MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

PRESTON ALEXANDER, *et al.*, Plaintiffs, vs. FLUOR CORPORATION, *et al.*, Defendants.	Cause No: 052-09567 Division No. 12
EMILY PEDERSON, *et al.*, Plaintiffs, vs. FLUOR CORPORATION, *et al.*, Defendants.	Cause No: 052-09856 Division No. 12
MATTHEW HEILIG, *et al.*, Plaintiffs, vs. FLUOR CORPORATION, *et al.*, Defendants.	Cause No: 052-09866 Division No. 12

DEFENDANTS' ALTERNATIVE JOINT MOTION FOR NEW TRIAL

Defendants Fluor Corporation, A.T. Massey Coal Company, and Doe Run Investment Holding are entitled to a judgment notwithstanding the verdict for the reasons stated in its other motions. If the Court does not grant a JNOV, defendants in the alternative move for a new trial

as to liability and damages on all of plaintiffs' claims. In support of their motion, defendants state as follows.

Jury Instructions

1. The Court erred in giving Instruction 8 (the Fluor "Control" Verdict Director) for all the reasons stated in the instruction conference on July 24, 2011, and for the additional reasons stated on the record on July 25, 2011.

2. The Court erred in giving Instruction 8 because Paragraphs Second, Third, and Fifth improperly used the phrase "before March 26, 1994," which allowed the jury to find Fluor individually liable for conduct prior to and/or after the time that Leadco and DRIH were partners. Under settled Missouri law, a partner may only be liable for the conduct of the partnership while the partner was a partner. *Maryland Assoc., L.P. v. Sheehan,* 14 S.W.3d 576 (Mo. banc 2000); §§358.150(1), 358.290, 358.360 RSMO. Rather than using the phrase "before March 26, 1994," Paragraphs Second, Third and Fifth should have identified the dates when DRIH and Leadco were partners. Under Missouri law, even if defendants or any of them could be liable for historical partnership liabilities, the defendants could only be liable to the extent of partnership assets. Since there are no partnership assets, there is no liability for the partnership conduct prior to any partner becoming a partner. Instruction 8 improperly allowed Fluor to be individually liable for conduct of the partnership when Fluor, Leadco, and DRIH were not partners, which is contrary to Missouri law, as recognized by the Court in its prior orders.

3. In addition to the law recognized by the Court on this issue, defendants cannot be held liable to Plaintiffs for prior acts of the partnership because they were not "obligations of the partnership" within the meaning of section 17 of the Uniform Partnership Act or the corresponding Section 378.170 of the Missouri Revised Statutes. Plaintiffs have claimed that

Defendants are liable for what amounts to unasserted tort claims that preceded the Defendants' respective entrance into the partnership. The comments to Section 17 of the Uniform Partnership Act show that the purpose of limiting an incoming partner's liability for the prior acts of the partnership is to protect creditors who have extended credit to the partnership. An incoming partner can protect itself from obligations to such creditors by obtaining full knowledge of the partnership's business from its books and records and can insist on liquidation when it joins. This is obviously not true as to ***unasserted*** tort claims, of which the incoming partner could have no notice. There is no Missouri case referring to any obligations assumed by an incoming partner other than those that would arise under contract. This is consistent with the plain meaning of the term "obligation," which equates to a "formal and binding agreement or acknowledgement of a liability to pay a certain sum or do a certain thing." In this case, the relevant "obligation" did not arise until the entry of the judgment. *See Bromberg & Ribstein on Partnership*, § 7.18(b), p. 7:268.3.

4. The Court erred in giving Instruction 8 because it failed to provide for or direct the jury to allocate between injury and damages caused by conduct when Fluor, Leadco and DRIH were not partners and conduct while Fluor, Leadco, or DRIH were partners. The instruction therefore improperly allowed the jury to find Fluor liable for conduct when it, Leadco, and DRIH were not partners, which is contrary to Missouri law as recognized by this Court in its prior orders.

5. The Court erred in giving Instruction 8 because the phrase "adjacent community" of Herculaneum in Paragraphs Second and Third is vague and constitutes a roving commission because it failed to give adequate guidance about what area is included, and allowed the jury unfettered authority to decide what constitutes the adjacent community.

6. The Court erred in giving Instruction 8 because the phrase "unsafe levels of lead" in Paragraphs Second, Third, and Fifth is vague and constitutes a roving commission because it failed to give sufficient guidance about what lead levels are unsafe and allowed the jury unfettered authority to decide what constitutes an unsafe level of lead.

7. The Court erred in giving Instruction 8 because the evidence did not support a finding that the Doe Run Company Partnership had the knowledge required by Paragraph Third.

8. The Court erred in giving Instruction 8 because the instruction did not require the jury to find that Fluor, Leadco and DRIH had the knowledge required by Paragraph Third but instead required only that the Doe Run Company Partnership had that knowledge. The instruction should have required that an identified partner defendant have the required knowledge.

9. The Court erred in giving Instruction 8 because Paragraphs Fourth and Fifth improperly submitted a claim based on piercing the corporate veil. Plaintiff never pleaded nor proved a claim based on piercing the corporate veil. Indeed, throughout the pendency of the case, plaintiffs repeatedly disavowed they were pursuing any claim based on piercing the corporate veil, and stated to defendants and the Court that they were not seeking to recover under a claim based on piercing the corporate veil. By giving this instruction over defendants' objection, the Court allowed plaintiffs to submit a theory of recovery that they never pleaded or proved.

10. Even if plaintiffs had pleaded a claim based on piercing the corporate veil, Instruction 8 was improper because it did not require the jury to find all the required elements of a claim based on piercing the corporate veil. In order to recover under a claim based on piercing the corporate veil, a plaintiff must prove (a) that one corporation disregards corporate

requirements and controls another corporation so completely that the controlled corporation has no separate existence or identity of its own, (b) that the corporate arrangement and control was used for a fraudulent purpose, and (c) that the plaintiff was injured as a result of that fraudulent conduct. *Ritter v. BJC Barnes Jewish Christian Health Systems,* 987 S.W.2d 377, 384 (Mo. App. 1999). Instruction 8 did not recite the elements of control necessary for a claim based on piercing the corporate veil – it did not require the jury to find that Fluor controlled the operations of the smelter on which plaintiffs' claims of personal injury were based – and improperly failed to require the jury to find that the corporate structure and relationship were for a fraudulent purpose and that plaintiffs were injured as a result of the fraudulent conduct.

11. Even if plaintiffs had pleaded a claim based on piercing the corporate veil and even if Instruction 8 had required the jury to find the elements of a claim based on piercing the corporate veil, the Court erred in giving Instruction 8 because plaintiffs failed to offer sufficient evidence of all of the elements of a claim based on piercing the corporate veil. Plaintiffs failed to offer sufficient evidence of the level of control required to pierce the corporate veil. Indeed, neither Leadco, which was a subsidiary holding company, nor DRIH, which was the subsidiary of a subsidiary (A.T. Massey) of a subsidiary (St. Joe) and also a holding company, had any involvement in the operation of the smelter, there was no evidence that Fluor's relationship with those corporations was any different than the normal relationship between a parent and a subsidiary corporation, and in fact there were not actions or conduct of DRIH or Leadco for Fluor to control with regard to the operation of the smelter or anything else. The evidence did not support a claim that the separate corporate identities should be ignored. There also was absolutely no evidence that these corporations were established or maintained for a wrongful or

fraudulent purpose or that plaintiffs were injured as a result of that fraudulent conduct. *Ritter*, 987 S.W.2d at 384.

12. Instruction 8 also is erroneous because it is not supported by Missouri law. The effect of Instruction 8 was to allow the jury to impose on Fluor the partnership status held by a subsidiary but separate corporation, and the partnership status of a subsidiary corporation of a subsidiary corporation of a subsidiary corporation to Fluor (which also was a partner and which jointly held that partnership interest). Even if the evidence had supported the control set out in Paragraph Fourth, nothing in Missouri law supports the contention that the effect of such control would be to cause Fluor to assume the status, duty, or liability of a partner in the place of DRIH and Leadco during the time they were partners, or that Fluor would then separately have any duty as a partner to take any action with regard to plaintiffs or any liability for its conduct or the conduct of the partnership. No authority supports the contention that a company assumes the status, duty, and liability of a partner under the circumstances set out in Instruction 8.

13. The Court erred in giving Instruction 8 because the phrase in Paragraph Fourth "with respect to the Doe Run Company partnership" was vague and failed to require the nature or level of control to pierce the corporate veil or to establish an agency relationship between separate corporations.

14. The Court erred in giving Instruction 8 because, to the extent the instruction purported to submit an agency theory, it also does not comply with Missouri Law, was not supported by the evidence, and did not submit to the jury or require findings of necessary evidentiary facts.

15. The Court erred in giving instruction 8 because, to the extent it purported to submit an agency theory, the instruction failed to require the level of control necessary under

Missouri law to establish a principle-agent relationship between two corporations. The instruction did not require the jury to find that Fluor exercised the required control of Leadco or DRIH with regard to the operations of the smelter or the conduct on which plaintiffs' claims were based. *Ritter,* 987 S.W.2d 377.

16. The Court erred in giving instruction 8 because, to the extent it purported to submit an agency theory, the instruction was not supported by sufficient evidence that Fluor exercised the level of control required by Paragraph Fourth or the level of control required under Missouri law to establish an agency relationship between separate corporations under *Ritter.* Again, neither Leadco, which was a subsidiary holding company, nor DRIH, which was the subsidiary of a subsidiary (A.T. Massey) of a subsidiary (St. Joe) and also a holding company, had any involvement in the operation of the smelter, there was no evidence that Fluor's relationship with those corporations was any different than the normal relationship between a parent and a subsidiary corporation, and in fact there were not actions or conduct of DRIH or Leadco for Fluor to control with regard to the operation of the smelter or anything else.

17. The Court erred in giving instruction 8 because, to the extent it purported to submit an agency theory, Paragraph Fifth improperly failed to require the jury to find that Leadco and DRIH engaged in negligent conduct, instead of referring to Fluor's conduct. Instead, the instruction improperly allowed the jury to base liability on Fluor's conduct and not the conduct of its alleged agents. To be a proper agency instruction, Instruction 8 should have required a finding that Leadco and DRIH, as Fluor's agents, engaged in negligent conduct that caused injuries to plaintiffs.

18. To the extent Instruction 8 purported to submit an agency theory of liability, it improperly imposes direct liability on Fluor for Fluor's own conduct during the time Leadco and

DRIH were partners, when Fluor had no duty or direct liability to plaintiffs. A principal-agent relationship potentially exposes the principal to liability for the conduct of the agent. It does not create a duty or direct liability in the alleged principal. *See Arnold v. Erkmann*, 934 S.W.2d 621, 631 (Mo. App. 1996) (finding that there can be no judgment against the principal if the agent is found not to have committed a tort); *Howard v. Youngman*, 81 S.W.3d 101, 117 (Mo. App. 2002). While a parent corporation can be liable for its subsidiary's acts in certain circumstances, *see Sedalia Mercantile Bank and Trust Co. v. Loges Farms, Inc.*, 740 S.W.2d 188, 202-03 (Mo. App. 1987), Instruction 8 improperly submitted a theory of liability whereby the alleged control of Leadco and DRIH did not purport to impose liability on Fluor for the conduct of its alleged agents, but improperly imposed a duty and direct liability on Fluor, by holding Fluor liable as a partner rather than holding it liable as a principal for the conduct of Leadco and DRIH as partners or agents. This is clear from Paragraph Fifth of the Instruction which directs the jury to base liability on Fluor's alleged negligence in "allowing" exposure while Leadco and DRIH were partners, rather than on the conduct of Leadco and DRIH. As a principal, Fluor had no duty that could give rise to a claim of negligence based on breach of any duty in "allowing" plaintiffs to be exposed to unsafe levels of lead. To the extent Instruction 8 purported to submit an agency theory of liability, it improperly imposed a duty on Fluor that Fluor did not have.

19. Instruction 8 instead improperly imposes partnership liability on Fluor for the time Leadco and DRIH were partners, based solely on a finding that Fluor exercised sufficient control over those separate corporations to create an agency relationship. Nothing in Missouri law supports the proposition embodied in this instruction that a principal corporation assumes the partnership status, duty, and liability of its corporate agent. The only way Fluor possibly could be found to have assumed the partnership status, duty, and liability of Leadco and DRIH would

be under a claim based on piercing the corporate veil. As discussed above, plaintiffs have never pleaded nor proved any claim based on piercing the corporate veil, and even stated at the instruction conference that this instruction was not submitting a claim based on piercing the corporate veil. Notwithstanding that denial, and because it does not properly submit a claim of agency, Instruction 8 improperly imposed liability on Fluor based on an unpleaded, unproven, and improperly submitted claim based on piercing the corporate veil.

20. The Court erred in giving Instruction 8 because the phrase "Fluor. . .allowed plaintiff . . . to be exposed to unsafe levels of lead" in Paragraph Fifth is vague and constitutes a roving commission. To avoid being a roving commission, an instruction must instruct the jurors regarding the specific conduct that renders the defendant liable. *Gomez v. Construction Design, Inc.,* 126 S.W.3d 366, 371 (Mo. banc 2004) (verdict director did not specify what improper act or omission by the defendant constituted negligence); *Centerre Bank of Kansas City, Nat'l Ass'n v. Angle,* 976 S.W.2d 608, 618 (Mo. App. 1998); *Davis v. Jefferson Savings & Loan Ass'n,* 820 S.W.2d 549, 556 (Mo. App. 1991) ("jury simply was not told what alleged conduct of defendant they were permitted to use to infer defendant's consent"). The instruction improperly failed to identify the allegedly negligent conduct that "allowed" the plaintiff to be exposed to unsafe levels of lead. There can be no adequate assessment of whether a duty existed, whether any conduct was negligent, or whether any alleged negligent conduct caused injury when the only required finding is that a party "allowed" something to happen. For example, under the instruction as phrased, the jury could have imposed liability on Fluor for not having purchased each of the plaintiffs' homes, when there was no duty or ability to buy another person's home, the parents of each plaintiff did not testify that they sought to have their homes purchased, and the effect of the instruction as written would be to hold Fluor liable for not entering into a

contract with another party. The prejudicial effect of this erroneous language was exacerbated with regard to the claims of those five plaintiffs (Jesse Miller, Manning, Fisher, Heilig, and Jonathan Miller) who were born after March 26, 1994, when the partnership ended. The instruction improperly imposed a duty on Fluor with regard to plaintiffs who had not yet moved to Herculaneum or were not born when the partnership ended. *See* Instructions 62, 89, 98, 107, 116. Fluor cannot have been liable for failing to buy someone out or warn someone who was not even born or who did not even live in Herculaneum when the partnership ended.

21. The Court erred in giving Instruction 8 because Paragraph Fifth improperly directed the jury to find that Fluor "allowed" plaintiff to be exposed to unsafe levels of lead, when, for the reasons stated above, neither the facts or the law supported a claim that Fluor assumed the status, duty, or liability of a partner under the circumstances set out in Instruction 8. Fluor cannot be held liable for having "allowed" a plaintiff to be exposed when Fluor did not assume the status of a partner during the time Leadco and DRIH were partners. Further, even under the allegations that Fluor controlled one or more partners, plaintiffs did not present sufficient evidence that Fluor, DRIH or Leadco exercised any control over any unnamed partner that purportedly exposed anyone to unsafe levels of lead.

22. The Court erred in giving Instruction 8 because the instruction is vague as to the claim it purports to submit to the jury. At the instruction conference, counsel for defendants asked counsel for plaintiffs to explain what theory they were submitting to the jury in this instruction, but plaintiffs refused to explain what theory they were submitting and the Court did not ask or require them to do so. A defendant cannot be fairly expected to object to the inadequacies of an instruction when plaintiffs refuse to explain what theory the instruction purports to submit, and the Court makes no effort to require such an explanation.

23. Instruction 8 is a not-in-MAI instruction and failed to comply with the requirements of Rule 70.02(b) in that it does not comply with Missouri law, was not supported by the evidence, and did not submit to the jury or require findings of detailed evidentiary facts.

24. The Court erred in giving Instruction 8 because plaintiffs failed to offer sufficient evidence that Fluor was negligent as required by Paragraph Sixth or that any such negligence caused damage to plaintiffs as required by Paragraph Seventh.

25. The Court erred in giving Instruction 8 because plaintiff failed to make a submissible case for the reasons stated in defendants' motion for directed verdict at the close of all the evidence and in defendants' motion for judgment notwithstanding the verdict.

26. The same errors recited above with regard to Instruction 8 are adopted, asserted, and incorporated by reference with respect to the other Fluor "Control" Verdict Directors for the other 15 plaintiffs (Instructions 17, 26, 35, 44, 53, 62, 71, 80, 89, 98, 107, 116, 125, 134, 143).

27. The Court erred in giving Instruction 9 (Fluor "Partner" Verdict Director) for the reasons stated at the instruction conference on July 24 and on the record on July 25.

28. The Court erred in giving Instruction 9 because the use of the phrase "adjacent community" in Paragraphs Second and Third is vague and constitutes a roving commission and allows the jury unfettered authority to decide what constitutes the adjacent community.

29. The Court erred in giving Instruction 9 because the phrase "unsafe levels of lead" in Paragraphs Second, Third, and Fourth is vague and constitutes a roving commission and allows the jury unfettered authority to decide what constitutes an unsafe level of lead.

30. The Court erred in giving Instruction 9 because Paragraph Third stated "at that time" and should have stated "while Fluor was a partner," so that it was clear to the jury that it must find that Fluor had the required knowledge while it was a partner. As submitted with the

phrase "at that time," the instruction was vague and did not adequately instruct the jurors that they could find Fluor liable only if they found that Fluor had the required knowledge while it was a partner.

31. The Court erred in giving Instruction 9 because the evidence did not support the finding that Fluor had the knowledge required by Paragraph Third while it was a partner.

32. The Court erred in giving Instruction 9 because the phrase "allowed plaintiff. . . to be exposed to unsafe levels of lead" is vague and constitutes a roving commission and is otherwise erroneous for all the reasons stated with regard to the use of the same language in Instruction 8. In addition, the error and prejudice created by the use of the phrase "allowed plaintiff to be exposed" and the failure to specify the allegedly negligent conduct is exacerbated with regard to the plaintiffs (Lauren Shanks, Ashley Shanks Getty, Yates, Blanks, and the five plaintiffs listed above in paragraph 20) who moved to Herculaneum or were born after May 26, 1990, the one day Fluor was a partner. *See* Instructions 18, 63, 90, 99, 108, 117, 126, 135, 144. The instructions improperly imposed a duty on Fluor with regard to plaintiffs who had not yet moved to Herculaneum or were not born yet when Fluor was a partner.

33. The Court erred in giving Instruction 9 because the use of the phrase "before May 26, 1990" improperly allowed the jury to return a verdict against Fluor based on conduct of the partnership before and/or after Fluor was a partner. The instruction should have referred to the one day Fluor was a partner and not before that day. The instruction is contrary to settled Missouri law, which provides that a partner is only liable for the conduct of a partnership while the partner was a partner. *Sheehan.* Under Missouri law, even if defendants or any of them could be liable for historical partnership liabilities, the defendants could only be liable to the extent of partnership assets with regard to any claim based on conduct of the partnership before

these defendants were partners. Since there are no partnership assets, there is no liability for any partnership conduct prior to Fluor becoming a partner. Instruction 9 thus improperly allowed Fluor to be individually liable for conduct of the partnership before Fluor became a partner, which is contrary to Missouri law as recognized by the Court in its prior orders.

34. The Court erred in giving Instruction 9 because it failed to provide for or direct the jury to allocate between injury and damages caused by conduct when Fluor was not a partner and conduct when Fluor was a partner and therefore improperly allowed the jury to find Fluor liable for conduct when it was not a partner, which is contrary to Missouri law as recognized by this Court in its prior orders.

35. The Court erred in giving Instruction 9 because the evidence did not support a finding that Fluor was negligent during the one day it was a partner as set forth in Paragraph Fifth or that any such negligence or other conduct by Fluor on the one day it was a partner caused or contributed to cause any injury to plaintiff as required by Paragraph Sixth.

36. The Court erred in giving Instruction 9 because plaintiff failed to prove the elements of the claim submitted in the instruction for the reasons stated in defendants' motion for directed verdict and motion for judgment notwithstanding the verdict.

37. If the Court finds that one of the Fluor verdict directors as to compensatory damages (*e.g.* Instruction 8 or 9) was not supported by sufficient evidence or otherwise was improper, Fluor is entitled to a new trial. The jury gave a single damage award without indicating the verdict director on which it was basing its award. Under such circumstances, plaintiffs must show that both verdict directors were legally sound, factually supported, and in proper form. If plaintiffs failed to make a submissible case under both verdict directors or both verdict directors were not otherwise in proper form, then it is impossible to determine whether

the jury's verdict was legally and factually supported, and a new trial is required. *See Mitchell v. Residential Funding Corp.*, 334 S.W.3d 477, 513 (Mo. App. 2010).

38. The Court erred in giving both Instructions 8 and 9 because they improperly submit two claims against Fluor imposing liability based on partnership status in two separate verdict directors. Plaintiff should not have been permitted to submit two separate instructions that both imposed partnership liability on Fluor. Instruction 8 submits a claim against Fluor based on its assuming the status and liability of Leadco and DRIH as partners in the Doe Run Company Partnership. Instruction 9 also submits a claim against Fluor based on partnership status and partnership liability. It was improper to give two verdict directors both submitting claims and imposing liability against Fluor based on partnership status for "allowing" plaintiff to be exposed to unsafe levels of lead. Plaintiffs were only entitled to one verdict director submitting a claim based on partnership liability.

39. Instruction 9 is a not-in-MAI instruction and failed to comply with the requirements of Rule 70.02(b) in that it does not comply with Missouri law, was not supported by the evidence, and did not submit to the jury or require findings of detailed evidentiary facts.

40. The same errors recited above with regard to Instruction 9 are adopted, asserted, and incorporated by reference with regard to the other Fluor "Partner" Instructions for the other 15 plaintiffs (Instructions 18, 27, 36, 45, 54, 63, 72, 81, 90, 99, 108, 117, 126, 135, 144).

41. The Court erred in giving Instruction 10 (Fluor Punitive Damage Instruction) because it was dependent on the jury finding against Fluor under Instructions 8 and 9 and the Court erred in giving Instructions 8 and 9 for the reasons stated above.

