

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBINSON TOWNSHIP, *et al.*, :

Petitioners, :

v. :

COMMONWEALTH OF
PENNSYLVANIA,
et al., :

Respondents. :

No. 284 MD 2012

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COMMONWEALTH COURT
OF PENNSYLVANIA
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**VERIFIED PETITION FOR LEAVE TO INTERVENE
AND FOR EXPEDITED CONSIDERATION THEREOF**

The Pennsylvania Independent Oil & Gas Association (“PIOGA”), the Marcellus Shale Coalition (the “MSC”), and the American Petroleum Institute (“API”) (collectively, the “Industry Parties”) respectfully petition this Court for leave to intervene, on remand, as additional respondents in this matter and for expedited consideration thereof. The Industry Parties have, as previously determined by this Court, unique, compelling and legally enforceable interests in the outcome of this case. *See* April 20, 2012 Order (“... members of the Industry

hold property interests that **will be** affected by Act 13”) (emphasis added). When the issue before this Court was the constitutionality of Act 13 in its entirety, this Court concluded that those interests were adequately represented by the Commonwealth parties. Now, however, there are several issues before this Court related to the interpretation and application of the Supreme Court’s majority decision and, more importantly for purposes of this petition, with respect to the new issues presented, the Industry Parties are neither necessarily aligned with, nor adequately represented by, the Commonwealth parties.

This case on remand presents several new issues beyond the constitutionality of Act 13 in its entirety - it ***now*** involves implementation of the Supreme Court’s mandate. Among other things, this Court will decide whether specific provisions of Act 13 are, or are not, severable from those stricken by the Supreme Court and, therefore, whether those provisions are invalid in light of the Supreme Court’s decision. This Court’s decision with respect to such individual provisions of Act 13 will materially affect the legal landscape for the oil and gas industry going forward. And, with respect to the new issues presented, it can no longer be said that the Industry Parties are necessarily aligned with the Commonwealth parties. Rather, and as discussed in detail below, the Industry Parties are potentially directly adverse to the Commonwealth parties. The Industry Parties, therefore,

should be permitted to intervene in order to protect their unique, compelling and unrepresented interests in this matter.

The Industry Parties, in support of their petition, state:

INTRODUCTION

A. The Industry Parties Have Unique And Compelling Interests In This Case On Remand.

1. The Industry Parties have a unique and compelling interest in the several questions, and subsidiary issues, now before this Court as a result of the Supreme Court's majority decision and mandate to this Court to address certain matters upon remand. Rather than clarify and confirm the law, the Supreme Court's majority decision, the dicta offered by the plurality, and the questions presented upon remand have increased the uncertainty surrounding the legal framework that will guide and govern the ongoing development of the Commonwealth's natural resources.

2. This case, on remand, is no longer just about the constitutionality of Act 13 and the specific claims asserted by Petitioners. Rather, this Court has been expressly tasked by the Supreme Court's mandate to decide whether the remainder of Act 13 will survive, in whole or in part; and, by implication, *how* the oil and gas industry will be regulated in this Commonwealth going forward. It cannot be reasonably disputed that the Industry Parties and their substantial capital investments have been, and will continue to be, impacted by the outcome this

litigation. The regulatory environment that results from this litigation is of paramount concern to the Industry Parties, and their unique interests will not be advanced by any current party.

3. The Industry Parties have a substantial and unrepresented interest in how the underlying issues are addressed and how the pending questions are resolved. Act 13 contains a myriad of regulatory provisions, including but not limited to: the payment of impact fees; the content of permit applications; well site construction; well construction and casing; recordkeeping and reporting; site bonding; and presumptions of liability. No current party to this case must actually plan for, finance and comply with Act 13's extensive list of regulatory requirements. Thus, no current party has the same interests as the Industry Parties in how the issues remanded to this Court, including severability, are decided.

4. From the perspective of the Industry Parties, the Supreme Court's majority decision eviscerates the needed reforms that Act 13 provides and interferes with the Industry Parties' legally enforceable property rights. Real and other property has been acquired, substantial investments have been made, thousands of employees have been hired, and materials, equipment and other resources have been deployed across the Commonwealth, as part of the historic development of natural gas and the recent increase in natural gas development

associated with production from the Marcellus shale.¹ The ability of the Industry Parties to utilize and enjoy their recognized property interests and realize reasonable returns on their substantial investments in the Commonwealth, including those within the municipal Petitioners' borders, has been placed in jeopardy.

