



IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

Docket Number: _____

THE NORTH RIVER INSURANCE COMPANY,

Petitioner/Defendant,

- v. -

THE HONORABLE ROBERT G. CHAFIN, SPECIAL JUDGE OF THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA; ALL PLAINTIFFS AND CROSS-CLAIMANT PLAINTIFFS IN *JILL A. LAMBERT, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF CARLOS G. LAMBERT, DECEASED V. MINE SAFETY APPLIANCES COMPANY, ET AL.*, CIVIL ACTION NO. 10-C-69, AND *TERESA DIANE PERSINGER, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF EDDIE D. PERSINGER, DECEASED V. MINES SAFETY APPLIANCES COMPANY, ET AL.*, CIVIL ACTION NO. 11-C-45

Respondents/Plaintiffs.

VERIFIED PETITION FOR WRIT OF PROHIBITION

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QUESTION PRESENTED

Whether the Wyoming Circuit Court abused its discretion when it denied *Defendant North River Insurance Company's Motions to Dismiss, or in the Alternative, Motions for Stay of Action* (“*Motions to Dismiss*”) in the above captioned actions in favor of retaining jurisdiction over Plaintiffs’ and Mine Safety Appliances Company (“MSA”) coverage actions against The North River Insurance Company (“North River”), when it ignored well-established West Virginia law regarding assignments, improperly applied the eight (8) point test in W. Va. Code § 56-1-1a(a) and ignored the directives of W. Va. Code § 56-6-10 thereby allowing MSA to perpetrate a sham upon the Court.

STATEMENT OF THE CASE

The essence of the issues pending in the immediate actions arose from an insurance relationship between North River and MSA. The operative insurance policy is Policy No. JU 1319. It is an excess insurance policy for the single year 1984-85 issued by North River to MSA.

In *Lambert* and *Persinger*, the individual plaintiffs have compromised and settled their coal workers' pneumoconiosis (“CWP”) claims against MSA. According to the settlement agreements, MSA paid Plaintiffs a sum of money (“the Payment Amount”), and also made a partial assignment of its rights under Policy No. JU 1319 for Plaintiffs to attempt to recover an additional stated amount from North River (“the Assignment Amount”). Both Plaintiffs subsequently filed Amended Complaints against North River to enforce the alleged partial Assignment of Rights granted to each party by MSA. *See* Plaintiffs’ Amended Complaints, A.R. 1318-1359. Each partial Assignment purports to convey to Plaintiffs MSA’s rights to recover the Assignment Amount under Policy No. JU 1319 while reserving to MSA the right to recover the Payment Amount and its defense costs under Policy No. JU 1319. North River rejects the validity of both Assignments and denies that either plaintiff is entitled to their enforcement.

These West Virginia actions ensnared North River when MSA elected to begin a settlement program that consisted of a cash payment to a plaintiff accompanied by a partial Assignment to each plaintiff that purported to convey the rights to sue North River to collect an additional sum of money. Through this mechanism, as discussed below, MSA intentionally sought to create a fourth forum to litigate coverage issues against North River. Before embarking on these assignments, MSA paid settlements for years to plaintiffs without assigning any policy rights.

In the immediate actions, the plaintiffs seek a declaratory judgment arising out of the partial assignments regarding coverage under Policy No. JU 1319. *See* Plaintiffs' Amended Complaints, A.R. 1318-1359. MSA, in its Cross-claim against North River, also seeks a declaratory judgment "regarding the nature and extent of North River's obligation to cover Plaintiffs' claims under Policy No. JU 1319." *See* MSA's Cross-claims in *Persinger* and *Lambert*, A.R. 1400 and A.R. 1452, respectively. The reality is that North River did not deny coverage in either *Lambert* or *Persinger* as alleged in the MSA's Cross-claims. *See* MSA's Cross-Claims, A.R. 1390-1456. Rather, MSA settled each of the cases in principle, without consultation with North River and without formally tendering the claims to North River under Policy No. JU 1319. In fact, MSA did not tender the claim in *Lambert* to North River under Policy No. JU 1319 until after the settlement in principle had been consummated with the respective plaintiffs. Moreover, MSA never tendered the *Persinger* claim to North River under Policy No. JU 1319.¹

¹ MSA spent much of its *Consolidated Opposition to North River's Motions to Dismiss or, in the Alternative, Motion for Stay* ("*Consolidated Opposition*"), stressing the fact that Judge Warren R. McGraw had twice, once by Order of Court and once from the bench, denied North River's Motion to Dismiss and/or Stay in *Moore v. Mine Safety Appliances Company, et al.*, Circuit Court of Wyoming County, West Virginia, Civil Action No. 10-C-35. *See* MSA's *Consolidated Opposition*, A.R. 900-1003. The *Moore* matter is substantially similar to the immediate actions in that it involves a plaintiff with a declaratory judgment claim against North River related to North River's

There is no dispute that the law of Pennsylvania is controlling in defining the rights of the parties under Policy No. JU 1319. To that end, MSA and North River are and have been engaged for years in coverage litigation in both Pennsylvania state court (Civil Action No. G.D. 10-007432 pending in The Court of Common Pleas of Allegheny County, Pennsylvania) and Pennsylvania federal court (Civil Action No. 2:09-CV-00348 pending in the United States District Court for the Western District of Pennsylvania) regarding coverage issues on policies substantially similar to Policy No. JU 1319. MSA has argued in those actions that Pennsylvania law applies to the interpretation of the policies issued to it by North River. Both of these Pennsylvania cases are at the summary judgment stage.²

Although Policy No. JU 1319 is not directly at issue in either Pennsylvania action, it was placed directly at issue in a lawsuit filed *by MSA* in the Superior Court of Delaware prior to the commencement of the immediate actions against North River. *See* First Amended Delaware Superior Court Complaint, A.R. 1127-1171. Recognizing the importance of comity, the Delaware court stayed MSA's action against North River in deference to the two prior pending

coverage of MSA under Policy No. JU 1319. North River filed a similar Motion to Dismiss that was subsequently denied by Judge McGraw. North River resolved plaintiff's claim in the *Moore* matter and renewed its Motion to dismiss and/or stay the action. Shortly before the scheduled argument, MSA completely changed its position and agreed that the *Moore* Action should be stayed, albeit while reserving its objections to the similar Motions filed in *Persinger* and *Lambert*. On July 8, 2013, MSA filed its Memorandum for Stay of Action in the *Moore* Action in which it states: "While MSA believes North River's motion is without merit, in the interest of avoiding unnecessary disputes, MSA agrees to entry of a stay in this action" and "requests that this Honorable Court enter a Stay of Action in this case." *See Defendant Mine Safety Appliances Company's Memorandum For Stay of Action*, A.R.1120. As a result, MSA's argument that because *Moore* was not stayed, *Persinger* and *Lambert* should also not be stayed is based on a fallacy as the *Moore* action has indeed now been stayed, with MSA's blessing. The Court signed the *Moore* Stay Order on July 15, 2013 without objection from MSA. *See Order Granting Defendant North River Insurance Company's Renewed Motion for Stay of Action*, A.R. 1124-1126.