42. The Court erred in giving Instruction 10 because the phrase "allowed plaintiff. . . to be exposed to unsafe levels of lead" in Paragraph First is vague, constitutes a roving

commission, and is otherwise erroneous for the reasons stated above with regard to the use of the same phrase in Instructions 8 and 9, which are incorporated by reference.

43. The Court erred in giving Instruction 10 because the phrase "unsafe levels of lead" is vague and constitutes a roving commission for the reasons stated with regard to Instruction 8.

44. The Court erred in giving Instruction 10 because the term "such conduct" in Paragraph Second (referring to the language "allowed" plaintiff to be exposed in Paragraph First) was vague and a roving commission in that it failed to sufficiently specify the conduct of Fluor on which the jury could base an award of punitive damages, gave the jury unfettered authority to decide what conduct constituted "allowing" plaintiff to be exposed to unsafe levels of lead sufficient to support an award of punitive damages, and allowed an award of punitive damages for actions for which Fluor was not responsible or had no duty to perform, particularly when the instruction bases Fluor's liability on the partnership status of a subsidiary corporation (Leadco) and the subsidiary of a subsidiary of a subsidiary (DRIH) which have no involvement in the operation of the smelter.

45. The Court erred in giving Instruction 10 because of the use of the phrase "before March 26, 1994" in Paragraph First and Second allowed the jury to hold Fluor liable for punitive damages for its own conduct or conduct of the partnership both before and after Fluor was a partner, which is contrary to Missouri law. Under Missouri law, a partner can only be liable for conduct while a partner. The instruction should have used the one day Fluor was a partner. Moreover, a partner is not subject to punitive damages for the wrongful acts of other partners, and even if defendants or any of them could be liable for historical partnership liabilities, the defendants could only be liable to the extent of partnership assets with regard to any claim based

on conduct of the partnership when these defendants were not partners. Since there are no partnership assets, there is no liability for any historical liabilities.

46. The Court erred in giving Instruction 10 because it was not limited in time and did not refer to the time when Fluor was a partner, and therefore improperly imposed a duty on and allowed Fluor to be held liable for conduct when Fluor was not a partner, and when Leadco and DRIH were not partners, which is contrary to Missouri law as recognized by the Court's prior holdings in this case.

47. The Court erred in giving Instruction 10 because the evidence did not support the finding required by Paragraph Second that Fluor knew or should have known that the conduct created a high degree of probability of injury as to these plaintiffs or the finding required by Paragraph Third that Fluor showed complete indifference to or conscious disregard for the safety of others. *Alack v. Vic Tanny International of Missouri, Inc.*, 923 S.W.2d 330, 338-39 (Mo. banc 1996); *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 375 (Mo. App. 1993) (evidence must show that, at the time of the act complained of, the defendant had knowledge of a high degree of probability of injury to a specific class of persons); *Lewis v. FAG Bearings Corp.*, 5 S.W.3d 579, 584 (knowledge not shown when knowledge was based on test after plaintiff moved from the area). Defendants incorporate by reference their Motion for Judgment Notwithstanding the Verdict.

48. The Court erred in giving Instruction 10 because the evidence did not support the finding required by Paragraph Second that Fluor knew or should have known that the conduct created a high degree of probability of injury or the finding required by Paragraph Third that Fluor showed complete indifference to or conscious disregard for the safety of others, with regard to the plaintiffs who moved to Herculaneum or were born after May 26, 1990, including

the five plaintiffs born after March 26, 1994. *Alack; Keene Corp.; Lewis. See also* Instructions 19, 62, 91, 100, 109, 118, 127, 136, 145.

49. The Court erred in giving Instruction 10 because, to the extent Instruction 8 submitted a claim based on agency, Instruction 10 allowed the jury to impose liability for punitive damages on Fluor as a principal based on the partnership status of Leadco as an agent, without the jury being required to find Leadco liable for punitive damages. Under Missouri law, a principal cannot be held liable for punitive damages without the agent also being held liable for punitive damages.

50. The Court erred in giving Instruction 10 because it imposed punitive damages on Fluor for conduct while Fluor was not a partner, based on the partnership status of Leadco and DRIH. For the reasons stated above with regard to Instruction 8, Instruction 10 improperly imposed on Fluor as principal the partnership status, duty, and liability of Leadco and DRIH. There is no support in Missouri law for imposing on a principal corporation the partnership status, duty, and liability of its alleged corporate agent.

51. The Court erred in giving Instruction 10 because the instruction improperly allowed the plaintiff to recover two punitive damage awards based on DRIH's status as a partner. Under Instructions 8 and 10, the jury awarded punitive damages against Fluor based on DRIH's status as a partner and then also allowed the jury to award punitive damages against DRIH based on that same partnership status. Because the Instruction allowed a double recovery of punitive damages based on DRIH's partnership status, Instruction 10 was improper.

52. The Court erred in giving Instruction 10 because it referred and incorporated Instruction 8 and thereby improperly allowed the jury to award punitive damages based on conduct when Fluor was not a partner and had no duty as a partner.

53. The Fluor Punitive Damages Verdict Director (*e.g.* Instruction 10) required the jury to find Fluor liable under both Fluor verdict directors (*e.g.* Instructions 8 and 9). For the reasons discussed in defendants' Motion for Judgment Notwithstanding the Verdict and in this motion, plaintiffs failed to make a submissible case against Fluor under either of the Fluor verdict directors, and Fluor is entitled to judgment as a matter of law on both compensatory and punitive damages. Even if the court concludes that Fluor made a submissible case under one of the Fluor verdict directors, Fluor is still entitled to judgment notwithstanding the verdict as punitive damages because, as submitted in Instruction 10, plaintiffs' claims for punitive damages required a finding of liability under both verdict directors. In the alternative, if plaintiffs only made a submissible case under one of the Fluor verdict directors, then Fluor is entitled to a new trial because plaintiffs failed to prove all the elements required for their punitive damage claims, and the Court cannot assume that the jury would have awarded punitive damages if one of the underlying verdict directors had not been submitted to the jury.

54. The Court erred in giving Instruction 10 because plaintiff failed to make a submissible case for punitive damages for the reasons stated in defendants' motion for directed verdict and motion for judgment notwithstanding the verdict.

55. The Court erred in giving Instruction 10 because the jury was not told that plaintiffs could only recover punitive damages against Fluor based on damage proximately caused to plaintiffs by the actions of Fluor, and that punitive damages cannot be assessed against Fluor unless Fluor personally participated in the conduct giving rise to the punitive damages.

56. Instruction 10 is a not-in-MAI instruction and failed to comply with the requirements of Rule 70.02(b) in that it does not comply with Missouri law, was not supported by the evidence, and did not submit to the jury or require findings of detailed evidentiary facts.

57. The Court erred in giving Instruction 10 for any other reasons stated at the instruction conference on July 24 and on the record on July 25.

58. The same errors recited above with regard to Instruction 10 are adopted, asserted, and incorporated by reference with regard to the other Fluor Punitive Damage Verdict Director for the other 15 plaintiffs (Instructions 19, 28, 37, 46, 55, 64, 73, 82, 91, 100, 100, 109, 118, 127, 136, 145).

59. The Court erred in giving Instruction 11 (the "A.T. Massey" Verdict Director) because the phrase "adjacent community of Herculaneum" in Paragraphs Second and Third is vague and a roving commission for the reasons stated above with regard to Instruction 8.

60. The Court erred in giving Instruction 11 because the phrase "unsafe levels of lead" in Paragraphs Second, Third, and Fourth is vague and constitutes a roving commission for the reasons stated above with regard to Instruction 8.

61. The Court erred in giving Instruction 11 because the evidence did not support the finding that Doe Run Company Partnership knew or should have known that the community of Herculaneum was contaminated with unsafe levels of lead while A.T. Massey Coal Company was a partner, as required by Paragraph Third.

62. The Court erred in giving Instruction 11 because Paragraph Third required only that the Doe Run Company Partnership had the knowledge required by that paragraph, when it should have required a finding that A.T. Massey Coal Company knew or should have known that the adjacent community of Herculaneum (properly defined) was contaminated with unsafe levels of lead.

63. The Court erred in giving Instruction 11 because Paragraph Third stated "at that time" and should have stated "while A.T. Massey was a partner," so that it was clear to the jury

that it must find that Doe Run Company Partnership or A.T. Massey had the required knowledge while A.T. Massey was a partner. As submitted with the phrase "at that time," the instruction was vague and did not adequately instruct the jurors that they could find A.T. Massey liable only if they found that it or the partnership had the required knowledge while it was a partner.

64. The Court erred in giving Instruction 11 because the phrase "allowed plaintiff. . . to be exposed to unsafe levels of lead" is vague, a roving commission, and otherwise erroneous for the reasons stated above with regard to Instruction 8, which are incorporated by reference. In addition, the error and prejudice created by this phrase is exacerbated with regard to the plaintiffs who moved to Herculaneum or were born after A.T. Massey's partnership status ended (Alexander, Tiffany Bolden, Bryan Bolden, Davis, and the nine plaintiffs listed in paragraphs 20 and 32 above), for the reasons stated with regard to Instruction 8. *See also* Instructions 20, 29, 38, 47, 65, 92, 101, 110, 119, 128, 137, 146.

65. The Court erred in giving Instruction 11 because the phrase "before April 5, 1989" in Paragraph Fourth allowed the jury to return a verdict against A.T. Massey based on the conduct of the partnership before and/or after A.T. Massey was a partner, which is contrary to Missouri law. The instruction should have stated the dates when A.T. Massey was a partner. Under Missouri law, a partner may be held liable for the conduct of a partnership only while the partner was a partner. *Sheehan.* Even if defendants or any of them could be liable for historical partnership liabilities, the defendants could only be liable to the extent of partnership assets with regard to any claim based on conduct of the partnership before those defendants were partners. Since there are no partnership assets, there is no liability for any historical liabilities. Instruction 11 improperly allowed A.T. Massey to be found individually liable for conduct of the partnership

predating A.T. Massey's time as a partner, which is contrary to Missouri law as recognized by the Court in its prior Orders.

66. The Court erred in giving Instruction 11 because it failed to provide for or direct the jury to allocate between injury and damages caused by conduct while A.T. Massey was not a partner and conduct while A.T. Massey was a partner, and therefore improperly allowed the jury to find A.T. Massey liable for conduct when it was not a partner, which is contrary to Missouri law as recognized by this Court in its prior orders.

67. The Court erred in giving Instruction 11 because Paragraph Fourth directed the jury to render a verdict against A.T. Massey if the jury found that the "Doe Run Partnership allowed plaintiff" to be exposed, when the instruction should have required a finding that A.T. Massey or some other partner allowed plaintiff to be exposed while A.T. Massey was a partner, and should not have based liability on the temporally unlimited conduct of the "partnership."

68. The Court erred in giving Instruction 11 because the evidence did not support the finding that the Doe Run Company Partnership was negligent, as required by Paragraph Fifth, or a finding that such negligence caused damage to plaintiff, as required by Paragraph Sixth.

69. The Court erred in giving Instruction 11 because Paragraph Fifth only required a finding that the Doe Run Company Partnership was negligent when it should have required a finding that A.T. Massey or some other partner was negligent while A.T. Massey was a partner.

70. Instruction 11 is a not-in-MAI instruction and failed to comply with the requirements of Rule 70.02(b) in that it does not comply with Missouri law, was not supported by the evidence, and did not submit to the jury or require findings of detailed evidentiary facts.

71. The Court erred in giving Instruction 11 for any other reasons stated at the instruction conference on July 24 and on the record on July 25, in addition to the reasons stated above.

72. Defendants adopt, assert, and incorporate by reference the same errors stated above with regard to Instruction 11 for each of the other A.T. Massey Coal Company Verdict Directors submitted for the other 15 plaintiffs (Instructions 20, 29, 38, 47, 56, 65, 74, 83, 92, 101, 110, 119, 128, 137, 146).

73. The Court erred in giving Instruction 12 (the A.T. Massey "Punitive Damages" Instruction) because Instruction 11 required the jury to have found against A.T. Massey Coal Company under Instruction 11, and Instruction 11 was erroneous for the reasons stated above.

74. The Court erred in giving Instruction 12 because Paragraph First improperly allowed the jury to return a finding based on the Doe Run Company Partnership having allowed plaintiff to be exposed to unsafe levels of lead, when the instruction should have required a finding that A.T. Massey Coal Company allowed plaintiff to be exposed.

75. The Court erred in giving Instruction 12 because the phrase "unsafe levels of lead," as used in Paragraph First, is vague and constitutes a roving commission, for the reasons stated with regard to Instruction 8.

76. The Court erred in giving Instruction 12 because the phrase "allowed plaintiff. . . to be exposed to unsafe levels of lead" is vague, constitutes a roving commission, and is otherwise erroneous for the reasons stated above with regard to the use of the same phrase in Instruction 8.

77. The Court erred in giving Instruction 12 because the term "such conduct" in Paragraph Second (referring to the language "allowed" plaintiff to be exposed in Paragraph First)

was vague and a roving commission in that it failed to sufficiently specify the conduct of A.T. Massey on which the jury could base an award of punitive damages, gave the jury unfettered authority to decide what conduct constituted "allowing" plaintiff to be exposed to unsafe levels of lead sufficient to support an award of punitive damages, and allowed an award of punitive damages for actions for which A.T. Massey was not responsible or had no duty to perform.

78. The Court erred in giving Instruction 12 because the phrase "before April 5, 1989" in Paragraphs First and Second improperly allowed A.T. Massey to be liable for punitive damages for the conduct before or after it was a partner, which is contrary to Missouri law. Under Missouri law, a partner may be liable only for the conduct of a partnership while it was a partner. *Ritter.* Moreover, a partner is not subject to punitive damages for the wrongful conduct of other partners, and, even if defendants or any of them could be liable for historical partnership liabilities, the defendants could only be liable to the extent of partnership assets with regard to any claim based on conduct of the partnership when these defendants were not partners. Since there are no partnership assets, there is no liability for any historical liabilities.

79. The Court erred in giving Instruction 12 because it was not limited to and did not refer to the time period when A.T. Massey was a partner and improperly imposed a duty on and allowed A.T. Massey to be liable for punitive damages for conduct that predated the period when A.T. Massey was a partner.

80. The Court erred in giving Instruction 12 because the instruction should have required that A.T. Massey, rather than the Doe Run Company Partnership, knew or should have known that its conduct created a high degree of probability of injury as set out in Paragraph Second, and should have required that A.T. Massey showed complete indifference to or conscious disregard for the safety of others, as set out in Paragraph Third. Thus, Instruction 12

improperly allowed A.T. Massey to be held liable for punitive damages for the actions, knowledge, and indifference of the Doe Run Company Partnership, without any finding that A.T. Massey "allowed" plaintiff to be exposed to unsafe levels of lead, that A.T. Massey knew or should have known its conduct created a high degree of probability of injury, or that A.T. Massey acted with complete indifference or conscious disregard for the safety of others. A defendant cannot be held liable unless it is found to have known that its conduct created a high degree of probability of injury and to have shown a complete indifference or conscious disregard for the safety of others. *Alack; Keene Corp.; Lewis.*

81. The Court erred in giving Instruction 12 because Paragraph Second should have identified the partner who knew or should have known that its conduct created a high degree of probability of injury and Paragraph Third should have identified the partner that showed complete indifference or conscious disregard for the safety of others, and the instruction erroneously required only a finding that the Doe Run Company Partnership had the requisite knowledge or the requisite state of mind to support punitive damages.

82. The Court erred in giving Instruction 12 because there was no clear and convincing evidence to support the findings required by Paragraph Second and Third that, before April 5, 1989, the Doe Run Company Partnership or A.T. Massey knew or should have known that its conduct created a high degree of probability of injury, or that the Doe Run Company Partnership or A.T. Massey showed complete indifference to or conscious disregard for the safety of others. *Alack; Keene Corp.; Lewis.*

83. The Court erred in giving Instruction 12 because the evidence did not support the finding required by Paragraph Second that A.T. Massey knew or should have known that the conduct created a high degree of probability of injury or the finding required by Paragraph Third

that A.T. Massey showed complete indifference to or conscious disregard for the safety of others, with regard to the thirteen plaintiffs who were born or moved to Herculaneum after April 5, 1989. *Alack; Keene Corp.; Lewis. See also* Instructions 21, 30, 39, 48, 66, 93, 102, 111, 120, 129, 138, 147.

84. The Court erred in giving Instruction 12 because plaintiffs' claim for punitive damages against A.T. Massey was not supported by clear and convincing evidence, for the reasons stated in defendants' motion for directed verdict and motion for judgment notwithstanding the verdict.

85. The Court erred in giving Instruction 12 because the jury was not told that plaintiffs could only recover punitive damages against A.T. Massey based on damage proximately caused to plaintiffs by the actions of A.T. Massey, and that punitive damages cannot be assessed against A.T. Massey unless A.T. Massey personally participated in the conduct giving rise to the punitive damages.

86. Instruction 12 is a not-in-MAI instruction and failed to comply with the requirements of Rule 70.02(b) in that it does not comply with Missouri law, was not supported by the evidence, and did not submit to the jury or require findings of detailed evidentiary facts.

87. The Court erred in giving Instruction 12 for all the reasons stated at the Instruction Conference on July 24, 2011, and in open court on July 25, 2011.

88. Defendants adopt, assert, and incorporate by reference the same errors recited above with regard to Instruction 12 for each of the other A.T. Massey Punitive Damage Instructions submitted for the other 15 plaintiffs (Instructions 21, 30, 39, 48, 57, 66, 76, 85, 94, 103, 112, 121, 130, 139, 148).

89. The Court erred in giving Instruction 13 (DRIH Verdict Director) for all of the reasons stated above with regard to Instruction 11, which are incorporated by reference.

90. The Court erred in giving Instruction 13 because Paragraph Third stated "at that time" and should have stated "while DRIH was a partner," so that it was clear to the jury that it must find that Doe Run Company Partnership or DRIH had the required knowledge while DRIH was a partner. As submitted with the phrase "at that time," the instruction was vague and did not adequately instruct the jurors that they could find DRIH liable only if they found that it or the partnership had the required knowledge while it was a partner.

91. The Court erred in giving Instruction 13 because the use of the phrase "before March 26, 1994" in Paragraph Fourth allows a jury to return a verdict against defendant DRIH for the conduct of the partnership or DRIH before and/or after DRIH was a partner, which is contrary to Missouri law. Under Missouri law, a partner may be held liable for the conduct of a partnership only while the partner was a partner. *Sheehan.* Even if defendants or any of them could be liable for historical partnership liabilities, the defendants could only be liable to the extent of partnership assets with regard to any claim based on conduct of the partnership before that defendant was a partner. Since there are no partnership assets, there is no liability for any historical liabilities. Instruction 13 improperly allowed DRIH to be found individually liable for conduct of the partnership that predates DRIH's time as a partner, which is contrary to Missouri law as recognized by the Court in its prior orders.

92. The Court erred in giving Instruction 13 because it failed to provide for or direct the jury to allocate between injury and damages caused by conduct when DRIH was not a partner and conduct while DRIH was a partner, and therefore improperly allowed the jury to find DRIH

liable for conduct when it was not a partner, which is contrary to Missouri law as recognized by this Court in its prior orders.

93. The Court erred in giving Instruction 13 because Paragraph Fourth directed the jury to render a verdict against DRIH if the jury found that the "Doe Run Partnership allowed plaintiff" to be exposed, when the instruction should have required a finding that DRIH or some other partner allowed plaintiff to be exposed while DRIH was a partner, and should not have based liability on the temporally unlimited conduct of the "partnership." The error and prejudice in using the March 26, 1994, date and the phrase "allowed plaintiff to be exposed" is exacerbated with regard to the five plaintiffs born after March 26, 1994 (Jesse Miller, Manning, Fisher, Heilig, and Jonathan Miller). *See* Instructions 67, 94, 103, 112, 121. The instructions improperly expands the time of partnership damages and then fails to specify the negligent conduct for which defendant may be found liable.

94. The Court erred in giving Instruction 13 because the evidence did not support the finding that the Doe Run Company Partnership was negligent, as required by Paragraph Fifth, or a finding that such negligence caused damage to plaintiff, as required by Paragraph Sixth.

95. The Court erred in giving Instruction 13 because Paragraph Fifth only required a finding that the Doe Run Company Partnership was negligent when it should have required a finding that DRIH or some other partner was negligent while DRIH was a partner.

96. Instruction 13 is a not-in-MAI instruction and failed to comply with the requirements of Rule 70.02(b) in that it does not comply with Missouri law, was not supported by the evidence, and did not submit to the jury or require findings of detailed evidentiary facts.

97. The Court erred in giving Instruction 13 for any other reasons stated at the instruction conference on July 24 and on the record on July 25, in addition to the reasons stated above.

98. Defendants adopt and assert the same errors stated above with regard to Instruction 13 for each of the DRIH Verdict Directors submitted for the other 15 plaintiffs (Instructions 22, 31, 40, 49, 58, 67, 76, 85, 94, 103, 112, 121, 130, 139, 148).

99. The Court erred in giving Instruction 14 (DRIH Punitive Damage Instruction) because Instruction 14 requires the jury to have found against defendant DRIH under Instruction 13, and the Court erred in giving Instruction 13 for the reasons stated above.

100. The Court erred in giving Instruction 14 for all the reasons stated with regard to Instruction 12, which are incorporated by reference.

101. The Court erred in giving Instruction 14 because the phrase "allowed plaintiff to be exposed to unsafe levels of lead" was vague and constituted a roving commission for all the reasons stated with regard to Instructions 8, 9 and 10.

102. The Court erred in giving Instruction 14 because the term "such conduct" in Paragraph Second (referring to the language "allowed" plaintiff to be exposed in Paragraph First) was vague and a roving commission in that it failed to sufficiently specify the conduct of DRIH on which the jury could base an award of punitive damages, gave the jury unfettered authority to decide what conduct constituted "allowing" plaintiff to be exposed to unsafe levels of lead sufficient to support an award of punitive damages, and allowed an award of punitive damages for actions for which DRIH was not responsible or had no duty to perform.

103. The Court erred in giving Instruction 14 because Paragraph First improperly allowed the jury to return a finding based on the Doe Run Company Partnership having allowed

plaintiff to be exposed to unsafe levels of lead, when the instruction should have required a finding that DRIH allowed plaintiff to be exposed.