5. At the same time, the Industry Parties are paying, and will continue to pay, millions of dollars in impact fees imposed by Chapter 23 of Act 13, which provides revenue to communities affected by Marcellus shale gas development. In reporting years 2011 and 2012, the Industry Parties' members, and others in the oil and gas industry, paid in excess of \$400,000,000 in impact fees to the Commonwealth pursuant to Chapter 23 of Act 13.² A significant portion of those fees, which will continue to be paid annually by the oil and gas industry, are distributed directly to local governments, *including* the municipal Petitioners in this case, to address local impacts of drilling. The next round of impact fee

¹ The substantial investments made by the oil and gas industry in this Commonwealth, and the resulting economic benefits to the Commonwealth and its citizens, cannot be reasonably denied. *See, e.g.,*:

PwC, Economic Impacts of the Oil and Natural Gas Industry (July 2013), available at http://www.api.org/~media/Files/Policy/Jobs/Economic_Impacts_ONG_2011.pdf

Pennsylvania Department of Labor and Industry, Marcellus Shale Fast Facts (Jan. 2014), available at <http://www.portal.state.pa.us/portal/server.pt?open=514&objID=1222103&mode=2>

² Information regarding these impact fee payments can be found in the 2011 and 2012 reports of the Public Utility Commission, which are mandated by Section 2314(h) of Act 13 and publicly available on the Commission's website on the following page:

http://www.puc.pa.gov/filing_resources/issues_laws_regulations/act_13_impact_fee_.aspx

payments is due to be paid by the oil and gas industry by April 1, 2014 - less than 30 days from now. *See* 58 Pa.C.S. § 2303.

B. The Industry Parties' Unique And Compelling Interests Are Impacted By The Issues On Remand.

6. There are several questions, and subsidiary issues, now before this Court and, as this Court previously concluded, the Industry Parties have legally enforceable property rights impacted by each question presented. *See* April 20, 2012 Order. Of particular importance to the Industry Parties, however, are the issues of severability presented by the Supreme Court's mandate.

7. The Supreme Court's mandate instructs this Court "to address whether *any* remaining provisions of Act 13, to the extent they are valid, are severable." *Robinson Twp. v. Commonwealth*, 2013 Pa. LEXIS 3068 at *274-75 (Pa. Dec. 19, 2013) (emphasis added). It cannot be reasonably disputed that, with respect to the issues of severability, the Industry Parties have interests that are separate and distinct from those of the Petitioners, the Commonwealth parties and the general citizenry and, as such, are not adequately represented in this matter.

8. Unlike Petitioners, the Commonwealth parties and the general citizenry, it is the Industry Parties that actually pay the impact fee imposed by Chapter 23 of Act 13, unless it is declared unconstitutional. As such, the Industry Parties have a distinct and unique interest in the outcome of any determination by

this Court regarding the continued viability of Chapter 23 of Act 13 in light of the Supreme Court's mandate.

9. Additionally, it is the Industry Parties and their daily operations that must comply with the remaining provisions of Act 13 and its implementing regulations. As such, the Industry Parties have a unique interest in the outcome of the severability issues remanded to this Court, not only as they pertain to the remaining provisions of Act 13, but also with respect to the Environmental Quality Board's ("Board's") proposed regulations implementing Act 13. *See* 43 Pa.B. 7377 (Dec. 14, 2013) (proposed amendments to 25 Pa. Code Chapter 78). Any determinations by this Court regarding severability, either globally or with respect to discrete provisions of Act 13, will have direct implications for the Board's proposed regulations and, ultimately, for the Industry Parties.

C. The Industry Parties' Interests Are Not Necessarily Aligned With Those Of The Commonwealth Parties, Or Petitioners, With Respect To The Severability Issues Before This Court On Remand.

10. The Industry Parties and the Commonwealth parties are no longer aligned with respect to all aspects of the ongoing validity and related implementation of Act 13.

11. By way of example only, the Department of Environmental Protection ("Department"), purporting to rely on parts of Section 3215 that the Industry Parties contend are not severable from provisions invalidated by the Supreme

Court, has proposed regulations through the Board that could have a material adverse impact on members of the Industry Parties. Accordingly, to the extent they ever were, the interests of the Industry Parties are not aligned with, or represented by, the Commonwealth parties.

