IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA (Wheeling)

MURRAY ENERGY CORPORATION, et al., Plaintiffs, v. GINA McCARTHY, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, acting in her official capacity, Defendant.	)	**Civil Action No. 5:14-CV-00039** **Judge Bailey**

REPLY IN SUPPORT OF UNITED STATES' MOTION TO DISQUALIFY OR EXCLUDE JEFFREY HOLMSTEAD

The United States submits this Reply in support of its Motion to Disqualify or Exclude Jeffrey Holmstead filed on May 16, 2016 (Doc. No. 206).[1] Mr. Holmstead is a lawyer and lobbyist with significant conflicts of interest that Plaintiffs have proffered to offer legal opinions in the guise of expert testimony. As explained in the United States supporting memorandum of law (Doc. No. 207) ("Memo."), there are two independent reasons why Holmstead should not be permitted to do so: (1) his testimony is based on confidential and privileged information gained during employment at EPA, creating an impermissible conflict of interest; and (2) his testimony consists of a series of legal conclusions, which is not permitted under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Memo. at 8-18.

[1] The United States moved to expedite its Motion so as to allow sufficient time for a decision before the close of discovery. Doc No. 206. That request was denied on May 20, 2016. Doc. No. 212. But contrary to Plaintiffs assertion (Opp. at 4), the United States has not "chose[n] not to depose" Holmstead. While, as previously explained, the United States is concerned that it cannot depose Holmstead without eliciting privileged and confidential information, *see* Memo. at n.1, 13-14, it will notice Holmstead's deposition, to be taken in the event that the Court denies the Motion or does not issue a timely decision.

Nothing in Plaintiffs' Memorandum in Opposition (ECF. No. 228) ("Opp.") overcomes these disqualifying flaws regarding Mr. Holmstead's proposed testimony. Plaintiffs insist that Holmstead be permitted to testify that, while the head of EPA's Office of Air and Radiation ("OAR"), he did *not* address the subject of this case, EPA's performance of the evaluations described in Section 321(a) of the Clean Air Act ("CAA")—the very gambit rejected by the court in *United States v. Ameren Missouri ("Ameren")*, No. 4:11-CV-77 RWS (E.D. Mo. 2014). Not only is such testimony a conflict of interest, it begs the question of how Holmstead could assist the Court in deciding whether the Agency performed the evaluations described in Section 321(a). At its core, the proposed testimony is a toxic combination of an inappropriate factual confession (i.e., that OAR, under Holmstead's leadership, did nothing to address Section 321(a)) and Holmstead's opinions on legal issues that this Court is fully capable of resolving on its own.

I. Holmstead Should Be Disqualified Because of a Significant Conflict of Interest.

The reason that Holmstead is conflicted out of serving as an expert in this case is simple: at EPA, he headed the office responsible for fulfilling the Agency's CAA obligations, including any obligations under Section 321(a). *See* Opp. Ex. 1 ("Holmstead Decl.") ¶¶ 4 & 16. Holmstead now seeks to testify, in essence, that he did not do his job, and (as far as he is aware) nobody else did either. This is a classic case of side switching that merits disqualification under the applicable conflict of interest tests. Plaintiffs argue that Holmstead did not receive privileged or confidential information about Section 321(a), pointing to his assertion that he did not address that provision while at EPA. Opp. at 4-5. But it is undisputed that Holmstead received privileged and confidential communications about regulatory impact analyses ("RIAs")—documents EPA has put forth as evidence that it has fulfilled any duty under Section 321(a). Thus, Holmstead's proposed testimony is inextricably entangled with privileged and confidential information that is highly relevant to the issues before the Court.

A. The United States need not show that Holmstead has violated 18 U.S.C. § 207(a).

Plaintiffs spend six pages of their opposition brief arguing that Holmstead has not violated a criminal federal conflict of interest statute, 18 U.S.C. § 207(a), or its implementing regulations, which are set forth in 5 C.F.R. Part 2641. *See* Opp. at 8-14. That is irrelevant.[2] The United States need not prove Holmstead criminally[3] liable for disqualification to be appropriate. Rather, as the United States explained in its Motion and discusses further below, federal case law bars former employees from testifying against their former employer if they were privy to confidential or privileged information that is relevant to the subject at hand. *See* Memo. at 8-14.[4] The case law applying 18 U.S.C. § 207(a) and its implementing regulations, on one hand, and the long line of cases applying the bright line and two-part disqualification tests, on the other hand,

