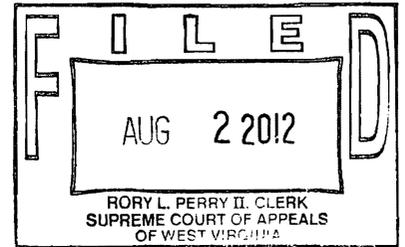


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0418



**MULTIPLEX, INC., a West Virginia corporation;
ART R. POFF; and PAMELA POFF, Petitioners**

vs.

TOWN OF CLAY, Respondent

**Hon. Richard A. Facemire, Judge
Circuit Court of Clay County
Civil Action No. 10-C-82**

BRIEF OF THE RESPONDENT

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I. (COUNTER-STATEMENT OF) ASSIGNMENTS OF ERROR

1. This Court should affirm the trial court's February 1, and 15, 2012 Orders correctly adopting the November 14, 2011 Special Commissioner's Report on Issues Referred by the Court, and February 14, 20102 (Second) Report of Special Commissioner ordering the forfeiture of Petitioners' \$25,000 injunction bond, because the Town's attorneys' fees and costs – tested for reasonableness in accordance with ***Aetna v. Pitrolo*** - incurred in securing the dismissal and dissolution of the injunction are recoverable as damages against the injunction bond pursuant to ***W.Va. Code § 53-5-9*** for Petitioners obtaining an injunction wrongfully enjoining the Town, especially where Petitioners later abandoned their injunction request, which was in fact dissolved and dismissed – WITH PREJUDICE before any determination on the merits with the Town's dispositive Motion to Dismiss, and in the Alternative To Dissolve Petitioners' Preliminary Injunction pending

2. This Court should affirm the trial court's February 1, and 15, 2012 Orders correctly adopting the November 14, 2011 Special Commissioner's Report on Issues Referred by the Court, and February 14, 20102 (Second) Report of Special Commissioner ordering the forfeiture of Petitioners' \$25,000 injunction bond pursuant to ***W.Va. Code § 53-5-9***, and the familiar ***Aetna v. Pitrolo*** standard along with the express terms of the trial court's Orders, because the Town may recover as damages (and not as "sanctions") against the injunction bond its expenses and costs including reasonable attorneys' fees and costs incurred in securing the dissolution and dismissal of the injunction - WITH PREJUDICE. And, because Petitioners are not entitled to an evidentiary hearing, and engaged in extensive discovery and lengthy briefing in response to the Town's Motion to Forfeit Injunction Bond, the Town's Proffer in Support of Motion to Forfeit Injunction Bond, and Itemized Attorneys' Fees and Costs pursuant to, *inter alia*, the trial court's December 28, 2010 Order authorizing the parties to engage in discovery, and the Special Commissioner's Reports and briefing schedules adopted by the circuit court before any determination of forfeiture, this Court should affirm the trial court's February 1, and 15, 2012

Orders correctly adopting the November 14, 2011 Special Commissioner's Report on Issues Referred by the Court, and February 14, 20102 (Second) Report of Special Commissioner.

3. Because the Town, the non-breaching party, may recover as damages against the injunction bond its reasonable attorneys' fees and costs incurred in securing the dissolution and dismissal of the injunction pursuant to **W.Va. Code § 53-5-9** and the familiar **Aetna v. Pitrolo**, this Court should affirm the trial court's February 1, and 15, 2012 Orders correctly adopting the November 14, 2011 Special Commissioner's Report on Issues Referred by the Court, and February 14, 20102 (Second) Report of Special Commissioner, which by their express terms relate to the statutory forfeiture of the petitioners' \$25,000 injunction bond under **W.Va. Code § 53-5-9** (and not "sanctions"). Petitioners exercised - before the entry of the trial court's February 1 and 15, 2012 Orders correctly adopting the November 14, 2011 Special Commissioner's Report on Issues Referred by the Court, and February 14, 20102 (Second) Report of Special Commissioner - their full, fair and meaningful opportunity with advance notice to contest the Town's 3 invoices documenting the Town's attorneys' fees and costs incurred as recoverable damages under **W.Va. Code § 53-5-9** and the familiar **Aetna v. Pitrolo** standard in securing the dissolution and dismissal of the injunction - WITH PREJUDICE. Because the Town (and Petitioners) met and complied with, *inter alia*: a) the trial court's February 5, 2011 Order Scheduling Deadlines for Parties to Respond and Reply to the Town of Clay's Motion to Forfeit, b) the November 14, 2011 Special Commissioner's Report on Issues Referred by the Court including the briefing schedule set forth therein, and c) the trial court's February 1, 2012 Order correctly adopting the November 14, 2011 Special Commissioner's Report on Issues Referred by the Court, which required the Town to submit a complete list of damages under **W.Va. Code § 53-5-9** and the familiar **Aetna v. Pitrolo** standard before November 22, 2011, later modified to before February 24, 2012 by the trial court, and for any response to be submitted by Petitioners before December 2, 2011, later modified to before March 12, 2012 by the trial court, this Court should affirm the circuit court's February 1 and 15, 2012 Orders forfeiting the injunction bond.

4. The trial court “set” Petitioners’ injunction bond “for \$25,000 in the matter” at the December 7, 2010 hearing, “secured by a cash payment of \$ 2,500” as “ten percent” (quoting Petitioners’ counsel). Because Petitioners’ preliminary injunction was dissolved by the circuit court, and because their complaint was dismissed – WITH PREJUDICE before determination on the merits with the Town’s dispositive Motion to Dismiss, and In the Alternative to Dissolve Temporary Restraining Order and Preliminary Injunction pending, but only after the Town incurred attorneys’ fees and costs in securing the dissolution and dismissal of the injunction, including attorneys’ fees and costs expended in obtaining by subpoena the production of damaging discovery documents, information, and admissions against Petitioners’ interests showing that Petitioners ran out of operating capital and thus abandoned the Town’s Project breaching Contract No. 4 with the Town, who was enjoined wrongly by Petitioners, the trial court properly forfeited Petitioners’ \$25,000 injunction bond.

Petitioners’ assignments of error are without merit. This Court should affirm the trial court’s February 1, and 15, 2012 Orders correctly adopting the November 14, 2011 Special Commissioner’s Report on Issues Referred by the Court, and February 14, 2010² (Second) Report of Special Commissioner.

II. COUNTER-STATEMENT OF THE CASE

Procedural History And Factual Background

This case arises from the unexcused breach of the Town’s Water System Improvements Project Contract No. 4 (the “bonded Project”) by Petitioner, Multiplex, Inc., the contractor (“Multiplex” or collectively, “Petitioners”), who ran out of operating capital during construction unbeknownst to the Town, and on or about September 7, 2010¹ walked off and abandoned the

¹ Ironically, to prevent the Town from declaring Petitioners in default, and terminating Contract No. 4 as was properly noticed by the Town on November 16, 2010 (App. 177), at the December 7, 2010 hearing Petitioners claimed that without \$478,757.33 in change orders from the Town they’d “be bankrupt”, company and personally. App. 204-208. Though they abandoned the Town’s Project in September, 2010 and claimed to be concerned about finishing the Project, Petitioners, however, failed to “finish” the Town’s Project, and Petitioners Mr. and Mrs. Poff verified the Complaint on December 2, 2010² while vacationing at their beach home in “Horry County, South Carolina”, i.e., Myrtle Beach. App.16, 204-208.

Town's Project, Contract No. 4 with no notice to the Town, leaving the Town's Project, Contract No. 4 unfinished². On December 7, 2010 Petitioners obtained a preliminary injunction wrongfully enjoining the Town from properly terminating the construction contract. App. 187. On December 21, 2010 the Town filed its Motion to Dismiss, and in the Alternative to Dissolve Temporary Restraining Order and Preliminary Injunction. App. 1. Unbeknownst to the Town, Petitioners' financial condition and bonding relationship, critical in the construction industry, was already dwindling and their bonding capacity declining, long before the April 30, 2009 bid date for this Project. App. 92, 185, 358, 365. Poff's "bombshell" email, and other smoking-gun documents later produced in discovery to the Town, were not available or produced to the Town before bidding, and thus the Town did not learn until on or about January 13, 2011 of Petitioners' overwhelming financial inability to perform the Project, Contract No. 4, when Greg Gordon of BB&T Carson Insurance Services, Petitioners' bonding agent with US Surety, produced 1068 pages of documents containing damaging information, including the July 27, 2010 email @ 2:20 p.m. from Petitioner Art Poff to Mr. Gordon stating,

² Petitioners' confusing arguments, *inter alia*, that the Town "mismanaged" this Project and that the Town's "mismanagement" has "spawned" 4 law suits are utterly contrived nonsense, false, and specious. On the contrary, Petitioners' misconduct, unexcused breach of Contract No. 4, and abandonment of the Town's Project is what caused and resulted in the filing of four lawsuits. The Town, the non-breaching party, prevailed in the action below. The Town prevailed in the pathetic, vexatious and collusive WDA civil action styled: WDA v. Town of Clay, C.A. No. 11-C-49 (J. Facemire), who on January 27, 2012 granted the Town's motion for judgment as a matter of law, gutting that action. App. 1454; 1537. Because Petitioners breached Contract No. 4, and refused to return and complete it, the Town declared Petitioners in default, and properly terminated Contract No.4 for cause. Petitioners claim to "be bankrupt" (App. 187-235). Petitioners' surety, asserting its rights as a secured creditor and assignee of Petitioners with an interest in "all contract funds" etc., instructed the Town that "no further payment should be made without the express written consent of USSC." App. 186. The Town, the non-breaching party, left with no other choice, filed a civil action to recover the Town's damages against Petitioners and their surety, United States Surety Company (US Surety) in Town of Clay v. United States Surety Company, 11-C-53 (Clay Co. Cir. Ct.) (J. Alsop). US Surety, who expended over \$741,000 to clean up and pay off Petitioners' unpaid subcontractors and suppliers filed suit in Nicholas County against Petitioners seeking indemnification for Petitioners' breach of Contract No. 4, US Surety Company v. Multiplex, Inc., et al, 11-C-31 (Nicholas Co. Cir. Ct.) (J. Johnson) (The "Nicholas County action"). Thusly stated, Petitioners' attempt to extort and loot the Town's public fisc, and Petitioners' arguments that the Town "mismanaged" this Project, and "spawned" four lawsuits are erroneous and specious. Rightly dubbed a "ruse" below to mislead the circuit court, the arguments remain a "ruse" on appeal. App. 321.

“(...I’M SURE THEY [Surety] KNOW, THAT WITHOUT ANOTHER PROJECT, WE [Multiplex] WILL NOT BE AFLOAT TO FINISH THE [TOWN OF CLAY’S] WATER PLANT. WHEN IT GETS DOWN TO THE LAST MONTH OR TWO THERE WILL NOT BE ENOUGH LEFT IN IT TO PAY OUR OVERHEAD.” (Emphasis added). (Quoting Petitioner Art Poff - 7/27/10 @ 2:20 p.m.) App. 319.

Thus, and not surprisingly, Petitioners Multiplex and Art Poff clearly communicated to US Surety Petitioners’ dwindling bonding capacity, just days before abandoning the Town’s Project, Contract No. 4, stating that there were not even enough remaining undisbursed contract funds in Contract No. 4 “to pay our overhead.” App. 319. Petitioners’ arguments to the contrary are utterly specious, and their allegations for injunction relief were knowingly false.

Immediately after abandoning the Town’s Project on September 7, 2010, Petitioners began demanding money for alleged “extra work” from the Town, through email communications with the Town’s Engineer, Mr. Jim Hildreth, P.E. On September 15, 2010, Petitioners submitted Proposal No. 67-1, demanding \$380,494.24. App. 104-122; 123-166. On September 28, 2010, Petitioners submitted Proposal No. 67-2, demanding \$1,216.61. App. 104-122. On October 1, 2010, Petitioners submitted Proposal No. 67-3, demanding \$2,948.41. App. 104-122. The Town’s Engineer responded to Petitioners’ string of inquiries and demands by various email in connection with Petitioners demands for change orders, and informed Petitioners that the “Owner respectfully requests that your company provide an updated construction progress schedule in connection with the Work”. App. 123-166. On October 22, 2010, Petitioners’ former counsel submitted another demand for “Required Change Orders for Contract Price and Time”, totaling **\$478,757.33**, demanding “receipt of the Change Orders reflecting revisions to the Contract Price and Contract Times”, for Petitioner Multiplex to “resume work on the project”, threatening to “refuse to return” to perform Contract No. 4, literally holding the Town hostage to the completion of the Project, Contract No. 4. App. 104-108.

On October 25, 2010 and again on November 16, 2010, the Town properly notified Petitioners and their surety under Contract No. 4 and Performance Bond No. 24101 that the Town was considering declaring Multiplex in default. App. 177; 1645. The Town scheduled the

November 18, 2010 meeting to discuss Petitioners' methods of performing the Town's Project, Contract No. 4. App. 178. Adding to Petitioners' mounting inability to perform Contract No. 4 and critical, declining financial condition, before the November 18, 2011 meeting, on November 11, (and 23), 2010 US Surety's President Richard Klein, however, wrote the Town instructing the Town that US Surety claimed a secured and perfected interest in all of Petitioners' assets, including by a perfected assignment thereof, and that "[i]n view of the above, no further payment should be made to Multiplex without the express written consent of USSC." App. 84, 86, 186. Petitioners thus assigned all of their rights, title, and interests to US Surety under the terms of the April 2, 2007 Agreement of Indemnity³ between Petitioners and US Surety, whose President, Mr. Klein demanded, that "no further payment should be made to Multiplex without the express written consent of USSC." App. 186. At the November 18, 2011 meeting, Petitioners failed to discuss their methods to perform, refused to return and complete the Town's Project, demanded the Town pay \$ 478,757.33, and again "walked off" and out of the meeting with the Town.