12. The adversity between the Industry Parties and the Commonwealth results from the Department's reliance on parts of Section 3215 of Act 13. Section 3215, as enacted, contained both setbacks and a corresponding, and longstanding, waiver provision pursuant to which industry and the Department agreed to waive certain setbacks provided that the environment was fully protected. *See* 58 Pa.C.S. § 3215(b). As enacted, and as historically applied for over 27 years, the waiver was an integral part of the overall regulatory scheme that recognized and protected property rights.³ The Supreme Court invalidated the waiver and enjoined certain setbacks subject to further proceedings before this Court. *See Robinson Twp.*, 2013 Pa. LEXIS 3068 at *271, *274. Now, however, and notwithstanding the Supreme Court's majority decision, the Department, purporting to rely on provisions of Section 3215 that it believes are severable from the invalidated provisions, is proposing through the Board regulatory setbacks without a

³ The waiver provision in Section 3215(b)(4) is not a new creation of Act 13. The waiver authority formerly resided, in nearly identical form as to what is required for a waiver, in Section 205(b) of the former Oil and Gas Act, 58 P.S. § 601.205 (repealed by Act 13). The waiver provision has been effectively used and administered by the Department and industry as to what is required for a waiver for over 27 years.

corresponding allowance for a waiver. *See* 43 Pa.B. at 7387 (proposed regulations at 25 Pa. Code §§ 78.15(c)-(g)). The Industry Parties contend, and as intervenors here will demonstrate, that the provisions relied upon by the Department are not severable from those invalidated by the Supreme Court.

13. As the foregoing, limited *example* demonstrates, while the interests of Industry Parties might have been aligned with those of the Commonwealth parties in initially defending the constitutionality of Act 13 in its entirety, the Industry Parties' interests are not necessarily aligned with those of the Commonwealth parties, or Petitioners, with respect to the severability issues before this Court on remand. This uncertainty, by itself, necessitates allowing intervention by the Industry Parties.

D. Members Of The Industry Parties That Hold Trade Secrets Have Unique And Strong Interests, Not Shared By The Commonwealth Parties Or Petitioners, In Preserving The Confidentiality Protections Afforded By Act 13.

14. In addition to the issue of severability, the Industry Parties have unique and compelling interest with respect to Petitioner Kahn's challenges to Section 3222.1(b)(11) of Act 13. This provision supplies necessary trade secret and proprietary information protections to certain members of the Industry Parties - vendors, service providers, and manufacturers, among others - where the specific identity or concentration of an additive is entitled to trade secret protection.

15. Act 13's protection of trade secret and proprietary information is not something unique to the oil and gas industry. To the contrary, the protection of trade secrets and other proprietary information has been both judicially and legislatively recognized as sound public policy in a wide variety of business-related contexts. *See, e.g.*, 12 Pa.C.S. §§ 5301 *et seq.* (Uniform Trade Secrets Act); 65 P.S. § 67.708(b)(11) (Right-to-Know Law); 35 P.S. § 7311 (Worker and Community Right-to-Know Act); 3 P.S. § 111.37c (Pennsylvania Pesticide Control Act); Pa.R.C.P. No. 4012(a)(9) (Protective Orders); *MarkWest Liberty Midstream & Res., LLC v. Clean Air Council*, 71 A.3d 337, 342 (Pa. Cmwlth. 2013) ("The right to confidentiality in matters involving proprietary rights and trade secrets is rooted in public policy and impacts individuals and entities other than those involved in the current litigation."); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (explaining that because of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others, and that if an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished).

16. Members of the Industry Parties that hold these trade secrets have unique and strong interests in preserving the confidentiality protections afforded by

Act 13 - a view that the Commonwealth parties may or may not share and certainly do not have an overriding interest in protecting. This Court's determination of the merits of Dr. Kahn's challenges to Section 3221.1(b)(11) directly implicates trade secret and other proprietary interests of certain members of the Industry Parties. *These are interests that the Commonwealth parties and Petitioners simply do not have.*

17. The Industry Parties, and their unique protectable interests, are currently *unrepresented* in this litigation, yet they remain statutorily obligated to comply with Act 13's remaining provisions and implementing regulations and to pay the impact fee imposed by Act 13. The Industry Parties should be permitted to intervene in this case on remand to protect their undeniably unique and legally enforceable interests.

