

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33664

IN RE: FLOOD LITIGATION

Raleigh County Civil Action No. 02-C-797  
(Coal River Watershed)

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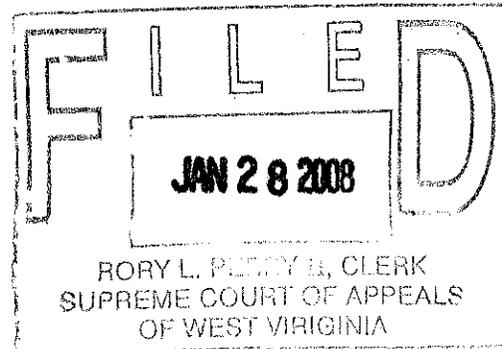
**BRIEF OF APPELLEES**

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Dated: January 28, 2008

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**BRIEF OF APPELLEES**

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**INTRODUCTION**

A group of complaints filed by several different attorneys for thousands of plaintiffs making essentially identical generic allegations indiscriminately against nearly two hundred defendants – almost literally every entity involved in the ownership of land and the extraction or harvesting of coal and timber from that land in a geographic area encompassing most of southern West Virginia – should be expected to raise some preliminary skepticism about their legitimacy. When reviewing what certainly appeared to be simply a *per se* attack on these industries in general, it was necessary and proper for the lower court to ask “What are your factual bases for suing each individual defendant? You must have some.” That is what the Panel Judges<sup>1</sup> did here. And what they found was that this litigation turned out to be exactly as it appeared.

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<sup>1</sup> The Mass Litigation Panel judges assigned to this case (“Panel Judges”) are the Honorable Gary L. Johnson, the Honorable Arthur M. Recht, and the Honorable John A. Hutchison.

Plaintiffs had no basis for their claims other than that the entities they had sued mined coal or harvested timber.<sup>2</sup> That may be sufficient if strict liability applies, but as this Honorable Court ruled in December 2004, it does not. In the face of repeated efforts to have plaintiffs provide a factual predicate for their tort claims, Judge Hutchison faced only recalcitrance and relentless argument that they need not do so, all while his proceedings moved toward a first trial date on preliminary issues that he clearly felt a duty to hold. Only after presiding over a six-week trial did Judge Hutchison conclude, as he has meticulously explained in his post-trial rulings, that the pleading insufficiencies he had repeatedly urged/exhorted/ordered plaintiffs to correct were exacerbated by a fundamental lack of credible scientific evidence. It had developed that one cannot prove that which one cannot plead. (NOTE: The Complaints and Amended Complaints before Judge Hutchison were either the same ones or contained identical generic allegations as those before Judge Recht.)

Meanwhile, as conceptualized in the Panel Judges' second Case Management Order, Judge Recht waited in the wings, and after the first trial, he took up the same

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<sup>2</sup> See 15 Sep. 2005 Tr. at p. 35, Ex. 1 to Resp. to Pet. for App., "[T]he theory of the plaintiffs' case is[] that the combined efforts of these defendants in this whole watershed have converged to cause enormous flooding down at the end of the watershed."; 7 Mar. 2006 Tr. at pp. 44-53, Ex. 2 to Resp. to Pet. for App., "Skid roads were cut. Haul roads were cut. Landing areas were established. Valley fills were created. Strip mines were established. All of these activities . . . caused surface water - reasonable though it may be for the defendants to engage in that [-] to leave their property in a different way. . . . Our experts merely provide the scientific basis for the jury to make whatever inferences the jury wants to make about the behavior of water on skid roads, . . . landing areas, . . . valley fills, . . . running off surface mines. There can be no serious contention in this case by the defendants that their disruption of their property in the quest for coal and timber did not alter the way surface water leaves their property. That is an undeniable fact. It is for the jury to decide . . . whether or not that undertaking was culpable."; 15 Mar. 2006 Tr. at p. 1010, Ex. 3 to Resp. to Pet. for App., "[T]he essence of the plaintiffs' case is the contribution of the disturbed areas[.] . . . [I]t's not testimony about wrongdoing; it's testimony about the contribution of the use of the land to peak flows of runoff."

gauntlet that plaintiffs had thrown down three times before Judge Hutchison. Judge Recht likewise gave plaintiffs at least three opportunities to back up their generic and inadequate allegations with at least minimum factual support. He too was faced with refusal and the obstinate mantra "We don't have a basis; we don't have to have a basis; but we want discovery to try to find a basis, and you have to allow it." Judge Recht correctly disagreed. And so does the Supreme Court of the United States. As this Brief will clearly demonstrate, this appeal is about whether the wolf of groundless, baseless claims may be hidden in the sheep's clothing of a "mass litigation" case, and the Appellees<sup>3</sup> respectfully submit that it may not. We respectfully submit that one may summon defendants and courts onto the litigation field only with allegations of discernable factual substance, not simple recitations of the generic contents of a legal theory.

The logical disconnect between the real world of what happened on 8 July 2001 and the legal world into which the plaintiffs of the "Mass Flood Litigation" ("MFL"), as the 8 July 2001 cases have come to be known, have sought to thrust it is both monumental and fundamental. So monumental that the two simply cannot rationally co-exist; so fundamental that no one ever thought to even try to make them co-exist before. But this truth gets obfuscated by the veil of "litigation," as though common sense is suspended when Complaints are filed and legal theories generally described. We come before this Court and spar about whether Appellants have pled a claim when common

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<sup>3</sup> For a list of defendants currently defending claims in the West Virginia Flood Litigation, see list entitled *In Re Flood Litigation Defendants*, attached as Exhibit A.  
{C1296864.1}

sense tells us plainly that they don't have a claim to plead. We argue about the legal implications of terms like "increased risk of flooding" and "reasonable use of land" when these concepts have no meaning either physically or intellectually in a situation where Mother Nature dictated that flooding was inevitable and unavoidable. There was no "increased risk of flooding" when the 8 July 2001 storms swept through southern West Virginia – there was a certainty of flooding. There is no issue of whether a particular land use was "reasonable" if liability is premised simply on such use being upstream of flooding – if that is unreasonable, every upstream use is liable. There is no purpose in examining what businesses or industries or individuals did with their land when nothing man constructs or places on or carves into his land – not a surface mine, not a timbering operation, not a golf course, not a farm, not a residence, not a shopping center, nothing – is designed or expected or required to impede a storm of the overwhelming magnitude of 8 July 2001.

Overwhelming means just that. This storm was so large in size and amplitude that all else was subsumed by it. We can litigate until the next storm system that visits 100 to 1000 year rainfall throughout most of southern West Virginia – which could be a very long time indeed – and hold every upstream land use liable for every localized downstream flood between now and then, but neither that nor anything else man does or does not do will change the outcome of 100 to 1000 year storms: Flooding in areas determined solely by how much rain falls where and when. Judge Recht's decision is legally sound, logically right, and does not suspend common sense. Appellees respectfully ask this Honorable Court to affirm it.

## FACTUAL AND PROCEDURAL BACKGROUND

The significant flooding that is at issue in this case occurred on or about 8 July 2001, after extremely heavy rains cut a wide swath across southern West Virginia. Thousands of residents and businesses were affected. Severe flash-flooding occurred throughout the region, and all three major rivers in southern West Virginia (the Tug Fork River, Guyandotte River, and Big Coal River), which flow from southeast to northwest toward the Ohio River, rose well above flood stage to record-setting levels, with flooding on parts of the Guyandotte exceeding the 100-year flood level.<sup>4</sup> While some people evacuated, many waited out the torrential rains and unpredictable waters, which began early on a Sunday and cycled from bad to somewhat better to unbelievably worse through Monday evening. Most emerged with only mild to severe property damage.<sup>5</sup> Sadly, two individuals lost their lives.

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<sup>4</sup> Flooding return interval is the probability that the water surface in a stream or creek will rise to a given elevation within a given year; this means there is a 1% chance each year that a 100-year flood will occur, a 10% chance of a ten-year flood, etc. A ten-year rainfall will frequently not produce a maximum water surface elevation corresponding to a ten-year return period flood, however. Flooding is dependent on several factors such as but not limited to total rainfall depth, rainfall intensity, temporal rainfall distribution, spatial uniformity of rainfall over the entire watershed, movement of storm front over the watershed, drought/wet season, vegetation (summer vs. winter) and the available storage within the watershed. A 50 or 100 or 1000-year storm will absolutely produce flash-flooding wherever it hits in the hills of southern West Virginia, however.

<sup>5</sup> Some areas were particularly hard-hit. For example, it is said that seventy-five percent of all businesses in Wyoming County were damaged or destroyed. See Mary Catherine Brooks, July 8, 2001 Flood Remains Worst Disaster in Local History, The Register Herald, June 29, 2006, at [http://www.register-herald.com/archivesearch/local\\_story\\_180204647.html](http://www.register-herald.com/archivesearch/local_story_180204647.html). For a review of the assistance provided by FEMA as a result of the 8 July 2001 flooding, see <http://www.fema.gov/news/newsrelease.fema?id=6463>.

Wholesale lawsuits against mining, timbering, and landowner (resource selling or leasing) defendants were immediately filed, beginning just days after the flooding. Plaintiffs, who already numbered in the hundreds, made a motion to refer their cases to the Mass Litigation Panel. Defendants argued in an opposing memorandum (served on 15 January 2002) that the motion should be denied because:

the flood cases pending in seven West Virginia circuit courts [did] not involve 'common questions of law or fact in a . . . single catastrophic event[]' as required by West Virginia Trial Court Rule ('W.Va. TCR') 26.01(c)(a). Moreover, transfer . . . to the Mass Litigation Panel ('MLP') [would] not advance the goal of fairly and expeditiously disposing of the litigation as contemplated by subsection (b)(1) of W.Va. TCR 26.01.

