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KANAWHA COUNTY CIRCUIT COURT
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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

KANAWHA COUNTY COMMISSION,

Plaintiff,

v.

Civil Action No. 23-C-47
Judge Tabit

DENNIS WEST; GADSDEN, GAILLARD, AND
WEST, LLC; and INNOSPEC ACTIVE
CHEMICALS LLC,

Defendants.

COMPLAINT

The Kanawha County Commission brings this action to enforce its Public Nuisance and Property Maintenance Ordinance and to recover from the tortious acts of Defendants Dennis West; Gadsden, Gaillard, and West, LLC; and Innospec Active Chemicals LLC (collectively, "Defendants"):

Preliminary Statement and Parties

1. Plaintiff Kanawha County Commission strives to promote and protect the public health, safety and welfare of Kanawha County and its residents.
2. Plaintiff Kanawha County Commission (hereinafter "Plaintiff"), is a West Virginia political subdivision which may sue and plead in its own name and has standing to take appropriate and necessary actions for the elimination of hazards to public health and safety and to abate or cause to be abated anything which the commission determines to be a public nuisance.
3. Defendant Dennis West is a citizen and resident of Moncks Corner, South Carolina.

4. Upon information and belief, at all relevant times Defendant Dennis West was the Vice Chief Executive Officer of Defendant Gadsden, Gaillard, and West, LLC (“GGW”).

5. Upon information and belief, at all relevant times Defendant GGW was organized as a Limited Liability Company in Moncks Corner, South Carolina.

6. Upon information and belief, at all relevant times Defendant Dennis West was the only agent or member listed with the South Carolina Secretary of State for GGW.

7. Upon information and belief, on August 30, 2022, Defendant GGW filed Articles of Termination with the South Carolina Secretary of State.

8. Upon information and belief, Defendant Innospec Active Chemicals LLC (“Innospec Active”) is in the business of manufacturing, supplying, and/or shipping hazardous chemicals.

9. Upon information and belief, Defendant Innospec Active is in the business of manufacturing, supplying, and/or shipping chemicals and/or chemical solutions, including EMPIGEN® AS/F90 / Alkyl Dimethylamine.

10. Upon information and belief, Defendant Innospec Active is Limited Liability Company organized in the state of North Carolina.

Jurisdiction and Venue

11. This Court has jurisdiction to hear this matter pursuant to Article VIII, Section 6 of the West Virginia Constitution and West Virginia Code § 51-2-2.

12. Venue is proper in this Court as the injuries suffered by the Plaintiff and its residents occurred in Kanawha County, West Virginia.

Statement of Facts

13. Plaintiff hereby incorporates the allegations set forth in the foregoing paragraphs as though fully alleged herein.

14. The people of Kanawha County who live within the vicinity of Paint Creek have worked for years to create a beautiful watershed.

15. The Plaintiff facilitated the restoration of the creek, and in recent years, Paint Creek has been a place of local pride.

16. Paint Creek, once full of fish and a location of recreation, no longer shows signs of life.

17. On or about August 24, 2022, Defendant Dennis West was driving a tractor-trailer owned and operated by Defendant GGW on Interstate 77.

18. Upon information and belief, the tractor-trailer being driven by Defendant Dennis West was hauling approximately twelve (12) totes of a hazardous material or substance.

19. Upon information and belief, each of the totes being hauled contained approximately 275 gallons of the hazardous material or substance.

20. Upon information and belief, the hazardous material or substance being hauled in the tractor-trailer was EMPIGEN® AS-F90, Commercial Abstract Service (“CAS”) Number 68140-01-2, an aqueous solution of Alkyl Dimethylamine.

21. EMPIGEN® AS-F90 / Alkyl Dimethylamine is used in consumer products and cleaning agents.

22. EMPIGEN® AS-F90 / Alkyl Dimethylamine is a toxic and corrosive substance.

23. EMPIGEN® AS-F90 / Alkyl Dimethylamine can cause environmental harm to humans, animals, and aquatic life.

24. It is not safe to drink or otherwise use water that has been contaminated with EMPIGEN® AS-F90 / Alkyl Dimethylamine.

25. Upon information and belief, a John Doe Purchaser engaged Defendant Innospec Active for the transportation of the totes of EMPIGEN® AS-F90 / Alkyl Dimethylamine.

26. Upon information and belief, Defendant Dennis West and Defendant GGW were selected as the carrier of John Doe Purchaser's EMPIGEN® AS-F90 / Alkyl Dimethylamine from Defendant Innospec Active.

27. Upon information and belief, Defendant Dennis West and Defendant GGW received the EMPIGEN® AS-F90 / Alkyl Dimethylamine for delivery from Defendant Innospec Active.

28. Upon information and belief, Defendant Dennis West, Defendant GGW, and Defendant Innospec Active failed to properly secure the totes of EMPIGEN® AS-F90 / Alkyl Dimethylamine in the Defendant Dennis West and Defendant GGW's tractor trailer.