THE INDUSTRY PARTIES

18. The Pennsylvania Independent Oil & Gas Association ("PIOGA") is a nonprofit trade association representing Pennsylvania's independent oil and natural gas producers. PIOGA member companies drill and operate the majority of the state's crude oil and natural gas wells, including wells extracting gas from shale formations. PIOGA's members, however, are not limited to owners and operators. PIOGA's members also include oil and natural gas drilling contractors, service

companies, manufacturers, distributors, professional firms and consultants, royalty owners, and others with interests in Pennsylvania's oil and gas industry.

19. The Marcellus Shale Coalition ("MSC") is a nonprofit trade association that represents companies operating in the exploration and production of natural gas from unconventional formations, such as the Marcellus shale, as well as companies constructing and operating the pipelines for the transmission of that natural gas. Included among its members are also national and local supply chain businesses that provide the necessary support services and materials for the development of shale gas in Pennsylvania. The MSC is committed to the responsible development of the Marcellus shale resources and its members seek to be responsible members of the community. The MSC's members seek to address issues related to the development of the State's natural gas resources directly with regulators, local, county, state and federal government officials and communities.

20. The American Petroleum Institute ("API") is a national trade association representing more than 580 companies involved in all aspects of the oil and natural gas industry. API's member companies include natural gas producers, processors, suppliers, pipeline operators, and service and supply companies. API's members have invested billions of dollars in Pennsylvania in order to develop the natural gas found within the Marcellus Shale.

21. The Industry Parties each have members that pay the unconventional gas well fee (or “impact fee”) imposed by Chapter 23 of Act 13.

22. Additionally, the Industry Parties’ respective members have significant investments in developing natural gas across the Commonwealth. As part of the surge in natural gas development associated with production from the Marcellus shale, vast property interests have been acquired, large investments have been made, thousands of employees have been hired, and materials, equipment and other resources have been deployed across the Commonwealth.

23. The Industry Parties each have members with leasehold and other property interests related to oil and gas well development and associated activities that are affected by the remaining provisions of Act 13, its implementing regulations, and this litigation. Leasehold interests, such as those held by certain of the Industry Parties’ members are protectable “property interests.” *See, e.g., Graham Realty Co. v. Dep’t of Transportation*, 447 A.2d 342, 344 (Pa. Cmwith. 1982) (a leasehold interest is a property interest that may not be condemned without just compensation). In addition, under Pennsylvania law, an oil-and-gas lease is a transfer of real property. *See Lesnick v. Chartiers Natural Gas Co.*, 889 A.2d 1282, 1284 (Pa. Super. 2005).

24. The Industry Parties each have members whose trade secret and confidential proprietary information is directly implicated by Dr. Kahn's challenge to Section 3222.1(b)(11) of Act 13.

GROUNDS FOR INTERVENTION

25. When the Pennsylvania Rules of Appellate Procedure do not prescribe the practice and procedure to be followed by this Court when acting in its original jurisdiction, the Pennsylvania Rules of Civil Procedure are applicable. Pa.R.A.P.

106. Intervention in an original jurisdiction matter is not addressed by the Appellate Rules. Accordingly, Pa.R.C.P. Nos. 2326 – 2350 govern intervention in this matter. *See Darlington, et al.*, PENNSYLVANIA APPELLATE PRACTICE (2011-2012 ed.) at §§ 106:10, 106:22.

26. Pennsylvania Rule of Civil Procedure 2327 provides that a person, “[a]t any time during the pendency of an action ... shall be permitted to intervene” if:

(1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or

(2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or

(3) such person could have joined as an original party in the action or could have been joined therein; or

(4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa.R.C.P. No. 2327.

27. The Pennsylvania Supreme Court has recognized that the standard for determining a “legally enforceable interest” for intervening in a pending action under Rule 2327(4) is not as straightforward as it might first appear and, further, has emphasized that the exact boundaries of the legally enforceable interest limitation of Pa.R.C.P. No. 2327(4) are not clear. *See Pennsylvania Crime Commission Subpoena*, 309 A.2d 401, 406 (Pa. 1973). Consequently, “[t]he result is a flexible, although uncertain rule whose application in a given case calls for a careful exercise of discretion and consideration of all the circumstances involved.”

