

11-1488

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2011 SEP 29 PM 1:15

SATHY S. BARTON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

MANVILLE PERSONAL INJURY TRUST,  
derivatively on behalf of MASSEY ENERGY  
COMPANY,

Plaintiff,

v.

Civil Action No. 07-C-1333  
Honorable James C. Stucky  
(Derivative Action)

DON L. BLANKENSHIP; BAXTER  
PHILLIPS, JR.; DAN MOORE; GORDON  
GEE; RICHARD M. GABRYS; JAMES  
CRAWFORD; BOBBY R. INMAN; ROBERT  
H. FOGLESONG; H. DREXEL SHORT, JR.;  
J. CHRISTOPHER ADKINS; JEFFREY M.  
JAROSINSKI; JAMES L. GARDNER; JOHN  
C. BALDWIN; MARTHA R. SEGER; and  
JAMES H. HARLESS,

Defendants,

and

MASSEY ENERGY COMPANY, a Delaware  
Corporation;

Nominal Defendant.

MANVILLE PERSONAL INJURY  
SETTLEMENT TRUST; AMALGAMATED  
BANK, AS TRUSTEE FOR THE  
LONGVIEW COLLECTIVE INVESTMENT  
FUNDS; and CALIFORNIA STATE  
TEACHERS' RETIREMENT SYSTEM;

Petitioners,

vs.

Case No. 07-C-1333  
Judge James C. Stucky  
(Contempt Proceeding)

DON L. BLANKENSHIP; BAXTER  
PHILLIPS, JR.; E. GORDON GEE;  
RICHARD M. GABRYS; JAMES  
CRAWFORD; BOBBY R. INMAN; ROBERT  
H. FOGLESONG; STANLEY C.  
SUBOLESKI; J. CHRISTOPHER ADKINS;  
M. SHANE HARVEY; MARK A.

---

CLEMENS; ELIZABETH S. CHAMBERLIN;  
and RICHARD R. GRINNAN;

Contemners,

MASSEY ENERGY COMPANY, a Delaware  
Corporation;

---

Nominal Defendant.

---

**ORDER GRANTING THE INDIVIDUAL DEFENDANTS' JOINT MOTIONS TO  
DISMISS PLAINTIFFS' PETITIONS FOR CIVIL CONTEMPT AND TO VACATE THE  
2008 ORDER AS AGAINST THEM**

On July 21, 2011, this matter came before the Court pursuant to a hearing on the joint motions of Defendants Don L. Blankenship, Baxter Phillips, Jr., Dan Moore, E. Gordon Gee, Richard M. Gabrys, James Crawford, Bobby R. Inman, Robert H. Foglesong, Stanley C. Suboleski, J. Christopher Adkins, M. Shane Harvey, Mark A. Clemens and Richard R. Grinnan (the "Individual Defendants" or "Defendants") to Dismiss Plaintiffs' Petitions for Civil Contempt And to Vacate the 2008 Order as Against Them. Plaintiffs Manville Personal Injury Settlement Trust, Amalgamated Bank, as trustee for the Longview Collective Investment Fund and the California State Teachers' Retirement System (collectively, the "Plaintiffs") were represented by counsel, A. Andrew MacQueen and Badge Humphries. Defendants James B. Crawford, Robert H. Foglesong, Richard M. Gabrys, E. Gordon Gee, Bobby R. Inman, Dan R. Moore and Stanley C. Suboleski were represented by counsel, A.L. Emch, Ronald S. Rolfe and Sean K. Thompson. Defendants Don L. Blankenship, Baxter Phillips, Jr., J. Christopher Adkins, M. Shane Harvey, Mark A. Clemens, and Richard R. Grinnan were represented by counsel, Thomas V. Flaherty and Tammy R. Harvey. Nominal defendant Massey Energy Company was represented by counsel, Ricklin Brown and Boaz S. Morag.<sup>1</sup>

---

<sup>1</sup> Defendant Elizabeth S. Chamberlin has not been served and was not represented at the hearing.

The Court has considered the instant motions, all responses, arguments of counsel, and all relevant legal authority and hereby **GRANTS** the Individual Defendants' Joint Motions to Dismiss Plaintiffs' Petitions for Civil Contempt And to Vacate the 2008 Order as Against Them based upon the following findings of fact and conclusions of law<sup>2</sup>.

---

<sup>2</sup> The Court notes that the instant motions do not call upon the Court to decide the merits of the two petitions for civil contempt, and the Court does not address the merits of the petitions for civil contempt in this Order.

