

01/14/08

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

THUNDERING HERD DEVELOPMENT, LLC.,
a West Virginia limited liability company, and
THD INVESTORS 7, LLC., a West Virginia
limited liability company,
Plaintiffs,

v.

Civil Action No. 03-C-0490
Honorable John L.

Cummings

S&ME, INC., a corporation, and
J.A. STREET & ASSOCIATES, INC.,
a corporation,
Defendants,

and

J.A. STREET & ASSOCIATES, INC.,
a corporation,
Third-Party Plaintiff,

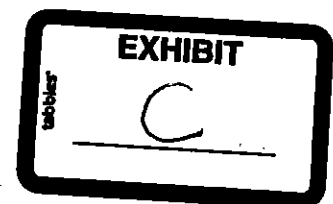
v.

CTL ENGINEERING OF WEST VIRGINIA, INC.,
a West Virginia corporation, **BIZZACK, INC.,** a
foreign corporation; **SITE, INC.,** a corporation,
BRAUN INTERTEC CORPORATION, a foreign
corporation, and **JOHN DOE CORPORATIONS,**
presently unknown business entities,
Third-Party Defendants.

ANSWER, COUNTER-CLAIM, CROSS-CLAIM, and
THIRD-PARTY COMPLAINT OF J. A. STREET & ASSOCIATES

I. ANSWER

COMES NOW the Defendant and Third-Party Plaintiff, J.A. Street & Associates, Inc.,
hereinafter "Street," by counsel, Frost Brown Todd LLC, James D. McQueen, Jr., and Amanda J.
Davis, and for its Answer to the Amended Complaint heretofore filed herein by Plaintiffs,



Thundering Herd Development, LLC, hereinafter "THD," and THD Investors 7, LLC, hereinafter "Investors," alleges and says as follows:

1. Admitted.
2. Without knowledge, therefore denied.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted in part to the extent that the allegation is generally true, but the contract referred to speaks for itself.
8. Admitted in part to the extent that the allegation is generally true, but the contract referred to speaks for itself.
9. Admitted in part to the extent that the allegation is generally true, but the contract referred to speaks for itself.
10. Admitted in part to the extent that the allegation is generally true, but the proposal referred to speaks for itself.
11. Admitted in part to the extent that the allegation is generally true, but the contract referred to speaks for itself.
12. Admitted in part to the extent that the allegation is generally true, but the contract referred to speaks for itself. The last sentence of paragraph 12 is admitted without qualification.
13. Admitted in part to the extent that the allegation is generally true, but the contracts referred to speak for themselves. Without knowledge as to the meaning of the term "contract documents" contained in the last sentence of this allegation, therefore denied.
14. Denied.
15. Denied.
16. Denied.

17. Admitted that on or about September 21, 2001, the slope at the rear of the Target store site failed at a deep level, thereby causing a landslide extending across the development's eastern property line, but otherwise denied.

18. Without knowledge, therefore denied.

19. Without knowledge, therefore denied.

20. Without knowledge, therefore denied.

21. Prior answers to allegations numbered 1-20 are incorporated by reference.

22. Without knowledge, therefore denied. In addition, the proposal speaks for itself.

23. Admitted generally that S&ME was negligent in the performance of its geotechnical investigation and report, and its findings and recommendations upon which others, including Street, relied in the performance of their work on the project. Additionally, the report speaks for itself.

24a. Admitted.

24b. Admitted.

24c. Admitted in part, but without knowledge of the full extent of the advice given, therefore denied in part.

24d. Admitted to the extent to which it refers to S&ME's January 17, 2001 report; otherwise without knowledge, therefore denied.

24e. Without knowledge, therefore denied.

24f. Without knowledge, therefore denied.

24g. With knowledge of local conditions, from a geotechnical perspective, but admits that S&ME approved a 1.75H:1V slope in the area in which a retaining wall was to have been

built but for an absence of detail on plans drawn by Site, Inc., upon which THD and others relied to prepare for and complete construction. Otherwise denied.

24h. Without knowledge, therefore denied.

25. Admitted.

26. Admitted.

27. Prior answers to allegations numbered 1-26 are incorporated by reference.

28. Without knowledge, therefore denied. In addition, the undated agreement and the Proposal for Geotechnical Exploration speak for themselves.

29. Admitted.

30. Admitted. In addition, Street and its subcontractors likewise relied on the recommendations of S&ME in the performance of their work and were entirely without knowledge of the sub-surface failure zone that was later determined to exist in the vicinity of the Southeast corner of the Target pad, which S&ME negligently failed to investigate, to explore or recommend exploration, or to discover.

