

STATE OF NEW MEXICO
SANTA FE COUNTY
FIRST JUDICIAL DISTRICT COURT

WILLIAM UTTER and AMADA UTTER,
Husband and Wife, Individually, and as the
Parents of and on Behalf of BRENDON
UTTER, Their Minor Son,

Plaintiffs,

Cause No.: D-101-CV-2014-01290

vs.

SOUTHWEST SAFETY SPECIALISTS, INC.,
NUCLEAR WASTE PARTNERSHIP, LLC,
WASHINGTON TRU SOLUTIONS, LLC,
URS ENERGY AND CONSTRUCTION, INC.,

Defendants.

**(CORRECTED¹) AMENDED COMPLAINT FOR PERSONAL INJURY, NEGLIGENCE,
PREMISES LIABILITY, INTENTIONAL AND WILLFUL CONDUCT,
LOSS OF CONSORTIUM, DAMAGES, HEDONIC DAMAGES,
OTHER DAMAGES, AND PUNITIVE DAMAGES**

Plaintiffs, William Utter and Amada Utter, husband and wife, individually and as the parents of and on behalf of their minor son, Brendon Utter, age 10, by and through their counsel, Atkinson, Thal & Baker, P.C., and for their (Corrected) Amended Complaint for Personal Injury, Negligence, Premises Liability, Intentional and Willful Conduct, Loss of Consortium, Hedonic Damages, Other Damages, and Punitive Damages against Defendants, state as follows.

¹ Counsel dictated certain changes to amend the original Complaint, but was not able to read the Amended Complaint until after it was filed July 28, 2014, and hence did not detect the errors until after filing. Additionally, counsel only post-filing discovered there was a lack of concordance in referring to the Exhibits as those attached to the Amendment when the Exhibits already were attached to the original Complaint. Finally, there was an error in paragraph numbering. This corrected pleading corrects these non-substantive errors in the July 28, 2014 filing. This filing is intended to be the operable Amended Complaint.

JURISDICTION AND VENUE AND PARTIES

1. Plaintiffs William Utter and Amada Utter are husband and wife and are citizens of the State of New Mexico, and are residents of Eddy County, New Mexico, as is their son Brendon Utter, age 10. Plaintiffs William and Amada Utter are expecting the birth of another child in the fall of 2014.

2. Defendant Southwest Safety Specialists, Inc. (hereinafter "SSS"), is a New Mexico for profit corporation, organized under the laws of New Mexico. SSS can be served with process by serving its registered agent Scott Magness at 2325 West County Road, Hobbs, New Mexico.

3. Defendant Nuclear Waste Partnership, LLC (hereinafter "NWP") is a Delaware limited liability company authorized to conduct business in New Mexico as a foreign limited liability company who is Plaintiff William Utter's employer. NWP can be served with service of process by serving its designated agent, CT Corporation System, 123 E. Marcy, Santa Fe, New Mexico 87501. Upon information and belief, the members of NWP are Defendant URS Energy and Construction, Inc. and non-party, Babcock and Wilcox Company.

4. Defendant Washington TRU Solutions, LLC (hereinafter "WTS") is a New Mexico domestic limited liability company organized under the laws of the State of New Mexico. WTS can be served with service of process by serving its registered agent, CT Corporation System, 123 E. Marcy, Santa Fe, New Mexico 87501. Upon information and belief the members of WTS are Defendant URS and non-party Weston Solutions, Inc.

5. Defendant URS Energy and Construction, Inc. (hereinafter "URS") is a foreign corporation organized under the laws of the State of Ohio. URS is authorized to conduct business in New Mexico as a foreign for-profit corporation. URS can be served with service of

process by serving its registered agent, CT Corporation System, 123 E. Marcy, Santa Fe, New Mexico 87501.

6. The causes of action asserted herein arise out of Defendants' transaction of business and commission of tortious acts within the State of New Mexico. The Incident which is the subject hereof occurred in Eddy County, New Mexico. Additionally, at all relevant times, the Defendants have been authorized and licensed by the New Mexico Secretary of State (formerly the New Mexico Public Regulations Commission) to conduct business in New Mexico as either a foreign or domestic entity. This Court has personal jurisdiction over the Defendants pursuant to NMSA 1978, § 38-1-16 and has jurisdiction over the subject matter. Venue is appropriate and proper in this Court, pursuant to NMSA 1978, § 38-3-1(F).

7. There is not complete diversity of citizenship between all Plaintiffs and all Defendants.

FACTS APPLICABLE TO ALL COUNTS²

A. STATUS OF PARTIES

8. The WIPP Facility is a sixteen square mile (approximately 10,240 acre) site owned by the U.S. Department of Energy (DOE) located in southeastern New Mexico, near Carlsbad, New Mexico. The WIPP Facility includes surface facilities and a geological repository located 2,150 feet below the surface, utilized for the storage of radioactive nuclear waste.

9. Beginning on or about October 1, 2012 and continuing through present, Plaintiff William Utter has been the employee of Defendant NWP, who, prior to the Incident, worked underground at the WIPP Facility.