## FINDINGS OF FACT

### I. THE PARTIES.

1. Alpha Appalachia Holdings, Inc., formerly known as Massey Energy Company (“Alpha Appalachia” or “Massey”), is a Delaware corporation. (Petition for Civil Contempt, dated May 31, 2011 (the “New Petition”) ¶ 7.)
2. Alpha Natural Resources, Inc. (“Alpha”), the parent of Alpha Appalachia, is a Delaware corporation. (Declaration of Jonathan L. Anderson, dated June 22, 2011 (“Anderson Decl.”) Ex. 2.)
3. Plaintiff Manville Personal Injury Settlement Trust (“Manville”) is a former Massey shareholder. (New Petition ¶ 4.)
4. Plaintiff Amalgamated Bank, as trustee for the Longview Collective Investment Fund (“Amalgamated Bank”) is a former Massey shareholder. (*Id.* ¶ 5.)
5. Plaintiff California State Teachers’ Retirement System (“CalSTRS”) is a former Massey shareholder. (*Id.* ¶ 6.)
6. Defendant Don L. Blankenship served as a Massey director from 1996 until December 3, 2010, and as Chairman and CEO from November 30, 2000 until December 3, 2010 and December 31, 2010, respectively. (*Id.* ¶ 8.)
7. Defendant Baxter F. Phillips, Jr. served as a Massey director from May 22, 2007 until June 1, 2011, and served as Massey’s CEO from December 31, 2010 until June 1, 2011. (*Id.* ¶ 9.)

8. Defendant E. Gordon Gee served as a Massey director from November 30, 2000 until July 1, 2009. (*Id.* ¶ 10.)

9. Defendant Richard M. Gabrys served as a Massey director from May 22, 2007 until June 1, 2011. (*Id.* ¶ 11.)

10. Defendant James B. Crawford served as a Massey director from February 2005 until June 1, 2011. (*Id.* ¶ 12.)

11. Defendant Admiral Bobby R. Inman served as a director of Fluor Corporation, which owned Massey, from 1985 until 2003, and served as a Massey director from November 2000 until June 1, 2011. (*Id.* ¶ 13.)

12. Defendant General Robert H. Foglesong served as a Massey director from February 21, 2006 until June 1, 2011. (*Id.* ¶ 14.)

13. Defendant Stanley C. Suboleski served as a Massey director from May 2008 until June 1, 2011. (*Id.* ¶ 15.)

14. Defendant J. Christopher Adkins served as Massey's Senior Vice President and Chief Operating Officer from June 23, 2003 until June 1, 2011. (*Id.* ¶ 16.)

15. Defendant M. Shane Harvey served as Massey's Vice President and General Counsel from January 2008 until June 1, 2011. (*Id.* ¶ 17.) From June 2, 2011 to July 28, 2011, Mr. Harvey served as Senior Vice President of Legal at Alpha.

16. Defendant Mark A. Clemens served as a Senior Vice President, Group Operations at Massey from July 2007 until June 1, 2011. (*Id.* ¶ 18.)

17. Defendant Elizabeth S. Chamberlin served as Massey's Vice President of Safety from January 2007 until June 1, 2011. (*Id.* ¶ 19.)

18. Defendant Richard R. Grinnan served as Massey's Vice President and Corporate Secretary from May 2006 until June 1, 2011. (*Id.* ¶ 20.) Mr. Grinnan currently serves as Vice President, Deputy General Counsel and Assistant Secretary of Alpha Natural Resources Services, Inc. and Assistant Secretary of Alpha Natural Resources, Inc.

## **II. BACKGROUND.**

19. On July 2, 2007, Manville commenced the underlying shareholder derivative litigation, filing a complaint alleging, on behalf of Massey, that the then Board of Directors (the "Board") of Massey and certain of Massey's officers breached their fiduciary duties by consciously failing to cause Massey's employees to comply with certain environmental and worker-safety laws and regulations. (Manville's Motion for an Order for a Rule to Show Cause as to Why the Board of Directors of Massey Energy Company Should Not Be Held in Civil Contempt and for Leave to Conduct Expedited Discovery, dated April 16, 2010 (the "Old Petition") at 2.)

20. On May 20, 2008, the parties executed a Stipulation of Settlement ("Stipulation"), which provided for a release of all claims that were or could have been asserted derivatively on behalf of Massey in exchange for, among other things, an agreement that the Board and Massey would implement agreed corporate governance changes, which were set forth in a "Corporate Governance Agreement" (the "CGA"). (New Petition Ex. B § 2.1.)

21. The Stipulation was executed by Manville “derivatively on behalf of Massey”. (Stipulation at 7, ¶ 1.9.)

22. The Stipulation provided for the release of all claims except those permitting “the Settling Parties to enforce the terms of the Stipulation or Settlement”. (*Id.* ¶ 1.9.) The term “Settling Parties” is defined as “each of the Defendants and the Plaintiff [Manville] derivatively on behalf of Massey”. (*Id.* ¶ 1.12.)

23. The Stipulation also provided “that no right of any third-party beneficiary shall arise from this Stipulation”. (*Id.* ¶ 8.10.)

24. On June 30, 2008, this Court, per Judge Irene Berger, approved the Stipulation and dismissed with prejudice the derivative claims Manville brought (the “2008 Order” and, together with the Stipulation and the CGA, the “Settlement”). (New Petition Ex. A.)

### **III. THE UBB EXPLOSION AND SUBSEQUENT LITIGATION.**

25. On April 5, 2010, an explosion occurred at Massey subsidiary Performance Coal Company’s Upper Big Branch mine. (New Petition ¶ 1.)

26. On April 16, 2010, Manville filed the Old Petition, alleging that certain of the Defendants (the then members of the Board) were in violation of the 2008 Order because Massey’s 2009 Corporate Social Responsibility Report “contains no report on the Company’s . . . worker safety compliance” as required by the CGA. (Old Petition at 5.)