Ds' Mem. in Opp. at p. 2, Ex. 4 to Resp. to Pet. for App. (exhibits omitted).

After receiving a report from an evidentiary hearing that followed, the Chief Justice of this Honorable Court ruled otherwise, finding that referral to the MLP would be superior to other methods of resolution in terms of fairness and efficiency, the objectives that must inform every application of Rule 26.01. See 16 May 2002 Administrative Order Granting Mo. to Refer, Ex. 5 to Resp. to Pet. for App. The extraordinary judicial procedure of at least temporary aggregation was determined to be the preferred means of handling all 8 July 2001 flooding claims, though there would undoubtedly be substantial individual questions of proximate cause. See id.

The Order seemed to recognize that because of substantial geomorphic and rainfall differences from property to property, proof as to one claimant was not going to be proof as to all. See id. at p. 5. It also appeared to take into account defendants' argument that the "sheer complexity and diversity of the individual issues would overwhelm or confuse

{C1296864.1}

the jury or severely compromise a party's ability to present viable claims or defenses." Ds' Mem. in Opp. (Ex. 4 to Resp. to Pet. for App.) at p. 10. As to issues of fact, the Chief Justice directed the Panel Judges to "determine and separate the various causes of action based on proximate cause[,] which may include either a watershed or a sub-watershed. After that determination is made, the case could be referred back to circuit court if it only involves one county or referred back to another circuit court if it only involves two counties and Rule 42 [consolidation] would be more appropriate." 16 May 2002 Order (Ex. 5 to Resp. to Pet. for App.) at p. 5. The common issues of law were identified as (a) What legal theories, if any, would permit the plaintiffs to recover? and (b) What would be the measure of damages if the plaintiffs show they are entitled to a recovery? *Id.* at p. 4.

The MFL was assigned to the Panel Judges and they announced in their second Case Management Order (Ex. 6 to Resp. to Pet. for App.) that they had assigned amongst themselves three of the six major watersheds at issue in the MFL for handling seriatim: Upper Guyandotte first by Judge Hutchison, Coal second by Judge Recht, and Tug Fork third by Judge Johnson. They also bifurcated the proceedings, deciding to address liability issues first and precluding discovery on or consideration of issues relating to the plaintiffs. See generally, 26 January 2006 Trial Plan for Subwatersheds 2A & 2E of the Upper Guyandotte Watershed.<sup>6</sup> Trial dates for liability-related issues were set in March, June, and September of 2006. The Panel Judges required from the parties Initial

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<sup>6</sup> For a discussion regarding the Phase I Trial Plan, see Amicus Curiae Brief, filed 7 January 2008, Section II. at pgs. 7-8 (WVSCA 33710).

Disclosures, which they envisioned would provide a basis upon which they could organize the cases for disposition.

Unwilling to accede to the unconstitutional, try-the-industries trial plan plaintiffs were promoting, defendants sought through motions to gain basic information that would allow them and the court to understand which of their holdings and operations were at issue and around what liability-producing acts or omissions the proof would revolve. First Judge Hutchison, and later Judge Recht, agreed that such information was necessary for the court to do its job and for the defendants to be provided with fair notice of the claims against them. But that did not happen as to either of the first two watershed proceedings, resulting in different courses to the same outcome reached.

Judge Hutchison's various orders requiring this information were ignored, disregarded, sidestepped, and circumvented as plaintiffs sought extension after extension to comply. With just forty-five days remaining until trial, they *dismissed voluntarily* forty-two of seventy-three defendants (more than half in that proceeding), a number of whom had by then been actively defending the matter for more than four years.<sup>7</sup> See 18 Jan. 2006 Pls' Am. Mo. to Dismiss Certain Ds Pursuant to R. 41, Ex. 7 to Resp. to Pet. for App., Pls' Consol. Identification of Remaining/Dismissed Ds, Ex. 8 to Resp. to Pet. for App., and McGraw Pls' Stipulation of Dismissal, Ex. 9 to Resp. to Pet. for App.<sup>8</sup> And

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<sup>7</sup> While some Mullens/Oceana defendants (as identified by plaintiffs in their complaints/disclosures/more definite statements) were joined in the litigation through amended complaints served as late as November 2005, a number of them were named in complaints served as early as November 2001.

<sup>8</sup> Coal River Watershed complaints were pending as early as 2001. Amended complaints {C1296864.1}

with just three weeks to go before trial, plaintiffs were still seeking additional time to identify Mullens and Oceana Subwatershed<sup>9</sup> defendants, operations, and allegedly wrongful conduct. See 8 Feb. 2006 Pls' Mo. for One Week Ext. to Make Court-Ordered Disclosures, Ex. 10 to Resp. to Pet. for App. Judge Hutchison never accepted or condoned plaintiffs' obstinance, but the pressures of a tightly compressed schedule, overcast by plaintiffs' constant obfuscation and dodging, led to the trial.<sup>10</sup>

At a Coal River Watershed hearing held on 22 February 2006 before Judge Recht,<sup>11</sup> Appellants were given thirty days to provide information that would allow the court to organize the cases for trial and would give defendants fair notice of the claims, if any, against each. See 22 Feb. 2006 Tr. at pp. 39-41, Ex. 12 to Resp. to Pet. for App. Plaintiffs moved for an extension on 21 March 2006, stating that they had not had "a sufficient amount of time to engage in the discovery needed to make this disclosure" (Ex.

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were filed as late as September 2005. With respect to the Oceana/Mullens Subwatershed, the plaintiffs' stated reason for the dismissals was that they had decided to proceed only against the landowner defendants. Nonetheless, and inexplicably, they included a few mining and timbering defendants in their final "identification."

<sup>9</sup> Judge Hutchison determined that he would first try certain specific, short-of-liability issues with respect to two subwatersheds within the Upper Guyandotte Watershed, those being named Mullens and Oceana.

<sup>10</sup> Judge Hutchison retained the opinion that each defendant was entitled to notice of the allegedly culpable conduct it would in twenty-one short days be required to defend. See 14 Feb. 2006 Tr. at pp. 14-15, 22-23, Ex. 11 to Resp. to Pet. for App. However, the court was not accepting perceived delay on the part of either side. Judge Hutchison had talked with the other Panel Judges, and they were all of the opinion that in order for the June and September trial groups to stay on track, Judge Hutchison's trial had to go forward in March; short of a stay put in place by some "higher power," the court was sticking to its schedule. Id. at pp. 11-12 & 33. "Trial by ambush" was what the court, in its frustration, would permit. See id. at p. 34.

<sup>11</sup> Prior to the 22 February 2006 hearing, two other hearings were held specifically addressing the Coal River Watershed plaintiffs' claims; one on 27 June 2003, and another on 8 June 2005. {C1296864.1}

13 to Resp. to Pet. for App.), even though they had agreed to do so without any caveat about needing discovery. In a 27 March 2006 Memorandum of Opinion and Order, Judge Recht allowed more time and described with precision exactly the three pieces of information Appellants were to provide, giving them until 7 April 2006 to comply. Ex. 14 to Resp. to Pet. for App.

On 27 March 2006, Appellants filed a motion to continue the Coal River Watershed proceedings, stating that “[t]here has been no opportunity for meaningful discovery.” Pls’ Mo. to Continue Coal River Phase I Trial, Ex. 15 to Resp. to Pet. for App. At a hearing held on 21 April 2006, Appellants’ counsel stated that “for plaintiffs to comply with the particularity that [defendants] and the Court demand[], we necessarily have to have some discovery . . . .” 21 Apr. 2006 Tr. at pp. 47-48, Ex. 16 to Resp. to Pet. for App. By the time of the next hearing, held on 1 June 2006, plaintiffs had ignored a 23 May deadline and had filed no responses to a multitude of motions submitted challenging plaintiffs’ 7 April 2006 disclosures. Judge Recht was understandably dismayed.<sup>12</sup>

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<sup>12</sup> During the course of the 1 June 2006 hearing, Judge Recht stated:

I appreciate the fact that discovery is – has not been ongoing; however, I thought that Paragraph 3 specifically, of the March 27th order, was something that was known to the plaintiff even at the time that the lawsuit was filed. And then to simply lay it out in on a defendant-by-defendant basis would be just to somehow marshal it together and lay it out. It's not there, sir. It isn't there. And now what do I do? What do I do? We're faced with a trial date of September the 5th.

See 1 June 2006 Hr. Trans. at pgs. 27-30 for the full discussion between Judge Recht and Stuart Calwell regarding the Appellants’ failure to provide more definite statements in accordance with the Court’s prior Order.

As he granted plaintiffs yet more time to provide the information, Judge Recht again stated his requirements clearly: “Each defendant, quite frankly, is entitled to know – you can take the requirements that are set out in the March 27th Order and you can use it almost as a bill of particulars. Each defendant – they’re going to be in this courtroom – what is it that they have to respond to specifically? What did they do?” 1 Jun. 2006 Tr. at p. 23, Ex. 17 to Resp. to Pet. for App. Plaintiffs were given ten days to provide a “specific definition of the activity that each defendant engaged in that caused the harm.” *Id.* at pp. 41-42. Plaintiffs responded with “More Definite Statements,” filed on or around 12 June 2006, which were also subsequently deemed insufficient by Judge Recht. *See* 30 Sep. 2006 Tr. at p. 42, Ex. 18 to Resp. to Pet. for App. At a 21 June 2006 hearing, Stuart Calwell (“Mr. Calwell”) once again stated that plaintiffs needed discovery to respond. *See* 21 Jun. 2006 Tr. at p. 43, Ex. 19 to Resp. to Pet. for App.