104. The Court erred in giving Instruction 14 because the phrase "unsafe levels of lead," as used in Paragraph First, is vague and constitutes a roving commission, for the reasons stated with regard to Instruction 8.

105. The Court erred in giving Instruction 14 because the phrase "before March 26, 1994" in Paragraphs First and Second directs the jury to return a verdict against defendant DRIH for punitive damages based on the conduct of the partnership before or after DRIH was a partner, which is contrary to Missouri law. Under Missouri law, a partner may be held liable for the conduct of the partnership occurring while the partner was a partner. Moreover, a partner may not be held liable for punitive damages for the conduct of another partner, but even if defendants or any of them could be liable for historical partnership liabilities, the defendants could only be liable to the extent of partnership assets with regard to any claim based on conduct of the partnership before the defendant was a partner. Since there are no partnership assets, there is no liability for any historical liabilities.

106. The Court erred in giving Instruction 14 because it was not limited to and did not refer to the time period when DRIH was a partner and improperly imposed a duty on and allowed DRIH to be liable for punitive damages for conduct that predated the period when DRIH was a partner.

107. The Court erred in giving Instruction 14 because it should have required the jury to find that DRIH, rather than the Doe Run Company Partnership, knew or should have known that the alleged conduct created a high degree of probability of injury, as set out in Paragraph Second, and should have required that DRIH, rather than the Doe Run Company Partnership,

showed complete indifference to or conscious disregard for the safety of others, as required by Paragraph Third. Thus, Instruction 14 improperly allowed DRIH to be held liable for punitive damages for the actions, knowledge, and indifference of the Doe Run Company Partnership, without any finding that DRIH "allowed" plaintiff to be exposed to unsafe levels of lead, that DRIH knew or should have known its conduct created a high degree of probability of injury, or that DRIH acted with complete indifference or conscious disregard for the safety of others. A defendant cannot be held liable unless it is found to have known that its conduct created a high degree of probability of injury to these plaintiffs and to have shown complete indifference to or conscious disregard for the safety of others. *Alack; Keene; Lewis.*

108. The Court erred in giving Instruction 14 because Paragraph Second should have identified the partner who knew or should have known that its conduct created a high degree of probability of injury and Paragraph Third should have identified the partner that showed complete indifference or conscious disregard for the safety of others, and the instruction erroneously required only a finding that the Doe Run Company partnership had the requisite knowledge or the requisite state of mind to support punitive damages.

109. The Court erred in giving Instruction 14 because there is no evidence supporting any finding, as required by Paragraph Second, that the Doe Run Company Partnership or DRIH knew or should have known that any conduct created a high degree of probability of injury to these plaintiffs, or, as required by Paragraph Third, that the Doe Run Company Partnership or DRIH showed complete indifference to or conscious disregard for the safety of others. *Alack; Keene Corp.; Lewis.*

110. The Court erred in giving Instruction 14 because the evidence did not support the finding required by Paragraph Second that DRIH knew or should have known that the conduct

created a high degree of probability of injury or the finding required by Paragraph Third that DRIH showed complete indifference to or conscious disregard for the safety of others, with regard to the five plaintiffs born after March 25, 1994. *Alack; Keene Corp.; Lewis. See* Instructions 68, 95, 104, 113, 122.

111. The Court erred in giving Instruction 14 because plaintiff failed to make a submissible case for punitive damages against defendant DRIH for the reasons stated in defendants' motion for directed verdict and motion for judgment notwithstanding the verdict.

112. The Court erred in giving Instruction 14 because the jury was not told that plaintiffs could only recover punitive damages against DRIH based on damage proximately caused to plaintiffs by the actions of DRIH, and that punitive damages cannot be assessed against DRIH unless DRIH personally participated in the conduct giving rise to the punitive damages.

113. Instruction 14 is a not-in-MAI instruction and failed to comply with the requirements of Rule 70.02(b) in that it does not comply with Missouri law, was not supported by the evidence, and did not submit to the jury or require findings of detailed evidentiary facts.

114. The Court erred in giving Instruction 14 for all the reasons stated at the Instruction Conference on July 24, 2011, and in open court on July 25, 2011.

115. Defendants adopt, assert, and incorporate by reference the same errors stated above with regard to Instruction 14 for each of the DRIH Punitive Damages Instructions submitted for the other 15 plaintiffs (Instructions 23, 32, 41, 50, 59, 68, 77, 86, 95, 104, 113, 122, 131, 140, 149).

116. The Court erred in giving Instruction 15 (Damages Instruction based on 4.01) because the instruction improperly referred to the "exposure to unsafe levels" of lead when it should have referred to the specific conduct or occurrence for which defendants were allegedly

liable. The phrase "exposure to unsafe levels of lead" is vague and a roving commission and improperly gave the jury unfettered authority to find defendants to be liable for any exposure to unsafe levels of lead, including exposures and levels of lead for which defendants were not responsible and could not be liable.

117. The Court erred in giving Instruction 15 because plaintiffs failed to prove that they were damaged as a result of any negligent conduct of any defendant or and any negligent conduct for which any defendant was responsible.

118. Defendants assert and incorporate by reference the above objections to Paragraph 15 with respect to all of the 4.01 damage instructions for the other 15 plaintiffs (Instructions 24, 33, 42, 51, 60, 69, 78, 87, 96, 105, 114, 123, 132, 141, 150).

119. The Court erred in giving Verdict Forms A through P because for all the reasons stated above with regard to all compensatory and punitive damage verdict directors as to all plaintiffs and defendants, and because the verdict forms did not provide for an allocation between damages caused by conduct predating the time when defendants were partners and allowed for the jury to assess and award damages for conduct predating the time when defendants were partners, which is contrary to Missouri law as recognized by this Court in prior orders.

120. The Court erred in rejecting defendants' proposed Instruction A, a not-in-MAI instruction, for the reasons stated at the instruction conference. The Instruction accurately stated Missouri law and was necessary to properly guide the jury in its deliberations with regard to agency liability.

121. The Court erred in rejecting defendants' proposed Instruction B, a not-in-MAI instruction, for the reasons stated at the instruction conference. The Instruction accurately stated

Missouri law and was necessary to properly guide the jury in its deliberations with regard to agency liability.

122. The Court erred in rejecting defendants' proposed Instruction C, a not-in-MAI instruction, for the reasons stated at the instruction conference. The Instruction accurately stated Missouri law and was necessary to properly guide the jury in its deliberations with regard to agency liability.

123. The Court erred in rejecting defendants' proposed Instruction D, a not-in-MAI instruction, for the reasons stated at the instruction conference. The Instruction accurately stated Missouri law and was necessary to properly guide the jury in its deliberations with regard to partnership liability.

124. The Court erred in rejecting defendants' proposed Instructions E, F, G, H, and I with regard to plaintiffs' claims for punitive damages. These instructions were necessary to provide the jury with further guidance concerning the factors that are necessary and appropriate to consider in determining whether punitive damages were appropriate. Under both federal and state cases, these instructions reflect the factors that a jury should consider in determining whether defendant acted with complete indifference or conscious disregard for the safety of others. The proposed instructions were in compliance with Rule 70.02 for a not-in-MAI instruction.

125. The Court erred in giving all punitive damage instructions as to each defendant for each plaintiff because an award of punitive damages under Missouri law pursuant to those instructions would violate defendants' procedural and substantive due process and equal protection rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 19, and 21 of the Missouri Constitution. Any law

permitting recovery of punitive damages in this case is unconstitutional, both on its face and as applied in this case, in that the law, among other things, (a) lacks constitutionally sufficient standards to guide and restrain the jury's discretion in determining whether to award punitive damages, (b) in determining an amount of any punitive damage award, unconstitutionally may permit the jury's consideration of a defendant's net worth, and (c) is void for vagueness in that it fails to afford constitutionally sufficient advance notice as to what conduct would result in punitive damage sanctions. The law as submitted in the instruction lacks constitutionally sufficient standards to be applied by the jury and trial court in its post-verdict review of punitive damages. The instructions fail to satisfy the constitutional requirements set forth in *State Farm Mutual Insurance Co. v. Campbell, Pacific Mutual Life Insurance Co. v. Haslip,* and *TXO Production Corp. v. Reliance Resources, Inc.*

126. The Court erred in giving Instruction 152 (Fluor Punitive Damage Instruction--Alexander) because the instruction was not supported by the evidence, in that the evidence did not support submission of punitive damages to the jury for the reasons stated with regard to Instructions 10, 19, 28, 37, 46, 55, 64, 73, 82, 91, 100, 109, 118, 127, 136, 145. Defendants refer to and incorporate all objections to the Compensatory and Punitive Damage Verdict Directors with regard to Fluor and all grounds raised in defendants' motion for directed verdict and motion for judgment notwithstanding the verdict.

127. The Court erred in giving Instruction 153 (A.T. Massey Punitive Damage Instruction) because the instruction was not supported by the evidence, in that the evidence did not support submission of punitive damages to the jury, and for the reasons stated with regard to Instructions 12, 21, 30, 39, 48, 57, 66, 75, 84, 93, 102, 111, 120, 129, 138, 147. In support of this error, defendants refer to and incorporate all objections to the Compensatory and Punitive

Damage Verdict Directors with regard to A.T. Massey and all grounds raised in defendants' motion for directed verdict and motion for judgment notwithstanding the verdict. In addition, the Court erred in giving Instruction 153 because in Paragraph Second it improperly refers to Doe Run Company Partnership's conduct when it should have referred to A.T. Massey's conduct.

128. The Court erred in giving Instruction 154 (DRIH Punitive Damage Instruction) because the evidence did not support submission of punitive damages to the jury, and for the reasons stated above with regard to 14, 23, 32, 41, 50, 59, 68, 77, 86, 95, 104, 113, 122, 131, 140, 149). In support of this error, defendants refer to and incorporate all objections to the Compensatory and Punitive Damage Verdict Directors with regard to DRIH and all grounds raised in defendants' motion for directed verdict and motion for judgment notwithstanding the verdict. The instruction is also erroneous because in Paragraph Second it improperly refers to the conduct of Doe Run Company, when it should have referred to the conduct of DRIH.

129. The Court erred in giving Instructions 152, 153, and 154 with regard to Preston Alexander, and the other identical instructions with regard to the claims of the other plaintiffs, because those instructions allow the jury to award punitive damages against these defendants for conduct when they were not partners, for the conduct of the partnership prior to these defendants becoming partners, and for the conduct of the partnership and not the conduct of these defendants. Under Missouri law, even if defendants or any of them could be liable for historical partnership liabilities, the defendants could only be liable to the extent of partnership assets with regard to any claim based on the conduct of the partnership when these defendants were not partners. Since there are no partnership assets, there is no liability for the any historical liabilities. Their instructions also erroneously permit the jury to impose punitive damages on partners for the conduct of other partners. These instructions also fail to provide for any

allocation of damages between claims based on conduct while the defendants were partners and claims based on conduct when they were not partners. The instructions were also erroneous because they improperly allowed duplicative damages based on the very same conduct. The verdicts against all three of these defendants are based on partnership liability, and these instructions allow duplicative punitive damage awards against all three partners based on the same conduct. Moreover, the verdict directing instructions erroneously allow the jury to base Fluor's liability for punitive damages on DRIH's status as a partner (*e.g.* Instruction 10), while at the same time allowing the jury also to award punitive damages against DRIH based on DRIH's status as a partner during the same time period (*e.g.* Instruction 12). Consequently, these instructions allow duplicate awards of punitive damages against Fluor and DRIH both based on the partnership status of DRIH for the same time period.

130. The Court erred in giving Instructions 153 and 154 as to Preston Alexander's claim, and all of the identical instructions submitted on behalf of the other defendants as to the claims of the other 15 plaintiffs, because they directed the jury to base punitive damages on the conduct of the partnership rather than the conduct or state of mind of the individual partners.

131. Defendants adopt, assert, and incorporate by reference the same errors raised above with regard to Instruction 152 as to Fluor for the Punitive Damages Instructions for the claims of the other 15 plaintiffs (Instructions 156, 160, 164, 168, 172, 176, 180, 184, 188, 192, 196, 200, 204, 208, 212).

132. Defendants adopt, assert, and incorporate by reference the same errors raised above with regard to Instruction 153 as to A.T. Massey for the Punitive Damages Instructions for the claims of the other 15 plaintiffs (Instructions 157, 161, 165, 169, 173, 177, 181, 185, 189, 193, 197, 201, 205, 209, 213).

133. Defendants adopt, assert, and incorporate by reference the same errors raised above with regard to Instruction 154 as to DRIH for the Punitive Damages Instructions for the claims of the other 15 plaintiffs (Instructions 158, 162, 166, 170, 174, 178, 182, 186, 190, 194, 198, 202, 206, 210, 214).

134. The Court also erred in refusing defendants' request to incorporate into Instructions 151, 152, and 152 the language contained in defendants' proposed Instructions E, F, G, H, and I. The proposed language was necessary to provide the jury with further guidance concerning the factors to consider in determining the appropriate amount of punitive damages. Under both federal and state cases, these instructions reflect the factors that a jury should consider in determining the appropriate amount of punitive damages.

135. The Court erred in giving Verdict Forms AA-PP for all the reasons stated above with regard to all compensatory and punitive damage verdict directors as to all plaintiffs and defendants, because the verdict forms allowed for the award of multiple and duplicative punitive damages awards against defendants for the same conduct, and because the verdict forms did not provide for an allocation between damages caused by conduct predating the time when defendants were partners and allowed for the jury to assess and award damages for conduct predating the time when defendants were partners, which is contrary to Missouri law as recognized by this Court in prior orders. Also with regard to Verdict Forms AA-PP, defendants assert and incorporate by reference all of their objections to Instructions 151, 152, and 153.

136. To the extent the instructions discussed above as to any of plaintiffs' claims against any defendants contain similar provisions, language, or terms, defendants intend that any objection asserted in this motion to any instruction shall be incorporated by reference and apply to all other instructions contain similar provisions, terms or language.

Henry Ordower

137. In response to Defendants' Motion in Limine, the Court found that: (1) Henry Ordower "shall not be allowed to opine in any fashion that the Court finds is an invasion of the province of the jury or the duties of this Court or offer an opinion concerning moral or ethical considerations, obligations or judgments regarding the Defendants;" and (2) James Fisher "shall not be allowed to opine in any fashion that the Court finds is an opinion on any moral or ethical considerations, obligations or judgment regarding the Defendants." *See* 4/22/11 MIL Order, ¶¶ 2, 3. During trial, the Court also found that Defendants' expert "may not comment upon what the law is." *See e.g.* Tr. 6/22/11 a.m., 73:11-22.

138. These rulings were consistent with Missouri law that states that expert opinion testimony on the law is inadmissible because it invades the province of the Court. *See 66 Inc. v. Crestwood Commons Redevelopment Corp.*, 130 S.W.3d 573, 592 (Mo. App. 2004) (finding an attorney witness' opinion inadmissible because it amounted to a legal conclusion); *see Cannady v. Firstcomp*, 2009 WL 707857 (W.D. Mo. 2009) ("[I]t is the Court's responsibility to provide the jury with the law in its instructions, and it will up to the jury to apply the facts of this case to the law in deciding whether Plaintiff's rights were violated.")

139. Despite this clear legal proposition and its motion in limine ruling, the Court permitted Ordower to opine, over Defendants' objection, on what the law is with respect to the legal responsibility of defendants for the conduct of the partnership predating (or post-dating) the time when they became partners. *See e.g.,* 5/10/11 p.m., 96:1 – 99:13, 99:17 – 100:24, 108:7 – 11:24, 112:7 – 113:6, 116:18 – 117:9, 124:16 – 125:10, 128:19 – 131:3, 133:1-12. The Court erred in allowing Ordower to testify about the allegedly applicable law, to testify to legal conclusions, and invade the province of the Court and the jury. The Court permitted Mr. Ordower to repeatedly testify about and misstate the scope of corporate or partnership liability

and give the jury his opinion about the applicable law. This testimony was improper because it purported to instruct the jury with regard to partnership liability law, called for legal conclusions, was contrary to the holding of the Court on the summary judgment motion in this case, and misstated Missouri law.

140. Ordower impermissibly opined on what the status of the law with respect to partnership liability. Ordower was asked if a partner remains "responsib[le]" after a partner leaves the partnership for toxic chemicals left in the ground when he was a partner, to which he responded: "Yes. Very definitely. If you create a hazard while you're a partner, then this is a consequence of that hazard." *E.g.* Tr. 5/11 p.m. 99:19 – 100:18. Ordower also testified that a partner "will be directly liable" for "any injury that creates a liability to a third party" and that a new partner "becomes liable" for prior injuries caused by former partners. *E.g.* Tr. 5/10/11 p.m., 93:5-19, 96:1-11; *see also*, Tr. 5/10/11 p.m., 93:5-19, 95:11-24.

141. The Court erred in permitting Mr. Ordower to testify that a partner becomes directly liable for the liabilities of a partnership to a third party. This testimony was improper because it purported to instruct the jury with regard to partnership liability law, called for a legal conclusion, invaded the province of the Court, was contrary to the holding of the Court on the summary judgment motion in this case, and misstated Missouri law.

142. The Court erred in permitting Mr. Ordower to testify when a partner becomes liable for the conduct of another partner, including testimony that a new partner assumes the partnership's historical liabilities. This testimony was improper because it purported to instruct the jury with regard to partnership liability law, called for a legal conclusion, invaded the province of the Court, was contrary to the holding of the Court on the summary judgment motion in this case, and misstated Missouri law.

143. The Court erred in permitting Mr. Ordower to testify that incoming partners assume all existing partnership liabilities. This testimony was improper because it purported to instruct the jury with regard to partnership liability law, called for a legal conclusion, invaded the province of the Court, was contrary to the holding of the Court on the summary judgment motion in this case, and misstated Missouri law.

144. The Court erred in permitting Mr. Ordower to testify about liabilities and obligations assumed upon a transfer of partnership interest. This testimony was improper because it purported to instruct the jury with regard to partnership liability law, called for a legal conclusion, invaded the province of the Court, was contrary to the holding of the Court on the summary judgment motion in this case, and misstated Missouri law.

145. The Court erred in permitting Mr. Ordower to testify regarding partnership obligations assumed by A.T. Massey Coal Company. This testimony was improper because it purported to instruct the jury with regard to partnership liability law, called for a legal conclusion, invaded the province of the Court, was contrary to the holding of the Court on the summary judgment motion in this case, and misstated Missouri law.

146. The Court erred in permitting Mr. Ordower to testify about the significance of being "wholly-owned" with regard to corporate liabilities. This testimony was improper because it purported to instruct the jury with regard to partnership liability law, called for a legal conclusion, invaded the province of the Court, was contrary to the holding of the Court on the summary judgment motion in this case, and misstated Missouri law.

147. The Court erred in permitting Mr. Ordower to testify about DRIH's assumptions of partnership liabilities. This testimony was improper because it purported to instruct the jury with regard to partnership liability law, called for a legal conclusion, invaded the province of the

Court, was contrary to the holding of the Court on the summary judgment motion in this case, and misstated Missouri law.

148. The Court erred in permitting Mr. Ordower to testify about an incoming partner's assumption of partnership liability, including historic liabilities under the terms of the partnership agreements. This testimony was improper because it purported to instruct the jury with regard to partnership liability law, called for a legal conclusion, invaded the province of the Court, was contrary to the holding of the Court on the summary judgment motion in this case, and misstated Missouri law.

149. The Court erred in permitting Mr. Ordower to testify that, based on the partnership agreement, Fluor assumed the historic liabilities of the partnership. This testimony was improper because it purported to instruct the jury with regard to partnership liability law, called for a legal conclusion, invaded the province of the Court, was contrary to the holding of the Court on the summary judgment motion in this case, and misstated Missouri law.

150. The Court erred in permitting Ordower to interpret the meaning of various business records to mean that Fluor had legal responsibilities over the operations of Doe Run. This testimony consisted of speculation and conjecture, was not an appropriate subject of expert testimony, lacked foundation, and was beyond the scope of any purported expertise.

151. The Court erred in permitting Ordower to speculate that Paul Allen would likely have reported to Fluor about EPA violations merely because he was a member of the partnership committee and that lawyers would likely have advised Fluor on setting up subsidiary companies and moving ownership interest in certain companies. This testimony was improper conjecture and speculation, lacked foundation, and was beyond the scope of any purported expertise of Ordower.

152. The Court erred in permitting Mr Ordower to give opinion testimony that he had not provided in his deposition. Defendants incorporate by reference their motion in limine with regard to Mr. Ordower and other experts being permitted to testify about opinions not disclosed during their deposition. Defendants also incorporate their renewed motion to exclude certain testimony from certain of plaintiffs' experts.

153. The Court erred in permitting Mr. Ordower to testify about the legal effect of the partnership agreement, Exhibit 163. This testimony was improper because it purported to instruct the jury with regard to partnership liability law, called for a legal conclusion, invaded the province of the Court, was contrary to the holding of the Court on the summary judgment motion in this case, and misstated Missouri law.

154. The Court erred in permitting Mr. Ordower to testify about plaintiffs' Exhibit 123, because no foundation was laid for him to testify about that exhibit and his testimony with regard to that exhibit was beyond his purported or designated area of expertise.

155. The Court erred in permitting to Mr. Ordower to testify that it was within the power of the partnership committee to issue directions to certain individuals to negotiate a consent order with the State, because the testimony was beyond his area of expertise and beyond the areas about which he had been designated to testify. This testimony was improper because it purported to instruct the jury with regard to partnership liability law, called for a legal conclusion, invaded the province of the Court, was contrary to the holding of the Court on the summary judgment motion in this case, and misstated Missouri law.

156. The Court erred in repeatedly permitting Mr. Ordower to read from and interpret documents that were beyond his area of expertise and outside the scope of the subject for which he had been designated to testify. The documents were hearsay, there was no foundation laid

that Mr. Ordower's experience or training qualified him to explain or interpret the documents, his testimony was speculative, and his testimony was not a proper subject for expert testimony. The Court erroneously permitted him to interpret or explain documents merely because the documents had been provided to him and he had read them.

157. The Court erred in permitting Mr. Ordower to testify about whether certain conduct by Mr. Allen or Mr. McCraw was consistent with their being a member of the partnership committee, because that testimony was beyond his area of expertise, was outside the area of expertise for which he had been disclosed, was without foundation, and called for speculation.