**IV. THE ALPHA-MASSEY MERGER AND THE NEW CONTEMPT PETITION.**

27. On January 28, 2011, Massey, Alpha and Mountain Merger Sub, Inc. (“Merger Sub”) entered into an Agreement and Plan of Merger (the “Merger Agreement”), pursuant to which Merger Sub would merge with and into Massey, which would be the surviving corporation of the merger and a wholly-owned subsidiary of Alpha (the “Merger”). (Anderson Decl. Ex. 2 § 1.01.)

28. On May 31, 2011, Manville, now joined by CalSTRS and Amalgamated Bank, filed “individually and on behalf of all other similarly situated shareholders” the New Petition.

29. On June 1, 2011, Massey and Alpha stockholders gave their respective approvals necessary to complete the Merger. Over 99% of Massey shares that were voted were for the Merger. Alpha Appalachia Holdings, Inc., Form 8-K, Item 5.07 (June 7, 2011). The Merger was completed later that day. (Anderson Decl. Ex. 3.)

30. Pursuant to the Merger Agreement, each issued and outstanding share of Massey common stock (other than any shares owned by (i) Alpha, Massey or any of their respective subsidiaries (which were canceled) or (ii) any stockholder who properly exercised and perfected appraisal rights under Delaware law, if any, was converted into the right to receive 1.025 shares of Alpha common stock and \$10 in cash. (*Id.* Ex 2 § 2.01(c).) As a result, Alpha paid Massey shareholders consideration that, valued as of the date of the Merger Agreement, exceeded \$7 billion. Alpha Appalachia Holdings, Inc., Form 8-K, Item 2.01 (June 7, 2011).

31. As of the effective time of the Merger, Plaintiffs ceased to own shares in Massey. Alpha became the sole shareholder of Massey, which was renamed Alpha Appalachia Holdings, Inc.

32. As of the effective time of the Merger, Massey's then-current Board was replaced by a Board of Directors elected by Alpha, as Massey's sole shareholder. The Massey board consists of a sole director (who is not a party here). (Anderson Decl. Ex. 2 § 1.06.)

**V. THE CGA IS RENDERED INOPERATIVE.**

33. The CGA provides that "any [CGA] guideline can be altered or removed if the [Massey] Board, in good faith and upon the advice of counsel, determines that such guideline conflicts with any subsequently adopted . . . amendment to the Company's Certificate of Incorporation approved by the Company's shareholders". (CGA at 1.)

34. On June 27, 2011, Alpha, as the sole shareholder of Alpha Appalachia, approved an amendment to Alpha Appalachia's Certificate of Incorporation to provide that Alpha Appalachia's safety, environmental and public policy practices, policies and guidelines are consistent with and modeled after those governing Alpha (the "Charter Amendment"). (See Affidavit of Ricklin Brown, dated June 28, 2011 ("Brown Aff.")). The Charter Amendment was filed with and accepted by the Secretary of State of the State of Delaware on June 28, 2011. (Brown Aff. Ex. C(2).)

35. Alpha Appalachia's Board of Directors, comprising a sole director, after receiving the advice of counsel, determined that the corporate governance policies previously implemented pursuant to the CGA conflicted with the Charter Amendment.

(Brown Aff. Ex. C(3).) The conflicting CGA policies, which amount to the entirety of the CGA, were thus rendered inoperative.

## CONCLUSIONS OF LAW

### I. PLAINTIFFS HAVE LOST STANDING.

#### A. Plaintiffs had only derivative standing to enforce the Settlement.

##### a. Under the express terms of the Stipulation, Plaintiffs do not have standing to enforce the Settlement, other than derivatively on behalf of Massey.

36. The underlying litigation here is a derivative litigation, *i.e.*, a litigation “on behalf of nominal defendant Massey Energy Company” to remedy damages allegedly suffered by Massey. (Stipulation at 2.)

37. It is a matter of black-letter law that in a derivative suit the corporation “is the real party in interest, the stockholder being at best the nominal plaintiff”. *Ross v. Bernhard*, 396 U.S. 531, 538-39 (1970).

38. Consequently, the Stipulation was executed by Manville “derivatively on behalf of Massey”. (Stipulation at 7, 10.)

39. The Stipulation released all claims except those permitting “the Settling Parties to enforce the terms of the Stipulation or Settlement”. (*Id.* ¶ 1.9.) The term “Settling Parties” is defined as “each of the Defendants and the Plaintiff derivatively on behalf of Massey”. (*Id.* ¶ 1.12.)

40. Plaintiffs, relying on the provision permitting “the Settling Parties to enforce the terms of the Stipulation or Settlement”, contend that “the 2008 Order expressly preserve[d] plaintiffs’ right to ‘enforce the terms of the Stipulation or Settlement’”. (Plaintiffs’ Memorandum of Law in Opposition to (1) Individual

Defendants' Joint Motion to Stay, (2) Individual Defendants' Motion to Dismiss and to Vacate the 2008 Order as Against Them, and (3) Nominal Defendant Massey Energy Company's Joinder and Motion to Stay Proceedings Pending Resolution of the Motion to Dismiss ("Pls. Br.") at 13.)

