(1) Defendants claim Plaintiffs did not plead a claim for punitive damages related to subsidiary and Mahonia transactions.

The Court found previously that Plaintiffs had adequately pleaded fraud related to the Mahonia claim. *See* Third Amended Complaint, ¶¶14-44, Count I, ¶¶45-46, Count IV, ¶¶51-52, Count VI, ¶55, Count VII, ¶61(i), Count VIII, ¶69, and the prayer for relief which requests punitive damages against all Defendants. The Court also notes that the entire Mahonia transaction was extensively discovered and Plaintiffs' allegations of fraud connected to Mahonia were set forth in the Court's Order certifying the Class early in this litigation. It was again explicitly set forth in Plaintiffs' Pretrial Memorandum. Therefore, the Court finds that besides being adequately pleaded, it was the subject of considerable discovery and subject to motions previously filed and heard by the Court. The Court finds, therefore, that Defendants had opportunity to file motions addressing the issue, had an opportunity to present witnesses and, in fact, called expert witnesses who appeared and testified at length that the Mahonia transactions were a good deal for both Plaintiffs/lessors and CNR. Therefore, the Court finds that Defendants' due process rights were not violated by lack of notice.

The court also believes that if there were deficiencies in the pleadings relating to fraud, the issue was tried by the consent of the parties. *WVRCivP Rule 15(b)*, provides:

> (b) Amendments to Conform to the Evidence. <u>When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.</u> Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the

[*] This argument is fully addressed section D.- 2, p. 32, *supra.*

> action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. (Emphasis added)

(2) Defendants claim that there was no evidence that Defendants fraudulently concealed from Plaintiffs the Mahonia transaction because they were reported in S.E.C. filings. Defendants also claim that Defendants' acts in relation to Mahonia had absolutely nothing to do with the Plaintiffs/lessors and relate to the mere exercise of business judgment, which judgment was incorrect based only on hindsight.

The fact that the Mahonia transactions may have been reported in public filings of CEG and NiSource, Inc., with the S.E.C. is not material. Plaintiffs/lessors had no duty to investigate the truth of the factual information contained in the accounting statements sent monthly by CNR and are not held to constructive notice of information contained in public filings. ***E.g., Syl. Pts. 8, 10, Kidd v. Mull,*** 215 W.Va. 151, 595 S.E.2d 308(2004). Regardless, the disclosures in the S.E.C. documents do not address the effect of the Mahonia contracts on the computation of Plaintiffs/lessors' royalty in any way whatsoever. However, what the undisputed evidence does show is that the forward-sale transactions were not disclosed to Plaintiffs/lessors. It is a fact that neither CEG nor NiSource, Inc. reported to Plaintiffs/lessors that, because of the Mahonia forward-sale transactions, their royalty would no longer be based on the market value for the gas at the time of production, but instead be based in large measure on the artificial, forward-sale Mahonia contract prices fixed years before.

Defendants' assertion that there was no evidence of a single decision regarding the Mahonia transactions directed in any manner at the Plaintiffs/lessors, is not supported by the evidence. Defendants could not have afforded to enter into the Mahonia transactions, in which Defendants (primarily, CEG) obtained $400 million up front, if Defendants intended to be faithful to Plaintiffs/lessors and pay Plaintiffs what was due them as royalty if and when the market prices for gas increased. It was the plan of CEG leading up to the Mahonia contracts that if natural gas prices rose, then royalty owners would receive royalty based not on the market value of the gas (or highest prices reasonably obtainable) at the time of production, but, instead and in violation of the leases, the royalty would be based on the contract prices that CNR would receive for the gas.

There was also substantial evidence in the record that rebutted Defendants' claims that the forward-sale contracts were entered into to protect Plaintiffs/lessors and CNR from declining gas prices, which was the testimony of Mr. O'Donnell, the CFO of CEG and then later, NiSource, Inc., and the testimony of other NiSource, Inc. management employees. Of significance was the testimony of Mr. Patrick Mulchay, the president of NiSource's Merchant Group. Mr. Mulchay testified that the risk of gas prices changing was in the prices going up, not down. Id. at 1717. This notion - - that the risk regarding gas prices was not that gas prices would fall, but that they would rise - - is also supported by other evidence. Many experts, including the federal government, were forecasting increasing natural gas prices after several years of generally lower, stagnant prices for gas, and a substantial part of this evidence came through admissions by Defendants' own experts. There was also substantial evidence of an upward spike in natural gas prices during the time between the first and second Mahonia contracts in the 1999-2000 period, yet CEG/NiSource, Inc. nonetheless elected to proceed with the second, long-term, fixed price, forward-sale contract. The evidence presented by Plaintiffs, when viewed in the light most favorable to the Plaintiffs, supports an inference that Defendants willfully chose the immediate $400 million over the rights of the Plaintiffs/lessors arising under the lease agreements.

The evidence supports an inference that the Defendants knew that it was likely that W. Va. royalty owners would suffer as a result of the decisions not only to enter into the Mahonia contracts, but to willfully violate the clear provisions of the royalty clauses of the subject leases in the likely event gas prices rose significantly. In other words, the $400 million paid to Defendants by Mahonia - - which as stated allowed payment of the $150 million in golden parachutes to the top CEG executives - - would be paid for on the backs of W. Va. royalty owners, the Plaintiffs/lessors.[20]

Therefore, the Court finds that evidence of fraud, oppression and bad faith was submitted to the jury in this case, and it became a jury question as to whether the Defendants set about to and did defraud the Plaintiffs. The Jury expressly rejected Defendants' claims that the forward-sale contracts and the sequence of events thereafter were a mere error in business judgment and found fraud on the part of the Defendants relating to the Mahonia contracts and resultant underpayment of royalties to the Plaintiffs/lessors.

Defendants claim that this case will somehow have long term, chilling effects on business decisions has no merit. Defendants and their experts admitted that nothing in the Mahonia transactions prevented Defendants from paying Plaintiffs/lessors royalty based on the market price or the Appalachian Basin Index price, instead of the artificial Mahonia contract prices. The Mahonia transactions have nothing to do with mere matters of "business judgment" and an honest error made in predicting the level of natural gas prices. One important reason to this court for this conclusion is that Defendants wholly failed to prove that it was the custom or practice of gas producers in the natural gas industry in 1999 and 2000, <u>similarly situated to Defendants</u> and <u>under the same or reasonably similar circumstances as Defendants,</u> to commit gas production for 5 or 6 years into the future at fixed rates that were reasonable only if natural

[20] Plaintiffs pointed out at trial that when prices went up to $10 to $16/mcf, royalty alone would have been 1/8 thereof, or $1.25/mcf to $2.00/mcf, respectively. With the second Mahonia contract, the contract price for gas was $2.82/mcf. At market prices, the Plaintiffs would have received anywhere from half to two-thirds of the entire $400 million received by Defendants from Mahonia in 1999 and 2000.

gas prices spiraled downwards over the 5 or 6 year period. The reason, of course, is because the question was not whether gas prices would decline, but how much were gas prices going to increase. In addition, the evidence was that it was very risky to predict gas prices beyond 6 months, much less 6 years.

(3) Defendants' claim that Mahonia was not based on any fraudulent act.

Defendants misconstrue the evidence submitted by the Plaintiffs in reference to the Mahonia transactions. As stated, prior to entering into the Mahonia fixed price, forward-sale contracts, the Defendants willfully and intentionally decided to pay Plaintiffs royalty only on the \$2.50/mcf or \$2.82/mcf price (the fixed prices) for natural gas provided by the Mahonia contracts, no matter if gas prices increased. By making this decision, Defendants targeted Plaintiffs and incorporated Plaintiffs into their deal. These were jury questions whether Defendants' acts and conduct amounted to fraud, and the Jury found that Defendants acted fraudulently in this regard.