² Except as context otherwise may require, the factual allegations hereof are based on information and belief.

10. Defendant WTS was the prior manager and operator of the WIPP Facility. Defendant WTS and its predecessor entities at all relevant times held the DOE contracts/awards for management and operation of the WIPP Facility from approximately 2002 until Defendants URS and NWP (as the “performing entity”) took over WIPP Facility operations on or about October 1, 2012.

11. By award/contract dated April 20, 2012, Defendant URS contracted with DOE to provide the management and operation of the WIPP Facility beginning on or about October 1, 2012 and continuing through September 30, 2017, with an additional option period beginning on October 1, 2017 and continuing through September 30, 2022. The contract award to Defendant URS, including the available option, exceeds a value of \$1.3 billion. A true and correct copy of the award/contract between DOE and Defendant URS for the management and operation of the WIPP Facility, by and through Defendant URS’s designated “performing entity,” Defendant NWP, is attached to the Complaint filed on May 29, 2014 as Exhibit A. The full substance, terms and conditions of the Exhibit A award/contract are hereby incorporated into this Complaint as if fully set forth herein.

12. There was no substantial change in management personnel or operation of the WIPP Facility, upon transition from Defendant WTS to Defendants URS and NWP (as “performing entity”), which was effective on or about October 1, 2012.

13. Defendant URS, in accordance with the terms of its contract with the DOE, is required to provide the personnel, equipment, materials, supplies, and services (except as may be furnished by the government) and otherwise do all things necessary for, or incident to, providing its best efforts so as to carry out in an efficient and effective manner all necessary and related services to manage and operate the WIPP Facility.

14. Pursuant to contract between Defendant URS and DOE, Defendant NWP became the “performing entity” of the WIPP Facility on which the award of Defendant URS’s contract with DOE was based, effective as of October, 2012. Defendant NWP at the time of the Incident was the “performing entity” for the management and operation of the WIPP Facility.

15. Defendant SSS is responsible for removing the automatic fire suppression system from the salt haul truck in or about October 2003, and installing the manual fire suppression system on the salt haul truck. The manual fire suppression system on the salt haul truck on which the fire originated on the day of the Incident failed to perform or perform adequately. At all times relevant to this Complaint, including for the last nineteen years before the Incident, Defendant SSS was under contract to maintain the fire suppression system. Defendant SSS was negligent and breached its duties, materially causing or contributing to this Incident and to Plaintiff’s injuries and damages.³

16. Defendants’ acts and omissions, including each and all of those alleged herein, caused or contributed to each of the dangerous conditions identified more fully in this Complaint, causing or contributing to the Incident. Each and all of Defendants’ acts and omissions alleged herein directly, proximately, and reasonably foreseeably caused or contributed to the Plaintiff’s injuries and damages alleged herein. Plaintiffs allege that each and all of the acts and omissions of Defendant NWP were engaged in willfully and intentionally and without just cause or excuse, all of which were reasonably expected to result in the injuries and damages alleged herein, or were engaged in with utter disregard for the consequences to and safety of Plaintiffs. Plaintiffs allege that each and all of the acts and omissions of the Defendants WTS, URS, and SSS complained of herein were at least negligent, and that, as will be shown further at

³ The salt haul truck was one of two used to move the salt (which was being removed to create more underground space) to the loading pocket where it dumped the salt. The salt hoist then took the salt to the surface.

trial, they engaged in some or all of the acts and omissions complained of herein willfully, intentionally with knowledge that harm may result; recklessly, intentionally with utter indifference to the consequences; and wantonly, with utter indifference as to or conscious disregard for Plaintiffs' rights, life, and safety. Plaintiffs further allege that at all material times there was a high risk of danger associated with each of the Defendant's acts alleged herein, and that their work was likely to create a substantial risk of physical harm to others, including to Plaintiff William Utter, and that they failed to exercise reasonable precautions necessary to avoid the harm. At all times relevant to this Complaint, Defendants NWP and URS were required to maintain the premises of the WIPP Facility in a safe condition.

B. ADDITIONAL FACTS RELATING TO THE INCIDENT

17. On Wednesday, February 5, 2014, at approximately 10:45 MST, an underground mine fire involving an EIMCO Haul Truck 74-U-006B (herein, "salt haul truck") occurred at the WIPP Facility. At the time the underground mine fire occurred, Plaintiff William Utter and eighty-five other workers were underground in the mine. The fire, among other things, resulted in the creation and spread of extensive smoke, soot, toxins, and dangerous airborne particulates and chemicals in the underground environment (hereinafter collectively referred to as "smoke"), thereby inflicting injury and damage to Plaintiff William Utter and other WIPP workers, directly or indirectly. The fire and its *sequellae*, in concert with other dangerous conditions identified herein, all of which Defendants caused or created, directly, proximately and reasonably foreseeably caused or contributed to the damages and injuries alleged herein.