On December 3, 2010, Petitioners, availing themselves of the judicial process, filed and served their "unfounded petition" (App. 1748) to wrongly enjoin the Town, demanding, *inter alia*, that the Town be enjoined from declaring Multiplex in default of Contract No. 4, ordering the Town "to issue change orders and respond to inquiries, and from preventing US Surety from collecting monies due and owing Petitioners, totaling \$478,757.33. App. 15.

The circuit court granted Petitioners' preliminary injunction request, enjoined the Town, the non-breaching party, from declaring Petitioners in default, and "set" a \$25,000 injunction bond, but allowed Petitioners to post ten percent of the \$25,000 injunction bond as collateral

³ The April 2, 2007 Agreement of Indemnity (App. 86-91) between Petitioners and US Surety is the subject matter of US Surety's Nicholas County civil action (11-C-31) against Petitioners seeking, currently, over \$ 741,000 for the surety's payments to Petitioners' unpaid subcontractors and suppliers and the surety's attorneys' fees and costs arising under, only, the "payment bond" on this public works construction project. Unbeknownst to the Town, Petitioners had absconded with over \$500,000 in progress payments that Petitioners failed and refused to pay to their subcontractors and suppliers further materially breaching Article 14.02, Progress Payments, under Contract No. 4, through no fault or involvement of the Town, the non-breaching party.

security for the \$25,000 injunction bond. App. 187-236. On December 21, 2010 the Town promptly filed its Motion to Dismiss, and in the Alternative to Dissolve Temporary Restraining Order and Preliminary Injunction. App. 1. The Town joined the Engineer's discovery motion, and on December 28, 2010 circuit court entered its Order authorizing discovery to be conducted. App. 452. The Town timely noticed the deposition of Greg Gordon, Petitioners' bonding agent at BB&T Carson Insurance Services, and authorized agent of US Surety along with the deposition of a BB&T records custodian for January 21, 2011 at 9:00 a.m. App. 241-251. Further availing themselves of the circuit court's process, procedurally and substantively, Petitioners engaged in discovery noticing various depositions of the Town and its Engineer, though later cancelling (App. 302-303), and obtained documents in discovery through discovery and compulsory process, including from the Town. App. 457-468; 1688.

At the January 6, 2011 hearing to dissolve the injunction, with the Town rightly challenging any allegation as to a "likelihood of success on the merits" by Petitioners, the circuit court stated: "And at this point the breach of contract has not been pled, and how can the plaintiffs show that they have a likelihood of prevailing in the proceedings?" App. 271-272. The circuit court chided Petitioners' counsel for not pleading any breach of contract, (i.e., *ancillary*), to the injunctive relief, and any showing of a "likelihood to prevail on the merits? Where are your merits at? You've got to show me that you have a likelihood to prevail under the contract,... but you've not pled it." App. 278-279. The circuit court repeatedly threatened to dissolve the injunction, with Petitioners, who were already balking, continuing to threaten bankruptcy as they did on December 7, 2010, but unwilling to go forward with their own litigation, because, as the trial court stated "the complaint does not sound out a breach of contract action, ...a breach of contract action, ... that's not been pled here." App. 264, 265.

The circuit court repeatedly threatened dismissal and dissolution because a "likelihood of success on the merits" depended upon a "breach of contract" determination, stating "Well, I can tell the plaintiffs now, as a result of failure to plead the breach of contract, that you're almost in a

situation I'm going to dissolve the injunction." App. 267. After reviewing the pleadings' meticulously, the circuit court stated, "Now I have reviewed everything in the matter and I, quite frankly, have some reservations as to whether the injunction should continue or not." App. 267. On January 6, 2011, the circuit court very clearly stated, "I've dismissed the issue of ordering [the] town to issue change orders and I have denied the issue of requiring Multiplex to have certain questions answered by the town and Mr. Hildreth ... But the problem I have is that the issue that should be addressed, if there is an issue, is whether or not someone breached the contract and who breached it and what the damages are, and that is not pled in the documents... you've not pled it." (Emphasis added). App. 269. "Well, with all due respect to the plaintiff, I do not see that the breach of contract issue is pled in the pleadings as they are currently constituted. And I went through that meticulously to make certain, and that was my question when I went through it in the matter." App. 272. "Well, I note that the complaint doesn't appear to make a claim for breach of contract." App. 275. "[T]hey've not sought damages in the current petition and pleadings for any kind of breach of contract. All they're seeking is this Court to order the town to answer questions and for Mr. Hildreth to take certain action; isn't that right?" App. 278.

Lacking any "likelihood of success on the merits" against the Town, the non-breaching party, Petitioners' injunctive relief failed, and was, in fact, adjudicated adversely to Petitioners by the dissolution and dismissal – WITH PREJUDICE. App. 264-278; 304-312.

Petitioners engaged extensively in the briefing schedules and discovery⁴. On January 20, 2011, the day before Petitioners' bonding agent Greg Gordon was scheduled to be deposed

⁴ Before dismissal-WITH PREJUDICE, Petitioners engaged in extensive briefing and discovery, issuing and serving on January 12, 2011 Notices of Deposition for Rob Beers, the Town's (then) Mayor Jack Brown, Engineer Jim Hildreth, P.E., Andy Collins (Employee/asst. to Engineer). App. 829-838. Petitioners' counsel on December 9, 2010 after the issuance of the preliminary injunction stubbornly refused the Town's discovery requests, requiring the Town to file a "discovery motion" and stated: "Tell it to the Judge". App. 257-258; 518. At the January 6, 2011 hearing as discovery had been ordered, Petitioners' counsel then stated "we think that all parties should be entitled to engage in that [discovery] process...." App. 256 At the January 6, 2011 hearing, the Town's January 7, 2011 separate subpoena/duces tecum and notices of deposition for BB&T's records custodian and for Greg Gordon had not yet been filed or

and to produce documents in response to the Town's subpoena/duces tecum, the Town secured the dissolution and dismissal from being wrongly enjoined, because Petitioners voluntarily dismissed – WITH PREJUDICE their own action. App. 301-312. Though Petitioners had previously opposed discovery, informing the Town to "Tell it to the Judge", on the other hand, Petitioners themselves engaged extensively in discovery, and briefing. App. 257.

By January 13, 2011 letter Mr. Gordon, however, voluntarily produced the 1068 pages of documents, delivered them to the Town's counsel in lieu of being deposed, to be excused from appearing at his deposition, scheduled for January 21, 2010. App. 656. The 1068 pages of documents contained dozens of "bombshell" communications and riveting admissions by Petitioners, and for example, Petitioners admitted to Mr. Gordon in a July 27, 2010 email, @ 2:20 p.m., just days before abandoning the Town's Project, Contract No. 4 (unbeknownst to the Town at the time) that,

"(...I'M SURE THEY [Surety] KNOW, THAT WITHOUT ANOTHER PROJECT, *WE [Multiplex] WILL NOT BE AFLOAT TO FINISH* THE [TOWN OF CLAY'S] WATER PLANT. WHEN IT GETS DOWN TO THE LAST MONTH OR TWO *THERE WILL NOT BE ENOUGH LEFT IN IT TO PAY OUR OVERHEAD.*)" (Emphasis added).
(Quoting Art Poff - 7/27/10 @ 2:20 p.m.) App. 319.

Petitioners' sudden dissolution and dismissal of this action – WITH PREJUDICE⁵ on January, 20, 2011 was an attempt to try to avoid and evade the Town's learning of, *inter alia*,

served, but as the Court can see, Petitioners engaged, extensively, in briefing, and discovery, which Petitioners terminated. Discovery is unavailable.

⁵ Petitioners' "never mind" childish antics to avoid a determination of a "likelihood of success on the merits" marred the solemn act of obtaining an injunction turning it into a game of "bluff", first to extort and loot the Town (and court), except as the Special Commissioner correctly observed, until the Town's discovery ferreted out the facts "on the ultimate issue", whereupon Petitioners "folded up the game board before [they] allowed anyone to determine the result of the game". App. 1742. Indeed, recognizing Petitioners' desperate plight, and to protect its indemnification claims and UCC recordings as a secured creditor and assignee of Petitioners, on March 11, 2011 Petitioners' surety, United States Surety Company ("US Surety" or "USSC"), who under the Performance Bond No. 24101 on this Project guaranteed and insured the performance of Petitioners on Contract No. 4, sued Petitioners in Nicholas County, *United States Surety Company v. Multiplex, Inc., Art Poff, and Pamela Poff, C.A. No. 11-C-31 Cir. Ct. Nicholas County* (*J. Johnson*) (the "Nicholas County Indemnity Action") seeking to enforce the April 2, 2007 Agreement of Indemnity against Petitioners for over \$741,000 expended by US Surety under the payment bond alone on this Project due to Petitioners' unexcused breach of Contract No. 4 and failure to

Petitioners' damaging admissions to their bonding agent, Mr. Gordon, on July 27, 2010, @ 2:20 p.m.,(just days before Petitioners abandoned the Town's Project), from the discovery and compulsory process. App. 313;1032. The 1,068 pages of documents obtained from Mr. Gordon assisted the Town in securing the dissolution and dismissal of the injunction, and completely contradicted and wholly refuted Petitioners' Complaint allegations and ("be bankrupt") testimony to wrongly enjoin the Town the Town from declaring Petitioners in default and "to issue change orders and respond to inquiries..." App. 15.⁶

The circuit court retained jurisdiction in its February 5, 2011 Order to rule upon the Town's Motion to Forfeit Plaintiffs' Injunction Bond, and in the Alternative Motion for Attorneys' Fees and Costs, and Sanctions, (hereinafter, the "Town's Motion to Forfeit Injunction Bond"). App. 383-385; 1739. Petitioners, further availing themselves of the circuit court's due process, filed a Response on March 2, 2011. App. 386. The Town filed its Reply on March 9, 2011, all in accordance with the circuit court's briefing schedule in the February 5, 2011 Order, and without discovery. App. 383-385; 492.

On April 22, 2011 the Special Commissioner reported on the status of case⁷. App. 527-528. After trying to resolve this matter with Petitioners, who breached Contract No. 4 with no

pay its subcontractors and suppliers (App. 272-273) out of regularly received progress payments from the Town, in further breach of the Town's Contract No. 4. App. 1637. US Surety also seeks even more indemnity from Petitioners for the additional amounts that US Surety must pay to the Town, the non-breaching party, under the Performance Bond for failing to takeover and complete the Town's Project, Contract No. 4, after Petitioners' unexcused breach thereof.

⁶ Petitioners cannot have it both ways and consented – without discovery - to the circuit court's February 5, 2011 briefing schedule to resolve "as a matter of law" the Town's Motion to Forfeit Injunction Bond. App. 383-385; 1738-1739. By Petitioners' dissolution and dismissal - WITH PREJUDICE of the injunction without showing a "likelihood of success on the merits" as the Town rightly challenged, they terminated the circuit court's discovery process, and cannot now be heard to complain of that termination by their own actions in the dissolution and dismissal-WITH PREJUDICE, especially after having availed themselves extensively of the circuit court's substantive and procedural processes, and briefing schedules. Discovery expired, was terminated by Petitioners, is not available or applicable to the Town's Motion to Forfeit Injunction Bond, and regardless, was waived by Petitioners.

⁷ On February 5, 2011, the circuit court appointed the Honorable Elliot G. Hicks, Esquire as Special Commissioner to address the Town's Motion to Forfeit Injunction Bond, with a briefing schedule for the

excuse or justification, and abandoned the Project because they ran out of operating capital, on October 14, 2011, the Town, the non-breaching party, in accordance with the Special Commissioner's new briefing schedule (App. 1025; 1505-1506) filed its Proffer in Support of Motion to Forfeit Injunction Bond. App. 603. After a response was filed (including the later filing of a "Sur-Reply") the Town filed its Reply on November 8, 2011 in further extensive briefing of the injunction bond forfeiture issue, to recover the Town's reasonable attorneys' fees and costs as damages under *W.Va. Code § 53-5-9* and the *Pitrolo* standard, in securing the dissolution and dismissal-WITH PREJUDICE of the injunction. App. 954.

On November 14, 2011, the Special Commissioner correctly recommended in his Special Commissioners Report On Issues Referred by the Court ("Report"), with a proposed Order that the Town was entitled to such proceeds of the Petitioners' \$25,000 injunction bond as the Town proves that it suffered as an expense resulting Multiplex's filing and then abandoning its Complaint with no determination on the merits. App. 1495; 1503-1512; 1514-1516. The Special Commissioner intimated, warning Petitioners, that they were "spending time addressing evidentiary issues that were most likely to be resolved as a matter of law." App. 1025; 1505.