The Court finds there was ample evidence, when viewed in the light most favorable to Plaintiffs, for the jury to find by clear and convincing evidence that it was fraudulent. It must be recognized that 70% to 90% of the gas necessary to perform the Mahonia contracts came from West Virginia CNR leases. In other words, it was the gas of the Plaintiffs/lessors that was sold for over 6 years at hugely discounted rates when compared to the market value for natural gas, based on 1999 and 2000 contracts with Mahonia that was plainly a "bad" deal for everyone except CEG and NiSource, Inc., who received the \$400 million up front. Defendants had oil and gas lease obligations towards the Plaintiffs/lessors, and, while Defendants may certainly enter into contracts for their own benefit, nonetheless, such contracts made by Defendants with Mahonia do not release nor modify the duties of the Defendants to the Plaintiffs/lessors under these leases. Yet, the evidence presented supports an inference, obviously drawn by the Jury, that Defendants acted designedly, willfully and deliberately, knowing that the issue regarding gas prices was not if they would be rising, but how high would the prices rise, but, nonetheless, determining that the when gas prices rose, Defendants would breach their lease agreements with the Plaintiffs/lessors and pay royalty on the reduced, fixed, artificial Mahonia contract prices. The "plan" would permit CEG/NiSource,Inc. to have its cake and eat it to - - at the expense of its W. Va. royalty owners.

The evidence is also sufficient to support an inference that Defendants committed fraud during the period of the Mahonia contracts - - via the monthly accounting statements - - in a way that is in addition to the issue of secretly taking deductions from royalty. These monthly royalty accounting statements have a "rate" column in which Defendants represent the rate or the price at which Plaintiffs/lessors gas was sold. A reasonable royalty owner, holding a lease requiring Defendants to compute and pay royalty based on a "rate" for the sale of the gas equal to market value or the highest price reasonably obtainable, would reasonably expect that the "rate" would be market value or the highest price reasonably obtainable or at least fair value for the gas, especially where as here Defendants failed to provide any notice to royalty owners that the "rate" at which the gas was sold was completely artificial and had absolutely nothing at all to do with market value, fair value or highest price reasonably available at the time Plaintiffs/lessors gas was produced and delivered to the purchaser. The court is of the opinion that Defendants had "a duty to speak" relating to these circumstances. Issues relating to fraudulent concealment and active, intentional suppression of the truth have been thoroughly addressed *supra*, at pp. 27-30. However, in the context of Defendants' claims that no evidence was presented regarding fraud in relation to the Mahonia transactions, this court again refers to the Second Restatement of Torts, § 551, *Liability For Nondisclosure*, which provides, in pertinent part:

(1) One who fails to disclose to another a fact that he knows may justifiably induce

> the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
>
> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
>
> . . . .
>
> (e) <u>facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.</u> (Emphasis supplied).

An action for fraud can arise by the active, willful and intentional concealment of the truth just as much as the utterance of a deliberate falsehood. A party's willful nondisclosure of a material fact that he knows is unknown to the other party may evince an intent to practice actual fraud. ***Kessel v. Leavitt***, at 204 W. Va. at page 127; 511 S.E.2d at 752.

The "basic facts" to a transaction relating to an oil and gas lease can of course relate to the issue of formation of the leasehold estate, but it also can relate to the ongoing operation of a the lease by the production of gas during the secondary term of the lease and fulfillment of lease obligations to the Plaintiffs/lessors. These gas leases can extend and be operative for decades and decades, remaining viable by reason of the *habendum* clause in the leases, which permit the lessee/operator to continue operations during the secondary period of the lease "for so long as oil or gas is produced" or language to this effect. So, the relationship - - essentially contractual - - is ongoing and characterized by a series of transactions between the lessor and the lessee/operator. The lessee/operator, here the Defendants, has the right to continue operations to produce oil or gas, but also has the duty to pay royalty to the Plaintiffs/lessors in accordance with the royalty clause of the leases, for production of gas occurring on the lease. As stated, the only consideration received by the Plaintiffs/lessors is royalty from production, but all of the information on which royalty can be calculated according to the lease obligations, is held by Defendants, as the operators of the lease. As stated, the royalty owner has no opportunity or avenue by which this important information can be obtained and, therefore, must rely - - exclusively - - on the information provided by the Defendants regarding volume of production, market value or highest price reasonably obtainable for the gas, and deductions from royalty. Therefore, for each period of production, a new "transaction" occurs between the royalty owner and the Defendants, i.e., Defendant operate the lease during the period, produce and market gas, account to the royalty owner and pay royalty due under Defendants' calculations. These are "objective circumstances" that place a duty of reasonable disclosure on the Defendants regarding the <u>basic facts</u> of the "transaction" because it is clear that the royalty owners were operating under a mistake as to a <u>basic fact</u>, i.e., that the "rate" upon which their royalty was computed during the years of the performance of the Mahonia contracts was neither market value, nor fair value nor the highest price reasonably obtainable, nor a reflection of any real value for their gas produced and delivered during the period of the transaction. Defendants had a duty to disclose to the Plaintiffs/lessors that the "rate" upon which their royalty was computed for all of those years was an artificial rate, fixed by contract years before, a rate that was not reflective of market value or any other real measure of the value of the gas at the time of production, delivery and sale of Plaintiffs/lessors' gas during the 6 year period the Mahonia contracts were performed by Defendants. A reasonable Jury could find that Defendants willfully, deliberately and affirmatively breached this duty of disclosure and they are, therefore, guilty of fraudulent concealment.[30]

---

[30] In analogous settings, W. Va. law recognizes a duty to speak and disclose facts basic to a transaction under certain circumstances where one party has the knowledge of basic facts, the other does not, is laboring under a mistake as to those facts, and cannot reasonably obtain such knowledge. ***See e. g., Logue v. Flanagan***, 213 W.Va. 552, 584 S.E.2d 186 (2003)(where a vendor is aware of defects or conditions which substantially affect the value or habitability of the property and the existence of which are unknown to the purchaser and would not be disclosed by a reasonably diligent inspection, then the

K. There is no evidence that the claims of Class members, if individually pursued, would have been dismissed based on failure of proof relating to "reliance" or "causation" or that the Plaintiff Class was not homogeneous at least as it relates to the claims of Fraud or that an award of Punitive Damages to Unnamed Class Members is a Violation of Due Process of Law as defined by Philip Morris USA v. Williams, 549 U.S. –, 127 S.Ct. 1057 (2007).

Defendants claim that, in this case, unnamed Plaintiff Class members are allowed to share in the proceeds of a verdict, including punitive damages, where punitive damage are meant to punish only where the plaintiff was the actual victim of intentional deceit. Defendants argue that the claims of some of the Plaintiffs would have been dismissed had they been pursued individually, and that this is inconsistent with the United States Supreme Court's recent decision in ***Philip Morris USA v. Williams***, 127 S.Ct. 1057 (2007). In ***Williams***, the Court held that it was a denial of due process to use a punitive damage award to punish a defendant for injury that it inflicts upon nonparties and strangers to the lawsuit, essentially because the defendant is denied an opportunity to defend against liability or damages as to the nonparty regarding issues of reliance and/or causation.

This argument flows from the rejected assertion that the court erred when it instructed the Jury that detrimental "reliance" of the Plaintiffs/lessors on the fraudulent concealment of the Defendants could be "inferred" by the Jury from the circumstantial evidence in the case. (See Section I-D-2, *supra*, p. 31-34).

vendor has a duty to disclose the same to the purchaser; his failure to disclose will give rise to a cause of action in favor of the purchaser); ***Kessel v. Leavitt***, 204 W.Va. 95, 511 S.E.2d 720(1998)(where a person has knowledge of information concerning a newborn child's birth or physical location, or indicating where and in whose care the child may be found, and the child's parent inquires of such person regarding his or her child's birth or physical location, and/or where and in whose care his or her child may be found, such person may be held liable for fraudulently concealing information if he or she affirmatively, intentionally, and willfully fails to provide such information to the child's parent pursuant to his or her request for such information, and such concealment unduly hinders or otherwise irreparably harms the parent's ability to establish a parent-child relationship with his or her child).