18. As the direct, proximate and reasonably foreseeable result of each and all of the Defendants' acts and omissions alleged more fully herein, Plaintiff William Utter and other workers were damaged and injured and were transported to the Carlsbad Medical Center for

medical treatment, including without limitation for major smoke inhalation, and other workers were injured and treated for injuries onsite. The Defendants' acts and omissions alleged more fully herein created foreseeably dangerous conditions which caused or contributed to Plaintiff William Utter's injuries and damages alleged herein. Each of the Defendants was required to exercise the highest degree of care in carrying out their duties and obligations, including without limitation those identified herein; each owed such duties and obligations to the foreseeable Plaintiff William Utter; each of the Defendants breached such duties. Plaintiff William Utter as an underground worker at the WIPP Facility foreseeably was a person who would be damaged and injured if Defendants breached their duties and obligations, and each Defendant knew this.

19. Following the underground mine fire, on February 7, 2014, the DOE appointed an Accident Investigation Board ("the Board") to investigate the underground mine fire. The Board began its investigation on February 10, 2014, completed the investigation on March 8, 2014, and submitted findings to the DOE on March 11, 2014. The Board concluded the underground mine fire was entirely preventable and that Defendants' acts and omissions caused and created the dangerous conditions and damages identified herein, including the smoke and damages and injuries to the workers (including Plaintiff) referred to herein.

20. A true and correct copy of the Board's March, 2014 Accident Investigation Report (the "Report" or "Ex. B Report") was attached as Exhibit B to Plaintiffs' Complaint filed May 29, 2014. Plaintiffs hereby incorporate by reference as if fully set forth herein, the full relevant substance and all relevant findings, facts and conclusions of the Ex. B Report.

21. A partial chronology and description of events directly leading up to and occurring during the underground mine fire and Incident is as follows. Plaintiffs allege that:

- a. The Operator had just unloaded salt from the truck at approximately 1045 Mountain Standard Time on February 5, 2014 when he noticed an orange glow and then flames between the engine and the dump sections of the truck. The Operator attempted to extinguish the fire with a portable fire extinguisher stored on the truck and then by activating the salt haul truck's fire suppression system. Both attempts to extinguish the fire were unsuccessful. The Operator then used a mine phone to notify Maintenance of the fire, and his Supervisor overheard the conversation over a nearby mine phone, which can also be heard throughout the underground. Two nearby workers heard the discussion on the mine phone and, based on the urgency of the Operator's voice, went to the scene to see if they could assist. They began pushing a nearby 300-pound fire extinguisher to the fire when their carbon monoxide monitor alarmed and the smoke worsened. One of the workers called the Central Monitoring Room (CMR) to report the fire and smoke, and recommended evacuation of the underground.
- b. At 1051, the Central Monitoring Room Operator (CMRO) sounded the evacuation "yelp" alarm for approximately two seconds and then made a public address system (PA) announcement that there was a fire in the underground and for all personnel to evacuate via the area egress stations. A subsequent announcement directed the workers to the waste hoist. As reported by some workers, this instruction was not heard throughout the underground. Some workers learned of the fire and need to evacuate through the "chatter" (discussions) on the mine phone, through coworkers, or through their supervisors.
- c. At 1058, the Facility Shift Manager (FSM) directed the CMRO to switch the ventilation system from normal to filtration mode believing this would reduce both the fire and smoke in the underground. However, this resulted in the flow of smoke into areas of the underground, which the workers expected to have "good" air. The first group of workers from the mine via the Waste Hoist (mantrips) to the surface was completed. The CMR activated the Emergency Operations Center (EOC) at 1103 and the Joint Information Center (JIC) was activated at 1125.
- d. Other workers continued to make their way on foot or on electric carts from various locations throughout the underground to the waste hoist. At this point, there was smoke in most areas of the underground and smoke could be seen on the surface exiting the Salt Handling Shaft. Workers had difficulty reaching the waste hoist due to poor visibility from their primary evacuation routes and obscured evacuation route reflectors; this was compounded by a delay in activating the evacuation strobe lights. Some workers had difficulty opening and/or donning their self-rescuers or self-contained self-rescuers (SCSRs). The second mantrip of underground personnel was completed at 1120 and the third

and final mantrip was completed at 1134. Full accountability for all underground workers was achieved at 1135.

- e. All surface waste-handling activities were suspended and the Mine Rescue Team (MRT) was activated at 1120.
- f. Once on the surface, workers were evaluated by Emergency Service Technicians (ESTs) and six personnel were transported to the CMC for treatment of smoke inhalation. At 1420, all personnel were released from the CMC.

Ex. B, Report, ¶¶ 22, 23 (p. 6).