² There have been delays in the Pennsylvania state court's resolution of certain pending summary judgment motions relating to defense costs due to MSA's submission of supplemental briefing and the submission of additional alleged expert testimony after argument was held in April, 2013, which resulted in the state court allowing North River to take additional discovery. Cross-motions for summary judgment related to CWP trigger were argued and are pending decision. Summary judgment motions in the Pennsylvania federal court await decisions from that court on motions to file certain information under seal.

Pennsylvania actions. *See* Del. Super. Jan. 24, 2011 Order, A.R. 1025-1047; *see also*, Del. Super. October 6, 2011 Order, A.R. 1048 and Del. Super. April 18, 2012 Order, App. Tr. 1049-1051. That stay was recently reaffirmed by the Delaware court on March 22, 2013 when the Court stated it would await rulings by the Pennsylvania state court on the cross motions for summary judgment related to trigger, which were argued in March, before it would lift the stay against North River.³ *See* Del. Super. March 22, 2013 Order, A.R. 1054. The Delaware Court stated the “stay remains in effect with respect to North River and Allstate in connection with the filing of any motions seeking substantive rulings on insurance coverage that are at issue in the Pennsylvania action” *See* Del. Super. March 22, 2013 Hearing Transcript, A.R. 1053; *see also*, Del. Super. March 22, 2013 Order, A.R. 1054.

Subsequently, North River commenced an action in equity in the Chancery Court of Delaware seeking injunctive relief against MSA continuing to litigate these actions, and the separate case before this Court of *Moore v. Mine Safety Appliances Co., et al.*, 10-C-45,⁴ in order to vindicate the Delaware Superior Court’s policy decision to await substantive rulings from the Pennsylvania courts before whom the central coverage issues involved in all cases, i.e. the proper trigger of coverage for coal dust claims, were first joined and are soon to be decided.⁵ *See* the Complaint in *North River Ins. Co. v. Mine Safety Appliances Co.*, C.A. No. 8456-VCG, Court of

³ The Superior Court did lift the stay in part, at North River’s request, to allow North River to participate in depositions being taken in the Delaware case to avoid any prejudice to its rights and avoid having persons deposed a second time after the stay there is lifted. *See* Del. Super. March 22, 2013 Order, A.R. 1054.

⁴ Only after argument before Vice Chancellor Glasscock on the parties’ cross motions for judgment on the pleadings, during which the Vice Chancellor questioned MSA’s West Virginia filings as an attempt to gain a third bite at the apple of issues being decided in Pennsylvania and Delaware did MSA agree to voluntarily stay that action in relation to its cross-claims against North River.

⁵ In Delaware, law and equity remain split between different courts, the Superior Court (law) and the Chancery Court (equity). “The propriety of confining litigation to the forum in which it is first commenced has repeatedly been recognized by courts of equity, and an injunction will generally be allowed to prevent either party from removing the litigation into another court.” *Household Int’l, Inc. v. Eljer Indus., Inc.*, 1995 WL 405741, at *2 (Del. Ch. June 19, 1995) (“*Household IP*”)(quoting *Connecticut Mut. Life Ins. Co. v. Merritt Chapman & Scott Corp.*, 163 A. 646, 648 (Del. 1932)).

Chancery of the State of Delaware, A.R. 1229-1245. In its Complaint for Injunctive Relief, North River sought, *inter alia*, to enjoin MSA from prosecuting any claim in West Virginia under any North River policy and from filing or prosecuting any claims for coverage under any North River policy other than the Pennsylvania actions and the Delaware actions. The parties filed cross motions for judgment on the pleadings.

The cross motions were argued before the Honorable Vice Chancellor Sam Glasscock on June 25, 2013. *See* Court of Chancery of the State of Delaware June 25, 2013 Hearing Transcript, A.R. 1055-1115. The argument of counsel provides an excellent historical review of the multi-state forum-shopping by MSA trying to secure more favorable decisions.

First, MSA opposed exercise of jurisdiction in New Jersey in a declaratory judgment suit filed by another of MSA's insurers against MSA and all of MSA's insurers, on grounds that these coverage claims properly belonged before the courts of Pennsylvania. Second, after years of litigating with North River in Pennsylvania, MSA then filed suit in Delaware in 2010 making claims against North River involving a number of excess policies, including Policy No. JU 1319 and the policies pending in the Pennsylvania actions. Now, by working with underlying Plaintiffs' counsel to make partial assignments part of a settlement, it has brought its coverage claims before a fourth forum in West Virginia.⁶ The disconnect for Vice Chancellor Glasscock in Delaware, and what should trouble this Court, is why MSA has invoked the jurisdiction of multiple courts to address the same dispute regarding the proper coverage for CWP claims under Pennsylvania law and the coverage obligations, if any, by North River pursuant to Policy No. JU 1319. The most logical explanation is that MSA has decided that the Pennsylvania and Delaware courts are unlikely to determine that it is entitled to the relief it seeks and has sought a fourth bite

⁶ Although MSA did not bring the New Jersey action, West Virginia is the fifth forum be asked to address coverage claims on the same or substantially similar policies.