Defendants mistakenly categorize the unnamed members of Plaintiff Class as "nonparties" or "strangers to the litigation" in an effort to argue that this case is similar to ***Philip Morris, USA v. Williams, supra.***[31] This is not the case at all. The unnamed members of the Plaintiff Class do not appear in the style of the case, but every member of the Plaintiff Class was identified based on the records of the Defendants! Every unnamed Plaintiff comprising the Class is an identified person who owns or is entitled to an interest in royalty with respect to West Virginia properties operated for natural gas production by Defendants. Each unnamed Class member has been given notice and is before the court (or has opted-out). Plaintiffs called as witnesses practically every named Plaintiff; each testified to the fact of their detrimental reliance on the materially false and misleading monthly accounting statements sent to them by CNR.

It is pure speculation to suggest that there are unnamed members of the Class whose claims, if presented individually, would be dismissed for failure of proof regarding the fraud elements of reliance and/or causation. As stated, the circumstantial evidence is such that it is not logical to conclude that a royalty owner would not rely on the monthly statements to determine volume produced and other important information relating to gas production on their lease. There was no evidence presented at trial that any of the members of Plaintiff Class - - whether named or unnamed - - did not rely on the active fraudulent concealment of the Defendants.

Defendants had complete access to the names, addresses and other contact information for every unnamed Plaintiff and could have called these persons; yet, Defendants did not call any of the unnamed Plaintiffs and did not otherwise produce any evidence whatsoever that called into question whether any of the Plaintiffs did or did not rely on the fraud of the Defendants.

---

[31] In ***Philip Morris USA v. Williams,*** one Plaintiff received a punitive damage award for harm occasioned by Defendant cigarette company to her but also to other smokers similarly situated who were nonparties to the suit. The ***Williams*** Court held that the jury should be instructed that they could only award punitive damages for harm to Plaintiffs. In the instant case, the court instructed the jury that they could only award punitive damages for harm to Plaintiffs. *See* Court's Jury Charge at 19.

Defendants state that if the Plaintiffs and leases in this case "were highly homogenous, the award of punitive damages in this case might be less problematic." This argument is specious. On the key issues surrounding fraudulent concealment, the Plaintiffs are all similarly situated - - each got a monthly accounting statement with false and fraudulent information in it regarding volume produced, rate and deductions from royalty, whether the royalty owner was a large landowner or a hold of small interest in modest property, whether some royalty owners had lawyers when they entered into their lease or did not, and whether some royalty may have negotiated lease terms with CNR while others did not. Defendants' argument that the Class is not "homogeneous" is specious, because the argument is based on factors that have absolutely nothing to do with the fraudulent plan and scheme of the Defendants, how it was carried out and how it affected each Plaintiff royalty owner. The fact is that CNR treated all royalty owners the same and all royalty owners got false and fraudulent monthly royalty accounting statements on precisely the same format.

2. ***The Review Of Damages Based On*** **Garnes, et al.**

The West Virginia Supreme Court has outlined the issues that this Court is to consider when analyzing the amount of a punitive award post-verdict. ***Alkire v. First National Bank of Parsons,*** 197 W.Va. 122, Syl. 6, 475 S.E.2d 122 (1996); ***Garnes v. Fleming Landfill, Inc.,*** 186 W.Va. 656, Syl. 3 and 4, 413 S.E.2d 897 (1991); ***TXO Production Corp. v. Alliance Resources Corp.,*** 187 W.Va. 457, Syl. 15, 419 S.E.2d 870 (1992); and ***Boyd v. Goffoli,*** 216 W.Va. 552, 608 S.E.2d 169 (2004).

West Virginia has long held that punitive or exemplary damages are appropriate in circumstances where gross fraud, malice, oppression, or wanton, willful or reckless indifference to civil obligations affects the rights of others appear. ***Mayer v. Frobe***, 40 W.Va. 246, 22 S.E. 58 (1895).

(1) Review Factors for the Punitive Damage Award.

Garnes, supra, requires that in instructing the jury the trial court is to carefully explain to the jury the factors which the jury is to consider in considering whether punitive damages are to be awarded. The Court finds that its instruction satisfied this requirement. *See* Court's Jury Charge at pp. 21-22 of Trial Transcript.

The Court also cautioned the jury as follows:

> The law presumes that a plaintiff has been made whole by any award of compensatory damages. Therefore, punitive damages should only be awarded if the defendant's culpability after having paid compensatory damages is so reprehensible as to warrant the imposition of further sanctions to achieve the twin goals of punitive damages: deterrence and punishment.

Id., Court's Jury Charge at pp. 17-18.

The Court's review of the factors outlined in ***Garnes, supra,*** Syllabus Point 3, is as follows:

1. *Do the punitive damages bear a reasonable relationship to the harm likely to occur from Defendants' conduct as well as the harm that actually occurred?*

Punitive damages should bear a reasonable relationship to the potential of harm caused by the Defendants' actions, and that generally means that punitive damages must bear a reasonable relationship to actual damages because compensatory damages provide a reasonable measure of likely harm. ***Garnes, supra,*** 186 W. Va. at 667, 413 S.E.2d at 908.

Initially, the court must determine the "*harm that actually occurred*" which must mean what were the actual compensatory damages awarded to Plaintiffs/lessors that relate to the conduct of the Defendants that that the law holds to be sufficiently egregious to allow the imposition of punitive damages? Defendants argue that fraud and fraudulent concealment - - the predicate claims for relief for punitive damages - - have nothing to do with most of the components of the punitive damage award. The court agrees in part, but mostly disagrees with this contention. The court agrees that compensatory damages awarded for underpayment of royalty relating to the unconverted flat rate leases must be excluded from this consideration.[38] Defendants' conduct in paying fixed annual sums as royalty under these leases was not "fraudulently concealed" and was based on an analysis of W. Va. Code 22-6-8, which condemns flat-rate gas leases as oppressive, unfair and exploitative, but does not explicitly, legislatively prohibit the continuation of annual, fixed sums (or flat rates) as royalty on those leases.[39] However, the key component in this court's conclusion that compensatory damages for underpayment of flat-rate well leases should be excluded in this punitive damage review is that Defendants concealed nothing in this regard from Plaintiffs/lessors - - every royalty owner under a flat-rate lease knew precisely what was occurring regarding their royalty and how it was computed. In this court's view, however, this is the only component of compensatory damages that should be excluded in the punitive damage review and the only item of compensatory damages that will not be considered in determining actual damages which is a measure of the "*harm that actually*

---

[38] The court refused Plaintiffs' Proposed Jury Instruction that would have permitted the Jury to award punitive damages for the Defendants' conduct in the underpayment of royalty on the flat-rate leases.

[39] The exception is the situation where activity on a lease requires a permit from the State of West Virginia, in which event the lease converts as a matter of law to a 1/8th royalty based on the volume of gas produced.

occurred."[34]

Accordingly, the court determines the compensatory damage component relevant to this punitive damage review to be $94 million dollars (rounding to nearest million), and that this is a "reasonable measure of the likely harm" occasioned to the Plaintiffs/lessors. The ratio then of punitive damages ($270 million) to compensatory damages is approximately 3 to 1.

Defendants cite ***State Farm Mutual Automobile Insurance Co. v. Campbell***, 538 U.S. 408, 123 S.Ct. 1513 (2003), which held that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of due process guarantee." There, one plaintiff was awarded $1 million in compensatory damages in a case against plaintiff's own insurance company alleging bad faith failure to settle, fraud, and intentional infliction of emotional distress. The Jury awarded $145 million in punitive damages. To be distinguished from ***Campbell***, in this case there are over 10,440 Plaintiffs before this court,

---

[34] The court rejects the Defendants' argument that compensatory damages for underpayment of royalty during the period of, and in relation to the **Mahonia contracts issues**, should also be excluded from this analysis because the evidence established nothing exceeding mere negligence, and because the Defendants did not "profit" from the Mahonia transactions. The Jury found on substantial evidence that Defendants committed fraud in this regard- - and, the Defendants did profit: CEG got the $400 million up-front, were able to complete the merger, and the top CEG executives received $150 million in "golden parachute" executive compensation, including Michael O'Donnell (now NiSource, Inc. CFO), who received in excess of $6 million dollars in the 2000 merger of CEG and NiSource.