158. The Court erred in permitting Mr. Ordower to provide opinion testimony purporting to explain or interpret plaintiffs' Exhibit 1, because his testimony involved hearsay, was speculative, was beyond his expertise, and was beyond any area or topic for which he had been designated to testify as an expert.

159. The Court erred in permitting Mr. Ordower to testify regarding Exhibit 134, and in permitting him to interpret and explain that exhibit, because his testimony was speculative, without foundation, beyond his area of expertise, beyond the area for which the witness had been designated as an expert, and not a proper subject for opinion or expert testimony.

160. The Court erred in permitting Mr. Ordower to testify regarding Exhibit 137, and in permitting him to purport to interpret and explain that exhibit, because his testimony was speculative, without foundation, beyond his area of expertise, beyond the area with regard to which he had been designated, and not a proper subject for opinion or expert testimony.

161. The Court erred in permitting Mr. Ordower to testify with regard to Exhibit 138, and specifically to testify that pre-tax revenues made by Doe Run could have been used to buy

out the town of Herculaneum, because that testimony was speculative and beyond his area of expertise, and allowed him to suggest to the jury that defendants had a duty to buy out the plaintiffs.

162. The Court erred in permitting Mr. Ordower to interpret and provide opinion testimony regarding Exhibit 143, and to testify that certain matters referred to in that exhibit would be Fluor's "responsibility." This testimony was improper because it purported to instruct the jury with regard to partnership liability law, called for a legal conclusion, invaded the province of the Court, was contrary to the holding of the Court on the summary judgment motion in this case, and misstated Missouri law.

163. The Court erred in permitting Mr. Ordower to testify about and purport to interpret and explain Exhibit 145, because the document contained hearsay, no foundation was laid for the witness to interpret, explain, or otherwise testify about the exhibit. His testimony was outside his area of expertise and the subject matter for which he had been designated to testify, and was not a proper subject for expert testimony.

164. The Court erred in permitting Mr. Ordower to testify about and purport to interpret and explain Exhibit 154, because the questions asked of Mr. Ordower called for hearsay, the document contained hearsay, no foundation was laid for the witness to interpret, explain, or otherwise testify about the exhibit. His testimony was outside his area of expertise and the subject matter for which he had been designated to testify, and was not a proper subject for expert testimony.

165. The Court erred in permitting Mr. Ordower to interpret and give his opinion regarding the meaning and effect of Exhibit 101, because the document spoke for itself and was not a proper subject of and did not call for opinion testimony, no foundation was laid for the

witness to interpret, explain, or otherwise testify about the exhibit. His testimony was outside his area of expertise and the subject matter for which he had been designated to testify.

166. The Court erred in refusing to permit defendants to cross examine Mr. Ordower with regard to the terms and effect of the 1994 Sale Agreement, because that testimony was responsive to statements made by Mr. Ordower during direct examination, reflected the parties' characterization and treatment of the liabilities of the partnership, was relevant in response to Mr. Ordower's testimony about the liabilities of the partnership and the past partners, and contained information establishing the amount of the sale and that, as part of the sale, a reserve of over $24.8 million has been set aside for environmental matters. The evidence was relevant to the issues regarding the relationship of the defendants to the partnership and other former defendants. Evidence concerning the environmental reserve also was relevant and responsive to plaintiffs' claim and argument that Fluor and the partnership were not allocating sufficient amounts of money to address environmental issues, and that Fluor was putting profits over health and safety issues and was acting with complete indifference or conscious disregard for the health and safety of others. The evidence regarding the environmental reserve was relevant not only to the issue of whether Fluor had the state of mind necessary to support and award punitive damages, but also to the amount of any punitive damages to be awarded. *See* Defendants' Motion to Reconsider and Written Offer of Proof with regard to the 1994 Sale Agreement and related documents, filed July 21, 2011, which are incorporated by reference

167. The Court erred in permitting Mr. Ordower to testify when a partner could be held liable for injuries incurred by a third party, even when the third party did not bring an action until after the partner left the partnership. This testimony was improper because it purported to instruct the jury with regard to partnership liability law, called for a legal conclusion, invaded the

province of the Court, and was contrary to the holding of the Court on the summary judgment motion in this case.

168. Defendants incorporate by reference their Motion to Strike Plaintiffs' Experts Henry Ordower and James Fisher that was filed on April 8, 2011.

James Fisher

169. Witness James Fisher is an associate professor of marketing with no expertise with respect to engineering, environmental, regulatory, legal, or medical matters. He is not a lawyer. Despite his lack of qualifications, Fisher was erroneously permitted to offer his opinions about legal issues, including duty of care, "primary responsibility" for safety issues related to the smelter, and assumption of liabilities.

170. Contrary to the its own order in response to defendants' motion in limine, the Court erred in permitting Fisher to opine that Fluor took on legal liabilities related to lead released into the air and had certain obligations and duties to Herculaneum residents by virtue of its involvement in the affairs of Doe Run.

171. The Court erred when it permitted Fisher to opine that Fluor took "primary responsibility" for the potential harm caused by pollution from the smelter by virtue of its participation in the affairs of Doe Run and control over the smelter. *E.g.* Tr. 6/20/11, 1:3 – 3:21, 23:3 – 24:7. First, this was an improper opinion on the law which is inadmissible. *See 66 Inc. v. Crestwood Commons Redevelopment Corp.*, 130 S.W.3d 573, 592 (Mo. App. 2004). Second, this opinion should also have been excluded because it lacked foundation in that it was based on ethical principles and his personal, subjective sense of right and wrong which are not a proper basis of expert testimony because such opinions tend to confuse and mislead the jury. *See In re Cessna 208 Series Aircraft Products Liability Litigation*, 2009 WL 1357234 (D. Kan. 2009); *Concord Boat Corp. v. Brunswich Corp.*, 1998 WL 35254137 (E.D. Ark. 1998) (excluding

business ethicist expert testimony because the jury may have incorrectly assumed that a breach of an ethical obligation equals a violation of the applicable legal standard); *In re Redulin Products Liability Litigation*, 309 F.Supp.2d 531, 542 (S.D. N.Y. 2004) (finding that expert testimony concerning the defendant's ethical character not relevant to the legal issues raised). Fisher also was not competent to render these opinions because he lacked legal training or experience or the necessary engineering or environmental experience concerning smelter operations, or scientific or medical knowledge about the alleged harm caused.

172. The Court erred when it permitted Fisher to opine that Fluor had a duty of care "to take reasonable and effective action not to do harm," *E.g.* Tr. 6/20/11 a.m., 24:8 – 19, and that the partnership, by virtue of the Partnership Agreement (Plaintiff's Exhibit 112), "took on" possible liabilities related to air emissions. *E.g.* Tr. 6/20/11 a.m., 50:18 – 51:23. The Court further erred when it permitted Fisher to testify that A.T. Massey "[took] on" the liabilities of "community legal action." These were each inadmissible opinions on the law which invaded the province of the Court. *See 66 Inc. v. Crestwood Commons Redevelopment Corp.*, 130 S.W.3d 573, 592 (Mo. App. 2004). Mr. Fisher also was not qualified by training, education, or experience to give opinions on these topics, and his opinions were without foundation.

173. The Court erred when it permitted Fisher to opine that management at the smelter attempted to "avoid[]", "reduce" or "put off" expenditures after being asked to increase profits. *E.g.* Tr. 6/20/11 a.m., 44:13 – 46:6. It further erred in permitting Fisher to opine that it was not "good business conduct" to withhold information from the public and that corporations have a "duty" to explain the risks of living near where the corporation operates and to "do no harm". *E.g.* Tr. 6/20/11 a.m., 49:7 -50:15, 53:10 – 54:11, 54:16 – 55:23, 61:20 – 62:6, 68:5 – 16. Further, the Court erred in permitting Fisher to opine that the company weighed the public good

of installing a monitor on the fence line against the possibility of increased liabilities and legal action. Fisher was not qualified by training, education, or experience to give opinions on these topics. These opinions also should have been excluded because they lacked foundation in that they were based on ethical principles and his personal, subjective sense of right and wrong which are not a proper basis of expert testimony because such opinions tend to confuse and mislead the jury. *See In re Cessna 208 Series Aircraft Products Liability Litigation*, 2009 WL 1357234 (D. Kan. 2009); *Concord Boat Corp. v. Brunswich Corp.*, 1998 WL 35254137 (E.D. Ark. 1998) (excluding business ethicist expert testimony because the jury may have incorrectly assumed that a breach of an ethical obligation equals a violation of the applicable legal standard); *In re Redulin Products Liability Litigation*, 309 F.Supp.2d 531, 542 (S.D. N.Y. 2004) (finding that expert testimony concerning the defendant's ethical character not relevant to the legal issues raised). Further, Fisher was not competent to render these opinions because he lacked legal training or the necessary engineering or environmental training or experience concerning smelter operations, or scientific or medical knowledge about the alleged harm. These opinions also involved inadmissible speculation, and purported to interpret the subjective intent of the defendants.

174. The Court erred in permitting Fisher to interpret and speculate as to the meaning and intention of the authors of various documents from Doe Run files, including Plaintiff's Exhibits 1, 93, 151, 68, 415, 433, 442, and 1040. For example, Fisher speculated that the salutation "Dear Resident" in a letter from Doe Run did not convey an appropriate sense of importance and was unlikely to have made an impression on the community. Where – as is the case here – an expert's opinion is irrelevant and based on speculation and conjecture as opposed

to specialized or scientific knowledge, admission of such an opinion constitutes reversible error. *McGuire v. Seltsam*, 138 S.W.3d 718, 721-22 (Mo. banc 2004).

175. The Court erred in permitting Fisher to opine that it is not reasonable for a company to weigh the likelihood of increased litigation against potential harm to the community. These opinions should have been excluded because they lacked foundation in that they were based on ethical principles and his personal, subjective sense of right and wrong as well as what considerations Doe Run may have been taking into account which are not proper subjects for expert testimony because such opinions tend to confuse and mislead the jury. *See In re Cessna 208 Series Aircraft Products Liability Litigation*, 2009 WL 1357234 (D. Kan. 2009); *Concord Boat Corp. v. Brunswich Corp.*, 1998 WL 35254137 (E.D. Ark. 1998) (excluding business ethicist expert testimony because the jury may have incorrectly assumed that a breach of an ethical obligation equals a violation of the applicable legal standard); *In re Redulin Products Liability Litigation*, 309 F.Supp.2d 531, 542 (S.D. N.Y. 2004) (finding that expert testimony concerning the defendant's ethical character not relevant to the legal issues raised). Fisher also was not competent to give this testimony because he lacked the necessary legal education or training or the necessary engineering or environmental training or experience concerning smelter operations, or scientific or medical knowledge about the alleged harm caused. In addition, the opinions constituted inadmissible speculation and lacked foundation.

176. The Court erred in permitted Fisher to speculate that not permitting children to live in Doe Run owned houses was an attempt to avoid liability. Fisher had no expert basis of foundation for this opinion, and expert opinions based solely on speculation and conjecture and lacking foundation are inadmissible. *McGuire v. Seltsam*, 138 S.W.3d 718, 721-22 (Mo. banc 2004).

177. The Court erred in permitting Fisher to opine that Fluor should have bought out residents and "removed them from harm's way." *E.g.* Tr. 6/20/11 p.m., 45:14 – 46:22. This opinion should have been excluded because it lacked foundation in that it was based on ethical principles and his personal, subjective sense of right and wrong, which are not a proper basis of expert testimony because such opinions tend to confuse and mislead the jury, and because the opinion is based on speculation. *See In re Cessna 208 Series Aircraft Products Liability Litigation*, 2009 WL 1357234 (D. Kan. 2009); *Concord Boat Corp. v. Brunswich Corp.*, 1998 WL 35254137 (E.D. Ark. 1998) (excluding business ethicist expert testimony because the jury may have incorrectly assumed that a breach of an ethical obligation equals a violation of the applicable legal standard); *In re Redulin Products Liability Litigation*, 309 F.Supp.2d 531, 542 (S.D. N.Y. 2004) (finding that expert testimony concerning the defendant's ethical character not relevant to the legal issues raised). Fisher also was not competent to testify about these matters because he lacked the legal education or training and the necessary engineering or environmental experience or training concerning smelter operations, or scientific or medical knowledge about the alleged harm, and improperly suggested to the jury that defendants had a duty to buy out the plaintiffs, which constituted a legal conclusion and invaded the province of the Court and the jury.

178. The Court erred in permitting Fisher to opine that based on his review of the trial exhibits, Fluor was aware of the dangers of lead emanating from the smelter to children in Herculaneum. *E.g.* Tr. 6/20/11 p.m., 43:4 – 16. Where – as is the case here – an expert's opinion is irrelevant and based on speculation and conjecture as opposed to specialized knowledge, admission of such an opinion constitutes reversible error. *McGuire v. Seltsam*, 138 S.W.3d 718, 721-22 (Mo. banc 2004). Fisher lacked the necessary engineering or environmental

experience concerning smelter operations, or scientific or medical knowledge about the alleged harm caused to qualify him to render these opinions, and therefore was not qualified to render this opinion. § 490.065.1, RSMo.; *State v. Watt*, 884 S.W.2d 413, 415-16 (Mo. App. 1994) (in order to provide an expert opinion, it must first be shown that the witness has sufficient experience and acquaintance with the phenomena involved). Nor was Fisher qualified as a mind-reader.

179. The Court erred in permitting Fisher to opine that Doe Run was pulling punches and otherwise dishonest in Neighborhood Notes (Defendant's Exhibit 5A) regarding lead content in the soil. *E.g.* Tr. 6/21/11 p.m., 26:22 – 28:19. This opinion is improper because it is nothing more than his personal belief, *see In re Reduline*, 309 F.Supp.2d at 543 (excluding testimony of business ethics expert because his opinions merely amounted to his own personal beliefs), and not based upon any engineering, environmental, or legal experience concerning smelter operations, or scientific or medical knowledge about the alleged harm caused. Fisher was not qualified to characterize defendants' actions or intent.

180. The Court erred in permitting Fisher to opine that a Doe Run communication was alarming that Fisher admitted he had not even seen prior to trial. *E.g.* Tr. 6/20/11 a.m., 61:11 – 62:6. It further erred in permitting Fisher to offer new opinions regarding the importance of blood lead studies. These were new opinions, admitted in violation of the Court's in limine ruling, which Fisher was not qualified to give and therefore, were without foundation. § 490.065.1, RSMo.; *State v. Watt*, 884 S.W.2d 413, 415-16 (Mo. App. 1994) (in order to provide an expert opinion, it must first be shown that the witness has sufficient experience and acquaintance with the phenomena involved).

181. The Court erred in permitting Fisher to testify that Fluor had a responsibility for pollution and that it was outrageous that Fluor did not report air monitoring data to the people in the community. *E.g.* Tr. 6/20/11 a.m., pp. 23, 49, 54, 55. Fisher was not qualified by education, training or experience to give opinions on these topics, which constituted legal conclusions and invaded the province of the Court and improperly instructed the jury on the law. For the same reasons, the Court erred in permitting Fisher to give similar opinions about Fluor's responsibility for and failure to warn about soil contamination.

182. The Court erred in permitting Fisher to testify that blood levels were alarming to him and that there was a health care emergency, and to interpret CDC standards and offer opinions on other health issues. *E.g.* Tr. 6/20/11 a.m., pp. 61, 63, 64, 67, 70. Fisher was not qualified by education, experience or training to give opinions on these topics, the opinions lacked foundation and were not supported by the record, and reflected only his personal opinion based on his subjective sense of right and wrong.

183. The Court erred in permitting Mr. Fisher to testify that a corporation has a duty and obligation to explain risks to the surrounding community. Mr. Fisher was not qualified by education, experience or training to give opinions on this issue. These were legal conclusions that invaded the province of the Court and improperly instructed the jury on the law.

184. The Court erred in permitting Mr. Fisher to testify that Fluor failed to use the degree of care of an ordinarily prudent corporation in communications with its neighbors. This was a new opinion that he did not disclose at his deposition. In addition, Mr. Fisher was not qualified by education, experience or training to give opinions on this topic, and his opinions constituted legal conclusions that invaded the province of the Court.

185. Defendants incorporate by reference their Motion to Strike Plaintiffs' Experts Henry Ordower and James Fisher that was filed on April 8, 2011.

Dr. George Rodgers

186. The Court erred in permitting Dr. Rodgers to opine that lead causes loss of IQ, learning disabilities and Attention Deficit Disorder in general, and that lead emanating from the smelter caused various cognitive and behavioral problems. In support of this opinion, Dr. Rodgers pointed to a body of literature he had compiled over the years which he claimed supported that conclusion, but acknowledged that the studies comprising that body of literature found only associations rather than a causal relationship between lead and such problems. Nonetheless, Dr. Rodgers stated that he can view the body of literature as a whole and infer a causal relationship, ostensibly on the basis of volume; that is, if enough studies show an association, he assumes there must also be causation. This methodology is nothing more than his personal assumption and conjecture that, if enough studies find an association, there must be causation, which is not a proper basis of expert opinion testimony. *McGuire v. Seltsam*, 138 S.W.3d 718, 721-22 (Mo. banc 2004). Dr. Rodgers' testimony that plaintiffs had lower IQs as a result of lead emissions and his attempt to quantify those deficiencies was undocumented, incompetent speculation, unsupported by any scientific or other reliable data. Moreover, Dr. Rodgers' opinions for certain Plaintiffs rely upon Dr. Ryer-Powder's flawed IEUBK modeling to provide predictions of childhood blood levels. His opinions also lacked foundation because he could not testify that plaintiffs will suffer from any conditions in the future with any degree of medical certainty, and had no air emissions data from which to draw conclusions that lead from the smelter caused asthma. Dr. Rodgers opinions were not based on any facts or data relied on by experts in the field and were not based on reasonably reliable facts or data as required by Section 490.065.

187. Defendants incorporate by reference their Motion in Limine to Exclude Certain Testimony from Plaintiffs' Expert George Rodgers that was filed on April 8, 2011.

Carl Hansen's 15-30% Adjustment Opinion

188. The trial court erred in permitting damages testimony of Dr. Carl Hansen regarding the augmentation by 15% to 30% of lost earning capacity damages.

189. Dr. Hansen initially testified and admitted in deposition that he could not assign a greater loss for additional periods of unemployment due to ADHD and would have to defer to an economist. He thus admitted that an opinion regarding augmentation of lost earning capacity damages was neither within his qualifications nor within the normal purview of his profession. It therefore was reversible error to permit this testimony at trial. *See Johnson v. State*, 58 S.W.3d 496, 499 (Mo. 2001).

190. In fact, economist Robert Johnson was the first expert to include a 30% add-on. Similarly, Johnson admitted at trial that his use of a 30% add-on was based on an assumption that he lacked the expertise to make. He did it for illustrative purposes for the jury.

191. Hansen's lack of knowledge, background and expertise on this topic became clearer when cross-examined on this opinion. He attempted to testify that his 15% to 30% numbers reflected the increased period of unemployment that a person with ADHD would experience.

192. In further contradiction of his opinions and confusion to the jury, he then stated that the 15% to 30% add-on could well be reduced by a few percentage points for the normal attrition that happens. *E.g.* Tr. 6/10/11 p.m., p. 15. Yet, his opinions of lost earning capacity contained no reduction for average time out of the work force expected of a person without ADHD.

193. The 15% to 30% add-on for lost earnings capacity damages claimed by Dr. Hansen was pure speculation and conjecture, lacked evidentiary support, was not based on reliable scientific data, was not based on data or facts relied upon by experts in this field, and was based on facts outside Dr. Hansen's knowledge and upon which he lacked qualification to testify under section 490.065, RSMo 2000. His opinions to this effect should have been excluded, and their admission prejudiced the defendants.

194. Defendants incorporate by reference their Motion to Exclude and/or Limit Testimony of Plaintiff's Retained Expert Carl Hansen that was filed on April 8, 2011.

Robert Johnson's speculative and unsupported damages

195. The trial court erred and abused its discretion to the prejudice of the defendants in permitting unsupported and unqualified damages testimony by Robert Johnson regarding lost earning capacity as well as in admitting Trial Exhibits 954 through 969-3 created and used by Johnson. His testimony was pure speculation and conjecture, lacked evidentiary support, was not based on any reliable data, was based on facts outside Johnson's knowledge and failed to satisfy section 490.065, RSMo 2000. The exhibits improperly introduced through Johnson's testimony were not supported by the record, lacked foundation, were not based on reliable data, were not based on facts or data of the type relied upon by experts in the field, and the exhibits are not based on facts or data that are otherwise reasonably reliable. The exhibits were unsupported by and inconsistent with the testimony and assumptions of Johnson, Hansen and other witnesses and should not have been admitted.

196. Johnson admitted that he lacked the expertise to assess each plaintiff's educational attainment or determine their career paths in the future and that he relied on Dr.

Hansen for those inputs. In fact, he based his opinions entirely upon the conclusions of Dr. Hansen.

197. Johnson's lost earning capacity calculations should not have been admitted into evidence because they materially departed from the conclusions of Dr. Hansen and thus were pure speculation, conjecture, lacked evidentiary support, were not stated to a reasonable degree of certainty and therefore were inadmissible. The jury was misled, and defendants were prejudiced by Johnson's gross overstatement of plaintiffs' lost earning capacities.

198. The numerical and substantive inputs used in Johnson's calculations conflicted with Dr. Hansen's testimony or were wholly absent from Dr. Hansen's testimony. These conflicts and unsupported conclusions include the following:

199. With respect to plaintiff Isaiah Yates, Dr. Hansen testified, as a vocational expert, that he expected Isaiah Yates to go beyond high school in his education. Yet, Johnson provided an upper-limit damages calculation based on a scenario that Mr. Yates did nothing more than get a high school diploma. Ex. 969-3.

200. With respect to plaintiff Lauren Shanks, Dr. Hansen testified, based on his vocational expertise, that Ms. Shanks would have a range of annual lost earning capacity of $9,000 to $16,000. Yet, Johnson replaced Hansen's numbers with a significantly higher annual loss range of $12,217 to $20,277. Ex. 968.