of the apple to seek a ruling in West Virginia inconsistent with what it now expects in those other courts. Vice Chancellor Glasscock keenly observed during the June 25, 2013 Hearing: “The issue is inconsistent judgments, the possibility of inconsistent judgments; correct?” *See* Court of Chancery of the State of Delaware June 25, 2013 Hearing Transcript, A.R. 1065, 1084-1085. Vice Chancellor Glasscock also stated that “there are some serious issues raised of whether MSA is -- the way it's proceeding is consistent with having sought Delaware jurisdiction in a declaratory judgment action,” and that “there are very significant concerns here that the way in which Mine Safety is proceeding can lead to inconsistent judgments.” *Id.* at A.R. 1111-1113. Vice Chancellor Glasscock also noted that the Delaware Superior Court had partially stayed some aspects of that coverage action pending receipt of the decision by the Allegheny County Court of Common Pleas on the pending Cross-Motions for Summary Judgment regarding the application of Pennsylvania trigger law regarding coal workers’ pneumoconiosis claims with respect to the similarly worded North River insurance policies. *Id.* at A.R. A.R. 1069.⁷

After filing the *Motions to Dismiss* in the immediate actions, North River agreed to defer argument on those Motions to allow Judge Chafin to consider *de novo* North River’s Renewed Motion to Dismiss and/or Stay in the *Moore* action and to allow the Delaware Chancery Court Hearing to convene and have the first opportunity to consider the injunction issues presented there. Even though Vice Chancellor Glasscock opined that Delaware had jurisdiction to enjoin MSA from prosecuting these cases in West Virginia, out of comity, he withheld his decision to give the Wyoming County Circuit Court the first opportunity to enter a Stay Order. *Id.* at A.R. 1088. Vice Chancellor Glasscock went on to state that

⁷ Oral argument on key Cross Motions for Summary Judgment in the Pennsylvania action took place on March 12, 2013. A ruling on these Motions is expected in the near future.

[t]his matter is scheduled for an oral argument in front of a judge in the Moore case. It's quite true that typically the Delaware courts, when faced with this type of a motion, when there has been one, let alone two, rulings adverse to the party seeking a stay in the other jurisdiction, will go ahead and decide it and not say, "Go back a third time." However, here the party has gone back a third time. They're there. It's teed up. Perfectly understandable why they did so, but this matter is pending before the West Virginia trial court. The fact that the West Virginia trial court did not try to jump his oral argument in front of this oral argument doesn't indicate to me that he is unable to make the decision that has been put in front of him. Quite the contrary. I'm quite sure he is able to make that decision. Comity requires that the courts of that state be given the chance to do so.

Id. at A.R. 1112. Consistent with the request made by the Chancery Court that counsel let the Court know the results of argument before this Court on North River's Renewed Motion with respect to the *Moore* case, the Delaware Court has been informed that a voluntary Stay Order has been entered in West Virginia. *Id.* at A.R. 1113; *see also*, Letter to Vice Chancellor Glasscock, A.R. 1116-11126.

In Delaware, MSA endorsed Vice Chancellor Glasscock's approach to allow the West Virginia court the first opportunity to stay these actions. *See* Court of Chancery of the State of Delaware June 25, 2013 Hearing Transcript, A.R. 1091. Notwithstanding, Vice Chancellor Glasscock was insistent that MSA explain why MSA had facilitated and encouraged new coverage actions in West Virginia when the coverage issue for Policy No. JU 1319 was already pending before the Delaware Superior Court. *Id.* at A.R. 1094-1097, 1103-1105. While he discussed all three West Virginia cases, he focused particularly on the *Moore* case because MSA and North River were the only parties who remain in that action and suggested that MSA is merely trying to get another bite at the coverage apple by its newly adopted settlement device of issuing assignments rather than checks in payment of the full amount of the settlement. *Id.* at 1097-1102. Obviously, MSA understood that if it had not voluntarily stayed the *Moore* case, that the Delaware Chancery Court would have enjoined it.

North River acknowledges that Jill Lambert and Teresa Diane Persinger, in their individual capacities, are not subject to the compulsory jurisdiction of the Delaware Court. Chancellor Glasscock expressly acknowledged that fact also and in response to an argument by MSA that it could not be enjoined from litigating in West Virginia, he advised MSA's counsel that the Delaware Court does have the power to prohibit MSA from participating in the *Lambert* and *Persinger* actions. See Court of Chancery of the State of Delaware June 25, 2013 Hearing Transcript, A.R. 1104-1105. However, by accepting the partial Assignments, Plaintiffs are no longer involved in these actions in their individual capacities but instead as extensions of MSA. See August 20, 2013 Hearing Transcript on the *Motions to Dismiss*, A.R. 1543-1546. Because these West Virginia plaintiffs have invoked the continuing jurisdiction of the Wyoming County Circuit Court with respect to a cause of action where they stand in the shoes of MSA regarding the coverage issues, the appropriate disposition is to stay the participation of all claims pending the resolution of the Delaware action.

On August 20, 2013, the Circuit Court held a Hearing on North River's *Motion to Dismiss*. *Id.* at A.R. 1498-1554. On September 4, 2013, the Circuit Court entered the *Order Denying Defendant The North River Insurance Company's Motion to Dismiss or, in the Alternative, Motion for Stay of Action* ("Denial Order"). In the Denial Order, the Circuit Court found that "it is in the interests of justice and the convenience of the parties to have the cases heard in this County and not out of state." See Denial Order, A.R. 3. In support of this finding, the Circuit Court also found that:

- 1) There was no alternative forum to address plaintiffs' claims against North River and to provide plaintiffs with an adequate remedy;
- 2) That maintaining these cases in West Virginia would not work a substantial injustice to North River;

- 3) That the courts of Pennsylvania and Delaware can exercise jurisdiction over a defendant to the plaintiffs' claims;
- 4) That since the plaintiffs are residents of West Virginia, that the plaintiffs would suffer a substantial injustice if their claims against North River were not adjudicated in West Virginia;
- 5) That the plaintiffs' claims accrued in West Virginia;
- 6) That a balance of the private and public interests do not predominate in favor of the cases being brought in an alternative forum;
- 7) The denying of the *Motion to Dismiss* does not result in the unreasonable duplication of litigation as the other pending actions cannot fully resolve the issues before the Circuit Court;
- 8) The alternative forums do not provide a remedy in these actions;
- 9) That the Pennsylvania and Delaware actions will not fully and finally resolve the plaintiffs' claims against North River;
- 10) That North River's request for a stay is not in the interest of justice; and
- 11) That since the plaintiffs' claims survive the *Motion to Dismiss*, that MSA should be allowed to participate in these actions.

