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KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

SCOTT MILLER, and
BAR 101, LLC d/b/a
BAR 101 and ICHIBAN,
individually and on behalf
of all others similarly situated,

Plaintiffs,

v.

CIVIL ACTION NO.: 14-C-47
JUDGE: STUCKY

FREEDOM INDUSTRIES, INC.,
a West Virginia Corporation, and
WEST VIRGINIA AMERICAN WATER
COMPANY, a West Virginia Corporation,

Defendants.

EMERGENCY TEMPORARY RESTRAINING ORDER
TO PRESERVE EVIDENCE AND FOR INSPECTION OF FACILITIES

On January 13, 2014, came the Plaintiff, Scott Miller ("Miller"), and Bar 101, LLC, d/b/a Bar 101 and Ichiban ("Bar 101"), individually and on behalf of all others similarly situated, by counsel, James C. Peterson and R. Edison Hill of the law firm of HILL, PETERSON, CARPER, BEE & DEITZLER, P.L.L,C., Anthony J. Majestro and J. C. Powell of the law firm POWELL & MAJESTRO, P.L.L.C., and Timothy C. Bailey and Lee Javins of the law firm of BUCCI BAILEY AND JAVINS, L.C., and, pursuant to Rule 65(b) of the West Virginia Rules of Civil Procedure hereby petitioned this Court for a Temporary Restraining Order (TRO).

Having reviewed the plaintiff's Verified Petition, which is attached hereto as Exhibit 1, and considered the arguments of plaintiff's counsel, the Court hereby finds:

1. During the morning of January 9, 2014, a chemical spill occurred at defendant Freedom Industries' facility located along the Elk River in Charleston, West Virginia. The

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chemical, 4-methylcyclohexane methanol, leaked from a containment area into the Elk River. The spill contaminated the Elk River and was introduced into the Defendant West Virginia American Water's water treatment facility downstream and which supplied water to at least nine (9) counties. As a result of the contaminated water supply, West Virginia Governor Earl Ray Tomblin declared a state of emergency in those portions of the nine (9) counties served by the subject WVAWC water treatment facility. All WVAWC customers in the affected counties were instructed to not use tap water for drinking, cooking, washing, doing laundry or bathing.

2. Plaintiff is a residential customer and business customer of West Virginia American Water (WVAWC). As a result of the subject chemical spill, Plaintiff alleges that he and members of the putative class have lost significant income and profits from having their businesses closed as ordered by county and state officials and have suffered annoyance, inconvenience and other nuisance both their personal and business pursuits. Plaintiff instituted and filed a class action lawsuit individually and on behalf of all others similarly situated in this matter on January 10, 2014.

3. The plaintiff in this action, and the over 300,000 affected West Virginians in nine (9) counties, have legitimate interests and property rights in this matter by way of claims for damages set forth in the Complaint. As such, plaintiff has the right to properly investigate the claims forming the basis for the complaint filed in this matter and to have evidence necessary to those claims preserved. Upon information and belief of plaintiff and plaintiff's counsel, there have been and continue to be significant changes, alterations or modifications to the facilities, equipment, premises and materials at the Freedom Industries Elk River facility. For instance, there is information indicating that the storage tank from which the chemical leaked has been moved. Likewise, soil containing the chemical is being removed from the site. The plaintiff will

be irreparably harmed if those changes, alterations and modifications continue unchecked as evidence will be permanently altered. The loss of evidence poses a potentially devastating impact on the plaintiff's rights. While some of the changes, alterations and modifications may have been required or even ordered by authorities, there is at this time no court-monitored system in place to have defendant Freedom properly document those changes, alterations or modifications in a manner that a record of them can be put together for use in litigation.

4. Plaintiff alleges and has reason to believe there are a significant number of relevant and crucial documents in the possession of both defendants. These documents should be preserved to allow plaintiff the ability to review them and utilize them as evidence in this case. At this time, there is no court-monitored system in place to ensure these documents are preserved and not are not altered.

