

IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

**NORMA ACORD,
West Virginia Residents,
Plaintiffs and Class Representatives,**

v.

Civil Action No. 04-C-151-0

COLANE COMPANY, a West Virginia corporation, individually and as a successor-in-interest to Cole & Crane Real Estate Trust; COAL & CRANE REAL ESTATE TRUST, a West Virginia trust; LOGAN COUNTY BOARD OF EDUCATION, a West Virginia public body; WEST VIRGINIA COAL & COKE COMPANY, a West Virginia corporation, OMAR MINING COMPANY, a West Virginia corporation, individually and as successor-in-interest to West Virginia Coal & Coke Company; A.T. MASSEY COAL COMPANY, a West Virginia corporation, individually and as a successor-in-interest to West Virginia Coal & Coke Company; MASSEY ENERGY COMPANY, a Virginia corporation, individually and as a successor-in-interest to West Virginia Coal & Coke Company; RICHARD FRY, a West Virginia resident, individually,

Defendants.

ORDER

Pending before the Court is the Defendants Massey Energy Company and A.T. Massey Coal Company, Inc.'s Motion for Summary Judgment. Based on the supporting and opposing memoranda of law, the arguments of counsel and the pertinent legal authorities, the Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

A. The Parties

1. Beginning in the 1920s, West Virginia Coal and Coke Corporation ("Coal & Coke") engaged in the business of mining coal in Logan County, West Virginia near Island

Creek. (Depo. Luther Woods 20:11-16, attached as Exhibit A to Defendant Omar Mining Company's Motion for Summary Judgment).

2. Coal & Coke mined the coal pursuant to a mineral lease with the landowner, Cole & Crane Real Estate Trust ("Cole & Crane"). (Depo. Luther Woods 20:11-16).

3. Coal & Coke's property interests in Logan County were not limited to its mining leasehold. Incidental to its coal mining operations, Coal & Coke had a "company town." The town included, among other things, houses for its miners and a coal-fired power plant to provide electricity. (Depo. Luther Woods 30:9-15).

4. In 1954, Coal & Coke sought to get out of the coal mining business, wanting to focus on its Ohio River barge operations. (Depo. Luther Woods 22:16-23:2). As a result, on July 14, 1954, Coal & Coke surrendered all of its leasehold in the minerals near Island Creek back to Cole & Crane. (Depo. Luther Woods 21:3-23:2).

5. Following Coal & Coke's surrender of its leasehold, Cole & Crane entered into a new lease with Omar Mining Company ("Omar Mining"). (Depo. Luther Woods 22:16-23:20; 1/2/55 Lease, attached as Exhibit C to Defendant Omar Mining Company's Motion for Summary Judgment).

6. In addition to the surrender of its leasehold, Coal & Coke sold its other assets in Logan County. Coal & Coke's coal-fired power plant was sold to an individual by the name of Joe Fish. (Depo. Luther Woods 40:7-15). Coal & Coke transferred the ownership of all of its land interests in Logan County, including the company homes and the land on which they sat, to Colane Corporation ("Colane"). (Depo. Luther Woods 39:1-23, 50:11-23; 12/13/54 Deed,

attached as Exhibit D to Defendant Omar Mining Company's Motion for Summary Judgment).¹ Colane then took over the responsibility for management of the homes, collection of rent, etc. (Depo. Luther Woods 51:21-52:12).

7. On December 10, 1954, Coal & Coke sold mining equipment and related assets to A.T. Massey Coal Company, Inc. ("A.T. Massey"). (Minutes from 12/13/54 Meeting of Board of Directors of Omar Mining at pp.2, 5-6, attached as Exhibit E to Defendant Omar Mining Company's Motion for Summary Judgment). A.T. Massey then assigned its rights under the agreement with Coal & Coke to Omar Mining. (Minutes from 12/13/54 Meeting of Board of Directors of Omar Mining at pp.2).

8. As part of the agreement between Coal & Coke and A.T. Massey, A.T. Massey purchased the tradenames and trademarks incident to Coal & Coke's mining operation. (Minutes from 12/13/54 Meeting of Board of Directors of Omar Mining at pp.5). As a result, Coal & Coke was to change its corporate name to one not substantially similar.