On 30 June 2006, Appellants served revised Coal River Watershed disclosures that merely indicated that many plaintiffs intended to bring claims against many more defendants than they previously had but which provided no further information as to the specifics for these additional claims. Following up on 18 August 2006, Mr. Calwell submitted what he identified as a Rule 56(f) affidavit, restating and reemphasizing plaintiffs’ need for discovery before they could state why they had brought suit.<sup>13</sup> Ex. 20 to Resp. to Pet. for App. At a 30 September 2006 hearing, Mr. Calwell reiterated plaintiffs’ need for discovery to be able to “come forward with specific allegations.”

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<sup>13</sup> Defendants argued that a Rule 56(f) affidavit was not well taken in this context, where the sufficiency of plaintiffs’ pleadings was the issue.

See 30 Sep. 2006 Tr. (Ex. 18 to Resp. to Pet. for App.) at p. 63. An amended affidavit followed, admitting that “[P]laintiffs [could not] offer admissible evidence in support of many of the allegations contained in their complaint and more definite statements” without discovery. Ex. 21 to Resp. to Pet. for App. In a 22 November 2006 motion to set aside rulings made by Judge Recht at the 30 September 2006 hearing, plaintiffs asserted that the complaints should not be dismissed “without giving [P]laintiffs a reasonable opportunity to develop their cases through the discovery process.” Ex. 22 to Resp. to Pet. for App. at p. 16. On 18 January 2007, Judge Recht entered an Order dismissing the Coal River Watershed plaintiffs’ claims, with prejudice, from which this appeal is sought. Thereafter, plaintiffs filed a motion to reconsider same, reciting the same “we need discovery” mantra. See Ex. 23 to Resp. to Pet. for App.

Discovery, discovery everywhere, but not a fact to start.<sup>14</sup> Plaintiffs have stood firmly throughout, including in their Petition and Appeal Brief to this Court, upon the untenable position that their utter inability to state a factual basis for their claims somehow gives them the inalienable right to do discovery to try to find one. Judge Hutchison, Judge Recht, the United States Supreme Court, this Court in Fass,<sup>15</sup> and, respectfully, these Appellees disagree.

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<sup>14</sup> Appellees’ allusion is to Samuel Taylor Coleridge’s “Rime of the Ancient Mariner” and the Mariner’s description of when the south wind sent the ship into uncharted waters then lay becalmed, leaving the sailors thirsty (though surrounded by water) and the vessel “[a]s idle as a painted ship [u]pon a painted ocean.”

<sup>15</sup> Fass v. Nowsco Well Service, LTD, 177 W. Va. 50, 350 S.E.2d 562 (1986).

## ARGUMENT

### I. THE PANEL JUDGES HAVE HANDLED THE REFERRED MFL CASES WITH INDUSTRY, DILIGENCE, COMPETENCE, COMPASSION, OPEN-MINDEDNESS, COURTESY, PATIENCE, FREEDOM FROM BIAS, AND A COMMITMENT TO EQUAL JUSTICE UNDER THE LAW.

Appellants devote much of their brief to lamenting with supposed righteous indignation the difficulties they have faced in their attempts to prosecute this action, while glossing over – or completely ignoring – their own chronic refusal to comply with the orders of the Judges and with basic pleading requirements. Appellants have wholly disregarded the extraordinary efforts that Panel Judges Recht and Hutchison have undertaken in this matter and would instead have this Court believe that they “contrived”<sup>16</sup> to “simply dispose”<sup>17</sup> of the flood litigation claims for varied and superficial reasons because the Judges simply do not want to be burdened with these cases any longer. The cavalier and baseless accusations against the Panel Judges, and Judge Recht in particular, are clearly contradicted by the record set out above, which demonstrates that the Panel Judges have expended much time and commendable effort in attempting to fairly manage this litigation. It is Appellants, not the Panel Judges, who have failed to put forth the statutorily-prescribed effort necessary to advance their claims,

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<sup>16</sup> Appellants’ Appeal Brief: at p. 4, fn 5, “Appellants believe the Panel Judge’s ruling is contrived”...; at pp. 18-19, “In short, the Panel Judge contrived to get around the *Law of the Case Doctrine* by suggestion and innuendo that ‘assumed facts’ are not sufficient to judge the sufficiency of an Appellants’ claim.”; at p. 22, “The Panel Judge, with all due respect, contrived this ‘flip-flop’ procedure to freeze Appellant [sic] in place”...; at pp. 23-24, “The Panel Judge permitted a contrived Rule 12(e) procedure to eclipse any chance Appellants had to gather evidence to prove their cases.”

<sup>17</sup> Appellants’ Appeal Brief at p. 4: “In all fairness, and with all due respect, an appearance has been created that the time has come to simply dispose of the *Flood Litigation* . . . .”

if any. Appellants' complaint does not lie with the motives of the Panel Judges; rather, Appellants are frustrated that every single Panel Judge that has closely scrutinized the Appellants' "claims" has found, sooner or later, that they are insufficient as a matter of law.

During the September 30, 2006 hearing on certain defendants' dispositive motions, Judge Recht succinctly explained the events that ultimately led to the dismissal of the Appellants' Complaints:

Now, before we get started, I'm going to make a general statement: Since approximately the end of March, this Court has been attempting to crystallize and define the issues that will be tried.

And there was a demand made of the plaintiffs to set forth these specific items: to identify the specific defendant by each plaintiff, the specific operations or specific properties of the defendants which each plaintiff contends caused harm; and the activities in which the defendants allegedly engaged that the plaintiffs claim caused the harm.

There was a response to that on April the 7<sup>th</sup>. That was deemed inadequate. We then went back and we tried to do it again, which led to the hearing on June 20<sup>th</sup>, I believe – it was the middle of June sometime – where I said and invited dispositive motions to be filed by the defendants to address where we are as of now, as of that time.

The reason that the three-part inquiry was formulated was this: (A) it is something that should be known to plaintiffs at the time that suit was instituted and not something that should rely upon the discovery process to formulate; 2) [sic] that, based upon the response of the West Virginia Supreme Court to the certified questions, it was necessary for this Court to be able to define the basis upon which the plaintiffs are asserting a cause of action against each defendant in these flood cases, and, principally, the three-point inquiry was designed to determine whether or not the plaintiff's cause of action were within the definition of what would be a cognizable cause of

action; particularly a determination needed to be made whether or not the plaintiffs' theories or theory would be grounded on the allegation that the operation of extracting and removing natural resources is an abnormally dangerous activity or that such activity produces ancillary conditions that create an unreasonably high risk of flash flooding so that the defendants would be strictly liable to the plaintiffs for any damage caused by those activities.

Of course, as we all know, if that were the cause of action, the West Virginia Supreme Court says there is no cause of action based upon a theory of strict liability.

Now the best way to determine whether or not that is going to be the theory upon which the plaintiff was attempting to assert a cause of action was all woven into the three-point inquiry, particularly No. 3.

See September 30, 2006 Hearing Transcript at 14-16.

As the procedural history outlined above aptly demonstrates, Judge Recht spent months giving Appellants multiple opportunities to augment their pleadings to comply with the minimum standard required under long-established rules (not some "super rule" as Appellants claim, but the normal rule applied in a "super-sized" case). However, Appellants apparently believed themselves to be above the rules and immune from complying with the "cryptic Order"<sup>18</sup> of the "'vigilant' Judge"<sup>19</sup> with his "hodgepodge of legal rules"<sup>20</sup> and "theories cobbled together."<sup>21</sup> Appellants repeatedly scorned the numerous opportunities extended to them by Judge Recht, responding with nothing more

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<sup>18</sup> Appellants' Appeal Brief at p. 25.

<sup>19</sup> Appellants' Appeal Brief at p. 25. Query: Are judges not charged with the duty of vigilance?

<sup>20</sup> Appellants' Appeal Brief at p. 25.

<sup>21</sup> Appellants' Appeal Brief at p. 25.

than defiance and obstinance. The following are just a few examples taken from the September 30, 2006 hearing before Judge Recht:

What we are saying is that, if the Court – that we are *unable* to do more.

See September 30, 2006 Hearing Transcript at 65) (emphasis added).

If the Court's ruling today is that the complaint with the detail plaintiffs have stated and provided is insufficient as a matter of law, then I think we're done. And we certainly don't need any more discovery; we're just done.

Id. at 90.

Having refused to comply with Judge Recht's orders applying well-established rules and requirements, Appellants now seek to characterize Judge Recht's application of such rules as mere contrivance or "editorializing"<sup>22</sup> resulting from his alleged "strong feeling about 'mass torts'."<sup>23</sup>

Although Appellees do not presume to know whether Judge Recht has "strong feelings" about mass torts or what those feelings might be, Appellees are aware that Judge Recht has significant experience on the West Virginia Mass Litigation Panel rendering him especially knowledgeable and adept in handling the unique challenges inherent in mass litigation. This Honorable Court is well aware of Judge Recht's distinguished background and long service to the MLP, and we feel no need to recite it in full detail here. In addition to noting Judge Recht's active participation on the Mass Litigation Panel, Justice Starcher stated in his concurring opinion in In re Tobacco Litig.,

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<sup>22</sup> Appellants' Appeal Brief at p. 5.

<sup>23</sup> Appellants' Appeal Brief at p. 5.

218 W. Va. 301, 311, 624 S.E.2d 738, 748 (2005), “the judges on the Panel are the *specially trained judges who are ready and willing* to take on cases with common questions of law or fact where large numbers of individuals have potentially been harmed, physically or economically, as a result of a catastrophe or as a result of a defective product (emphasis added).” Yet, the clear implication of Appellants’ accusations is that Judge Recht was neither ready nor willing to take on the flood litigation, and instead chose to “simply dispose” of it. In light of the many years that Judge Recht has devoted to mass litigation cases, which by definition are more procedurally complex than regular civil cases, it is difficult to lend much credence to Appellants’ accusations that Judge Recht “contrived” to “simply dispose” of the flood litigation for no reason other than a feeling that “the time has come.” To the contrary, it is much more logical, and correct, to conclude that his experience, insight, and assiduous attention to his duties led him to the decision commanded by the law.