31. Without knowledge, therefore denied.

32. Generally admitted if referring to the failure of September 21, 2001, but otherwise without knowledge, therefore denied.

33. Generally admitted, but the documents referred to speak for themselves.

34. Generally admitted that S&ME negligently failed to make appropriate findings and recommendations in accordance with its proposal, but otherwise without knowledge, therefore denied. The agreement speaks for itself.

35. Admitted.

36. Admitted.

37. Prior answers to allegations numbered 1-36 are incorporated by reference.

38. The negligence of S&ME is admitted, but not with respect to the reference to "unanticipated settling of the fill material," if that phrase is intended to imply inadequate fill placement, testing, or supervision. Otherwise without knowledge, therefore denied.

39. Denied.

40. Admitted that the fill area related to the Target pad was constructed in accordance with S&ME's recommendations, as contained in its report of January 17, 2001, and other written documents and plans prepared in reliance upon S&ME. Denied that unanticipated settling occurred, but alleges affirmatively that the unanticipated slope failure and other significant earth movement was due in substantial part to an undiscovered failure zone at or near the Southeast corner of the Target pad, at a level below the natural soil surface at a depth of approximately 55 feet and in a thickness approximating 9 inches, probably due to unappreciated or undiscovered ground water flow or seepage at various places throughout the development site.

41. Admitted.

42. Admitted.

43. Prior answers to allegations numbered 1-42 are incorporated by reference.

44. Admitted.

45. Admitted in part but denied with respect to term "settling." Affirmatively, the earth movement or landslide activity in the area attributable to the failure zone was the sole cause or a substantial cause of any significant instability of the fill material and damage to the various structures within the site development.

46. Denied with respect to the term "settlement," but admitted that S&ME failed to adequately investigate and make appropriate recommendations concerning the geotechnical

stability of the soils in the area of the site development or the need for more thorough exploration.

47. Denied with respect to the term "settlement," to the extent that it implies inadequate placement of fill material, testing or supervision, but otherwise admitted.

48. Denied with respect to the term "settlement," to the extent that it implies inadequate placement of fill material, testing, or supervision, but otherwise admitted.

49. Without knowledge, therefore denied. Further, the agreement speaks for itself.

50. Admitted.

51. Prior answers to allegations numbered 1-50 are incorporated by reference.

52. Without knowledge, therefore denied.

53. Without knowledge, therefore denied.

54. Without knowledge, therefore denied.

55. Without knowledge, therefore denied in part, but admitted to the extent that the allegation implies that S&ME did not perform or make recommendations in a manner consistent with the level of skill reasonably required for the profession in which S&ME is engaged.

56. Without knowledge, therefore denied.

57. Without knowledge, therefore denied.

58. Without knowledge, therefore denied. Additionally, the agreement speaks for itself.

59. Admitted.

60. Prior answers to allegations numbered 1-59 are incorporated by reference

61. Without knowledge, therefore denied. Additionally, the agreement speaks for itself.

62. Without knowledge, therefore denied. Additionally, the agreement with Target speaks for itself.

63. Without knowledge, therefore denied. Additionally, the agreement with Target speaks for itself.

64. Prior answers to allegations numbered 1-63 are incorporated by reference

65. Without knowledge, therefore denied.

66. Without knowledge, therefore denied.

67. Without knowledge, therefore denied. Also, requires a legal conclusion.

68. Without knowledge, therefore denied. Also, requires a legal conclusion.

69. Without knowledge, therefore denied. Also, requires a legal conclusion.

70. Street joins in seeking such declaration but is otherwise without knowledge, therefore denied.

71. Prior answers to allegations numbered 1-70 are incorporated by reference.

72. The written agreement between THD and Street speaks for itself. Denied.

73. Denied.

74. Denied, except that Street does not allege that THD failed Street in THD's payment obligations under their contract, which speaks for itself.

75. Denied.

76. Denied.

77. Prior answers to allegations numbered 1-76 are incorporated by reference.

78. The written agreement(s) related to the remainder of the Merritt Creek Farm site between THD and Street speak for themselves. Denied. Without knowledge as to any assignment to Investors, therefore denied.

79. Admitted in part, to the extent that there has been evidence of land movement and, affirmatively, to ground water in certain areas with associated slides and sloughing, but denied to

the extent that this allegation implies negligent fill placement, testing or supervision, and resulting settlement.

