IN THE SUPREME COURT OF OHIO

BETHEL OIL & GAS, LLC, *et al.*, Appellee, v. REDBIRD DEVELOPMENT, LLC, *et al.*, Appellant.	)	Supreme Court No. 2024-1696 On Appeal from the Fourth District Court of Appeals Case No. 23CA5

APPELLANTS DIVERSIFIED PRODUCTION LLC, NUVERRA ENVIRONMENTAL SOLUTIONS, INC., AND HECKMAN WATER RESOURCES (crv), INC., MERIT BRIEF

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEALS

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STATEMENT OF FACTS

For the sake of brevity, these Appellants adopt by reference the Statement of the Facts and Case filed before this Court by Appellants, K&H Partners LLC and Tallgrass Operations LLC in their Merit Brief.

The allegations asserted against the Appellants herein are equally implausible and indistinguishable from those made against the other Defendants lumped together in Bethel's shotgun Complaint. Bethel offers nothing more than vague general conclusions to somehow link all the Defendants to its alleged harms. These generalities and conclusions culminate in the following claims against all the Defendants:

> Defendants conduct their waste fluid injection operations within sufficient proximity to Plaintiffs' Property and the Bethel Wells to infiltrate, flood, contaminate, pollute, and damage the gas and oil reservoirs beneath Plaintiff's Property and the Property itself, including but not limited to certain of the Bethel Wells, with harmful volumes of waste fluid.
>
> Upon information and belief, the Defendants' Injection Wells have infiltrated, flooded, contaminated, polluted, and/or damaged certain of the Bethel Wells and damaged the Plaintiffs and the Plaintiffs' Property.

(Complaint, ¶¶ 49-50). In essence, Plaintiffs would have the Court believe that the Defendants are exactly alike and indistinguishable tortfeasors.

For example, Plaintiffs' sole specific allegation against these Appellants, Diversified and Nuverra, are that these Defendants operate injection wells somewhere in Washington County or Athens County, Ohio. Complaint, ¶ 24 and 27. Plaintiffs rely on bare assertions and vague conclusions to then serve as the basis for seven claims each against Diversified and Nuverra. Even under Ohio's liberal notice pleading standards, Plaintiffs' claims must be dismissed for failure to state a claim. Plaintiffs' bare bones allegations fail to put Diversified and Nuverra on fair notice because they do not allege any specific underlying facts to connect Diversified's and Nuverra's operations with any of Plaintiffs' purported damages. Diversified and Nuverra do not know which

of their injection wells, if any, allegedly damaged which of Plaintiffs' property interests.[1] For instance, Diversified does not even know if Plaintiffs claim to have property near Diversified's injection well and if so, what type of property – property owned in fee, mineral rights in a certain formation, lease rights, equipment, or something else. In short, it appears that Plaintiffs' bare bones allegations against Diversified and Nuverra are based on pure conjecture without having conducted proper research to factually support its causes of action.

Procedurally, Appellants' Motion to Dismiss Plaintiff Bethel's Complaint under Rule 12(B)(6) was granted by the trial court on January 11, 2023. Bethel filed a Motion to Amend its Complaint on January 31, 2023, which was denied on futility grounds on March 31, 2023. The Fourth District subsequently reversed, holding that the trial court applied an improper pleading standard.

Bethel's claims against these Appellants are simply not plausible on their face. The sheer distance between Appellants' injection wells and the tens of thousands of acres over two counties in which Bethel claims harm makes Bethel's claims almost fantastical. This is exactly why Bethel's Complaint should be measured against the *Bell Atlantic v. Twombly* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal* 556 U.S. 662 (2009) pleading standards.

[1] The Complaint does reference the Nichols 1-A (SWIW #13) – API No. 34167238620000 as being utilized by Heckman and Nuverra. *See* Complaint, ¶ 27. The Complaint fails, however, to identify how the operation of that well impacted Plaintiffs or even the proximity of that well to Plaintiffs' interests.