As this Court has oft-repeated, and as Appellants acknowledge in their brief, judges are afforded significant leeway in handling mass litigation matters. In re Tobacco Litigation, 218 W. Va. 301, 303, 625 S.E.2d 738, 740 (2005); State ex. rel. Mobil Corp. v. Gaughan, 211 W. Va. 106, 563 S.E.2d 419 (2002), cert denied, Mobil Corp v. Adkins, 537 U.S. 944, 123 S.Ct. 346, 154 L.Ed.2d 252 (2002); State ex rel. Appalachian Power Co. v. MacQueen, 198 W. Va. 1, 479 S.E.2d 300 (1996). However, it is inevitable that, at times, there will arise reasonable disputes regarding the interpretation and application of pertinent legal principles. On those occasions, one would hope and expect that the legal issues could be debated and challenged with civility and respect for the judicial

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officers who must decide them. Unfortunately, that expectation has not been met by Appellants in the instant appeal.

**II. WHEN ANSWERING THE CERTIFIED QUESTIONS PRESENTED IN IN RE FLOOD LITIGATION, THIS HONORABLE COURT MERELY EXAMINED THE LEGAL SUFFICIENCY OF SEVERAL CLAIMS CONTAINING COMMON LEGAL THEORIES; IT DID NOT SCRUTINIZE THE FACTUAL SUFFICIENCY OF INDIVIDUAL PLAINTIFFS' COMPLAINTS.**

Appellants' reliance on the "law of the case" doctrine to bypass the requirements of Rule 12(b)(6) and Rule 12(c) of the West Virginia Rules of Civil Procedure is misplaced. The law of the case doctrine prevents a judge from reconsidering issues that have been previously decided in the same case, unless material factual changes arise following the decision. State ex. rel. Frazier & Oxley, L.C. Cummings, 214 W. Va. 802, 808, 591 S.E.2d 728, 734 (2004). Judge Recht did not violate the law of the case doctrine by considering the factual predicate (or lack thereof) set out in Appellants' pleadings and granting Appellees' motions to dismiss.

When answering the certified questions in In Re Flood Litigation, this Honorable Court was asked to analyze the legal theories of liability presented by the plaintiffs in the light of some factual assumptions. Thus, Judge Recht was not reconsidering a previously decided issue but was considering, for the first time, the factual sufficiency of the plaintiffs' individual complaints in the Coal River Watershed litigation.

Certainly, to give breath to the certified questions, this Court had to recognize a set of "stipulated facts," which it assumed to be common to most of the plaintiffs' actions. In doing so, the Court expressly stated that it "assumed as true" certain facts "for the

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purposes of the motion for judgment on the pleadings and the motion for certification.” In Re Flood Litigation, 216 W. Va. 534, 540, 607 S.E.2d 863, 869 (2004). The Court’s use of “stipulated facts” was similar to an expert witness’s adoption of hypothetical factual conditions for the purpose of offering a scientific opinion – the expert is not representing that the factual assumptions are true. Thus, the Court adopted “stipulated facts” to create a “sufficiently precise and undisputed factual record on which the *legal* issues [could] be determined.” *Id.* (emphasis added). Those assumed “facts” were generic and conclusory.

In its December 2004 opinion, this Court expressly stated that “these *legal issues* substantially control the case,” *Id.* (emphasis added), revealing its intention to determine controlling legal issues common to all cases rather than the factual sufficiency of individual claims. Following its adoption of the stipulated facts, the In Re Flood Litigation Court set forth potentially viable theories of liability that plaintiffs might pursue if supported with sufficient factual allegations. For example, the Court rejected the non-fault-based legal theory of strict liability; affirmed three fault-based theories – unreasonable use, negligence, and riparian rights; and recognized that “*a sufficient and precise undisputed factual record*” did not exist from which to determine whether the nuisance theory of liability could apply. *Id.* at 550, 607 S.E.2d at 879 (emphasis added). However, nowhere in the ruling did this Court review or analyze the sufficiency of the facts actually alleged – or not alleged – in the plaintiffs’ Complaints. Thus, the plaintiffs still bore the burden of properly pleading and proving those causes of action.

For example, by stating that under the assumed facts, plaintiffs had a “cognizable cause of action” based on unreasonable use of land, this Court told plaintiffs that a particular legal avenue could apply. Id. at 543, 607 S.E.2d at 872. Although it recognized that the Morris Assocs., Inc. v. Priddy rule was “applicable to the facts of this case,” this Court suggested that examining reasonableness under this theory of liability would require a more fact-specific inquiry than the Court was then performing. Id. at 542, 607 S.E.2d at 871. Consequently, this Court neither enumerated factors relevant to determining the “reasonable use” nor analyzed whether the facts presented in the plaintiffs’ Complaints stated a claim under that theory. How could it? Plaintiffs’ Complaints contain no specific facts in this regard – only conclusory, generalized ones.

Once it was determined what legal theories could be applied to these flood cases generally, and after this Court answered the certified questions, it was the Panel Judges who ultimately examined the plaintiffs’ pleadings in detail and considered under what theories of law, if any, plaintiffs had stated (or could state, given one, two, even three opportunities) a claim. And what the Appellants fail to acknowledge is that a court may find a complaint to be legally sufficient but factually inadequate. For example, where a landowner brought a declaratory judgment action against a city alleging that a zoning ordinance that limited his property to residential purposes was “arbitrary and unreasonable,” this Court recognized the legal sufficiency of his claim. Par Mar v. City of Parkersburg, 183 W. Va. 706, 710-11, 398 S.E.2d 532, 536-37 (1990). However, it granted the city’s Rule 12(b)(6) motion because the landowner had failed to provide factual allegations. Id. at 712, 398 S.E.2d at 538. The Court noted that “[s]implicity and

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informality of pleading do not permit carelessness and sloth: the plaintiff's attorney must know every essential element of his cause of action and must state it in the complaint." Id. at 711, 398 S.E.2d at 537 (citing Lugar and Silverstein, West Virginia Rules of Civil Procedure (1960) at 75). Despite its liberal interpretation of the pleading requirements, this Court held that the landowner's allegations were conclusory, unsupported by the facts, and ultimately failed to state a cause of action. Id. at 711-12, 398 S.E.2d at 537-38.

The United States Court of Appeals for the First Circuit (hereinafter "First [or other] Circuit Court of Appeals") reached a similar result regarding the legal sufficiency of a complaint that was unsupported by factual allegations. In DM Research v. College of American Pathologists, a manufacturer of reagent grade water brought an action against both accrediting and standards organizations for clinical laboratories alleging that the organizations were conspiring to restrain trade, but offered only conclusory allegations in support of its legal theory. 170 F.3d 53 (1st Cir. 1999). That court held that the manufacturer failed to state a claim in the conspiracy action it brought and suggested that "the price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome; conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition." Id. at 55. Unlike the courts in Par Mar and DM Research, this Court in In Re Flood Litigation did not reach the legal sufficiency of the plaintiffs' factual allegations; it assessed only the potential viability of plaintiffs' causes of action, and the qualitative sufficiency of their pleadings was appropriately left for the trial court.

Rule 12(c) states in part that “[a]fter the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.” The factual insufficiency of Appellants’ pleadings having been thoroughly revealed, Judge Recht invited and ruled on Rule 12(b)(6) and (c) motions in the Coal River Watershed. That ruling was prudently delayed, painstakingly weighed and considered, and timely made, and this Court should not disturb it.

**III. JUDGE RECHT’S DECISION IS STRONGLY GROUNDED IN WELL-REASONED WEST VIRGINIA LAW AND IS CONSISTENT WITH THE LAW OF OTHER JURISDICTIONS, THE ANALYSIS OF LEADING WEST VIRGINIA LEGAL SCHOLARS, AND RECENT CASE LAW FROM THE SUPREME COURT OF THE UNITED STATES.**

**A. Judge Recht’s Decision to Require More Definite Statements Pursuant to Rule 12(e) was Appropriate.**

Appellants argue that because answers were filed in response to the original Complaints, Judge Recht erred in granting Motions for More Definite Statements under Rule 12(e) of the West Virginia Rules of Civil Procedure. However, courts and legal scholars alike have stated that Rule 12(e) motions for a more definite statement may be made in response to an amended complaint even if answers were filed in response to the original complaint. “If an original pleading has been amended, a party who responded to the initial pleading may move for a more definite statement of the amended pleading before serving an amended response.” 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1378 (2d ed.1990); see also Black & Veatch International Co. v. Wartsila NSD North America, Inc., 1998 U.S. Dist. LEXIS 7756 (D.

Kan. May 21, 1998) (holding that “Defendant Wartsila NSD North America, Inc. did not waive its right to seek a more definite statement in response to the Amended Complaint by answering the original Complaint”).<sup>24</sup> It is also well-settled that the granting of a motion for more definite statement is left to the sound discretion of the trial court. See Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* 402 (2nd ed. 2006); 5 *Wright & Miller, Federal Practice & Procedure*, § 1217 (1990). Furthermore, federal courts have agreed that a more definite statement may be sought through a motion filed by the defendant or may be ordered *sua sponte* by the court. See *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999) (approving the court’s *sua sponte* allowance of an amendment under Rule 12(e) where the plaintiff originally failed to plead with sufficient clarity); Moore’s *Federal Practice* ¶ 12.36(1) (3d ed. 2004). In this case, Judge Recht was clearly within his authority to order the Appellants to provide more definite statements, prescient in seeing the need for them, diligent in his pursuit of them, and correct in his decision in light of them.

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<sup>24</sup> “Because the West Virginia Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, we often refer to interpretations of the Federal Rules when discussing our own rules.” *Hardwood Group v. Larocco*, 219 W. Va. 56, 51 n.6, 631 S.E.2d 614, 619 n.6 (2006) (citations omitted).

