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2017 MAY 25 P 2:26  
FEDERAL BUREAU OF INVESTIGATION  
UNITED STATES DEPARTMENT OF JUSTICE  
WASHINGTON, D.C. 20535

Plaintiffs,

**V.**

## Defendants.

Case No. 16-C-70-LGN

Presiding Judge: Hon. James H. Young, Jr.

Resolution Judge: Hon. Joanna I. Tabit

## ORDER

On the 2nd day of May, 2017, this matter came before the Court on Defendants’ Motion to Compel Discovery of Communications for Which Privilege Has Been Waived and on Plaintiffs’ Response and Motion for Protective Order and on the Response of Nonparties Bowles Rice LLP and J. Thomas Lane. Defendants Addington, Inc. and The Brink’s Company appeared by counsel Wade W. Massie and W. Henry Jernigan, Jr. Defendant Pittston Coal Company appeared by counsel Shawn P. George. Plaintiffs The Bruce McDonald Holding Company, et al. appeared by counsel Nicholas S. Johnson and Sharon F. Iskra. Nonparties Bowles Rice LLP (“Bowles”) and J. Thomas Lane (“Mr. Lane”) appeared by counsel David D. Johnson, III.

Thereupon, the Court proceeded to hear arguments of the parties and nonparties and, at the conclusion of which, announced the following findings and rulings:

1. Defendants seek to compel discovery of certain communications on two grounds. The first is waiver by disclosure of the communications. The second is waiver by placing knowledge and advice at issue.

2. With respect to the deposition testimony of Mr. Yost, the Court finds that plaintiffs did not waive the attorney-client privilege by voluntary disclosure of privileged information, but that plaintiffs did place their knowledge and advice at issue.

3. The applicable standard for placing knowledge and advice at issue is set forth in *State ex rel. United States Fidelity & Guaranty Co. v. Canady*, 194 W. Va. 431, 442 n.16, 460 S.E.2d 677, 688 n.16 (1995), which states:

[A]dvice is not in issue merely because it is relevant, and it does not come in issue merely because it may have some [e]ffect on a client's state of mind. Rather, it becomes an issue where a client takes affirmative action to assert a defense and attempts to prove that defense by disclosing or describing an attorney's communication.

4. The Court finds that plaintiffs affirmatively relied upon communications with counsel to explain their delay in bringing this action and described those communications in the deposition of Mr. Yost.

5. As a result, knowledge and advice are at issue with respect to the following subjects:

- (a) How the annual minimum production payments should be calculated, and, in particular, whether the rate for such payments should be based on \$2.00 per ton or on sales of comparable coal by third parties;
- (b) The rulings in the prior litigation; and
- (c) Any duty of diligent mining and the nature or limits thereof.

These subjects are referred to as "Knowledge at Issue."

6. The Court further finds that the period of time for such waiver extends through plaintiffs' representation by Bowles and Mr. Lane, but the waiver does not include

documents and communications with Bailey Glasser or other attorneys who were consulted after Bowles and Mr. Lane (“Applicable Period”).

7. By June 1, 2017, Bowles and Mr. Lane shall produce to the Court in camera all documents described in the subpoenas (“Subpoenaed Documents”).

8. By June 1, 2017, plaintiffs shall identify for the Court in camera any Subpoenaed Documents that they contend should not be produced to defendants. The Court will review these documents and determine whether they should be produced.

9. By June 1, 2017, plaintiffs shall produce to defendants all documents relating to Knowledge at Issue during the Applicable Period, along with redacted copies of the Subpoenaed Documents that they have asked the Court to withhold.

10. Defendants shall be permitted to depose Mr. Lane and other attorneys on Knowledge at Issue within the Applicable Period. This Order shall be considered an order requiring production and testimony under Rule 1:6(b)(6) of the West Virginia Rules of Professional Conduct.

11. The Court establishes the following procedure for resolving disputes about documents and communications relating to Knowledge at Issue:

(a) The parties shall make a good faith effort to resolve among themselves any disputes about documents that plaintiffs have withheld or redacted;

(b) If the parties are unable to resolve their dispute, defendants may seek a ruling from the Court on whether any withheld or redacted documents should be produced or may be withheld. Within seven days, plaintiffs shall



respond. Upon review, the Court will decide whether the withheld or redacted documents should be produced. In its discretion, the Court may convene a hearing by conference telephone call or in person to discuss the documents in question.


11. Plaintiffs' Motion for a Protective Order is denied.

The parties preserve their objections to all adverse rulings.

The Clerk shall send attested copies of this Order to counsel of record.

All which is ORDERED and DECREED.

ENTER: this 24 day of May, 2017.

  
\_\_\_\_\_  
Hon. James H. Young, Jr.

RECEIVED  
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CLERK OF COURT  
LOGAN COUNTY



**TWENTY-FOURTH JUDICIAL CIRCUIT**

WAYNE COUNTY, WEST VIRGINIA

POST OFFICE BOX 68

WAYNE, WEST VIRGINIA 25570

**JAMES H. YOUNG, JR.**

*Judge*

*Telephone*

304-272-6332

*Fax*

304-272-6335

May 24, 2017

Vickie "Vance" Kolata, Circuit Clerk  
Logan County Courthouse  
300 Stratton Street  
Logan, West Virginia 25601

RE: The Bruce McDonald Holding Company, et al. vs. Addington, Inc., et al., Civil  
Action No. 16-C-70

Dear Ms. Kolata:

Please find enclosed an original Order in the above-referenced matter, along with a self-addressed envelope in order that **a time-stamped copy can be returned to me. Also, please mail copies to the Business Court Division, all attorneys of record, and the Resolution Judge in this matter.** For your convenience, I have also enclosed a list of the attorneys of record.