41. However, the Stipulation preserved their right to enforce the Settlement only "derivatively on behalf of Massey". Thus, Plaintiffs may bring an enforcement action only "derivatively on behalf of Massey".

42. Apparently recognizing this, in the numerous filings made by Manville before the Merger, Manville sought civil contempt derivatively on behalf of Massey. For example, in the first sentence of the Old Petition, Manville stated that it was seeking contempt "on behalf of Massey". (Old Petition at 1; *see also* Plaintiff's First Set of Requests for the Production of Documents, dated May 26, 2010, at 1 n.1; Plaintiff's Motion to Compel the Production of Documents, dated July 6, 2010, at 1; Plaintiff's Response to Alleged Contemnors' Joint Motion to Vacate, dated July 9, 2010, at 1; Plaintiff's Memorandum of Law in Further Support of the Court's Rule to Show Cause as to Why the Board of Directors of Massey Energy Company Should not be Held in Civil Contempt, dated August 3, 2010, at 1.) Manville also styled its original motion for a rule to show cause as part of the underlying "Derivative Action" and Plaintiffs captioned Massey as a "nominal defendant", which reflects the corporation's status in a derivative action, in both Petitions. Finally, in its Motion to Consolidate, Manville argued to this Court that the contempt proceeding was brought "derivatively on behalf of and for the benefit of Massey Energy Company". (Plaintiff's Motion to Consolidate, dated August 11, 2010, at 1; *see also id.* at 8.)

43. Thus, the Court concludes that, under the express terms of the Stipulation, Plaintiffs have only derivative standing to enforce the Settlement.

b. **Plaintiffs do not have standing other than as provided for in the Stipulation.**

44. Plaintiffs alternatively contend that, even if the Stipulation does not explicitly provide for their standing, Manville has standing because it was a “named party in the underlying action”, that the 2008 Order conclusively established that Plaintiffs have standing, and that Plaintiffs have standing because they have a “legally cognizable interest” in the Settlement. The Court disagrees.

45. As an initial matter, being a “named party in the underlying action” does not confer on Manville standing to enforce the Settlement *directly*.

46. Although it is generally the case that a party to the underlying action has standing to enforce a court order entered in its favor in that action, the situation here is different because the underlying action is a derivative action.

47. As the Court has already noted above, in a derivative action, the corporation “is the real party in interest, the stockholder being at best the nominal plaintiff”. *Ross*, 396 U.S. at 538-39. Because Manville was acting merely as a representative of Massey, no direct enforcement right arose in the underlying proceeding.

48. Plaintiffs’ reliance on *United Mine Workers of Am. v. Faerber*, 179 W. Va. 73, 365 S.E.2d 353 (1986) is misplaced because it did not involve derivative litigation.

49. Plaintiffs, primarily relying on *Salazar v. Buono*, 130 S. Ct. 1803 (2010), advance two other arguments in support of their assertion that they are entitled to standing here.

50. In *Buono*, a litigant, Buono, who had previously sought and obtained a permanent injunction prohibiting the display of a cross on public land, attempted to enforce the injunction by challenging a statute authorizing the transfer to a private party of the land on which the cross was displayed. The United States Supreme Court granted *certiorari* to review the district court's grant of the injunction challenging the statute.

51. On appeal, the government raised two distinct standing arguments: (1) that Buono did not have standing to seek the original injunction (challenging the presence of the cross) (*id.* at 1814) and (2) that Buono did not have standing to enforce the original injunction (*id.* at 1814-15). With respect to the first issue, the Court held that because the government had litigated and lost the issue of whether Buono had standing to challenge the presence of the cross, and had not appealed that decision, "the Government cannot now [in the subsequent enforcement action] contest Buono's standing to [challenge the presence of the cross]". *Id.* at 1814. With respect to the second issue, the Court held that "[a] party that obtains a judgment in its favor acquires a 'judicially cognizable' interest in ensuring compliance with that judgment". *Id.* at 1814-15.

52. Plaintiffs attempt to avail themselves of each of these holdings, arguing that (1) the 2008 Order "is a final, nonreviewable order [establishing that Plaintiffs have standing] that Contemnors cannot now challenge" and (2) that they have a "legally cognizable interest" in ensuring compliance with the Settlement.

53. As a threshold matter, the Court finds that, even if Plaintiffs have established that they *had* been found to have standing to enforce the Settlement because the 2008 Order determined that they could act on behalf of Massey or because they were Massey shareholders in whose favor the Settlement was agreed—neither of which the Court, as discussed below, determines to be the case—the Merger effectively ended any such standing.

54. Plaintiffs are now *former* Massey shareholders. Thus, even if the 2008 Order represented a determination that Manville could properly prosecute claims on Massey’s behalf, Manville ceased to be the proper party to prosecute those claims (and enforce the settlement of those claims) when it surrendered its Massey shares in the Merger that was overwhelmingly approved by Massey’s shareholders. Similarly, even if Massey’s shareholders had a “legally cognizable interest” in the Settlement because the Settlement was “made in favor of Massey Energy shareholders”, they lost that interest when they surrendered their Massey shares. The legal effect of the Merger is no different than if, for example, Plaintiffs had sold their Massey shares in the market, not in connection with the merger.