9. On April 19, 1956, Coal & Coke changed its corporate name to Midland Enterprises, Inc. ("Midland"). (West Virginia Secretary of State Records for Coal & Coke, attached as Exhibit A to Supplemental Memorandum in Support of Defendants Massey Energy Company and A.T. Massey Coal Company, Inc.'s Motion for Summary Judgment).²

¹ The transaction between Coal & Coke and Colane was actually accomplished using a "straw man." On December 13, 1954, Coal & Coke transferred ownership of its land interests in Logan County to an individual, Tom Stark, who was essentially standing in the shoes of Colane. (Depo. Luther Woods 39:10-23). Then, on May 10, 1955, Mr. Stark transferred the property to Colane.

² The Secretary of State's records are essentially copies of the information contained on the Secretary of State's online business organizations database. The Court would note that during this case's pendency in the United States District Court of the Southern District of West Virginia, the plaintiff produced these very same documents as part of her Amended Rule 26(a)(1) Disclosures as documents she intended to rely upon to support her claims herein.

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10. On that same day, a second West Virginia Coal & Coke Corporation ("Coal & Coke II") was incorporated. (West Virginia Secretary of State Records for West Virginia Coal & Coke II, attached as Exhibit H to Supplemental Memorandum in Support of Defendants Massey Energy Company and A.T. Massey Coal Company, Inc.'s Motion for Summary Judgment). The corporate records state that Coal & Coke II was formed solely to protect the trade name of "West Virginia Coal & Coke," which was purchased as part of the December 10, 1954 agreement. (West Virginia Coal & Coke II Minute Book at pp.27-28, attached as Exhibit C to Reply to Plaintiff's Response to Defendants Massey Energy Company and A.T. Massey Coal Company's Motion for Summary Judgment). Coal & Coke II was dissolved in May 1964. (West Virginia Coal & Coke II Minute Book at pp.27-28; West Virginia Secretary of State Records for West Virginia Coal & Coke II).

11. As for Coal & Coke, the testimony is that in 1954 it sought to get out of the coal mining aspect of its business and focus on its Ohio River barge operations. (Depo. Luther Woods 22:16-23:2).

12. The undisputed evidence is that Coal & Coke, subsequently known as Midland, continued in existence in that capacity.

13. Midland has made filings with the Securities and Exchange Commission ("SEC"), at least as late as 1995. (12/31/95 SEC Form 10-K405, attached as Exhibit L to Supplemental Memorandum in Support of Defendants Massey Energy Company and A.T. Massey Coal Company, Inc., and Omar Mining Company's Motions for Summary Judgment).³ The SEC filing states that Midland is "primarily engaged through wholly-owned subsidiaries in

³ Courts may take judicial notice of filings with the SEC. See *In re Guidance Corp. Securities Litigation*, 536 F. Supp. 2d 913, 921 (S.D. Ind. 2008) ("Among the documents of which a court may take judicial notice are public records, including SEC filings."); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (same).

the operation of a fleet of towboats, tugboats and barges, principally on the Ohio and Mississippi Rivers and their tributaries, the Gulf Intercoastal Waterway and in the Gulf of Mexico." The SEC filing contains financial statements of Midland, which reveal that as of 1995, Midland's total asset value exceeded \$425,000,000.

14. In a June 2000 article from MarineLink.com titled "Midland Enterprises Expands With the Times." (9/15/00 Article, attached as Exhibit K to Supplemental Memorandum in Support of Defendants Massey Energy Company and A.T. Massey Coal Company, Inc., and Omar Mining Company's Motions for Summary Judgment). The article sets forth the history of Midland, and how it began as Coal & Coke. The article states that in 1954, the company had a "change in leadership and direction." The article explains that the company "[sold] coalmines to focus on barging." The article further explains, "One year later, West Virginia Coal & Coke's name is changed to Midland Enterprises" The article states that, as of 2000, Midland has a fleet of "more than 85 boats and 2,400 barges moving the entire eastern inland waterways system."

15. In 2002, an online article from the Nashville Business Journal indicates that Cincinnati-based Midland was purchased by Ingram Barge Company ("Ingram"), a division of Nashville-based Ingram Industries, Inc. for \$230,000,000. (7/2/02 Article, attached as Exhibit M to Supplemental Memorandum in Support of Defendants Massey Energy Company and A.T. Massey Coal Company, Inc., and Omar Mining Company's Motions for Summary Judgment).

16. Ingram continues in existence today. Information concerning Ingram and its history, including its 2002 purchase of Midland, can be found on Ingram's website at <http://www.ingrambarge.com/default.aspx?v=barge/about/history>.

B. The Omar School Site

17. The property where the Omar School was constructed and sits today was originally owned by Coal & Coke from the 1920s up until 1954. It is alleged that during this time period, Coal & Coke used this property as a public garbage dump for the company town and surrounding areas. (Fourth Am. Compl. ¶ 10).

