discovery responses) of the West Virginia Rules of Civil Procedure, warranting sanctions pursuant to Rule 37.

documents were likely duplicates. *See Petitioners' Brief at 20.* This is contrary to Petitioners' counsels' representations before the Circuit Court at the April 14, 2011 hearing. Indeed, during the hearing, counsel for the Petitioners declared that the documents had already been "de-duplicated" before approximately three hundred thousand (300,000) documents were sent to all counsel of record. *SCT000718.* It is inconceivable that the magnitude of the documents produced on the eve of trial do not contain new information relevant to the underlying litigation, especially when compared to the volume of documents Petitioners produced during the discovery phase of the case, just over fourteen thousand (14,000) pages of documents. Accordingly, the Circuit Court appropriately exercised its discretion in fashioning the sanction of dismissal for the Petitioners' late supplementation.

#### **IV. THE CIRCUIT COURT PROPERLY CONDUCTED HEARINGS AND CONSIDERED THE ENTIRE RECORD BEFORE IMPOSING RULE 37(b) SANCTIONS.**

In reliance upon Syllabus Point 2 in *Bell, supra*, Petitioners argue that dismissal was premature because the Circuit Court failed to conduct an "evidentiary" hearing before imposing sanctions on the Petitioners. The Petitioners' argument is without merit. The Circuit Court conducted two (2) hearings wherein Petitioners had an opportunity to oppose the imposition of sanctions for failure to seasonably supplement discovery responses that were in the possession of Petitioners' in-house and litigation counsel.

This Court addressed an analogous situation in the case of *Cox v. State*, 194 W. Va. 210, 460 S.E.2d 25 (1995), wherein it considered the decision of a circuit court to strike the pleadings of the State of West Virginia as a discovery sanction for the failure to comply with a court order. In *Cox*, much like the Petitioners herein, the State argued that dismissal under Rule 37(b) was inappropriate because no "evidentiary" hearing was held. *Id.* at 217, 32. The circuit court held a

combined hearing on Cox's motion for summary judgment and motion for sanctions, to which the State failed to file a written response and failed to file any evidentiary rebuttal. *Id.* at 213, 28. Instead, the State's attorney attended the hearing and opposed each motion by oral argument. *Id.* Following the hearing, the circuit court entered an order granting Cox's motion for summary judgment and motion for sanctions, striking all of the State's pleadings and awarding judgment on the pleadings. *Id.*

On appeal, the State argued that no evidence supported the finding that it willfully failed to respond to discovery requests and the circuit court failed to hold an evidentiary hearing. This Court held that the record contained a transcript of a hearing during which the circuit court considered the motion for sanctions and the State's response -- the oral argument of the State's attorney. *Id.* at 217, 32. In so doing, the Court recognized that a circuit court "is required to hold an evidentiary hearing and consider the entire record in order to determine if the 'the failure to comply has been due to willfulness, bad faith or fault of the disobedient party and not the inability to comply and, further, that such sanctions are otherwise just.'" *Id.* (quoting Syl. Pt. 2, *in part, Bell*, 175 W. Va. 165, 332 S.E.2d 127). The Court also recognized that "[o]nce the party seeking the sanction has met his burden of establishing noncompliance with the order compelling discovery, the burden shifts to 'the disobedient party to avoid the sanctions sought under W. Va. R. Civ. P. Rule 37(b) by showing that the inability to comply or special circumstances render the particular sanctions unjust.'" *Id.* (quoting Syl. Pt. 3, *in part, Bell*, 175 W. Va. 165, 332 S.E.2d 127). Ultimately, in considering these principles and the underlying record, the Court affirmed the dismissal of the case pursuant to Rule 37. *Id.* at 217, 32.

Here, just like the State in *Cox*, Petitioners argue that the Circuit Court failed to conduct an "evidentiary" hearing. Despite such argument, there is clearly a record where the Circuit

Court conducted two (2) hearings (April 14, 2011 and April 19, 2011) wherein it gave Petitioners the opportunity to oppose the imposition of any sanctions and to explain why they failed to timely supplement the discovery. As discussed above, upon a proper showing by the moving party, the burden shifts to the disobedient party to avoid the sanctions by showing that the inability to comply or special circumstances render the particular sanctions unjust. To this end, during the two (2) hearings, the Circuit Court did not prevent Petitioners from presenting any rebuttal evidence to oppose any sanctions. Rather, the transcripts of both hearings reveal that Petitioners did offer an explanation for their failure to seasonably supplement during discovery, which the Circuit Court considered, but exercised its discretion and imposed sanctions in the form of dismissal. *SCT000660-661*. Thus, the Circuit Court properly conducted hearings and considered the entire record that Petitioners' made, before dismissing their cross-claims.

Moreover, during the April 14, 2011 hearing on Petitioners' failure to supplement, the Circuit Court made it clear that it was not precluding the imposition of sanctions, including the striking of pleadings. Indeed, the Circuit Court left the possibility of sanctions on the table. *SCT000730-SCT000731*. Thus, Petitioners were on notice that the Circuit Court was taking the failure to timely supplement very seriously. As such, to meet its burden, Petitioners should have taken affirmative steps to tender any evidence that they deemed necessary to demonstrate their inability to comply or special circumstances to avoid sanctions before a ruling was issued by the Circuit Court. In this regard, on April 19, 2011, the Circuit Court conducted a second hearing wherein it addressed the motions for sanctions. At such hearing, Petitioners failed to put forth evidentiary rebuttal in the form of affidavit(s) or otherwise. Instead, much like the State in *Cox*, Petitioners relied upon the oral argument of counsel.