Id. at A.R. 4-8. North River disagrees with the Circuit Court's ultimate findings and denial of the *Motion to Dismiss*. It is the Denial Order that precipitated the filing of North River's *Verified Petition for Writ of Prohibition*.

SUMMARY OF ARGUMENT

MSA must not be allowed to continue commencing multiple litigations on the same issue in four (4) different forums in hopes that one of those jurisdictions will agree with its position. With each action on the same issue that MSA brings in a new jurisdiction, MSA is not only creating the potential for inconsistent judgments, by increasing the likelihood of inconsistent judgments. To allow such an action would be a miscarriage of justice and severely prejudice North River.

Plaintiffs abdicated their right to have their claims heard exclusively by a West Virginia Court when they accepted the partial Assignments from MSA. Now, as Assignees of MSA's rights under Policy No. JU 1319, they no longer represent themselves in these litigations, but are instead extensions of MSA. Plaintiffs must not be allowed to use the partial Assignments as both a sword to attack North River and a shield against having their claims adjudicated in an alternative forum better suited to hear their claims.

Plaintiffs' actions are classic examples of actions that should be dismissed or stayed on the basis of *forum non conveniens*. There is already a forum for coverage claims related to Policy No. JU 1319, Delaware Superior Court. *See* First Amended Delaware Superior Court Complaint, A.R. 1127-1171. It is a forum that was handpicked by MSA to adjudicate the coverage issue related to Policy No. JU 1319. Contrary to the holding of the Circuit Court, by virtue of the partial Assignments, the Delaware Superior Court does have jurisdiction over all the parties in these litigations.

MSA, by granting the partial Assignments, is attempting to perpetrate a sham upon the Court. At the time it granted the partial Assignments, it was well aware of the Delaware Superior Court's original Order staying that action as to North River in favor of the Pennsylvania actions, as well as the Court's subsequent order only partially lifting the stay for MSA to pursue discovery against its other insurers that were not party to the Pennsylvania actions. *See* Del. Super. Jan. 24, 2011 Order, A.R. 1025-1047; *see also*, Del. Super. October 6, 2011 Order, A.R. 1048 and Del. Super. April 18, 2012 Order, App. Tr. 1049-1051. MSA colluded with Plaintiffs by granting the partial Assignments in an attempt to circumvent the letter and spirit of that the Delaware Superior Court's Order. By assigning some rights to Plaintiffs, MSA sought to have the coverage actions brought in West Virginia and then bring its cross-claims against North

River, while shielding itself from the Delaware Superior Court's Order and from having the action dismissed or stayed on the basis of *forum non conveniens*. This allows MSA a fourth bite at the apple and purports to give its assignees greater rights than MSA possesses, a position that is in stark contrast to well established assignment law in the State of West Virginia. Such a sham must not be allowed to continue.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Under the West Virginia Rules of Appellate Procedure 18(a), Petitioner respectfully requests Rule 19 oral argument. This Petition is appropriate for oral argument pursuant to Rule of Appellate Procedure 19(a). Specifically, this Petition addresses issues involving assignments of error in the application of settled law. Because this Petition addresses at least one of the enumerated factors listed under Rule of Appellate Procedure 19(a), oral argument is both necessary and appropriate. North River further recommends that this Petition is not appropriate for a memorandum decision. The parties would be better served by a disposition by published opinion providing precedential guidance on the interpretation of the legal issues presented in this Petition.

ARGUMENT

The most important factor in evaluating a petition for a Writ of Prohibition is “whether the lower tribunal’s order is clearly erroneous as a matter of law.” *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 21, 483 S.E.2d 12, 21 (1996). In the immediate actions, the Circuit Court ignored well established assignment law in the State of West Virginia that states that an Assignee “stands in the shoes” of the Assignor. *See* syl. pt. 10, *Lightner v. Lightner*, 146 W. Va. 1024, 124 S.E.2d 355 (1962). By ignoring this fact, the Circuit Court was able to justify the denial of the *Motion to Dismiss* by incorrectly stating that no other forum has jurisdiction over the plaintiffs. This denial also perpetuates the sham that MSA is perpetrating upon the Court.

I. BY ACCEPTING THE PARTIAL ASSIGNMENTS, PLAINTIFFS STAND IN THE SHOES OF MSA AND ARE SUBJECT TO THE SAME LIABILITIES AND PROHIBITIONS PLACED UPON MSA.

Plaintiffs knowingly entered into the Assignments with MSA.⁸ By entering into these partial Assignments, Plaintiffs are no longer involved in these actions in their individual capacities but rather are extensions of MSA. *See* August 20, 2013 Hearing Transcript on the *Motions to Dismiss*, A.R. 1543-1546. Plaintiffs' status in these actions changed following the acceptance of the partial Assignments because they now "stand in the shoes" of MSA and enjoy the same rights and privileges of MSA and are also subject to the same liabilities and prohibitions limiting MSA. *See* syl. pt. 10, *Lightner v. Lightner*, 146 W. Va. 1024, 124 S.E.2d 355 (1962) ("Ordinarily an assignee acquires no greater right than that possessed by his assignor, and he stands in his shoes; and an assignee takes subject to all defenses and all equities which could have been set up against an instrument in the hands of an assignor at the time of the assignment."); *see also* *Strahin v. Sullivan*, 220 W. Va. 329, 647 S.E.2d 765, 773 (2007) (citing *Lightner v. Lightner*); *New England Insurance Co. v. Barnett*, 2011 U.S. Dist. LEXIS 27272 at *9 (WDLA 2011) ("It is axiomatic that an assignee acquires no greater rights than his assignor, and that all defenses available against the assignor are likewise available against the assignee."). The same rule exists under Pennsylvania law, which governs the insurance policy at issue. *See Crawford Cent. School Dist. v. Commonwealth*, 888 A.2d 616, 619-20 (Pa. 2005) ("the assignee succeeds to no greater rights than those possessed by the assignor" and "an assignee stands in the shoes of the assignor") (citations omitted); *see also, e.g., Smith v. Cumberland Group, Ltd.*, 687

⁸ Plaintiffs' counsel are not novices in relation to dealing with MSA regarding Plaintiffs' alleged injuries having litigated similar claims against MSA for a number of years and settling those claims without partial assignments. Plaintiffs' counsel was fully aware at the time of settlement that the mere conveyance of an assignment of rights does not guarantee Plaintiffs' ability to recover against North River. *See Strahin v. Sullivan*, 220 W. Va. 329, 337, 647 S.E.2d 765, 773 (2007) ("[T]he mere assignment of rights does not translate into automatic recovery. Rather, the assignee must still satisfy all of the essential elements of the cause of action.").