[2] Although compliance with 18 U.S.C. § 207(a) is not the relevant question here, Holmstead's offer to testify is arguably inconsistent with that provision, which *permanently* bars a former EPA employee from testifying in litigation against EPA regarding a matter in which he "participated personally and substantially." Here, the matter before the Court is whether EPA performed the evaluations described in Section 321(a), and Holmstead seeks to testify that the office he headed did not do so. Plaintiffs cite an example from the implementing regulations as confirmation that Holmstead has not violated 18 U.S.C. § 207. *See* Opp. at 10 (citing 5 C.F.R. § 2641.301 (Example 3 to paragraph (f)). But that example concerns § 207(c) (addressing one-year restrictions on senior personnel), not § 207(a). And the key fact in the example is that the former employee "had not worked on the matter" before the court while at the agency. 5 C.F.R. § 2641.301 (Example 3 to paragraph (f)). Here, Holmstead describes himself as "the architect" of several key rulemakings that included RIAs (Holmstead Rep. at Ex. B)—the type of evaluation that EPA has argued constitutes performance under Section 321(a). Even if the Court were to conclude otherwise, there is no question that Holmstead "worked on the matter" before the Court. Indeed, the next example in the regulations makes this clear, explaining that a former EPA employee who worked on a report concerning a utility company's practices may not serve as an expert witness for the company in litigation concerning those practices. 5 C.F.R. § 2641.301 (Example 4 to paragraph (f)). Like Holmstead, the employee worked "on the matter" before the court, and thus is barred.

[3] Plaintiffs argue that 18 U.S.C. § 207(a) "is not limited to criminal matters." Opp. at 11. 18 U.S.C. § 207(a) states that violations "shall be punished as provided in section 216," which states that violators "shall be imprisoned . . . or fined . . . or both." 18 U.S.C. § 216(a). Thus, it is up to the United States to decide whether to seek imprisonment and/or a civil penalty under this provision.

[4] Although, as the United States noted (Memo. at 14), there is one case where the court analyzed whether an expert should be disqualified under *either* 18 U.S.C. §207(a) *or* the two-part test, *see Return Mail, Inc. v. United States*, 107 Fed. Cl. 459, 461-69 (2012), no court has suggested violating 18 U.S.C. §207(a) is a prerequisite for disqualification under the two-part test.

are distinct branches of conflict of interest law, and the United States need not show a violation of the former to prove the latter.

B. The *Wang Labs* two-part conflict of interest test applies here, and the *Ameren* court's application of that test to disqualify Holmstead is indistinguishable.

As the United States explained in its Motion, there is a simple two-part conflict of interest test for situations like this, under which the court asks: (1) whether the moving party reasonably thought it had a confidential relationship with the former employee/proposed expert; and (2) whether the moving party disclosed relevant confidential or privileged information to that person. *See Wang Labs, Inc. v. Toshiba Corp.*, 762 F. Supp. 1246 (E.D. Va. 1991). If both prongs of that inquiry are met—as they are here (*see* Memo. at 10-12), given that Holmstead was a high-level EPA official who received a number of the documents listed on the United States' privilege log—then disqualification is warranted. *See id.*

Plaintiffs themselves admit that there is a conflict under *Wang Labs* "when an expert witness was [a] intimately involved with one party that [b] provided him with confidential information and then [c] sought to testify on behalf of the opposing party in a particular matter involving that same information." Opp. at 14. That is precisely this case. As Holmstead stated in his expert report, "[d]uring my tenure at EPA, I oversaw the development of many CAA regulations and was *intimately* involved in developing a number of them." Memo. Ex. 3 ("Holmstead Rep.") at 1 (emphasis added). Holmstead was [a] intimately involved with EPA when head of OAR, [b] was given confidential information (e.g., regarding RIAs conducted for various rulemakings), and [c] now seeks to testify in a matter involving that information (i.e., concerning whether EPA's past RIAs fulfilled any obligation under Section 321(a)).

Plaintiffs fail to rebut that EPA had a reasonable expectation of confidentiality in regard to any discussions Holmstead had—or claims not to have had—related to Section 321(a).