29. At approximately 2338 hours on August 24, 2022, Defendant Dennis West was driving near the 62.5 mile-marker of the West Virginia Turnpike when he lost control of the tractor-trailer.

30. The tractor-trailer jackknifed and crossed the barrier wall between the north and southbound lanes:



[Photo from West Virginia Department of Transportation].

31. The tractor-trailer operated by Defendant Dennis West and owned by Defendant GGW caught fire.

32. The tractor-trailer crash and the subsequent clean-up blocked both the northbound and southbound lanes of the West Virginia Turnpike for more than 19 hours.

33. Defendant Dennis West was intoxicated while driving the tractor-trailer.

34. Upon information and belief, Defendant Dennis West was given a breathalyzer test at the scene of the incident.

35. Defendant Dennis West was arrested by law enforcement for driving under the influence.

36. Upon information and belief, Defendant Dennis West has been arrested for suspected driving under the influence in the past.

37. Upon information and belief, Defendant Dennis West has an extensive criminal history in the state of Montana.

38. Kanawha County emergency services responded to the crash site.

39. Kanawha County 911 telecommunicators handled approximately 42 phone calls related to the incident.

40. Upon information and belief, as a result of the crash all twelve (12) totes of EMPIGEN® AS-F90 / Alkyl Dimethylamine contained in the tractor-trailer leaked onto the West Virginia Turnpike and into local water streams including Skitter Creek and Paint Creek.

41. The chemical spill resulted in fish kills on Skitter Creek and Paint Creek.

42. A limited West Virginia Division of Natural Resources study found that some 33,446 fish were killed.

43. Paint Creek was once replete with fish including minnow, darters, walleye, sunfish, smallmouth bass, and rainbow trout.

44. Kanawha County residents living near Paint Creek have reported that wildlife previously visible within Paint Creek has disappeared.

45. While the accident occurred in Fayette County West Virginia, a portion of Paint Creek that was affected by the EMPIGEN® AS-F90 / Alkyl Dimethylamine spill is located in Kanawha County, West Virginia.

46. On August 25, 2022, Kanawha County emergency services activated a Wireless Emergency Alert for cell phones and the reverse 9-1-1 for landlines for Kanawha County residents in the Paint Creek area.

47. As a result of the chemical spill, numerous residents of Kanawha County were advised to cease use of their well water, pending health department testing for contamination.

48. On August 25, 2022, in response to the chemical spill, the Plaintiff issued a media release instructing residents in the area surrounding Paint Creek to avoid contact with the water.

49. Kanawha County residents living near Paint Creek, West Virginia suffered and continue to suffer from fear that their water sources are, have been, or may be contaminated due to the EMPIGEN® AS-F90 / Alkyl Dimethylamine spill.

50. Kanawha County residents living near Paint Creek, West Virginia suffered and continue to suffer a loss of convenience due to fear that their land and water sources are, have been, or may be contaminated due to the EMPIGEN® AS-F90 / Alkyl Dimethylamine spill.

51. Kanawha County residents living near Paint Creek, West Virginia suffered and continue to suffer a loss of their right to access clean water, due to fear that their water wells are, have been, or may be contaminated due to the EMPIGEN® AS-F90 / Alkyl Dimethylamine spill.

52. The Kanawha County Health Department expended resources canvassing the affected area to determine which residents may have been affected by the EMPIGEN® AS-F90 / Alkyl Dimethylamine spill.

53. The Kanawha County Health Department has expended and will continue to expend resources testing Paint Creek and the wells of residents living near Paint Creek.

54. Hundreds of working hours have been spent by Kanawha County employees responding to the accident and EMPIGEN® AS-F90 / Alkyl Dimethylamine spill.

55. Kanawha County residents in the Paint Creek vicinity remain concerned that their property and water sources are contaminated.

56. Kanawha County residents living near Paint Creek have reported that since EMPIGEN® AS-F90 / Alkyl Dimethylamine spill, when it rains the creek “refoams.”

57. The County and its residents living near Paint Creek believe there is still a lot of EMPIGEN® AS-F90 / Alkyl Dimethylamine in the sediment or mud near the spill site and along Paint Creek.

58. When it rains, EMPIGEN® AS-F90 / Alkyl Dimethylamine at the spill site drains into Skitter Creek and flows downstream.

59. Plaintiff and its residents believe that exposure to EMPIGEN® AS-F90 / Alkyl Dimethylamine could cause long-term health problems, including potential birth defects.

Notice of Violation

60. In an effort to promote the public health, safety and welfare of its residents, Plaintiff passed the Public Nuisance and Property Maintenance Ordinance (hereinafter “Ordinance”).

61. The Ordinance allows the Plaintiff to issue notices of violation and abatement orders to parties who are deemed responsible for creating a public nuisance, as defined by the Ordinance.

62. On Monday, November 14, 2022, Plaintiff sent Defendants Dennis West and GGW a notice of violation of the Ordinance. Ex. A.