201. With respect to plaintiff Preston Alexander, Dr. Hansen testified, based on his vocational expertise, that with "some college credits" after high school Alexander would earn $43,830 per year, compared with expected earnings of $60,090 for being a college graduate had he not been injured. *E.g.* Tr. 6/9/11 p.m., p. 153. Dr. Hansen thus concluded an upper-limit loss of $17,000. *Id.* Contrary to Dr. Hansen, Johnson based his upper-limit loss on Mr. Alexander

being only a high school graduate with no additional college, which was factually incorrect, resulting in an unsupported upper-limit annual loss number of $26,118 used in Johnson's calculations for Mr. Alexander. Ex. 955.

202. With respect to plaintiff Tiffany Bolden, Dr. Hansen testified that her lower-limit annual earning capacity loss was $10,961. Despite his admitted lack of vocational qualifications or expertise, Johnson rejected Hansen's conclusion and used $20,229 as his low-end value. Ex. 958.

203. With respect to plaintiff Nathan Davis, Dr. Hansen testified and confirmed that Mr. Davis was able to earn, and was earning, $24,648 per year in a production job. However, Johnson's lost earning capacity calculations included a scenario for "entry level protective services" starting at a lower salary ($20,226) than Nathan had and created a gap of approximately $18,000 per year. Ex. 959. Because the facts indicated that Nathan had the capacity and ability to earn at least $24,634, Johnson could not base a loss of earning capacity calculation on something less than he and Dr. Hansen admitted that plaintiff could earn. Johnson's improper third scenario on this basis (Ex. 959) improperly raised the range of potential damages, and this augmentation was not supported by the evidence.

204. With respect to plaintiff Gabe Farmer, Dr. Hansen testified that he did not expect Mr. Farmer would have obtained a college bachelor's degree, even without ADHD, and would have a range of loss of between $10,230 and $13,675. Yet, Johnson presented evidence based on a range of a $10,762 to $26,972 annual lost earning capacity, with the increased upper limit based on the purported capacity of Mr. Farmer to have obtained a bachelor's degree, which Dr. Hansen had expressly denied. Ex. 960.

205. With respect to plaintiff Sydney Fisher, Dr. Hansen's best speculation was that she would achieve an associate of arts degree but not a college bachelor's degree, which would result in an annual lost earning capacity of $10,250. Johnson rejected this estimated loss on this basis and testified that this educational deficit would result in an annual loss of $16,310. (Ex. 961). Johnson then gave an even higher damage figure on the basis that Sydney would only finish high school -- a conclusion directly contradicted by Dr. Hansen's testimony -- which resulted in an even greater earning capacity loss of $26,294. Ex. 961. Johnson admitted he added this scenario at the request of plaintiffs' counsel, not because Dr. Hansen had this in his report.

206. With respect to plaintiff Matthew Heilig, Dr. Hansen testified that he likely would obtain a high school diploma giving him the capacity to earn $38,214 per year versus an inability to obtain an associate of arts degree, resulting in a $10,230 per year loss. Yet, both Hansen and Johnson used Mr. Heilig's election to take a lower paying mechanic's job at $26,055 per year (Ex. 965) as the basis for higher annual loss figures, which was factually unsupported given his admitted capacity to earn in the average range for a high school graduate.

207. With respect to plaintiff Jonathan Miller, Dr. Hansen testified that he would graduate high school and get an associate's degree, but would be unable to get a bachelor's degree due to ADHD, resulting in an annual lost earning capacity of $13,840. Yet, Johnson offered a damages scenario based on Mr. Miller completing only high school, resulting in a greater annual lost earnings capacity, which was unsupported by Hansen's testimony. Ex. 967. Johnson admitted he added this scenario at the request of plaintiffs' counsel, not because Dr. Hansen had this in his report.

208. Further, Dr. Hansen provided specific lost earning capacity figures in his testimony. Johnson used different figures for nearly all of the plaintiffs' economic calculations, despite his admitted lack of ability and expertise to make those determinations. As a result, Mr. Johnson's damage calculations should have been excluded.

209. Johnson's damages calculations also were based on the incorrect assumption that the plaintiffs would work continuously and uninterrupted until age 65. On the contrary, the evidence at trial confirmed that the average person would be employed about 77% to 82% during their lifetime. Dr. Hansen testified that the average person, even without ADHD, would not work continuously until age 65 and that the damages values should reflect this attrition. Johnson, himself, agreed that continuous and uninterrupted employment during a person's working years would be unrealistic and that a 77% work time expectancy was accurate. Yet, he based his calculations, however, on each plaintiff working continuously and without interruption until age 65 rather than a lesser percentage of that time period (*see* Trial Exs. 954 through 969-3), which resulted in inflated and unsupported lost earning capacity damage calculations. This testimony was speculative, not supported by any reliable data, inconsistent with the assumptions on which it was purportedly based, and should have been excluded. A reduction of these damages calculations based on average expected work duration should have been applied.

210. Mr. Johnson's testimony was also fundamentally flawed and inadmissible because he admitted that "more likely than not" an average person not suffering from ADHD would not work uninterrupted until retirement at age 65, and then ignored this fact when calculating plaintiffs' damages. An expert must testify that he or she holds an opinion to a reasonable degree of certainty. Mr. Johnson's testimony about damages should have been excluded because he failed to apply even a "more likely than not" standard, much less the required "reasonable

degree of certainty" standard. Mr. Johnson improperly based his opinions merely on plaintiffs' maximum potential earning capacities, rather than a period of employment that he could predict to a reasonable degree of certainty (or even characterized as more likely than not).

211. Johnson erroneously increased all lost earning capacity damages by 15% to 30%, which should have been excluded for lack of foundation. Dr. Hansen did not include this add-on in his initial reports. A random 30% add-on was first injected by Mr. Johnson in an initial report, despite his lack of vocational expertise to opine that an additional loss would be attributed to ADHD. Johnson then consulted Dr. Hansen, who modified his reports to opine, still without basis, that the lost earning capacity should be increased by 15-30% for ADHD sufferers. Randomly increasing plaintiffs' damages by 15% to 30% was pure speculation and conjecture. Even if 15-30% was somehow supported, Dr. Hansen testified that those figures should have been reduced for normal expected work attrition. *E.g.* Tr. 6/10/11 p.m., p. 15 ("15 to 30 percent, [ ] it could well be reduced by a few percentage points for the normal attrition that happens."). Johnson rejected the conclusions of plaintiffs' vocational expert that average work life expectancy should be used. He also did not reduce the 15-30% add-on on the basis of normal attrition, despite Dr. Hansen's instruction.

212. Under Missouri law, where an expert's opinion is irrelevant and based on speculation and conjecture as opposed to specialized knowledge, admission of such an opinion constitutes reversible error. *McGuire v. Seltsam*, 138 S.W.3d 718, 721-22 (Mo. 2004). Where an expert's opinion lacks "substantial evidentiary support," the opinion is inadmissible. *See Greer v. Continental Gaming Co.*, 5 S.W.3d 559, 566-67 (Mo. App. 1999); *see also*, *Hobbs v. Harken*, 969 S.W.2d 318, 325 (Mo. App. 1998) and *First Nat. Bank of Fort Smith v. Kansas City S. Ry. Co*, 865 S.W.2d 719, 738 (Mo. App. 1993). If an economist is used to present the plaintiff's lost

earnings, there must be a proper evidentiary foundation for any assumptions the economist makes. *See Hobbs v. Harken*, 969 S.W.2d 318 (Mo. App. W.D. 1998). Robert Johnson's opinion testimony failed all of these standards.

213. Johnson's lost earning capacity calculations should not have been admitted into evidence because they materially departed from the conclusions of Dr. Hansen and thus were pure speculation, conjecture, lacked in evidentiary support, were not stated to a reasonable degree of certainty and therefore inadmissible. Neither he nor his opinions were qualified under section 490.065, RSMo 2000. The jury was misled, and the defendants were prejudiced by Johnson's gross overstatement of plaintiffs' lost earning capacities.

214. Defendants incorporate by reference their Motion to Exclude and/or Limit Testimony of Plaintiffs' Expert Robert Johnson that was filed on April 8, 2011.

215. The Court should order a new trial because the damages awarded are duplicative, in that the amounts testified to by Johnson included damages resulting from the alleged effects of lead exposure, including loss of IQ, and plaintiffs requested and the jury awarded damages that included both the damages Johnson estimated and additional amounts for lost IQ points.

216. Moreover, plaintiffs' compensatory damages were based solely upon Johnson's improper and inadmissible opinions on Plaintiffs' lost earning capacities. Because these opinions lacked evidentiary foundation, it follows that Plaintiffs' compensatory damage award – based on those faulty opinions – also lacked foundation. Accordingly, due to plaintiffs' failure to establish actual damages, the Court should enter a JNOV as to all plaintiffs. If the Court does not enter a JNOV, a new trail is warranted.

Dr. Jeff Sippel

217. The Court erred in permitting Dr. Sippel to opine that Plaintiffs Matthew Heilig, Sydney Fisher and Patrick Blanks were harmed by exposure to lead, specifically that these

Plaintiffs were "likely to have holes" in their brains, and to provide expert opinion testimony on the vocational outlook for Plaintiffs. *E.g.* Tr. 5/12/11 p.m., 6:3 – 8:2, 64:24 – 72:12; 85:15 – 87:11, 95:9 – 96:18; 5/13/11 a.m., 12:23 – 13:22. Dr. Sippel was identified merely as a treating physician only and never designated in the areas of toxicology and causation. These expert opinions were outside the scope of his expertise and outside the designation as a treating physician. In order to provide an expert opinion, the expert must be qualified to provide that opinion. § 490.065.1, RSMo.; *State v. Watt*, 884 S.W.2d 413, 415-16 (Mo. App. 1994) (in order to provide an expert opinion, it must first be shown that the witness has sufficient experience and acquaintance with the phenomena involved). In order to determine whether a witness is qualified to provide an expert opinion on a given matter, the trial court must look to the witness's area of expertise. *Johnson v. State*, 58 S.W.3d 496, 499 (Mo. banc 2001). When an expert is attempting to provide testimony regarding a matter that does not fall within the normal purview of the witness's profession, it is reversible error not to exclude that testimony from trial. *Id.* Here Dr. Sippel should have been limited to providing testimony regarding the "diagnosis and treatment of the sick" – the topic for which he was designated. As a physician, he has no background in toxicology, causation, or any lead-specific field, without which he is not qualified to provide testimony regarding such matters. Moreover, as a treating physician, and not an expert, he should not have been permitted to talk about scientific literature.

218. The Court erred in permitting Dr. Sippel to testify about vocational issues with regard to plaintiffs because he was not qualified by education, knowledge or experience to give opinions on vocational issues, he was not designated as an expert witness with regard to that issue, and his opinions given at trial on vocational issues had not been previously disclosed. § 490.065.1, RSMo.; *State v. Watt*, 884 S.W.2d 413, 415-16 (Mo. App. 1994) (in order to

provide an expert opinion, it must first be shown that the witness has sufficient experience and acquaintance with the phenomena involved). An expert witness should be limited to opinions for which the witness has been designated and which have been provided during the expert's deposition. Allowing Sippel to testify about these issues cannot be reconciled with the Court's later refusal to permit Dr. Antell to testify about vocational issues.

219. Defendants incorporate by reference their Motion to Strike and/or Limit Expert Testimony of Plaintiffs' Retained Experts (Section VI) that was filed on April 8, 2011.

Kristen Brown

220. The Court erred in permitted Kristen Brown, a licensed professional counselor, to opine that Plaintiff Gabe Farmer has ADHD. Ms. Brown was designated as a non-retained treating counselor who saw Farmer twice regarding "sadness" after a breakup. She claimed to have diagnosed Farmer with ADHD, despite providing no evidence that she was qualified to make such a diagnosis, especially in the limited time she spent with Farmer. Without showing the requisite qualifications in diagnosing ADHD, this opinion lacked foundation. § 490.065.1, RSMo.; *State v. Watt*, 884 S.W.2d 413, 415-16 (Mo. App. 1994) (in order to provide an expert opinion, it must first be shown that the witness has sufficient experience and acquaintance with the phenomena involved).

221. Defendants incorporate by reference their Motion to Strike and/or Limit Expert Testimony of Plaintiffs' Retained Experts (Section VI) that was filed on April 8, 2011.

Dr. Robert O'Conner

222. The Court erred in permitting Dr. O'Conner to opine that lead that entered the soil prior to 1994 was a substantial contributing factor to Plaintiffs' exposure and that the majority of the lead plaintiffs were exposed to was from the smelter. An expert witness is precluded from changing his testimony or the basis of his testimony offered during his discovery deposition

without advance notice to defendants to allow them an opportunity to prepare for the issues raised by such a change in opinion. *Green v. Fleishman*, 882 S.W.2d 219 (Mo. App. 1994). Yet despite this clear law against changing opinions and the Court's order granting Defendants' Motion in Limine to exclude new expert opinions, Dr. O'Conner was permitted to offer a new opinion that was contrary to his deposition testimony where he stated: (1) he had made no attempt to quantify how much lead was deposited at certain locations in Herculaneum from the smelter or what period of time that lead was deposited; and (2) there was no way to determine that lead emitted from 1981 to 1994 was a substantial contributor to the health effects of Plaintiffs. Because this opinion was entirely new, it should have been excluded for that reason alone. Moreover, in addition to being a new opinion, this opinion was without scientific explanation or analysis, and therefore lacked proper foundation and should have been excluded. *State v. Watt*, 884 S.W.2d 413, 415-16 (in order to provide an expert opinion, it must first be shown that the witness has sufficient experience and acquaintance with the phenomena involved).

223. The Court erred in permitting Dr. O'Conner to opine that the residents living near the smelter should have been bought out on a "rush basis" and that these residents "should have been offered a chance to get out of there by a buyout" much earlier than 1989. *E.g.* Tr. 5/26/11 p.m., 139:20 – 142:16. This opinion as to what should have been done in the 1980's is purportedly based on lead level sampling from Herculaneum homes that was done in 2005. He provided no scientific or other expert explanation as to how lead level testing from 2005 can inform his opinion of what should have been done at any point prior to 2005, but instead merely states that the 2005 testing informed him of what would have likely been found if anybody had bothered to test the houses in the 1980's. Speculation and guesswork without any scientific

explanation or analysis as to what lead levels might have been in Herculaneum homes in the 1980's based on 2005 test results is not a proper basis for expert testimony. *Harken*, 969 S.W.2d at 318 (an expert's opinion must not be founded on mere assumption or surmise, but on facts within the expert's knowledge or upon hypothetical questions embracing proven facts). O'Conner testified as to what should have been done in the 1980's in response to lead levels, when he has no idea what the lead levels were in Herculaneum in the 1980's. The Court should have excluded this opinion due to this lack of foundation. In addition, O'Conner was not qualified by education, training or experience to give an opinion on this topic. The opinion also improperly suggested to the jury that defendants had a legal duty to buy out the plaintiffs.

224. The Court erred in permitting plaintiffs' experts to testify that they based their opinions on scientific studies and tests when those studies and tests were conducted post-1994 after Defendants no longer had any ownership position in Doe Run. For instance, Dr. O'Conner's opinion that phosphate fertilizer applied to residents' yards by Doe Run in the early 1990's did "diddley" to prevent lead exposure was based on a 2004 study. *E.g.* Tr. 5/26/11 p.m., 131:6 – 133:25. It is fundamentally unfair to permit Dr. O'Conner to criticize Doe Run's remediation efforts using information that was only first available 10 years after defendants ceased involvement in smelter operations, and years after the use of phosphate fertilizer was tried. Likewise, the Court similarly erred in permitting Dr. Rodgers to opine that lead caused Plaintiffs' ADHD, IQ loss, and other claimed injuries based upon information from post-1994 lead studies, some of which were published as recently as 2008.

225. Defendants incorporate by reference their Motion to Strike and/or Limit Expert Testimony of Plaintiffs' Retained Experts (Section IV) that was filed on April 8, 2011.

James Tarr

226. The Court erred in permitting James Tarr to offer the following opinions that were beyond his expertise by education, training or experience or his designated expertise in air pollution and emissions: (1) that Vornberg wanted to "hide the truth" about ambient air readings from the Missouri Air Pollution Control Department based on Tarr's personal interpretation of a Doe Run business record (Pl's Ex. 50); and (2) that the Environmental Protection Agency's ambient air standards were not "overprotective" and "set very conservatively." *E.g.* Tr. 5/27/11 p.m., 29:23 – 31:24, 39:13 – 40:25. Tarr was designated as an engineering expert, and provided no scientific basis to offer his opinion that Vornberg was being untruthful or that certain EPA standards were over or under protective. It was therefore improper to allow him to opine on these topics or to express opinions on the subjective intent of defendants. § 490.065.1, RSMo.; *State v. Watt*, 884 S.W.2d 413, 415-16 (Mo. App. 1994) (in order to provide an expert opinion, it must first be shown that the witness has sufficient experience and acquaintance with the phenomena involved).

227. The Court erred in permitting Tarr to opine that, in order to properly "protect the people," Defendants should have "told the truth, both to the community and to the regulatory agencies," and "provid[ed] [Plaintiffs] and their families an opportunity to live somewhere else, or … shut[] down the lead smelter in Herculaneum and ceas[ed[operation." *E.g.* Tr. 5/27/11 p.m., 56:19 – 57:10. Again, Tarr was merely an air pollution expert who was never offered or qualified to give far-reaching opinions about whether the Defendants should have been more truthful, conducted massive buyouts of Herculaneum or even shut down the smelter altogether. § 490.065.1, RSMo.; *State v. Watt*, 884 S.W.2d 413, 415-16 (Mo. App. 1994) (in order to provide an expert opinion, it must first be shown that the witness has sufficient experience and acquaintance with the phenomena involved). Moreover, these opinions are based on his own

personal, subjective views, and not any scientific or specialized knowledge, and should have been excluded. *In re Redulin Products Liability Litigation*, 309 F.Supp.2d 531, 542 (S.D. N.Y. 2004) (finding that expert testimony concerning the defendant's ethical character not relevant to the legal issues raised); *McGuire v. Seltsam*, 138 S.W.3d 718, 721-22 (Mo. banc 2004) (holding that where an expert's opinion is irrelevant and based on speculation and conjecture as opposed to specialized knowledge, admission of such an opinion constitutes reversible error). Accordingly, these opinions should have been excluded because they lacked foundation.

228. The Court erred in permitting Tarr to opine that "to a reasonable degree of certainty" he believed that Doe Run deceived the community and regulators about lead contamination. Whether Defendants intended to deceive or hide lead levels from regulators and the community – and honesty in general – are not proper area of expert testimony. *See Robinson v. Hartzell Propeller, Inc.*, 326 F.Supp.2d 631, 647-48 (E.D. Penn. 2004) (finding that expert opinion testimony on the defendant's state of mind when it made statements to a government agency to be improper expert testimony); *Novartis Pharmaceuticals Corp. v. Teva Pharmaceuticals USA, Inc.*, 2009 WL 3754170 at *7, Cause No. 050CV-1887 (D. N.J. 2009) (finding that an expert was not permitted to opine as to whether the corporate plaintiff intended to deceive the United States Patent and Trademark Office); *DaPaepe v. General Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998) (finding that an engineering expert lacked any scientific basis to opine about the bad motives or intent of General Motors' employees when it designed the allegedly defective product). In *Robinson*, the Court excluded opinions that the defendant had lied to a federal agency. The plaintiffs in that case offered two engineering experts who had experience in Federal Aviation Administration reporting requirements to testify that the defendant "misled" the FAA. *Robinson*, F.Supp.2d at 648. The Court found this to be an

improper area of expert testimony: "[T]he experts' experience in metallurgy, propeller design, propeller maintenance, and FAA reporting requirements does not qualify them to testify as to the subjective intent of [the defendant's] employees." *Id.* Similarly here, Tarr was asked as "an environmental engineer and air expert who dealt with regulatory agencies . . . is it your opinion that Doe Run concealed the level of lead contamination from the state and from regulators in the community that was occurring at the fence line?" *E.g.* Tr. 5/27/11 p.m., 55:7 – 56:18. Over defendants' objection on foundation grounds, Tarr testified that: "Number one, I think that the truth of the matter, with respect to ambient air lead concentrations in the community of Herculaneum was hidden . . . ." As was the case in *Robinson*, the fact that Tarr was an engineering expert who had a background in regulatory agencies did to qualify him to provide conclusory opinions that defendants were dishonest or concealed information from state agencies or the community.

229. Moreover, it was error to permit Tarr to offer these opinions based on smelter documents (Exs. 378-381) that predated 1981 and were created prior to any Defendant becoming involved in the smelter. Such evidence documenting conduct of the smelter when Defendants were not involved was prejudicial and tended to mislead the jury into basing its decision on matters that occurred outside the relevant time period.

230. Defendants incorporate by reference their Motion to Strike and/or Limit Expert Testimony of Plaintiffs' Retained Experts (Section V) that was filed on April 8, 2011.

Richard Coleman

231. The Court erred in permitting Mr. Coleman to opine that, based on a Doe Run business record (Plaintiff's Exhibit 49), he believed that the smelter could "never comply with the [EPA] standard" and if the EPA had developed a compliance plan, it would have resulted in "plant closure." *E.g.* Tr. 6/2/11 p.m., 65:1 – 22. Coleman's personal, subjective interpretation of

Doe Run's document is not a proper area of expert testimony. *McGuire v. Seltsam*, 138 S.W.3d 718, 721-22 (Mo. banc 2004) (holding that where an expert's opinion is irrelevant and based on speculation and conjecture as opposed to specialized knowledge, admission of such an opinion constitutes reversible error). A jury is fully capable of reading Plaintiff's Exhibit 49 and making the same or different suppositions as Coleman did, and for that reason, there was no foundation for Coleman to provide "expert" opinion testimony as to the meaning of the document. *Duerbusch v. Karasa*, 267 S.W.3d 700, 710 (Mo. App. 2008).

232. The Court erred in permitting Coleman to testify that a "reasonable company would have known" that fugitive emissions were causing problems and that Defendants knew for the "entire time" "what the emissions are" and "where they're coming from." *E.g.* Tr. 6/2/11 p.m., 74:14 – 76:4. Coleman was designated as an engineering expert, which in no way qualifies him to offer his personal, subjective opinions as to what Defendants "knew" at a given time. *McGuire v. Seltsam*, 138 S.W.3d 718, 721-22 (Mo. banc 2004) (holding that where an expert's opinion is irrelevant and based on speculation and conjecture as opposed to specialized knowledge, admission of such an opinion constitutes reversible error). Moreover, Coleman was not designated or qualified to testify as to what Defendants may or may not have known about emissions during particular periods of time, and therefore this opinion should have been excluded because it was undisclosed and beyond his expertise. § 490.065.1, RSMo.; *State v. Watt*, 884 S.W.2d 413, 415-16 (Mo. App. 1994) (in order to provide an expert opinion, it must first be shown that the witness has sufficient experience and acquaintance with the phenomena involved).

