UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

MASSEY ENERGY COMPANY and
MARFORK COAL COMPANY, INC.,

Plaintiffs

v. **Civil Action No. 2:06-0614**

THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA,

Defendant

MEMORANDUM OPINION AND ORDER

Pending are the motions of the defendant, The Supreme Court of Appeals of West Virginia ("movant"), (1) to strike portions of paragraphs 18, 22, 23 and 28 and all of paragraphs 19-21 and 24-27 of the complaint ("motion to strike"), filed October 5, 2007, (2) for certification pursuant to 28 U.S.C. § 1292(b) ("motion for certification"), filed the same day, and (3) to stay discovery pending a ruling on the motion for certification, filed December 10, 2007.[1]

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[1]**Also pending is the movant's motion for a hearing on the aforementioned motions, filed January 14, 2008. Having fully considered the matter, the court concludes the facts and legal contentions are adequately presented in the materials presently pending and argument would not aid the decisional process. The court, accordingly, ORDERS that the motion for a hearing be, and it hereby is, denied.**

The disposition of the motion for certification renders moot the motion to stay. The court, accordingly, ORDERS that the motion to stay be, and it hereby is, denied as moot.

I.

Plaintiffs instituted this action seeking a declaration that West Virginia Rule of Appellate Procedure 29 is facially unconstitutional. Plaintiffs allege, inter alia, that the movant's promulgation, construction, and application of Rule 29 violates the Due Process Clause of the Fourteenth Amendment. Plaintiffs additionally seek an order directing the movant to amend Rule 29 "so that it provides for a fair hearing before an impartial tribunal of all motions for disqualification . . . ." (Id.)

The movant initially sought dismissal pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), contending (1) the court lacked subject matter jurisdiction in view of the rules prescribed by Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), and their progeny, (2) the plaintiffs' claims were barred by res judicata, (3) the claims

stated are ones for which no relief can be granted, and (4) both Younger and Burford abstention counsel in favor of dismissal in favor of state court resolution of the claims stated. A standing issue also developed late in the briefing.

On September 21, 2007, the court entered a memorandum opinion and order denying the movant's motion to dismiss. The court rejected the standing challenge, noting it would consider the matter further at summary judgment if requested. The court also rejected both the Younger and Burford arguments, noting the need for further development of the applicable factors governing those abstention doctrines. The Rooker/Feldman, res judicata, and Rule 12(b)(6) arguments were rejected in their entirety.

The movant now seeks an order striking a number of allegations from the complaint. The proposed deletions are indicated by the struck-through text appearing below:

> 18. In light of Plaintiffs' past experience before the West Virginia Supreme Court, Plaintiffs reasonably anticipate that they will suffer a deprivation of their constitutional right to a fair hearing before an impartial tribunal in the future. ~~Currently, one member of the West Virginia Supreme Court, Justice Larry Starcher, has shown a strong personal bias against Plaintiff Massey Energy, and Plaintiff Massey Energy's Chairman and Chief Executive Officer, Don L. Blankenship.~~ Because Plaintiffs are likely to appear before the West Virginia Supreme Court in the future, their disqualification motions will be subject to Rule 29.

19. The basis of such disqualification motions will include numerous instances in which Justice Starcher has violated Canon 3(E)(1) of the Code of Judicial Conduct by expressing publicly a personal bias against Plaintiffs. For instance, on January 3, 2003, the State Journal reported that Justice Starcher told a group of high school students visiting the State Capitol on December 3, 2002, that coal companies were not good for the State of West Virginia because coal companies reap benefits without contributing anything in return. In the course of those remarks, Justice Starcher singled out Plaintiff Massey Energy specifically for criticism.

20. Apart from Justice Starcher's comments about Plaintiff Massey Energy to the students, he also criticized Massey Energy following the November 2004 contest for a seat on the West Virginia Supreme Court. After the victory of attorney Brent Benjamin, a candidate supported personally by Mr. Blankenship, Justice Starcher criticized Plaintiff Massey Energy, saying in a public radio interview:

> What we're going to see is we're gonna see Massey Coal and the big out-of-state insurance companies and huge mega-corporations buy a seat on our Supreme Court, and I'll be very sad to sit on that Supreme Court for the next four years, quite frankly. I hate to see out-of-state money be used in such an obscene way as it was in this race to buy a seat on the Supreme Court and attempt to control it. It saddens me very much.

In the days before the election, Justice Starcher had stated that if Mr. Benjamin prevailed, "Don Blankenship and the Massey Coal Co. will own the West Virginia Supreme Court."