63. Defendants Dennis West and GGW failed to take the required corrective action, and on December 14, 2022, Defendants Dennis West and GGW were served with a Final Notice regarding their violation of the Ordinance. Ex. B.

64. The Final Notice identified the same public nuisance and provided Defendant Dennis West and Defendant GGW with ten (10) days to take corrective action and contact the code official with their plans to remediate the nuisance.

65. Defendant Dennis West and Defendant GGW— as recipients of the Final Notice — were given twenty (20) days to file an appeal to/with the Kanawha County Commission.

66. On December 22, 2022, through counsel, Defendant Dennis West and Defendant GGW appealed the November 14, 2022 NOV and the December 14, 2022 Final Notice (collectively “NOVs”).

67. Pursuant to the Ordinance, Plaintiff placed the appeal on the calendar for the next Kanawha County Commission meeting.

68. On January 5, 2023, counsel for Defendant Dennis West and Defendant GGW appeared before the Commission.

69. Following the hearing the Plaintiff affirmed and adopted the conclusions of the Planning and Development Office’s Director and denied Defendant Dennis West and Defendant GGW’s appeal.

70. At the hearing, Defendant Dennis West and Defendant GGW agreed to meet with the Planning and Development Office's Director regarding the development of a plan for remediating Defendant Dennis West and Defendant GGW's continuing nuisance.

71. Defendant Dennis West and Defendant GGW agreed to provide Plaintiff with a plan by Friday, January 13, 2023.

72. The "plan" proposed by Defendant Dennis West and Defendant GGW does not seek to remediate the ongoing nuisance they have caused, but rather seeks to contest their responsibility.

73. The only actions proposed by Defendant Dennis West and Defendant GGW are that they hire environmental engineers to visually observe Paint Creek during significant rain events and install a filtration structure, which Defendant Dennis West and Defendant GGW admit may not be effective.

74. Inasmuch as the Kanawha County Commission has given Defendant Dennis West and Defendant GGW the opportunity to mitigate damages, and insamuch as Defendant Dennis West and Defendant GGW do not appear to be proposing remediation in good faith, Plaintiff is now engaging its own environmental engineers to develop a real remediation plan.

COUNT I
Violation of the Public Nuisance and Property Maintenance Ordinance
(against Defendants Dennis West and GGW)

75. The Kanawha County Commission has statutory standing to eliminate the hazards to the public health and safety to abate, or cause to abate, the public nuisance. W. Va. Code § 7-1-3kk; W. Va. Code § 8-12-5(23).

76. Pursuant to its authority, the Kanawha County Commission passed the Public Nuisance and Property Maintenance Ordinance ("Ordinance").

77. Through the enactment of its Ordinance, the County seeks to abate what it considers to be a public nuisance(s).

78. The County's nuisance Ordinance defines public nuisances and provides a procedure by which the County may seek to abate the same.

79. As alleged throughout this Complaint, the accident caused by Defendant West and Defendant GGW and the spill of EMPIGEN® AS-F90 / Alkyl Dimethylamine into Paint Creek constitute a public nuisance.

80. The spill of EMPIGEN® AS-F90 / Alkyl Dimethylamine into Paint Creek, and Defendant West and Defendant GGW's failure to remove the chemical from the watershed constitutes a violation of the County Ordinance.

81. Specifically, Defendant West and Defendant GGW are in violation of Section 307.1, which provides in pertinent part,

307.1 Nuisances. The following acts, when committed, or conditions, when existing, are defined and declared to be nuisances:

(1) An act done or committed or aided or assisted to be done or committed by any person, or any substance, being or thing kept, maintained, placed or found in or upon any public or private place, which is injurious or dangerous to the public health, safety or good order.

....

(3) All ponds or pool of putrid or stagnant water, and all foul or dirty water or liquid found or discharged into or upon any street, public place or lot to the injury or annoyance of the public.

82. Defendant Dennis West and Defendant GGW's spill of EMPIGEN® AS-F90 / Alkyl Dimethylamine into Paint Creek is an act which is injurious or dangerous to the public health, safety, and good order.

83. Defendant Dennis West and Defendant GGW's spill of EMPIGEN® AS-F90 / Alkyl Dimethylamine into Paint Creek is a discharge of a liquid into a public place to the injury and annoyance of the public.

84. Defendant West and Defendant GGW are also in violation of Section 307.2, which provides that "any condition which constitutes a nuisance by statute or common law of the state, when committed or existing within the unincorporated area of the county, is declared to constitute a nuisance."