A.2d 1167, 1172 (Pa. Super. 1997) (“an assignee’s right against the obligor is subject to all of the limitations of the assignor’s right, to all defenses thereto, and to all set-offs and counterclaims which would have been available against the assignor had there been no assignments, provided that these defenses and set-offs are based on facts existing at the time of the assignment”). By all practical purposes, by virtue of accepting the partial Assignments, Plaintiffs are MSA as it relates to the interests conveyed in the partial Assignments. In the immediate actions, the limitation placed upon MSA, that Plaintiffs are now subject to, included the Delaware Superior Court’s stay of MSA’s claims against North River regarding Policy No. JU 1319 in favor of the Pennsylvania actions. *See* Del. Super. Jan. 24, 2011 Order, A.R. 1025-1047; *see also*, Del. Super. October 6, 2011 Order, A.R. 1048 and Del. Super. April 18, 2012 Order, App. Tr. 1049-1051. This prohibition was imputed to Plaintiffs by virtue of the partial Assignments because the partial Assignments conveyed all the rights and **limitations** MSA enjoyed. Consequently, contrary to the Circuit Court’s findings, Plaintiffs are subject to the jurisdiction of the Delaware Superior Court and its rulings. Since MSA and Plaintiffs are viewed as the same entity under the law, then dismissal or stay of Plaintiffs’ actions by this Court is appropriate and warranted in light of the stay entered by the Delaware Superior Court. That is, just as dismissal or stay against MSA is appropriate (as MSA acknowledged in its Motion for Stay in the *Moore* action), dismissal or stay against Plaintiffs is appropriate.

A. By accepting the partial Assignments, Plaintiffs subjected themselves to the same alternative forums that have jurisdiction over MSA.

By accepting the partial Assignments, Plaintiffs are subject to the same analysis of W. Va. Code § 56-1-1a as MSA is. *See* Section II, *infra*. By virtue of the partial Assignment, Plaintiffs are MSA as it relates to rights conveyed by MSA in the partial Assignments. This includes submitting to the personal jurisdiction of the courts that hold personal jurisdiction over

MSA. Plaintiffs cannot use the assignment of MSA's rights against North River as a sword, while at the same time ignoring the limitations that came along with those partial Assignments, including the personal jurisdiction of the Delaware courts, as a shield against the dismissal or stay of their claims. By accepting the Assignments, Plaintiffs abdicated the right for their claims to be exclusively heard in a West Virginia court and instead willingly subjected themselves to the jurisdictions in which courts have personal jurisdiction over MSA, including Delaware.

B. Denial of North River's *Motions to Dismiss* on the basis that Plaintiffs are not subject to the rulings of the Delaware court will result in substantial injustice to North River.

It is beyond obvious that, after years of settling respirator cases, MSA suddenly began issuing partial Assignments after the Delaware Superior Court stayed its action under Policy No. JU 1319 in favor of the Pennsylvania. To allow Plaintiffs to only be entitled to the benefits they derive from the partial Assignments and none of the limitations would result in substantial injustice to North River. Plaintiffs cannot be allowed to pick and choose what aspects of the partial Assignments they want to apply. A denial of North River's *Motions to Dismiss* on the basis that Plaintiffs are not subject to the rulings of the Delaware court would allow Plaintiffs to only benefit from the good it derives from MSA's conveyance of rights and avoid the bad. It would also allow MSA to circumvent the Delaware Superior Court's stay order. This outcome would be contrary to Pennsylvania law regarding an insurer having the same defenses against an assignee that it has against its insured and what the Supreme Court of Appeals would declare to be the law of West Virginia and would result in substantial injustice to North River.

C. A dismissal is warranted after balancing the private and public interest of maintaining the integrity of assignment law in the State of West Virginia.

To allow Plaintiffs to avoid the limitations inherently included in the partial Assignments would run contrary to the existing assignment law in the State of West Virginia. Both the private

and public interests desire that assignment law in West Virginia be predictable so that the parties to an assignment know from the onset what benefits and limitations come with the assignment. To allow Plaintiffs to avoid the parts of the partial Assignments that they do not wish to abide by would result in uncertainty regarding the obligations of the parties to an assignment. It is imperative that the Court apply West Virginia law and require Plaintiffs to honor all aspects of the partial Assignments they willingly entered into.

D. The denial of North River's Motions to Dismiss will result in the unreasonable duplication of litigation.

The Circuit Court abused its discretion when it allowed for the unreasonable duplication of litigation. MSA instituted litigation against North River regarding coverage pursuant to Policy No. JU 1319 in Delaware in 2010. *See* First Amended Delaware Superior Court Complaint, A.R. 1127-1171. Plaintiffs, standing in the shoes of MSA, subsequently instituted litigation in West Virginia regarding coverage pursuant to Policy No. JU 1319. *See* Plaintiffs' Amended Complaints, A.R. 1318-1359. MSA chose Delaware as the forum to litigate issues under Policy No. JU 1319. Just as MSA cannot file a second suit in another forum, MSA and Plaintiffs cannot be permitted to circumvent that choice via partial assignments to claimants. Likewise, it is unreasonable to allow Plaintiffs and MSA to duplicate the same action in West Virginia in an attempt to create conflicting rulings that will only result in confusion and additional litigation.

II. AN ANALYSIS OF W. VA. CODE § 56-1-1a INDICATES THAT A DISMISSAL AND/OR STAY BASED ON FORUM NON CONVENIENS IS APPROPRIATE.

West Virginia Code § 56-1-1a governs the disposition of the Motions to Dismiss and Alternative Motion to Stay based on *forum non conveniens*. *See* Syl. Pt. 2, *State ex rel. Piper v. Sanders*, 228 W. Va. 792, 724 S.E.2d 763 (2012) (“To warrant the stay it must be essential to

justice, and it must be that the judgment of decree by the other court will have legal operation and effect in the suit in which the stay is asked, and settle the matter of controversy in it.”