22. A partial list of the dangerous conditions created by Defendants' wrongful acts and omissions that caused or contributed to Plaintiffs' damages and injuries, and a partial list of Defendants' wrongful acts and omissions constituting bases for the claims alleged herein include, without limitation, the following. Plaintiffs allege that:

- a. The onboard fire suppression system of the salt haul truck failed to operate and fully discharge.
- b. The salt haul truck onboard portable fire extinguisher was not applied at the source of the fire.
- c. The salt haul truck was designed for and specified the use of non-flammable hydraulic fluid, yet it was charged with flammable hydraulic fluid.
- d. The accessible 300 pound fire suppression equipment was unable to get to the scene.
- e. Defendants URS and NWP failed to adequately use a rescue truck after the fire began.
- f. The salt haul truck had been inadequately maintained by Defendants WTS, URS, NWP, and SSS, allowing an accumulation of combustibles.

- g. The operator of the salt haul truck was inadequately trained to respond to the fire.
- h. The salt haul truck was allowed by Defendants to continue in service without a solid integrity of fluid systems and despite a general acceptance of leaks based on the views of daily inspections and walk-arounds of the vehicles.
- i. The automatic detection actuation of the fire suppression system was removed by Defendant SSS at the direction of one or more of the other Defendants, and never reinstalled; each of the Defendants had knowledge of this.
- j. Previous fires of the catalytic converter of the salt haul truck were not recognized and Defendants did not identify and resolve the causes and issues adequately and Defendants failed to install adequate fire protection systems on the salt haul truck despite their knowledge of previous fires. This was despite that, e.g., Defendant SSS had been under contract to maintain the on board fire suppression system of the salt haul truck for the previous nineteen years.
- k. The PA system was ineffective and the volume of the speakers was inadequate to warn of emergencies.
- l. There were inadequate training drills for underground fires.
- m. Evacuation alarms were inadequate and sounded for less than a full five (5) seconds and not all mine phones were operable.
- n. Evacuation strobe lights were not turned on immediately and failed to

provide adequate visibility and intensity, and were inoperable.

- o. Mine phones were not operable throughout the mine.
- p. Mine reflectors were obscured by other equipment, mesh, salt, dust and not visible in heavy smoke.
- q. Ventilation to filtration was contrary to industry practice, contrary to the underground fire response procedure, and counter to worker training on egress during evacuation, yet Defendants URS and NWP employed this ventilation system at the time of the Incident.
- r. Ventilation control and egress routes were chained open or closed by Defendants URS and NWP.
- s. Self rescue respiratory masks (SRRM's) and systems, including without limitation the W 65 Self Rescuer as well as the Self Contained Self Rescuers (SCSR's) were not maintained and were ineffective, the SRRN's were not stored in locations that were readily identifiable to workers in emergency conditions, and Defendants URS, NWP, and WTS inadequately trained Plaintiff William Utter and other workers in the use of W 65 Self Rescuer and how to access and use the SCSR's.
- t. Defendants' fire protection programs were inadequate.
- u. Defendants' maintenance programs were inadequate and did not adequately consider management and control of combustibles in the underground.
- v. Defendants' emergency management programs were ineffective.
- w. Defendants historically and at the time ineffectively managed and

operated the Facility as relevant to the conditions associated with this Incident.

23. The Ex. B Report, Appendix D, Table D-1, thereto, Section No's C1-C8, identify certain Causal Factors and Related Conditions relevant to the allegations of this Complaint and which caused or contributed to the Incident and to Plaintiffs' injuries and damages, and which constitute and describe additional acts and omissions forming bases for the claims alleged herein. Plaintiffs incorporate herein by reference Sections C1-C8 thereof as allegations hereof which Defendants must answer.

24. The Ex. B Report, Appendix B, Table B-1, Section No's B1-B34, identify certain further factors relevant to the allegations of this Complaint and which caused or contributed to the Incident and to Plaintiffs' injuries and damages, and which constitute and describe additional acts and omissions forming bases for the claims alleged herein. Plaintiffs incorporate herein by reference Sections B1-B34 thereof as allegations hereof which Defendants must answer.

25. Additional facts relating to and constituting Defendants' acts and omissions that caused or contributed to Plaintiffs' injuries and damages are alleged as follows:

- a. The fire burned in the engine compartment and consumed the front tires of the salt haul truck and the upholstery, vinyl, and other combustibles, which contributed significantly to the amount of smoke in the underground where Plaintiff William Utter was located at the time of the fire, and caused or contributed to further damages to Plaintiff.
- b. The salt haul truck where the fire originated was originally purchased in May 1985 and had been used continuously over the preceding twenty-nine years to transport mine salt in the WIPP Facility to the salt hoist for

removal from the underground, and was inadequately equipped and maintained and was in an unsafe condition.

- c. The salt haul truck when purchased did not include a fire suppression system. The site contractor installed an automatic fire suppression system on the salt haul truck sometime before 1995. However, in or about 2003, Defendant WTS hired Defendant SSS to deactivate or remove the automatic fire suppression system and to install or convert to a manual activation system. On October 21, 2003 Defendant SSS, under direction of Defendant WTS, changed the automatic fire suppression system on the salt haul truck to a manual fire suppression system. The new system configuration did not include automatic detection or automatic engine shutdown, whereas previously both of these were functions in the fire suppression system of the original installation. Defendants WTS's and SSS's removal of the automatic fire suppression system was a significantly contributing factor to the fire, as were other acts and omissions of Defendants described below. The change or removal of the automatic fire suppression system to or for a manual fire suppression system impeded the operator's ability to control the fire and minimize damage, including at the time of the Incident. In operations of underground mining, automatic detection and extinguishment is the standard. Manual systems are inadequate and unsafe. Defendants NWP, WTS, URS, and SSS created and maintained a known and foreseeable danger by removing the automatic fire suppression system in favor of the

unsafe manual fire suppression system and then failed to maintain that, and the system foreseeably failed to properly deploy or operate on the date of the Incident.