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**B. Neither Appellants' Complaints, More Definite Statements, Nor Second More Definite Statements Met the Pleading Requirements of Rule 8, and Dismissal Pursuant to Rule 12(b)(6) Was Appropriate.**

Judge Recht correctly ruled that Appellants failed, even after filing Complaints, Amended Complaints, and two "more definite statements," to state a claim under the pleading requirements of Rule 8 and Rule 12(b)(6). Appellants' Complaints and Amended Complaints generally and generically asserted broad and conclusory claims by all plaintiffs against all defendants, without alleging which plaintiffs were suing which defendants, which defendants' operations were at issue, or in what liability-producing acts or omissions each defendant operation had engaged. Rather than dismiss Appellants' Amended Complaints immediately, Judge Recht extended to Appellants' counsel two additional opportunities to provide this basic information. In fact, Judge Recht explained exactly what information must be provided to avoid dismissal under Rule 12(b)(6).<sup>25</sup> That information (which was required to be set forth in the more definite

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<sup>25</sup> In Airborne Beepers and Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663 (7<sup>th</sup> Cir. 2007), the 7<sup>th</sup> Circuit praised the lower court for providing guidance and direction to plaintiffs prior to dismissing the Complaint. The 7<sup>th</sup> Circuit stated as follows:

Each time it acted, the court gave the plaintiffs detailed instructions about the pleading requirements for particular claims. For example, . . . . the court advised plaintiffs that in order to present their RICO claim (Count VII) properly, "plaintiff should avoid generalities and provide sufficient detail for defendant to understand the claim against it by stating the specific factual bases and identifying the alleged pattern of racketeering activity." (Apparently the court never required plaintiffs to file a more definite statement, as contemplated by Rule 12(e). Although Rule 12(e) appears to be a closer fit to the problem the court was experiencing than Rule 8, at this point the difference is unimportant.)

Id., at 665. Judge Recht provided the same guidance to Appellants on numerous occasions before finally dismissing their complaints and amended complaints. In fact, he did so using Rule 12(e), the procedural {C1296864.1}

statement) included: “(a) the specific defendant that is being challenged by each plaintiff, (b) the specific operation or specific properties which each plaintiff contends caused harm, and (c) the activities in which the defendant allegedly engaged that the plaintiffs claim was tortious.” 18 Jan. 2007 Mem. Op. & Order at pp. 8-9, ¶ 13, Ex. 24 to Resp. to Pet. for App.<sup>26</sup> Though given three opportunities to provide this core information, Appellants never complied with the court’s Orders requiring more definite statements. Based upon Appellants’ failures to explain the factual basis (or grounds) for the conclusory allegations, the court ultimately dismissed the Coal River Complaints and Amended Complaints with prejudice.

In their brief, Appellants rely extensively upon the case of Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 207 (1957). Specifically, Appellants point to Conley’s oft-quoted passage that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Id. 355 U.S. at 45-46 (emphasis added).

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mechanism recommended by the United States Court of Appeals for the 7<sup>th</sup> Circuit.

<sup>26</sup> The decision to require the three-part more definite statements was a Panel Judges’ decision. As recognized by Judge Recht, the Panel Judges had determined that this three-part inquiry should be undertaken to require plaintiffs to identify basic elements of their claims - elements that must be included in all complaints. The reasoning behind the three-part inquiry was that (a) this information was something that plaintiffs should have known at the time they instituted their suits and not something that they could rely upon the discovery process to formulate, and (b) based upon the response of this Court to the certified questions, this information was necessary for the court to be able to align plaintiffs against Defendants and assess the factual basis upon which each plaintiff was asserting a fault-based cause of action against each Defendant in these flood cases. Principally, the three-point inquiry was designed to distinguish each plaintiff’s specific allegations against each defendant and determine whether such allegations stated claims within the causes of action approved by this Court in In Re Flood Litigation. See September 30, 2006 Hearing Transcript at 15-16.

Id. at pp. 9-10, ¶ 15.  
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Appellants contend that their allegations alone, without providing any factual foundation for their conclusory claims, meet this liberal pleading standard. However, in the years since Conley was decided, many courts have recognized the conflict between this statement and the purpose (indeed, the very language) of Rule 8's notice pleading standard.

It comes as no surprise then that the Supreme Court of the United States ("United States Supreme Court") revisited the "no set of facts" language in Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007). In doing so, it abrogated Conley, stating as follows:

On such a focused and literal reading of Conley's "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery . . . .

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We could go on, but there is no need to pile up further citations to show that Conley's "no set of facts" language has been questioned, criticized, and explained away long enough. . . . The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. . . . Conley, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.

Id. at 1968-69 (emphasis added) (internal citations omitted). To date, this Court has "decline[d] to preemptively settle" what impact the Twombly decision has on West Virginia's notice pleading requirements. Highmark WV, Inc. v. Jamie, No. 33309, 2007 WL 4150211 (W.Va. November 20, 2007). Due to the similarities between the MFL and

the Twombly case, however, a perfect opportunity exists for this Court to clarify whether some minimal “notice” and “grounds” must be pled to survive dismissal under Rule 12(b)(6) or whether conclusory allegations that admittedly lack any factual support are sufficient to open the courtroom doors to costly and onerous discovery.

As stated above, there are marked similarities between the Twombly opinion and the Memorandum of Opinion and Order issued by Judge Recht. Judge Recht’s Memorandum of Opinion and Order stated, in part, as follows:

It is the law of West Virginia that allegations in a complaint must be supported by essential factual statements. General allegations that are mere sketchy generalizations of a conclusive nature unsupported by operative facts will not withstand a motion to dismiss pursuant to Rule 12(b)(6) and Rule 12(c). Fass v. Nowesco Well Service, LTD, 177 W. Va. 50, 350 S.E.2d 562 (1986).

18 Jan. 2007 Mem. Op. & Order (Ex. 24 to Resp. to Pet. for App.) at p. 23, ¶ 5 (emphasis added). The United States Supreme Court, in Twombly, also addressed these issues:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*; Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (C.A.7 1994), a plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, *see Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation”).

Twombly, 1964-65 (emphasis added). Furthermore, the United States Supreme Court

stated:

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. . . Rule 8(a)(2) still requires a “showing,” rather than a blanket assertion, of entitlement to relief. *Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only “fair notice” of the nature of the claim, but also “grounds” on which the claim rests. See 5 Wright & Miller §1202, at 94, 95 (Rule 8(a) “contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented” and does not authorize a pleader’s “bare averment that he wants relief and is entitled to it”).*

Id., at 1965 n.3 (emphasis added).

Judge Recht also appreciated the special need for true “fair notice” in complex mass litigation cases where hundreds of plaintiffs sued scores of defendants, and the prospect of broad discovery is ominous to say the least. See 18 Jan. 2007 Mem. Op. & Order (Ex. 24 to Resp. to Pet. for App.) at pp. 25-26, ¶¶10-13.<sup>27</sup> The Twombly Court mirrored Judge Recht’s sound reasoning:

As we indicated over 20 years ago in Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n.17, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”

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It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management,” given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. See, e.g., Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638 (1989) (“Judges can do little about

<sup>27</sup> Keep in mind, after Appellants filed Amended Complaints in the Coal River matter, before Judge Recht ordered the filing of more definite statements, hundreds of plaintiffs had brought suit against hundreds of defendants without ever having identified which plaintiffs were making claims against which defendants. At the same time, the plaintiffs in the Oceana/Mullens Subwatershed Phase I Trial were dismissing many of the defendants after four years of litigation.

impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves”). And it is self-evident that the problem of discovery abuse cannot be solved by “careful scrutiny of evidence at the summary judgment stage,” much less “lucid instructions to juries,” *Post*, at 4; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.

Twombly, at 1967 (emphasis added). The Twombly Court further noted that “phased” discovery would not impact this analysis in light of the “sprawling, costly, and hugely time-consuming” discovery that would be necessary. Id.

Appellants’ reliance on Conley, and cases that have followed a strict view of the “no set of facts” language set forth in Conley, is no longer appropriate. This Court’s statement in Fass v. Newsco Well Service, Ltd., 177 W. Va. 50, 350 S.E.2d 562 (1986) is perfectly aligned with Twombly, which sets forth the correct standard for pleading a claim, especially in a case like the present which involves so many plaintiffs, so many defendants, and no clear delineation of claims against any operation of any specific defendant: “[A]llegations in a complaint must be supported by essential factual statements. General allegations that are mere sketchy generalizations of a conclusive nature unsupported by operative facts will not withstand a motion to dismiss pursuant to Rule 12(b)(6).” Fass, 177 W. Va. at 52, 350 S.E.2d at 564. This pleading rule, described by Judge Recht in his Memorandum of Opinion and Order and by the United States Supreme Court in Twombly, has historically been aligned with other high courts across the country.<sup>28</sup> Moreover, some of the leading legal scholars in West Virginia have also

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<sup>28</sup> See, e.g., McHenry v. Renne, 84 F.3d 1172 (9th Cir. 1996) (affirming dismissal under {C1296864.1})

forcefully stated that Rule 8's notice pleading requirements are not met with bald assertions that lack factual predicate in the Complaint for the claims asserted.<sup>29</sup>

The United States Court of Appeals for the Second Circuit analyzed the Rule 8 pleading requirements post-Twombly. In In re Elevator Antitrust Litigation, 502 F.3d 47 (2d Cir. 2007), the court dealt with a deficient complaint similar to the complaints at issue in this case. The court noted as follows:

As the district court observed, the complaint enumerates “basically every type of conspiratorial activity that one could imagine . . . . The list is in entirely general terms without any specification of any particular activities by any particular defendant; [it] is nothing more than a list of theoretical

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Rule 12(b)(6) and citing lower court's observation that “no attempt is made to match up the specific factual allegations and the specific legal claims to a specific defendant. The result is that defendants and this court are literally guessing as to what facts support the legal claims being asserted against certain defendants” and holding that “[s]omething labeled a complaint but written more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a complaint.”); Perkins v. Silverstein, 939 F.2d 463 (7th Cir. 1991) (holding that “[w]hile plaintiffs make clear in their original complaint what their claims are, they fail to identify the grounds upon which their claims are based. This they must do, even under the liberal notice pleading of Rule 8(a).”); Migdal v. Rowe Price-Fleming Intern., Inc., 248 F.3d 321, 328 (4th Cir. 2001) (stating that “[a]lthough the pleading requirements of Rule 8(a) are very liberal, more detail often is required than the bald statement by plaintiff that he has a valid claim of some type against defendant” and that “[t]his requirement serves to prevent costly discovery on claims with no underlying factual or legal basis. . . .”) (internal citations omitted); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) (holding that “a complaint, which contains a ‘bare bones’ allegation that a wrong occurred and which does not plead any of the facts giving rise to the injury, does not provide adequate notice.”) (citation omitted); Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005) (upholding a dismissal under Rule 12(b)(6) stating that “[w]e commend the district court for remembering that some minimal pleading standard does still exist and for that court's serious and thorough examination of the complaint”).