18. The property on which the dump was located was part of the 1954 transaction between Coal & Coke and Colane in which Coal & Coke transferred all of its land interests in Logan County to Colane. (12/13/54 Deed; Depo. Luther Woods 39:1-23, 50:11-23).

19. The plaintiff alleges that in 1954, after Colane took control of the property from Coal & Coke, it continued to be used as a garbage dump until about 1961. (Fourth Am. Compl. ¶ 13).

20. The plaintiff alleges that during this 1954 to 1961 time period, Omar Mining was a "direct polluter" of the future school grounds. (Fourth Am. Compl. ¶¶ 7, 14).

21. In 1961, Colane transferred the property where the dump was located to the Logan County Board of Education ("Board of Education"). (8/15/61 Deed, attached as Exhibit I to Defendant Omar Mining Company's Motion for Summary Judgment). The Board of Education opened the Omar School on the site in 1964. (Fourth Am. Compl. ¶ 3).

C. The Claims Against Massey Energy and A.T. Massey

22. In 2004, this action was commenced. The plaintiff seeks medical monitoring expenses on behalf of a class of persons comprised of the current and former students and staff of the Omar School. (Fourth Am. Compl. ¶¶ 32-40).

23. The plaintiff does not contend that Massey Energy or A.T. Massey engaged in any independent acts of pollution or contamination. (Answers to Interrogatory Nos. 2

and 3 of Amended Responses of Plaintiff to A.T. Massey Coal Company's First Set of Interrogatories, attached as Exhibit L to Defendant Omar Mining Company's Motion for Summary Judgment).

24. Instead, the plaintiff alleges that A.T. Massey is, first, liable for the actions of Coal & Coke from the 1920s to 1954. Specifically, the Fourth Amended Complaint alleges: "In December 1954, A.T. Massey Coal Company took control of Coal & Coke's corporate structure, mining repair shop, company store, power station and mining operations, thereby assuming responsibility for previous contamination from Coal & Coke's dump and power plant operations." (Fourth Am. Compl. ¶ 12).

25. Next, the plaintiff alleges that both Massey Energy and A.T. Massey are liable because of their control over and/or management of Omar Mining. (Fourth Am. Compl. ¶¶ 7, 8).

II. CONCLUSIONS OF LAW

A. Summary Judgment Standard

1. Rule 56 of the West Virginia Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." W. Va. R. Civ. P. 56(c) (2009).

2. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

3. “If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.” *Id.* at syl. pt. 3.

4. “[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere scintilla of evidence and must produce evidence sufficient for a reasonably jury to find in a nonmoving party’s favor.” *Id.* at 60, 459 S.E.2d at 337 (internal quotations and citations omitted).

5. “The evidence illustrating the factual controversy cannot be conjectural or problematic.” *Id.* “[U]nsupported speculation is not sufficient to defeat a summary judgment motion.” *Id.* at 61, 459 S.E.2d at 338 (internal quotations and citation omitted).

B. Neither Massey Energy or A.T. Massey Have Any Successor Liability for Coal & Coke.

6. As a general rule, when a company purchases the assets of another, the buyer does not assume the liabilities of the seller of those assets. *See, e.g., Tankersley v. Tankersley*, 182 W.Va. 627, 631, 390 S.E.2d 826, 830 (1990) (“The second method of purchasing a corporation or business is when the buyer acquires its assets. Under this arrangement . . . the owner-seller will ordinarily be responsible for some or all of the business’s debts or liabilities.”); Syl. Pt. 2, *Davis v. Celotex Corp.*, 187 W.Va. 566, 420 S.E.2d 557 (1992) (“At common law, the purchaser of all the assets of a corporation was not liable fo the debts or liabilities of the corporation purchased.”).

7. “[T]he principle consideration in determining whether one corporation is mere continuation or reincarnation of the other is whether only one corporation exists after completion of a transfer of assets and whether there is a common identity of directors and stockholders.” *Jordan v. Ravenswood Aluminum Corp.*, 193 W.Va. 192, 195, 455 S.E.2d 561, 564 (1995).

8. On December 10, 1954, A.T. Massey entered into an agreement to purchase assets related to Coal & Coke’s mining equipment and related assets located in the Island Creek area of Logan County. (Minutes from 12/13/54 Meeting of Board of Directors of Omar Mining at pp.2, 5-6). A.T. Massey did not purchase all of Coal & Coke’s assets in Logan County. Coal & Coke’s coal-fired power plant was sold to an individual by the name of Joe Fish. (Depo. Luther Woods 40:7-15). Coal & Coke transferred the ownership of all of its land interests in Logan County, including the land where the dump was located, to Colane. (12/13/54 Deed; Depo. Woods 39:1-23, 50:11-23).