(Citation omitted)). The Court may stay “a case over which it has jurisdiction if it determines that ‘in the interest of justice and for the convenience of the parties’ the action would more properly be heard in forum outside this state.” *See Mace v. Mylan Pharmaceuticals, Inc.*, 227 W. Va. 666, 672, 714 S.E.2d 223, 229 (2011) (citations omitted). In making that determination the statute provides the eight factors to be considered. *See Mace v. Mylan Pharmaceuticals, Inc.*, 227 W. Va. 666, 672, 714 S.E.2d 223, 229 (2011); *see also, Nezan v. Aries Technologies*, 226 W. Va. 631, 704 S.E.2d 631 (2010) (Dismissing an action following the application of W. Va. Code § 56-1-1a). The statutory test for a granting of a Motion to Stay is satisfied pursuant to W. Va. Code § 56-1-1a based on the undisputed conduct by MSA when it chose Delaware to litigate Policy No. JU 1319 against North River beginning in 2010 and continues to actively participate in the Delaware litigation today. The following analysis of the statutory criteria compels a favorable ruling on the Motions to Dismiss and Alternative Motions to Stay:

- (1) Whether an alternate forum exists in which the claim or action may be tried;

RESPONSE: Yes; MSA already has invoked the jurisdiction of the Superior Court of Delaware on July 26, 2010 in Civil Action No. N10C-07-241 MMJ. See First Amended Delaware Superior Court Complaint, A.R. 1127-1171. By virtue of accepting the Assignment, Plaintiffs are also subject to the jurisdiction of the Delaware Superior Court. See Section I, *supra*. Consequently, the Delaware Superior Court has or can have jurisdiction over all the parties in this action.

- (2) Whether maintenance of the claim or action in the courts of this State would work a substantial injustice to the moving party;

RESPONSE: Yes; in a situation where MSA invoked the jurisdiction of the Delaware Superior Court in 2010 and directly placed Policy No. JU 1319 at issue, it would work a substantial injustice to require North River to participate in these cases brought by Plaintiffs as MSA’s proxies by virtue of the partial Assignments, when this policy is being litigated in

Delaware. See First Amended Delaware Superior Court Complaint, A.R. 1127-1171.

- (3) Whether the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;

RESPONSE: Yes, with explanation Mrs. Lambert and Mrs. Persinger settled their respective claims against MSA with full knowledge that MSA, as assignor, had previous to the execution of the partial Assignments filed a Declaratory Judgment Action against North River to determine insurance coverage for all claims asserted pursuant to Policy No. JU 1319. *Id.* Plaintiffs and MSA knew that plaintiffs had the same rights, if any exist, under Policy No. JU 1319 that MSA has, if any. And, they also knew that Plaintiffs were subject to the same limitations as MSA. Delaware has jurisdiction over both MSA and North River. By virtue of accepting the partial Assignments, Plaintiffs subjected themselves to the jurisdiction of the Delaware court. See Section I, *supra*. No one can dispute that if there is no coverage owed by North River to MSA pursuant to Policy No. 1319, then the "assignment" issue is moot.

- (4) The state in which the plaintiff(s) reside:

RESPONSE: Plaintiffs are residents of West Virginia, but abdicated their right to have their claims heard by a West Virginia Court by virtue of accepting the partial Assignments from MSA. Plaintiffs no longer appear in these litigations in their individual capacities, but instead as extensions of MSA. Plaintiffs' rights are no greater than the rights held by MSA. See Section I, *supra*. Consequently, Plaintiffs have subjected themselves to the jurisdiction of the Delaware Superior Court.

- (5) The state in which the cause of action accrued:

RESPONSE: The Circuit Court erred when it stated that the cause of action accrued in West Virginia. Plaintiffs' underlying injury may have accrued in West Virginia, but Plaintiffs did not bring a cause of action regarding their underlying injuries against North River. Plaintiffs instead brought a declaratory judgment action regarding coverage under Policy No. JU 1319. Any cause of action regarding coverage, if any, would have accrued in Pennsylvania, where MSA is located. None of the actions taken by MSA and North River with respect to coverage (e.g., formation of the insurance contract, tendering, withdrawing or re-tendering of the claims, North River's review of and response to correspondence of MSA) occurred in West Virginia.

- (6) Whether the balance of the private interests of the parties and the public interest of the State predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this State. Factors relevant to the private interests of the parties include, but are not limited to, the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; possibility of a view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. Factors relevant to the public interest of the State include, but are not limited to, the administrative difficulties flowing from court congestion; the interest in having localized controversies decided within the State; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty;

RESPONSE: The State of West Virginia does have a public interest in this coverage action being litigated in the Delaware Superior Court because that is the forum selected by MSA three (3) years ago to litigate the coverage dispute with North River regarding Policy No. JU 1319. See First Amended Delaware Superior Court Complaint, A.R. 1127-1171. In addition:

- 1. There is no State interest on behalf of Mrs. Lambert or Mrs. Persinger in having the coverage claims litigated here when MSA already placed Policy No. JU 1319 at issue in Delaware in 2010 because these plaintiffs stand in the shoes of MSA regarding coverage. Furthermore, Plaintiffs, by virtue of accepting the partial Assignments, abdicated their rights to have their claims exclusively heard by a court in the State of West Virginia. See Section I, *supra*. If there is no coverage, then the partial Assignments conveyed no right to coverage and are ineffective. If and only if the Delaware Superior Court determines that there is coverage pursuant to Policy No. JU 1319 will there be any reason to prosecute a claim to determine the validity of the partial Assignments.**
- 2. There were no acts or omissions by North River that occurred in the State of West Virginia.**
- 3. The majority of the documentary and testimonial evidence regarding MSA's alleged entitlement to coverage under Policy No. JU 1319 is located outside the State of West Virginia.**
- 4. All of the witnesses regarding an alleged entitlement to coverage by MSA under Policy No. JU 1319 reside and work outside the State of West Virginia.**