55. In any event, this Court finds that *Buono* and Plaintiffs’ other authorities are inapposite, and that each of Plaintiffs’ arguments fail.

56. Here, unlike *Buono*, the issue of standing in the underlying litigation had not been litigated at the time of the Settlement and was not otherwise resolved by the 2008 Order. As Plaintiffs themselves note, before the Settlement, “Defendants and Massey Energy filed motions to dismiss the underlying case . . . arguing that Petitioner Manville Trust had no authority to pursue the claims under West Virginia Rule of Civil

Procedure 23.1.” (Pls. Br. 15 (citing Memorandum of Law in Support of Joint Motion to Dismiss Plaintiffs’ Amended Shareholder Derivative Complaint at 3-17).) (More precisely, Defendants argued that Manville failed to make a demand on the Board that Massey pursue the claims and had failed to plead particularized facts demonstrating that demand would have been futile.) The Court, however, never ruled on Defendants’ motion.<sup>3</sup>

57. The 2008 Order was not an adjudication that Manville could pursue its claim on Massey’s behalf. The Stipulation specifically provides that it “shall not be deemed an admission by any Settling Party as to the merits of any claim, allegation or *defense*”. (Stipulation ¶ 8.2 (emphasis added).) Plaintiffs contend that Defendants “agree[d] that the Litigation was filed in good faith and in accordance with West Virginia law” (Pls. Br. 6 (*quoting* Stipulation ¶ 8.2)), however, an agreement that a complaint was filed in good faith is not a concession of standing, leaving aside the express language of the Stipulation, which prohibits precisely the argument Plaintiffs make.

58. Nor do Plaintiffs have a “legally cognizable interest” in the Settlement sufficient to confer standing upon them.

59. A party with a “legally cognizable interest” in an order may have standing to seek its enforcement through contempt. But this raises the question of what a party must show to establish a “legally cognizable interest”.

---

<sup>3</sup> The U.S. District Court for the Southern District of West Virginia did rule on Defendants’ motion to dismiss another Massey shareholder’s complaint, containing virtually identical allegations to those made by Manville in the underlying derivative litigation here. The Court granted Defendants’ motion because, among other reasons, the “plaintiff ha[d] failed to demonstrate futility of demand”. *Mercier v. Blankenship*, 662 F. Supp. 2d 562, 577 (S.D.W.Va. 2009).

60. Plaintiffs assert that they have such an interest because “the 2008 Order expressly states that it was intended for the benefit of Massey Energy shareholders”. (Pls. Br. 2, 15.) The 2008 Order, however, merely recites that “Massey and its [Board] are satisfied that the [Settlement] constitutes reasonably equivalent value for the . . . Released Claims . . . and is in the best interests of Massey and Massey shareholders” (Stipulation ¶ 2.3) and that “Plaintiff’s Counsel have determined that the Settlement . . . is in the best interests of Massey . . . after considering [among other things] the substantial benefits that the Company and its shareholders will receive from the Settlement” (*id.* at 6). That the Board and Manville’s counsel believed that the Settlement was in the best interests of Massey’s shareholders does not mean that they were “intended beneficiaries” on whom were conferred a right to enforce the settlement. Were there any doubt about this, the Stipulation’s no third-party beneficiary clause removes it.

61. Plaintiffs also claim that the “express terms of the Stipulation” provide that the Settlement would “benefit not only the company but its employees as well as the public”. (Pls. Br. 18 n.6 (*quoting* Transcript of Hearing on Final Settlement Approval, dated June 25, 2008 at 64); *see also id.* 24 (“[T]he 2008 Order . . . was intended to benefit Massey Energy’s shareholders, employees and the public . . .”).) If Plaintiffs were correct, then both Massey’s employees and the public at large would have standing to enforce the Settlement in spite of the express limitation of standing to Manville “derivatively on behalf of Massey.” That cannot be the case, and the Stipulation’s no third-party beneficiary clause makes clear it is not.

62. Plaintiffs’ status as shareholders at the time of the Settlement is insufficient to confer a “legally cognizable interest” on them. Plaintiffs cite no case stating that a corporation’s shareholders have a “legally cognizable interest” in that

corporation's derivative settlement agreement. Nor do they cite a case stating that *former* shareholders continue to have a "legally cognizable interest" even after surrendering their shares.

63. Neither *Buono*, nor any of the other cases relied upon by Plaintiffs (other than *Tyson Foods*, which is addressed below), involves shareholders seeking to enforce derivative settlements or, indeed, derivative litigation at all. Plaintiffs primarily rely on federal cases, such as *Buono*, involving whether a litigant has Article III standing to challenge a government action. *Allen v. Wright*, 468 U.S. 737, 763 (1984) (Article III standing to challenge state aid to allegedly discriminatory private schools by virtue of being parties to school desegregation order); *Cape Hatteras Access Pres. Alliance v. U.S. Dept. of Interior*, 731 F. Supp. 2d 15, 20 (D.D.C. 2010) (Article III standing to challenge environmental regulations designating critical habitat for a small shorebird). Constitutional standing under Article III is fundamentally different from the issue here, which is whether a derivative settlement confers a "legally cognizable interest" on a corporation's former shareholders.