<sup>29</sup> “While it is true the rules of civil procedure are designed to expedite and simplify the trial on an action, certain requirements still must be met in the pleadings in order to properly arrive at the issue to be decided.” Cleckley, et al., supra, at 192. Furthermore, in addressing motions to dismiss under Rule 12(b)(6), “a trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.” Id. at 384. Finally, Cleckley, et al. note that “[a] complaint which contains a bare bones allegation that a wrong occurred and which does not plead any of the facts giving rise to the injury, does not provide adequate notice.” Id. at 400.

possibilities, which one could postulate without knowing any facts whatever.”

In re Elevator Antitrust Litigation, 502 F.3d at 50-51 [citation omitted] (emphasis added).

The court was critical of plaintiffs’ use of generalities and the lack of specificity as to particular activities of particular defendants. In this case, the Appellants’ Complaints were similarly general and non-specific. In their Complaints, Amended Complaints, and more definite statements, Appellants boldly claimed that: 1) every defendant; 2) did everything wrong; 3) everywhere they were; 4) all the time.<sup>30</sup> Presumably, Appellants seek to use discovery to determine whether their groundless assertions are valid; that is, did: 1) any defendant; 2) do anything wrong; 3) anywhere they were; 4) at any time? Should discovery prove fruitless, perhaps Appellants would voluntarily dismiss certain defendants (as they did just forty-five days before trial in the Upper Guyandotte watershed bringing the number of defendants down from seventy-three to thirty-one). Regardless, Appellants would have every defendant suffer through a lengthy and costly discovery process based on “nothing more than a list of theoretical possibilities, which one could postulate without knowing any facts whatsoever.” Id.

It is clear Appellants did just that – without any facts other than locations of plaintiffs, locations of defendants’ operations, and the fact that a flood occurred,

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<sup>30</sup> Plaintiffs’ More Definite Statements, which required the Appellants to provide a “specific definition of the activity that each defendant engaged in that caused the harm,” claimed that every coal mining defendant did the exact same things wrong at every operation regardless of who did the mining, where the mining was done, or when the mining was done. The More Definite Statements submitted against the timbering defendants also suffered from “sameness.” In other words, every timber defendant allegedly did the exact same things wrong at every timber operation regardless of who did the timbering, where the timbering was done, or when the timbering was done. Finally, the More Definite Statements supplied to each landowner defendant were, once again, identical.

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Appellants postulated identical lists of theoretical possibilities. Appellants' counsel, on four separate occasions, admitted that they had no facts to support their allegations prior to engaging in discovery. During a hearing on 21 April 2006, Appellants' counsel stated that "for plaintiffs to comply with the particularity that [defendants] and the Court demand[], we necessarily have to have some discovery . . . ." 21 Apr. 2006 Tr. at pp. 47-48, Ex. 16 to Resp. to Pet. for App. Two months later, during a hearing on 21 June, Appellants' counsel once again stated that Appellants needed discovery to respond. See 21 Jun. 2006 Tr. at p. 43, Ex. 19 to Resp. to Pet. for App. On 18 August 2006, Appellants' counsel submitted what he denominated as a Rule 56(f) affidavit, reiterating plaintiffs' need for discovery before they could identify whether there were actually any facts upon which their allegations were based. Ex. 20 to Resp. to Pet. for App. At a 30 September 2006 hearing, Appellants' counsel reiterated plaintiffs' inability to "come forward with specific allegations" without discovery to try to find them. See 30 Sep. 2006 Tr. (Ex. 18 to Resp. to Pet. for App.) at p. 63. In other words, Appellants have no actual grounds for their conclusory allegations. Instead, they have "theoretical possibilities" of everything they claim any of the Appellees may have done wrong on any piece of property at any time. Actually, all they really say is that mining companies mined and timber companies timbered; naked strict liability.

Twombly is not a significant departure from previous West Virginia jurisprudence governing Rule 8 and Rule 12(b)(6). For over 20 years, Fass has steadfastly held that "allegations in a complaint must be supported by essential factual statements. General allegations that are mere sketchy generalizations of a conclusive nature unsupported by

operative facts will not withstand a motion to dismiss pursuant to Rule 12(b)(6).” *Id.* at 52, 350 S.E.2d at 564. That rule, when applied as it was by Judge Recht, ensures that plaintiffs provide a “showing” of the “grounds” setting forth their entitlement to relief. In West Virginia, circuit judges, especially those sitting by appointment on the Mass Litigation Panel, must have “the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” *Twombly*, at 1967.

**C. An Opportunity to Conduct Discovery is Neither Necessary Nor Appropriate When Evaluating the Sufficiency of Appellants’ Complaints Under Rule 12(b)(6).**

Appellants’ contention that a Rule 12(b)(6) motion should not be granted without allowing Appellants an *opportunity* to use discovery to learn whether a factual foundation can be developed to support their blanket allegations is meritless. Their constant “we need discovery” refrain merely underscores the insufficiency of their pleading. Judge Recht’s Memorandum of Opinion and Order directly addressed this contention:

The situation before this Court, at its essence, presents the following fundamental questions: May plaintiffs, under the guise of so-called “mass litigation,” file complaints in which scores or hundreds or thousands of plaintiffs collectively sue scores or hundreds of defendants collectively and indiscriminately upon the same generic factual allegations without having any specific factual basis indicating actionable conduct on the part of any defendant with respect to any plaintiff? *If they have filed such complaints without factual bases, may they survive a motion to dismiss for failure to state a claim by arguing that they may find such factual bases later through discovery? This Court is of the opinion that our system of justice does not contemplate or permit plaintiffs to bring suits implicating scores or hundreds of defendants without a factual basis as to any of them and then attempt through discovery to identify such bases, and accordingly*

*answers these questions "no."*

18 Jan. 2007 Mem. Op. & Order (Ex. 24 to Resp. to Pet. for App.) at pp. 25-26, ¶ 13 (emphasis added). Should this Court answer the questions posed in paragraph 13 of Judge Recht's Conclusions of Law in the affirmative, it would grant any plaintiff a right of entry into extraordinarily expensive and expansive (to defendants) discovery based upon groundless allegations, which will lead to legally-sanctioned extortion in mass litigation cases.

Discovery in consolidated litigation such as the Mass Flood Litigation can be extremely laborious and expensive.<sup>31</sup> This explains why other courts have cautioned

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<sup>31</sup> Appellants have asked each defendant, *inter alia*, for "a description of every timber harvest in the Coal River Watershed in the ten years preceding July 8, 2001 that occurred on land owned [or leased] by you [or on which you owned the timber estate] [or of timber you purchased prior to the harvest] [or conducted by you] [including] (a) the location of the harvest . . . ; (b) the number or approximate number of acres actually harvested . . . during the harvest; (c) the beginning and end dates . . . ; (d) the type of harvest . . . ; (e) the diameter limits of the harvest by tree species, if applicable, and where the diameter was to be measured; and (f) the name of each and every other individual and entity involved in the harvest (whether as the land owner, leaseholder, timber estate owner, timber owner, and/or the logging company)." Interrogs. Nos. 6-9, served 23 May 2006. Appellants also asked each defendant for "a description of every surface mining operation in the Coal River Watershed that was active at any point during the ten years preceding July 8, 2001 that was conducted on land owned by you [or on which you owned the mineral rights] [or for which you were a permittee] [or that was conducted by you] [ including] (a) the location of the mining operation . . . ; (b) the location of each and every valley fill; (c) the number or approximate number of acres actually disturbed by mine pits . . . ; (d) the number or approximate number of acres actually disturbed by valley fills . . . ; (e) the number or approximate number of acres actually disturbed by mine-related structures . . . ; (f) the number or approximate number of acres actually disturbed by timbering conducted in advance of the mining . . . ; (g) the beginning and end dates . . . ; (h) the name of each and every other individual and entity involved in the harvest . . ." Interrogs. Nos. 17-20, *id.* Such all-inclusive inquiries are inherently suspect where no particular conduct on the part of any defendant is alleged and where plaintiffs claim nothing more than that the lawful "collective activities" of every landowner, timbering entity, and mining entity in southern West Virginia contributed water to naturally-occurring flooding. This discovery request was coupled with more interrogatories and document requests for everything under the sun within the 10-year period preceding the 8 July 2001 floods. The phrase "collective activities" is meaningless. There is no "collective" duty or standard. "Collective activities can only bring liability if the "individual" activities within them are each liable. Again, this is strict liability.

against allowing subpar, lax complaints to pass muster under Rule 12(b)(6). See, e.g., DM Research, Inc. v. College of American Pathologists, 170 F.3d 53, 55 (1st Cir. 1999), discussed infra. at p. 15. As stated above, the Twombly Court noted that “[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management . . . .’” Twombly, 127 S.Ct. at 1967. The Fourth Circuit Court of Appeals also held that requiring greater detail than a bald claim for relief “serves to prevent costly discovery on claims with no underlying factual or legal basis . . . .” Migdal, 248 F.3d at 328.