5. **There is no compulsory process available to North River by which it could compel unwilling out of state witnesses to participate in a Wyoming County, West Virginia trial.**
6. **Because the North River witnesses relevant to these cases reside in the Northeast section of the United States, the cost of obtaining attendance of willing witnesses to appear in Wyoming County would be very expensive and would require travel at a greater distance than that provided by the Delaware Court.**
7. **There is no West Virginia premises that is relevant to any of the causes of action asserted by Plaintiffs or MSA against North River in the immediate actions. Therefore, no view is anticipated or necessary.**
8. **There is nothing about holding trial in Pineville, West Virginia that would make the trial of a case “easy, expeditious and inexpensive” for North River or MSA. Transportation, food and lodging expenses would be expensive for both MSA and North River because of the out of state witnesses. For those witnesses who would be unwilling to appear in person, the need to take evidentiary videotaped depositions would significantly increase the litigation expense for all parties.**
9. **The public interest of the State would be served by a dismissal and/or stay that would reduce Court congestion in the Circuit Court of Wyoming County. Moreover, the public interest would be served by reducing the added expense of a Special Judge charged with trying a complicated coverage case that is already pending in Delaware, a forum selected by MSA.**
10. **There is no “localized interest” in conducting the trial of two MSA Cross-claims in West Virginia because MSA already sued North River in 2010 regarding all coverage issues attendant to Policy No. JU 1319. MSA artificially created this alternative West Virginia coverage forum by manipulating the settlement process when it issued partial Assignments to the tort plaintiffs rather than cash because of an alleged cash flow problem. *See* Court of Chancery of the State of Delaware June 25, 2013 Hearing Transcript, A.R. 1095-1097. MSA has no cash flow problem if it is accurately reporting its profits. For example, in a press release related to its 2012 annual report, “MSA . . . announced that net sales for the year ended December 31, 2012 were \$1.169 billion compared with \$1.173 billion in 2011, a decrease of \$4 million. . . . Net income for the year ended December 31, 2012 was a record \$91 million, or \$2.45 per basic share, an increase of \$21 million, or 30 percent, compared with \$70 million, or \$1.91 per basic share, in 2011.” *See* February 13, 2013 MSA Press Release, A.R. 1172-1175.**

11. Vice Chancellor Glasscock expressly recognized that Delaware's injunctive powers, if exercised, should focus on the avoidance of inconsistent outcomes. The controlling West Virginia statute expressly requires this Court to consider the "avoidance of unnecessary problems in conflict of laws, or in the application of foreign law." Delaware acknowledged the same consideration and is awaiting the determination of the North River and MSA Cross-Motions for Summary Judgment pending in the Court of Common Pleas of Allegheny County. *See* Court of Chancery of the State of Delaware June 25, 2013 Hearing Transcript, A.R. 1099-1104. MSA concedes that resolution of the coverage opinion is "absolutely Pennsylvania law." *Id.* at A.R. 1099. There is no reason why this Court should involve itself with a determination of Pennsylvania law when the Delaware Court has stayed certain aspects of MSA's case pending receipt of the Allegheny County Court's determination regarding Pennsylvania law.

12. The final significant State interest issue to be considered is the jury. This Court understands the costs to the State, loss of income by the jurors and the interruption of their lives that would be involved in the two (2) jury trials now scheduled for Pineville in April, 2014. The negative impact on the jury pool is unwarranted.

(7) Whether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation; and

RESPONSE: Yes; the Delaware action was filed by MSA on July 26, 2010. *See* First Amended Delaware Superior Court Complaint, A.R. 1127-1171. MSA cannot dispute that the failure by this Court to grant a stay or dismissal will result in a "duplication or proliferation of litigation." While MSA will contest the reasonableness or unreasonableness of the "duplication or proliferation," common sense and fairness compels the conclusion that MSA should not be allowed to create mini-coverage claims in every tort case that it settles. MSA chose Delaware and should be compelled to litigate the coverage claims arising from Policy No. JU 1319 in that forum. As Plaintiffs have no high rights than MSA, they are likewise bound by MSA's choice of the Delaware forum.

(8) Whether the alternate forum provides a remedy.

RESPONSE: Yes; Delaware is the alternate forum first selected by MSA to litigate all of its coverage claims against North River that arise from Policy No. JU 1319. *Id.* Even though Mr. Packman represented to Vice Chancellor Glasscock that MSA could not secure a money judgment in

Delaware because it had not included the settlement monies as a cause of action or remedy sought in Delaware, MSA's Delaware First Amended Complaint confirms the opposite conclusion. See Court of Chancery of the State of Delaware June 25, 2013 Hearing Transcript, A.R. 1099; see also, First Amended Delaware Superior Court Complaint, A.R. 1127-1171. The "Prayer For Relief" by MSA in Delaware describes the relief *inter alia* sought as:

- a. For a judgment on Count One, declaring the rights and obligations of MSA and the Defendants under the Policies, including but not limited to the obligations of the Defendants to defend and/or *indemnify* MSA with respect to the Underlying Claims described above;**
- b. *For an award of money damages on Count One for all damages that have accrued as of the time of trial as a result of the Court's declaration of MSA's entitlement to coverage (except with respect to CNA). (Emphasis Supplied).***

***Id.* at A.R. 1141. Moreover, contrary to the findings of the Circuit Court, the Delaware Superior Court is an alternative forum that has jurisdiction over Plaintiffs, by virtue of the partial Assignments, and can provide a remedy to all parties in these litigations. See Section I, *supra*.**

See W. Va. Code § 56-1-1a(a).

The argument advanced by MSA that the West Virginia litigation involves the additional issues as to the reasonableness of the settlement with each tort plaintiff and the failure to obtain the consent of North River before entering into the respective settlement agreements is disingenuous with respect to the issues presented. Neither of those defenses arises unless or until there is a determination of coverage. A central issue in Delaware and Pennsylvania, the trigger of coverage for coal dust claims, is also the central issue of the West Virginia Actions. West Virginia will benefit from a decision by the Pennsylvania courts on a substantive issue of Pennsylvania law, and since MSA's assignees, Lambert and Persinger, in West Virginia step into MSA's shoes,⁹ decisions in Pennsylvania and Delaware, on the trigger issue may render the

⁹ Under Pennsylvania law, which governs the insurance policy at issue, "an assignee stands in the shoes of the assignor." *Crawford Cent. School Dist. v. Commonwealth*, 888 A.2d 616, 619-20 (Pa. 2005); *see also, e.g., Smith v. Cumberland Group, Ltd.*, 687 A.2d 1167, 1172 (Pa. Super. 1997). The result would be the same under

[w]henever it shall be made to appear to any court, or to the judge thereof in vacation, that a stay of proceedings in a case therein pending should be had until the decision of some other action, suit or proceeding in the same or another court, such court or judge shall make an order staying proceedings therein, upon such terms as may be prescribed in the order. But no application for such stay shall be entertained in vacation until reasonable notice thereof has been served upon the opposite party.