Id. The Supreme Court has further recognized that, pursuant to Rule 2327:

[t]he right of intervention should be accorded to any one having title to property which is the subject of litigation, provided that his right will be substantially affected by the direct legal operation and effect of the decisions, and provided also that it is reasonably necessary for him to safeguard an interest of his own which no other party on the record is interested in protecting.

Bily v. Bd. of Prop. Assessment, Appeals and Review of Allegheny Cnty, Pa., 44 A.2d 250, 251 (Pa. 1945); *see also Twp. of Radnor v. Radnor Recreational, LLC*, 859 A.2d 1, 5 (Pa. Cmwlt. 2004) (holding that owners of property in the vicinity of property involved in zoning litigation have the “requisite interest to fit under the

definition of Pa.R.C.P. No. 2327(4) and such property owners have grounds to intervene in the litigation”).

28. In *Pa. Liquor Control Bd. v. Raneri*, 509 A.2d 939, 940 (Pa. Cmwlth. 1986), this Court concluded that a common pleas court did not err in determining that an association of local restaurateurs had standing to intervene to protect the economic interests of its members in an appeal to common pleas court from the denial of a request for a special liquor license. The Court concluded that the association had demonstrated that it would be aggrieved by the loss of dues-paying members and that some members would be aggrieved by the loss of their businesses if the application were granted.

29. In *Koter v. Cosgrove*, 844 A.2d 29, 32 (Pa. Cmwlth. 2004), this Court concluded that a common pleas court did not err in allowing an association of taxpayers to intervene in a challenge to a ballot referendum where the association had a stake in protecting the reforms it had sought. In that case, the association’s members consisted of taxpayers who had previously been proponents of having the referendum placed on the ballot. *Id.*

30. Some of the Industry Parties (at the time, PIOGA, the MSC, and certain individual members), at the very outset of this litigation, petitioned this Court for leave to intervene in the underlying action as additional respondents. In connection with their prior petition for leave to intervene, the Industry Parties filed

preliminary objections to Petitioners' petition, as well as a brief in opposition to Petitioners' then-pending motion for preliminary injunctive relief.

31. This Court denied the Industry Parties' prior petition for leave to intervene. *See* April 20, 2012 Order. This Court concluded that the Industry Parties fell within the class of persons permitted to intervene under Pa.R.C.P. No. 2327(4), specifically finding that the Industry Parties held legally enforceable property interests that will be affected by Act 13. *Id.* ("... members of the Industry hold property interests that will be affected by Act 13). Accordingly, the Industry Parties, now joined by API, qualify for intervention under Pa.R.C.P. No. 2327(4) for the reasons stated above, and as previously determined by this Court.

32. Despite concluding that the Industry Parties' interests qualified for intervention, this Court concluded that those interests were, at least at that time, adequately represented by the Commonwealth parties. For the reasons stated above, the Industry Parties and their unique and protectable interests are currently unrepresented in this litigation. The Industry Parties remain statutorily obligated to comply with Act 13's remaining provisions and implementing regulations and to pay the impact fee imposed by Act 13, *yet they have no voice in this litigation.* The Industry Parties' interests are not necessarily aligned with those of the Commonwealth parties, or Petitioners, with respect to the issues before this Court

on remand, including the issues of severability presented by the Supreme Court's mandate.

33. If the Industry Parties are permitted to intervene, the Court will have the benefit of the technical expertise and perspective of the oil and gas industry concerning the very important issues remanded to this Court.

34. Industry Parties are seeking to intervene to protect their undeniably unique and protectable interests in this case on remand. They are not seeking to raise issues that go beyond the scope of the Supreme Court majority's mandate and remand order and what is needed for the protection of their unique interests.

35. Industry Parties' intervention will not unduly delay, embarrass or prejudice adjudication of the matters on remand.

36. If permitted to intervene, the Industry Parties will file appropriate pleadings, briefs and other documents in accordance with the orders and instructions of this Court for disposition of the issues on remand.