9. Coal & Coke determined to get out of the coal mining aspect of its business and focus on its Ohio River barge operations. (Depo. Luther Woods 22:16-23:2). On April 19, 1956, Coal & Coke changed its corporate name to Midland. (West Virginia Secretary of State Records for Coal & Coke).

10. Coal & Coke, subsequently known as Midland, continued in existence after 1954. Public filings with the SEC and information obtained from the World Wide Web indicate that Midland grew to a large inland marine transportation company, operating a fleet of “more than 85 boats and 2,400 barges” (9/15/00 Article). Midland’s 10-K405 filing with the SEC indicates that as of 1995, Midland’s total asset value exceeded \$425,000,000. (12/31/95 SEC Form 10-K405). A 2002 publication indicates that Cincinnati-based Midland was

purchased by Nashville-based Ingram for \$230,000,000. (7/2/02 Article). Ingram still exists today.

11. Again, as set forth in *Jordan*, "the principle consideration in determining whether one corporation is mere continuation or reincarnation of the other is whether only one corporation exists after completion of a transfer of assets and whether there is a common identity of directors and stockholders." *Jordan*, 193 W.Va. at 195, 455 S.E.2d at 564.

12. There is no evidence in the record before the Court that A.T. Massey ever had any ownership interest in Coal & Coke, either before or after its name change to Midland. The undisputed evidence, which consists of property records, corporate records, West Virginia Secretary of State Records, public SEC filings, and publications, all show that Coal & Coke, subsequently Midland and now Ingram, continued in existence and apparently became a successful inland marine operator.

13. The plaintiff has come forward with no evidence to the contrary other than to point to the fact that E. Morgan Massey incorporated Coal & Coke II in April 1956. (West Virginia Secretary of State Records for West Virginia Coal & Coke II). However, again, the undisputed corporate records show that Coal & Coke II was formed solely to protect the trade name of "West Virginia Coal & Coke," an asset that was purchased as part of the December 10, 1954 agreement. (West Virginia Coal & Coke II Minute Book at pp.27-28). Coal & Coke II was dissolved in May 1964 when the "West Virginia Coal & Coke" trade name ceased to be used. (West Virginia Coal & Coke II Minute Book at pp.27-28; West Virginia Secretary of State Records for West Virginia Coal & Coke II). There is no evidence that Coal & Coke II had any active operations and the corporate records, in fact, explicitly state otherwise.

14. Neither A.T. Massey, nor any Massey-related entity, “took control of Coal & Coke’s corporate structure” as the Fourth Amended Complaint alleges. Coal & Coke undeniably continued in existence as a separate, independent corporation and, as a result, there is no successor liability. *See Jordan*, 193 W.Va. at 195, 455 S.E.2d at 564

C. The Plaintiff Cannot “Pierce the Corporate Veil” of Massey Energy or A.T. Massey for the Alleged Acts of Omar Mining.

15. Mere ownership interest in a corporation is not in itself a sufficient basis to attach liability for the acts of the corporation. *See W. Va. Code* § 31D-622 (A[A] shareholder of a corporation is not personally liable for the acts of the corporation . . .”).

16. “The law presumes . . . that corporations are separate from their shareholders.” Syl. Pt. 3, *Southern Elec. Supply Co. v. Raleigh County Nat=l Bank*, 173 W. Va. 780, 320 S.E.2d 515 (1984).

17. “Under exceptional circumstances, the corporate entity may be disregarded to remove the barrier to personal liability of the shareholder(s) activity participating in the business.” *Laya v. Erin Homes, Inc.*, 177 W.Va. 343, 347, 352 S.E.2d 93, 97 (1986). However, “[t]he corporate form should never be disregarded lightly.” *Southern Elec. Supply Co.*, 173 W. Va. at 787, 320 S.E.2d at 522.