- d. In or about September 2005, while Defendant WTS was the manager and operator of the WIPP Facility, there was a fire on this salt haul truck that was caused by an electrical short and by Defendant WTS's acts and omissions. Defendants WTS, URS, NWP, and SSS knew, or are charged with knowledge of, or should have known of, this prior fire. Despite this fire and the age of the vehicle, however, Defendants WTS, URS, NWP, and SSS nonetheless left the salt haul truck in service, and still persisted in not re-installing the automatic fire suppression system and did not properly maintain the salt haul truck, and utilized the unsafe manual system.
- e. As a result of Defendants WTS's, URS's, NWP's, and SSS's acts and omissions, the salt haul truck was an obvious and known fire hazard and comprised a dangerous condition. Defendants knew the salt haul truck contained numerous combustible fluids, including diesel fuel, engine oil, torque converter/transmission fluid, hydraulic fluid, wheel end lubricant and joint lubricant, which foreseeably contributed to and caused or contributed to the Incident once the fire began. Defendants URS and NWP used standard hydraulic fluid in the salt haul truck, which was unsafe under the conditions, rather than the fire resistant hydraulic fluid called for in the manufacturer's specifications for the salt haul truck,

which further contributed to or caused the underground mine fire. The Defendants' use of the unsafe fluid in the hydraulic system of the salt haul truck significantly increased the quantity of combustible liquids on the salt haul truck and was unsafe. Moreover the Defendants' failure to rigorously inspect and police and remove the oil and grease accumulations further increased the combustible loading on the salt haul truck and created a foreseeably unsafe condition.

- f. Prior to 2004, this salt haul truck and other equipment were cleaned in the underground in wash stations to remove combustible fluids from the vehicles. However, in 2004, Defendant WTS intentionally took the underground wash station out of service. Defendant WTS's intentional removal of the underground wash station created a clear, obvious and foreseeably known dangerous condition that foreseeably caused combustible materials to accumulate on the salt haul truck, thereby creating a further fire hazard and unsafe condition. Defendants WTS, URS, NWP, and SSS knew this, are charged with knowledge of this, or should have known this. Defendants URS and NWP failed to remedy this dangerous condition. The Defendants WTS, URS, NWP and SSS failed to adequately and properly maintain the salt haul truck, failed to identify and correct fluid leaks, and permitted the continued buildup of combustibles on the salt haul truck, creating a dangerous condition, which caused or contributed to the Incident.

- g. Defendants' knowing removal of and failure to utilize or reinstall the automatic fire suppression system and failure to properly maintain the salt haul truck on February 5, 2014 foreseeably resulted in, or caused or contributed to the Incident. Although the operator of the salt haul truck assertedly attempted to activate the onboard manual fire suppression system, the onboard manual fire suppression system failed to function properly and was ineffective, causing or contributing to the Incident.
- h. The Defendants URS and NWP sounded the emergency evacuation "yelp" alarm for only approximately two seconds and made an ineffective public announcement for all workers to evacuate the underground via the area egress points. At the time of the initial, ineffective evacuation notice, Defendants URS and NWP also failed to activate the emergency egress lights. These acts and omissions caused or contributed to Plaintiff William Utter's being unable to safely and expeditiously exit the smoke-filled underground, and further caused or contributed to Plaintiff Utter's injuries and damages alleged herein.
- i. Defendants URS and NWP failed to activate the evacuation alarm for the full five seconds required and they failed to turn on the evacuation strobe lights. Additionally, Defendants URS and NWP willfully and intentionally failed to inform personnel, including Plaintiff William Utter, of the fire location or to suspend underground operations.
- j. Following the ineffective evacuation order, Defendants URS and NWP intentionally changed the WIPP Facility ventilation system to the filtration

mode, foreseeably and materially causing the already thick smoke to further thicken and to gather significantly throughout the underground. The underground environment thus was further filled with the toxic and dangerous smoke. This resulted in reduction of air flow in evacuation paths and increase of smoke in the underground and caused even higher local concentrations of smoke and carbon monoxide in the mine. These conditions also further materially obstructed and impaired emergency rescue and escape efforts. Defendants URS and NWP knew or should have known changing to the filtration mode would lead to these conditions. Furthermore, Plaintiff William Utter suffered increased and extreme emotional distress as a result of Defendants URS and NWP placing the underground ventilation system in filtration mode, including without limitation by causing him to reasonably believe a radiation leak was present and that he was being exposed to radiation.