21. At the 2005 Annual Conference of the Virginia Trial Lawyers Association, held from March 31 to April 3, 2005, Justice Starcher continued to discuss publicly Mr. Blankenship's participation in the November 2004 West Virginia Supreme Court of Appeal campaign, saying:

> ~~Justice McGraw was not opposed in the general election by some neophyte lawyer named Brent Benjamin. He was opposed by a Richmond, Virginia resident named Don Blankenship, who poked $4 million into defeating Justice Warren McGraw in [the] Supreme Court. Nobody ever heard of Brent Benjamin, including my friend Tom and I, and he practiced law in Charleston for 20 years, I believe.~~
>
> ~~So, really, the election was bought, a seat was purchased on our Supreme Court, and I'm highly offended by it. I'm highly offended by the obscene use of out-of-state money . . . .~~
>
> ~~[T]hey tried to purchase a seat on our Supreme Court, and they succeeded. Coincidentally, Massey Coal, which Don Blankenship is a CEO [sic], has a $60 million case on appeal in our court at this time. He has also - his coal company has more EPA violations than all other coal companies put together in West Virginia. He has a very special interest in owning a seat on the Supreme Court.~~

~~Most of this statement is false: (i) Mr. Blankenship is not a Richmond, Virginia resident; (ii) Mr. Blankenship is not an "out-of-state" person, having instead spent most of his life in West Virginia; (iii) Plaintiff Massey Energy does not have "more EPA violations than all other coal companies put together in West Virginia"; and (iv) Mr. Blankenship, through his participation in the political process, has neither sought nor accomplished the goal of "owning a seat on the Supreme Court."~~

22. ~~On account of Justice Starcher's public hostility to Plaintiffs,~~ Plaintiff Marfork Coal sought Justice Starcher's disqualification under Rule 29 in a recent matter before the West Virginia Supreme Court - Marfork Coal Company v. Timmermeyer, No. 051011 - in which Plaintiff Marfork Coal sought review of a permitting decision by the West Virginia Department of

Environmental Protection.

23. On June 16, 2005, Justice Starcher denied the disqualification motion in a memorandum decision~~, observing: "True, I have said that, in my opinion, Massey has not been a good corporate citizen. I read papers and form personal opinions as other people do." Then, after analogizing to prior cases before the court involving infamous behavior, including murder, drunk driving, child abuse and domestic violence, Justice Starcher concluded: "So, as one can see, this is not the first time I have been asked to sit in judgment of a party for which I may have less than full respect . . . ."~~ Because Rule 29 does not provide for further review of disqualification motions by an impartial tribunal, no other justice or panel of justices of the West Virginia Supreme Court reviewed the merits of the disqualification motion.

~~24. On October 26, 2005, Justice Starcher discussed with the Bluefield Daily Telegraph Mr. Blankenship's participation in the political process, saying "I think he has no real concern or interest in the betterment of West Virginia . . . . I think he's simply on an egomaniac trip and is trying to better the bottom line of his coal company."~~

~~25. On October 27, 2005, Justice Starcher sent a note via United States mail to Mr. Blankenship. Upon information and belief, the note was written in Justice Starcher's own handwriting. The note stated:~~

> ~~Dear Mr. Blankenship -~~
> ~~Some reading information to help you "keep the record straight."~~
> ~~Larry V. Starcher~~
> ~~P.S. I paid the postage~~

~~The note was written on Justice Starcher's government-issued official Supreme Court stationery. Attached to the note was (1) a copy of Justice Starcher's curriculum vitae; (2) a document written by Justice Starcher entitled "an abbreviated autobiography"; and (3) a document containing Justice Starcher's career biography, including a picture of~~

~~Justice Starcher, which Justice Starcher autographed with the following inscription:~~

> ~~Best wishes~~
> ~~to a "fine West~~
> ~~Virginian" -----~~
> ~~L. Starcher~~
> ~~10/27/05~~

~~26. On October 28, 2005, Justice Starcher spoke at the Annual West Virginia Political Science Association Meeting. During an interview with a local news station, Justice Starcher answered questions about Mr. Blankenship, stating, "I think he's a clown, and he's an outsider, and he's running around this state trying to buy influence like buying candy for children. And, I think it's disgusting." In further discussing Mr. Blankenship, Justice Starcher also stated, "He's stupid. He doesn't know what he's talking about. . . ." Justice Starcher also added, "I'm certainly not afraid of him."~~

~~27. On October 31, 2005, Marfork Coal renewed its motion for disqualification of Justice Starcher. On the same day, Justice Starcher, in accordance with the procedures provided under Rule 29, denied the motion without explanation. Because Rule 29 does not provide for further review of disqualification motions by an impartial tribunal, no other justice or panel of justices of the West Virginia Supreme Court reviewed the merits of the disqualification motion.~~

28. On or about April 5, 2006, Plaintiffs sought Justice Starcher's disqualification under Rule 29 in State of West Virginia ex rel A.T. Massey v. The Honorable Jay M. Hoke, Judge of the 25th Judicial Circuit et al., No. 060936~~, a matter related to the "$60 million case" Justice Starcher referenced at the 2005 Annual Conference of the Virginia Trial Lawyers Association.~~

(Ex. A, Def.'s Mot. to Strike ¶¶ 18-28).