Similarly, the court rejects Defendants' assertion that compensatory damages totally $6,544,318 for "**shrinkage/line loss**" and "**the 1/8th royalty wells "mis-measurement"**" claims should be deducted, because, according to Defendants, these claims had nothing to do with fraudulent concealment and, in addition, Defendants did not profit therefrom. "Line loss" means gas lost from the point of production to the point of sale. The court recalls that credible evidence was presented to the Jury that CNR's maintenance of its gathering lines was less than adequate. One witness testified that in his area of Roane County where CNR operates, the odor of gas is always in the air, and that where a gathering line from his well forded a stream, gas continually bubbled up to the surface of the stream, a "line loss" problem never fixed by Defendants. (Trial Tr., at pp. 763-764) Be that as it may, the deductions for line loss was fraudulently concealed from the royalty owners, because it was not deducted prior to 1993, when Defendants began taking this deduction; no notice was provided to the royalty owners that deductions were beginning; and, the monthly royalty accounting statement concealed the fact of deductions from royalty by reporting that no deductions were being taken from royalty. Further, to the extent that actual line loss is the result of Defendants' negligence, Defendants did profit from fraudulently concealing the fact of this deduction from royalty. The "**the 1/8th royalty wells mis-measurement**" relates to CNR measuring production from unmetered wells and then, based on the Jury finding, arbitrarily deducting a major portion thereof and subsequently reporting in the royalty statement, as volume produced, this false measure of actual production. In effect, an unreported volume "deduction" from royalty. The evidence in support of this claim came from CNR's database.

therefore the average (mean) compensatory damage award is $10,000.00 and the average (mean) punitive damage award to Plaintiffs is approximately $25,000.

Thus, the first-blush reaction that this award of $270 million is excessive must be tempered by the fact that thousands and thousands of W. Va. royalty owners in Plaintiff Class is a Plaintiff, is before the Court and will have a claim to a portion of the punitive damage award.[46]

In ***Campbell, supra***, the United States Supreme Court also states, "[w]e decline again to impose a bright-line ratio which a punitive damages award cannot exceed." Id. at 425. Defendants argue that Defendants' conduct caused no injury to "person or property." *See* Defendants' Brief at 51. Defendants claim that "the only harm alleged was the underpayment of royalties." Id. The Court agrees with Defendants and finds that withholding money from Plaintiffs is not as grievous and harmful as conduct justifying punitive damages for injuries to persons. However, secretly taking money from a person is a serious offense and can cause a person or corporation serious financial problems. A person who is depending on payment of royalty over a long period of time can be significantly harmed. Plaintiff, Orton A. Jones, testified that his mother depended on the royalty checks. Plaintiff, Larry Parker, told of his mother's need and reliance on the royalty checks to supplement social security. Businesses in this case were required to pay taxes on their lands, and businesses relied on royalty payments to pay for upkeep and taxes. Royalty was their payment for depletion of their own assets - - natural gas that was owned by the Plaintiffs/lessors. There is also a "lost opportunity" cost that amounts to economic harm to the Plaintiffs but is not necessarily "made whole" by simple receipt of pre-judgment interest. The Court finds that to minimize the fraudulent conduct as mere

---

[46] Except for, perhaps, the flat-rate royalty owners under leases not converted by operation of law prior to the commencement of this suit.

misunderstandings, honest mistakes, and mere economic harm of not paying royalty does not adequately describe the harm that Defendants caused the thousands of persons, firms and corporations defrauded and entitled to punitive damages.

The Court also finds that Defendants had the use of the money in their businesses to promote themselves and their businesses while Plaintiffs unknowingly were deprived of the use for over 10 years.

In ***TXO Production Corp. v. Alliance Resources Corp.***, 509 U.S. 443, 113 S.Ct. 2711 (1993), the court affirmed the W. Va. Supreme Court of Appeals, in ***TXO Production Corp. v. Alliance Resources Corp.***, 187 W.Va. 457, Syl. 15, 419 S.E.2d 870 (1992).[36] The judgment appealed from arose from a claim of slander of title by a developer in the oil and gas leasing context, where the Jury awarded compensatory damages in the sum of $19,000 and punitive damages in the sum of $10 million. The United States Supreme Court held that in light of the millions of dollars potentially at stake by reason of the misconduct, the developer's bad faith, the fact that its scheme was part of larger pattern of fraud, trickery, and deceit, and the wealth of the Defendant, award could not be said to be beyond the power of state of West Virginia to allow under principles of Due Process of the Law. The court mentioned that a ratio of 10:1 was acceptable. ***Id.***, at 509 U.S. 472 (Scalia, J and Thomas, J, concurring). In ***Pacific Mut. Life Ins. Co. v. Haslip***, 499 U.S. 1, 111 S.Ct. 1032 (1991), in a health insurance fraud case, the insured, Haslip, was awarded a verdict by the Jury of over $1 million, which sum included a punitive

---

[36] In Syllabus Point 15 of *TXO*, the Court held:

> The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1.[18] However, when the defendant has acted with actual evil intention, much higher ratios are not *per se* unconstitutional.

damages award that was more than four times the amount of compensatory damages Haslip claimed. At 499 U.S. 23-24, the court stated:

> We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses of respondent Haslip, . . . and, of course, is much in excess of the fine that could be imposed for insurance fraud under Ala.Code §§ 13A-5-11 and 13A-5-12(a) (1982), and Ala.Code §§ 27-1-12, 27-12-17, and 27-12-23 (1986). Imprisonment, however, could also be required of an individual in the criminal context. While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety.

As stated, the Court believes that the ratio here is 3:1, and that the punitive damages award does bear a reasonable relationship to the harm that was inflicted on the Plaintiffs/lessors by the misconduct of the Defendants.

2. ***Garnes'*** second factor includes reprehensibility, how long Defendants continued in their actions, whether Defendants were aware of the harm, whether and how often Defendants engaged in similar misconduct, and whether Defendants made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once their liability became clear to them.

Reprehensibility of Defendants' conduct is one of the most important factors in determining the reasonableness of a punitive damages award under the due process analysis. ***BMW of North America, Inc. v. Gore***, 517 U.S. 559, 116 S. Ct. 1589 (1996). The damages imposed should reflect the enormity of Defendants' offense, but not be out of proportion with it. The question for the Court is whether it was reprehensible for Defendants to defraud over

10,000 Plaintiffs of the moneys to which they were entitled for several years, and, if so, to what degree. In this regard, the following factors are considered:

The Court, having reviewed the entire record of this case, finds the following:

(a) How long did Defendants continue in their actions?

The Court finds that the Defendants' conduct with respect to the deductions began in 1993, and continued after the litigation was filed in late 2003 and has in fact continued through he course of the Jury trial in January, 2007. Therefore, Defendants' conduct continued for 10 years before the fraud was discovered and for three years during litigation, for a total of 13 years.

With respect to underpaying Plaintiffs the royalty due based on the artificial prices set by the Mahonia contracts, the conduct began in 1999, and continued through February 2006, a period of six years. But Defendants, from 1990 through trial, admittedly were selling Plaintiffs' gas to sister (affiliated) companies who, in turn, in many instances, sold to other sister companies. The Jury found that the Plaintiffs' evidence established significant underpayment of royalty based on the Mahonia matters and the sales to affiliates. The long term nature of this conduct, combined with the vast number of persons, firms and corporations defrauded, indicates significant reprehensibility of the conduct.

(b) Were Defendants aware their actions were causing harm to Plaintiffs?

The Court finds that Defendants' highest officers, their presidents, chief financial officers, department heads and boards of directors, were all involved in making the decisions to withhold moneys belonging to Plaintiffs and, therefore, the corporations knew that they were withholding moneys from Plaintiffs and they planned the scheme to conceal it from Plaintiffs.