Indeed, if Holmstead sought to testify that he *had* conversations with EPA personnel about whether and how the agency was performing the evaluations described in Section 321(a), those conversations would plainly be confidential (given that EPA reasonably expects internal discussions with high-level managers regarding whether the Agency is performing its statutory duties not to be publicly disclosed) and privileged (as any analysis of EPA's legal obligations would necessarily involve counsel). It would be illogical, and create perverse incentives, for the claimed *absence* of such discussions to be treated any differently. Indeed, the *Ameren* court refused to allow the exact same type of omission testimony from Holmstead. *See* Memo. Ex. 2 at 74 (declining to allow Holmstead to "tell us what wasn't discussed"). Moreover, Holmstead contends that EPA did not just fail to perform its duty but "refused" to do so (Holmstead Rep. at 14), suggesting an affirmative decision not to act. If Holmstead is basing that conclusion on internal discussions, those conversations would be privileged even under Plaintiffs' crabbed reading of the law.

Having failed to rebut the Agency's reasonable expectation of confidentiality in regard to Holmstead's activities at EPA, Plaintiffs instead claim that Holmstead was not "privy to privileged documents that were relevant to issues in [the] case." Opp. at 16. In support, Plaintiffs argue that the 50-plus privileged documents EPA identified on its log as having been sent or received by Holmstead (*see* Memo. Ex. 5) do not, based on their descriptions on the log, include "any Section 321(a) document," and therefore are not relevant to the issues before the Court. Opp. at 5, 17 & n.3. But the documents are listed on the United States' privilege log because (in addition to being privileged) they were determined to be responsive to the Plaintiffs' discovery requests. The United States should not be put in the untenable position of having to disclose the substance of privileged documents to which Holmstead was unquestionably privy in

order to prove that they are sufficiently related to Plaintiffs' claim. The Court may ultimately agree or disagree that RIAs undertaken by the Agency over the past several decades of rulemaking—including under Holmstead's leadership—are sufficient to constitute performance of any duty in Section 321(a), but there is no question that Holmstead was involved in those analyses while at EPA and received privileged communications about them. Disqualification is imperative in such circumstances.

Plaintiffs attempt to marginalize the *Wang Labs* test, no doubt because of how squarely it applies to these facts. *See* Opp. at 14-16. But contrary to Plaintiffs' suggestion (Opp. at 15), the *Wang Labs* analysis has been applied in numerous federal district courts,[5] to government as well as private sector employees. *See, e.g., Return Mail, Inc. v. United States*, 107 Fed. Cl. 459 (Fed. Cl. 2012) (applying two-part test to retired postal service executive);[6] *Fisher v. United States*, 78 Fed. Cl. 710, 712 (Fed. Cl. 2007) (citing *Wang Labs* when declining to allow plaintiff to introduce IRS consultant's report for rebuttal purposes); *United States v. Larkin*, 1994 WL 627569 (D. Minn. April 12, 1994) (applying *Wang Labs* to federal bank examiner); *see also United States v. HNC Health Care Corps.*, 150 F. Supp. 2d 1013 (W.D. Mo. 2001) (disqualifying former state government manager because she gained confidential information relevant to the

[5] Plaintiffs cite to a single case that speaks somewhat disapprovingly of *Wang Labs*. Opp. at 15. In contrast, there are many dozens of cases applying *Wang Labs* in district and appellate courts across the United States. *See Rhodes v. E.I. Du Pont de Nemours and Co.*, 558 F. Supp. 2d 660, 664 (S.D. W. Va. 2008) ("Numerous courts cite to *Wang Laboratories, Inc.* . . . in assessing whether an expert should be disqualified. *See, e.g., Koch Refining*, 85 F.3d at 1181; *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1093 (N.D. Cal. 2004); *Grant Thornton*, 297 F. Supp. 2d at 883 n.2; *U.S. ex rel. Cherry Hill Convalescent Center, Inc. v. Healthcare Rehab Sys., Inc.*, 994 F. Supp. 244, 249 (D.N.J. 1997); *Theriot v. Parish of Jefferson*, Civ. A. No. 95-2453, 1996 WL 392149, *2 (E.D. La. Jul. 8, 1996); *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 580 (D.N.J. 1994)").

[6] Plaintiffs suggest that the test applied in *Return Mail* was "not clearly *Wang Labs*." Opp. at 17. But while the court did not explicitly cite *Wang Labs*, Plaintiffs admit that it asked the same two questions: (1) was there a confidential relationship, and (2) did the government disclose confidential or privileged information. *See* Opp. at 17 (citing *Return Mail*, 107 Fed. Cl. at 461). There is no daylight between this formulation and the two-part test described *Wang Labs*.

matter during employment). Indeed, as Plaintiffs concede, *Wang Labs* was explicitly applied to Holmstead himself in *Ameren*—and the result was his disqualification. Opp. at 16.