64. *In re Tyson Foods, Inc.*, 919 A.2d 563 (Del. Ch. 2007) does not support Plaintiffs' position. *Tyson* involved shareholders seeking to assert derivatively a "claim" for civil contempt and a claim for breach of contract arising out of alleged violations of a settlement agreement. 919 A.2d at 598-99. *Tyson* establishes that multiple shareholders can join in a derivative claim to assert such a claim on the corporation's behalf. It does not establish that each shareholder has a direct claim. That is particularly the case here, where the Settlement contains a no third-party beneficiary clause. In addition, the *Tyson* Court "easily dismissed" plaintiffs' contempt claim as "procedurally improper", and stressed the derivative nature of the contemplated contempt motion. *Id.* at 598-99

(“Given the peculiar nature of derivative complaints, in which a corporation is both a nominal defendant and the entity on whose behalf damages are sought, plaintiffs are arguably already parties to the earlier case.”). More to the point, the shareholders in *Tyson* still owned shares in the corporation whose settlement they sought to enforce. Plaintiffs do not.

65. This Court therefore concludes that Plaintiffs have failed to assert any basis on which they could enforce the Settlement other than derivatively on behalf of Massey.

c. **The Court’s continued jurisdiction is insufficient to confer standing on Plaintiffs.**

66. Plaintiffs contend that they have standing by virtue of the Court’s continued jurisdiction. (New Petition ¶ 50.) It is undisputed that this Court has jurisdiction to decide these motions. (*See* Transcript of Hearing on Defendants’ Joint Motion to Dismiss the Plaintiffs’ Petition for Civil Contempt and to Vacate the 2008 Order as Against Them, July 21, 2011 (“Transcript”) at 27:7-10, 46:22-47-2.) The issue for the Court’s consideration, however, is whether Plaintiffs’ have standing to seek contempt now that they no longer own Massey shares.

d. **Even if Plaintiffs had standing to enforce the Settlement directly, Plaintiffs have alleged a derivative claim.**

67. Even if Plaintiffs had some basis on which to proceed directly, Plaintiffs have not asserted a direct claim. Their claim in the New Petition is derivative.

68. The Court recognizes that Plaintiffs purported to submit their New Petition “individually and on behalf of all other similarly situated shareholders”. (New Petition at 2.) But whether a claim is direct or derivative is not a function of the label a party gives it. Rather, that is determined with reference “to the nature of the wrong and to whom the

relief should go”. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004).

69. In the New Petition, Plaintiffs allege that Defendants’ alleged breaches of the 2008 Order “led directly to the massive explosion at Massey Energy’s Upper Big Branch mine”. (New Petition 1.) Plaintiffs do not allege for whose harm arising out of the explosion they seek to recover. It appears, however, that Plaintiffs, who do not allege any injury to themselves independent of injury to Massey, seek to recover for harm suffered by Massey. (The Court also observes that in the suit these Plaintiffs maintain before Judge King, filed April 15, 2010, Plaintiffs allege that that the Upper Big Branch explosion harmed Massey and seek to recover damages for that harm derivatively. (Anderson Decl. Ex. 6 at 93-95.)

70. Since Plaintiffs allege harm only to Massey and do not allege any injury to themselves independent of injury to Massey, their claim is, in fact, derivative. *See Tooley*, 845 A.2d at 1039 (“The stockholder’s claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.”). Thus, regardless of whether Plaintiffs *could* assert a direct claim, the Court finds that the claim Plaintiffs have, in fact, asserted is derivative.

71. Plaintiffs contend that under both West Virginia and Delaware law, “[i]n a given case, it is possible that both causes of action may be utilized.” (Pls. Br. 18 (*quoting Masinter v. WEBCO Co.*, 164 W. Va. 241, 255, 262 S.E.2d 433, 442 (1980)). While Plaintiffs are correct that a plaintiff may assert both direct and derivative claims in the same case, the issue before the Court is not whether Plaintiffs could theoretically assert a

direct claim alongside a derivative claim, but rather whether Plaintiffs have established a cognizable basis upon which they could proceed directly and whether they have, in fact, asserted a direct claim. As the Court has discussed, they have not.

**B. Plaintiffs lost their derivative standing when they lost their Massey shares.**

**a. Whether Plaintiffs may assert claims derivatively on behalf of Massey is governed by Delaware law.**

72. Massey is a Delaware corporation, as is Alpha. Thus, Delaware law applies to the issue of whether former Massey shareholders have standing to assert a claim on behalf of Massey. Syl. pt. 2, *State ex rel. Elish v. Wilson*, 189 W. Va. 739, 434 S.E.2d 411 (1993) (“The local law of the state of incorporation should be applied to determine who can bring a shareholder derivative suit.”).