As detailed above, the Court finds that Defendants' officers and department heads initiated and directed the Mahonia transactions and, critically, <u>the decision to pay royalty owners on the artificial $2.82 Mahonia price, when they knew at the time of the Mahonia contracts that</u>

natural gas prices were or would be likely to rise and that Plaintiffs were entitled royalty based on the market value of the gas or "highest price reasonably available."[37] In this case, both Plaintiffs and Defendants admitted to the fact that the Plaintiffs were entitled to royalty computed at the highest price for the gas that was reasonably available, and the only evidence was that the Appalachian Index price was always available and was the market price. Therefore, the Court finds that Defendants knew they were not paying Plaintiffs what they were due from the very beginning of the 6 year, Mahonia transactions period. Defendants obviously knew from the outset that Plaintiffs/lessors were being harmed by their fraud.

(c) Whether Defendants attempted to conceal or cover up their actions and harm they caused Plaintiffs?

The Court finds that Defendants changed its practices from paying Plaintiffs one-eighth of the value of the gas to paying less than one-eighth of the price without ever advising Plaintiffs. This decision was unilateral and was made by Defendants' officers and department heads. Defendants' decision was to make all the adjustments to the figures in their own database where it was encoded and not available to public scrutiny or access by Plaintiffs/lessors. The actual correct numbers are included in the database, and Defendants paid the state taxes based on the correct numbers. However, the Defendants, in 1993, embarked on a scheme to reduce Plaintiffs' royalty by adjusting the "volume" of Plaintiffs' gas and the "price" of Plaintiffs' gas. Defendants then published in its accounting statement to each owner, materially false information which always provided for less volume than was measured or calculated at the wellhead, and always stated a price that was less than what Defendants received for the gas or for which it was valued. These numbers were arrived at by Defendants by taking out deductions for money and

[37] Mr. Michael O'Donnell, the Chief Financial Officer of Columbia Energy Group and later for NiSource, Inc., positively testified that the operator had the duty of paying Plaintiffs royalty based on the best

volume and then averaging the prices to back into the false numbers on Plaintiffs' accounting statements. Therefore, all of the information relating to the calculation of royalty, which Defendants placed on the Plaintiffs' accounting statements, was false. Defendants also placed on each accounting statement an affirmative statement that there were "0.00" deductions being taken from each royalty owner on each of the accounting statements sent to Plaintiffs. This course of conduct spanned over 10 years and continued through the trial.

The Court finds that all of evidence showed that Defendants knowingly engaged in this conduct and knew they were not paying Plaintiffs all royalty to which Plaintiffs were due.

The Court also finds that the Defendants did not disclose that they were selling Plaintiffs' gas to their own sister companies who were re-selling it for a profit. Nor did they disclose that the Defendants had accepted $400 million in advance for delivery of 146 billion cubic feet of Plaintiffs' gas for six years into the future. Plaintiffs' evidence was that these sales did not meet the requirements of a prudent operator and, therefore, Defendants violated that requirement. The Court finds that based upon the evidence Defendants did conceal the fact that they were paying Plaintiffs on sales, which were not arms-length and not pursuant to Defendants' duty to compute royalty based on market price or the highest price reasonably available.

The Court finds that in this regard Defendants possessed all the knowledge concerning sales of gas, the volume of gas measured at Plaintiffs' wellhead, the date of sale, and the circumstances surrounding the sale of the gas to purchases, and the Plaintiffs had none of this information and no practical way to obtain it.

The Court also finds that Plaintiffs had a right to rely on Defendants to perform their duties related to the sale of Plaintiffs' gas and accurately account to them. Plaintiffs had a right to

---

price reasonably obtainable for the gas produced. (Trial Tr., p. 492, Jan. 11, 2007).

believe, as the evidence indicated, that Defendants were honestly and fairly performing their duties and accurately and fully reporting to Plaintiffs the sales, volume and deductions, if any.

The Court, therefore, finds that Defendants, through fraud, intentionally and knowingly concealed from Plaintiffs material information. The efforts at concealment through misrepresentation and nondisclosure indicate that this conduct was significantly reprehensible.

(d) Whether and how often Defendants engaged in the conduct in the past?

Defendants' conduct involved here was uniform as to all Plaintiffs for the entire period. Monthly, Defendants forwarded approximately 10,000 accounting statements to Plaintiffs with false information from 1993 through trial.

(e) Whether Defendants offered to make amends for the harm caused?

The Court finds that Defendants never offered to make amends before litigation was filed and that, even on the eve of trial at the pretrial conference, only days before the trial began, Defendants offered as a gross settlement of $30 million, only 20 percent of the total compensatory damages awarded in this case. The only offers to compensate Plaintiffs were made three years after litigation was instituted, after the discovery in the case revealed the Defendants' fraudulent conduct.

The Court has reviewed the Defendants' conduct with respect to whether the Defendants made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once Defendants' liability became clear to them. This case was filed in February 2003. After substantial litigation, including litigation in the Supreme Court of Appeals, the Plaintiffs made a demand of $500 million on November 23, 2005. Defendants responded with an offer of $4.542 million on February 9, 2006. On May 1, 2006, Defendants increased their offer to $6 million. Plaintiffs demanded $485 million. At the second mediation, Defendants offered $10 million, and Plaintiffs offered to settle for $470 million. At the third mediation, Defendants offered $17.5 million, and Plaintiffs offered to settle for $393 million. At the pretrial conference, Defendants offered $30 million, and Plaintiffs offered to settle for $273 million. No other offers were made after that date by either party.

The Defendants' position throughout the negotiations was (1) that Defendants were not going to pay interest on any money due, (2) that Defendants were not going to pay for punitive damages because it was not a punitive damage case, and (3) that Plaintiffs did not rely on the statements which Defendants sent to them and Plaintiffs were not damaged in any way.

The Court, therefore, finds that Defendants were not forthcoming at all to make amends. This court finds that the Defendants were recalcitrant in continuing to deny that Plaintiffs were entitled to compensation. Defendants even opposed paying Plaintiffs <u>interest</u> on the moneys owed since 1993 for deductions from royalty of gathering, processing and marketing expenses, which since the decision in ***Estate of Tawney v. CNR, LLC, supra***, in 2006, amounted to liquidated contract damages. Defendants' positions relating to settlement have not been conciliatory or aimed at making amends. The Court also finds that punitive damages, as awarded by the Jury in this case, serves the salutary purpose of encouraging fair and prompt settlements when liability becomes reasonably clear.

(l) Reprehensibility based on violation of Criminal Statutes

In evaluating the reprehensibility of Defendants' conduct, the Court finds that a review of criminal statutes provides significant evidence of whether the predicate conduct is generally viewed by society as reprehensible and to what degree it is deemed reprehensible. The following are statutes bearing on conduct akin to Defendants' conduct:

18 U.S.C. § 1341. *Frauds and swindles.*

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent

> pretenses, representations, . . . [and] for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatsoever to be sent or delivered by the Postal Service, or deposits . . . or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be [guilty of mail fraud].

The Court notes that mail fraud violations constitute predicate acts under the criminal RICO Statute. The RICO statute makes it illegal for an enterprise to engage in a series of predicate acts, i.e. mail fraud. Under the civil RICO Statute, the Plaintiffs would be entitled to treble damages, in addition to restitution. As such, the punitive damages in this case are approximately equal to the treble damages that would be authorized under the RICO Statute.

(g) Ambiguities Contained the Royalty Clauses in the Leases Do Not Mitigate the Reprehensibility of Defendants' conduct.

Defendants claim that their conduct cannot be deemed reprehensible, because the leases were ambiguous and their decision could only be deemed to be a mistaken belief – not fraud. Defendants point to the ***Wellman*** decision as supporting their position. Defendants claim that ***Wellman v. Energy Resources, Inc.***, 210 W.Va. 200, 557 S.E.2d 254 (2001), indicated that "at the mouth of the wellhead" might be sufficient to call for allocation of post production expenses. *See* Defendants' Brief at 53, f.n. 117. The Court , however, finds that:

(1) ***Wellman*** language was mere *dicta.*

(2) ***Wellman*** was not decided until 2001, and Defendants' misconduct began in 1993.