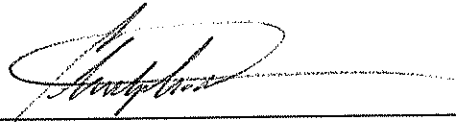
REQUEST FOR EXPEDITED CONSIDERATION

37. Because this matter involves issues of grave importance to the Industry Parties, the Industry Parties respectfully ask the Court to give expedited consideration to their application for leave to intervene such that the Industry Parties can participate fully in any proceedings before this Court on remand and protect their unique interests in this matter.

WHEREFORE, the Industry Parties respectfully request leave to intervene as additional respondents in this matter.

Respectfully submitted,

Date: March 5, 2014



Walter A. Bunt, Jr.
Pa. Id. No. 36738
David R. Overstreet
Pa. Id. No. 68950
K&L GATES LLP
K&L Gates Center
210 Sixth Avenue
Pittsburgh, PA 15222
Tel: (412) 355-6500
Fax: (412) 355-6501
walter.bunt@klgates.com
david.overstreet@klgates.com

Christopher R. Nestor
Pa. Id. No. 82400
K&L GATES LLP
17 North Second Street, 18th Floor
Harrisburg, PA 17101-1507
Tel: (717) 231-4500
Fax: (717) 231-4501
christopher.nestor@klgates.com

Attorneys for Pending Intervenors/Industry Parties, *the Pennsylvania Independent Oil & Gas Association, the Marcellus Shale Coalition, and the American Petroleum Institute*

VERIFICATION

The undersigned, Lou D'Amico, hereby deposes and states that:


1. I am the President and Executive Director of the Pennsylvania Independent Oil & Gas Association ("PIOGA") and I am authorized to make this verification on behalf of PIOGA.

2. The facts set forth in the foregoing Petition for Leave to Intervene as they pertain to PIOGA are true and correct to the best of my knowledge or information and belief;

3. This verification is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsifications to authorities.

Date:

3-5-14


Name:

Pennsylvania Independent Oil & Gas Association

VERIFICATION

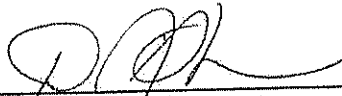
The undersigned, David J. Spigelmyer, hereby deposes and states that:

1. I am the President of the Marcellus Shale Coalition ("MSC") and I am authorized to make this verification on behalf of the MSC.

2. The facts set forth in the foregoing Petition for Leave to Intervene as they pertain to the MSC are true and correct to the best of my knowledge or information and belief;

3. This verification is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsifications to authorities.

Date:



Name: David J. Spigelmyer
Marcellus Shale Coalition

VERIFICATION

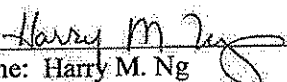
The undersigned, Harry M. Ng, hereby deposes and states that:

1. I am the Vice President, General Counsel and Corporate Secretary of the American Petroleum Institute ("API") and I am authorized to make this verification on behalf of API.

2. The facts set forth in the foregoing Petition for Leave to Intervene as they pertain to API are true and correct to the best of my knowledge or information and belief;

3. This verification is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsifications to authorities.

Date: March 4, 2014


Name: Harry M. Ng
American Petroleum Institute

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITION FOR LEAVE TO INTERVENE AND FOR EXPEDITED CONSIDERATION THEREOF was served this 5th day of March 2014 by first-class U.S. mail addressed as follows:

John M. Smith
Smith Butz, LLC
125 Technology Drive, Suite 202
Bailey Center I, Southpointe
Canonsburg, PA 15317

Jordan B. Yeager
Curtin & Heefner LLP
Heritage Gateway Center
1980 South Eaton Road, Suite 220
Doylestown, PA 18901

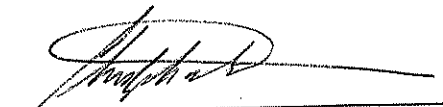
Susan J. Kraham
Columbia University School of Law
435 West 116th Street
New York, NY 10027

Matthew H. Haverstick
Conrad O' Brien PC
1500 Market Street
Centre Square, West Tower, Ste. 3900
Philadelphia, PA 19102-1021

Jonathan M. Kamin
Goldberg, Kamin & Garvin LLP
1806 Frick Building
437 Grant Street
Pittsburgh, PA 15219

William A. Johnson
23 East Beau Street
Washington, PA 15301

Howard G. Hopkirk
Senior Deputy Attorney General
Pennsylvania Office of Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120



Christopher R. Nestor