73. Plaintiffs contend that West Virginia law should apply because the Stipulation contains a West Virginia choice-of-law clause. (Stipulation at 19.) That a Delaware corporation entered into an agreement governed by West Virginia law does not mean that the corporation’s shareholders’ rights with respect to the corporation also become governed by West Virginia law. *Elish*, 189 W. Va. 739, 744-45, 434 S.E. 2d 411, 416-17 (citing Restatement (Second) of Conflict of Laws § 302 (1969)).

74. Plaintiffs also suggest that West Virginia law should apply as a matter of “public policy”. (Pls. Br. 18 n.6.) As in *Elish*, however, Plaintiffs have failed to identify a sufficient public policy reason for West Virginia law to be applied over Delaware law. *Elish*, 189 W. Va. at 745, 434 S.E.2d at 417 (“Further, there is no identifiable public policy reason for West Virginia law to be applied over that of Delaware . . . . While [the corporation] is a prominent employer in West Virginia, the battle over who can participate in a shareholder derivative suit is a struggle peculiar to the corporation itself

and must be handled as such.”). The Court notes that “the local law of the state of incorporation should be applied except in the extremely rare situation where a contrary result is required by the overriding interest of another state in having its rule applied.” Restatement (Second) of Conflict of Laws § 302 cmt. g (1969) (“In the absence of an explicitly applicable local statute, the local law of the state of incorporation has been applied almost invariably to determine issues involving matters that are peculiar to corporations.”). This is not the “extremely rare situation” that would require deviation from that rule.

75. Thus, the Court concludes that Delaware law applies to this issue.

b. **Plaintiffs no longer satisfy Delaware’s “continuous ownership” requirement and have not adequately pleaded the application of any exception.**

76. It is well-settled Delaware law that “for a shareholder to have standing to maintain a derivative action, the plaintiff ‘must not only be a stockholder at the time of the alleged wrong and at the time of commencement of suit but . . . must also maintain shareholder status throughout the litigation’”. *Lambrecht v. O’Neal*, 3 A.3d 277, 284 (Del. 2010) (quoting *Lewis v. Anderson*, 477 A.2d 1040, 1046 (Del. 1984)).

77. As the Delaware Supreme Court recently explained:

“[This] continuous ownership requirement . . . holds that where the corporation on whose behalf a derivative action is pending is later acquired in a merger that deprives the derivative plaintiff of his shares, the derivative claim—originally belonging to the acquired corporation—is transferred to and becomes an asset of the acquiring corporation as a matter of statutory law. Because as a consequence the original derivative shareholder plaintiff can no longer satisfy the continuous ownership requirement, the plaintiff loses standing to maintain the derivative action. And, because the claim is now (post merger) the property of the acquiring corporation, that corporation is now the only party with standing to enforce the claim, either by substituting itself as the plaintiff or by authorizing the original plaintiff to continue prosecuting the suit on the acquiring company’s behalf.”

*Id.* (citing *Anderson*, 477 A.2d at 1049-50 and 8 Del. C. § 259).

78. The “continuous ownership rule . . . is a bedrock tenet of Delaware law and is adhered to closely”. *Parfi Holding AB v. Mirror Image Internet, Inc.* 954 A.2d 911, 940 (Del. Ch. 2008).

79. On June 1, 2011, Plaintiffs ceased to own shares in the Company. They therefore no longer have standing to seek contempt. As the Delaware Chancery Court explained in its denial of certain former Massey shareholders’ motion to enjoin preliminarily the Alpha-Massey Merger, “[a]s a matter of black letter law [control of] the Derivative Claims will pass to Alpha in the Merger”. *In re Massey Energy Co.*, C.A. No. 5430–VCS, 2011 WL 2176479, at \*2 (Del. Ch. May 31, 2011) (internal citation omitted).<sup>4</sup> Dismissing these Petitions is not a decision on the merits. It means that Massey’s new owner will have the opportunity to consider for itself the underlying facts, the benefits of pursuing any available remedies and the costs of doing so, and to form its own business judgment as to the best course of action. These decisions will be made by the Boards of Directors of Alpha and Alpha Appalachia on which none of the Defendants serves.

80. There are “two exceptions to this loss-of-standing rule”. *Lambrecht*, 3 A.3d at 284 n.20. The first, the so-called “fraud exception”, arises “where the merger itself is the subject of a claim of fraud, being perpetrated merely to deprive shareholders of their standing to bring the derivative action”. *Id.* The second exception arises “where

---

<sup>4</sup> Because the derivative claims against former Massey officers and directors passed to Alpha, Plaintiffs’ suggestion at the July 21, 2011 hearing that their status as Alpha shareholders is sufficient to give them standing to pursue this contempt proceeding (Transcript at 57:15-18) is unavailing. The claim they seek to pursue is Massey’s, and Alpha is now the sole shareholder of Massey.

the merger is essentially a reorganization that does not affect the plaintiff's relative ownership in the post-merger enterprise". *Id.* Plaintiffs claim that the "fraud exception" may apply here and that the possible application of that exception "broadens the scope of the show-cause hearing to include discovery regarding [Defendants'] motivations behind the Merger". (Pls. Br. 3.)