233. Defendants incorporate by reference their Motion to Strike and/or Limit Expert Testimony of Plaintiffs' Retained Experts (Section II) that was filed on April 8, 2011.

Dr. David Rosner

234. The Court erred in permitting Dr. Rosner to testify about a public health emergency. Dr. Rosner made no mention of and gave no opinion about a public health emergency during his deposition, and this opinion was outside the scope of his expertise by education, experience or training and the scope of plaintiffs' expert witness designation for him. Dr. Rosner did not provide a report as part of his expert work on behalf of plaintiffs, and so defendants were left with nothing other than his deposition testimony as a guide to what his opinions might address. Plaintiffs' expert disclosure simply stated Dr. Rosner would provide opinions on "historical/liability for wrongful conduct." This limited *historical* testimony framed the boundaries of Dr. Rosner's opinion, given his deposition testimony in which he stated he was testifying as a historian, and that his role as a historian was not to "try and assess if there is or isn't a particular health risk to populations based on certain activities of a plant." "Historical" liability does not include opinions about a public health emergency. In addition, Dr. Rosner was not qualified by education, training, or experience to testify about a public health emergency, and his opinion was not supported by the record.

235. As set forth in Defendants' Motion in Limine, Dr. Rosner testified at his deposition that he had no real substantive knowledge regarding Herculaneum, other than to have conducted a Google™ search prior to his deposition on January 2, 2008, and having read documents provided by Plaintiffs' counsel. Notwithstanding that lack of knowledge, the Court permitted Dr. Rosner to offer testimony that a "public health emergency" existed in Herculaneum. Not only was this opinion never expressed during his deposition as an opinion he would offer, despite being asked to provide all such opinions, this testimony was based entirely on speculation and conjecture. By his own admission at a deposition – which was never

supplemented – Dr. Rosner had no real knowledge of any facts about Herculaneum. Indeed, at trial, Dr. Rosner was unable to substantiate his opinion on a "public health emergency."

236. Defendants incorporate by reference their Motion in Limine to Strike and/or Limit Expert Testimony of Plaintiffs' Retained Experts, specifically pages 1 through 6 containing general argument and Section III, pages 10 through 14 focusing on Dr. Rosner and his colleague Dr. Markowitz, with whom he testified he consulted in formulating his opinions for plaintiffs. As stated in the Motion in Limine, defendants anticipated that Dr. Rosner would testify as to his personal opinion unsupported as viable expert testimony, and based on "facts" and opinions totally irrelevant to the claims asserted against defendants, who had no involvement in Herculaneum or the lead industry prior to August 1981. As stated in the Motion, Dr. Rosner also testified at deposition that he had no real knowledge regarding Fluor. Notwithstanding this lack of knowledge, the Court improperly permitted Dr. Rosner to testify extensively about facts and historical issues that – by his own admission on cross-examination – predated any involvement by Fluor or any of the other Defendants. The Court essentially provided free reign to Dr. Rosner to testify at length on issues he admitted were completely unrelated and irrelevant to Fluor and the other defendants, and which only served to inflame the jury with irrelevant evidence and testimony.

237. The Court also erred in allowing Dr. Rosner to compare his proposed remedies for Herculaneum to prior remedies enacted in Love Canal and Times Beach. References to Love Canal and Times Beach, the latter of which has strong, prejudicial intonations for a jury in St. Louis, served to improperly inflame the jury by introducing argument and opinion by Dr. Rosner that Love Canal, Times Beach and Herculaneum were substantially similar situations. Prior to Dr. Rosner's direct examination, defendants made a specific objection on the record that this

anticipated testimony was irrelevant and unduly prejudicial. The Court improperly overruled that objection, yet again encouraging plaintiffs and their "expert" witnesses to offer unsubstantiated and inflammatory testimony to the prejudice of defendants.

238. Defendants incorporate by reference their Motion to Strike and/or Limit Expert Testimony of Plaintiffs' Retained Experts (Section III(A)) that was filed on April 8, 2011.

239. As to all the experts discussed above, there should first have been a threshold level of competency and reliability before a witness was permitted to give opinion testimony or exhibits were admitted. The admission and exclusion of expert testimony in civil cases is governed by section 490.065. *Kivland v. Columbia Orthopaedic Group, LLP,* 331 S.W.3d 299, 310-311 (Mo. banc. 2011). The statute requires that the expert's testimony be based on facts and data that are reasonably relied on by experts in the field and that the factors and data on which the expert relied are reasonably reliable. § 490.065; *Kivland,* 331 S.W.3d at 301. It is the Court's role to determine as a matter of law whether the statutory requirements are met. All matters relating to expert testimony do not go to issues of weight. The Court failed to perform its gatekeeping function of excluding expert testimony that fails to meet the minimum level of competency and reliability by not excluding this testimony

Dr. Jill Ryer-Powder

240. The Court erred in permitting Dr. Jill Ryer-Powder to opine on what the blood lead levels of five of the plaintiffs – Taylor Howze, Patrick Blanks, Heather Glaze, Gabriel Farmer and Jeremy Halbrook – might have been between the ages of six months and seven years old. The blood lead levels for those five plaintiffs were never tested during the relevant time period. In order to "predict" what the blood lead levels for those plaintiffs might have been during that time period, Dr. Ryer-Powder used a model called the Integrated Exposure Uptake

Biokinetic Model (the "IEUBK model"). Based on the results she obtained from the IEUBK model, Dr. Ryer-Powder testified as to most likely blood lead level that each specific individual had during the relevant period.

241. Dr. Ryer-Powder's testimony should have been excluded because the IEUBK model is not reasonably relied upon by experts in the field to determine blood lead levels for specific individuals, and is not otherwise reasonably reliable for such purposes. *Scott v. Blue Spring Ford Sales, Inc.*, 215 S.W.3d 145, 176 (Mo. App. 2006). The IEUBK model was developed by the United States Environmental Protection Agency ("EPA") to determine risk levels and expected average blood lead levels across a given community. The EPA has explicitly recognized that the IEUBK model inaccurately calculates the expected blood lead levels for a particular individual, and has expressly disavowed the model's use for that purpose. *See e.g.* Tr. Ex. 28K ("The IEUBK model is not intended to be used as a substitute for blood lead measurement and medical evaluation of a specific child at risk."); Tr. Ex. 28L ("The Model does not aim to reproduce the observed blood lead level for any specific child, . . . Most importantly, the Model is not a substitute for medical evaluation of an existing child . . . "prediction of a specific child's measured blood lead level is not one of the Model's intended or valid uses."); Tr. Ex. 28M ("[I]t is not the goal of the IEUBK model to match the measured BLL of a specific child. The model is designed to predict an average BLL concentration for an entire population..."). Because the IEUBK is not reasonably reliable and is not reasonably relied on in the field to predict individual blood lead levels, Dr. Ryer-Powder's testimony as to the individual blood lead levels of the five plaintiffs lacked the necessary foundation, and constituted nothing more than conjecture and speculation. *McGuire v. Seltsam*, 138 S.W.3d 718, 721 (Mo. 2004);

Scott, 215 S.W.3d at 176. It was, therefore, error for the Court to allow Dr. Ryer-Powder to testify. *McGuire*, 138 S.W.3d at 721; *Scott*, 215 S.W.3d at 176.

242. Defendants incorporate by reference their Motion in Limine to Exclude Testimony from Plaintiffs' Expert Dr. Jill Ryer-Powder that was filed on April 8, 2011.

Dr. Sue Ellen Antell

243. The Court erred in preventing defendants' witness Dr. Antell from giving her opinion about the vocational and academic possibilities of Plaintiffs. These opinions were not new, as plaintiffs claimed them to be, were directly relevant to plaintiffs' damage claims, and should not have been excluded. Plaintiffs' counsel objected on the grounds that this was a new opinion and argued that Dr. Antell had not been disclosed as an expert that would offer this type of opinion, and had not disclosed this opinion during her deposition. Simply accepting as true the assertions made by plaintiffs' counsel that this opinion had not been disclosed and citing its prior motion in limine ruling regarding new opinions, the Court sustained the objection and prohibited Dr. Antell from testifying on this subject. The ruling that Dr. Antell's testimony would constitute a new, undisclosed opinion is contrary to the plain and clear statements made by Dr. Antell at her deposition. This ruling relating to "new" opinions from defendants' expert also is inconsistent with this Court's prior rulings uniformly permitting new opinions to be stated by plaintiffs' experts.

244. At that deposition, Dr. Antell specifically and repeatedly disclosed that she had formed and was willing to offer opinions regarding the lack of neurological impediments to the plaintiffs' future education or vocational activities:

> Q. Are you intending to testify at trial regarding vocational issues of these children?
>
> A. Insofar as they fall within my expertise as a neuropsychologist and if I'm asked, yes.

(Antell Deposition, 353:24-354:2)

Q. Were you ever given the assignment to look into that question?

...

A. You know, it's part of what I do. Whenever I evaluate somebody, I look at their neurocognitive status, and based on their neurocognitive status, I form an opinion as to whether or not they're likely to graduate from high school, graduate from college, if they're going to have certain kinds of performance problems on the job. That's part of what a clinical neuropsychologist does.

Q. (By Mr. Smoger) And have you developed such opinions on each person in this litigation?

...

A. If asked, I will give such opinions.

(Antell Deposition, 356:3-19)

Q. (By Mr. Smoger) Well, as you sit here today, you don't know one way or the other whether you're going to give opinions regarding the vocational future of any of these individuals?

...

A. All I can say is that if asked, I will respond to questions as to whether or not these – the neurocognitive profiles of these individuals or psychological profiles of these individuals present any impediment to various kinds of educational or vocational opportunities.

(Antell Deposition, 359:14-360:1)

Despite being told by Dr. Antell that she had opinions on these issues and that she intended to testify to those opinions if asked, plaintiffs' counsel never asked Dr. Antell what her opinions were. Instead of asking Dr. Antell questions what her opinions were while he was deposing her, plaintiffs' counsel argued to counsel defending the deposition that this testimony had not been contained in Dr. Antell's report and that Dr. Antell had not been offered on this subject. The counsel defending the deposition made it abundantly clear to Plaintiffs' counsel that Dr. Antell could and would provide testimony on this subject as necessary at trial:

> MR. SMOGER: Well, the report speaks for themselves, but the witness has seen a deposition that I was not aware of and only elicited right now. So obviously I was not intending to question the witness on vocational. It's not in the reports. If that's an area of testimony, then I want to go into it.
>
> MR. BERRA: I disagree that it's not in her reports. I mean her findings about the individuals relate to their vocational capacity in their reports.
>
> (Antell Deposition, 354:23-355:6)

245. Whether or not this opinion was specifically stated in Dr. Antell's report has no bearing on whether or not Dr. Antell should have been allowed to testify on the subject at trial, and it certainly did not relieve plaintiffs' counsel of his duty to inquire into the matter at deposition to the extent that he wanted further information regarding the opinions he admitted that she had. *Redel v. Capital Region Medical Center*, 165 S.W.3d 168, 175-76 (Mo. App. 2005). Experts are allowed to add to, change or otherwise supplement the written list of their opinions so long as those changes are disclosed to the opposing party. (This is what makes Dr. Antell's opinions different from the undisclosed opinions of plaintiffs' experts noted above.) Rule 56.01(e); *Redel*, 165 S.W.3d at 175-76. The disclosure of those changes can be made through and during the expert's deposition. *Redel*, 165 S.W.3d at 175-76. To the extent the opinion was not specifically stated in Dr. Antell's report (which Defendants claim it was), Plaintiffs' counsel was made aware at Dr. Antell's deposition that she had an opinion. He chose not "to go into it" then or later. In fact, Plaintiffs' counsel said he wanted to go into that area if it was "an area of testimony" that Dr. Antell might address, and after being informed that it was such an area of testimony, he inexplicably failed to "go into it."

246. Plaintiffs, therefore, cannot complain that this was a "new" or "undisclosed" opinion. The opinion was disclosed at the deposition and, having been disclosed, Plaintiffs could have and should have addressed the matter at that time. Plaintiffs' counsel adopted a strategy of not asking about the opinions even though he knew they had been formed and might be asked

about at trial. Plaintiffs cannot claim prejudice or surprise because, for whatever reasons, they chose not to ask follow-up questions, and instead improperly relied on a prior written report that, to the extent necessary, had been sufficiently supplemented through Dr. Antell's deposition testimony. It is fundamentally unfair and prejudicial to exclude an expert's testimony on the ground that it was a "new" opinion, when the witness specifically told counsel that she had an opinion and counsel chose not to ask what it was. Plaintiffs have no one but themselves to blame for their failure to address this topic. Dr. Antell's candor stands in stark contrast to the conduct of plaintiffs' experts when they were asked at their depositions for all their opinions and simply did not disclose the existence of opinions that they then brought up for the first time at trial. As noted above, the exclusion of Dr. Antell's testimony cannot be reconciled with the Court's decision to allow Sippel to testify about vocational issues even though he was not designated as an expert on that issue.

247. If permitted to testify, Dr. Antell would have opined that Preston Alexander, Brian Bolden, Tiffany Bolden, Gabe Farmer, Sidney Fisher, Ashley Getty, Heather Glaze, Matthew Helig, Jonathan Miller, Lauren Shanks, and Isaiah Yates have no neurocognitive impediments to successful completion of the typical educational and life endeavors of the average person. She would have further opined that Patrick Blanks and Heather Glaze may have some impediment to completing a four year university degree, but not to completing a community college degree, or obtaining employment and supporting a family.

248. The Court also erred in preventing Dr. Antell to give her opinion about why the QEEG is not a valid and accepted neuropsychological test. Plaintiffs' counsel objected on the grounds that this was a new opinion and argued that Dr. Antell had not been disclosed as an expert who would offer an opinion on the substantive reasons why the QEEG test was not valid

or accepted. Based on this objection, the Court limited her testimony on this subject. Dr. Antell testified in her deposition that the QEEG test was not valid, and should have been permitted to explain her reasons. The Court's holding effectively allows a party to exclude the opinion of an expert witness, when it is known that the expert has such an opinion, simply by never asking the expert what his or her opinion is. Plaintiffs chose not to ask her the reasons why she holds this opinion, despite having a duty to inquire further. *Redel v. Capital Region Medical Center*, 165 S.W.3d 168, 175-76 (Mo. App. 2005). Plaintiffs had no right to seek exclusion of an opinion because they should have addressed the matter at her deposition, but chose not to. It is absurd to penalize defendants by excluding an expert's opinion on a critical issues because plaintiffs strategically decided not to take their opportunity to inquire about it. Moreover, Dr. Antell's testimony also was necessary to rebut Dr. Cantor who claimed the QEEG was a valid test. Such rebuttal testimony is permitted, and should have been admitted here. *See Stone v. City of Columbia*, 885 S.W.2d 744, 747 (Mo. App. 1994).

Dr. William Nassetta

249. The Court erred in not permitting Dr. Nassetta to rebut Dr. Rosner's previously undisclosed opinion that there was a public health emergency in Herculaneum. An expert may base his opinion upon matters within his personal knowledge or observation, upon competent evidence presented during the trial, or both. *See* 490.065 RSMo ("The facts or date in a particular case upon which an expert bases as opinion or inference may be those ... made known to him at or before the hearing..."); *Sigrist By and Through Sigrist v. Clarke*, 935 S.W.2d 350 (Mo. App. 1996). Experts are permitted to testify with reference to facts previously presented to the jury, which if *believed would have the effect of discrediting an opposing witness. See Stone v. City of Columbia*, 885 S.W.2d 744, 747 (Mo. App. 1994). Experts are also permitted to comment on an opposing expert's methodology presented to the jury. *Id.* at 748. Dr. Nassetta

was designated to opine about health effects of lead exposure and the community's knowledge of the same, and was therefore qualified to rebut Dr. Rosner's claim that there was a public health emergency.

Dr. Christopher Long

250. The Court erred in not allowing Dr. Long to testify regarding documents submitted to the EPA by St. Joe or explain the reasons why such documents would have been submitted. Plaintiffs' argued that the document (Def. Ex. B) was never produced by Dr. Long as a "reliance" document, and for that reason alone, he was not permitted to testify as to why St. Joe would have been providing the emissions data. The Court excluded the testimony based on plaintiffs' objection that Dr. Long would be commenting about "the mind of St. Joe." The Court's ruling with regard to Dr. Long stands in stark contrast to the free rein given to Plaintiffs' experts who regularly were permitted testify as to what St. Joe or Fluor's employees or other persons intended or meant to convey in various documents. Dr. Long's testimony should have been allowed.

Jury Request for Exhibits

251. The Court erred in refusing to send defendants' Exhibit 19P to the jurors when the jury requested the "DSM-IV book." Certain sections of the book had been admitted into evidence as Exhibit 19P, presented to and used to examine witnesses, and shown to the jury. In response to the jury's request, counsel for defendants requested that the section of the DSM-IV book that had been admitted into evidence be sent to the jury, because it was clear from the jurors' request that they wanted to see those portions of the DSM-IV book that had been show to them and discussed by witnesses. It was prejudicial error not to send to the jury an admitted exhibit that the jurors had requested, when the Court sent to the jurors all other admitted exhibits the jurors requested.

252. The Court erred when it responded to the jury's request for the DSM-IV book by stating that the DSM-IV book had not been admitted into evidence. The Court's response erroneously and prejudicially gave the jury the impression that no part of the DSM-IV book had been admitted into evidence, when, in fact, sections of the book had been admitted into evidence, discussed with witnesses, and shown to the jury. It was those parts of the book that directly related to the injuries claimed by plaintiffs. After the Court stated that it did not intend to send the entire book or the admitted sections of the book to the jury in response to the jurors' request, the Court stated its intention to advise the jury that the book had not been admitted into evidence. Counsel for defendant objected to that statement and requested the Court to respond to the jury by saying that the "entire" book had not been admitted into evidence and that only certain sections of it had been. Plaintiffs objected, and the Court refused to include the word "entire" and refused to refer to sections of the exhibit having been admitted into evidence, stating that it would be improper to guide the jury. The Court instead advised the jury that "the DMS-IV book was not placed in evidence." The Court's response was improper and misleading, because it suggested to the jury that no portion of the DSM-IV book had been admitted into evidence, when in fact the section of the book relating to ADHD (which was clearly what the jurors were requesting) had been admitted into evidence. *See* Exhibit 19P. MAI 2.01 instructs the jurors that their deliberations and verdict may be based only on the "evidence" presented in the courtroom, and MAI 3.01 instructs the jury to apply the burden of proof based on the evidence. Assuming, as we must, that the jury followed these instructions, the Court's response to the jury's request for the DSM-IV book was that they should not consider the DSM-IV materials that defendants had used to cross examine plaintiff's expert, had used in examining defendant's expert, and had

shown to the jury, because they had not been admitted into evidence. The Court was wrong, and its response to the jury's request misled the jury during deliberations.

253. The Court's written response to the jury's request for the DSM-IV book was also inconsistent with the Court's treatment of the jurors' prior request for documents plaintiff had used. For example, the Court refused to inform the jury that only certain sections of the book had been admitted because the Court said that it did not want to guide the jury toward a more specific request. Yet earlier that same morning, the jurors had described and requested a particular exhibit – 451 – which did not appear to be consistent with the description of the document they were seeking. In its response to the jury's request, the Court stated "Exhibit 451 seems to be the wrong exhibit. Could you provide more detailed information for this request?" Clearly, in responding to the jury's request for Exhibit 451, an exhibit introduced by plaintiffs, the Court expressly solicited more detailed information from the jury about what it was seeking and advised the jury that it had requested the wrong exhibit. Defendants were asking for similar treatment, a level playing field, when they asked the Court to inform the jury that the entire DSM-IV book had not been admitted into evidence and that only certain sections had been. Instead of responding to the jury's questions in a consistent way that would have allowed the jury to reach a result based on the evidence, the Court inconsistently applied an unreasonably hypertechnical and strict interpretation of the jurors' question when it applied to one of defendants' exhibits, preventing a fair assessment of the evidence. It did so after taking the opposite approach to one of plaintiffs' exhibits.

254. In addition, earlier that morning the jurors had requested "all partnership agreements." When providing documents in response to this request, the Court did not send back only partnership agreements or narrow or strictly interpret the jurors' request, but at the

request of plaintiffs' counsel, included other documents, including amendments and a transfer document (Exhibit 102) and a document that contained an unsigned page that was not part of any agreement (Exhibit 108). Inconsistent with its subsequent treatment of the request for the DSM-IV book which impacted a defense exhibit, the Court agreed to plaintiffs' counsel's request, and following what plaintiffs' counsel interpreted the specific request to mean, the Court sent the jury not only actual partnership agreements but also other documents that were "part and parcel" with partnership agreements. It was improper, unfairly inconsistent, and prejudicial to narrowly interpret the words in the jury's request for the DSM-IV "book" while ignoring those words and interpreting more broadly the jury's request for the "partnership agreement."

255. In response to the Court's request for more detailed information about the type of exhibit they were seeking when the jurors requested Exhibit 451, the jurors requested a demonstrative exhibit plaintiffs' counsel had used in closing argument. The Court properly refused to send the chart back to the jury because it had not been admitted into evidence, and initially proposed to say "that the chart requested was not admitted into evidence by the Court." *E.g.* Tr. 7/27/11 a.m., 11:22 – 12:2. Plaintiffs objected to informing the jury that the chart was not admitted into evidence (even though it was accurate to state that it had not been admitted into evidence), based on a stated concern that it might mislead the jury into thinking that the information contained in the chart was not admitted into evidence. At plaintiffs' request, the Court changed its response by deleting the statement that the chart "was not admitted into evidence" (even though the language was true), and stated only that "the chart was for demonstrative purposes." *Id.*, 12:5-14. It is impossible to reconcile the Court's decision not to tell the jury that the chart was not admitted into evidence, which was true, with its decision to advise the jury that the DSM-IV book was not admitted into evidence, which clearly was

misleading because part of the book had been admitted into evidence. Standing alone, the Court's written response to the request for the DSM-IV book was prejudicial error. The Court's inconsistent treatment of the jury's request for the partnership agreement and the demonstrative chart highlights the extent and nature of the error and prejudice in failing to send back the requested exhibit and in the Court's response to the jury's request for that exhibit. Although the Court has discretion in deciding whether to send exhibits back to the jury, once a court has received an item in evidence as an exhibit "that evidence should be made available to the jury on an equal basis with all other evidence in the case." *Aluminum Products Enterprises, Inc. v. Fuhrmann Tooling and Manufacturing Co.*, 758 S.W.2d 119, 122 (Mo. App. 1988); *Gambrell v. Kansas City Chiefs Football Club,* 621 S.W.2d 382, 386 (Mo. App. 1981). To defendants' prejudice, the Court did not treat the jury's request for the DSM-IV book (a defense exhibit) on an equal basis with the other juror requests (for plaintiffs' exhibits and demonstratives).