The trial court adopted the Special Commissioner's Report dated November 14, 2011 by its Order – later - entered February 1, 2012, ordering that the Town was entitled to such proceeds of the injunction bond posted by Petitioner Multiplex as the Town proves that it has suffered as an expense resulting from Multiplex's filing and abandoning its Complaint with no determination on the merits, delaying the Town from pursuing its business interests and resulting in the Town incurring certain expenses before it was allowed to resume its business activities. App. 1734-1736. The November 14, 2011 Special Commissioner's Report with its

filing of any response and a reply to the Town's Motion to Forfeit Injunction Bond. App. 383-385. The circuit court ruled in its February 5, 2011 Order that "there is nothing preventing or prohibiting the Town of Clay from declaring the Plaintiffs in default and proceeding against the Plaintiff's surety bond." On February 14, 2012 the briefing was "now complete". App. 1749.

proposed Order included a briefing schedule stating the “Town of Clay **shall submit a complete list of any damages** it claims to have suffered as a result of the abandoned temporary injunction to the Court for consideration by the Court’s appointed Special Commissioner to determine whether all or part of the injunction bond should be forfeited. The Town shall address the factors listed in *Aetna v. Pitrolo* in submitting its claim for attorney’s fees. **The schedule for submission of such a list shall be that the Town shall submit its list before November 23, 2011 and Multiplex shall submit its response or objections to such damages on or before December 2, 2011**”. (Emphasis in Original). App. 1511. The trial court’s Order – later - entered February 1, 2012, adopting the Special Commissioners’ Report of November 14, 2011, also, set forth the exact same briefing schedule language (Cf., App. 1503-1516; 1734-1736), **except**, that Judge Facemire, by handwritten/initialed change, ordered that **“The schedule for submission of such a list shall be that the Town shall submit its list before [February 24, 2012] ~~November 23, 2011~~ and Multiplex shall submit its response or objections to such damages on or before [March 12, 2012] ~~December 2, 2011~~”**. App. 1735. No prejudice ensued to Petitioners by the enlargement of the briefing schedule, and on February 14, 2012, the briefing was “now complete” per the Special Commissioner. App. 1749.

Per the Special Commissioners Report of November 14, 2011, (App. 1503-1512; 1514-1516) and also the – later – Order by the circuit court on February 1, 2012 (App. 1735-1736), adopting the Special Commissioner’s Report of November 14, 2011, the Town submitted the Town of Clay’s Itemized Attorneys’ Fees and Costs For Recovery From Injunction Bond on November 22, 2012. App. 1032 On December 1, 2012, Petitioners filed their Response to the Towns 3 invoices and itemized attorneys’ fees and costs, per the Special Commissioner’s November 14, 2011 Report, and circuit court’s February 1, 2012 Order.⁸

⁸. Petitioners, suffering no confusion or misunderstanding, had no trouble complying with the briefing schedule in the Special Commissioner’s Report of November 14, 2011, filing their Response on December 1, 2011, along with their objections. App. 1077; 1494. The briefing was completed by

The Town set forth its detailed "list" of itemized attorneys' fees and costs in 3 separate individualized invoices, with written and dated entries detailing the Town's expenses and costs in securing the dissolution and dismissal of the injunction after being wrongly enjoined, under the familiar *Aetna v. Pitrolo*, standard. App. 1032-1041; 1042 – 1076. The Town's Itemized Attorneys' Fees and Costs for Recovery From Injunction Bond totaled \$47,186.18 (though the amount was actually greater for legal services/costs expended outside the 12/7/10-2/5/11 timeframe) in the 3 itemized and properly redacted invoices: invoice 14727(a) dated January 5, 2011, Invoice 14741(a) dated February 3, 2011, and Invoice 147478 (a) dated March 31, 2011, for work performed by the Town's counsel between December 3, 2010 when Petitioners' Complaint was filed, and February 5, 2011 when the trial court entered its Order modifying its earlier entered January 21, 2012 Order dismissing Petitioners' Complaint with prejudice. App. 1032. Thus, the Town in fairness, and the Special Commissioner and circuit court confined to the foregoing timeframes ("after" being wrongly enjoined) the Town's damages and expenses it sustained and incurred in securing the dissolution and dismissal of the injunction, and which are recoverable from Petitioners' injunction bond under *W.Va. Code § 53-5-9*.

The circuit court's February 1, 2012 Order correctly adopting the Special Commissioner's Report of November 14, 2011 ordered that the injunction bond amount was set at \$25,000. App. 1514-1516; 1734-1736. Suffering no confusion regarding any so-called

Petitioners in accordance with the Special Commissioner's designated briefing schedule, and after December 1, 2011 there was no "brief" left to be filed. Discovery had long since been terminated by Petitioners' dissolution and dismissal-WITH PREJUDICE of their Complaint. App. 304-312. In fact, Petitioners "cancelled" their previously noticed depositions, as discovery was "over". App. 301. Under the circuit court's February 15, 2012 Order, nothing was left to be filed. Discovery was over, and is unavailable in this instance.

The Court's Order entered February 1, 2012 Order in no way "ordered additional evidence and briefing" as erroneously and deceptively suggested by Petitioners' counsel. App. 1767. On December 1, 2011 and by February 14, 2012, the briefing was "now complete". App.1749. Thus, Petitioners suffered no confusion or misunderstanding as they improperly suggest. The circuit court's February 15, 2012 Order was not entered "before" the time period for Petitioners to respond had expired as set forth in the Special Commissioner's Report dated November 14, 2011, adopted by the circuit court's February 1, 2012 Order Accordingly, such arguments to assign error by Petitioners are specious, and there is, and was – no - "additional evidence and briefing". App. 1759. By February 14, 2012, the briefing was "*now complete*." App. 1749.

“additional evidence and briefing” as improperly suggested by Petitioners in their Brief (bizarre, etc.), the circuit court’s February 1, 2012 Order adopting the Special Commissioners Report dated November 14, 2012 stated in paragraph 5:

“5. Following the Town’s submission of its costs, fees and any other expense, Special Commissioner Hicks shall make a finding of such costs referenced in Paragraph 1, above, and submit that finding to the Court as a further recommendation.” App. 1735.

On February 14, 2012, with the briefing “*now complete*” (App. 1749), the Special Commissioner submitted a further and final recommendation, the (Second) Report of Special Commissioner (with “a proposed Order”), with findings and recommendations on the Town’s Itemized Attorneys’ Fees and Costs for Recovery From Injunction Bond. App. 1748-1751. Employing the *Aetna v. Pitrolo* factors and analysis laid out in the Town’s earlier briefings (App. 1032; 1625), the February 14, 2012 (Second) Report of Special Commissioner limited and reduced the Town’s recovery of charges in its 3 itemized invoices for legal fees and costs under *W.Va. Code § 53-5-9* to \$39,542.58, confining – as did the Town’s invoices – consideration of forfeiture liability to a timeframe “after” December 7, 2010 when the Town was wrongly enjoined until January 21, 2011 when dissolved and dismissed, and then further found that the amount for which Petitioners should be liable for abandoning their injunction action without any indication that the petition had any merit, should not exceed the amount of the \$25,000 injunction bond. App. 1749.

The Town’s counsel’s invoices are contemporaneously kept, checked, and reviewed, and are genuine, authentic, and accurate, and “can and should withstand any level of judicial scrutiny⁹” (App. 1690-1692) as the Special Commissioner rightly found in his (Second) Report of

⁹ From just a mere cursory review and comparison of the Town’s undersigned counsel’s invoices and the billing entries, it is undisputed, as the Special Commissioner correctly observed, found, and recommended, that the Town’s counsel’s itemized invoices, in all respects regarding billing entries for the invoices 14727, 14741, and 14748, are, in fact, identical. App. 1689-1731. The only difference between the invoices (Cf., App.1694-1711 versus 1712-1731) is the name, “Mayor Jack Brown” versus “Mayor Ryan Clifton”. App. 1694; 1710. Petitioners’ argument (“false”, fabricated”, etc.) is shallow, and amounts to form over substance. Save the different names of the Town’s respective Mayors, the invoices are “identical”. Mayor Ryan Clifton was elected around July, 2011, and the Town’s counsel inserted his name

Special Commissioner of February 14, 2011, and as the trial court properly found and adopted in its Orders of February 1, and February 15, 2011, forfeiting Petitioners' \$25,000 injunction bond. App. 1734-1746; 1747-1754; 1765-1766. The Town of Clay's Itemized Attorneys' Fees and Costs For Recovery From Injunction Bond, and the accompanying exhibits, filed November 22, 2011 set forth the *Aetna v. Pitrolo* factors and standards, including related analysis under *W.Va. Code § 53-5-9*. App. 1032-1076; 1750. The Town's Reply to Petitioners' Response to Town of Clay's Itemized Attorneys' Fees and Costs, and the accompanying exhibits (see, Affidavit Exh. 1 and 2) similarly set forth the *Aetna v. Pitrolo* factors and standards, including related analysis under *W.Va. Code § 53-5-9*. App. 1625.

The Special Commissioner, and circuit court relying in part on that analysis ordered the forfeiture of Petitioners' injunction bond, set at \$25,000, because "[t]he Town of Clay [was] entitled to the proceeds of the injunction bond posted by Multiplex in the amount of \$25,000 as the Town of Clay proved to this Court that it suffered [sic] expenses and costs resulting from Multiplex' having filed a Complaint for a Temporary Injunction, and then abandoning the Complaint before the Court could determine the merits of the Complaint." App. 1765-1766.

This appeal was then filed by Petitioners. This appeal lacks merit.

III. SUMMARY OF ARGUMENT

The circuit court's February 1, and 15, 2012 Orders correctly adopted the November 14, 2011 Special Commissioner's Report, and February 14, 20102 (Second) Report forfeiting Petitioners' \$25,000 injunction bond. The circuit court properly ordered, and liquidated by forfeiture the injunction bond to compensate the Town under *W.Va. Code § 53-5-9*. The Town's reasonable attorneys' fees and costs incurred in securing the dissolution and dismissal of the injunction – WITH PREJUDICE are recoverable damages under *W.Va. Code § 53-5-9*. It was

into the undersigned counsel's client information electronic database to correctly reflect this fact, as he became the new Mayor, replacing the former Mayor Jack Brown. App. 1691-1730.

only after abandoning the Town's Project in September, 2010, because Petitioners ran out of operating capital, that they began demanding the Town "issue change orders and respond to inquiries" totaling \$478,757.33 in "Proposals", 67-1, 67-2, and 67-3 submitted to the Town in October, 2010, even though absolutely no work had been performed by Petitioners pursuant to those "Proposals", and no valid or legitimate grounds to issue a "change order" existed. If not paid their bogus demands, Petitioners threatened not to return and resume performance, in violation of Contract No. 4. The Town's Engineer responded promptly to Petitioners' bogus inquiries. Tellingly, Contract No. 4 expressly provides that the,

"Contractor ***shall carry on the Work*** and adhere to the Progress Schedules during all disputes or disagreements with Owner. No Work shall be delayed or postponed pending resolution of any disputes or disagreements, except as permitted in Paragraphs 15.04 or as Owner and Contractor may otherwise agree in writing." App. 1281.

Documents from Petitioners' agent ferreted out and irrefutably proved that Petitioners abandoned the Town's Project, because Petitioners would "(... ***NOT BE AFLOAT TO FINISH THE [TOWN OF CLAY'S] WATER PLANT. WHEN IT GETS DOWN TO THE LAST MONTH OR TWO THERE WILL NOT BE ENOUGH LEFT IN IT TO PAY OUR OVERHEAD***)". Petitioners' former counsel knew before filing the Complaint, and had received "the file on Monday" in October, 2010 (App. 690) including these same documents and numerous other material facts¹⁰

¹⁰ As later correctly argued by the Town, shamefully Petitioners' former counsel attempted on January 6, 2011 to have the then-scheduled January 27, 2011 final hearing "without discovery", as if to keep everybody in the dark, and "bluff" the circuit court, and opposing counsel to enjoin wrongly, the Town. App. 256. As the record shows, before the ill-advised filing of this "unfounded petition" in December, 2010, Petitioners' former counsel, who later withdrew from representation, had already received in October, 2010 from Mr. Klein, President of US Surety, the 1,068 pages of documents ultimately produced by Mr. Gordon to the Town in January, 2011, including in a detailed "narrative" Petitioners' dwindling bonding capacity, declining financial conditions, and inability to perform Contract No. 4 – even before the April 30, 2009 bid opening, and before the October 16, 2009 award of Contract No. 4 for the Town's Project. App. 681-684; 690. Those documents that Petitioners' former counsel received in October, 2010 from Mr. Klein also included the July 27, 2010 @ 2:20 p.m. compromising-email from Petitioner Multiplex's President, Mr. Poff. App. 319. Yet, Petitioners unbelievably filed and maintained this ill-advised and unfounded action, which the Town successfully defended, forcing Petitioners' voluntary dismissal – WITH PREJUDICE. App. 304-312; 383-385. Petitioners' unfounded petition improperly vexed the Town, and sought to loot the Town's public fisc with utterly bogus demands that the Town "issue change orders" totaling \$478,757.33, which caused the Town to incur attorneys' fees and costs recoverable as damages under W.Va. **Code § 53-5-9** against the injunction bond, and in accordance with the *Aetna v. Pitrolo* factors, in securing the dissolution and dismissal – WITH PREJUDICE of the injunction. Petitioners' former counsel thus had actual knowledge of Petitioners'

later revealed through and ferreted out in discovery by the Town in securing the dissolution and dismissal of the injunction, wrongly enjoining the Town, negating any ability to show a “likelihood of success on the merits”. The Town’s reasonable attorneys’ fees, expenses and costs incurred are recoverable under *W.Va. Code § 53-5-9* and the *Aetna v. Pitrolo* factors, analysis, and standards.