80. Denied.

81. Denied.

82. Denied.

83. Prior answers to allegations numbered 1-82 are incorporated by reference.

84. The agreements between THD and Street speak for themselves. Street is not aware of an assignment to Investors. Otherwise denied.

85. Denied.

86. Denied.

87. The agreements between THD and Street speak for themselves. That an implied warranty is contained within the said agreements is denied. THD is not without fault, but it must prove that it is without fault to obtain the remedy of implied indemnity.

88. Denied.

89. Denied.

90. Denied.

91. Prior answers to allegations numbered 1-90 are incorporated by reference.

92. The agreements between THD and Street speak for themselves. That losses or damages payable by THD are the result of negligence or wrongful acts of J. A. Street or its subcontractors. As a matter of law, Street denies that the said agreements create a right of indemnity by implication.

93. Without knowledge, therefore denied.

94. Without knowledge, therefore denied.

95. Denied.

96. Denied.

97. All allegations contained in the Amended Complaint that are not expressly admitted are hereby denied.

DEFENSES

98. As to the following affirmative defenses, Street says that as to all allegations of misconduct by THD, it incorporates by reference its responses and affirmative allegations contained in paragraphs 1 through 97 and intends all allegations against THD to apply as well to Investors, to extent that any assignment of rights or duties by THD to Investors requires Investors to assume any liabilities of THD.

FIRST DEFENSE

99. The amended complaint fails to state a claim upon which relief can be granted under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

SECOND DEFENSE

100. THD is guilty of contributory negligence or fault in carrying out its duties as the developer of the Merritt's Creek site, whether such duties exist as a matter of one or more contracts or as a general duty of due care owed by developers to all other entities involved in the construction project as a whole.

THIRD DEFENSE

101. THD assumed the risk of the damages it claims by reason of its negligent selection of S&ME as its geotechnical engineering consultant and/or by reason of its failure to properly define the scope and depth of S&ME's investigation and/or the full requirements of

Target in terms of geotechnical investigation, or by its deliberate refusal to advise Target of the inadequacy of the plans and specifications by Site, Inc. as to the omission of a retaining wall in sufficient detail to permit proper construction planning, material procurement and delivery, and construction within Target's time constraints and budget, and its deliberate failure to request more time and funding from Target to complete the project according to the intention negligently expressed by Site, Inc., to the extent to which its drawings made subtle reference to an extensive retaining wall in the vicinity of the Southeast corner of the Target pad but omitted any detailed instructions or plans as to the design or construction thereof.

FOURTH DEFENSE

102. To the extent that THD alleges any negligent conduct by Street, such claims are barred by the applicable statute of limitations, whether with reference to the Target pad construction or other sections of the overall development site, or to the extent that THD relies upon an implied contract or the doctrine of implied indemnity or any form of oral contract. This defense does not apply to any expressly stated provisions of a written contract executed by Street and creating express duties owed thereunder to THD.

FIFTH DEFENSE

103. To the extent that THD makes allegations in reference to aspects of the construction site other than the Target Store, such claims are barred by the equitable doctrine of laches.

SIXTH DEFENSE

104. The damages which THD claims at the Target site are the sole proximate result of an undiscovered muddy failure zone of a thickness of approximately nine inches and at a depth of approximately 55 feet below the natural surface of the soil beneath at or closely adjacent to the Target pad, of which neither THD, Street nor any other parties to this action had actual or constructive knowledge until after the Target project was completed, in 2004 or 2005. This defense is not intended as a waiver of claims that certain geotechnical consultants should have undertaken a more in depth investigation of the foundational soil upon which an extensive fill placement was required as an integral part of the construction project. Likewise, this defense is not intended as a waiver of claims that certain geotechnical consultants or THD itself should have investigated for probable sources of ground water that were present within the site.

SEVENTH DEFENSE

105. To the extent that discovery or investigation reveals facts which offer support for other affirmative defenses set forth in Rule 8(c) of the West Virginia Rules of Civil Procedure, including the defenses of collateral estoppel, waiver and estoppel, as well as other matters of avoidance such as failure to mitigate damages and the absence of a causal relationship between any alleged act or omission of Street and the damage sustained, said defenses are hereby preserved.

WHEREFORE, the Amended Complaint of THD and Investors should be dismissed with prejudice, with an award of costs and attorneys' fees to Street, together with such other and further relief that, as to the Court may be just and equitable.