- k. Defendants WTS, URS, and NWP failed to train or properly train Plaintiff Utter and other employees in the operation, use, and application of the self-rescue respiratory masks (SRRM's). Defendants also failed to maintain the SRRM's and failed to install proper filters or maintain those. Plaintiff Utter's SRRM failed to operate and function properly. As a result of Defendants' acts and omissions, Plaintiff Utter was exposed to even greater doses of smoke and sustained further damages and injuries than otherwise would have been.

- l. Other acts and omissions of the Defendants also directly, proximately, and reasonably foreseeably caused or created other dangerous conditions that prevented Plaintiff William Utter (and others) from being able to safely and timely evacuate the underground. These include, without limitation, that strobes were not on or not working, smoke was channeled into areas expected to have “good air,” and evacuation reflectors were obscured. Though Plaintiff William Utter and others attempted to mitigate by, *e.g.*, improvising routes to the safety waste hoist, and by cutting holes in ventilation curtains installed by Defendants URS and NWP, these additional acts and omissions of Defendants nonetheless further caused or contributed to Plaintiff Utter’s injuries and damages alleged herein.
- m. Defendants URS’s and NWP’s acts and omissions also created other dangerous conditions that led to near collisions between Plaintiff William Utter and other employees and equipment, preventing him from safely and timely exiting the underground, resulting in further injury and damage to him.
- n. Defendants WTS, URS and NWP during their operations knowingly left large quantities of material in the underground along exit routes, foreseeably obstructing or impairing egress throughout the mine, creating a dangerous condition. Additionally, they knew the underground reflectors that were supposed to provide guidance to employees on where to proceed during an evacuation were not effective. Furthermore, several of the reflectors were obscured by being placed under mesh fencing

installed by Defendants WTS, URS and NWP, while others were hidden from sight by other materials stored in the mine.

26. These conditions and the failure to maintain the premises in a safe condition, impaired Plaintiff William Utter's ability to timely and safely navigate to a safe egress point in the reduced visibility environment, further causing or contributing to his injuries.

27. In addition, the DOE further identified in the Ex. B Report additional contributing causes of the underground fire. Plaintiffs plead as allegations hereof as against Defendants WTS, URS and NWP (unless otherwise alleged), the additional acts and omissions of Defendants that constitute bases for the claims alleged herein, as follows: Defendants' preventive and corrective maintenance programs did not prevent or correct the buildup of combustible fluids on the salt haul truck; Defendants maintained waste handling and non-waste handling vehicles such as the salt haul truck in a distinctly different way, and failed to maintain non-waste handling vehicles to the same level as waste handling vehicles; Defendants created a nuclear versus mine culture in which there were significant differences between the maintenance of waste handling versus non-waste handling equipment such as the salt haul truck; Defendants' fire protection system was inadequate; Defendants created an improper accumulation of combustible materials in the underground in quantities that exceeded the limits specified in the fire hazard analysis; Defendants inadequately trained the operator of the salt haul truck, and employed him even though he was not qualified for the job; Defendants inadequately responded to the fire; Defendants URS's and NWP's emergency preparedness and response was ineffective; Defendants URS's and NWP's emergency management fire protection was deficient.

28. Furthermore, and in addition, Defendants are liable for what the DOE identified in the Ex. B Report as their ongoing, significant and systematic maintenance failures. Plaintiffs

plead as allegations hereof that Defendants' WTS's, URS's, and NWP's failures that caused dangerous conditions and contributing causes of the Incident include or are evidenced by: the buildup of engine and hydraulic fluid on mine equipment; puddles of hydraulic fluid underneath the salt haul truck; inoperable mine phones; numerous components of the mine ventilation system being out of service; bulkhead doors being chained open; broken regulators on bulkhead doors; inoperable and unrepaired equipment; difficult to hear or inoperable PA announcement systems; failures to complete preoperational checklists; and the failure to remedy or repair other equipment problems and inoperable emergency lights (for as long as two years after those dangerous conditions had been identified). Additionally, Defendants WTS, URS, and NWP lacked a clear schedule for maintenance activities to critical equipment, creating dangerous conditions. These Defendants also failed to train or properly train their employees or contractors and failed to maintain equipment and failed to formulate, create, and follow a sufficient fire protection plan that took into account the foreseeable events that caused the Incident. The underground mine fire and the Incident were preventable.

29. As the direct, proximate and reasonably foreseeable result of the Defendants' acts and omissions, Plaintiffs have suffered, among others, the injuries and damages set out herein, all of a kind and in an amount to be further determined and presented at trial.

30. Plaintiffs are entitled to an award of damages and punitive damages against each of the Defendants.

**COUNT I: WILLFUL OR INTENTIONAL INJURY CLAIMS AGAINST
DEFENDANT NWP BY PLAINTIFF WILLIAM UTTER**

31. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 30, as fully set forth herein.

32. At all times pertinent hereto, Plaintiff William Utter's only employer relative to the accident was Defendant NWP.

33. At all pertinent times hereto, Defendant NWP was under a duty not to cause willful or intentional injury to Plaintiff William Utter.