In the September 21, 2007, memorandum opinion and order, the court observed that some of these allegations relating "to prior recusal decisions . . . [appear to be] intended to demonstrate only the manner in which Rule 29 has been applied to these plaintiffs in the past and to help explain the imminence of future injury as a result of Rule 29." Massey Energy Co v. The Supreme Court of Appeals of West Virginia, No. 2:06-614, slip. op. at 12 n.5, 17 (S.D. W. Va. Sept. 21, 2007) ("At most, it might be said the complaint's references to the recusal decisions of the named, individual justice are referenced by plaintiffs only to illustrate their view of the injustice worked by Rule 29.").

A. Motion to Strike

Federal Rule of Civil Procedure 12(f) provides pertinently as follows:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any . . . immaterial, impertinent, or scandalous matter.

Fed. R. Civ. P. 12(f). Our court of appeals has not addressed

the Rule 12(f) standard at length. One decision from this district adequately sets forth the governing considerations in a case where the movant sought to strike certain defenses:

> At the outset, the Court notes the standard by which courts judge Rule 12(f) motions imposes a sizable burden on the movant. A motion to strike is a drastic remedy which is disfavored by the courts and infrequently granted. Before granting a motion to strike, a court must be convinced "there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed." It is difficult to establish a defense is clearly insufficient. Even where "technically appropriate and well-founded," motions to strike defenses as insufficient are often denied in absence of a showing of prejudice to the moving party.

Clark v. Milam, 152 F.R.D. 66, 70 (S.D. W. Va. 1993) (citations omitted); see Stanbury Law Firm v. I.R.S., 221 F.3d 1059, 1063 (8th Cir. 2000); 5C Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1380 (3rd ed. 2004)[2]; see also Waste

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[2]The cited commentators observe as follows:

> [N]umerous judicial decisions make it clear that motions under Rule 12(f) are viewed with disfavor by the federal courts and are infrequently granted. Thus, in order to succeed on a Rule 12(f) motion to strike surplus matter from an answer, the federal courts have established a standard under which it must be shown that the allegations being challenged are so unrelated to the plaintiff's claims as to be unworthy of any consideration as a defense and that their presence in the pleading throughout the proceeding will be prejudicial to the moving party.

5C Charles A. Wright & Arthur R. Miller supra § 1380.

Mgt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 347 (4th Cir. 2001).

The movant forthrightly concedes that motions to strike are viewed with disfavor. It notes plaintiffs' position, however, that this action constitutes a facial challenge to the constitutionality of Rule 29 and not particular recusal decisions by individual justices. It thus asserts that plaintiffs' "detailed allegations of personal bias, ethical misconduct and alleged interactions between a Justice of the West Virginia Supreme Court and the Chairman and Chief Executive Officer of Massey Energy Company . . . have no place in the Complaint and should be struck . . . ." (Def.'s Memo. in Supp. of Mot. to Strike at 2).

The movant additionally asserts the "offending paragraphs serve only to prejudice [it] . . . with an inflammatory and unnecessary side show . . . ." (Id. at 3). It contends further that if the challenged allegations are not stricken, it "will be required to respond to unnecessary allegations of personal bias and ethical misconduct lodged against a fellow Justice of the Court." (Def.'s Reply in Supp. of Mot. to Strike at 3). At bottom, the movant observes that the portions of paragraphs 18, 22, 23, and 24 that would remain after

a striking order would be sufficient to reveal that plaintiffs moved previously for disqualification and the process that was applied to those motions.

Plaintiffs note the court's September 21, 2007, observation respecting the purpose of some of the challenged allegations "to demonstrate the manner in which a rule of appellate procedure has been applied . . . and to help explain the imminence of the resulting constitutional injury." (Pls.' Resp. to Mot. to Strike at 1). Plaintiffs also note the challenged allegations are "almost entirely . . . verbatim quotes from [the named justice's] . . . published statements and, in one instance, an opinion rendered by . . . [that] [j]ustice." (Id. at 2).

As noted by plaintiffs, many of the challenged allegations have been attributed to the named justice by various media sources or, alternatively, arise from his own writings. Additionally, as noted previously by the court, some of the challenged allegations are necessary for purposes of context and proper analysis of the movant's standing challenge. The court, accordingly, concludes the movant has not discharged the heavy burden imposed upon it to support a striking order.

