

JEFFERSON COUNTY DISTRICT COURT 100 Jefferson County Parkway Golden, Colorado 80401	DATE FILED: February 18, 2014 3:00 PM CASE NUMBER: 2012CV2550 <b>Case No.: 12 CV 2550</b> <b>Div.: 5</b> <b>Courtroom: 4e</b>
<hr/> <b>In re the Lower North Fork Fire litigation</b>	
<b>ORDER re: amended claims of homeowners</b>	

This matter is before the court on the motions of several homeowners to amend their claims.

**1. Background**

The origins of the present litigation have been reviewed by the parties many times and will not be repeated by the court.

**(a) parties**

In the present posture of this litigation, the parties may generally be grouped into homeowners and insurance companies, on one side of the case, and various governmental agencies and their agents or employees, on the other.

The formal names of the parties involved in this litigation are difficult to understand.<sup>1</sup> To simplify the present Order, and without prejudice to any party, the court usually refers to the homeowner and insurance company parties as simply “homeowners” or “claiming parties.” The court usually refers to the governmental entities or employees who are opposing the homeowners as “defending parties.”

**(b) homeowners’ claims**

The technical names for the homeowners’ claims are also difficult to understand. To simplify the present Order, and without prejudice to any party, the court refers to the homeowner’s claims as simply “claims.”

The homeowners’ claims were initially set forth in pleadings filed in the spring of the year 2013. The pleadings were quite lengthy,<sup>2</sup> and asserted claims for both affirmative relief and declaratory judgment. Some of the theories advanced in the pleadings (the claims for nuisance and trespass, for example) were relatively simple; others (the claims alleging violation of 42 U.S.C. sec.1983, for example) were quite complex.

---

<sup>1</sup> Most of the homeowners, for example, are technically Respondents in Interpleader.

<sup>2</sup> One of the pleadings setting forth the claims of one group of homeowners, for example, was 65 pages in length.

All of the defending parties filed motions to dismiss all of the homeowners' claims pursuant to Rules 12(b)(1) and 12(b)(5), C.R.C.P. The defending parties' Rule 12 motions, and their subsequent replies, were also very lengthy.

**(c) the requests for oral argument**

As the Rule 12 briefing was nearing completion, several parties requested leave of court to present oral arguments on their motions or responses. Oral argument is ordinarily not held on Rule 12 motions; because of the complexity of the issues raised in the motions, however, and because the requests for oral argument were made by parties on both sides of the case, the court granted the request.

On many of the issues raised in the Rule 12 motions, the court believed that the parties' briefing was sufficient to inform the court of the pertinent authorities. As to these issues, therefore, the court believed that oral argument would not be helpful. To avoid presentation of unhelpful oral argument, and to permit the parties to properly focus their presentations, the court issued an Order setting forth the particular issues which it wished the parties to address at the oral argument.

The court's Order was issued on October 25, 2013. On October 30, 2013, the parties scheduled the oral argument to take place on November 15, 2013.

On the afternoon and late evening of November 14, 2013, counsel for several of the homeowner groups filed amended claims. It would appear that the amended claims were intended to address the failings of the initial claims which were suggested by the court's Order of October 25.

The amended claims were not provided to the attorney general until shortly before the oral argument was scheduled to take place. As of the time scheduled for arguments, the amended claims were not available to the court on its electronic filing system. At the time of the arguments, therefore, neither the attorney general nor the court was prepared to address the claims in the amended complaints.

The court expressed its views of the homeowners' conduct at the beginning of the November 15 hearing.

The attorney general now objects to the homeowners' requests to amend their claims.

**2. Summary of law concerning amendments**

A claiming party's right to amend his or her claims is set forth in Rule 15, C.R.C.P. This Rule provides, in pertinent part:

**RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS**

**(a) Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is filed or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it any time within 21 days after it is filed. Otherwise, a party may amend his pleading

only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The policies intended to be expressed by the above-quoted Rule were explained by the Court in Varner v. District Court, 618 P.2d 1388 (Colo. 1980). There the Court wrote:

The rule [*i.e.*, Rule 15(a), C.R.C.P.] prescribes a liberal policy of amendment and encourages the courts to look favorably on requests to amend. Although leave to amend is not to be granted automatically, the court should not impose arbitrary restrictions on the application of the rule or exercise its discretion in a manner that undercuts its basic policy. Pleadings are not sacrosanct, and amendments thereto should be granted in accordance with the overriding purposes of our rules of civil procedure—"to secure the just, speedy, and inexpensive determination of every action."