18. “[T]he burden of proof is on a party soliciting a court to disregard a corporate structure.” *Id.*

19. “Piercing the corporate veil” is an equitable remedy, the propriety of which must be examined on an case-by-by case basis. *Laya*, 177 W.Va. at 347, 352 S.E.2d at 98. The Supreme Court of Appeals has set forth nineteen factors to be considered in determining whether to pierce the corporate veil:

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- (1) commingling of funds and other assets of the corporation with those of the individual shareholders;
 - (2) diversion of the corporation's funds or assets to noncorporate uses (to the personal uses of the corporation's shareholders);
 - (3) failure to maintain the corporate formalities necessary for the issuance of or subscription to the corporation's stock, such as formal approval of the stock issue by the board of directors;
 - (4) an individual shareholder representing to persons outside the corporation that he or she is personally liable for the debts or other obligations of the corporation;
 - (5) failure to maintain corporate minutes or adequate corporate records;
 - (6) identical equitable ownership in two entities;
 - (7) identity of the directors and officers of two entities who are responsible for supervision and management (a partnership or sole proprietorship and a corporation owned and managed by the same parties);
 - (8) failure to adequately capitalize a corporation for the reasonable risks of the corporate undertaking;
 - (9) absence of separately held corporate assets;
 - (10) use of a corporation as a mere shell or conduit to operate a single venture or some particular aspect of the business of an individual or another corporation;
 - (11) sole ownership of all the stock by one individual or members of a single family;
 - (12) use of the same office or business location by the corporation and its individual shareholder(s);
 - (13) employment of the same employees or attorney by the corporation and its shareholder(s);
 - (14) concealment or misrepresentation of the identity of the ownership, management or financial interests in the corporation, and concealment of personal business

activities of the shareholders (sole shareholders do not reveal the association with a corporation, which makes loans to them without adequate security);

- (15) disregard of legal formalities and failure to maintain proper arm's length relationships among related entities;
- (16) use of a corporate entity as a conduit to procure labor, services or merchandise for another person or entity;
- (17) diversion of corporate assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors, or the manipulation of assets and liabilities between entities to concentrate the assets in one and the liabilities in another;
- (18) contracting by the corporation with another person with the intent to avoid the risk of nonperformance by use of the corporate entity; or the use of a corporation as a subterfuge for illegal transactions;
- (19) the formation and use of the corporation to assume the existing liabilities of another person or entity.

Id. at 347-48, 352 S.E.2d at 98-99.

20. In this case, the plaintiff seeks to pierce the corporate veil of Omar Mining. In other words, the plaintiff seeks to hold Massey Energy and A.T. Massey liable for the alleged actions of Omar Mining in connection with this case.

21. In this case, there is no testimony from anyone that worked for Omar Mining, much less during the relevant time period of 1955 to 1961.

22. The only item the plaintiff submitted in support of her argument that Omar Mining's corporate veil should be pierced was a two-question excerpt from a March 2007 deposition given by a gentlemen by the name of Baxter Phillips. (Pl.'s Response at p.7). The deposition was not taken in connection with this case, but a 2005 breach of contract case in the Circuit Court of Brooke County between Wheeling Pittsburgh Steel Corporation, Central West

Virginia Energy Company and Massey Energy Company, Civil Action No. 05-C-85-MJG. (See Exhibit K of Exhibits in Support of Plaintiff's Response to Motion for Summary Judgment of Defendants Cole & Crane Real Estate Trust, Colane Company, Omar Mining, A.T. Massey and Massey Energy). Omar Mining was not a party to that proceeding.

23. Since it is the plaintiff seeking to pierce the corporate veil of Omar Mining, it is, again, her burden of proof. See *Southern Elec. Supply Co.*, 173 W. Va. at 787, 320 S.E.2d at 522.

24. The Supreme Court of Appeals has said that the corporate form should not be disregarded lightly and it should only be disregarded under "exceptional circumstances." *Laya*, 177 W. Va. at 347, 352 S.E.2d at 97.

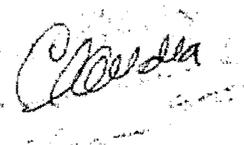
25. The Court **FINDS** that the plaintiff has failed to carry her burden with regard to piercing the corporate veil of Omar Mining. It is impossible for the Court to analyze the nineteen *Laya* factors based upon the information submitted in the plaintiff's Response, which the Court would note is not even of the record in this case.

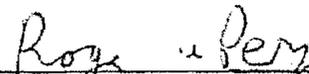
CONCLUSION

Based upon the foregoing findings and conclusions, Defendants Massey Energy Company and A.T. Massey Coal Company, Inc.'s Motion for Summary Judgment is hereby **GRANTED**. Massey Energy Company and A.T. Massey Coal Company, Inc. are hereby **DISMISSED** with prejudice as party defendants hereto.

The objections and exceptions of any party aggrieved by this Order are preserved.

Entered this 15th day of July, 2009.





Honorable Roger L. Perry