Because Mr. Gordon produced these damaging documents, Petitioners then hastily dissolved and dismissed – WITH PREJUDICE the injunction to avoid a determination on the merits after wrongly enjoining the Town, and before any determination of a “likelihood of success on the merits”. This Court should affirm the circuit court’s Orders correctly adopting the Special Commissioner’s recommendations and findings. because the Town’s reasonable attorneys’ fees, expenses, and costs incurred in securing the dissolution and dismissal of the injunction are recoverable as damages under *W.Va. Code § 53-5-9* and the *Aetna v. Pitrolo* factors and standards.

IV. COUNTER-STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal lacks merit, and presents nothing new under *W.Va. Code § 53-5-9* and *Aetna v. Pitrolo* for oral argument purposes under *Rule 20, West Virginia Rules of Appellate Procedure*. The circuit court’s February 1, and 15, 2012 Orders correctly adopting the Special Commissioner’s Reports of November 14, 2011 and February 14, 2012 forfeiting Petitioners’ \$25,000 injunction bond should be affirmed. The circuit court’s Orders “forfeiting” the injunction bond (not as “sanctions”) up to the penalty sum of the bond, and award of attorneys’ fees and costs is authorized under *W.Va. Code § 53-5-9*, and the *Aetna v. Pitrolo* factors, because “the Town of Clay proved to this Court that it suffered [sic] expenses and costs resulting from Multiplex having filed a Complaint for a Temporary Injunction, and then abandoning the Complaint before the Court could determine the merits of the Complaint”. (Emphasis added).

startling admission on July 27, 2010 @ 2:20 p.m., that Petitioners would “(... ***NOT BE AFLOAT TO FINISH*** THE [TOWN OF CLAY’S] WATER PLANT. WHEN IT GETS DOWN TO THE LAST MONTH OR TWO ***THERE WILL NOT BE ENOUGH LEFT IN IT TO PAY OUR OVERHEAD***)”

V. ARGUMENT
A. STANDARD OF REVIEW

After extensive briefing below, this appeal relates to the Town's simple post trial motion to liquidate, and forfeit Petitioners' injunction bond up to the nominated penalty sum "set at \$25,000" to recover the Town's expenses and costs incurred as damages in securing the dissolution and dismissal with prejudice of Petitioners' preliminary injunction, wrongly enjoining the Town. The trial court's February 1, and 15, 2012 Orders correctly adopted the findings and recommendations of the Special Commissioner's Reports of November 14, 2011, and February 14, 2012. On December 7, 2010 Petitioners wrongfully enjoined the Town from terminating Contract No. 4 with Petitioner Multiplex, and on January 21, 2011 hastily sought voluntary dismissal – WITH PREJUDICE - of the underlying action and injunction with the Town's dispositive motion pending, to avoid a determination on the merits.

On February 28, 2011 the Town properly declared Petitioners in default, and terminated Contract No. 4 with Petitioners, for cause, which is precisely the "opposite"¹¹ remedy and relief sought by Petitioners. The circuit court's Orders adopting the Special Commissioner's Report to liquidate and forfeit Petitioners' injunction bond are not an abuse of discretion, and the Special Commissioner's detailed findings of fact are not clearly erroneous. Petitioners filed no **Rule 59, W.Va. R. Civ. P.** motion seeking to alter or amend the trial court's Orders, or **Rule 60, W.Va. R. Civ. P.** motion "to reconsider", but engaged in extensive briefing and discovery below.

¹¹ Petitioners' disingenuous contention, if to be believed, begs the question that *if* the trial court only issued a preliminary injunction "until a hearing could be conducted on the contract claims by Multiplex" (App. 745), *then* why did Multiplex and its former counsel pursue and cause to be entered, a voluntary dismissal of Petitioners' Complaint, dismissing the injunction with prejudice? *See, generally, Pets' Brief.* The facts of this case refute any such false notion. The injunction was pointless. Similarly, Petitioners' arguments beg the question that *if* the trial court only issued a preliminary injunction "until a hearing could be conducted on the contract claims by Multiplex" (App. 745), *then* why did Multiplex and its former counsel oppose the Town's Motion to Dismiss, and to Dissolve Preliminary Injunction, but later dismiss – WITH PREJUDICE their injunction, before any decision of a "likelihood of success on the merits" ? App.252-287. This appeal lacks merit.

“In reviewing challenges to the findings and conclusions [found by a special commissioner that were adopted by the circuit court], a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.” **Syl. 1, *Dodd v. Potomac Riverside Farm, Inc.*, 222 W.Va. 299, 664 S.E.2d 184 (2008), citing, Syl. 1, *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W. Va. 329,480 S.E.2d 538 (1996); Syl. 1, *Napier v. Compton*, 210 W. Va. 594, 558 S.E.2d 593 (2001).**

Petitioners are not entitled to discovery, or an evidentiary hearing. Petitioners terminated discovery by the entry of the January 21, 2011 Order dismissing preliminary injunction “WITH PREJUDICE”. App.309-310. Discovery rules typically do not apply to extraordinary writ matters unless specifically ordered, or to such a routine post-trial motion anyway (not as “sanctions” under **Rule 11, W.Va. R. Civ. P.**) resolved as a matter of law under **W.Va. Code § 53-5-9**.

Like ***Dodd v. Potomac Riverside Farm, Inc.*, supra**, the circuit court’s straight forward Order forfeiting Petitioners’ \$25,000 injunction bond to compensate the Town for its reasonable attorneys’ fees and costs incurred in securing the dissolution and dismissal of the injunction, which are recoverable as damages under **W.Va. Code § 53-5-9**, and under ***Aetna v. Pitrolo*** for reasonableness is reviewed under an abuse of discretion standard. No question of law is presented. The *de novo* standard does not apply.

B. The Trial Court Properly Forfeited Petitioners’ Injunction Bond Under W.Va. Code § 53-5-9, And Not As “Sanctions” Under Rule 11 WVRCP, To Compensate The Town In Defending Against, and Securing The Dissolution And Dismissal Of The Injunction That Wrongly Enjoined Petitioners

The circuit court, over the Town’s timely objection, set Petitioners’ injunction bond at \$25,000. App. 230-235; 1736, 1745. The circuit court and Special Commissioner limited any forfeiture to the penal sum of the injunction bond, \$25,000. App.1736, 1745. Petitioners were

on notice as a matter of law when they filed their “unfounded petition” (App. 1748) under *W.Va. Code § 53-5-9* and *Rule 65(c), W.Va. R. Civ. P.*, of the potential forfeiture and liquidation of that injunction bond, to protect a party – like the Town – who successfully secured the dissolution and dismissal of the injunction, wrongly enjoining the Town - including through the procedures from the appointment of the Special Commissioner, to which Petitioners consented and waived any right to object. The trial court’s February 1 and 15, 2012 Orders adopting the Special Commissioner’s November 14, 2011 and February 14, 2012 Reports involved the forfeiture of Petitioners’ \$25,000 injunction bond under *W.Va. Code § 53-5-9* as correctly argued by the Town, and not as “sanctions” under *Rule 11, W.Va. R. Civ. P.* Petitioners terminated discovery by their own dismissal – WITH PREJUDICE. App. 307-312. Petitioners “cancelled’ their own notices of deposition, before the entry of the dismissal order, dismissing – WITH PREJUDICE, their injunction, waiving any discovery, which is unavailable. App. 301

Petitioners argue 4 mechanical and manipulated points to ignore the circuit court’s Order forfeiting and liquidation of the injunction bond under *W.Va. Code § 53-5-9* (not as “sanctions”) including attorneys’ fees and costs incurred therein as recoverable damages and under the *Aetna v. Pitrolo* factors as to reasonableness. See, *Pets’ Brief at 15-23*. First, Petitioners set up a straw-man mechanical proposition, claiming that *W.Va. Code § 53-5-9* does not apply, to then argue that “there was never an ‘injunction bond’ posted, but rather only cash in the amount of \$2,500 was paid into Court.” *Pets’ Brief, at 16*. Second, that the “injunction was only “*ancillary*” to the main object of the suit”, (without identifying or defining the “main object”), claiming that the “purpose of the preliminary injunction was to maintain the status quo while the parties mediated”, and if unsuccessful, then petitioners “were entitled, as was the Town, to pursue their damages claims against one another, which are still pending.” *Id., at 17*. Third, to avoid forfeiture, Petitioners ignore the circuit court’s adjudication in the January 6, 2011 hearing, “*dismissing*” the “issue of ordering [the] town to issue change orders and”, “*denial*” of “the issue of requiring Multiplex to have certain questions answered by the town and Mr. Hildreth”

(App. 269), but argue that the circuit court's dismissal – WITH PREJUDICE – of Petitioners' request for preliminary injunction is not *res judicata*¹². *Id.* at 17-18. And fourth, that the trial court's dismissal of Petitioners' Complaint for preliminary injunction – WITH PREJUDICE – dissolving the preliminary injunction on the merits has “no legal support”.

W.Va. Code § 53-5-9, entitled “Injunction bond”, states that when an injunction bond is required it shall be used to pay “all such costs as may be awarded against the party obtaining the injunction, and also such damages as shall be incurred or sustained by the person enjoined, in case the injunction be dissolved....”. **See also, Rule 65(c), W.Va. R. Civ. P.** That statute authorizes the forfeiture of Petitioners' \$25,000 injunction bond to pay the Town's costs incurred, including reasonable attorneys' fees and costs in securing the dissolution and dismissal of the injunction as was the case here, under **W.Va. Code § 53-5-9** and pursuant to **Syl. 4, Aetna Cas. & Sur. Co. v. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986)**, as to reasonableness. This Court should reject Petitioners' mischaracterizing bond forfeiture and liquidation under **W.Va. Code § 53-5-9**, and an award of attorneys' fees via the **Pitrolo** factors as “sanctions” to try to confuse the Court.

In **Meyers v. Washington Heights Land Co., 107 W.Va. 632, 149 S.E. 819 (1929)**, the Court addressed **Code (1923), c. 133, § 10**, now codified as **W.Va. Code § 53-5-9 (2008 Repl. Vol.)** and stated that,

“Our cases recognize **and enforce the mandate of the statute**. ...The intent and purpose of the statute is manifest, namely, that he who invokes the injunction process of the court **must** be proper bond guarantee to make good to any person whose rights are

¹² Petitioners waive appellate review under the doctrine of *stare decisis* or collateral estoppel on the issue of the “merits” (i.e., “change orders and inquiries” alleged in the Complaint) as to injunction bond forfeiture. Obviously, Petitioners' “changes orders” for \$478,757.33 claimed in the Complaint – as the supposed basis for the “merits” against the Town “to issue change orders and respond to inquiries” (App. 15) to obtain the injunction wrongly enjoining the Town are identical, and the same issues of “change orders and inquiries”, i.e., the “merits” “pursuant to Paragraph 10.05” (quoting *Pets' counsel*) (App. 108). On January 6, 2011, the circuit court “dismissed” **and** “denied” these exact same issues, thus barring relitigation to avoid forfeiture. App. 269. Accordingly, having already once been adjudicated adversely to Petitioners, these same issues cannot be relitigated to avoid forfeiture.

prejudicially affected by such injunction all damages and injuries thus occasioned to him.” (Internal citations omitted.) (Emphasis added.)
“Having been enjoined it [the Town] is entitled upon the dissolution of the injunction to recover reasonable counsel fees.” *State ex rel, Finley Brothers Co. v. Freshwater, 107 W.Va. 210, 213, 149 S.E. 6, 9 (1929)*. In *State ex rel, Finley Brothers Co. v. Freshwater*, the Court reversed the quashing of the Finley Bros. Co.’s notice of hearing on motion for judgment to collect \$350.00 in attorneys’ fees against the injunction bond “*in procuring the dissolution of the injunction*”, even though Finley Bros. Co. was not a directly a “person enjoined”. Here, the Town was “directly” enjoined. After “procuring dissolution and dismissal”, the Town properly declared Petitioners in default under, and terminated, Contract No. 4 for cause, contrary to Petitioners’ allegations. Here, the trial court’s Order, adopting the Special Commissioner’s Report forfeiting Petitioners’ injunction bond under *W.Va. Code § 53-5-9*, which clearly applies, is not an abuse of discretion, and the underlying factual findings are not clearly erroneous.

Second, the circuit court specifically “set” the injunction bond on December 7, 2010 “In Chambers”, and frankly over the Town’s counsel’s timely objection, at \$25,000. App.230-235 1743. The Special Commissioner’s November 14, 2011 Report stated,

“Multiplex has now contended that the injunction bond was only set at \$2,500, and \$25,000. After reading the transcripts of the [December 7, 2010] hearing where the bond was set, the position that Multiplex has taken is ***without credibility***. It is clear from the transcript that the Court set the bond at \$25,000, but then allowed Multiplex to meet the that bond, and to put the temporary injunction into effect, by depositing only \$2,500 with the court. ***The amount of the bond is \$25,000.***” (Emphasis added.) App. 1743.