5. Plaintiff will need to inspect defendants' facilities and premises with the aid and advice of appropriate experts. It is appropriate that the subject facilities and premises be in as close a condition as possible to their condition at the time of the chemical spill.

6. The Court takes notice that the West Virginia Department of Environmental Protection (WVDEP) and other county, state and federal regulatory agencies are conducting their own investigation of this chemical spill and contamination of the water system. However, these investigations may take several months or more to conclude. Relevant documents and information that these agencies may not have requested may be destroyed as part of normal corporate document retention policies or may simply be lost. For instance, many documents which may be relevant to this case are required to be kept for only a certain limited period of time by the WVDEP. There are also documents that each of the Defendants have and which will not be requested by the WVDEP or other regulatory agencies. It is important that these documents

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be preserved and not be lost or destroyed. Likewise, there are documents that each of the Defendants have or will turn over to the WVDEP or other county, state and federal regulatory bodies which the Defendants should be made to preserve once returned by those agencies, even if those agencies inform the Defendants that they are no longer required to keep such documents as part of the investigation.

7. It is not reasonable to expect that the named Defendants will cooperate in preservation of all documents as requested and in the inspection of the subject facilities and premises without the issuance of an appropriate retraining order.

8. Should the Court not enter a Temporary Restraining Order, the Plaintiff will suffer irreparable harm in that his ability to fully and adequately investigate this matter will be lost to him and the members of the putative class. There is no other relief or mechanism available to the Plaintiff to accomplish the goal of preserving critical evidence and information for investigation into this serious chemical spill and leak into the water system.

9. It is not the intention of the Court to interfere with the WVDEP's investigation or the investigation of any other county, state or federal regulatory body, and the Plaintiff asks for no relief which infringes or impedes the agencies' investigations. Any documents in those agencies' possession will remain with those agencies until such time as the agencies release them. Once released, however, those documents should be subject to an Order from this Court which preserves them and makes them available for Plaintiff's review. Likewise, the Court has no intention to have an inspection interfere with the agencies' investigation of the chemical spill and subsequent leak into the water system. The requested inspection would not occur until all the appropriate county, state and federal agencies determine that the inspection can safely take place and not unduly interfere with any of their investigations.

10. Time is of the essence in preserving the evidence in this matter. With this matter filed on Friday, January 10, 2014, plaintiff does not know the identity of counsel for the respective defendants. Therefore, there is no reasonable manner for plaintiff to have given counsel for the defendants notice of this request for emergency relief. As such, the Court finds the ex parte request for an Emergency Temporary Restraining Order proper under the circumstances. However, the Court should set a hearing date within ten (10) days for the defendants to appear and show cause as to why the Emergency Temporary Restraining Order should not be continued in effect during the pendency of this suit or until the Court deems the relief granted thereunder no longer necessary.

WHEREFORE, the Court issues this EMERGENCY TEMPORARY RESTRAINING ORDER which shall be in effect until such time as all the parties appear before the Court for hearing on whether the Emergency Temporary Restraining shall remain in effect during the pendency of this matter and/or shall be modified. The following emergency relief is hereby granted:

A. Defendant Freedom Industries, Inc. ("Freedom") is enjoined from altering or modifying in any manner, any structure, tank, equipment, material or condition of defendant's terminal facility and premises along the Elk River in Kanawha County, West Virginia, from the condition and location in which they existed on January 9, 2014, at the time Freedom discovered 4 methylcylcohexane methanol was leaking into the Elk River. An exception is expressly made for any alterations, changes or modifications necessary for stopping the chemical spill and for clean up of the spill as ordered by or reached as part of an agreement with any county, state or federal regulatory authority. However for any such alterations,

changes or modifications, defendant Freedom is hereby required to document the precise nature of the changes, alterations or modifications, the date they occurred and by whose authority they were made.