256. The Court erred in sending back to the jury plaintiffs' Exhibit 102 (document titled Transfer of Partnership Interest) and plaintiffs' Exhibit 108, which contained a document that was never executed by both parties, in response to its request for all "partnership agreements." These documents were not responsive to that request and should not have been sent to the jury room.

The 1994 Sale Agreement

257. The Court erred in excluding evidence of the Stock Sale Agreement entered into on February 4, 1994, between Fluor and DRA (Def. Exhs. A-F), which Defendants first attempted to introduce during the examination of Profession Henry Ordower. Plaintiffs objected to the use of the Stock Sale Agreement, arguing that (1) it was irrelevant to any issue at trial; (2) it violated the settlement statute because it could only be used in an attempt to apportion blame to St. Joe, a settled party; and (3) the statements regarding all liabilities being owned by St. Joe

and Doe Run and sold to DRA through the agreement constituted a conclusion of law. On the basis of plaintiffs' arguments, the Court prohibited defendants from introducing the Stock Sale Agreement and other documents relating to that transaction, and from eliciting testimony regarding those documents and that transaction. Defendants made an offer of proof through questions posed to Henry Ordower to preserve the testimony that defendants would have elicited if they had been permitted to use the document. The defendants again sought to introduce the Stock Sale Agreement, related documents and explanatory testimony as part of their case in chief and during the hearing on punitive damages. The Court rejected those efforts too.

258. The Stock Sale Agreement provided that, as of the time that the Stock Sale Agreement was executed: (1) St. Joe directly and through its subsidiaries owned a 57.5% interest in Doe Run, with the remaining 42.5% interest held by Leadco Investments, Inc.; and (2) St. Joe and Doe Run owned all the assets and liabilities associated with both the current and prior conduct of the Lead Business. *See* Exhibit A, Recital A. The Stock Sale Agreement also provided that, prior to closing: (1) St. Joe would acquire the 42.5% interest in Doe Run held by Leadco and dissolve the partnership; and (2) upon dissolution of the partnership, St. Joe would become the direct and exclusive owner of the Lead Business, with the "Lead Business" defined as including all of the lead related operations. *See* Exhibit A, Recital B. The Stock Sale Agreement further provided that, upon closing: (1) DRA would be purchasing the Lead Business by acquiring all of the stock in St. Joe from Fluor "as is;" and (2) DRA would pay Fluor for the stock in St. Joe according to the calculations, requirements and schedules contained in section 3.2 of the Stock Sale Agreement. *See* Exhibit A, Recital C, § 3.2. Schedule 4.6 of the Schedules provided that a reserve of $24.8 million had been set aside specifically for post-sale environmental projects. *See* Exhibit B. On April 7, 1994, Fluor and DRA executed the First

Amendment to Agreement for Sale of Stock. *See* Exhibit F. The amendment modified certain terms contained in the Stock Sale Agreement. Among other things, the amendment provided that: (1) the purchase price calculation contained in the Stock Sale Agreement would be modified; (2) the closing date would be set for April 7, 1994, with the closing to be effective March 31, 1994; and (3) St. Joe would change its name to The Doe Run Resources Corporation. *See* Exhibit F. The amendment did not modify any of the other material terms described above. *See* Exhibit F. On April 7, 1994, the Stock Sale Agreement closed on the terms and conditions set forth in the Stock Sale Agreement, as amended. *See* Exhibits A, F and G. Pursuant to the calculations contained in the Stock Sale Agreement, DRA ultimately paid to Fluor the total sum of approximately $132,500,000 for the St. Joe Stock.

259. Plaintiffs' arguments against the admission of the Stock Sale Agreement, and by correlation the Related Documents, not only were without merit, but also were contrary to positions they took with regard to the admission of their exhibits and the testimony of their witnesses. The Stock Sale Agreement and related documents identified during the offers of proof are highly relevant to defendants' claims that St. Joe was solely responsible for any harm allegedly suffered by plaintiffs, whether it be to the plaintiffs who were alive in April 1994, or to those born thereafter. Missouri law clearly holds that it is permissible to argue at trial that a settled party was the one to cause the alleged damages at issue. *Oldaker*, 817 S.W.2d at 253; *Whisenand v. McCord*, 996 S.W.2d 528, 531 (Mo. App. W.D. 1999). Such documents further were directly relevant to the cross-examination of Ordower and Fisher who were permitted to incorrectly opine on legal rights, obligations, and responsibilities.

260. Defendants intended to call either Larry Fisher or Victor Prechtl to the stand for the purpose of offering and introducing the Sale Agreement and the Schedules, and submitted a

written offer of proof to that effect on July 22, 2011. Larry Fisher was the former general counsel for Fluor and was directly and personally involved in the negotiation of the Stock Sale Agreement and the Related Documents. Mr. Prechtl was a Controller at Fluor, and is familiar with these documents as well. Mr. Fisher would have identified the documents and their relevant provisions. Had Mr. Fisher or Mr. Prechtl or some other Fluor witness been permitted to discuss the Stock Sale Agreement and the Related Documents, in addition to authenticating the documents, he would have offered the following testimony:

a. The Stock Sale Agreement was entered into by Fluor and DRA on February 4, 1994.

b. Pursuant to the Stock Sale Agreement, DRA agreed to purchase all of the St. Joe stock held by Fluor, and not just the assets of the St. Joe. The stock was being purchased "as is."

c. At the time the Stock Sale Agreement was entered, all of the lead business assets and liabilities were owned by either St. Joe or the Doe Run Partnership.

d. Thereafter, prior to the closing on the purchase of the stock, St. Joe would own all of the assets and liabilities from the Lead Business.

e. The Lead Business was defined in the Stock Sale Agreement to include the liabilities for the Herculaneum smelter.

f. Under the Stock Sale Agreement, St. Joe was to acquire 100% ownership of the partnership interests in the Doe Run partnership prior to its purchase by DRA.

g. St. Joe, in fact, did acquire 100% ownership of the partnership interests in the Doe Run Company Partnership, per the terms of the agreement, before April 1994.

h. Schedule 4.6 to the Stock Sale Agreement identifies a reserve of $24.8 million that was set aside specifically for environmental projects associated with the Lead Business.

i. That reserve was left in St. Joe by Fluor as part of the Stock Sale Agreement for St. Joe to have cash to fund its ongoing and potential future environmental control efforts in conjunction with the EPA and for environmental liabilities.

j. The $24.8 million reserve for environmental projects was a clear indication that Fluor was aware of and responsive to future environmental requirements and left significant funds in the smelter company to cover the anticipated expenses.

k. On April 7, 1994, DRA and Fluor executed the First Amendment to Agreement for Sale of Stock.

l. The First Amendment to Agreement for Sale of Stock modified the purchase price being paid by DRA to Fluor.

m. Pursuant to the First Amendment to Agreement for Sale of Stock, St. Joe changed its name to The Doe Run Resources Corporation.

n. Pursuant to the First Amendment to the Agreement for Sale of Stock, the Stock Sale Agreement, as amended, would close on April 7, 1994, with the closing effective as of March 31, 1994.

o. On April 7, 1994, the stock sale closed pursuant to the terms of the Agreement, as amended.

261. DRA ultimately paid Fluor approximately $132,500,000 for the St. Joe stock. This price constituted a substantial discount to DRA because St. Joe held all of the historical liabilities for the Lead Business, including the Herculaneum smelter, as of the time of sale.

262. The Stock Sale Agreement and Related Documents are directly relevant because they show that, at least as of the time that DRA purchased St. Joe, both Fluor and DRA considered St. Joe (which changed its name to Doe Run Resources Corporation) to be the party responsible for the Lead Business. Not only was it the sole actor, it also held all the past liabilities too. Both parties clearly contemplated that St. Joe was the one that had undertaken all of the actions, over the course of one-hundred years, from which any kind of liability for the lead smelting operations could arise. Defendants' position that St. Joe was always the responsible party, based on this document, is clearly not something that was created for purposes of trial. Over seventeen years ago, when the Stock Sale Agreement was entered into, all the parties to the transaction, including Defendants, took this position that is wholly consistent with Defendants' position in this case. The Stock Sale Agreement, the Related Documents and the statements contained therein are therefore directly relevant to Defendants' defense in this case and its

argument that St. Joe was the sole proximate cause of Plaintiffs' alleged injuries. They support defendants' position that the Lead Business liabilities were the responsibility of another entity. Unable to show this evidence to the jury, defendants' defenses were inappropriately and unfairly weakened.

263. The Stock Sale Agreement, related documents, and supporting testimony are also relevant to show the relationship of the parties and the parties' treatment and understanding of the responsibilities of those involved in the operation of the smelter. The Stock Sale Agreement and the Related Documents complete the story about the legal liabilities of these defendants. Defendants were not sued because they operated the Herculaneum smelter. Rather they have been sued simply because they had, for a period of time, an ownership relationship dependant on agreements like the Stock Sale Agreement and Related Documents. Defendants should have been permitted to show the effect of the final agreement in the long line of agreements presented to the jury in this case. After permitting, improperly, plaintiffs' experts to use some of the legal documents without requiring that those experts consider all the documents and all the documents' language, the Court limited fair cross-examination and did not permit the jury to see the entirety of the documents relating to the Lead Business ownership during the relevant time period. The statements in the Stock Sale Agreement and Related Documents defendants sought to introduce are not conclusions of law – as a factual matter, the documents say what they say. To the extent that the testimony flowing from those documents includes statements regarding how liability passed as a result of the Stock Sale Agreement and Related Documents, plaintiffs have waived any right to complain about such testimony on the basis that such testimony constitutes improper opinions on the law. Notably, plaintiffs opened the door to defendants' proposed evidence by eliciting extensive testimony from Ordower regarding how liability would

pass as a result of Fluor's purchase of the partnership interest previously held by Homestake – formerly a defendant in this action and now a settled party. The jury did not hear him say how that liability was held or passed on in 1994 to defendants' prejudice, and defendants were entitled to clarify that issue.

264. The Schedules are also directly relevant to the issues in this case for punitive damages. Schedule 4.6 provides that a reserve of $24.8 million was set aside specifically for environmental projects as part of the Stock Sale Agreement. Plaintiffs repeatedly presented testimony in an attempt to support their argument that defendants failed to spend profits on environmental measures, failed to approve sufficient funds to put the necessary environmental measures in place, and further restricted those funds and stalled environmental projects at the point when they knew that St. Joe would be sold. Plaintiffs suggest defendants ignored environmental issues. Plaintiffs presented these arguments not only in support of their claims for compensatory damages, but also in support of their argument that defendants showed a conscious disregard for Plaintiffs and the Herculaneum community as a whole, and that plaintiffs are entitled to punitive damages.

265. The fact that there was a $24.8 million dollar reserve set aside for environmental projects, and retained in St. Joe for the new company to use, directly contradicts Plaintiffs' arguments. Defendants had, in fact, set aside significant funds for those projects as part of the assets of the company being acquired. The purpose of this was to allow the new owner to have funds believed to be appropriate for environmental issues going forward. This evidence supports Defendants position that they were cognizant of environmental issues, they were always supportive of the smelter in its work to resolve environmental issues, they approved and funded environmental expenditures, and that their effort to resolve environmental issues did not cease

upon the determination that St. Joe would be sold, but continued post-sale. This evidence, therefore, tends to show that Defendants did not consciously disregard Plaintiffs or the Herculaneum community, and that punitive damages are not appropriate.

266. The sale price of the lead operations was also relevant to the amount of any punitive damages. Evidence relevant to the issue of the appropriate amount of any punitive damages award would include evidence of the amount Fluor received when it sold the lead business. It is unlikely at best that a jury would have awarded $320 million in punitive damages against defendants when the lead operations sold for less than half of that amount.

267. To prohibit defendants from providing this evidence was to prohibit defendants from defending themselves against plaintiffs' primary arguments at trial with regard to liability for compensatory and punitive damages.

268. Defendants incorporate their Motion To Reconsider and Written Offer of Proof that was filed on July 21, 2011.

Cheryl Aylesworth

269. The Court erred in excluding the testimony of school principal Cheryl Aylesworth and in excluding 34F, 36G, 36H, 36I, 36J, 36K, 36L, 36M, 36N, 36O, 36P, 36Q, 36R, 36S, 36T, 36U, 36V, 36W, 36X, 36Y, 36Z, 37A, and 37B, based on plaintiffs' objection that she was an undisclosed expert witness. Ms. Aylesworth was a counselor at a school attended by several of the plaintiffs and later a principal at another school where some plaintiffs attended, and was going to testify about ILP and IEP programs at the school and also about certain of the plaintiffs based on her personal experience and observations in dealing with them. She was not an expert witness, but was a fact witness testifying based on personal knowledge and experience and her interactions with some of the plaintiffs. A witness is permitted to testify about the conduct and behavior of others based on her personal interactions and observations. The Court's exclusion of

Ms. Aylesworth's testimony was not only erroneous standing on its own, but was inconsistent with the Court's admission of testimony from teachers and co-workers presented by plaintiffs, who were permitted to testify to similar topics even though none of them had ever been disclosed by plaintiffs. The Court permitted plaintiffs to present the testimony of teachers and co-workers about the conduct, behavior, and conditions of plaintiffs based on personal observations, even though none of those witnesses were ever disclosed as expert witnesses (or even disclosed as witnesses at all in response to discovery requests). The Court's exclusion of Ms. Aylesworth's testimony and related exhibits was erroneous and prejudicial, as was the Court's inconsistent treatment of this defense witness compared to similar testimony offered by the plaintiffs.

Voir dire questions regarding Tort Victims Compensation Fund

270. The Court erred in denying defendants' motion for a mistrial after plaintiffs' counsel deliberately informed the potential jurors during voir dire that half of the punitive damages awarded in this case would go the Missouri Tort Victims Compensation fund (the "TVC") and not to plaintiffs. This type of questioning is improper, prejudicial and cannot be remedied short of awarding Defendants a mistrial. Missouri courts have specifically held, "with no hesitation," that it is error for the counsel to make a comment regarding the TVC, or that half of the punitive damages awarded go to that fund. *Henderson v. Fields*, 68 S.W.3d 455, 470 (Mo. App. 2001) (finding that comment about the compensation fund by plaintiff's counsel was unquestionably improper).

271. There was absolutely no purpose to plaintiffs' counsel asking the TVC "question" other than to poison the jury by interjecting a discussion of an irrelevant matter of law. The receipt of 50% of a punitive damage award by the TVC is statutorily possible in every case where punitive damages are awarded. The jury is not required to make any findings of facts related to this distribution, and there is no issue at trial related to this distribution. It happens as

an operation of law. The ***only*** purpose of providing this information to the jury during *voir dire* would be to encourage them to double any punitive damages they choose to award. Counsel cannot properly go beyond the issues and urge prejudicial matters. *Id.*

272. By raising the TCV during *voir dire*, Plaintiffs' counsel elevated this improper objection to an even higher plane of prejudice. Plaintiffs' counsel's questioning and discussion of the TCV is not only argument by an attorney on a point of law, but part of a dialogue with the jurors. This discussion even involved comments by the Court. Knowledge of or a position with respect to the TCV and its statutory operation is ***not*** a relevant criterion for participation as a juror; in fact, it is something they are not even supposed to know about and are never instructed on at any point in a civil trial. Plaintiffs' counsel's improper interjection of the TCV into *voir dire* was a deliberate, not a mistaken reference, interjecting into the juror qualification process an issue that has no bearing on juror qualification and on which there was no basis to make an inquiry in the first place.

273. The fact that Plaintiffs' counsels' statement regarding the Missouri TCV served no other purpose than to prejudice the jury qualifies the injection of that issue into *voir dire* as having been done in bad faith. The injection of impermissible issues into a trial by counsel increases the need for the Court to grant a mistrial and not attempt to remedy the issue through lesser means. *Boyne v. Schulte*, 222 S.W.2d 503, 508 (Mo. App. 1949).

274. While other options, such as striking and asking the jury to disregard a comment may sometimes be preferable, there are circumstances under which these lesser measures are wholly insufficient to remedy the issues caused by a prejudicial statement. *See Spears v. Schantz*, 246 S.W.2d 399, 409-10 (Mo. App. 1952) (striking or withdrawing the prejudicial statement did not remove its damaging influence and only a mistrial would have been sufficient);

Boyne, 222 S.W.2d at 508 (sustaining the defendant's objections and ordering the jury to disregard the testimony were not sufficient to cure the prejudice).

275. The uncorrectable prejudice from this willful effort to impermissibly inform the jury of the TCV is readily apparent from the jury's verdicts on punitive damages. Plaintiffs' counsel asked the jury to award a total of $208 million in punitive damages, $160 million from Fluor. The jury awarded $320 million in punitive damages, more than 50% more than plaintiffs' requested, and double the Fluor amount. As one of the jurors stated in a conversation with defense counsel, plaintiffs' attorney's improper statement to the jury that half of any award would go to the state resulted in a patently excessive award that exceeded by over $110 million the amount of punitive damages plaintiffs requested. *See* Affidavit of John H. Quinn, filed in support of this motion. The Court could have cured the prejudice created by plaintiffs' counsel's improper conduct during *voir dire*, and the Court erred in failing to do so.

276. Defendants incorporate by reference their Motion for a Mistrial on this issue filed on May 14, 2011.

Punitive Damages Financial Information

277. The Court erred and abused its discretion to the prejudice of defendants in permitting evidence during the punitive damages phase of trial concerning defendants' financial conditions and/or ability to pay punitive damages other than net worth and evidence of the net worth or other financial information relating to Massey Energy Company ("Massey Energy").

278. Through the testimony of Robert Johnson plaintiffs introduced evidence of the net worth of defendant Fluor Corporation and the net worth of non-party Massey Energy. Johnson also offered financial information regarding these companies beyond net worth, including total revenue, cash on hand, amounts paid to executives, revenue generated per day, net income, dividends paid to shareholders, free cash paid to certain parties, cash flow data, stock purchase

prices, capital expenditures, available lines of credit, stock market valuation and value of treasury stock. Mr. Johnson was also improperly permitted to testify as to what amount could be awarded without affecting the viability of defendants.

279. The trial court erred in admitting financial information beyond net worth because it was irrelevant and inadmissible under Missouri law. Section 510.263, RSMo 2000, expressly or implicitly limits relevant punitive damages' financial evidence to "net worth." In addition, the information beyond net worth should have been excluded because it was more prejudicial than probative of defendants' available financial resources and confused and misled the jury. Numerous courts have held that only a defendant's net worth – because it accounts for both the defendant's total assets and total liabilities – is probative of the resources the defendant has available to pay a punitive damages award. *See, e.g., Gollwitzer v. Theodoro*, 675 S.W.2d 109, 111-12 (Mo. App. 1984) (holding that is was error for the trial court to admit evidence of the defendant's gross sales and inventory, because they were not probative of "affluence, wealth or net worth of the defendant.")[1]; *United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, No. 87-6020, 1990 WL 617, at *3 (9th Cir. Jan. 8, 1990); *Welty v. Heggy*, 429 N.W.2d 546, 549 (Wis. Ct. App. 1988); *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 941 (D.C. 1995); *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 202 Cal. Rptr. 204, 210 (Cal. Ct. App. 1984); *Fopay v. Noveroske*, 334 N.E.2d 79, 94 (Ill. Ct. App. 1975). Courts have held that other measures of a defendant's financial condition are misleading with respect to a defendant's ability to pay a

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[1] The Court of Appeals for the Western District subsequently concluded that *Gollwitzer* does not support limiting financial evidence to the defendant's net worth. *See Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 655 (Mo. App. 1997). It later held that there is no limitation on the types of financial evidence that can be considered. *See Collins v. Hertenstein*, 90 S.W.3d 87, 97 (Mo. App. 2002). Notably, both *Barnett* and *Collins* were decided prior to the U.S. Supreme Court's decision in *State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. 408, 416 (2003), and neither decision includes an analysis of the statutory language contained in § 510.263, RSMo.

punitive damages award and should not be admitted. *Fopay*, 334 N.E.2d at 94. *See also, Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 331 (Tex. 1993); *Kenly v. Ukegawa*, 19 Cal. Rptr. 2d 771, 776 (Cal. Ct. App. 1993); *Southland Corp. v. Burnett*, 790 S.W.2d 828, 830 (Tex. App. 1990); *Walker v. Dominick's Finer Foods, Inc.*, 415 N.E.2d 1213, 1217 (Ill. Ct. App. 1980). The financial information beyond net worth was irrelevant to the question of punitive damages because it went well beyond the information required to demonstrate defendants' current wealth and ability to pay a punitive damage awards.

280. This testimony was inadmissible under section 490.065.1, RSMo 2000, because it did not assist the trier of fact. The purpose of the additional financial information was to confuse and inflame the jury, making its more prejudicial than probative and thus inadmissible as a matter of Missouri law.

281. While Missouri law authorizes the consideration of a defendant's net worth in the assessment of punitive damages, the other financial metrics plaintiffs introduced were inflammatory and misleading and, thus, constituted "improper factors" on which to base a punitive damages award. Defendants were entitled to protection against the risk that the jury will award punitive damages based on improper considerations. *Philip Morris USA v. Williams*, 549 U.S. 346, 352, 357 (2007). The trial court's admission of evidence beyond net worth violated defendants' procedural and substantive due process and equal protection rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 19, and 21 of the Missouri Constitution, including the right to be free from arbitrary punishments and from punishments based on improper considerations.