(3) ***Wellman*** actually held that if anyone did take deductions they still had to specifically state what the deductions were for, account for them as in an "accounting," and they must be reasonable. Defendants did none of those things, the deductions were concealed, and the expenses were not "reasonable."

(4) There was no evidence presented that the Defendants came to the conclusion in 1993 that the leases were ambiguous; however, there is evidence Defendants arrived at the decision in 1993 to begin taking the deductions after discussions with their legal department. While the jury did not consider the Defendants' discourse with their attorneys because Defendants asserted the attorney-client privilege and never waived it, Defendants should not be heard to say, "we lay people thought the lease language was ambiguous, but we are not telling you what our attorneys told us."

The Court finds that the assertions by Defendants that the decision to begin withholding Plaintiffs' royalty in 1993 as a result of the ambiguity in lease language is incredible for the following reasons:

(5) Despite Defendants' assertions otherwise, the royalty provisions are obviously ambiguous on the question of whether post-production expenses can be deducted from the royalty interest. For many years before these leases were at issue, the law is that ambiguities in leases are to be construed against the lessee, the person who prepared the lease - - here, the Defendants.

(6) The Defendants are asking the Court to believe that Defendants, in 1993, did not know that lease ambiguities would be resolved in favor of the interpretation that benefits the Plaintiffs/lessors.

(7) Defendants offered other versions of the reason it began charging Plaintiffs, including FERC rules, which Defendants ultimately admitted had nothing to do with Plaintiffs' leases. Defendants also claimed that it was a "fair" thing to do.

(8) Defendants had a land department and a legal department. They regularly dealt with leases and contracts. It is, therefore, incredible to believe that Defendants did not seek and receive legal advice on the issue.

(9) Finally, more revealing than anything is the decision to fraudulently and intentionally conceal from the royalty owners the decision to begin taking deductions from royalty. If the Defendants believed they had the right, Defendants would have placed the amount of deductions on the monthly accounting statements and plainly informed the royalty owners of the deductions and the reasons therefor.

(h) The Fact that No "Check Stub" Statute Has Been Enacted in West Virginia Does Not Mitigate the Reprehensibility of Defendants' Conduct.

A "check stub" statute is one enacted by a legislative body which requires that producers of mineral interests, as the remitter of royalty, provide a written disclosure to the royalty owner of the essential information relating to calculation of royalty. (See Trial Tr., at pp. 1182-1183).

West Virginia does not have a "check stub" statute. The Defendants argue, therefore, that a reason they did not disclose that they were taking deductions from royalty was because there was no "check stub" statute in this state and, hence, no duty of disclosure. The Court has addressed this "no duty to speak" argument throughout this order in other contexts, i.e., the fraudulent concealment claims. The court finds that the Defendants' duty to disclose in this case was based in part on the fact that Defendants "undertook to speak" and intentionally, designedly and fraudulently provided materially false and misleading information in the royalty statements. In other words, Defendants are claiming that only if there was a statute are they required to truthfully disclose the royalty to Plaintiffs. This is not the law and has no tendency to mitigate the reprehensibility of Defendants' conduct.

(i) The Fact that Some of Plaintiffs/lessors may be "sophisticated" Lessors is Irrelevant to the Issue of Reprehensibility.

Defendants argue that sophisticated parties should not have been misled by Defendants' false accounting statements. The Court finds that there was no evidence presented by

Defendants to demonstrate circumstances where a "sophisticated" or smarter person could discover the fraud any quicker than an unsophisticated one. The fact that Defendants were successful in concealing their conduct for over 10 years is evidence that this argument has no merit.

3. Did Defendants profit from the fraud?

The third ***Garnes*** factor requires an analysis of whether Defendants profited from their wrongful conduct and, if so, the award of punitive damages should remove this profit and be in excess of the profit, so that the award discourages future bad acts by the Defendant (and, also, others contemplating similar conduct).

Defendants claim they did not profit or benefit from the fraud. The Court finds, however, that Defendants did profit.

(a) NiSource/CEG benefited because they needed the $400 million to effect the $8 billion merger. New NiSource gained all of CEG for the assumption of $2 billion in debt and by borrowing $6 billion more. NiSource ended up with (1) Columbia Gas Transmission Corp., (2) $400 million in cash, and, (3) from the sale of CNR to Triana, another $300 million in cash, as well as (4) all of CNR's other subsidiaries, including numerous gas and electric distribution companies.

(b) CNR used the $94 million (compensatory damages) to advance its goals from 1993 (when it had little value), to 2003 when it sold for $300 million, to 2005 when it sold for $2.2 billion.

(c) NiSource and CEG used the proceeds from the Mahonia contracts to help pay for and facilitate the merger in 2000, including paying the $150 million dollars in "golden parachute" executive compensation plans to top CEG executives.

(d) While Defendants claim they received no benefit from the deductions because they pass them on to other people, the fact is that Defendants have money to use for other things, like growing their company, drilling wells and mergers.

(e) Defendants profited from not being accountable for line loss in several ways, one of which was that "line loss" was not necessarily line loss. The evidence was that it could have been anything, including Defendants' own gas from its own wells or gas sold and not accounted for. Defendants also profited by not having to spend money to fix or repair lines. If Defendants can charge Plaintiffs and other producers for the loss, it may be more profitable simply to let the line leak than to fix it.

4. **Financial Position of the Defendants.**

Garnes, supra, teaches that the financial position of the Defendants is relevant to the issue of punitive damages. The Court finds that Plaintiffs put into evidence - - only after conclusion of all the evidence - - the net worth of NiSource,Inc./CEG, the parent of CNR. While the Defendants objected to punitive damages, the parties stipulated to the Defendants' net worth, being $5 billion dollars. The Court finds that Defendants' financial position was relevant and properly submitted to the jury, and that care was taken to make sure the Jury was advised that punitive damages were not to be awarded merely because Defendants are large corporations with substantial net worth. [See Defendants' Proposed Jury Instruction No. 29 (Revised), given by the Court.] The Court finds that the punitive damage award, being $270 million, which is approximately 5% of the net worth of the Defendants, is not excessive or so unreasonable to amount to an unconscionable, destructive burden to the Defendants or otherwise a denial of due process, but is in an amount sufficient under the circumstances of this case and the position of Defendants, to serve the primary purposes of punitive damages - - deterrence and punishment.

5. **Cost of litigation, criminal sanctions, and other civil actions as Possible Mitigating Factors.**

In ***Garnes vs. Fleming Landfill, supra,*** at 186 W.Va. 668, 413 S.E.2d 909, the Supreme Court of Appeals stated:

> "[w]hen the trial court reviews an award of punitive damages, the court should consider the factors explained to the jury as well as the following other factors taken from *Haslip* and *Green Oil:*
>
> (1) The costs of litigation. (We want to encourage plaintiffs to bring wrongdoers to trial.);
>
> (2) Any criminal sanctions imposed on the defendant for his conduct. (Any sanctions should mitigate the punitive damages award.);
>
> (3) Any other civil actions against the same defendant, based on the same conduct. (Any other awards should mitigate the punitive damages award.); and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff."

(a) *Cost of Litigation.*

The Court finds that from this record Defendants knew from the beginning of this litigation that Plaintiffs would have to spend an enormous amount of money to prepare and present this complex case. The sum of Plaintiffs' out-of-pocket litigation costs and expenses alone exceed $1 million dollars. The four firms representing Plaintiff Class have spent six years litigating this case. The record discloses that Defendants opposed all of Plaintiffs' claims at every step of the way, in every way possible. The case was litigated in this court, it was litigated many times prior to trial in the Supreme Court of Appeals on Petitions for a Writ of Prohibition, and it was fully tried over a period of three weeks, yet the Defendants never made a *bona fide* effort to equitably and reasonably resolve this case when liability became clear.[*]

This factor militates towards sustaining the Jury's judgment as to punitive damages.