85. West Virginia has adopted a "broad and flexible definition" of nuisance which is "adaptable to a wide variety of factual situations":

A public nuisance is an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons. The distinction between a public nuisance and a private nuisance is that the former affects the general public, and the latter injures one person or a limited number of persons only. Ordinarily, a suit to abate a public nuisance cannot be maintained by an individual in his private capacity, as it is the duty of the proper public officials to vindicate the rights of the public.¹

86. A public nuisance results from conduct that caused an unreasonable and substantial interference with a right common to the general public, which is the proximate cause of, and/or substantial factor leading to Plaintiff's injury. *See* Restatement Second, Torts § 821B.²

87. Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

¹ *Sharon Steel Corp. v. City of Fairmont*, 175 W. Va. 479, 483, 334 S.E.2d 616, 620 (1985) (citing Restatement (Second) of Torts § 821B (1979)); *see also State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 241, 488 S.E.2d 901, 921 (1997).

² *See also Rhodes v. E.I. du Pont de Nemours & Co.*, 657 F. Supp. 2d 751, 768 (S.D. W.Va. 2009) (West Virginia's definition of nuisance is "consistent with the Restatement (Second) of Torts § 821B(1)") (quoting *Duff v. Morgantown Energy Assocs. (M.E.A.)*, 187 W.Va. 712, 421 S.E.2d 253, 257 n.6 (1992)).

- a. Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
- b. Whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
- c. whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.³

88. Defendant West and Defendant GGW's interreference is unreasonable, as they have created a nuisance which:

- a. Involves a significant interreference with the public health, the public safety, the public peace, the public comfort, and/or the public convenience;
- b. At all relevant times was and is proscribed by state and federal laws and regulations; and/or
- c. Is of a continuing nature and, as Defendant Dennis West and Defendant GGW know, has had and is continuing to have a significant effect upon rights common to the general public, the public safety, the public peace, the public comfort, and/or the public convenience.

89. Defendant West and Defendant GGW's actions injuriously affected – and continue to injuriously affect – public rights, including the right to public health, public safety, public peace, public comfort, and welfare of the people of Plaintiff's Community.

90. Plaintiff and Plaintiff's Community have a common right to be free from conduct that creates an unreasonable jeopardy to the public health, safety and welfare, and to be free from conduct that creates a disturbance and reasonable apprehension of danger to person and property.

³ RESTATEMENT (SECOND) OF TORTS § 821B (1979); *Barker v. Naik*, No. 2:17-CV-04387, 2018 WL 3824376, at *3 (S.D.W. Va. Aug. 10, 2018) (noting the consistency with the West Virginia Supreme Court's definition of public nuisance); *see also Rhodes v. E.I. du Pont de Nemours & Co.*, 657 F. Supp. 2d 751, 768 (S.D.W. Va. 2009) *aff'd in part, appeal dismissed in part*, 636 F.3d 88 (4th Cir. 2011).

91. Kanawha County residents, including residents who live near Paint Creek, have a common right to access water that is free from actual or suspected contamination.

92. The presence of EMPIGEN® AS-F90 / Alkyl Dimethylamine in Paint Creek creates an unreasonable risk to the public.

93. Indeed, West Virginia has long recognized that “[t]he unlawful pollution of a stream is a public nuisance.” *International Shoe Co. v. Heatwole*, 126 W. Va. 888, 30 S.E. 2d 537, 540 (1944).

94. Defendants Dennis West and GGW have unreasonably interfered with Plaintiff and Plaintiff’s residents’ common rights by contaminating the water supply and/or imposing a fear that they have contaminated the water supply of numerous Kanawha County residents.

95. Defendants Dennis West and GGW’s actions have created a public nuisance that injures the Plaintiff and its residents, producing a material annoyance, inconvenience, fears, and/or harm to the Plaintiff and its residents.

96. As a direct and proximate result of Defendants Dennis West and GGW’s public nuisance, numerous County residents ceased use of their water wells due to actual and/or feared contamination.

97. As a direct and proximate result of Defendants Dennis West and GGW’s public nuisance, Plaintiff’s residents have avoided contact with the Paint Creek watershed.

98. As a direct and proximate result of Defendants Dennis West and GGW’s public nuisance, Plaintiff’s residents have been unable to engage in recreational activities in their local watershed due to actual and/or feared contamination.

99. As a direct and proximate result of Defendants Dennis West and GGW's public nuisance, land in Kanawha County has been contaminated with EMPIGEN® AS-F90 / Alkyl Dimethylamine.

100. As a direct and proximate result of Defendants Dennis West and GGW's public nuisance, Plaintiff's health department and emergency services have been forced to expend County resources.

101. As a direct and proximate result of Defendants Dennis West and GGW's public nuisance, Plaintiff and Plaintiff's residents have been forced to expend resources to clean up the watershed and its surrounding areas.

102. Defendants Dennis West and GGW's conduct is the factual and proximate cause of the unreasonable interference and of the Plaintiff's and its residents' injuries.

103. This nuisance can be abated by the Defendants West and GGW.

104. At all times relevant hereto, Defendant Dennis West was acting within the scope of his employment and/or within the scope of his role as a member and agent of Defendant GGW.