“The amount of the bond is \$25,000”. The circuit court’s Orders, and Special Commissioner’s Reports, and the findings of fact are not an abuse of discretion, or clearly erroneous. Petitioner’s argument that, “there was never an ‘injunction bond’ posted, but rather cash in the amount of \$2,500 was paid into the Court” is, as it was below, is “without credibility”. App. 1743.

Next, Petitioners neither define nor identify the “main object of the suit”, if to claim an “ancillary” issue. Petitioners failed to plead a breach of contract theory to show a “likelihood of success on the merits”, (if creatively to be the so-called “main object of the suit”), and as the trial

court stated as to the “merits”: “the complaint does not sound out a breach of contract action, ... a breach of contract action, ... that’s not been pled here.” App. 264, 265. The Town declared Petitioners in default, and properly terminated Contract No. 4, for cause, contrary to Petitioners’ allegations, with no “status quo” maintained ending any “likelihood of success on the merits”. Claiming the “purpose” of the preliminary injunction was to maintain the status quo while the parties mediated¹³ their claims, and that after mediation failed, the parties were entitled to “pursue their damages claims against one another, which are still pending” is nonsensical, unsubstantiated in the record, and grossly overlooks the undisputed fact that the trial court, on January 6, 2011 stated “I’ve dismissed the issue of ordering [the] town to issue change orders and I have denied the issue of requiring Multiplex to have certain questions answered by the town and Mr. Hildreth....” App. 269. There was no such “status quo”, and *stare decisis* bars relitigation to avoid forfeiture. Petitioners failed to raise below any such “ancillary” argument, i.e., that the request for injunction was “ancillary” to the so-called “main object of the suit”, thus waiving appellate review of the trial court’s dismissal of the injunction – WITH PREJUDICE. Because no ancillary issue is, was, or can be, identified, Petitioners’ third argument is without merit.

¹³ Disingenuously *to trick the reader* regarding a “status quo”, to relitigate the same issues to avoid forfeiture, Petitioners’ Brief pretends as if the purpose of the injunction was to “maintain the status quo while the parties mediated their claims against one another...”, which ignores the circuit court’s prior adjudication of the underlying issues for any “merits” of an injunction, not to mention that mediation is not “mandated” under Contract No. 4. See, *Pets’ Brief*, at 17. Contract No. 4 provides in the General Conditions that the parties “may mutually request mediation of Claims submitted to Engineer for a decisions under Article 10.05...” App. 71. Contract No. 4 provides in the Supplementary Conditions, Article 16.01.B, Arbitration by Mutual Agreement. App. 81. The Town, the non-breaching party, never agreed, mutually, to any contractual mediation, or arbitration. To be sure, Petitioners first submitted their Claims under Article 10.05 for \$478,757.33 for alleged “extra work” in Proposals 67-1, 67-2, and 67-3 after Petitioners abandoned the Town’s Project. App. 108. Petitioners’ “Claims” for “extra work” (App. 108) were denied under Article 10.05D. App. 54. Such Claims provide no basis to cease work or abandon the Project, anyway. Thus, there was no “status quo” to maintain, and mediation is not “mandated” under Contract No. 4, if to try “maintain the status quo”. Article 6.18 of Contract No. 4 provides that “Contractor *shall* carry on the Work and adhere to the Progress Schedule during all disputes or disagreements with Owner. No Work shall be delayed or postponed pending mediation or any disputes or disagreements, except as permitted by ¶ 15.04 or as Owner and Contractor may otherwise agree in writing.” (Emphasis added). App. 47. As to the “merits”, Petitioners attempt to wrongly enjoin the Town, and then strong arm the Town “to issue change orders” and pay \$478,757.33 more for the same construction and pre-existing duty under Contract No. 4, failed, and they are barred from relitigating the same to avoid forfeiture.

Fourth, despite the Town procuring the dissolution of the injunction and its dismissal – WITH PREJUDICE, Petitioners nevertheless persist in trying to convert, or equate the circuit court’s Orders adopting the Special Commissioner’s Reports, properly forfeiting the injunction bond as recompense to the Town under *W.Va. Code § 53-5-9*, and under *Pitrolo*, to “sanctions”. Bond forfeiture and liquidation is not uncommon under West Virginia law: *e.g., See, Syl. 3, State v. Elder, 152 W.Va. 571, 578, 165 S.E.2d 108, 115 (1968)* (Bond given to public body as a condition of license or other privilege, or conditioned upon compliance with law, “the full penalty of such bond may be recovered as in the nature of liquidated damages for its breach, ... the forfeiture of the face amount of the bond as a penalty for the failure to comply with the law.”) Forfeiture of a “bond” in the nature of liquidated damages comes as no surprise and is common throughout West Virginia law where bonds are involved, not just only under *W.Va. Code § 53-5-9* and *Rule 65(c), W.Va. R. Civ. P.*, suretyship, environmental/minerals, and criminal law. In fact, US Surety’s Performance Bond No. 24201 (App. 84) as “surety” in this very case is just such a bond, subject to the “penalty” of “forfeiture”, i.e., “from being forfeited” (App. 191), and “seizure” (App. 1742), as the circuit court and Special Commissioner stated.

Petitioners further argue that the circuit court’s dismissal of the injunction request – WITH PREJUDICE – on the merits, even *sub silentio*, is not the same as dissolution, that Petitioners did not act in bad faith, that the dismissal – WITH PREJUDICE “has no legal support, and that, instead, Petitioners “exercise[d their] right to voluntarily dismiss a preliminary injunction pursuant to *Rule 41, W.Va. R. Civ. P. in favor of a suit for damages*”, as if to suggest some type of trade off existed in the trial court’s dismissal of the injunction – WITH PREJUDICE to pursue a “damages claim”. *Pets’ Brief, at 19*. That is, of course, not so, nor do the circuit court’s Orders, or the Special Commissioner’s Reports support any such whacky argument.

No trade off existed. None was presented by Petitioners. None was “recognized” by the circuit court, or Special Commissioner, or the Town. Trying to avoid injunction bond forfeiture and bolster their whacky, flagging arguments on appeal, suggesting improperly that “Multiplex

could not proceed with construction because the Town was directing its Engineer not to answer questions related to completion of the contract”, Petitioners’ follow up their argumentative statement, “*in favor of a suit for damages*” with a litany of other argumentative, speculative, and misleading statements: a) circuit court “recognized” dispute between petitioners and Town concerned Town’s failure to direct Engineer to answer Multiplex’s questions; b) Engineer’s counsel’s December 30, 2010 letter addressed some but not all of pending questions that precluded Multiplex from proceeding to complete project; c) petitioners’ suit “included claims for both injunctive relief and damages is beyond dispute” because Town’s attorney argued at December 7, 2010 hearing “adequate remedy at law”; d) “[i]ncredibly, the Town’s attorney also argued ... Circuit Court was without jurisdiction to order mediation”; e) unfortunately parties were unable to resolve claims “at mediation and petitioners decided to proceed with their damages claims against the Town”; f) “acted in good faith” and when mediation “did not produce a settlement” petitioners voluntarily dismissed suit “in favor of pursuing claims for damages against the Town which are still pending”; and g) \$900,000 check from surety to compensate “apparently for the same attorney fees and costs” as “best as petitioners “can discern”. See, Pets’ Brief, at 20-22. These arguments are without merit.

In *seriatim* response, a) the trial court’s dismissal of the injunction – WITH PREJUDICE. was not occasioned, motivated, or spurred by Petitioners, “*in favor of a suit for damages*”. The trial court did not “recognize” what Petitioners purport. Instead at the January 6, 2011 hearing, the circuit court warned Petitioners that a breach of contract allegation to show a “likelihood of success on the merits” was missing: “I’ve dismissed the issue of ordering [the] town to issue change orders and I have denied the issue of requiring Multiplex to have certain questions answered by the town and Mr. Hildreth ... But the problem I have is that the issue that should be addressed, if there is an issue, is whether or not someone breached the contract and who breached it and what the damages are, and that is not pled in the documents... you’ve not pled it.” App. 269. b) The Engineer’s counsel’s December 30, 2010 letter responds, exhaustively

again as the Engineer did previously to Petitioners' former counsel's December 23, 2010 agonizing letter and, again, to Petitioners' bogus claims of \$478,757.33 allegedly for "extra work" and "pending questions" (Proposal 67-1 dated September 15, 2010, Proposal 67-2 dated September 28, 2010, Proposal 67-3 dated October 1, 2010), which were only and first submitted "after the Contractor's abandonment of the Project". App. 1159-1167. Contrary to Petitioners' speculation, the December 30, 2010 letter was not evidence of any "legitimate questions", but rather was, as expressly stated, to **"be treated as protected settlement negotiations and shall not be used in any evidentiary capacity."** App. 159-1167 (Emphasis in original.) c) An "adequate remedy at law" is a proper argument and defense in equity to requested injunctive relief, *assuming arguendo* proper equity jurisdiction, first, exists. The Town asserted, rightly, that equity jurisdiction was lacking, such that without equity jurisdiction, the trial court could not simply just "order" mediation¹⁴ as confusingly suggested by Petitioners. App.224. Mediation in

¹⁴ Petitioners' confusing arguments regarding mediation, as if to suggest it and maintain the "status quo" as the "purpose" of the injunction, emanated from Petitioners' trying to get ahead of themselves at the December 7, 2010 hearing to strong arm the Town, as the Town rightly proved when the injunction was later dismissed – with prejudice. At the January 6, 2010 hearing, Petitioners' counsel attempted to confuse the issues of the different potential sources of "mediation", sought to trump up on the trial court's frustration, and have the trial court "refer the parties to that [contractual] mediation process". App. 222. The Town rightly resisted, because contractual mediation, and arbitration required the Town's "consent", not to mention that "Poff [Petitioners] had pulled off the job and... failed to complete the contract". App. 223. Mediation could not just simply be ordered on a "contractual basis", or in equity, as a means to "prevent the Town from declaring default", not to mention that with an adequate remedy at law, as the Town correctly argued, equitable relief was unavailable, and was "outside the [equity] jurisdiction of the Court". App. 223. Contractual mediation, as a source of "mediation" is not to be confused with the trial court's inherent authority to order parties, in general, to participate in mediation, which of course the Town's counsel recognized. The two, though, are different. To be sure, Petitioners' voluntary dismissal deliberately avoided and contradicts the very hearing "on the merits" that they sought as the trial court explained on December 7, 2010: "whether to order the town to issue a change order or to answer Multiplex questions; that's an issue that I will address at the hearing in the matter." App. 221. On January 6, 2011, the circuit court adjudicated those issues and claims stating,

"I've **dismissed** the issue of ordering [the] town to issue change orders and I have **denied** the issue of requiring Multiplex to have certain questions answered by the town and Mr. Hildreth ... But the problem I have is that the issue that should be addressed, if there is an issue, is whether or not someone breached the contract and who breached it and what the damages are, and that is **not** pled in the documents... you've not pled it." (Emphasis added). App. 269.

Petitioners filed no action against the Town and are not the "Plaintiff" in any action against the Town. The Special Commissioner correctly found "Multiplex cannot now say 'never mind' on the ultimate issue of delaying seizure of the performance bond, dismiss its Complaint without giving the issue a chance to be heard, and then avoid the harm it might have caused the Town by that delay." App. 1742. "The purpose of the bond expired when Multiplex's motion to voluntarily dismiss its case was granted a

Contract No. is not “obligatory”, but instead is “discretionary”. 1304; 1316. Petitioners did not “include claims for both injunctive relief and damages...”, which is unavailing to avoid injunction bond forfeiture and could not establish a likelihood of success on the merits. The circuit court chided Petitioners’ counsel for not pleading any breach of contract, (i.e., *ancillary*), to the injunctive relief, and any showing of a “likelihood to prevail on the merits? Where are your merits at? You’ve got to show me that you have a likelihood to prevail under the contract,... but you’ve not pled it.” App. 278-279. As to the “merits” in order to show a “likelihood of success”, the circuit court stated, repeatedly at the January 6, 2011 hearing on this very issue: “the complaint does not sound out a breach of contract action, ...a breach of contract action, ... that’s not been pled here.” App. 264, 265; 266-278. d) Contractual mediation in Contract No. 4, could not be enforced by, and was “outside” of Petitioners’ injunction request, as the Town’s counsel made clear at the December 7, 2010 hearing. Regardless, by dismissal – WITH PREJUDICE, Petitioners avoided “the merits” extinguishing any “likelihood of success”, and contradicting the very claimed “purpose” of seeking extraordinary relief in the first place. In fact, the circuit court dismissed the injunction – WITH PREJUDICE, precisely as the Town requested. Petitioners’ arguments are nonsensical. e) That Mediation was unsuccessful and “the parties were unable to resolve their claims” is not, as improperly suggested, why “Petitioners decided to proceed with their damages claims against the Town”, which makes no sense, is contradictory, and “internally inconsistent”. App. 273. f) the Special Commissioner’s “Recommendations” regarding Petitioners “not” having been “shown to have acted in bad faith”, was not with respect to, as erroneously and confusingly suggested by Petitioners, “in seeking injunctive relief”, but instead was with respect to limiting the Town’s recovery under the injunction bond up to its penal sum: “recompense to the Town of Clay should be limited to the amount of the Multiplex injunction bond....” App. 1745. The circuit court and Special Commissioner limited liquidation and

prejudice specifically on the point of the injunction. Searching the law, it is difficult to find a clearer method of dissolving the [injunction] than the expiration of the cause of action for the temporary injunction.” App. 1743.

forfeiture of the injunction bond its penalty sum of \$25,000, as no “bad faith” warranted exceeding the penalty sum of the bond, meaning no “sanctions” were imposed. “Forfeiture” of a bond in the nature of liquidated damages, includes “the face amount of the bond as a penalty for the failure to comply with the law.” *Syl. 3, State v. Elder, 152 W.Va. 571, 578, 165 S.E.2d 108, 115 (1968)*. Here, the penalty sum of the bond was “set at \$25,000”. Petitioners waived a written “bond” to the clerk, (though in 20/20 hindsight wish they hadn’t) asking to post 10% cash as security to protect the Town. And, g) Petitioners’ argument that the “issuance of a check for nearly \$900,000 ...to compensate the Town for those delay damages and apparently for the same attorney fees and costs for which the Town is seeking double recovery, as best as petitioners can discern, in this suit” is rank, and unsubstantiated speculation, unworthy of and dignity or further comment. The referenced and unsolicited check issued by the surety for Petitioners was neither solicited, agreed to, or expected by the Town, and by all means was not accepted by the Town.