Plaintiffs attempt to distinguish *Ameren* on the ground that Holmstead was offered there as an expert witness for the defense in an EPA enforcement action that was similar to prior litigation in which Holmstead had personally participated while at EPA. Here, they argue, there was no prior similar litigation concerning Section 321(a) while Holmstead was at EPA. Opp. at 16-17. But while, before this case, no party ever sued EPA alleging that the Agency failed to perform a non-discretionary duty to conduct Section 321(a) evaluations, any duty EPA may have under Section 321(a) was in effect while Holmstead was head of OAR, and it was that office's responsibility to perform any such duty. Thus, Holmstead, as head of OAR, participated in whatever EPA did—or, as he alleges, did not do—to perform that duty. He was a key player in the EPA actions (or, as Plaintiffs allege, inactions) that are now the subject matter of this suit.

Moreover, in Plaintiffs' own words, the *Ameren* court's reason for disqualifying Holmstead was that he "had been privy to privileged documents relevant to issues in this case." Opp. at 16. The same is true here. As discussed above, EPA listed a significant number of privileged documents sent or received by Holmstead on its privilege log in this case. Plaintiffs' self-serving characterization of those documents as not relevant to the issues before this Court cannot possibly be sufficient to allow testimony that would otherwise be precluded. Rather, because "disqualification rules are designed to guard against even the potential breach of confidences by experts who had a confidential relationship" with the movant, *see Larkin*, 1994 WL 627569, at *2, the Court should err on the side of caution, and reject Plaintiffs' improper offer to have Holmstead testify against his former employer regarding the key issue in this case: whether the Agency has performed its alleged duty under Section 321(a).

C. Holmstead's testimony is also barred under the bright line test.

Plaintiffs also argue that there is no disqualifying conflict of interest here under the "bright line" test because Plaintiffs did not bring their suit until 2014, so Holmstead was not involved in *this same litigation* while at EPA. Opp. at 7. But this argument ignores that Holmstead worked on the very matter that is now the subject of this litigation while at EPA. As head of OAR, Section 321(a) of the CAA was within his purview. Despite this, Holmstead now seeks to testify, in essence, that, under his leadership OAR did *not* conduct Section 321(a) evaluations, and thus failed to perform its alleged duty. As in *NHC Health Care Corp.*, 150 F. Supp. 2d at 1013, Holmstead has been involved "both for and against" EPA (Opp. at 8) in regard to the same matter: EPA's performance of any duty it has under CAA Section 321(a). This is side switching.

Plaintiffs seek to distinguish *NHC Health Care* on the grounds that, there, "the proposed expert was employed by the [plaintiff] government agency that pursued investigation and sanctions *against* NHC Health Care at the time of that investigation and then sought to serve as an expert *for* [defendant] NHC." Opp. at 7 (emphasis in original). But the only difference between that factual scenario and this one is that the government was on the other side of the "v." in *NHC Health Care*, which is plainly irrelevant. What is relevant is that the court disqualified the proposed expert regardless of the fact that the initiation of litigation post-dated the proposed expert's work for the other party. Thus, as in *NHC Healthcare*, application of the bright line test requires disqualification here.

Disqualification of Holmstead on such grounds would not bar every former EPA official "from ever testifying on behalf of the private sector" as Plaintiffs claim. *See* Opp. at 8. Rather, former agency personnel may provide expert testimony, under both the bright line and *Wang*

Labs tests, where they did not previously do work related to the matter before the reviewing court. This is a sensible limitation, and one that protects the integrity of the adversarial process.

II. Holmstead Does Not Offer Expert Testimony, But Rather Legal Advocacy.

Although, as discussed above, there is an impermissible conflict of interest between Holmstead's employment at EPA and the testimony he offers this Court, the Court need not wade into conflict-of-interest analysis. There is another, very simple reason the Court should bar Mr. Holmstead's testimony: it is not expert testimony. *See* Memo. at 14-18.