II. COUNTERCLAIM

For its counterclaim against the Plaintiff, THD, and against Investors to the extent that it accepts any liabilities of THD within the terms of an assignment of which Street has no knowledge, Street alleges as follows:

106. The responsive allegations, admissions and denials contained in paragraphs 1 through 105 are incorporated by reference.

107. THD itself undertook the engagement of S&ME and with respect to the selection and/or supervision of S&ME was guilty of negligence which caused or contributed to the damages of which it now claims.

108. THD had a duty generally to the various owners within the construction site to keep them fully informed as to changes in circumstances or problems that would delay or hinder completion of the projects in a timely or workmanlike manner, and breached that duty in many particulars, including but not limited to the decision to avoid informing Target of Site, Inc.'s omission of detailed plans and specifications pertaining to the retaining wall at or near the Southeast corner of the Target site, and it failed to request sufficient time and/or funding for materials and/or detailed design drawings, plans or specifications for the use and benefit of other contractors on the site in building said site.

109. THD had actual or constructive knowledge of the probable existence of ground water and/or drainage problems that existed at the Merritts' Creek development site, prior to the

retention of S&ME as a geotechnical consultant and also had knowledge generally of landslide activity within the general area or the region in which the site was situate, and negligently failed to inform S&ME and/or Target of these potential problems so that adequate exploration and geotechnical investigation could be done prior to the commencement of construction.

110. THD owed a duty of due care to the owners of the various properties within the Merritts' Creek properties and to the contractors and sub-contractors employed to complete the design and construction of the various structures and parking lots on that site.

111. THD intentionally and/or negligently breached its duties of due care and various contractual duties it had under written agreements with the owner, the general contractor, CTL (regarding the pad certification), Site, Inc., Street, and S&ME, by reason of its failure to deal candidly with the said owners regarding various problems at the site, by reason of its failure to select and supervise the contractors it hired directly, excluding Street, and by reason of its failure to take or authorize appropriate remedial action when presented with information regarding geotechnical or design failures or problems that were not known or appreciated when THD entered into its contract with Target or other owners on the site.

112. Street was and continues to be damaged as a result of THD's negligence, intentional wrongdoing, and breaches of various contracts it had, as aforesaid, to the extent that Street is, has been or will be required to indemnify Target or other owners of properties at the Merritts' Creek site for damages they have sustained by reason of the said failure zone, the ground water problem, and the omitted retaining wall, as well as any other problems experienced on the site in areas other than the Target site.

113. Street is entitled to actual damages and to damages over from THD and from its assignee, to the extent that liabilities were retained, including its damages for extra costs of

construction, liability over for damages caused by others, its costs and attorneys' fees in defending the Target suit and this suit and other compensatory damages.

WHEREFORE, Street demands judgment against THD and against Investors, to the extent of which the latter accepted any of THD's liabilities under the terms of any assignment from THD, for actual damages in a sum within the jurisdiction of this Court and for damages over for any liabilities imposed on Street by reason of the claims of others involved in the construction project as a whole.

III. CROSS-CLAIM AGAINST S&ME

For its cross-claim against the Defendant, S&ME, Street alleges as follows:

114. The responsive allegations, admissions and denials contained in paragraphs 1 through 113 are incorporated by reference.

115. S&ME negligently failed to perform a thorough, complete and competent geotechnical exploration and investigation of the construction site in question, in accordance with Target's Guidelines, THD's instructions, the geotechnical characteristics of the local area, its own proposal, and generally accepted geotechnical engineering standards of care.

116. S&ME negligently failed to design or to recommend an appropriate design for the construction of the slope that replaced the retaining wall at or near the Southeast corner of the Target pad, after consultation with THD as to alternative designs that would meet the acceptable safety factors. Although Street is the entity who first discovered the omission of Site, Inc, and was a party to certain conversations between THD's representative and S&ME's representative regarding the same, it had neither the expertise nor the duty to perform any design or

was a party to certain conversations between THD's representative and S&ME's representative regarding the same, it had neither the expertise nor the duty to perform any design or geotechnical investigation or to make recommendations regarding the same, and such duties were not within the scope of its contract with THD.

117. S&ME negligently failed to design or to recommend an appropriate remedial design or construction plan for the landslide activity that occurred on or about September 21, 2001, at or near the Southeast corner of the Target pad, and/or to design or effectively supervise Schnabel, Inc. in the implementation of S&ME's design or plan for remediation.