(b) *Other Civil Actions.* The Court finds that NiSource and CNR[#] have no other similar civil actions against them, but Chesapeake Energy does. Chesapeake has two cases pending in Oklahoma for similar conduct, one of which was settled but the other is pending.

This court is not apprised of any other verdict against CNR or NiSource, Inc./CEG for punitive damages. Therefore, under ***Garnes, supra,*** this factor militates towards sustaining the Jury's judgment as to punitive damages.

(c) *Criminal Actions.* There is no evidence that any of the Defendants have been charged with any crime arising from the operative facts presented by this lawsuit. Therefore, under ***Garnes, supra,*** this factor militates towards sustaining the Jury's judgment as to punitive damages.

6. The Court's Review Of The United States Supreme Court Opinions And Trial Court Procedures For The Punitive Award.

While there have been several United States Supreme Court opinions since ***TXO, supra,*** including the recent opinion of ***Philip Morris USA v. Williams,*** 127 S.Ct. 1057 (2007), ***TXO*** is instructive with respect to some of the issues in this case. As stated, ***Williams*** actually supports

---

[*] This court convened a special pre-trial conference in December, 2006, just a few weeks before trial. This court directed that persons with authority to settle be present. The court by that time - - having ruled on several motions for summary judgment, being apprised of the 2006 ruling by the Supreme Court of Appeals in *Estate of Tawney v. CNR* and being fully aware of the circumstances relating to the monthly royalty accounting statements that had been sent by CNR to the Plaintiffs and the information in CNR's database, and the arguments of fraud being made by Plaintiffs' counsel, was well aware and convinced that the case needed to be settled by the Defendants. Yet, as revealed post-trial, Defendants' settlement offer was for a sum that indicated intransigence.

[#] CNR has been sued in federal court in Kentucky for underpayment of royalty. This case was only recently filed and is in discovery. Whether fraud, fraudulent concealment or other punitive damages predicate claims are being pursued is not clear to the court.

the trial court's instructions to the jury. The ***Williams*** Court held that the jury should be instructed that they could only award punitive damages for harm to Plaintiffs and not for harm to nonparties or strangers to the litigation. This trial court instructed the jury that they could only award punitive damages for harm to Plaintiffs. (*See* Court's Jury Charge at 19). As will be further discussed below, ***Williams*** supports this verdict.

TXO involved a slander of title suit where defendant had undertaken, in bad faith, to advance a claim of title to Plaintiffs' oil and gas rights. The United States Supreme Court stated:

> While petitioner [TXO] stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme. Thus, even if the actual value of the "potential harm" to respondents is not between $5 million and $8.3 million, but is closer to $4 million, or $2 million, or even $1 million, the disparity between the punitive award and the potential harm does not, in our view, "jar one's constitutional sensibilities." *Haslip,* 499 U.S., at 18, 111 S.Ct., at 1043.

TXO, 509 U.S. at 462. In ***TXO,*** the United States Supreme Court examined defendant's conduct and "potential harm." The United States Supreme Court found that, even if the potential harm to plaintiff was only $1 million, a $10 million punitive award was not inappropriate. In other words, in a case where the defendant tried to harm plaintiff, but only cost plaintiff $19,000 in damages, a $10 million award, 10 times the "potential harm" of $1 million would not shock the conscience.

The United States Supreme Court went on to hold that:

> In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

Id. at 462.

Defendants filed a supplemental brief claiming that ***Williams*** supports its position. However, ***Williams*** decided only one new issue. The United States Supreme Court stated, "[w]e did not previously hold explicitly that a jury may not punish for the harm caused by others. But we do so hold now." ***Williams,*** 127 S.Ct. at 1065. That was the only new holding in the ***Williams*** case. This Court instructed the jury on the case at bar that they could only punish for harm to the Plaintiffs. Defendants argues in essence that the jury can only assess punitive damages for the named Plaintiffs, and that the unnamed Plaintiffs are actually strangers to the litigation. This court has already rejected this contention.[40] There were 10,440 class members before the Court and jury in this case, each one of whom was identified to (and actually by) the Defendants and could have been called by the Defendants. Defendants would not be better off trying 10,440 cases and have equal number of juries decide independently the amount of punitive damages to which each plaintiff is entitled.

TXO teaches that Defendants are better off having one jury decide punitive damages for 10,000 Plaintiffs than 10,000 juries deciding punitive damages in 10,000 cases. Trying punitive damages issues for the entire class actually protects Defendants from inordinate punitive damage awards and assures a fair award to all persons harmed.

Here, the jury awarded essentially three times the compensatory damage award that can serve as a predicate for punitive damages, which will be allocated proportionately to each of the Plaintiffs in the class.[41] The fairness of this approach and its advantages in lieu of individual trials

---

[40] See this Order, supra, Section 1 – k, pp. 71-72.

[41] Although this will no doubt be the subject of a hearing to be held hereafter, this court has serious reservations about the basis on which the unconverted, flat-rate royalty owners (those who received when this lawsuit commenced, a "flat rate" for gas produced pursuant to a flat-rate royalty lease) would be entitled to share in the punitive damage award.

punishing the Defendants over and over again is well recognized. ***See Turley v. Owens Corning Fiberglass Corp.,*** C.A. No. 84-C-3321, Kan Co. Cir. Ct. (1989); Newburg on Class Actions, Vol. 5, § 17.33. "The use of a multiplier provides a method by which Defendants will not be subjected to repeated individual trials."

Therefore, the Court finds that, in retrospect, the award per plaintiff is reasonable considering the conduct. In ***BMW v. Gore,*** 517 U.S. 559, 116 S.Ct. 1589 (1996), the jury awarded $4,000 compensatory for paint damage to a car, and $4 million in punitive damages. The Supreme Court had reduced the punitive award to $2 million because the award was "grossly excessive." But, the United States Supreme Court stated that such an award violated due process "only when it can fairly be characterized as grossly excessive in relation to the State's legitimate interests in punishing unlawful conduct and deterring its repetition." 517 U.S. at 568. While the United States Supreme Court in ***BMW*** found that BMW's conduct was not "particularly reprehensible," the Court reaffirmed that:

> To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct (*citing TXO, 509 at 453, 1135 at 2717-2718*) or when the target is financially vulnerable, can warrant a substantial penalty.

517 U.S. at 576.

The Court finds that the case at bar is more like TXO's attempt to gain royalty by trickery than BMW's paint job case. The ***BMW*** court stated that, "in upholding the $10 million award in ***TXO,*** we relied on the difference between that figure and the harm to the victim that would have ensued if the tortuous plan had succeeded. That difference suggested that the relevant ratio was not more than 10 to 1." 517 U.S. at 559.

In evaluating whether a defendant had notice that their misconduct may make them liable for a certain multiplier, ***BMW*** affirmed that a Court may look at legislative judgments concerning appropriate sanctions for the conduct at issue. 517 U.S. at 583. In the case at bar, numerous statutes in West Virginia provide for three times the compensatory damages. See the following:

1. W. Va. Code § 37-7-1, Waste by tenant in possession, "[i]f any tenant of land or any person who has alienated land commit any waste thereon while he remains in possession, unless by special permission of the owner so to do, he shall be liable to any party injured for damages" in conjunction with W. Va. Code § 37-7-4, Actions; damages, provides as follows:

   Any person entitled to damages, in any case arising under the preceding sections of this article, may recover the same in an action on the case. And <u>if it shall be found by the jury that the waste was committed wantonly, judgment shall be for three times the amount of damages assessed therefore</u>.

2. W. Va. Code § 61-3-48a. Cutting, damaging or carrying away without written permission, timber, trees, growing plants or the products thereof; treble damages provided:

   Any person who enters upon the land or premises of another without written permission from the owner of the land or premises in order to cut, damage or carry away or cause to be cut, damaged or carried away, any timber, trees, logs, posts, fruit, nuts, growing plan or product of any growing plant, <u>shall be liable to the owner in the amount of three times the value of the timber</u>, trees, growing plants or products thereof, which shall be in addition to and notwithstanding any other penalties by law provided.