282. The trial court further erred in permitting defendants to offer financial information regarding Massey Energy Company ("Massey Energy"), the parent company of A.T. Massey,

where Massey Energy was not a party to this lawsuit. The net worth of a parent company is irrelevant to the punitive damages awarded against it subsidiary, and "piercing the corporate veil" or another similar theory to hold Massey Energy liable for its subsidiary was not proven or adjudged. To the extent that financial information is relevant to punitive damages, it is that of the defendants – not that of their affiliated companies. *See Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40, 52 (Mo. App. 1984) (it was error to admit evidence regarding the financial condition of a nonparty parent corporation). In keeping with Missouri precedent, courts routinely hold that financial evidence regarding a defendant's parent is inadmissible for purposes of assessing punitive damages. *See, e.g., George Grubbs Enters., Inc. v. Bien*, 900 S.W.2d 337, 339 (Tex. 1995) ("Awarding exemplary damages against one defendant according to the wealth of a separate entity substantially increases the risk of unjust punishment."); *Herman v. Hess Oil V.I. Corp.*, 379 F. Supp. 1268, 1276 (D.V.I. 1974) (holding size of defendant's parent corporation is irrelevant in assessing punitive damages against defendant). The trial court therefore should have precluded plaintiffs' evidence and testimony regarding the net worth, or any other financial information, relating to Massey Energy. The trial court's admission of evidence regarding Massey Energy also violated defendants' procedural and substantive due process and equal protection rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 19, and 21 of the Missouri Constitution, including the right to be free from arbitrary punishments and from punishments based on improper considerations.

283. Defendants incorporate by reference their Motion to Limit the Testimony of Plaintiffs' Financial Expert Robert W. Johnson that was filed July 28, 2011.

Other rulings regarding the admission or exclusion of evidence.

284. The Court erred in permitting plaintiffs to introduce evidence relating to concerns about lead paint in the City of St. Louis. This evidence was not relevant to any issues affecting defendants' liability or plaintiffs' damages and was inflammatory and highly and unfairly prejudicial.

285. The Court erred in permitting certain exhibits (Pl's Exs. 879 – 882) that contained blood lead levels of some of the Plaintiffs from the late 1990's and early 2000's – long after Defendants sold their interests in the smelter – to be admitted. Dr. Rodgers was also permitted over objection to opine that, based on these post-1994 blood lead levels, Plaintiffs lead levels "would likely have been higher" if they had been tested at a younger age. These opinions were speculative and without foundation. These readings were taken when other former Defendants owned the smelter, and it was prejudicial to permit these blood lead levels, and Dr. Rodgers corresponding opinions, to be introduced against these Defendants.

286. The Court erred in preventing Defendants from questioning Chester and Melissa Alexander about Doe Run offering to buy their house in 1995. The Alexanders both testified that they wanted to sell their home, but that Doe Run told them they were no longer purchasing houses in Herculaneum because it was getting "too costly". Tr. 5/23/11 p.m., 51:23 – 52:24; 118:3 - 25. In fact, Doe Run offered to purchase their home in 1995, but the Alexanders refused to sell. Defendants should have been permitted to examine the Alexanders on this issue because it would have undermined their credibility with respect to their claim that they always had wanted to remove their children from harm's way, but could not because Doe Run refused to purchase their house. Indeed, as explained in Defendants Motion for Mistrial, Defendants made an offer of proof on this issue with Mrs. Alexander, and it was discovered later that she lied under oath in that offer of proof when she stated she did not remember any opportunity to sell to

Doe Run that occurred in 1995. However, in a newspaper interview published a day after the compensatory damages award Mrs. Alexander stated that Doe Run had offered to purchase her home, but they had not sold their home because the offer was too low. By excluding the evidence that the Alexanders had rejected an offer to purchase their home, and by permitting them to say both that the smelter company never offered to buy their home, and that they, the Alexanders, truly wanted to leave but could not sell, the jury was misled and defendants were prejudiced. This was not an innocent mistake. The witnesses knew the facts, as witnessed by their statement the day of the verdict, but they did not tell the truth when under oath. Since their son never testified live, these two witnesses were primary witnesses for his case. It was error for the Court to permit the Alexanders to mislead the jury into believing that they only wanted to be bought out when, in fact, they refused to sell when the opportunity arose less than a year after Defendants sold their interests in the smelter. The Court also erred in denying defendants' motion for a mistrial with regard to Preston Alexander's claim after Ms. Alexander stated in an interview that Doe Run had offered to purchase her home in 1995, which was contrary to her sworn testimony during defendants' offer of proof that Doe Run had never made such an offer.

287. The Court erred in admitting plaintiffs' experts' demonstrative exhibits (Exs. 1001, 451, 314, 320, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969), particularly while, at the same time, preventing defendants from introducing demonstrative exhibits (Exs. 17A) used by defendants' experts in the same way. Plaintiffs' demonstrative exhibits should not have been admitted because they contained impermissible hearsay, speculation, and impermissible new opinions, and lacked foundation for the reasons discussed with regard to the expert witnesses with whom the exhibits were used. In addition, the inconsistent treatment of these key exhibits constituted error. *See Bingham v. City of Fairborn*,

1980 WL 352391 at *7 (Ohio App. 1980) (finding error where the court admitted certain evidence offered by the plaintiff, but refused to admit the same type of evidence when offered by the defendant); *United States v. Ferguson*, 2011 WL 3251464 (2nd Cir. 2011) (finding abuse of discretion where the Government was permitted to introduce demonstrative evidence, while the defendant's similar demonstrative exhibit was excluded). This prejudicial error was made worse due to the fact that the jury requested – and was sent – plaintiffs' key demonstrative exhibits outlining plaintiffs' damages.

288. The Court erred in admitting plaintiffs' Exhibit 123, a Herculaneum air lead chronology, because there was no adequate foundation laid for the admission of the document and it contained hearsay information.

289. The Court erred in admitting into evidence Exhibit 144, a handwritten note. The exhibit was admitted without proper foundation, solely on the basis of it having been found in Fluor's file.

290. The Court erred in excluding defendants' Exhibit 15Q, which was a memorandum filed by plaintiffs' counsel stating that a partner is only liable for the conduct of the partnership while a partner and that an incoming partner does not assume historical liabilities for the partnership. The document was contrary to testimony given by Henry Ordower and relevant to the accuracy of his opinions and his overall credibility as a witness.

291. The Court erred in permitting plaintiffs' counsel to argue the law of partnership in opening statement.

292. The Court erred in preventing Zelms from testifying regarding Exhibit 1 (the Paul Allen letter) on the ground that such testimony would be expert opinion testimony, even though Mr. Zelms was shown as having received a copy of the letter, and even though the Court

permitted witness Ordower to explain and interpret that same exhibit. Further, plaintiffs' counsel incorrectly referred to a separate letter, of the same date, which was shown to Mr. Zelms at his deposition and which he had not seen, to keep out the second letter in Exhibit 1 which he had seen. Exhibit 1 was created and submitted by plaintiffs as a joint exhibit, and counsel incorrectly informed the Court about the part of the document that had never been shown to the witness at his deposition. In light of the fact that the same counsel at the deposition, knowing the facts, told the judge at trial an inaccurate recount of what had been shown, the objection was improper, misleading, and prejudicial because the Court accepted plaintiffs' counsel's statement to initially bar testimony.

293. The Court erred in permitting evidence regarding the contamination at Times Beach and Love Canal. The evidence was not relevant to any of the issues in the case and was intended only to mislead, inflame, and prejudice the jury against defendants.

294. The Court erred in admitting unauthenticated handwritten documents (Exs. 194, 1129, 13) into evidence without any foundation being laid for their admission.

295. The Court erred in admitting into evidence various documents as business records when no foundation was laid establishing that the documents were business record.

296. The Court erred in admitting into evidence Exhibits 879, 880, 881, and 882, which were blood lead level tests taken after 1994 when the partnership ended and none of the defendants had any ownership interest in or relationship to the smelter.

297. The Court erred in permitting plaintiffs to elicit testimony from Jeffrey Zelms concerning labor issues and strikes. Specifically, plaintiffs' counsel was permitted to question Zelms about whether the community was happy with Doe Run during the 1992 strike and whether the strike was the result of Doe Run's desire to reduce its employees' wages. That the

Herculaneum smelter once had labor disputes had no tendency to prove or disprove any issue raised in Plaintiffs' personal injury action and was prejudicial to Defendants. *See Brown v. Hamid*, 856 S.W.2d 51, 56 (Mo. banc 1993); *see also State v. Davis*, 32 S.W.3d 603, 611 (Mo. App. 2000) ("If evidence does not tend to prove or disprove any material issue, it is not admissible."). Therefore, this line of questioning should not have been allowed because it was irrelevant, and clearly designed to inflame the jury and prejudice Defendants. *Kelly v. Jackson*, 798 S.W.2d 699, 704 (Mo. 1990). Defendants incorporate by reference their Motion in Limine to Exclude Irrelevant and Prejudicial Evidence (Section I(D)) that was filed on April 8, 2011.

298. The Court erred in permitting Plaintiffs' counsel to question and elicit testimony from Daniel Vornberg concerning Occupational Safety and Health Administration ("OSHA") enforcement actions and violations against the Doe Run smelter. OSHA's primary purpose is to "assure employees' safe working conditions." *See Dunlop v. Haybuster Mfg. Co.*, 524 F.2d 222, 224 (8th Cir. 1975) (emphasis added); *see also Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156, 1160 (3d Cir. 1992) (citing Occupational Safety and Health Law, p. 32-33 (Stephen A. Bokat and Horace A. Thompson III, eds., 1988) (noting that OSHA was enacted in 1970 to curb industrial injuries and deaths in the workplace). 29 U.S.C. 651 (noting that the purpose and policy of OSHA was to "to assure so far as possible every working man and woman . . . safe and healthful working conditions and to preserve our human resources . . . by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions")

299. While Missouri courts have permitted the admission of OSHA regulations where the plaintiff was an employee of defendant or a person for whom OSHA was intended to benefit

(i.e. an independent contractor working on the defendant's premises), OSHA regulations have been found not to be relevant where, as here, the plaintiff is merely a member of the public at large with no specific ties to the defendant's place of business. *See Giddens v. The Kansas City Southern Railway Co.,* 29 S.W.3d 813, 821 (Mo. banc 2000); *Schneider v. Union Electric Co.*, 805 S.W.2d 222, 229 (Mo. App. 1991)

300. Moreover, courts have specifically excluded evidence of OSHA regulations as unfairly prejudicial or irrelevant where they did not apply to the relationship between the plaintiff and defendant. *See Sprankle v. Bower Ammonia & Chemical Co.*, 824 F.2d 409, 416 (5th Cir. 1987); *Robertson v. Cal Dive International, Inc.*, 2006 WL 1968917 at *4 (E.D. La. 2006) (excluding evidence of OSHA as irrelevant because OSHA does not apply to working conditions of seaman on vessels)

301. Because OSHA enforcement actions and violations had absolutely nothing to do with these Plaintiffs – as members of the public at large, and not employees – this evidence was irrelevant, prejudiced Defendants, and should have been excluded. Defendants incorporate by reference their Motion in Limine to Exclude Irrelevant and Prejudicial Evidence (Section I(G)) that was filed on April 8, 2011.

302. The Court erred in permitting Plaintiffs to question witnesses concerning the lobbying of congressional bodies and development of lead related regulations. These lobbying efforts should have been excluded under the First Amendment to the United States Constitution. U.S. Const. Amend. I. Under what is known as the *Noerr-Pennington* Doctrine, the courts may not base civil liability on a defendant's exercise of its right to petition. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1960) (lobbying and public relations activities designed to influence government action is protected); *United Mine*

Workers of America v. Pennington, 381 U.S. 657 (1965). Missouri courts have also recognized that lobbying activities are immunized from liability by the *Noerr-Pennington* Doctrine. *See Defino v. Civic Ctr. Corp.*, 780 S.W.2d 665 (Mo. App. 1989).

303. The scope of these protections extend not just to direct petitioning or lobbying activities, but even to conduct "incidental" to petitioning, such as public relations campaigns. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) ("private action . . . cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence government action"); *id.* at 503 ("the claim of *Noerr* immunity cannot be dismissed on the ground that the conduct at issue involved no 'direct' petitioning of government officials, for *Noerr* itself immunized a form of 'indirect' petitioning). For the foregoing reasons, all testimony and documents related to lobbying activities should have been excluded. Defendants incorporate by reference their Motion in Limine to Exclude Irrelevant and Prejudicial Evidence (Section VII) that was filed on April 8, 2011.

304. The Court erred in excluding evidence regarding traumatic events that could have caused plaintiffs' alleged ADHD and other conditions. The evidence was relevant to the issues of the causation of plaintiffs' alleged injuries, as evidenced by defendants' offer of proof. *E.g.* Tr., 5/26/11 p.m., pp. 40-44; 7/9/11 a.m., pp. 100-11; 7/9/11 p.m., pp. 158-32.

305. The trial court erred in admitting Exhibit 25 into evidence without any authentication or proper foundation.

306. The Court erred in admitting Exhibit 60 into evidence without any authentication of the document or foundation for its admission.

Other grounds for relief.

307. The Court erred in entering sixteen judgments for punitive damages against the defendants for the same conduct. The awards are duplicative in violation of state and federal law and improperly punish defendants multiple times for the same conduct. The United States Supreme Court has stated that multiple punitive damages awards for the same conduct may be a due process violation. *See State Farm v. Campbell,* 538 U.S. 408, 423 (2003). This includes orders to pay punitive damages in successive cases based on the same conduct. *See Huu Nam Tran v. Metropolitan Life Ins. Co.*, 2006 WL 1437376 at * 2 (W.D. Pa. 2006); *Zachair, Ltd. v. Driggs*, 762 A.2d 991, 1002 (Md. Ct. App. 2000) (multiple punitive awards may be unlawfully duplicative if they "have their basis in one continuous course of conduct."). Each of the sixteen awards for each plaintiff is based on the same partnership status by the same defendants for the same time period.

308. The Court erred in entering sixteen judgments on the sixteen jury verdicts. The Court should enter one judgment in this consolidated case. The entry of sixteen judgments was improper because there was one consolidated action before the Court as shown by the consolidation order of December 20, 2010. The effect of the consolidation order was to combine several civil actions into one civil action. *Hudson v. DeLonjay,* 731 S.W.2d 922, 931-32 (Mo. App. 1987). Because there is only one action, there can be only one judgment entered, disposing of all claims of all parties. *Johnson v. Heitland,* 314 S.W.3d 777, 778 (Mo. App. 2010); *Sanders v. Hartville Milling Co.,* 14 S.W.3d 188, 217 (Mo. App. 2000); *Johnson-Mulhern Properties, LLC v. TCI Cablevision of Missouri, Inc.,* 980 S.W.2d 171, 172 (Mo. App. 1998); *M.F.A. Control v. Harrill,* 405 S.W.2d 525, 530 (Mo. App. 1966). After the consolidation, there was one case, and the Court should enter one final judgment in the consolidated case, not the sixteen judgments requested by Plaintiffs.

309. In the alternative, and without waiving Defendants' right to the entry of a single judgment, at most the Court should have entered three judgments -- one for each of the three cause numbers that were assigned before the consolidation order.

310. The trial court erred in entering judgments containing certification language under Rule 74.01(b), because there are no remaining claims after the entry of a judgment on the jury verdicts. Plaintiffs have settled with the other defendants in this case, those settling defendants have been released, and all claims as to all parties have been resolved. The settlement agreements with the settling defendants terminate plaintiffs' claims against those defendants and create contractual rights enforceable by a separate claim for breach of contract, if any settling defendant does not perform its obligations under a settlement agreement. *See Wenneker v. Frager,* 448 S.W.2d 932, 935 (Mo. App. 1969) (settlement of a pending claim and a stipulation passing the claim for settlement terminates the cause of action). Those settlement agreements do not provide a basis for this Court to keep the file open or to prevent the verdicts against defendants being merged into a final judgment. There are no remaining claims to be resolved as to the settling defendants. Any contractual right created by those settlement agreements is not a pending, unresolved claim that warrants certification under Rule 74.01(b). The Court's ability to enforce a judgment or settlement does not mean that a claim remains pending so as to require certification under Rule 74.10(b). Because all claims as to all parties have been resolved by settlement or verdict, it is improper to include Rule 74.01(b) certification language in any judgment.

311. The Court erred in entering sixteen judgments totaling $320 million because the punitive damages exceed the amount of punitive damages allowed by Missouri law. Section 510.265 RSMO provides that a punitive damages award may be no more than five times the

amount of compensatory damages. Defendants object to the entry of any judgment for punitive damages that, separate from or when combined with other punitive damage awards for the same conduct, exceeds five times the compensatory damages awards.

312. The Court erred in entering judgment for sixteen punitive damage awards totaling $320 million because results in punitive damages awards in excess of that allowed by Missouri law. Section 510.265 RSMO provides that a punitive damages award may be no more than five times the amount of compensatory damages. The judgments for punitive damages entered by the Court, whether considered separately or as a total combined punitive damage award, were based on the same conduct and exceed five times any individual or combined compensatory damage award.

313. The Court erred in entering judgments awarding plaintiffs post-judgment interest at 9% per annum on the net amount of the verdicts after set-offs, because interest awarded exceeds the rate of interest permitted by section 408.040 RSMO.

314. Each and every error specified in this motion prejudiced defendants and prevented them from getting a fair trial. Hence, a new trial is required.

315. If the court concludes that any one of the above grounds are not sufficient to support a new trial, the cumulative effect of all of the above errors prevented defendants from receiving a fair trial in this case, and a new trial is required.

Excessive verdicts

316. The Court should grant a new trial because the verdicts returned by the jury are excessive as to both compensatory and punitive damages. For all the reasons discussed above – including but not limited to the instructional error, the erroneous admission or exclusion of evidence, the erroneous response to the jurors requests for exhibits, and the improper statements during voir dire – the excessiveness of the verdicts was caused by the errors discussed above and

resulted from the bias and prejudice of the jury triggered by those errors. A new trial is appropriate when the jury verdicts are excessive and that excessiveness is "engendered by trial misconduct and thus results from the bias and prejudice of the jury." *Barnett v. La Societe Anonyme Turbomeca France,* 963 S.W. 2d 639, 655 (Mo. App. 1997).

Verdicts against the weight of the evidence.

317. The Court should order a new trial because the verdicts awarding compensatory and punitive damages are against the weight of the evidence.

Incorporation of other motions.

318. The Court should grant a new trial for the reasons set forth in Defendants' Motion for Judgment Notwithstanding the Verdict, which is incorporated herein by this reference.

319. The Court should grant a new trial for the reasons set forth in Defendants' Alternative Motion for Remittitur of Punitive Damages, which is incorporated herein by this reference.

320. The Court should grant a new trial because the awards of punitive damages are unconstitutionally excessive and violate defendants' due process rights for the reasons set forth in Defendants' Alternative Motion for Reduction of Punitive Damages Awards as Unconstitutionally Excessive, which is incorporated herein by this reference.

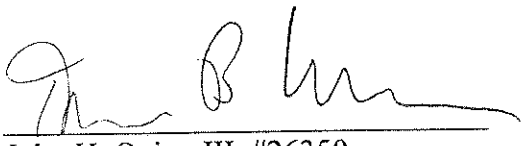
321. The Court should grant a new trial for the reasons set forth in Defendants' Alternative Motion for Remittitur of Compensatory Damages, which is incorporated herein by this reference.

322. The Court should grant a new trial for the reasons set forth in Defendants' Alternative Motion to Amend Judgment, which is incorporated herein by this reference..

Wherefore, for the reasons stated above, defendants request an order granting a new trial as to liability and damages as to all plaintiffs and all defendants. In the alternative, to the extent the Court finds error based on any grounds raised above applicable only to certain of the plaintiffs, then defendants request an order granting a new trial on both liability and damages as to those plaintiffs. In the alternative, to the extent the Court finds error based on any grounds raised above that applicable only to certain of the defendants, then those defendants pray for an order granting a new trial on both liability and damages as to all plaintiffs' claims against those defendants. In the alternative, to the extent the Court finds error based on any grounds that raised above applicable on to damages, the defendants request a new trial as to damages.

Respectfully submitted,

ARMSTRONG TEASDALE LLP

BY: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was delivered via first class mail to counsel of record this 14th day of September, 2011, to:

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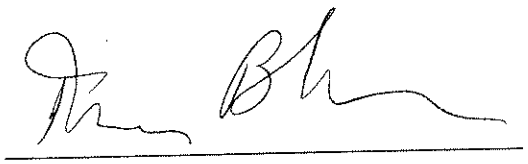

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

PRESTON ALEXANDER, *et al.*, Plaintiffs, vs. FLUOR CORPORATION, *et al.*, Defendants.	)	Cause No: 052-09567 Division No. 12

EMILY PEDERSON, *et al.*, Plaintiffs, vs. FLUOR CORPORATION, *et al.*, Defendants.	)	Cause No: 052-09856 Division No. 12

MATTHEW HEILIG, *et al.*, Plaintiffs, vs. FLUOR CORPORATION, *et al.*, Defendants.	)	Cause No: 052-09866 Division No. 12

AFFIDAVIT OF JOHN H. QUINN III

John H. Quinn III, being duly sworn upon his oath, states that he has personal knowledge of the facts stated in this affidavit and they are true and correct to the best of his knowledge.

1. I was one of the attorneys for defendants in the trial in the above case involving the claims of sixteen plaintiffs.

2. Pursuant to the procedure established by the Court granting permission for the jurors in the above captioned case to contact counsel for the parties, I was contacted by Juror No. 880. Juror No. 880 and I agreed to meet to discuss the case, and we met on September 10, 2011.

3. During our conversation, I asked Juror No. 880 why the jury had awarded more in punitive damages then the plaintiffs had requested. The juror responded it was because of that "Missouri law." I asked if he meant the law where the State receives one-half of any punitive damage award, and he said, "Yes." I asked if this was discussed by jurors during deliberations and he said "Yes." The juror stated that he was aware of that statute as a result of questions asked during jury selection.

Further affiant sayeth not.

John H. Quinn III
#26350

Subscribed and sworn, before me, a notary public on this 14th day of September 2011.

JEANNE R. REANY
Notary Public - Notary Seal
STATE OF MISSOURI
St. Louis County
My Commission Expires: Jan. 30, 2013
Commission # 09487108

Notary Public