B. Motion for Certification

Title 28 U.S.C. § 1292(b) provides pertinently as follows:

> **When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.**

28 U.S.C. § 1292(b). Federal Rule of Appellate Procedure 5(a)(3) provides pertinently as follows:

> **If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.**

Fed. R. App. Proc. 5(a)(3). The court of appeals has observed that section 1292(b) "should be used sparingly . . . ." Myles v. Laffitte, 881 F.2d 125, 127 (4th Cir. 1989).

The movant contends the following two issues present controlling questions of law upon which there are substantial grounds for difference of opinion:

> **(1) Whether plaintiffs . . . have standing to pursue this claim in this forum and whether this Court**

can redress the injury alleged by plaintiffs; and

> **(2) Whether, based upon the pleadings and the constitutional authority of Defendant, the elements of the Younger abstention doctrine were, contrary to this Court's holding, established as a matter of law.**

(Ex. 1, Def.'s Mot. for Certific. at 2).

Respecting the first issue, the movant contends (1) the court's injury analysis wrongly assumes, contrary to Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), that the movant's members will not comply with their ethical, judicial, and constitutional oaths, and (2) the movant is not authorized under the West Virginia Constitution to disqualify one of its members from a particular case pursuant to Bagley v. Blankenship, 246 S.E.2d 99 (1978). Respecting the second issue, the movant contends (1) there are ongoing state proceedings sufficient to justify abstention, and (2) it is authorized to entertain a constitutional challenge to Rule 29 if the aggrieved appellant moves for that relief pursuant to West Virginia Rule of Appellate Procedure 17(a).[3]

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[3]**The cited rule provides pertinently as follows:**

> **Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with service on all other parties. The motion shall state with particularity the grounds on which it is based, and shall set forth the order or relief**

The United States Supreme Court's decision in Huffman addressed the appellants' failures to avail themselves of available state appellate remedies. As noted by the court in its September 21, 2007, memorandum opinion, the availability of those remedies is presently an open question subject to further factual and legal development following discovery. Similarly, the question of ongoing state proceedings, along with the impact of the Bagley and Rule 17(a) arguments, are each subject to further development, as explicitly noted in the September 21, 2007, memorandum opinion. See, e.g., Massey Energy Co v. The Supreme Court of Appeals of West Virginia, No. 2:06-614, slip. op. at 18 n.6, 22 (S.D. W. Va. Sept. 21, 2007) ("[O]ne is left largely to speculate concerning whether the Supreme Court of Appeals would be willing, or have the ability under West Virginia law, to entertain a Fourteenth Amendment challenge to one of its appellate rules such as Rule 29 in a pending appeal.") ("Inasmuch as the parties have devoted little attention to the argument [that the Supreme Court of Appeals is prohibited from

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> **sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion. A reply to a response to a motion may not be filed.**

W. Va. R. App. Proc. 17(a).

promulgating a rule requiring its members to review the merits of a disqualification motion aimed at one of its members] . . . the court declines to reach the matter presently.") ("[T]he court is left to speculate concerning the nature of the state actions involving plaintiffs and the recusal issues that have arisen or may arise therein. This hampers the court's ability to analyze whether there is actually an ongoing state judicial proceeding.").

It is clear to the court that a certification of issues here, requiring further factual and legal development, would not "materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b). Section 1292(b) is best suited for use in a dispute that involves "a narrow question of pure law whose resolution will be completely dispositive . . . ." Difelice v. U.S. Airways, Inc., 404 F. Supp.2d 907, 908 (E.D. Va. 2005)(quoting Fannin v. CSX Transp., Inc., No. 88-8120, 1989 WL 42583, at *5 (4th Cir. 1989) (unpublished)); see also Charles A. Wright et al., 16 Fed. Prac. & Proc. § 3930 and cases cited at ns.26-27 (Elec. Ed. 2007)("The statutory language naturally suggests an opposition between a question of law and 'a question of fact or matter for the discretion of the trial court.' There is indeed no reason to suppose that interlocutory appeals are to

be certified for the purpose of inflicting upon courts of appeals an unaccustomed and ill-suited role as factfinders. Even when the question is the supposed question of law whether there are any genuine issues of material fact that preclude summary judgment, ordinarily it seems better to keep courts of appeals aloof from interlocutory embroilment with the factual content of the record."). The present dispute does not fit the model contemplated by section 1292(b).

The court, accordingly, ORDERS that the motion for certification be, and it hereby is, denied.

The Clerk is directed to forward copies of this written opinion and order to all counsel of record.

DATED: January 16, 2008

John T. Copenhaver, Jr.
United States District Judge