3. W. Va. Code § 5A-3C-12. Restraint of trade; civil and criminal violations defined.

   (b) Any person violating the provisions of this section is guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility for not less than one nor more than ten years, or fined in an amount consistent with the Clayton Act 15 U.S.C. § 15 et seq., <u>which may include treble damages</u>, or both fined and confined.

4. W. Va. Code § 17A-6A-16. Actions at law; damages.

   (1) If a manufacturer or distributor terminates, cancels, fails to renew or discontinues a dealer agreement for other than good cause . . . the new motor vehicle dealer adversely affected by the actions may bring an action for damages and equitable relief against the manufacturer or distributor. If the new motor vehicle dealer prevails, the dealer may recover, <u>in addition to actual damages treble damages up to three times</u> the amount of the actual damages awarded. . . .

5. W. Va. Code § 37-15-6a. Termination of tenancy of more than twenty-five tenants.

> (b) If a landlord violates the provisions of this section, the tenant has a cause of action to recover actual damages, the costs required to relocate the aggrieved tenant and, in addition, a right to recover treble damages or the equivalent of the aggrieved tenant's rent for one year, whichever is greater, and reasonable attorney fees.

6. W. Va. Code § 31-3-3. Injuries to property of boom company.

> If any person or persons shall willfully and maliciously injure or destroy . . . alter or deface any mark or marks on any logs or other timber intended for such boom, he shall pay treble damages. . . .

7. W. Va. Code § 59-3-7. Criminal and civil penalties.

> (c) Any qualified newspaper which shall knowingly charge any rates in excess of those specified . . . shall be liable to the person damaged thereby for treble damages.

8. W. Va. Code § 61-3-50. Unauthorized transferal of recorded sounds; sale and possession; penalties; civil action; definition.

> (b) Any owner of such recorded sounds, images or any audio-visual combination and any person lawfully transferring such sounds by agreement with such owner shall have a cause of action for the unauthorized transferal of such sounds and shall be entitled to treble damages resulting therefrom.

9. W. Va. Code § 47-18-9. Damages; treble damage suits.

> Any person who shall be injured in his business or property by reason of a violation of the provisions of this article may bring an action therefor and shall recover threefold the damages sustained by him, together with reasonable attorneys' fees, filing fees and reasonable costs of the action. Reasonable costs of the action may include, but shall not be limited to the expenses of discovery and document reproduction.

(Emphases added.)

Therefore, the Court finds that the above statutes are notice that West Virginia holds punitive awards of three times compensatory damages as a common practice, and a party who defrauds persons by withholding their money for 10 years could reasonably expect substantial punitive damages at a much greater ratio.

Defendants' reliance on the United States Supreme Court's holding in ***State Farm Mutual Automobile Insurance Co. v. Campbell***, 538 U.S. 408, 123 S.Ct. 1513 (2003), is misplaced. The jury in ***Campbell*** awarded one plaintiff $1 million in compensatory damages and $134 million in punitive damages. The ratio there was 134:1, with one plaintiff being awarded $1 million in compensatory damages. Again, there are thousands of Plaintiffs here and there is, therefore, no comparison to Plaintiffs' single digit ratio here. In ***Campbell***, the Court pointed out:

> [A] long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damage to deter and punish. . . . While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 . . . .

538 U.S. at 425.

The Supreme Court in ***Campbell*** found that much or even most of the conduct that State Farm was punished for was conduct occurring in other cases, which were irrelevant or minimally relevant to the conduct towards Plaintiffs. 538 U.S. at 423-424. The Supreme Court stated, "[i]n sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." 538 U.S. at 426. The damages in ***Campbell*** arose out of State Farm's first party bad faith failure to settle a $50,000 liability limit policy claim. Mr. Campbell was sued as a result of a death caused by an auto accident. State Farm's failure to settle led to Campbell's serious emotional distress during the litigation. The United States Supreme Court pointed out that Campbell was not physically injured. His claim was 18 months of emotional distress. "The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries. . . ." 538 U.S. at 426.

In determining reprehensibility, the United States Supreme Court, in *Gore, supra,* 517 U.S. at 576-577, instructed that Courts should consider the following:

1. Whether the harm was physical or economic.

The Court finds that in this case it was economic.

2. The tortuous conduct evinced an indifference to or reckless disregard of the health or safety of others.

The Court finds here that health and safety were not issues in this case.

3. The target had financial vulnerability.

The Court here finds that Plaintiffs did have financial vulnerability because they were kept in the dark about the circumstances and did not independently have the wherewithal to obtain information to challenge Defendants.

4. Conduct involved repeated actions.

The Court finds that Defendants repeated these violations thousands of times over 13 years.

5. The harm was caused by Defendants' intentional malice, trickery and deceit.

The Court finds that the harm was caused by deceit, all as set forth above.

ORDER

The Court, therefore, has fully reviewed all of the Defendants' bases for either striking entirely the punitive award or reducing it and all of the factors required to be considered by the W. Va. Supreme Court of Appeals and the United States Supreme Court. With respect to whether Plaintiffs' evidence supported an award for fraud and punitive damages, the Court is mindful of the manner in which the Court is to review the evidence. "In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." ***E.g.,*** Syl. Pt. 5, ***Orr v. Crowder***, 315 S.E.2d 593 (W.Va. 1983); Syl. Pt. 2, ***Bowyer v. Hi-Lad, Inc.,*** 609 S.E.2d 895 (W.Va. 2004).

Based on consideration of all of the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. The Jury's verdict for Plaintiffs relating to the various claims of fraud and fraudulent concealment is sustained as being fully supported by the law and the facts. The jury verdict, therefore, for fraud will not be set aside and Defendants' objections thereto are hereby overruled.

2. The evidence, and other relevant circumstances to be considered by the court, are sufficient to sustain the verdict of Jury for punitive damages in the sum of $270 million dollars. The Court has reviewed this evidence in light of ***Games v. Fleming Landfill, Inc.,*** 186 W.Va. 656, 413 S.E.2d 897 (1991), as set forth above, and precedent of the United States Supreme Court, and in the opinion of this court, the evidence and other circumstances of this case establishes that a downward adjustment in punitive damages is not warranted under the evidence and the law and would amount to a denial of the Plaintiffs/lessors' right to the Due Process of the Law (their right to trial by Jury).

3. The findings and conclusions made throughout this order are made an order of this court and incorporated herein by reference.

4. The Court also finds that the verdict as to fraud related to Mahonia is a verdict against NiSource and CEG for their own misconduct as well and also based on alter ego and/or joint venture.

5. The Court finds that as a result of CEG and NiSource's merger in November 2000, the new NiSource, Inc. is one and the same as CEG for purposes of this litigation as it relates to any misconduct or liability of CEG that predated the merger.

6. The Court finds and ORDERS that the verdict, as "harmonized" with the pleadings, evidence, instructions of the Court, stipulations of the Defendants, and the jury's findings, shall be reduced to a judgment for Plaintiffs and against all Defendants for $134,335,134.00 million in compensatory damages and $270,000,000.00 in punitive damages, together with additional prejudgment interest at the legal rate effective on the date of the verdict through date of entry of judgment, interest thereon subsequent to entry of judgment at the legal rate until paid, and the costs of this action. This court directs Plaintiffs' counsel to prepare and submit such a judgment order to the court for entry, pursuant to *Trial Court Rule 24.01(c)*. Once judgment is entered, then post-trial motions shall be according to the W. Va. Rules of Civil Procedure.

7. The Court further finds that this concludes one aspect of this litigation. The Court retains jurisdiction of the remaining matters either not tried or stayed, pending further Order of the Court.

The exceptions of the Defendants to all adverse rulings are noted and saved.

The Clerk shall forward attested copies of this order to counsel of record.

ENTER: June 27, 2007

Thomas C. Evans III

Thomas C. Evans, III, Circuit Judge
Fifth Judicial Circuit
State of West Virginia