PROPOSITION OF LAW AND ARGUMENTS IN SUPPORT

Proposition of Law 1: Ohio's pleading standard under Civil Rule 8 includes the plausibility requirement outlined by the United States Supreme Court in *Iqbal* and *Twombly*.

1. The standard of review is de novo.

Ohio courts of appeal "review de novo a decision granting a motion to dismiss under Civ.R. 12(B)(6)." *Alford v. Collins-McGregor Operating Co.*, 2018 Ohio 8,95 N.E.3d 382,152 Ohio St. 3d 303, ¶ 10. "In conducting this review," courts "accept as true all factual allegations in the complaint." *Id.* When deciding "a question of law," this Court rules "without deference to the lower court's decision." *Lycan v. Cleveland*, 171 Ohio St.3d 550, 2022-Ohio-4676, ¶ 21. Accordingly, the Fourth District's analysis of legal issues herein should receive no such deference.

2. Ohio courts should reject an outdated and flawed notice pleading standard in favor of the plausibility standard used in federal court.

Some Ohio courts appear to interpret Ohio's notice pleading standard as simply requiring little more than identification of the parties and claims. As noted below by the Fourth District, a party need not answer "the who, what, when, where and how questions" regarding their claims. *Bethel Oil & Gas, LLC v. Redbird Development*, 2024-Ohio-5285 at ¶¶ 46-47. The Fourth District goes on to say that motions to dismiss will be granted only if there is "certainty that the plaintiff can prove no set of facts upon which he might recover." *Id.* at ¶ 36.

However, Ohio Rule of Civil Procedure 8 requires not only a "short and plain statement of the claim" but more importantly, also a **"showing that the party is entitled to relief."** Civ. R. 8(A) (emphasis added). Thus, a complaint must demonstrate why a plaintiff should prevail. Accordingly, per the plain test of Rule 8(A), mere notice of the claims is insufficient.

3. Ohio should explicitly adopt the current federal pleadings standard.

Without question, almost 50 years ago Ohio adopted the notice pleading standards then used by the federal courts. *See O'Brien v. University Community Tenants Union, Inc.*, 327 N.E.2d

753,42 Ohio St.2d 242,71 O.O.2d 223 (1975). The U.S. Supreme Court has since clarified those federal pleading standards in *Twombly* and *Iqbal* by making clear that even when relying on notice pleading, litigants must still plead facially plausible claims. Yet, Ohio courts have yet to explicitly adopt that clarification: "the Court has never addressed the question of whether we should apply a similar plausibility standard for complaints." *Maternal Grandmother v. Hamilton Cty. Dept. of Job & Family Servs., 167 Ohio St.3d 390, 2021-Ohio-4096* at ¶ 28. (DeWine, J., concurring). The time for doing so is now.

Ohio's "no set of facts" test for evaluating a motion to dismiss is simply out of line with federal pleading standards. In 1975, this Court held that Ohio courts should apply the same "no set of facts" standard for determining a motion to dismiss as under the federal rules:

> In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted (Civ.R. 12(B)(6)), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. (*Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80, followed.).

O'Brien, 42 Ohio St.2d at paragraph one of the syllabus. As this Court later described it, "[t]his standard for granting a motion to dismiss is in accord with the notice pleading regimen set up by the Federal Rules of Civil Procedure and incorporated into the Ohio Rules of Civil Procedure." *York v. Ohio State Highway Patrol*, 573 N.E.2d 1063, 60 Ohio St.3d 143, 144 (1991).

Yet, more than 30 years later in *Twombly*, the U.S. Supreme Court explicitly held that the "no set of facts" standard was now insufficient. *Twombly*, 550 U.S. at 564 (2007). Instead, in rejecting that standard, that Court noted that to "require more than labels and conclusions, a formulaic recitation of the elements of a course of action will not do." *Id.* At 555. As noted, two years later, the Court further held that the operative pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusations." *Iqbal*, 556 U.S. at 678. Yet that clearly is what Bethel has improperly alleged in its Complaint's shot-gun allegations.