Petitioners also relied upon an opposition brief to the motion for sanctions, which was filed on April 19, 2011. However, the opposition brief did not include any evidentiary rebuttal such as a sworn affidavit. Such evidentiary rebuttal could have been included for consideration. Indeed, counsel for Petitioners represented in their opposition brief that the “attorney review of these documents [that were in the process of being supplemented] was completed today, April 19, 2011.” *SCT000510*. Inasmuch as the “attorney review” had been completed on April 19, 2011, Petitioners could have provided evidentiary rebuttal to the Circuit Court before entry of the dismissal order on September 30, 2011. Nevertheless, as in *Cox*, the Petitioners failed to file any evidentiary rebuttal. Instead, Petitioners relied upon the oral argument of their counsel at the April 14, 2011 and April 19, 2011 hearings, as well as the opposing brief filed on April 19, 2011. Therefore, Petitioners should be estopped from arguing that the Circuit Court failed to conduct an evidentiary hearing.

Moreover, similar to the State’s argument in *Cox*, Petitioners assert that the Circuit Court had no basis for determining whether the failure was the result of bad faith or rather was due simply to mistake or oversight. However, at the April 14, 2011 hearing, counsel for Petitioner admitted that the subject documents in electronic format were in the “care, custody and control” of in-house counsel for AEP at all times. *SCT000727-SCT000728*. Indeed, the Circuit Court noted that “AEP is still responsible for those documents.” *SCT000729*. Clearly, given the fact that AEP’s in-house counsel at all times had knowledge of the existence of these documents, the Circuit Court had a basis to determine that Petitioners acted in bad faith by failing to seasonably supplement documentation that was in their possession at all times.

Ultimately, Petitioners were given an opportunity to make a complete and full evidentiary record at both hearings and otherwise before the Circuit Court exercised its discretion to strike

the Petitioners' pleadings. It is now disingenuous for Petitioners to assert that the Circuit Court failed to conduct an "evidentiary" hearing. As such, consistent with *Cox*, this Court should affirm the dismissal of Petitioners' cross-claims.

### **CONCLUSION**

Based upon the foregoing argument, Respondents submit that this Court should affirm the Order granting the Motions for Sanctions filed by the Respondents against the Petitioners. Petitioners' late supplementation/disclosure of hundreds of thousands of pages of documents beginning one week before the trial date of April 20, 2011 was in violation of the Circuit Court's June 25, 2010 Order mandating that all discovery be supplemented by January 14, 2011. Further, Petitioners prejudicial supplementation of discovery responses with these documents was a violation of Rule 26(e) of the Rules of Civil Procedure, as the documents were in possession of the Petitioners' counsel for years before their disclosure. Petitioners must bear the consequence of their counsels' actions and the prejudicial nature of the same. Thus, the Circuit Court properly exercised its discretion in this regard.

Furthermore, Petitioners' characterization that the Circuit Court did not conduct an 'evidentiary hearing' is misplaced. Indeed, the Circuit Court conducted two (2) hearings wherein Petitioners had an opportunity to oppose the imposition of sanctions for failure to seasonably supplement discovery responses with documents that were in the possession of Petitioners' in-house and litigation counsel. Petitioners were given an opportunity to make a complete and full evidentiary record at both hearings, before the Circuit Court properly exercised its discretion to strike the Petitioners' pleadings. The Petitioners failed to make that record.

**WHEREFORE**, the Respondents, Pullman Power, LLC, Structural Group, Inc. and Ershigs, Inc., by and through their counsel of record, respectfully pray that this Honorable Court

deny Petitioners' Petition for Appeal. The Respondent further pray for such further and full relief as this Honorable Court deems appropriate under the circumstances.

Respectfully submitted,



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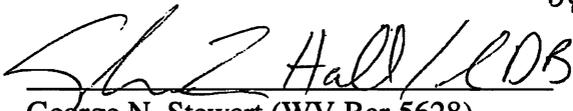


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

OHIO POWER COMPANY and  
AMERICAN ELECTRIC POWER  
SERVICE CORPORATION,

Petitioners,

Docket No. 11-1512

v.

PULLMAN POWER, LLC, STRUCTURAL,  
GROUP, INC., and ERSHIGS, INC.,

Respondents.

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**CERTIFICATE OF SERVICE**

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The undersigned counsel does hereby certify that the foregoing "***Respondents Pullman Power, LLC, Structural Group, Inc., and Ershigs, Inc.'s Joint Response to Petitioners' Brief***" was served upon all counsel and parties of record via facsimile and United States mail, postage prepaid, addressed as follows:

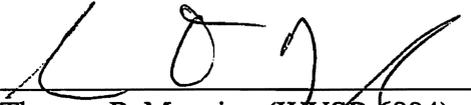
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