If you need anything further, please contact me.

Sincerely,

A handwritten signature in cursive script that reads "Diana Fields".

Diana Fields  
Secretary

Enclosures

GEO. E. PENN (1895-1931)  
WM. A. STUART (1922-1976)  
G.R.C. STUART (1952-1991)

WM. W. ESKRIDGE  
STEPHEN M. HODGES  
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# PENNSTUART

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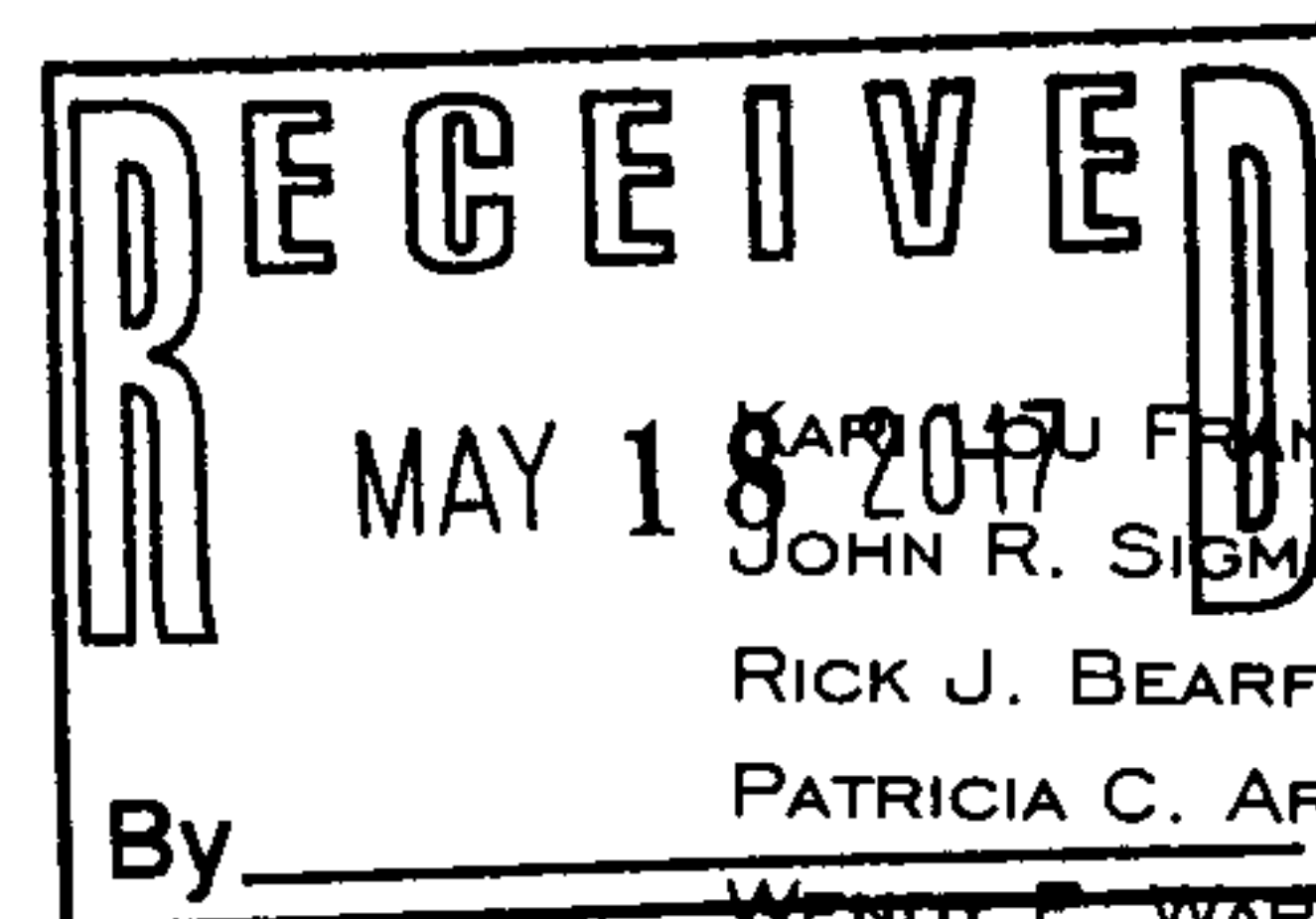
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Additional Bar Memberships:  
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K. ELIZABETH KENDALL  
KENDRA M. PRINCE

May 17, 2017

### VIA OVERNIGHT DELIVERY

Hon. James H. Young, Jr., Presiding Judge  
Wayne County Courthouse  
700 Hendricks Street  
Wayne, WV 25570

Re: The Bruce McDonald Holding Company, et al. v.  
Addington, Inc., et al.  
Circuit Court of Logan County Case No. 16-C-70-LGN

Dear Judge Young:

I enclose a proposed Order on the Motion to Compel that we argued on  
May 2. All counsel have approved the form of this Order.

If the Order meets with your approval, we request that it be entered.

2017 MAY 25 A 10:18  
LOGAN COUNTY  
COURTHOUSE

Hon. James H. Young, Jr., Presiding Judge  
May 17, 2017  
Page 2

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Thank you for your consideration.

Very truly yours,



Wade W. Massie

WWM/pjf  
Enclosure

cc: Nicholas S. Johnson, Esq.	(via email)
Sharon F. Iskra, Esq.	(via email)
W. Henry Jernigan, Jr., Esq.	(via email)
Jennifer J. Hicks, Esq.	(via email)
Shawn P. George, Esq.	(via email)
David D. Johnson, III, Esq.	(via email)