At its root, Appellants’ arguments that an opportunity to conduct discovery is required prior to ruling on a Rule 12(b)(6) motion is an oxymoron. If an opportunity to pursue discovery is a prerequisite to dismissing a claim under Rule 12(b)(6), then Appellants would necessarily have an opportunity to rely on matters outside of the pleadings. Thus, every motion to dismiss under Rule 12(b)(6) would be converted to a Rule 56 motion for summary judgment. See Poling v. Belington Bank, Inc., 207 W. Va. 145, 529 S.E.2d 856 (1999). That conversion would then allow the responding party to pursue exhaustive discovery until the discovery period is closed. Otherwise, the court would violate the rule that “a decision for summary judgment before discovery has been completed must be viewed as precipitous.” Board of Ed. of Ohio County v. Van Buren and Firestone, 165 W. Va. 140, 267 S.E.2d 440 (1980). This circular analysis leads to only one conclusion: if this Court determines that an opportunity to engage in discovery is required prior to granting a motion to dismiss, then Rule 12(b)(6) will be eviscerated and utterly useless, regardless of how deficient a complaint is on its face. Consequently,

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Rule 12(b)(6) could never be used to “weed out unfounded suits” as envisioned by this Court in State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (1995).

**D. Appellants’ Contention that Judge Recht Utilized a “Super Rule” of Pleading in this Mass Torts Case is Wrong.**

As the preceding sections indicate, Judge Recht did not hold the Appellants to a higher standard or “super rule” of pleading. The standard utilized by Judge Recht is firmly grounded in West Virginia law, case law from other high courts across the country, works from leading West Virginia scholars, the United States Supreme Court’s recent decision in Twombly, and, importantly, common sense. Appellants were asked only to provide fair notice to each defendant. Fair notice includes delineating which plaintiffs are asserting claims against which defendants. Fair notice includes designating which defendant operations are actually at issue. Fair notice also includes identifying the factual predicate, or grounds, upon which their claims of liability are based as to each defendant. These principles apply to all types of litigation, not just mass tort claims; however, the reasoning behind these requirements is even more obvious and compelling in the mass tort context. Plaintiffs should not be permitted to ignore what is expected in a one plaintiff versus one defendant case by naming thousands of plaintiffs against hundreds of defendants. If anything, more vigilance is required in this “mass” context to assure that claims that would be frivolous if asserted alone (as our Rules contemplate they should be) are permitted because they are included with and buried in an avalanche of others.

Moreover, the Mass Litigation Panel, by design, is empowered with the authority and discretion to use “creative, innovative trial management plan[s]” to handle such cumbersome litigation. See Syl. Pt. 3, State ex rel. Appalachian Power Co. v. MacQueen, 198 W. Va. 1, 479 S.E.2d 300 (1996); W. Va. T. C. R. 26.01 (stating that it is the responsibility of the Mass Litigation Panel to “develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which may be referred to it by the Chief Justice”). While the pleading standard utilized by Judge Recht applies to all litigation, the need for some minimal pleading standard cannot be overstated in this type of case, where so many plaintiffs sue so many defendants indiscriminately simply based upon the fact that each defendant is engaged in a certain type (here mining or timbering) of lawful conduct.

**E. By Dismissing the Coal River Claims Outright, Judge Recht Acted Appropriately in the Face of Appellants’ Unwavering Attempts to Treat Reasonable Use and Nuisance Like Strict Liability.<sup>32</sup>**

In their Complaints and Amended Complaints, all Appellants asserted general and generic allegations against all defendants, and no attempt was made to differentiate or

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<sup>32</sup> In their Petition for Appeal, plaintiffs complained only of Judge Recht’s application of the “rule of reasonable use.” See Petition, Assignment of Error G. at p. 16 and Argument at pp. 27-34. In their Brief here, they now complain about Judge Recht’s handling of their nuisance and negligence claims, but those issues and arguments were never made before Judge Recht or included in their Petition. Plaintiffs’ Assignment of Error H., and its corresponding Argument at pp. 33-35, is completely new and on an issue that this Court did not accept for review. Rule 3(c) of the West Virginia Rules of Appellate Procedure provides that a Petition for Appeal set forth the “assignments of error relied upon on appeal[.]” In Canterbury v. Laird, \_\_\_\_\_ S.E.2d \_\_\_\_\_, 2007 WL 4165399 (W.Va. 2007), this Court stated that “our cases have made clear that this Court ordinarily will not address an assignment of error that was not raised in a petition for appeal.” See Koerner v. West Virginia Dep’t of Military Affairs & Pub. Safety, 217 W.Va. 231, 617 S.E.2d 778 (2005) (refusing to consider an argument in appellant’s brief that was not assigned as error in petition for appeal).

customize their claims with respect to any particular plaintiff or defendant. None of the Complaints and Amended Complaints provided specificity of the claims, instead opting for a jumble of generic allegations asserting that all defendants engaged in mining and timbering and activities regularly associated with these industries. None of the Complaints and Amended Complaints contained any specific allegations that any particular defendant engaged in any tortious activity with respect to any particular plaintiff – even though this Court had rejected plaintiffs’ efforts to pursue claims based on strict liability, now more than two years ago.

It became evident to Judge Recht early on that only small groups of plaintiffs could substantiate claims against small groups of defendants, if at all, and it further became evident to Judge Recht that the same general allegations contained in the Complaints and Amended Complaints could not possibly be applicable to the various groups of claims that involved location-specific activities. It was within this context that Judge Recht required each individual Appellant to identify each individual defendant or group of defendants he or she was suing and provide the basis for the claims against those defendants, making specific reference to the operations of each defendant at issue and the specific activities upon which those claims were based.

In response to Judge Recht’s Order, individual Appellants and groups of Appellants began to identify which defendants and groups of defendants they were making claims against, but refused to disclose the nature of or specific details regarding those claims. 18 Jan. 2007 Mem. Op. & Order at pp. 8-9, Ex. 24 to Resp. to Pet. for App. Appellants continually and repeatedly maintained that all defendants did all of the same

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things to all Appellants, even though it had become abundantly clear to Judge Recht that we were dealing with scores of small claims or groups of claims and not one massive flood claim.

Each Appellant in the Coal River watershed advised that he or she was asserting claims against essentially every landowner, every timber operator, and every surface mine operator that was located or that operated upstream from that Appellants' property. It could be next door, or it could be miles away; that mattered not. And the claims that each Appellant was asserting against each landowner, each timber operator, and each surface mine operator were exactly the same as the claims that every other downstream Appellant – regardless of where he or she was located – was asserting against every other landowner, timber operator, or surface mine operator, no matter where any particular defendant was located or what they had actually done, so long as that defendant was located upstream of that Appellant. These claims were not premised in tort law; they were premised on geography.

Appellants' Brief describes the "disclosures" made by them by referring only to the "more definitive statements" filed by the Calwell plaintiffs. See Brief at 28-29. These disclosures and their "colorful maps," see Brief at p. 23, were the bell cows of Appellants' efforts to comply with Judge Recht's orders. As discussed below, the disclosures by the other Appellants – represented by the Humphreys Firm and the McGraw Firm – were even less enlightening. But, first, like Appellants, we will begin with the Calwell plaintiffs' disclosures.

Appellants' Brief uses the Calwell plaintiffs' "more definitive statement" as to

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Berwind Land Company (“Berwind”) as its best example of plaintiffs’ alleged “compliance” with Judge Recht’s various orders.<sup>33</sup> Berwind is a landowner. It neither timbers nor mines, but instead it leases its property to others who perform such activities.<sup>34</sup> The “more definitive statement” alleges that Berwind: (a) failed to monitor timbering companies on its property; (b) failed to “compare BMP compliance” on its property with “state BMP surveys and failed to set benchmarks for future performance and improvement;” (c) failed to “implement riparian protection measures, such as marking or flagging streamside management zones;” (d) failed to develop a plan for “protection of steams from timbering;” and (e) apparently allowed too much of the “drainage area” above each plaintiff to be timbered, whether Berwind owned that “drainage area” or not. See Brief at 28-29. Similarly vague and generalized statements were made about Berwind’s failure to stop its lessee surface mining companies from allegedly violating their permits and applicable regulations, though no such violations were ever identified by plaintiffs. Id. at 29-30.

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<sup>33</sup> Before Judge Recht, Appellants made a similar example of Jim C. Hamer Company (“Hamer”), a timbering company. In the case of Hamer, the Calwell plaintiffs’ “more definitive statement” asserted seven boilerplate allegations of alleged shortcomings with Hamer’s operations that are asserted in exactly the same language against all other timbering companies. See The Calwell Plaintiffs’ Omnibus Response to Certain Defendants’ Motion to Dismiss at 5-6 (filed 8/18/06). Nowhere does that “more definitive statement” assert *how* and *where* Hamer’s operations fell short on these seven points; it simply states the conclusion that they did, even though Hamer engaged in timbering operations throughout the entire Coal River Watershed on the properties of many defendant landowners, including Berwind. As this “more definitive statement” filed with Judge Recht candidly conceded, “[t]he Calwell Plaintiffs allege that – at each and every timbering operation identified as having been conducted by [Hamer] by the Calwell Plaintiffs on April 7, 2006 – [Hamer’s] conduct fell below the applicable standard of care in each of those seven respects.” Id. at 6. “Each and every!” And in all seven respects! And these same allegations were made in the “more definitive statements” that were made against each and every timber company in the Coal River Watershed cases.