See W. Va. Code § 56-6-10. Applying W. Va. Code § 56-6-10 to the facts in the immediate actions, it is clear that the Circuit Court should have dismissed or stayed these actions in favor of the action before the Delaware Superior Court. Failure to do so on the part of the Circuit Court was an abuse of discretion.

IV. THESE ACTIONS SHOULD BE STAYED BECAUSE BY ASSIGNING A PORTION OF ITS RIGHTS UNDER POLICY NO. JU 1319 TO THE PLAINTIFFS IN LAMBERT AND PERSINGER, MSA IS ATTEMPTING TO COMMIT A SHAM UPON THE COURT IN AN ATTEMPT TO CIRCUMVENT THE STAY ISSUED BY DELAWARE SUPERIOR COURT.

MSA has engineered the immediate actions in an attempt to circumvent the stay entered by the Delaware Superior Court. The Delaware Superior Court entered the stay while it waits for a decision by the Court of Common Pleas of Allegheny County on the pending Cross-Motions for Summary Judgment regarding the application of Pennsylvania law to the similarly-worded North River insurance policies. See Del. Super. Jan. 24, 2011 Order, A.R. 1025-1047; see also, Del. Super. October 6, 2011 Order, A.R. 1048 and Del. Super. April 18, 2012 Order, App. Tr. 1049-1051. In an attempt to circumvent the stay, MSA issued improper partial assignments of its rights under Policy No. JU 1319 and forced plaintiffs to file their respective Amended Complaints. It is a sham upon the court for MSA to use an assignment to circumvent the rule of law, in this case the stay entered by the Delaware Superior Court. See *Frieson v. Isner*, 168 W. Va. 758, 775, 285 S.E.2d 641, 653 (1981) (It is a sham upon the court to bring an action that is prohibited by the rule of law.). This is exactly what MSA is attempting to do by assigning some

of its rights under Policy No. JU 1319 to the plaintiffs; MSA used these partial assignments to circumvent the rule of law in an attempt to create inconsistent judgments in various jurisdictions in direct violation of the spirit of the Delaware Superior Court's stay. Vice Chancellor Glasscock questioned MSA's motivations for facilitating these coverage actions in West Virginia in direct contradiction with the letter and the spirit of the stay entered by the Delaware Superior Court. *See* Court of Chancery of the State of Delaware June 25, 2013 Hearing Transcript, A.R. 1094-1097, 1103-1105. The Court should not permit this sham to continue and should dismiss Plaintiffs' and MSA's claims in favor of the action before the Delaware Superior Court.

MSA's sham goes beyond simply circumventing the stay issued by the Delaware Superior Court. MSA's is also attempting to use Plaintiffs to block these actions from being dismissed for *forum non conveniens*. Without the inclusion of Plaintiffs, these actions would be appropriately dismissed for *forum non conveniens*. The Circuit Court improperly blocked such an outcome when it ignored well settled assignment law and found that Plaintiffs brought these actions against North River in their individual capacity instead of as extensions of MSA by virtue of the partial Assignments. The result of this finding on the part of the Court is that Plaintiffs are not subject to the jurisdiction of the Delaware Superior Court and cannot receive a remedy if the West Virginia actions are dismissed. This simply is not the case. *See* Section I, *supra*. MSA used the partial Assignments as a method by which it could improperly anchor these litigations in West Virginia. This is proven by the fact that in the *Moore* action, once the plaintiff's claims against North River were resolved, MSA reversed its previous position and agreed to voluntarily stay the action in favor of the Delaware action. *See Defendant Mine Safety Appliances Company's Memorandum For Stay of Action*, A.R. 1119-1122. By anchoring these litigations in West Virginia, MSA hopes to capitalize on the sympathies of a West Virginia jury

in relation to Plaintiffs' alleged injuries, which are not at issue in these litigations, and hopes to find a forum that is receptive to its arguments. Such a sham must not be allowed to continue.

CONCLUSION

WHEREFORE, based on the foregoing, North River respectfully moves this Honorable Court to grant its Verified Petition for a Writ of Prohibition and issue a writ finding that the Circuit Court of Wyoming County abused its discretion when it denied *Defendant North River Insurance Company's Motion to Dismiss, or in the Alternative, Motion for Stay of Action*.

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VERIFICATION

STATE OF WV

COUNTY OF Cabell, TO-WIT:

I, Tamela J. White, being first duly sworn upon my oath, depose and say that I have read the foregoing *Verified Petition for Writ of Prohibition* and *Appendix* thereto and the procedural facts contained therein are true and correct to the best of my knowledge.

Tamela J. White
Tamela J. White, Esq.

Taken, subscribed and sworn to before me this 18th day of September,
2013.

My commission expires 8/25/19.

Beverly G. Morrison



IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

Docket Number: _____

THE NORTH RIVER INSURANCE COMPANY,

Petitioner/Defendant,

- v. -

THE HONORABLE ROBERT G. CHAFIN, SPECIAL JUDGE OF THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA; ALL PLAINTIFFS AND CROSS-CLAIMANT PLAINTIFFS IN *JILL A. LAMBERT, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF CARLOS G. LAMBERT, DECEASED V. MINE SAFETY APPLIANCES COMPANY, ET AL.*, CIVIL ACTION NO. 10-C-69, AND *TERESA DIANE PERSINGER, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF EDDIE D. PERSINGER, DECEASED V. MINES SAFETY APPLIANCES COMPANY, ET AL.*, CIVIL ACTION NO. 11-C-45

Respondents/Plaintiffs.

CERTIFICATE OF SERVICE

I, the undersigned, do here by certify that I have timely transmitted on this 18th day of September, 2013, true and correct copies of **Verified Petition for Writ of Prohibition**, via U.S. Mail, as follows:

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