105. Defendant GGW is vicariously liable for the actions of Defendant Dennis West.

Count II
Common Law Public Nuisance
(against Defendants Dennis West and Gadsden, Gaillard, and West, LLC)

106. Plaintiff hereby incorporates the allegations set forth in the foregoing paragraphs as though fully alleged herein.

107. Defendant West and Defendant GGW's actions injuriously affected – and continue to injuriously affect – public rights, including the right to public health, public safety, public peace, public comfort, and welfare of the people of Plaintiff's Community.

108. Plaintiff and Plaintiff's Community have a common right to be free from conduct that creates an unreasonable jeopardy to the public health, safety and welfare, and to be free from conduct that creates a disturbance and reasonable apprehension of danger to person and property.

109. Kanawha County residents, including residents who live near Paint Creek, have a common right to access water that is free from actual or suspected contamination.

110. The presence of EMPIGEN® AS-F90 / Alkyl Dimethylamine in Paint Creek creates an unreasonable risk to the public. *See International Shoe Co. v. Heatwole*, 126 W. Va. 888, 30 S.E. 2d 537, 540 (1944).

111. Defendants Dennis West and GGW have unreasonably interfered with Plaintiff and Plaintiff's residents' common rights by contaminating the water supply and/or imposing a fear that they have contaminated the water supply of numerous Kanawha County residents.

112. Defendants Dennis West and GGW's actions have created a public nuisance that injures the Plaintiff and its residents, producing a material annoyance, inconvenience, fears, and/or harm to the Plaintiff and its residents.

113. As a direct and proximate result of Defendants Dennis West and GGW's public nuisance, numerous County residents ceased use of their water wells due to actual and/or feared contamination.

114. As a direct and proximate result of Defendants Dennis West and GGW's public nuisance, Plaintiff's residents have avoided contact with the Paint Creek watershed.

115. As a direct and proximate result of Defendants Dennis West and GGW's public nuisance, Plaintiff's residents have been unable to engage in recreational activities in their local watershed due to actual and/or feared contamination.

116. As a direct and proximate result of Defendants Dennis West and GGW's public nuisance, land in Kanawha County has been contaminated with EMPIGEN® AS-F90 / Alkyl Dimethylamine.

117. As a direct and proximate result of Defendants Dennis West and GGW's public nuisance, Plaintiff's health department and emergency services have been forced to expend County resources.

118. As a direct and proximate result of Defendants Dennis West and GGW's public nuisance, Plaintiff and Plaintiff's residents have been forced to expend resources to clean up the watershed and its surrounding areas.

119. Defendants Dennis West and GGW's conduct is the factual and proximate cause of the unreasonable interference and of the Plaintiff's and its residents' injuries.

120. This nuisance can be abated by the Defendants West and GGW.

121. At all times relevant hereto, Defendant Dennis West was acting within the scope of his employment and/or within the scope of his role as a member and agent of Defendant GGW.

122. Defendant GGW is vicariously liable for the actions of Defendant Dennis West.

COUNT III
Negligence
(against Defendants Dennis West and GGW)

123. Plaintiff hereby incorporates the allegations set forth in the foregoing paragraphs as though fully alleged herein.

124. Defendants Dennis West and GGW owed Plaintiff and its residents a duty to not expose Plaintiff and its residents to an unreasonable risk of harm.

125. Defendants Dennis West and GGW had a duty to exercise reasonable and ordinary care while transporting EMPIGEN® AS-F90 / Alkyl Dimethylamine.

126. Defendants Dennis West had a duty to exercise reasonable and ordinary care while operating a tractor-trailer on a public highway. *See Griffith v. George Transfer & Rigging, Inc.*, 157 W. Va. 316, 201 S.E.2d 281 (1973).

127. Defendant Dennis West breached his duty of care by, *inter alia*:

- a. Failing to maintain control of the tractor-trailer he was driving;
- b. Driving a tractor-trailer containing hazardous substances while intoxicated;
- c. Failing to stay in his lane;
- d. Driving at an unreasonable speed;
- e. Failing to secure the hazardous cargo he was hauling;
- f. Failing to notice open and obvious defects in the loading and/or storage of the hazardous cargo;
- g. Failing to have a plan to address a spill of EMPIGEN® AS-F90 / Alkyl Dimethylamine; and
- h. Failing to comply with industry standards for carriers of hazardous substances.

128. Defendant Dennis West was acting within the scope of his employment and/or within the scope of his role as a member and agent of Defendant GGW.

129. Defendant GGW is vicariously liable for the actions of Defendant Dennis West.

130. Defendant GGW further breached its duty of care by, *inter alia*:

- a. Failing to adequately secure the hazardous cargo loaded into its tractor-trailer;
- b. Failing to adequately inspect its tractor-trailer carrying hazardous cargo;
- c. Failing to adequately train its hazmat employees/drivers;
- d. Failing to have a plan to address a spill of EMPIGEN® AS-F90 / Alkyl Dimethylamine, and

- e. Failing to comply with industry standards for carriers of hazardous substances.

131. As a direct and proximate result of Defendants Dennis West and GGW's negligence, Plaintiff and its residents have sufficient significant injury.