618 P.2d at 1390 (citations omitted).

Notwithstanding the above-quoted policy, a claiming party's right to amend is not without limitation. The limitations were summarized in Vinton v. Virzi, 269 P.3d 1342 (Colo. 2012), where the Court wrote:

Although the decision whether to grant or deny leave to amend is a matter within the discretion of the trial court, its discretion is not without limits. Both this court and the United States Supreme Court have identified the dominant considerations applicable to the resolution of requests for amendatory pleadings, including among them such things as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party by virtue of allowing the amendment, and whether the amendment would be futile in any event.

269 P.3d at 1245-6 (citations omitted).

### **3. The law, applied**

The timing of the homeowners' proposed amended claims raises questions concerning the homeowners' good faith. The circumstances in which the amended claims were filed also raise questions concerning undue prejudice: it seems to the court that, as the result of the timing of the homeowners' amended claims, the attorney general was prevented from presenting effective oral argument at the November 15 hearing. The court chooses, however, to address the matter under the futility doctrine.

#### **(a) futility doctrine**

A cogent statement of the futility doctrine is contained in Benton v. Adams, 56 P.3d 81 (Colo. 2002). There the Court wrote:

Amendments are futile if they are legally insufficient, for example, when a proposed amendment fails to cure defects in previous pleadings, fails to state a legal theory, or would not withstand a motion to dismiss.

56 P.3d 87 (citing 3 *Moore's Federal Practice* at ¶ 15.15[3] (3<sup>rd</sup> ed. 1999)).

Applying the above analysis, the court asks whether the homeowners' proposed amendments are futile, and should for that reason be disallowed.

**(b) conduct which shocks the conscience**

The court has now compared the homeowners' amended claims to the homeowners' original claims. For Rule 12 purposes, the difference between the two is that, in the initial filing, the homeowners cast their sec. 1983 claims in the framework of the culpable mental states set forth in the Colorado Criminal Code. In the amended sec. 1983 claims, the homeowners add to their references to culpable mental states allegations that the complained-of conduct of the governmental actors "shocks the conscience."

The phrase "shock the conscience" is a term of art in sec. 1983 litigation. In its Order of October 25, the court implied that the homeowners' sec. 1983 claims were defective for failure to allege that the governmental conduct of which they complained shocked the conscience, and to set forth factual allegations which, if true, would establish the requisite conscience-shock.

**(c) 12(b)(5) standard**

In prior Orders, this court has explained that the sufficiency of the homeowners' sec. 1983 claims is determined by applying the standard set forth in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009). The standard is contained in the following passage, which the court has quoted in other Orders:

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in Twombly, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Iqbal, *supra*, 556 U.S. at 676 (citations omitted; emphasis added).

**(d) Twombly applied to allegations of conscience shock**

In their amended claims, the homeowners seek to cure the defect of their original sec. 1983 claims by adding allegations that the governmental conduct of which they complain "shocks the conscience." The governmental conduct described in the amended claims, however, is no different than the conduct described in the original claims. The fatal flaw in the proposed amended claims, therefore, is the same as the fatal flaw in the original claims.

As this court has explained in other Orders, an actionable claim for violation of 42 U.S.C. sec. 1983 can be made out only if the complained-of governmental action shocks the conscience. In the circumstances of the Lower North Fork wildfire, conscience-shocking behavior must take the form of “deliberate indifference.” Deliberate indifference “is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” Connick v. Thompson, 131 S.Ct. 1350, 1360 (2011).

Here, the homeowners do not, and in good faith cannot, allege that their losses were a “known or obvious consequence” of the manner in which the Forest Service conducted the controlled burn. Conducting a controlled burn in a manner which would “obviously” cause damage or injury to innocent persons would require a quantum of malevolence which is alleged in neither the homeowners’ original nor amended claims, and which all involved in the present litigation know was not present in the minds of the Forest Service employees who started the fire.

#### **4. Conclusion**

The proposed amendments to the homeowners’ claims do no more than add “labels and conclusions” to the legally insufficient factual and legal allegations of the homeowners’ original claims. Applying the analysis of Twombly, *supra*, amendments such as these cannot cure the fatal defect in the original sec. 1983 claims.

The homeowners’ requests to amend their claims are DENIED.

Date: February 18, 2014

  
\_\_\_\_\_  
Judge