Petitioners may not re-litigate the same issues, to avoid forfeiture. Petitioners abandoned their action, without establishing a “likelihood of success on the merits”, and the Town - wrongly enjoined – procured the dissolution and dismissal of the preliminary injunction– WITH PREJUDICE, thereby forever adjudicating the issues and claims raised therein, or which could have been raised by Petitioners. Petitioners’ preliminary injunction was not voluntarily dismissed “in favor of the pursuit of damages claims” by Petitioners. The Special Commissioner’s comment, as Petitioners erroneously suggest, that they had “not been shown to have acted in bad faith”, was made only with respect to limiting the Town’s recovery under the injunction bond up to its penalty sum: “recompense to the Town of Clay should be limited to the amount of the Multiplex injunction bond....” App. 1745. Under West Virginia law, the Town “[h]aving been enjoined it is entitled upon the dissolution of the injunction to recover reasonable

counsel fees." *State ex rel, Finley Brothers Co. v. Freshwater*, 107 W.Va. 210, 213, 149 S.E. 6, 9 (1929)¹⁵.

15. Petitioners citation to *Syl. 1, State ex rel Meadow River Lumber Co. v. Marguerite Coal Co.*, 104 W.Va. 324, 140 S.E.49 (1927) is not accurate. Petitioners ignore the "legal support" for forfeiture. For example, *State ex rel. Shatzer v. Freeport Coal Co.*, 144 W.Va. 178, 107 S.E. 2d 503 (1959) ("It is settled law in this State that reasonable attorneys' fees, incurred by the party enjoined in procuring the dissolution of an injunction which was wrongfully issued, are recoverable as an element of damages in an action upon the bond required by Section 9, Article 5, Chapter 53, Code, , 1931", but not speculative, "lost profits".) *Shatzer, supra* was not "abrogated" in *Cell, Inc. v. Ranson Investors*, 189 W.Va. 13, 427 S.E.2d 447 (1992), or overruled in *American Safety Indem. Co. v. Stollings Trucking Co., Inc.*, 2007 WL 2220589 at * 11 (S.D.W.Va.). The grounds upon which *Shatzer, supra* was, if, "overruled" dealt with the issue of "lost profits" and the related proof. The overruling of *Shatzer* had nothing to do with forfeiture of a statutory injunction bond, or the recovery of attorneys' fees and costs by persons wrongfully enjoined. The "law" of *Shatzer* related to statutory injunction bonds, forfeiture, and recovery of attorneys' fees and costs by those wrongfully enjoined was not disturbed, was not expressly overruled, and arguably remains "good law"; See, also, *State ex rel. Citizen's Nat'l Bank, v. Graham*, 68 W. Va. 1, 69, 70 S.E. 301, 302 (1910) (Applying Code 1906, c. 133, § 12, reasonable counsel fees (not "outside the record") "to overthrow the injunction ...are allowed to be recovered upon injunction bonds.") Thus, there is "legal support". The text of the opinion in *State ex rel Meadow Lumber, supra* distinguishes, and thus makes clear, that under Code (1906), c. 133, § 10, predecessor to W.Va. Code § 53-5-9, "the bond was to cover costs and damages as shall be incurred or sustained on account of said injunction, and therefore as a logical sequence for damages sustained after the giving of the bond. Counsel fees given in resisting the application are not damages sustained from the issuance of the writ, and are therefore not in the condition of the bond. *Randall v. Carpenter*, 88 N.Y. 294; *Sturgis v. Knapp*, 33 Vt. 486; *Kennedy v. Hammond*, 16 Mo. 341; *Lambert v. Haskel*, 80 Cal. 611. ... The damages that are caused by the writ must necessarily follow it, and cannot precede it." *State ex rel Meadow River Lumber Co. v. Marguerite Coal Co.*, 104 W.Va. 324, 327-328, 140 S.E.49, 52-53 (1927). The February 14, 2012 (Second) Report of Special Commissioner very clearly complied with *State ex rel Meadow River Lumber Co.*, carefully reducing the Town's counsel's invoices totaling \$47,186.08 for the 3 invoices submitted in this particular case by \$7,643.50, to correspond to attorneys' fees and costs sustained by the Town in procuring the dissolution, and obtaining the dismissal – WITH PREJUDICE of the preliminary injunction for the applicable dates between December 7, 2010 after the issuance of the preliminary injunction up and until January 21, 2011 when the notice of voluntary dismissal was filed. App. 1690 – 1732; 1749. The Town's Proffer and Itemized 3 Invoices, acknowledged the noted distinction by this Court to recover attorneys' fees and expenses under W.Va. Code § 53-5-9, "after the giving of the bond", and stated: "Here, as in *State v. Margeurite*, the Town seeks to recover its attorneys' fees and costs incurred as "damages sustained after the giving of the bond", which was posted after the December 7, 2010 hearing, wrongfully enjoining the Town and its Engineer. *Id.*" (Emphasis in original.) App. 603-745. *Ohio River Valley Environmental Coalition, Inc. v. Timmermeyer*, 363 F. Supp. 2d 849, 854-855 (S.D.W.Va. 2005),(Under Clean Water Act, 30 U.S.C. § 1270, in environmental suit involving voluntary dismissal of action before adjudication on the merits, attorneys' fees petitioned for in same action as a matter of law, without filing separate action.)

The Special Commissioner's Reports, and circuit court's Order reduced and limited forfeiture to the penalty sum of the bond, though the Town's expenses and costs incurred were greater. App. 1747-1754; 1765-1766. The Special Commissioner's Report of November 14, 2011 specifically found that the request for the injunction was solely "asking that the Court *force* the Town to answer the questions, and that the Court enjoin the Town from declaring that Multiplex was in default, and making a claim on its performance bond." (Emphasis added). App. 1737. No breach of contract was pled, to show a "likelihood of success on the merits", and no issue is "ancillary" to the injunction. Petitioners filed no post-judgment *R. Civ. P.* 59, or 60 motion to alter or amend the trial court's judgment, for appellate review purposes.

In *Syl. 1 & 2, Glen Jean, Lower Loup & D.R. Co. v. Kanawha, Glen Jean & E.R. Co.*, 47 W.Va. 725, 35 S.E. 978 (1900), where no bond was required, the Court distinguished the statutory forfeiture situation presented in the case at bar and specifically held that at common law damages caused by being wrongfully enjoined were not recoverable unless “prosecuted through malice”, and that under then *Code (1882), c. 78 § 10*, now codified at *W.Va. Code § 53-5-9 (2008)*, the requirement of a “statutory bond” was “intended to supply [and correct] this defect in the common law”, allowing the forfeiture of an injunction bond for one wrongfully enjoined: “The remedy of the party unjustly enjoined is the recovery of costs in the first instance, damages on the statutory bond.” Here, an injunction bond was required and posted, unlike as argued by Plaintiffs’ new counsel in *Glen Jean, Lower Loup & D.R. Co., supra*, which is unavailing to Plaintiffs.

1. The Town’s Rights Were Prejudicially Affected

Petitioners ‘cannot deprive’ the Town of injunction bond forfeiture as “recompense to the Town” in being wrongly enjoined. Here, the Town’s rights were “prejudicially affected”. *W.Va. Code § 53-5-9* makes no mention of any distinction between the “dissolution” of an injunction and its “voluntary dismissal”, “WITH PREJUDICE”. The Town’s Motion to Dismiss and to Dissolve was pending. And, in *Sandusky v. Faris*, 49 W.Va. 150, 38 S.E. 563 (1901), the Court, recognizing the procedural common law defect corrected by § 53-5-9 and its statutory predecessor that Petitioners seek to exploit- though are foreclosed under § 53-5-9, stated that the plaintiff seeking an injunction “cannot deprive” the defendant (Town) of the benefit of its motion to dissolve, by postponing the hearing thereon, or in vacation.¹⁶

¹⁶ No “ancillary” issues existed below. At the critical January 6, 2011 hearing, the circuit court aptly stated: “I’ve dismissed the issue of ordering [the] town to issue change orders and I have denied the issue of requiring Multiplex to have certain questions answered by the town and Mr. Hildreth ... But the problem I have is that the issue that should be addressed, if there is an issue, is whether or not someone breached the contract and who breached it and what the damages are, and that is not pled in the documents...”

C. Because The Town's Attorneys' Fees and Costs – Determined As To Reasonableness In Accordance With Aetna v. Pitrolo - Incurred In Securing The Dissolution And Dismissal Of The Injunction May Be Recovered As Damages Under W.Va. Code § 53-5-9, And Because The Circuit Court Entered Its Orders Correctly Adopting the Special Commissioner's Reports Forfeiting Petitioners' Injunction Bond Under W.Va. Code § 53-5-9 Only After The Town Submitted, And Served On Petitioners, A Complete List of Its Statutory Damages Under W.Va. Code § 53-5-9, And Only After The Parties Engaged In Extensive Briefing Pursuant To The Court's Briefing Schedule, Before Forfeiture of The Injunction Bond, The Trial Court's Orders Should Be Affirmed

Petitioners' second assigned error is, likewise, without merit¹⁷. Petitioners claim erroneously that a "sanctions order" was entered, yet ignore the fact that the circuit court's Orders correctly adopting the Special Commissioners' Reports forfeited the injunction bond with

you've not pled it." App. 269. "And at this point the breach of contract has not been pled, and how can the plaintiffs show that they have a likelihood of prevailing in the proceedings?" The circuit court chided Petitioners' counsel for not pleading any breach of contract, (i.e., *ancillary*), to the injunctive relief, and thus precluding any showing of a "likelihood to prevail on the merits". The circuit court asked: "Where are your merits at? You've got to show me that you have a likelihood to prevail under the contract,... but you've not pled it." App. 278-279. This Court should reject Petitioners' arguments on appeal that "[t]he fact that petitioners' suit included claims for both injunctive relief and damages is beyond dispute as the Town's attorney argued at the hearing that this Court should not issue an injunction because money damages were sufficient:..." *Pets' Brief*, at 20. That argument makes no sense. As the circuit court stated, no "breach of contract" was pled by Petitioners. "[T]hey've not sought damages in the current petition and pleadings for any kind of breach of contract." App. 278. Thus, no "ancillary" issue existed. Petitioners forewent any showing of a "likelihood of success on the merits", and *stare decisis* bars re-litigation to avoid forfeiture.

¹⁷ Petitioners' arguments attacking the Town and its counsel are a last ditch 11th-hour attempt to distract and confuse this Court from the undisputed fact that Petitioners fabricated allegations for injunctive relief to avoid contract termination when they ran out of operating capital in July, 2010, evidenced by Petitioners' admission they would "**NOT BE AFLOAT TO FINISH THE [TOWN OF CLAY'S] WATER PLANT**", and that "**WHEN IT GETS DOWN TO THE LAST MONTH OR TWO THERE WILL NOT BE ENOUGH LEFT IN IT [CONTRACT No. 4] TO PAY OUR [Multiple] OVERHEAD**". App. 319. Dissolution and dismissal – WITH PREJUDICE by Petitioners precluded any ability for Petitioners to satisfy a "likelihood of success on the merits". Petitioners' arguments are specious: a "sanctions order was entered", that the Town "had not complied with directives to provide appropriate documentation of the attorney fees...", that the Town "stonewalled", that "there were multiple, legitimate reasons to question what the Town was attempting to perpetrate", that "Town's motivation is not the recovery of any 'damages' incurred as a result of a 45-day preliminary injunction to maintain the status quo so that mediation mandated under the contract could be conducted and for which the Town is already protected by liquidated damages under the contract", that "Town's motivation is to financially destroy petitioners so that they will not be able to pursue their damages claims against the Town after it wrongfully directed its Engineer not to answer basis questions about proceeding with construction and then improperly terminated the contract", and that "the Town was proffering questionable documents", and should rightly be rejected on appeal. See *Pets' Brief*, at 23–29.. The Town proffered no "questionable documents", to which such false and irresponsible statement the undersigned counsel *takes exception, personally and professionally*. The Town responded timely to Petitioners' FOIA request, and did not "stonewall", making documents available, which Petitioners never inspected, or attempted to inspect. Such a FOIA based "stonewalling" argument is not even remotely relevant, or applicable under *W.Va. Code § 53-5-9* and the *Pitrolo* factors. Mediation is not "mandated" under Contract No. 4 as falsely stated by Petitioners. App. 70.

its penalty sum of \$25,000 already nominated pursuant to *W.Va. Code § 53-5-9*, under which attorneys' fees and costs may be recovered as damages in securing a dissolution of the injunction, as made clear in *Meyers v. Washington Heights Land Co.*, 107 W.Va. 632, 149 S.E. 819 (1929) and *State v. Marguerite Coal Co.*, 104 W.Va. 324, 140 S.E. 49 (1927) (counsel fees and expense recovered "as damages" on an injunction bond where paid out "solely for the purpose of securing a dissolution of the injunction as distinguished from expenditures for the hearing of the principal issues involved in the case.")