Plaintiffs contend that the fact that Mr. Holmstead is a lawyer does not preclude him from offering expert testimony. Opp. at 1. While that may be true in the abstract, the testimony Holmstead offers, as summarized in his report, consists entirely of factual assertions (e.g., that, during Holmstead's time at EPA, nobody discussed Section 321(a) with him) and legal conclusions on the core issues in this case (e.g., that EPA did not fulfill its alleged responsibilities under Section 321(a) of the CAA). *See* Holmstead Rep. at 3, 5 & 13-14 (EPA has "ignored section 321(a)," "never made any effort to conduct" Section 321(a) analyses, and "refused to conduct" such analyses). Plaintiffs even concede that Holmstead is offering "an underlying factual opinion." Opp. at 18.

Plaintiffs argue that Holmstead's assertions regarding the Agency's alleged non-performance of the evaluations described in Section 321(a) are not legal conclusions because they are not couched in "traditional legal terminology." Opp. at 24. Plaintiffs are slicing the bologna far too thin. Mr. Holmstead's claims that "EPA has refused to conduct [Section 321(a)] analyses," "EPA has essentially ignored section 321(a)," and "EPA has never made any effort to conduct [section 321(a) analyses]" cannot credibly be read as anything less than what they are: assertions that EPA has not performed the evaluations described under Section 321(a) of the CAA. That is a quintessential legal conclusion on the ultimate issue in this case (one that is

doubly problematic here given that it is based on confidential information gained during employment at EPA), not "expert testimony."

If one takes Plaintiffs at their word and views the aforementioned statements as *not* opining on whether EPA has performed the evaluations described in CAA Section 321(a), it begs the question: what remains of Holmstead's proposed testimony, and of what use is it to the Court? Holmstead's proffer then becomes no more than one former employee's fact testimony (well after the close of discovery) that, during his four years at EPA over a decade ago, he does not recollect the Agency taking actions explicitly labeled as Section 321(a) evaluations. This is plainly not what Plaintiffs intend; rather, they want this Court to take Holmstead at his word, accept his conclusion that EPA has never performed the evaluations described in Section 321(a), and therefore order EPA to conduct Section 321(a) evaluations. But this is the core legal issue in this case, and it is for the Court to determine whether EPA complied with Section 321(a).

Plaintiffs counter that Holmstead has "specialized knowledge" of the CAA, gained from years of CAA-focused practice in the private sector as well as the government, that will help this Court decide the issues presented here. Opp. at 5-6, 18-19. But the same can be said for many other lawyers representing industrial entities and non-governmental organizations that have been heavily involved in CAA litigation over the past few decades, as well as EPA personnel and Department of Justice attorneys (many of whom have also rotated through multiple government and private practice positions); that does not mean they should be presented to the Court as experts. Moreover, a review of Holmstead's resume (Holmstead Rep., Ex. B) makes clear that his "specialization" is in CAA *advocacy*; apart from his time at EPA, he has made his career advocating against EPA regulations before various Committees and Subcommittees of the

United States Congress and in litigation.[7] While knowledge of the CAA accumulated from such work might be colloquially termed "specialized," this is plainly not what the drafters of Rule 702 had in mind when they appended "or other specialized knowledge" to the core description of expert testimony as consisting of "scientific" or "technical" knowledge.

Indeed, this Court made clear that more is required to fulfill the first prong of the Rule 702 analysis in *Landis v. Hearthmark, LLC,* No. 2:11-CV-101, 2014 WL 199261, at *1 (N.D. W. Va., Jan. 14, 2014), when it explained that it must examine "whether the reasoning or methodology underlying the expert's proffered opinion is reliable." Here, there is *no* "reasoning" or "methodology" underlying Holmstead's conclusions that EPA "ignored" Section 321(a) and "refused to conduct" the evaluations described by that provision. Indeed, Plaintiffs admit that the "opinions and conclusions" in Holmstead's Report (listed at p.3) are based entirely on Holmstead's experience during his four years at EPA (e.g., the alleged absence of conversations regarding Section 321(a)), which Plaintiffs attempt to buttress with "his years working on CAA issues in the private sector."[8] Opp. at 18-19.

Mr. Holmstead's years of experience as an advocate on CAA issues may make him suited to write an amicus brief supporting Plaintiffs, but it does not make him an "expert" for purposes of Rule 702 and *Daubert*. To hold otherwise would open the door very wide for attorney "experts" in future cases concerning statutes like the CAA, in regard to which many lawyers have similarly "specialized" knowledge from years of focused practice.