132. Plaintiff suffered injury as a result of Defendants Dennis West and GGW's negligence including, *inter alia*:

- a. Contamination of its public waterway;
- b. Contamination of its physical property;
- c. Harm to its watershed;
- d. Loss of recreational space;
- e. Incurring the cost of the emergency response to the accident and spill;
- f. Incurring the cost of health department response;
- g. Incurring the cost of cleaning up Kanawha County property; and
- h. Incurring the cost of developing a test for EMPIGEN® AS-F90 / Alkyl Dimethylamine;
- i. Incurring the cost of testing water sources; and
- j. Incurring the cost of cleaning up and restoring Paint Creek.

133. Defendants Dennis West and GGW's conduct is the factual and proximate cause of Plaintiff's injuries.

**COUNT IV
Negligence
(Against Defendant Innospec Active Chemicals LLC)**

134. Plaintiff hereby incorporates the allegations set forth in the foregoing paragraphs as though fully alleged herein.

135. As a manufacturer, producer, and/or shipper of hazardous materials, Defendant Innospec Active owed Plaintiff and its residents a duty to not expose Plaintiff and its residents to an unreasonable risk of harm.

136. Defendant Innospec Active owed Plaintiff and its residents a duty to exercise reasonable and ordinary care while packaging and shipping EMPIGEN® AS-F90 / Alkyl Dimethylamine.

137. Defendant Innospec Active breached its duty of care by, *inter alia*:

- a. Improperly loading the totes of EMPIGEN® AS-F90 / Alkyl Dimethylamine into Defendant GGW's tractor-trailer;
- b. Improperly inspecting Defendant GGW's tractor-trailer;
- c. Negligently hiring Defendant GGW to transport EMPIGEN® AS-F90 / Alkyl Dimethylamine even though he has a history of being arrested for driving under the influence;
- d. Negligently retaining Defendant GGW to EMPIGEN® AS-F90 / Alkyl Dimethylamine; and
- e. Allowing for the shipment of EMPIGEN® AS-F90 / Alkyl Dimethylamine without first developing a plan to clean up spills.

138. Plaintiff suffered injury as a result of Defendant Innospec Active's negligence including, *inter alia*:

- a. Contamination of its public waterway;
- b. Contamination of its physical property;
- c. Harm to its watershed;
- d. Loss of recreational space;
- e. Incurring the cost of the emergency response to the accident and spill;
- f. Incurring the cost of health department response;
- g. Incurring the cost of cleaning up Kanawha County property; and
- h. Incurring the cost of developing a test for EMPIGEN® AS-F90 / Alkyl Dimethylamine;
- i. Incurring the cost of testing water sources; and
- j. Incurring the cost of cleaning up and restoring Paint Creek.

139. Defendant Innospec Active's conduct is the factual and proximate cause of the Plaintiff's injuries.

COUNT V
Negligence Per Se
(against all Defendants)

140. Plaintiff hereby incorporates the allegations set forth in the foregoing paragraphs as though fully alleged herein.

141. Defendant Dennis West's conduct constituted a willful or wanton disregard for the safety of persons or property.

142. Defendant Dennis West's conduct was negligence *per se* in that he violated West Virginia law, including, but not limited to:

- a. Driving under the influence of alcohol in violation of W. Va. Code § 17C-5-2;
- b. Driving recklessly, in violation of W. Va. Code § 17C-5-3;
- c. Driving at a speed greater than reasonable and prudent under the existing conditions, in violation of W. Va. Code § 17C-6-1; and
- d. Transporting hazardous material that was not prepared in accordance with the requirements of federal law, in violation of 49 C.F.R. § 177.801.

143. Defendant Dennis West was acting within the scope of his employment and/or within the scope of his role as a member and agent of Defendant GGW.

144. Defendant GGW is vicariously liable for the actions of Defendant Dennis West.

145. Defendant GGW's conduct was negligence *per se* in that it violated federal regulations that apply to the carriage of hazardous materials by private, common, or contract carriers as required by 49 C.F.R. Parts 172 and 177 including, but not limited to:

- a. Failing to adequately train its drivers and/or employees, in violation of 49 C.F.R. § 177.800, 49 C.F.R. § 177.816, and 49 C.F.R. Part 172, Subpart H;
- b. Transporting hazardous material that was not prepared in accordance with the requirements of federal law, in violation of 49 C.F.R. § 177.801;

- c. Failing to comply with all Federal Motor Carrier Safety Regulations, in violation of 49 C.F.R. § 177.804; and
- d. Failing to adequately load and/or secure hazardous material, in violation of 49 C.F.R. § 177.834.

146. Defendant Innospec Active's conduct was negligence *per se* in that it violated federal regulations that apply to the shipment of hazardous materials as listed in 49 C.F.R. Part 173 including, but not limited to:

- a. Failing to adequately package hazardous materials for transportation by highway, in violation of 49 C.F.R. § 173.3;
- b. Failing to adequately package hazardous materials in small quantities for highway transportation, in violation of 49 C.F.R. § 173.4; and
- c. Failing to adequately package hazardous materials for transportation, in violation of 49 C.F.R. § 173.24.