118. S&ME negligently failed to discover the presence or effect of ground water that was apparent at various locations throughout the site, including the Target site, when it conducted its initial geotechnical investigation and when it designed the remedial fix of the slope failure that occurred on or about September 21, 2001, at or near the Southeast corner of the Target pad.

119. S&ME negligently failed to discover by means of adequate exploration and testing, the failure zone located at or near the Southeast corner of the Target pad, at a depth of approximately 55 feet below the natural surface of the construction site.

120. S&ME was otherwise negligent in the performance of its duties by contract or common law at the Merritts' Creek development site.

121. Street was a third-party beneficiary to the contract between S&ME and THD and/or was entitled to rely on the accuracy, completeness and competency of the report of geotechnical investigation rendered by S&ME in January, 2001, as well as other investigative reports and plans created by S&ME throughout the construction period as to other aspects of the Merritts' Creek project.

122. S&ME breached its duties of due care and the duties it accepted as a matter of contract with THD, upon the performance of which this Defendant is entitled to rely.

123. The sole proximate cause of the slope failures and undetected landslide activity at or near the Southeast corner of the Target pad, which allegedly continues to this day, is solely due to the failure zone discovered by the Langan engineering firm, Target's consultant, some 3 to 4 years after completion of the construction project.

124. As a direct and proximate result of S&ME's negligence as aforesaid, Street has sustained actual damages in respect to extra construction costs and remedial efforts it has undertaken due to such negligence, without adequate compensation, and has incurred costs and attorneys' fees in its defense of the Target suit and this action, and it has or may incur liability for damages that have been sustained or may be sustained for the liability of others by reason of the negligence of S&ME.

125. Street is entitled to rely upon, and hereby does assert such entitlement, to the equitable doctrines of implied indemnity and/or comparative contribution, by reason of the negligence and contractual breaches of S&ME.

WHEREFORE, Street demands judgment against S&ME for actual compensatory damages for extra sums it has expended to correct or to attempt to remedy problems that were due solely to the negligence of S&ME and/or for liability over for liabilities incurred by Street as a result of conduct by S&ME that contributed to the negligent design of the Target pad and remedies for various slope failures that occurred at or near the Target pad and allegedly continue to this day. Street also demands judgment for its costs and attorneys' fees expended to defend itself in the Target suit, in this suit, and in any other actions that may occur with respect to the Merritt's Creek construction project.

**IV. THIRD-PARTY COMPLAINT AGAINST CTL, BIZZAK, BRAUN INTERTEC,
AND SITE, INC.**

For its third-party claims against Site, Inc., hereafter "Site," CTL Engineering of WV, Inc., hereafter "CTL," Bizzak, Inc., hereinafter "Bizzak," and Braun Intertec Corporation, hereafter "Braun," Third-Party Defendants, the Third Party Plaintiff, Street, alleges as follows:

126. Street did not contract with either Site or Braun, but claims entitlement to the remedies of implied indemnity and comparative contribution with respect to any acts of negligence committed by either of them in the performance of their assignments related to or at the Merritts' Creek construction site, including damages to the Target Store as well as other buildings and parking lots situate within the site, about which THD complains in its Amended Complaint.

127. Street and its subcontractors were entitled to rely on the accuracy, completeness and competence of these design professionals, as well as S&ME.

128. Braun had a duty of due care to exercise in its role as a geotechnical engineering firm hired by Target to "peer review" the work of S&ME, to make sure that S&ME's geotechnical investigation, report and recommendations met the Target guidelines and complied with the proposal by S&ME.

129. Site had a duty of due care to prepare plans and specifications for the construction of the pad for the Target Store, including the plans and specifications with respect to slope design and the retaining wall associated with the Southeast corner of the Target pad.

130. CTL and Bizzak are subcontractors in privity of contract with Street, pursuant to written subcontracts that detailed the scope of their work at the Target construction site, and as general contractor for the project, Street had a right to rely on their competence and the

completeness and accuracy of their respective reports and the competence of their respective efforts, as the job progressed to a conclusion.

131. CTL and Bizzak had both contractual and common law duties to perform their work in a workmanlike manner and within the standard of care for their respective roles in the project, except that CTL entered into a separate agreement with THD to certify the pad for the Target Store.

132. Street supervised and monitored the activities of CTL and Bizzak on the site, except for the pad certification, and Street has no criticism of the work of either entity.