Petitioners have no "right" to discovery, and are not entitled to "discovery", or an evidentiary hearing, or to compel discovery. The Town – "*wonderful to work with*" according to Petitioners - had no "motivation" as Petitioners wrongly speculate and suggest. The Town timely answered Petitioners' FOIA Requests on October 21, and 28, 2011. App. 940-945. Petitioners' argumentative comments are irrelevant, with no bearing on forfeiture under *W.Va. Code § 53-5-9*. Regardless, discovery was terminated¹⁸ by the injunction's dismissal – WITH PREJUDICE. Petitioners never sought, or obtained, leave from the circuit court to engage in "discovery". Under *W.Va. Code § 53-5-9*, a party enjoined wrongly as was the Town may recover attorneys' fees and costs – determined for reasonableness in accordance with *Pitrolo* – in securing the dissolution and dismissal of the injunction, precisely, as the Town did.¹⁹

¹⁸ Typical discovery rules, and civil procedure rules do not apply in cases of extraordinary relief, as wrongly implied by Petitioners. *See, Rule 81(a)4, W.Va. R. Civ. P.* In fact, the circuit court required the submission of a "discovery motion", and a "discovery order" (App.233) to conduct discovery in this case. Only the Town's counsel mentioned the discovery motion matter on December 7, 2010, and Petitioners never filed a discovery motion in this case. App.233. On December 9, 2010, Petitioners opposed the Town's discovery efforts, requiring a "motion for discovery" to be filed. App. 618. Petitioners, having filed no discovery motion, and having dissolved the injunction dismissed – WITH PREJUDICE, waived any "right" to discovery, to "compel discovery."

¹⁹ Petitioners' citation to various cases, "reversed and remanded" (See, Pets' Brief, at 27) provides no support for their appeal as to the determination of the reasonableness of the Town's attorneys' fees and cost under *Pitrolo* or *W.Va. Code § 53-5-9*. None of Petitioners' cases involved forfeiture, or an injunction bond. The circuit court properly tested the reasonableness of the Town's 3 invoices for attorneys' fees and costs, subjecting them to the rigorous *Pitrolo* analysis and extensive briefing before entry of the February 1, 2012 and February 15, 2012 Orders, all of which is reflected in the detailed briefings and the Special Commissioners' Reports explaining the amount for forfeiture of the injunction bond. App. 1749-1751. Consequently, this Court should affirm the circuit court's Orders adopting the Special Commissioners' Reports, following the analysis and bases under *Pitrolo* as authoritatively briefed in the

Town of Clay's Itemized Attorneys' Fees and Costs for Recovery from Injunction Bond, filed November 22, 2011. (App. 1032-1076), Reply to Plaintiffs' Response to Town of Clay's Itemized Attorneys' Fees and Costs (App. 1625-1733). *See, e.g., Paugh v. Linger, W.Va. , 718 S.E.2d 793 (Nov. 18, 2011)* (In divorce under parenting plan dispute resulting in award of attorneys' fees under *Banker v. Banker, 196 W. Va. 535, 474 S.E.2d 465 (1996)* and *W.Va. Code § 48-9-501(a)*, party sought no hearing on attorneys' fees with no briefing where order simply awarded fees with no explanation of award); *Croft v. TBR, Inc., 222 W.Va. 224, 230, 664 S.E.2d 109, 115 (2008)* (After accepting Rule 68(a) offer of judgment where plaintiffs then moved for attorneys' fees and costs, "costs" under Rule 68(a)WVRCP included attorneys' fees, unless applicable statute (Human Rights Act) creating right defined attorneys' fees as "in addition to, or separate and distinct from, costs."); *Horkulic v. Galloway, 222 W.Va. 450, 465, 665 S.E.2d 284, 299 (2008)* (Court granted moulded writ of prohibition in consolidated appeal of order granting motion to compel enforcement of settlement in legal malpractice action and insured/insurer dispute over attorney client privilege where malpractice insurer attorney was excluded from "plenary hearing" on motion to compel, resulting in award of attorneys' fees.); *Heldreth v. Rahimian, 219 W.Va. 462, 470-471, 637 S.E.2d 359, 368-369 (2006)* (In sexual harassment action, where plaintiff prevailed on only 1 of 5 theories, trial court erred in arriving at award of attorneys' fees through "application of a straight percentage formula of reduction."); *Staler v. Dodson, 195 W.Va. 646, 648, 466 S.E.2d 497, 499 (1995)* (Court reversed circuit court order denying attorneys' fees to attorney for pretermitted infant child of decedent regarding paternity, for determination whether attorney's employment for pretermitted infant was necessary, and if so whether fees were "reasonable"). Similarly, no due process requirements are implicated here as wrongly suggested by Petitioners: *See, e.g., State ex rel. Rees v. Hatcher, 214 W.Va. 746, 749-50, 591 S.E.2d 304,, 307-08(2003)* (Noting "the second time in as many days" that indigent defendant complained of inadequate assistance of counsel against public defender's office, where circuit court, *sua sponte*, continued trial without seeking any additional information and sanctioned petitioner by assessing jury costs against public defender/attorney in order entered "the same day", Court granted writ of prohibition because circuit court "without affording the petitioner a hearing, denied" motion for reconsideration" and failed "to accord Appellant's counsel an opportunity to respond to the lower court's basis for assessing fees and costs...."); *Corporation of Harpers Ferry v. Taylor, 227 W.Va. 501, 711 S.E.2d 571 (2011)* (Unlike *Horkulic, supra*, City was not precluded from participating in the proceeding to determine whether attorneys' fees should be awarded in declaratory judgment action, and City was not entitled to evidentiary hearing on motion for attorneys' fees with 'itemized statement', which was "decided on the pleadings and record."); *State ex rel. Hoover v. Smith, 198 W.Va. 507, 482 S.E.2d 124 (1997)* (Writ of prohibition issued where hearing examiner refused to issue pre-hearing subpoenas in letter written 1-day after petitioner's written request, with no hearing); *Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A., 223 W.Va. 229, 557 S.E.2d 277, 283 (2001)* (Circuit court erred in entering order, later stayed, awarding attorneys' fees and costs against CNA, *sua sponte*, and without conducting a hearing in CNA's subrogation claim over employee embezzlement.) Here, Petitioners are not entitled to an "evidentiary hearing" regarding the reasonableness of the Town's 3 itemized invoices for attorneys' fees and costs under *Pitrolo*, or *W.Va. Code § 53-5-9*, under which attorneys' fees and costs may be recovered in securing the dissolution and dismissal of the injunction. Moreover, Petitioners participated extensively in all proceedings, in advance of the Special Commissioners' Reports (App. 1748-1753), later correctly adopted by the circuit court, forfeiting Petitioners' injunction bond (App. 1765-1766), including Petitioners' Objection To Report of Special Commissioner and Proposed Order. App. 1735.

Here, the Special Commissioner's Report sufficiently explained the reasonableness of the Town's attorneys' fees and costs detailed in the Town's pleadings, and the Special Commissioner's Report. App. 17 Like *Corporation of Harpers Ferry, supra*, the Special Commissioner warned Petitioner that the Town's Motion to Forfeit Injunction Bond, and the reasonableness of the Town's 3 invoices for attorneys' fees and cost would be "decided on the pleadings and record", stating: "Your Commissioner had intimated to the parties that they were spending time addressing evidentiary issues that were most likely to be resolved as a matter of law, and without the need for testimony. The proffer was intended to help the Commissioner narrow down the issues for which testimony would be useful." App. 1738.

Limited discovery, which had already been conducted by special motion and order (App. 452-455) had long since been terminated, and was neither necessary nor available in the forfeiture of the injunction bond as to any determination of reasonableness of the Town's 3 invoices for its contemporaneously kept attorneys' fees and costs recoverable as damages under *W.Va. Code § 53-5-9* and *Pitrolo* in securing the dissolution and dismissal of the injunction. In the February 14, 2012 (Second) Report of Special Commissioner, the Special Commissioner reviewed the Town's 3 itemized invoices totaling \$ 47,186.08, reduced them to \$39,542.58 to exclude time "after" dissolution and dismissal (App. 1749), with already - "[a]ny recompense to the Town...limited to the amount of the...injunction bond..." from the Special Commissioner's earlier November 14, 2011 Report App.1745. The Town's 3 itemized invoices, reviewed by the Special Commissioner, met and satisfied *W.Va. Code § 53-5-9* as recoverable damages in the forfeiture of the injunction bond, and the *Pitrolo* standard as to reasonableness.

Ironically, Petitioners and their counsel refused to cooperate with the Town in discovery (App. 712), and required a "motion for discovery" from the Town (App. 618) and entry of a Discovery Order (App. 452-455). Petitioners, however, participated in discovery to benefit themselves, noticing several depositions on short notice (App. 457-465) and adhered to the Special Commissioner's and circuit court's extensive briefing schedule from the filing of Petitioners' Response to the Town's Motion to Forfeit Injunction Bond on March 2, 2011 (App. 386), to the Petitioners' February 15, 2011 Objections (App. 1755) to the (Second) Special Commissioner's Report, and their December 1, 2011 Response to the Town's Itemized Attorneys' Fees (App. 1077). Petitioners participated with extensive briefing, and received the benefit of discovery until terminated, including the February 5, 2011 Order setting forth an extensive briefing schedule for Petitioners to Respond to the Town's Motion to Forfeit Injunction Bond by February 17, 2011, and for the Town to file any Reply. App. 384.

Petitioners received the Town's counsel's 3 itemized invoices for attorneys' fees and costs on November 22, 2011, before forfeiture. App. 1022 The Special Commissioner advised

Petitioners of wasting resources on evidentiary issues likely to be resolved “as a matter of law”. App. 1738. App.1749. On January 25, 2011, the Town cooperatively disclosed and gave to Petitioners’ counsel (and the surety’s) on a CD (compact disc) all of the 1,068 bates stamped (BBTC 001-1068) pages of documents produced by Greg Gordon, though Petitioners’ counsel had already obtained and received Mr. Gordon’s file in October, 2010. App. 1189, 1631, 1688. On November 22, 2011, the Town timely disclosed and served as ordered copies of the Town’s 3 itemized invoices. App. 1032. Discovery, terminated and waived by Petitioners, is unavailable.

D. Because The Circuit Court Correctly Adopted The Special Commissioner’s Reports Forfeiting The Injunction Bond After Petitioners’ Receipt of The Town’s 3 Itemized Invoices For Attorneys’ Fees And Costs Recoverable As Damages Under W.Va. Code § 53-5-9 In Securing The Dissolution And Dismissal Of The Preliminary Injunction, And After Petitioners’ Extensive Briefing, And Submission Of “Objections” As To The Reasonableness Of The Town’s Attorneys’ Fees And Costs In Accordance With Aetna v. Pitrolo, The Circuit Court’s Orders Entered February 1, and February 15, 2012, Adopting The Special Commissioner’s Reports Should Be Affirmed

Petitioners’ incredulous (“before”/“after”) arguments depend upon manipulation, and misstatement of the documented facts to claim, erroneously, that the circuit court’s Order entered February 15, 2012 was a “sanctions order”, and was entered “*before*” the Town had complied with the circuit court’s order entered February 1, 2012 directing the Town to submit its documentation by February 24, 2012 and affording Petitioners until March 12, 2012 to respond. See, *Pets’ Brief*, at 29. First, the Town, the non-breaching party, was according to Petitioners, “wonderful to work with”, and by February 15, 2012 the entire briefing regarding the reasonableness of the Town’s attorneys’ fees and costs was “now complete”. App. 1749. The Special Commissioner’s November 14, 2011 and February 14, 2012 Reports and the circuit court’s February 1 and 15, 2012 Orders forfeiting the injunction bond adhered to the ***Aetna v. Pitrolo*** factors/standard as to reasonableness of the Town’s expenses and costs incurred in securing the dissolution and dismissal of the injunction as recoverable damages under ***W.Va. Code § 53-5-9***. Again, the briefing was “now complete”! App. 1749. Nothing was left to be filed, or further briefed. No “sanctions order” was entered. Instead, Petitioners’ injunction bond was

properly forfeited, in the nature of liquidated damages as the defined “penalty” under *W.Va. Code § 53-5-9*. The parties “complied” with the briefing schedule in the Special Commissioner’s Report of November 14, 2011, lengthened and enlarged by the circuit court in its February 1, 2012 Order. No prejudice to any party by the “enlargement”, and by February 14, 2012, the briefing was “now complete”. App. 1749.

