

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION**

\_\_\_\_\_  
MARFORK COAL COMPANY, INC., a )  
West Virginia Corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
DAVID AARON SMITH, AMBER )  
NITCHMAN, ERIC BLEVINS, )  
JOSHUA FRANCISCO GRAUPERA, )  
and ISABELLE ROZENDAAL, )  
 )  
Defendants. )  
\_\_\_\_\_ )

Civil Action No.: 5:10-0069

**MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

The Plaintiff coal companies overinflated claim of more than \$75,000 in damages resulting from three protestors sitting in trees for several days beside a thousand-plus acre mountaintop removal site is disingenuous. Defendants DAVID AARON SMITH, AMBER NITCHMAN, ERIC BLEVINS, JOSHUA FRANCISCO GRAUPERA, and ISABELLE ROZENDALL, through counsel, Forman & Rist, by Thomas A. Rist, move this Honorable Court pursuant to Federal Rule of Civil Procedure 12(b)(1) to dismiss the Plaintiff Coal Company's Complaint. The amount in controversy in this matter could not possibly be anywhere close to \$75,000. A Memorandum of Law in support of this motion is attached.

**WHEREFORE**, the Defendants request that the Court dismiss this action with prejudice and set a hearing on this motion.

Respectfully Submitted,

DAVID AARON SMITH, et al.

By Counsel

/s/ **Thomas A. Rist**

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Civil Action No.: 5:10-0069

**MEMORANDUM OF LAW IN SUPPORT OF THE DEFENDANTS'  
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

**I.  
INTRODUCTION**

This case arises out of a peaceful protest to the devastation being caused by the Plaintiff Coal Company's mountaintop removal operation in southern West Virginia. The Plaintiff's complaint alleges that the Defendants illegally trespassed onto the Plaintiff's property and that their presence somehow caused in excess of \$75,000 in damages.

To the contrary, during the entirety of this peaceful demonstration, the Plaintiff's continued to blast, haul, destroy mountains, fill valleys, and remove coal from the area. Although the complaint alleges that the actions of the Defendants deprived them of the exclusive use of the property, "including mining and coal production operations", a press release by the Plaintiff which was sent to the Charleston Gazette and presumably

other news outlets completely conflicts with these allegations and the inflated damage claim: “[t]heir actions have not stopped operations at the site.” See Exhibit 1.

The Plaintiff’s claim of over \$75,000 in damages is unsupported and unsubstantiated. For this reason, the complaint must be dismissed.

**II.**  
**“INCALCULABLE DAMAGES” DO NOT MEET THE**  
**REQUIREMENTS OF 28 U.S.C. § 1332(a)**

When, as in this case, a defendant challenges the amount in controversy, the plaintiff has the burden to show to a reasonable probability that jurisdiction exists. See *Anthony v. Security Pacific Financial Services, Inc.*, 75 F.3d 311 (7<sup>th</sup> Cir. 1996). By the Plaintiff Coal Company’s own admission, this is impossible: “[the actions of the Defendants caused] irreparable economic harm *incapable of calculation or reparation through an award of damages.*” See complaint at paragraphs 30 and 42 (emphasis added). The only reference to damages in excess of the jurisdictional requirement found anywhere in the complaint are self-serving, conclusory allegations that the amount in controversy is more than \$75,000.

Specifically, the relief requested by the Plaintiff Coal Company is for “compensatory damages in excess of \$75,000 [to] be awarded to Marfork for the losses it has suffered.” See complaint at page 11, second paragraph labeled (a). This damage request is not supported by any evidence whatsoever appearing anywhere in the complaint of “losses suffered.” Confusingly, the damage reward request conflicts with the “incapable of calculation” statements found elsewhere in the Complaint. As such, the Complaint itself appears to lack the specificity required to satisfy the amount in controversy.

“The amount in controversy is a critical element in determining whether a federal district court has jurisdiction in a diversity action and should be specifically stated in the pleadings. However, in the absence of such a statement, the amount in controversy is determined by the ‘whole record.’” *Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co.*, 753 F.Supp. 660 (D.C.Ohio 1990).

Looking at the allegations in the case more simply, the Plaintiff claims that five people trespassed on land owned or controlled by them. The conclusion that this caused in excess of \$75,000 in “losses” simply goes beyond any realm of reasonableness. The Plaintiff Coal Company was not stopped from undertaking any work, as is evident from their own press release and eyewitnesses to their continued work. “If it is apparent from the face of the pleadings that the plaintiff cannot recover the jurisdictional amount, the suit should be dismissed.” *Laughlin v. Kmart Corp.*, 50 F.3d 871, 872 (10<sup>th</sup> Cir. 1995).

The injunctive relief and punitive damages claims likewise are not enough to meet the jurisdictional minimum in this case. “In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.” *Hunt v. Washington State Apple Advertising Com’n*, 432 U.S. 333, 347, 97 S.Ct. 2434, 2443 (1977). The Plaintiff’s Complaint is silent as to any value placed on such an injunction outside of the blanket requests for more than \$75,000 in damages, which has already been addressed. Again, this case arises out of allegations of simple trespass. The injunction sought cannot possibly be valued at more than \$75,000, no matter how favorably the Complaint is examined.