34. Defendant NWP, contrary to its duty, engaged in willful or intentional conduct that proximately caused Plaintiff William Utter to suffer injury.

35. Consequently, Defendant NWP is not entitled in this action to the protections of the exclusivity provision of the New Mexico Worker's Compensation Act.

36. Defendant NWP engaged in willful and intentional acts or omissions without cause or excuse, that were reasonably expected to result in the injuries suffered by Plaintiffs by committing the acts and or omissions alleged herein.

37. Defendant NWP committed each of these acts or omissions with the expectation that injury would result, or with utter disregard for the consequences and safety of Plaintiff William Utter.

38. As the direct, proximate, and reasonably foreseeable result of the above identified acts and omissions, Plaintiff William Utter was injured.

39. As the direct, proximate, and reasonably foreseeable cause of Defendant NWP's willful or intentional acts, Plaintiff William Utter has suffered and continues to suffer injuries and damages, and is entitled to an award of damages against Defendant NWP as described and set out more fully herein.

40. The acts or omissions of Defendant NWP were wanton, willful, intentional and/or engaged in in reckless disregard for the safety, life, and well-being of Plaintiff William Utter, and Plaintiff William Utter is entitled to an award of punitive damages against Defendant NWP.

COUNT II: NEGLIGENCE CLAIMS AGAINST DEFENDANTS WTS AND URS AND CLAIMS FOR DAMAGES AND PUNITIVE DAMAGES AGAINST DEFENDANTS WTS AND URS BY PLAINTIFF WILLIAM UTTER

41. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 40, as fully set forth herein.

42. At all times pertinent hereto, Defendants WTS and URS owed Plaintiff William Utter a duty of ordinary care to avoid and/or prevent an unreasonable risk of injury or death and owed Plaintiff other duties.

43. Defendants WTS and URS breached those duties of care by committing the acts or omissions alleged herein.

44. Defendant URS further owed Plaintiff William Utter a duty to use ordinary care to keep the premises of the WIPP Facility safe for use by Plaintiff William Utter.

45. Defendant URS failed to do so and breached that duty, among others, including without limitation as set out herein.

46. As the direct, proximate, and reasonably foreseeable result of Defendants WTS's and URS's negligent acts or omissions, Plaintiff William Utter has suffered and continues to suffer injuries and damages, among others, and is entitled to an award of damages against Defendants WTS and URS, as described and set forth more fully in herein.

47. The acts and omissions of Defendants WTS and URS were wanton, willful, intentional and/or engaged in in reckless disregard for the safety, life, and well-being of Plaintiff William Utter, and Plaintiff William Utter is entitled to an award of punitive damages against Defendants WTS and URS.

**COUNT III: NEGLIGENCE CLAIMS AGAINST DEFENDANT SSS AND
CLAIM FOR DAMAGES AND PUNITIVE DAMAGES AGAINST
DEFENDANT SSS BY PLAINTIFF WILLIAM UTTER**

48. Plaintiffs hereby reallege and incorporate by reference the allegations contained in paragraphs 1 through 47, as fully set forth herein.

49. At all times pertinent hereto, Defendant SSS owed Plaintiff William Utter a duty of ordinary care to avoid and/or prevent an unreasonable risk of injury. Defendant SSS breached that duty of care by committing the acts or omissions alleged herein.

50. As the direct, proximate, and foreseeable result of Defendant SSS's negligence, Plaintiff William Utter has suffered and continues to suffer, injuries and damages, and is entitled to an award of damages against Defendant SSS as described and set forth more fully herein.

51. The acts and omissions of Defendant SSS, were wanton, willful, intentional and/or engaged in in reckless disregard for the safety, life, and well-being of Plaintiff William Utter, and Plaintiff William Utter is entitled to an award of punitive damages against Defendant SSS.

**COUNT IV: LOSS OF CONSORTIUM CLAIMS AGAINST
DEFENDANTS WTS, URS, AND SSS BY PLAINTIFF AMADA UTTER**

52. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 51, as fully set forth herein.

53. At all times pertinent hereto, Plaintiff William Utter and Plaintiff Amada Utter were married as husband and wife.

54. As a direct, proximate, and reasonably foreseeable result of the acts and omissions, conduct and negligence, and willful and intentional conduct of Defendants alleged

herein, Plaintiff Amada Utter has suffered the loss of the society, guidance, and companionship, and a loss of consortium with Plaintiff William Utter.

55. As a direct, proximate, and reasonably foreseeable result of Plaintiff William Utter's injuries caused by Defendants, Plaintiff Amada Utter has been foreclosed from a loving, caring, and intimate relationship with her husband, such that she has suffered a loss of consortium with him.

56. As a direct, proximate, and reasonably foreseeable result of Defendants' acts and omissions, Plaintiff Amada Utter is entitled to an award of damages for loss of consortium in accordance with New Mexico law.