147. As a result of the Defendants' negligence, Plaintiff suffered injury including, *inter alia*:

- a. Contamination of its public waterway;
- b. Contamination of its physical property;
- c. Harm to its watershed;
- d. Loss of recreational space;
- e. Incurring the cost of the emergency response to the accident and spill;
- f. Incurring the cost of health department response;
- g. Incurring the cost of cleaning up Kanawha County property; and
- h. Incurring the cost of developing a test for EMPIGEN® AS-F90 / Alkyl Dimethylamine;
- i. Incurring the cost of testing water sources; and
- j. Incurring the cost of cleaning up and restoring Paint Creek.

148. The Defendants' conduct is the factual and proximate cause of the Plaintiff's injuries.

COUNT VI
Strict Liability
(Against all Defendants)

149. Plaintiff hereby incorporates the allegations set forth in the foregoing paragraphs as though fully alleged herein.

150. West Virginia has adopted the Restatement (Second) of Torts doctrine of strict liability for abnormally dangerous activities. *Crum v. Equity Inns, Inc.*, 224 W. Va. 246, 685 S.E.2d 219, 230 (2009).

151. The Restatement (Second) of Torts § 519 (1976) provides:

- (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
- (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

152. The shipment and/or transportation of hazardous substances such as EMPIGEN® AS-F90 / Alkyl Dimethylamine is an abnormally dangerous activity.

153. Defendants Dennis West; GGW; and Defendant Innospec Active are all engaged in the shipment and/or transportation of hazardous materials.

154. Defendants Dennis West; GGW; and Defendant Innospec Active's engagement in the shipment and/or transportation of hazardous materials caused harm to the Plaintiff and its residents.

155. The harm suffered by the Plaintiff is the kind of harm which makes the shipment and/or transportation of hazardous materials abnormally dangerous.

156. Defendants Dennis West; GGW; and Defendant Innospec Active are strictly liable for the harm caused by their abnormally dangerous activity.

Prayer for Relief:

Wherefore, Plaintiff requests the following relief:

- a. Trial by jury on all issues so triable;
- b. Abatement of the nuisance;
- c. Actual damages;
- d. Equitable and injunctive relief in the form of Court-enforced corrective action, program(s), and communication(s);
- d. Compensatory Damages;
- f. Pre- and/or post-judgment interest at the maximum allowable rates at law;
- g. Attorneys' fees and costs; and
- h. Such other and further relief as this Court deems appropriate.

Dated: January 19, 2023

**Kanawha County Commission,
By Counsel:**

/s/ Isaac R. Forman

Isaac R. Forman (WVSB # 11668)

Casey E. Waldeck (WVSB # 14001)

HISSAM FORMAN DONOVAN RITCHIE PLLC

707 Virginia Street, Suite 201

Charleston, WV 25301

(681) 265-3802

iforman@hfdrlaw.com

cwaldeck@hfdrlaw.com

Counsel for the Kanawha County Commission

EXHIBIT A

Kanawha County Planning and Community Development

Second Floor, 407 Virginia Street, East, Charleston, West Virginia 25301 (304) 357-0570



- Notice of Violation -

November 14, 2022

Gadsden, Gaillard, and West LLC
400 Brookgreen Dr.
Moncks Corner, SC 29461

Dennis West
400 Brookgreen Dr.
Moncks Corner, SC 29461

On August 24, 2022, a traffic accident occurred on the West Virginia Turnpike involving a tractor-trailer carrying chemical containers with the surfactant Empigen AS/F90. The accident occurred near the 62 mile marker at Pax, WV. The operator of the tractor-trailer was arrested and charged with driving under the influence. The accident caused the chemical to spill into Skitter Creek, which flows into Paint Creek. The chemical is not soluble in water, and it traveled from the spill location downstream into Kanawha County, creating a safety hazard and public nuisance that negatively impacted Kanawha County residents and properties. Based on observations, the chemical is still present at or near the spill site creating a continuing public nuisance that requires immediate remediation.

You have been identified as the responsible parties of the incident described above.

Your actions have resulted in violations of the Kanawha County Public Nuisance Ordinance as follows:

307.1	<p>Nuisances. The following acts, when committed, or conditions, when existing, are defined and declared to be nuisances:</p> <ol style="list-style-type: none"><li data-bbox="470 1428 1218 1596">1. An act done or committed or aided or assisted to be done or committed by any person, or any substance, being or thing kept, maintained, placed or found in or upon any public or private place, which is injurious or dangerous to the public health, safety or good order.<li data-bbox="470 1617 1218 1764">3. All ponds or pool of putrid or stagnant water, and all foul or dirty water or liquid found or discharged into or upon any street, public place or lot to the injury or annoyance of the public.
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307.2

Nuisances.