<sup>34</sup> The complaints, amended complaints, and even the “more definitive statements” all recognize that Berwind is a landowner. Appellants’ Brief, as did their Petition for Appeal, inexplicably refers to Berwind as a “timbering and coal mining defendant.”

These allegations were asserted as to each and every piece of land owned by Berwind in the Coal River Watershed by every Appellant who happened to be anywhere downstream from that land. This was not the particularization of claims that the United States Supreme Court had in mind when it decided Twombly or that this Court required of plaintiffs by its decision in Fass.

As a result of Judge Recht's Order, the cases moved from Complaints and Amended Complaints in which every plaintiff was suing every defendant for exactly the same thing – coal mining and timbering – to “disclosures” and “more definitive statements” in which separate groups of plaintiffs were suing separate groups of defendants for exactly the same thing – coal mining and timbering. Every defendant upstream from every plaintiff did exactly the same thing on each and every parcel of land owned, each and every timber job undertaken, and each and every surface mine operated. In actuality, it did not matter what specifically anyone did or did not do; it only mattered that there was mining or timbering located upstream from an Appellant. Sound like strict liability? It did to Judge Recht. As Abraham Lincoln famously said, “If you call a tail a leg, how many legs has a dog? Five? No, calling a tail a leg don't make it so.” Calling strict liability “nuisance” or “reasonable use” does not make it so.

Without accepting hypothetically even for a moment that alleging and proving a citation or notice of violation or failure to follow a Best Management Practice on or immediately before 8 July 2001 could conceivably have any legal significance in the face of storms that overwhelmed everything man could and did do, consider how “undefinitive” this “more definitive statement” is in the Berwind example. Appellants

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stated that Berwind's timbering and mining lessees did not comply with best practices, but who, what, and where? For example, Berwind does not know which timber operation allegedly did not have streamside management zones in which locations. Berwind does not know which mining company supposedly violated its permits or regulations and where those violations occurred (unless "all of them everywhere" suffices, which it does not). (Of course, in the real world of the historic and overwhelming 8 July 2001 storm, it doesn't matter anyway.) When repeatedly ordered by Judge Recht to make a meaningful and specific disclosure, Appellants' consistent retort was "everywhere, every way, and always." As an exercise in making their claims more "definitive," however, these responses actually meant "nowhere in particular, no manner in particular, and no time in particular."<sup>35</sup> Specific generic facts are not analytically better than general generic facts; they are still generic facts.

And these were Appellants' best efforts in complying with Judge Recht's repeated orders. The Humphreys plaintiffs' disclosures simply state this:

Upon information and belief, Plaintiffs allege that due to the manner in which Defendants, and each of them, have engaged in and/or permitted mining and timbering activities, large quantities of surface waters which formerly lay upon the property until it naturally evaporated, and/or percolated into the soil and/or was collected into certain streams and other

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<sup>35</sup> As troubling as this may be, this response is probably better than their other responses to Judge Recht, namely, "we don't have to do that," and "we can't do that until you allow us to take some discovery." These are the same parties who have told this Court that, "within 48 hours of July 8, 2001, plaintiffs conducted independent investigations involving aerial photography, public record reviews, witness interviews, surface runoff modeling and investment of approximately \$400,000 in expert fees and costs in connection therewith." Brief at p. 9, fn. 11. Plaintiffs' counsel, with righteous indignation, stood behind their allegations that everyone did everything everywhere every single time. This is, one supposes, an oddly logical corollary to their admissions on 21 April 2006, 21 June 2006, 18 August 2006, and 30 September 2006 that they could point to no factual support without discovery. If you can't point to any thing, you point to every thing. Two sides of the same generic coin.

natural drainage, did unnaturally flow upon the Plaintiffs' land, causing damages and harm to the persons and/or homes and/or property of the Plaintiffs as averred in Plaintiffs' complaint.

[Humphreys] Plaintiffs' Unified More Definite Statement, at 2-3. This general statement was followed by a list of permits either held by a defendant or by a lessee of a defendant. This "more definitive statement" does not even attempt to go through the motions of making any specific allegations.

The "more definitive statement" filed by the McGraw plaintiffs is similar in substance to the Calwell plaintiffs' disclosures, but more straightforward. Rather than repeat verbatim each set of allegations for each defendant, the McGraw plaintiffs simply stated the same allegations would apply, without change or variation, to each and every defendant identified as a landowner, timbering operator, or mining operator. See [McGraw] Plaintiffs [sic] More Definite Statement of Defendants [sic] Misconduct.

In conjunction with their pitiful efforts at particularizing their claims as required by the West Virginia Rules of Civil Procedure, the most basic tenets of due process and the repeated orders of Judge Recht, plaintiffs also have espoused a flawed view of "unreasonable use" as set forth in Morris Assocs., Inc. v. Priddy, 181 W.Va. 588, 383 S.E.770 (1989), and discussed in In Re Flood Litigation, 216 W.Va. 534, 607 S.E.2d 863 (2004). In Appellants' view, these authorities allow them to state a claim by baldly alleging that defendants have been "unreasonable" in their use of their various property interests. But these authorities state much more. The theory of "unreasonable use" is based on the concept of foreseeable harm and a balancing of interests. Id. 607 S.E.2d at 870-71. Without a direct and specific statement of what it was about each defendant's

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use of its land each Appellant contends was unreasonable – what each defendant did wrong – this inquiry is simply impossible to perform. Appellants’ argument is that the fact that the floods of 8 July 2001 – which were the inevitable result of the once-in-several-lifetimes rainfall of 8 July 2001 – occurred makes all whose use of land contributed water to that flooding liable. That is strict liability.

In effect, Appellants maintain that a complaint is legally sufficient to state a claim upon which relief can be granted so long as it states the buzz words (elements) associated with a recognized cause of action. Being able to recite the elements of a cause of action might help pass the bar exam, but it is not sufficient to state a claim upon which relief can be granted. Appellants believe a complaint need not contain any factual bases or underpinning whatsoever. They believe it is sufficient to file a complaint, without any basis in fact, and then take discovery to see if they can stumble into something (or extract a settlement). West Virginia must not accept that premise, especially when so boldly and baldly asserted as it is here.

A claim that the actions charged to all defendants across the board are “unreasonable” simply because they allegedly contributed to flooding downstream is nothing more than strict liability dressed up in the language, but not the spirit, of an unreasonable use claim. Contrary to the position staked out by Appellants in their Brief, Judge Recht did not misunderstand or “misapprehend” the difference between strict liability under Rylands v. Fletcher<sup>36</sup> and unreasonable use under Morris; he simply held,

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<sup>36</sup> Fletcher v. Rylands, 3H. & C. 774, 159 Eng. Rep. 737 (1865) rev’d Fletcher v. Rylands, L.R. 1 Ex. 265 (1866), aff’d Rylands v. Fletcher, L.R. 3 H.L. 330 (1868) and the Restatement (Second) {C1296864.1}

and rightly so, that Appellants had repeatedly failed to plead any facts sufficient to establish a claim under any theory except strict liability, which necessarily includes within its analytical sphere the concomitant holding that they did not plead an unreasonable use (or any other) claim either.

### CONCLUSION

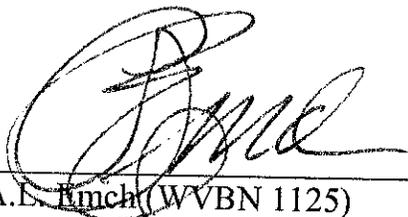
Over six years have elapsed since the devastating natural flooding that engendered the Appellants' lawsuits, and it has been over three years since this Court so carefully considered and articulated under which legal theories plaintiffs could attempt to proceed. In these cases of first impression, the likes of which have not been seen anywhere in the country but which have implications for *all* land use and development activities in West Virginia, this Honorable Court is now faced with an effort to appeal the dismissal of some of those actions under Rules 12(b)(6) and (c).

All of Appellants' pleadings, both original and supplemental (Complaints, Amended Complaints, disclosures, and "more definite statements"), allege nothing more than that the Appellees' day-to-day activities alter land and may result in an increase in runoff. After all this time, Appellants are unable to say definitively which defendant(s) each of them is suing and utterly refuse to explain what conduct (other than the everyday lawful activities inherent in mining and timbering) by each such defendant(s) is alleged to have caused him or her harm. Neither "notice pleading" nor this Court's previous decisions excuse the Appellants from these fundamental requirements.

Appellants have yet to comply with the most basic procedural requirements for bringing a lawsuit, depriving the Appellees of the notice to which they are entitled under due process and depriving the court below of information that it must have to organize the cases for disposition and that plaintiffs must have before they sue. How might one further describe a claim that is "not cognizable"? It can be a claim that fails to surmount the lowest legal bar (which is what Judge Recht tells us), states in general terms a theoretical argument that cannot be reliably or credibly proved in specific terms (which is what Judge Hutchison tells us), or presents so great a disconnect between reality and legality that it is not a proper situation to be litigated – the legal glove does not fit the factual hand (which is what common sense tells us). Appellees respectfully ask this Honorable Court to recognize that Appellants have managed to meet all three criteria. Judge Recht's decision to dismiss the Coal River Watershed lawsuits was eminently reasonable and fully supported by logic and precedent; therefore, Appellees urge this Honorable Court to conclude that Judge Recht was plainly right in dismissing the claims of Appellants and affirm his decision.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33664

IN RE: FLOOD LITIGATION

Raleigh County Civil Action No. 02-C-797  
(Coal River Watershed)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 28th day of January 2008 true and correct copies of the *Brief of Appellees* was sent via first-class U.S. mail to:

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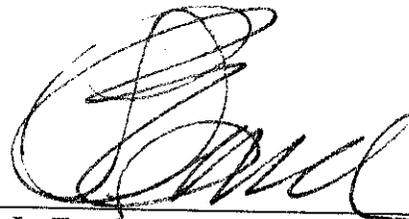
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