Finally, the punitive damage claim should be closely scrutinized in this case with respect to the amount in controversy requirement. As it appears that the blanket claim

for more than \$75,000 in compensatory damages for “incalculable losses” fails to meet the requirements of 28 U.S.C. § 1332(a), the bulk of the Plaintiff Coal Company’s damages that are necessary to meet the amount in controversy requirement would have to be derived from the punitive damage claim. “When a claim for punitive damages makes up the bulk of the amount in controversy, and may even have been colorably asserted solely to confer jurisdiction, we should scrutinize that claim closely.” *Anthony v. Security Pacific Financial Services, Inc.*, 75 F.3d 311, 315 (7<sup>th</sup> Cir. 1996).

### **III. CONCLUSION**

The Complaint filed by the Plaintiffs contains jurisdictional wounds that cannot be mended through any amount of evidentiary support. 28 U.S.C.A. § 1332(a) requires that the Plaintiff allege facts that show the amount in controversy exceeds \$75,000, excluding interest and costs. The alleged actions of the Defendants could not possibly have caused damages anywhere near this amount. As such, this case should be dismissed.

Respectfully Submitted,

DAVID AARON SMITH, et al.

By Counsel

/s/ **Thomas A. Rist**  
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West Virginia State Bar # 9100  
Roger Forman  
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# Three more tree-sitters launch protest at Massey

by Ken Ward Jr.



Climate Ground Zero just announced that three of its supporters have taken to the trees at Massey Energy

*The sitters plan to remain in the trees as long as it takes to stop blasting on Coal River Mountain. It began in February of last year, has kept up a sustained series of direct actions since that time concerning mining in Appalachia.*

*The sitters are calling for the EPA to put an end to mountaintop removal and encourage the land-use production.*

1 comment

1 **Ken Ward Jr.** { 01.21.10 at 2:35 pm }

Here's a press release from Massey Energy about this protest:

JULIAN, WV – (January 21, 2010) Massey Energy (MEE) issued the following statement today in Ground Zero regarding tree sitters at Coal River Mountain.

Protestors, probably from out of state, are again putting themselves, coal miners and law enforcement against Massey's operation at Coal River Mountain. Their actions have not stopped operations at the site.

Their claims, such as Coal River Mountain is "the last mountain around here that hasn't been touched" "currently contains 8.2 billion gallons" are entirely false. These activist groups know that the information is untruthful but they continue to deceive the public.

For a better understanding of the facts, please review the attached Myth vs. Fact sheet.

Massey Energy Company, headquartered in Richmond, Virginia, with operations in West Virginia, is a coal producer in Central Appalachia and is included in the S&P 500 Index.

###

## Myths and Facts About Coal River Mountain

**MYTH:** Mountaintop removal coal mining is taking place on Coal River Mountain.

**FACT:** Massey Energy's operation on Coal River Mountain is not a mountaintop removal mine. It is a contour mining system and some point removals. Contour mining occurs at the seam level of coal in the mountain. The mountain is suitable for a wind farm will not change.

**MYTH:** Coal River Mountain is the last intact mountain in the Coal River Valley watershed.

**FACT:** From Coal River Mountain, one can see the summits of a number of mountains. Opponents of the last intact mountain are lying and deliberately spreading this information in a desperate attempt to : (Google Earth)

This area of Coal River Mountain has been extensively mined – with underground and surface mining. Massey Energy will reclaim more than nine (9) miles of existing highwalls left from pre-law mining.

**MYTH:** An industrial wind farm on the mountain could provide more jobs, tax revenues and electrical power removal operation.

**FACT:** Massey Energy believes that a wind farm can still be built after mining operations have completed. This is not coal jobs versus wind jobs. The mining can provide jobs now and wind farm investors can provide jobs later.

Massey Energy has repeatedly stated that the Coal River Mountain group has the opportunity to provide a wind farm. They have investors. To date, the Coal River Mountain Group has not identified any investors interested in a wind farm on the property.

**FACT:** The environmental groups know this is not a mountain top removal operation, they know that the mountain has been mined by other companies, they know that both mining, followed by a wind farm would provide jobs and tax revenues. They know that investors for their proposed wind farm, and they know that the information is accurate.

Ken.

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**NOTICE OF HEARING ON MOTION TO DISMISS**

Take notice that a hearing on the Defendant's Motion to Dismiss will be heard on **February 4, 2010 at 1:30 p.m.** before the Honorable Irene Berger, United States District Court, 110 North Heber Street, Room 336, Beckley, WV 25801. You may appear to protect your interests if you so desire.

Respectfully Submitted,

DAVID AARON SMITH, et al.

By Counsel

/s/ **Thomas A. Rist**  
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West Virginia State Bar # 9100  
Roger Forman  
West Virginia State Bar # 1249  
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**CERTIFICATE OF SERVICE**

I, Thomas A. Rist, certify that the Motion to Dismiss for Lack of Subject Matter Jurisdiction, Memorandum of Law in Support of the Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, and a Notice of Hearing were served via electronic filing on this the **3<sup>rd</sup>** day of **February, 2010** upon the following:

Samuel M. Brock  
Spilman Thomas & Battle  
300 Kanawha Boulevard, East  
Charleston, WV 25301

*Counsel for Plaintiff*

/s/ **Thomas A. Rist** \_\_\_\_\_  
Thomas A. Rist