B. Defendant Freedom is enjoined from destroying or altering any documents, including those in electronic form, related to any other chemical spills or leaks from each of its facilities (including documents from time periods when the facilities were operated by predecessors); documents related to any chemical storage policies and procedures at each of its facilities; documents related to any inspection policies and procedures for each of its facilities and storage tanks and impoundments; documents related to and including all MSDS information, warnings and instructions for all chemicals kept in storage tanks at each of its facilities; documents related to any hazardous materials communications policies and procedures for each of its facilities; documents related to any policies and procedures for reporting chemical leaks at each of its facilities to regulatory agencies and/or water treatment facilities; documents related to the purchase of 4 methylcyclohexane methanol which leaked into the Elk River on January 9, 2014; any and all documents generated and received by Freedom from 12:00 am on January 8, 2014, until the TRO expires; documents related to communications between Freedom and WVAWC and commuications between Freedom and any county, state or federal regulatory agency from 12:00 am January 8, 2014, until the TRO expires; documents/communications between Freedom and WVAWC at any time related to the chemicals being stored at its Elk River facility; documents related to any needed or planned upgrades, repairs, improvements or replacement

of any storage tanks, spill containment ponds or retaining walls for each of its facilities; and, documents related in any manner to the chemical spill and clean up subject of this action.

C. Defendant WVAWC is enjoined from destroying or altering any documents, including those in electronic form, related to Freedom Industries or its predecessors; documents related in any manner to chemicals being stored at Freedom Industries' Elk River terminal/storage facility, including any MSDS, warnings or instructions for those chemicals; documents related to water monitoring policies and procedures in effect on January 9, 2014; documents related to policies and procedures for monitoring, detecting and reporting the presence of harmful or potentially harmful chemicals in the water supply in effect on January 9, 2014; documents related to policies and procedures for filtering, cleaning and/or flushing harmful or potentially harmful chemicals from the water supply; documents related to and showing WVAWC's knowledge of the chemicals being stored at the Freedom Industries facility upstream of its water treatment facility and any potential harm those chemicals posed to the water supply; documents related to any water testing or monitoring policies for WVAWC's water treatment facility in effect on January 9, 2014; any and all documents generated and received by WVAWC from 12:00 am on January 8, 2014, until the TRO expires related in any manner to the subject chemical spill and clean up activities and water testing; documents related to communications between Freedom and WVAWC and commuications between WVAWC and any county, state or federal regulatory agency from 12:00 am January 8, 2014, until

the TRO expires; documents/communications between Freedom and WVAWC at any time related to the chemicals being stored at its Elk River facility; documents related to any water testing and results from 12:00 am on January 8, 2014, until the TRO expires; documents related to WVAWC's reporting of the water contamination to county, state and/or federal agencies; documents related to any communications between WVAWC and any manufacturer or distributor of 4 methylcyclohexane methanol from 12:00 am on January 8, 2014, until the TRO expires; documents related to any communications between WVAWC and chemical engineers, chemical spill or clean up consultants discussing potential harmful effects of the spilled chemical and methods of testing for and cleaning the chemical from the water supply; and, documents related in any manner to the chemical spill and clean up subject of this action.

D. Plaintiffs and their representatives, including experts, shall be permitted to enter and inspect Defendants' facilities and premises subject of this action at such time as county, state and federal regulatory agencies shall declare the subject facilities and premises safe and ready for such an inspection;

E. Defendants are enjoined from permanently close their facilities until the plaintiff's inspection or inspections take place;

F. A hearing to determine if this emergency temporary relief should be continued during the pendency of this action or such other time as the Court deems the relief no longer necessary is hereby set for January 23, 2014 at 3:00 o'clock; and,

G. Defendants by their respective counsel are ordered to meet and confer with counsel for the Plaintiff before the date of the hearing to explore the possibility of an agreement on the preservation of evidence and information and the mechanisms for such an agreement if reached.

The Clerk of the Court is ordered to prepare Certified Copies of this Order for service upon the Defendants.

ENTERED January 13, 2014.

James C. Stucky
JUDGE JAMES STUCKY

Prepared by:

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