4. The adoption of a Twombly standard will align with other jurisdictions.

Following the United States Supreme Court's decision in *Twombly*, several state courts adopted the plausibility standard in some form to determine if claims have been sufficiently pled:

- The Massachusetts Supreme Court adopted the federal pleading standard and formally retired the prior "no set of facts" standard. *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 451 Mass. 623 (2008). In *Iannacchino*, the Court determined that the complaint failed under the current pleading standard, then clarified the Massachusetts standards and adopted the plausibility standard. *Id.* at 890. The Court echoed the United States Supreme Court's criticisms of the prior "no set of facts" standard and agreed that this standard had earned its retirement, adopting the plausibility pleading standard going forward. *Id.*

- The Supreme Court of South Dakota similarly adopted the *Twombly* pleading standard in lieu of the "no set of facts" standard that they had historically followed. *Sisney v. Best Inc.* 754 N.W. 2d 804 (S.D. 2008). The Court compared Fed. R. Civ. P. 8(a)(2) with South Dakota Codified Law 15-6-8(a)(2), the South Dakota general pleading rule, and found that both rules require a showing that the pleader is entitled to relief. Based on this similarity, the Court deemed the prior pleading standard inadequate and adopted the plausibility standard.

- The Supreme Court of Wisconsin adopted the federal pleading standard as a framework that requires a plaintiff to allege facts that plausibly suggest they are entitled to relief based on the substantive law underlying the claim. *Data Key Partners v. Permira Advisers LLC*, 849 N.W.2d 693 (Wisc. 2014). The Court emphasized that this was a "straightforward application of notice pleading standards to the substantive law of the case," noting that this is not an addition to the pleading requirements but instead a framework that applies notice pleading. *Id.* at 702, 708.

- The Supreme Court of Nebraska adopted the *Twombly* pleading requirement, noting that the Nebraska pleading rules mirror the corresponding Federal Rules of Civil Procedure and thus revisiting pleading standards was necessary post *Twombly*. *Doe v. Bd. of Regents Univ. of Nebraska*, 788 N.W.2d 264 (Neb. 2010). The Court interpreted *Twombly* as presenting a balanced approach for determining if a complaint is sufficiently pleaded, and not as a heightened requirement for pleading specific facts. *Id.* at 278.

- The Supreme Court of Colorado adopted the *Twombly* pleading standard based on "a preference to maintain uniformity in the interpretation of the federal and state rules of civil procedure and a willingness to be guided by the Supreme Court's interpretation of corresponding federal rules whenever possible, rather than an intent to adhere to a particular federal interpretation prevalent at some fixed point in the past." *Warne v. Hall*, 373 P.3d 588, 590 (Co. 2016). Like the Ohio Rules of Civil Procedure, the Colorado Rules of Civil Procedure "were modeled almost entirely after the corresponding federal rules, with the principal goal of establishing uniformity between state and federal judicial proceedings in this jurisdiction." *Id.* at 593.

- Although other jurisdictions have not formally adopted the federal plausibility standard, several continue to apply this standard in specific contexts. For example, Maine courts apply the federal pleading standard to civil perjury claims to ensure that disgruntled litigants cannot use these claims as a mechanism to re-litigate cases when they are dissatisfied with the outcomes. *Bean v. Cummings,* 939 A.2d 676 (Me. 2008).

Multiple state courts have considered, adopted, and applied the federal pleading requirements, and the time has come for this Court to depart from the antiquated "no set of facts" standard and embrace *Twombly's* plausibility requirement.

These Appellants once again incorporate for brevity's sake Appellants K&H Partners LLC's and Tallgrass Operations LLC's Proposition of Law and Argument in Support contained in their Merit Brief filed in this case.

CONCLUSION

This Court should reverse the Fourth District's opinion and confirm that Ohio follows the plausibility standard in *Iqbal* and *Twombly*. Further, this Court should enter dismissal for all claims against Diversified and Nuverra.

Respectfully submitted,

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APPENDIX

These Appellants adopt by reference the Appendix and materials referenced therein by Appellants K&H Partners LLC and Tallgrass Operations LLC as contained in their Merit Brief.

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2025, I served a copy of the foregoing via email upon the following:

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