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[7] *See* Holmstead Rep., Ex. B (listing Congressional testimony); Nos. 15-1368 et al. (D.C. Cir.) (challenging EPA's Clean Power Plan on behalf of various utility groups and companies); Tri State Gen. and Trans. Ass'n v. EPA, No. 12-1178 (D.C. Cir.) (challenging EPA's Mercury and Air Toxics Rule).

[8] It is unclear how work done in the private sector could support Holmstead's assertions regarding the Agency's internal capabilities and processes (the fifth, sixth, and seventh of the "opinions and conclusions" in Holmstead's report). *See* Holmstead Rep. at 3.

Plaintiffs cite a handful of cases as examples of instances where experts on the CAA or other statutes testified. *See* Opp. at 19-20. But most of those cases only highlight how far from the norm Holmstead's proposed testimony is. For example, the expert testimony provided in *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003), addressed whether certain power plant projects would significantly increase the plants' net emissions. The government's expert performed complex calculations involving heat rate improvements and other inputs, and Ohio Edison's expert attempted to discredit those calculations. *Id.* at 867-68, 878. This sort of highly technical, mathematically focused analysis is classic expert testimony, and stands in stark contrast to that offered by Holmstead. The expert testimony briefly cited in *United States v. Ala. Power Co.*, 372 F. Supp. 2d 1283, 1315 (N.D. Ala. 2005), similarly addressed emissions calculations. In *United States v. Conagra Grocery Prods. Co.*, 4 F. Supp. 3d 243 (D. Maine 2014), the court allowed expert testimony regarding the likely source of contaminated soils—a science-based inquiry that would be very difficult for a court or jury to undertake. Again, there is a stark contrast with the legal conclusions offered by Holmstead (e.g., that "EPA has essentially ignored section 321(a)" and that a court-ordered Section 321(a) evaluation "would be a powerful tool in regulatory advocacy"). Holmstead Rep. at 3-4.

Plaintiffs best case is *Adams v. United States*, 2008 WL 5429801 (D. Idaho Dec. 31, 2008), where the subjects of the experts' reports (whether EPA had sufficient information to know about concerns with a pesticide at a certain time, the effects of a label modification, and the adequacy of a label) come closer to the line between scientific assessment and legal conclusions. But the opinion provides no further information regarding the nature of the expert

testimony, except that it was *not* based at all on the expert's experience at EPA.[9] And critically, no party in that case moved to exclude the testimony. Therefore, no apt analogy can be drawn.

Plaintiffs nevertheless argue that Holmstead provides "particularly helpful" testimony by informing the Court that EPA has the authority under CAA Section 114 to gather the information it needs to conduct Section 321(a) evaluations. But, like Holmstead's contention that EPA "essentially ignored section 321(a)," this is a legal conclusion, and it is the job of this Court, not Plaintiffs' "expert" attorney, to interpret the law.[10] This Court can and should decide whether EPA has performed the evaluations described in CAA Section 321(a) without the so-called expert assistance proffered in the form of Mr. Holmstead.

DATED: June 7, 2016

Respectfully Submitted,

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[9] Rather, when EPA (which was not the federal party in the case) raised concerns regarding its former employees' potential violation of 18 U.S.C. § 207(a)(1), Du Pont (the party on behalf of which the experts sought to testify) cancelled their depositions and moved for a protective order, and the other parties then moved to strike the experts on grounds of the cancelled depositions. 2008 WL 5429801, at *2. The court concluded that 18 U.S.C. § 207(a) did apply to one of the experts, but that an order granting an exception under § 207(j)(6) was appropriate given the prejudice that would result from barring the expert at that late stage of the case, and therefore declined to strike the expert's testimony. *Id.* at *2-5.

[10] *United States v. E. Ky. Power Coop.*, Civil Action No. 04-34-KSF, 2007 WL 4732047, at *3 (E.D. Ky. Mar. 30, 2007) (quoting *United States v. Ohio Edison Co.*, No. 2:99-CV-1181, 2003 WL 723269, at *1 (S.D. Ohio Feb. 25, 2003)).

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MURRAY ENERGY CORPORATION, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 5:14-CV-00039**
	)	**Judge Bailey**
GINA McCARTHY, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, acting in her official capacity,	)	
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I, Erin Carter Tison, hereby certify that on the 7th day of June, 2016, the foregoing Reply in Support of the United States Motion to Disqualify or Exclude Jeffrey Holmstead was served using the CM/ECF system, which will cause a copy to be served upon counsel of record.

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