Second, the Town’s attorneys’ fees and costs were subjected to the rigorous *Aetna v. Pitrolo* factors and analysis, before the Special Commissioner’s Report containing the findings of fact, and recommendations dated February 14, 2012, and after Petitioners’ documented receipt of the Town’s complete “list” of damages (App. 1032) detailing each entry, properly redacted, i.e., the 3 invoices for attorneys’ fees and costs as damages recoverable under *W.Va. Code § 53-5-9*. Petitioners’ repeated and extensive briefing²⁰ belies any incredulous argument. Petitioners may simply not be heard to complain, and their “before”/“after” and “sanctions order” arguments are without merit.

²⁰ To be sure of Petitioners’ extensive briefing in opposition to the Town’s recovery of its attorneys’ fees and costs as damages under *W.Va. Code, § 53-5-9* in securing the dissolution and dismissal of the injunction as set forth in the circuit court’s January 21, and February 5, 2011 Orders (App. 303), the Town had previously submitted its Proffer in Support of Motion to Forfeit Injunction Bond (App. 603-745) on October 23, 2011 per the Special Commissioner’s direction (App.1738), and included a detailed and organized “Summary of Invoices for Town of Clay’s Defense of Multiplex’s Request for Injunction, and To Dissolve Injunction Bond 1/7/10-1/21/11”, showing the “bill date”, “invoice”, “amount billed”, and “amount paid”. App. 624. A Response was filed by Petitioners on October 28, 2011. App. 4, 746. And, on November 4, 2011 Petitioners’ Supplemental Response to Town of Clay’s Proffer was filed. App. 947. Then, on November 8, 2011 Petitioners’ “Sur-Reply” to Town’s Reply in Support of Town’s Proffer, was filed. App. 1014. Petitioners’ extensive briefing regarding the Town’s attorneys’ fees and costs recoverable as damages under *W.Va. Code, § 53-5-9* in securing the dissolution and dismissal of the injunction cannot be denied.

On January 25, 2011, the Town filed its Motion to Forfeit Injunction Bond (App. 313). Per the circuit court’s February 5, 2011 Order (Scheduling Deadlines for Parties To Respond and Reply to Town’s Motion to Forfeit) (App. 383-385), a Response was filed by Petitioners on March 1, 2011 (App. 386) objecting to forfeiture, and opposing the Town’s damages including attorneys’ fees incurred in securing the dismissal and dissolution of the injunction recoverable to pay “all such costs as may be awarded against the party obtaining the injunction, and also such damages as shall be incurred or sustained by the person enjoined, in case the injunction be dissolved...” *W.Va. Code, § 53-5-9*. App. 323. Petitioners’ briefing was extensive, and they cannot now be heard to complain.

Here, Petitioners simply ran out of operating capital²¹ (though then in July, 2010 unbeknownst to the Town), and on an “unfounded petition” to prevent the Town from declaring Petitioners in default under Contract No. 4 wrongly enjoined the Town, who secured the dissolution and dismissal of the injunction, justifying forfeiture as “recompense to the Town” under *W.Va. Code § 53-5-9*.

E. The Circuit Court Correctly Ordered Forfeiture of Petitioners’ \$25,000 Injunction Bond, And Mediation Is Not “Mandated” By Contract No. 4

Petitioners’ final assigned error is “without credibility” and without merit, too. App. 1743. ***Ballard v. Logan, 68 W.Va. 655, 70 S.E. 558 (1911)*** is unavailing to Petitioners’ “never mind” mentality on the “ultimate issue” of a likelihood of success on the merits, where the documents produced by Mr. Gordon showed the utter falsity of Petitioners’ allegations regarding a “likelihood of success on the merits”, resulting in Petitioners “fold[ing] up the game board before

²¹ Petitioners’ continual attempt to deny the undisputed fact that they ran out of operating capital is, equally, “without credibility”. At the December 7, 2010 hearing, the record below is replete with undisputed instances of Petitioners’ prejudicial admissions against their own financial and pecuniary interests of their own declining financial condition and dwindling bonding capacity. App. 318-319, 340-380. Petitioners’ “unfounded action” was nothing more than “a ruse” to mislead the circuit court and an improper attempt to strong arm the Town into “issuing change orders”, which simply failed. The 1,068 pages of documents produced by Petitioners’ bonding agent, Greg Gordon irrefutably demonstrate Petitioners’ prejudicial admissions against their financial and pecuniary interest, bearing directly on the utter falsity of Petitioners’ allegations in this case as follows: “unable to obtain a bond for Multiplex” (0048); “No bonds for Multiplex unless I [Gordon] approve” (0050); “[A]ttached my analysis of the 5/31/10 f/s and it is not [g]etting better. I don’t see this request in the picture right now” (00113); “Greg, It’s time for that miracle” (00128); “bonding out on a limb...” (00168); “doesn’t look good...” (00176); “since I am an agent for HCC Surety, the contractor cut off communication with me. With the questioning of this claim and Smoot ‘s Lexx Group, I would like to know where I [Gordon] stand with HCC Surety” (00281); “minimal bonding credit...prognosis doesn’t look positive”-“thanks. I [Art Poff] get the picture. I will be in touch.”(00292); “This account is struggling” (00293); “This is the best I can do” (00295); “As I said, I think we need another miracle” (00296); “string of bidding slumps...started reducing our bonding line...financial condition had become weaker...” (00333-335); “No increasing coverage or send returns on bonds and insurance unless I [Gordon] approve” (00357); “Multiplex’s attorney, Kerrie Boyle, who received the file on Monday” (00478).

From the documents produced by BB&T Carson, Petitioners’ strong arm technique of “walking off” the Town’s Project to extort the Town is, evidently, not the first time. Those documents from Mr. Gordon reveal that Petitioners walked of another Project in Beckley, West Virginia, resulting in another litigious claim, a \$183,000 change order, delaying construction, and “Release in Full of Claims”, detailed in a “narrative”. App. 678-684; 1187. That same strong arm technique, however failed in the case at bar, but severely damaged and injured the Town of Clay, which has been prejudiced and harmed by Petitioners’ misconduct, false allegations, and costly delayed construction, now to be finished by another contractor.

it allowed anyone to determine the result of the game”, as aptly described by the Special Commissioner. App. 1743. The Special Commissioner’s Report, adopted by the circuit court, limited the Town’s recovery of damages under *W.Va. Code § 53-5-9*, including attorneys’ fees and costs incurred in securing the dissolution and dismissal of the injunction “to the amount of the Multiplex injunction bond”, from December 7, 2010 to on or about January 21, 2011. App. 143, 1745. The circuit court set the injunction bond at “\$25,000.” Before forfeiture, Petitioners engaged in discovery, and extensive briefing, availing themselves of the circuit court’s jurisdiction and processes, substantively and procedurally. The briefing was “now complete” on February 14, 2012, when the Special Commissioner issued the (Second) Report. No “sanctions” order was entered, just proper forfeiture of the injunction bond, as “recompense to the Town” for being wrongly enjoined.

In *Ballard v. Logan, supra*, no actual bond amount was set, “except one for costs”, and, the “condition of the bond d[id] not, in terms, cover costs... and no decree is alleged to have been made requiring anything to be done respecting the judgment.” *Id. at 558*. Even where “ambiguous” though, “the law under which it [injunction bond] was given may always be considered, as bearing on the element of intent....” *Id.* The transcripts from the December 7, 2010 hearing confirm the Special Commissioner’s accurate finding of fact that the circuit court “set” the injunction bond at \$ 25,000. App. 736-743.

“25. With respect to an injunction bond, the Court set the same at \$ 25,000, over the Town’s objection, and allowed it to be secured by a cash payment of \$ 2,500.” App. 614.

As to forfeiture, the Special Commissioner expressly limited forfeiture liability, and the Town’s recovery of damages including for the Town’s attorneys’ fees and costs incurred in securing the dissolution and dismissal of the injunction under *W.Va. Code § 53-5-9*, “to the amount of the Multiplex injunction bond” in accord with *Ballard v. Logan, supra*, and unlike that case, here, a “bond amount” was “set” at \$25,000. App. 143, 1745. The circuit court found, and specifically ordered that: “The amount of the bond posted by Multiplex is determined to have

been set at \$25,000.” App. App. 230-235; 613-615; 736-743; 1735. Thus, there was no “void”. The Special Commissioner correctly found Petitioners’ arguments on this issue to be “without credibility”. App. 1743. Forfeiture of a bond is the “penalty”, but not a “sanction.” **See, W.Va. Code § 53-5-9** (“until bond be given in such **penalty**....”)

Finally, the “purpose” of the preliminary injunction was **not**, as Petitioners wrongly argue, “to permit the parties to mediate the case in hopes of achieving a settlement”, or “to maintain the status quo pending mediation”. *See, Pets’ Brief, at 30, 32.* On January 6, 2011 the circuit court had already “dismissed the issue of ordering the town to issue change orders and ... denied the issue of requiring Multiplex to have certain questions answered by the town and Mr. Hildreth”, before appointing a mediator, and before later appointing the Special Commissioner on February 5, 2011. App. 269; 298-299; 383-385. Mediation is not “mandated” by Contract No. 4.

Petitioners’ 10 page verified Complaint (App. 6-16) nowhere even mentions the phrase “status quo”. App. 6-16. Rather, the stated “purpose” of the injunction was to “force” the Town to answer questions, to “force” the Town “to issue change orders”, and prevent the Town from declaring a default. App. 6-16; 1737. There are, and were no more “additional submissions”, as the record shows. App. 1767. By February 14, 2011, the briefing was “**now complete**”!

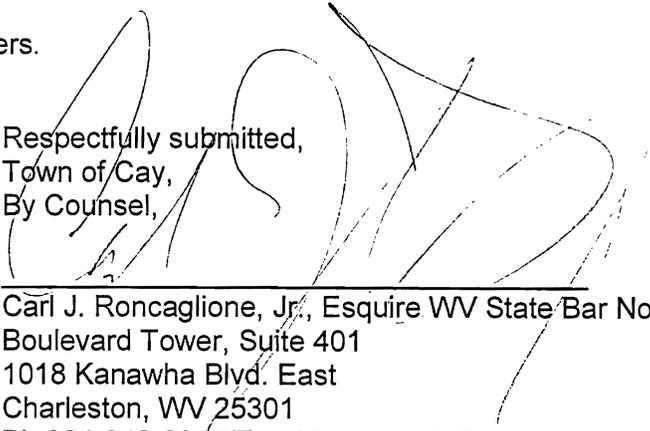
Contrary to any stated “purpose” of Petitioners in enjoining the Town, the Town properly declared Petitioners in default, and terminated Contract No. 4, for cause. The Town issued “no” change order”. And, contrary to any such “purpose”, the Town secured the dissolution of the injunction, and its dismissal – WITH PREJUDICE. Petitioners’ injunction request was, thus, pointless. Neither a “status quo”, nor a “purpose” of “maintaining the status quo pending mediation” is identified in Petitioners’ verified Complaint. Again, mediation is not “mandated” in Contract No. 4. The circuit court set the injunction bond at \$25,000, as properly found by the Special Commissioner from “the transcripts of the hearing” App. 1743. That finding is correct,

and not clearly erroneous. The circuit court's order adopting that finding is not an abuse of discretion.

VI. Conclusion

Petitioners filed an "unfounded petition" wrongly enjoining the Town. The Town secured the dissolution and dismissal of the injunction – WITH PREJUDICE. *W.Va. Code § 53-5-9* allows the Town to recover as damages its reasonable attorneys' fees and costs – per the *Aetna v. Pitrolo* factors and analysis - incurred in securing dissolution and dismissal. The circuit court properly forfeited, i.e., the "*penalty*", Petitioners' \$25,000 injunction bond, and limited liability to the penalty sum of the bond. Petitioners' appeal lacks merit. Accordingly, this Court should affirm the circuit court's February 1, and 15, 2012 Orders correctly adopting the Special Commissioner's Reports dated November 14, 2011, and February 14, 2012, taxing all costs for this appeal against Petitioners.

Respectfully submitted,
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By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MULTIPLEX, INC., a West Virginia

Corporation; Art R. Poff; and Pamela Poff,

Petitioners,

v.

Appeal No. 12-0418

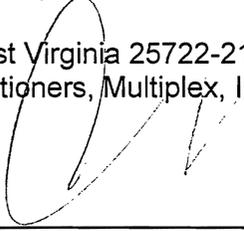
Town of Clay,

Respondent.

CERTIFICATE OF SERVICE

I, Carl J. Roncaglione, Jr., counsel for Town of Clay, hereby certify that I have this 2nd day of August, 2012 served the forgoing "Brief of the Respondent" upon the within named party by serving a true copy thereof via email and U. S. Mail, postage prepaid, to:

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