**COUNT V: LOSS OF CONSORTIUM AGAINST WTS, URS,
AND SSS BY PLAINTIFFS WILLIAM AND AMADA UTTER
ON BEHALF OF THEIR MINOR SON, BRENDON UTTER**

57. Plaintiffs hereby reallege and incorporate by reference the allegations contained in Paragraphs 1 through 56, as fully set forth herein.

58. Brendon Utter is the son of Plaintiff William Utter.

59. As the direct, proximate, and reasonably foreseeable result of the acts and omissions, conduct and negligence, and willful and intentional conduct of Defendants alleged herein, and Plaintiff William Utter's injuries caused by Defendants, Brendon Utter has suffered and continues to suffer the loss of society, guidance, and counseling he enjoyed with Plaintiff William Utter.

60. As the direct, proximate, and reasonably foreseeable result of Defendants' acts and omissions, Brendon Utter is entitled to an award of damages for loss of consortium in accordance with New Mexico law.

**COUNT VI: WILLFUL OR INTENTIONAL INJURY CLAIMS AGAINST
DEFENDANTS WTS AND URS BY PLAINTIFF WILLIAM UTTER**

61. Plaintiffs state this Count VI in the alternative, to the extent alternative pleading is necessary. Plaintiffs hereby reallege and incorporate by reference the allegations contained in paragraphs 1 through 60, as fully set forth herein, except to the extent inconsistent with the pleading of this Count VI in the alternative.

62. To the extent Defendants WTS and URS contend that they were or are an “employer” of Plaintiff William Utter, Plaintiffs state as follows. Plaintiffs do not admit that either WTS or URS are or were an employer of Mr. Utter and deny that either of them is entitled to any protection under the New Mexico Worker’s Compensation Act. However, Plaintiffs nonetheless state that at all pertinent times hereto, Defendants WTS and URS were under a duty not to cause willful or intentional injury to Plaintiff William Utter.

63. Defendants WTS and URS, contrary to their duty, engaged in willful or intentional conduct that proximately caused Plaintiff William Utter to suffer injury.

64. Defendants WTS and URS engaged in willful or intentional acts or omissions without cause or excuse that they reasonably expected to result in the injuries suffered by Plaintiffs by committing the acts and omissions alleged herein.

65. Defendants WTS and URS committed each of these acts or omissions with the expectation that injury would result, or with utter disregard for the consequences and safety of Plaintiff William Utter.

66. Defendants WTS and URS are not entitled to the protections of the New Mexico Worker’s Compensation Act.

67. As the direct, proximate, and reasonably foreseeable result of the above identified acts and omissions, Plaintiff William Utter was injured.

68. As the direct, proximate, and reasonably foreseeable cause of Defendants WTS's and URS's willful or intentional acts, Plaintiff William Utter has suffered and continues to suffer injuries and damages, and is entitled to an award of damages against Defendants WTS and URS, as described and set out more fully herein.

69. The acts or omissions of Defendants WTS and URS were wanton, willful, intentional and/or engaged in in reckless disregard for the safety, life, and well-being of Plaintiff William Utter, and Plaintiff William Utter is entitled to an award of punitive damages against Defendants WTS and URS.

DAMAGES

70. Plaintiff William Utter's injuries and damages for which he is entitled to a Judgment against Defendants as pleaded herein, include without limitation the following, all of which are ongoing:

- a. He has experienced severe physical injuries, including without limitation as a result of smoke inhalation and toxic inhalation;
- b. He has experienced severe mental and emotional injuries;
- c. He has experienced severe emotional distress;
- d. He has experienced severe pain and suffering;
- e. He is unable to perform or engage in the normal activities of daily living, including providing household services and spending time with his wife and son;
- f. He is unable to sleep or sleep healthily;
- g. He is unable to perform the work of his choosing;
- h. He has experienced a loss of earning capacity;

- i. He has experienced a loss of enjoyment of life;
- j. He has incurred hedonic damages;
- k. He has incurred expenses for medical care and treatment, medicines, nursing services, and other types of medically related attention;

The above injuries and damages are ongoing; some or all of these may be permanent. Plaintiff William Utter may provide evidence of other damages at trial.

71. Plaintiffs Amada Utter and Brendon Utter have incurred loss of consortium damages, which are ongoing.

PUNITIVE DAMAGES

72. The Court should award Plaintiffs punitive damages, and in doing so should consider not only the harm to and wrongful conduct directed by Defendants to Plaintiff William Utter, but also the risk of harm and harm to others as a result of Defendants' conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that a Judgment be entered in their favor against Defendants for damages of a kind and in amounts to be proven at trial, including for, but not limited to:

- a. Compensatory and special and other damages;
- b. Punitive damages;
- c. Costs and fees associated with this lawsuit;
- d. Interest as provided by law.

Plaintiffs also request that the Court enter Judgment in their favor and for such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs by and through their attorneys, Atkinson, Thal & Baker, P.C., hereby demand a six (6) person jury in the above captioned case.

ATKINSON, THAL & BAKER, P.C.

Electronically filed

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