The nuisances described shall not be construed as exclusive; and any act of commission or omission and any condition which constitutes a nuisance by statute or common law of the state, when committed or existing within the unincorporated area of the county, is declared to constitute a nuisance.

Please contact our office within 10 days from receipt of this letter to explain your plans for having Kanawha County property cleared of all noted violations. You will need to schedule an inspection of the affected area.

If you do not take corrective action, you will automatically receive a Final Notice of Code Violation. Failure to bring the affected area into compliance with the Kanawha County Public Nuisance Ordinance will result in the Kanawha County Commission pursuing legal means to ensure remediation of the nuisance. As the responsible parties, you will be responsible for all expenses incurred, including but not limited to, contractor's fees, legal fees, court costs and any civil penalties that may result.

Please contact our office (304) 357-0570, to inform me of your plan, and to schedule a follow-up inspection of the affected area. Thank you for your attention to this matter.

Sincerely,



Steve Neddo
Planning Director

EXHIBIT B



- Final Notice of Violation -

December 14, 2022

Gadsden, Gaillard, and West LLC and Dennis West
c/o Joseph C. Unger
Spilman Thomas and Battle, PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301

On August 24, 2022, a traffic accident occurred on the West Virginia Turnpike involving a tractor-trailer carrying chemical containers with the surfactant Empigen AS/F90. The accident occurred near the 62-mile marker at Pax, WV. The operator of the tractor-trailer was arrested and charged with driving under the influence. The accident caused the chemical to spill into Skitter Creek, which flows into Paint Creek. The chemical is not soluble in water, and it traveled from the spill location downstream into Kanawha County, creating a safety hazard and public nuisance that negatively impacted Kanawha County residents and properties. Based on observations, the chemical is still present at or near the spill site creating a continuing public nuisance that requires immediate remediation.

You have been identified as the responsible parties of the incident described above.

Your actions have resulted in violations of the Kanawha County Public Nuisance Ordinance as follows:

307.1	<p>Nuisances. The following acts, when committed, or conditions, when existing, are defined and declared to be nuisances:</p> <ol style="list-style-type: none">1. An act done or committed or aided or assisted to be done or committed by any person, or any substance, being or thing kept, maintained, placed or found in or upon any public or private place, which is injurious or dangerous to the public health, safety or good order.3. All ponds or pool of putrid or stagnant water, and all foul or dirty water or liquid found or discharged into or upon any street, public place or lot to the injury or annoyance of the public.
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307.2	Nuisances. The nuisances described shall not be construed as exclusive; and any act of commission or omission and any condition which constitutes a nuisance by statute or common law of the state, when committed or existing within the unincorporated area of the county, is declared to constitute a nuisance.
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Correction Order:

Within 10 days of receiving this letter, you must call or meet with the code official with a plan for remediating the violations.

Time for Corrective Action:

10 days from receipt of this letter.

This is your final notice of violation. Failure to bring the affected area into compliance with the Kanawha County Public Nuisance Ordinance will result in the Kanawha County Commission pursuing legal means to ensure remediation of the nuisance. As the responsible parties, you will be responsible for all expenses incurred, including but not limited to, contractor's fees, legal fees, court costs and any civil penalties that may result.

Right to Appeal:

Pursuant to Kanawha County's ordinance, you are entitled to appeal this notice as follows:

111.1 Application for appeal. Any person directly affected by a decision of the code official or a notice or order issued under this code shall have the right to appeal to the Kanawha County Commission, provided that a written application for an appeal is filed within twenty (20) days after the day the decision, notice or order was served. An application for appeal shall be based on a claim that the true intent of this code or the rules legally adopted there under have been incorrectly interpreted, the provisions of this code do not fully apply, or the requirements of this code are adequately satisfied by other means, or that the strict application of any requirement of this code would cause an undue hardship.

111.2 Notice of meeting. The Commission shall meet upon notice from the President, within the twenty (20) days of the filing of an appeal, or as stated periodic meetings.

111.3 Open hearing. All hearings before the Commission shall be open to the public. The appellant, the appellant's representative, the code official and any person whose interests are affected shall be given an opportunity to be heard. A quorum shall consist of not less than two-thirds of the Commission membership.

111.4 Postponed hearing. When the full Commission is not present to hear an appeal, either the appellant or the appellant's representative shall have the right to request a postponement of the hearing.

111.5 Commission decision. The Commission shall modify or reverse the decision of the code official only by a concurring vote of a majority of the total number of Commission members.

111.6 Court review. Any person, whether or not a previous party of the appeal, shall have the right to apply to the Circuit Court of Kanawha County.

111.7 Stays of enforcement. Appeals of notice and orders (other than Imminent Danger notices) shall stay the enforcement of the notice and order until the appeal is heard by the County Commission.

Please contact our office (304) 357-0570, to inform me of your plan, and to schedule a follow-up inspection of the affected area. Thank you for your attention to this matter.

Sincerely,



Steve Neddo
Planning Director