133. However, others, including but not limited to S&ME, Target, and THD have criticized the work of CTL and Bizzak and attributed one or more slope failures to the work of these Third-Party Defendants, specifically with regard to the quality of compaction and the placement of fill materials which was performed by Bizzak and tested by CTL.

134. To the extent that Street is held liable vicariously for the acts or omissions of CTL and/or Bizzak, it is entitled to any damages it incurred, or may incur, by reason of said negligence or breach of contract under theories of express indemnity, and/or implied indemnity and/or comparative contribution.

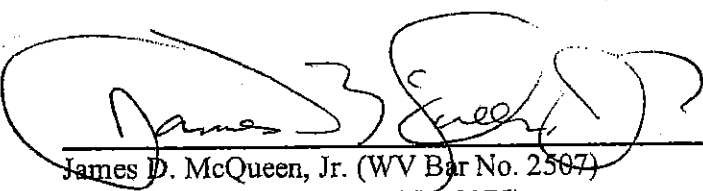
135. Street is entitled to damages from Site and Braun to the extent that their acts or omissions have caused or contributed to the slope failures and undetected landslide activity at the Target site and/or to the need for remedial efforts undertaken as a result of undetected landslide activity, slope failures, extra construction costs, and/or any remedial aspects of the construction project, and to the extent that Street is held vicariously or directly liable due to the contributions of either to the damages claimed in this suit by THD, its assignee, and/or in the Target suit, based on the equitable theories of implied indemnity and/or comparative contribution.

problems that were caused in whole or in part by the negligence or breach of contract by one or more of said entities, and for liability over for damages it has incurred as a result of conduct by one or more of said entities that caused or contributed to the negligent design or construction of the Target pad and/or the design or construction of various remedies for various slope failures that occurred at or near the Target pad and allegedly continue to this day. Street also demands judgment for its costs and attorneys' fees expended to defend itself in the Target suit, in this suit, and in any other actions that may occur with respect to the Merritt's Creek construction project.

A trial by jury is demanded as to all issues of fact as to which a genuine issue of fact exists.

Respectfully submitted,

J.A. Street & Associates, Inc.
By Counsel



James D. McQueen, Jr. (WV Bar No. 2567)
Amanda J. Davis (WV Bar No. 9375)
FROST BROWN & TODD LLC
Chase Tower, Suite 1200
707 Virginia Street, East
Charleston, West Virginia 25301
Telephone: 304 345-0111
Facsimile: 304 345-0115
E-Mail: jmcqueen@fbtlaw.com and adavis@fbtlaw.com
*Counsel for Fourth-Party Defendant and
Fifth-Party Plaintiff, J.A. Street & Associates, Inc.*

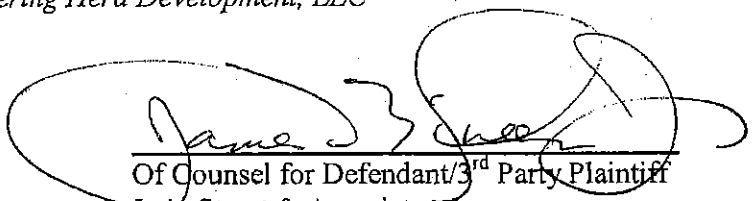
CERTIFICATE OF SERVICE

The undersigned, of counsel for J.A. Street & Associates, Inc., does hereby certify that the foregoing **ANSWER, COUNTER-CLAIM, CROSS-CLAIM, and THIRD-PARTY COMPLAINT OF J. A. STREET & ASSOCIATES** has been mailed to call counsel of record as listed below on this 14th day of January, 2008:

William R. Slicer, Esquire (WV Bar No. 5177)
John D. Hoblitzell, Esquire (WV Bar No. 9346)
SHUMAN, McCUSKEY & SLICER, PLLC
1411 Virginia Street, East, Suite 200
Charleston, WV 25301
Counsel for S&ME, Inc.

J.H. Mahaney, Esquire (WV Bar No. 6993)
HUDDLESTON BOLEN LLP
611 Third Avenue
P.O. Box 2185
Huntington, WV 25722
Email: jmahaney@huddlestonbolen.com
Counsel for Thundering Herd Development, LLC

Scott A. Damron, Esquire (WV Bar No. 935)
DAMRON LAW OFFICES
P.O. Box 1822
Huntington, WV 25719-1822
Counsel for Thundering Herd Development, LLC



Of Counsel for Defendant/3rd Party Plaintiff
J. A. Street & Associates, Inc.