81. However, Plaintiffs must first adequately *plead* that the "fraud exception" applies. To plead the application of the "fraud exception", a plaintiff must plead that "(1) the Individual Defendants faced substantial liability [on the claims that they allegedly sought to escape]; (2) the Individual Defendants were motivated by such liability; and (3) the [m]erger was pretextual", "*i.e.*, its purpose was solely to avoid liability". *Globis Partners, L.P. v. Plumtree Software, Inc.*, Civil Action No. 1577-VCP, 2007 WL 4292024, at \*6-7 (Del. Ch. Nov. 30, 2007). The second and third prongs are "interrelated". *Id.* at \*7. Because they sound in fraud, these allegations must be pleaded with particularity under West Virginia Rule of Civil Procedure 9(b). *Id.* at \*5.

82. Even assuming that Plaintiffs have adequately pleaded that Defendants faced a substantial likelihood of liability on Plaintiffs' claims, neither the Old nor the New Petition pleads sufficient facts to establish the application of the "fraud exception".

83. The entirety of Plaintiffs' pleading on this issue amounts to a single sentence in the New Petition: "Instead of ensuring compliance with the Order and applicable law, Company management was concerned only with protecting themselves, concocting an implausible exculpatory explanation for the tragedy, and pursuing a merger with [Alpha] aimed at escaping their liability for additional shareholder derivative claims." (New Petition at 3-4.)

84. This single, conclusory allegation falls far short of meeting Plaintiffs' pleading burden under Rule 9(b). Plaintiffs have not alleged a single fact, other than that the former directors allegedly faced a substantial likelihood of liability, from which it could be inferred that Defendants were motivated by their potential liability here (or on any other derivative claim). If that were sufficient then the other two prongs of the fraud exception would be superfluous.

85. The Court also recognizes that the more than \$7 billion purchase price and the substantial premium delivered to Massey's former shareholders from the Merger is hardly indicative of a transaction undertaken "solely" for liability avoidance. *In re Massey Energy Co.*, C.A. No. 5430-VCS, 2011 WL 2176479, at \*1 (noting that "the Merger consideration amounted to a 25% premium over Massey's stock price based on [the January 26, 2011] closing price of Massey and Alpha stock, a 95% premium over the closing price of Massey stock on October 18, 2010 before it was publicly reported that Massey was engaged in a strategic alternatives review, and even a 27% premium over Massey's stock price the day of the explosion at the Upper Big Branch mine").

86. In addition, the Court is mindful that the Delaware Chancery Court, after considering the record on the motion by an alleged class of now-former Massey shareholders to enjoin preliminarily the Alpha-Massey merger, found that it was "highly doubtful that the plaintiffs will be able to show that Massey's directors and officers sought to sell the company to Alpha solely in order to extinguish their potential liability for the [derivative claims pending against the former directors and officers in Delaware]". *Id.* at \*2; *see also id.* at \*16 and \*18.) The Court notes that our Supreme Court, in denying Plaintiffs' Emergency Petition to enjoin the Alpha-Massey merger preliminarily, observed that the Delaware Chancery Court "is recognized as having gained specialized

expertise in disputes” involving mergers and “ha[d] the benefit of considerable discovery”. (*Cal. State Teachers’ Ret. Sys. v. Blankenship*, No. 11-0839, slip. op. at 3 (W. Va. May 31, 2011) (order denying emergency petition for a preliminary injunction).)

87. Thus, the Court finds that because Plaintiffs no longer own Massey shares, they do not have standing to prosecute either contempt Petition. Additionally, the Court finds that Plaintiffs have not adequately pleaded the application of the “fraud exception” and, therefore, are not entitled to discovery on that issue.

## **II. DEFENDANTS CANNOT BE HELD IN CIVIL CONTEMPT.**

88. The parties agree that it is no longer possible for Defendants to comply or to cause Massey to comply with the Settlement. (Defs. Br. 2, Pls. Br. 22.) This is because, with respect to the former Massey director Defendants, they ceased serving as directors at the effective time of the Merger. With respect to the non-director Defendant currently employed by Alpha, Plaintiffs do not dispute he is no longer in a position to cause Massey to comply. (Pls. Br. 22.)

89. Moreover, Alpha’s amendment to Alpha Appalachia’s Certificate of Incorporation renders the CGA inoperative going forward. Plaintiffs contend that Alpha’s actions are a “contrivance” and are “void” (Pls. Br. 4); however, the CGA expressly provides that subsequent amendments to Massey’s certificate of incorporation can supersede the terms of the CGA, and Alpha and Alpha Appalachia have properly complied with the amendment provision. In addition, as a practical matter, it would make no sense to subject Alpha Appalachia to one set of corporate governance rules, while another governs the rest of the Alpha organization.

90. Given the impossibility of future compliance, the individual Defendants contend that civil contempt is no longer appropriate. They contend that civil contempt is inappropriate because whether a contempt is civil or criminal is determined by reference to “the purpose to be served by imposing a sanction”, and contempt is civil where the purpose “is to compel compliance with a court order by the contemner so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order”. (Amended Memorandum of Law in Support of the Individual Defendants’ Joint Motion to Dismiss the Plaintiffs’ Petition for Civil Contempt and to Vacate the 2008 Order as Against Them (citing Syl. pt. 2, *State ex rel. Robinson v. Michael*, 166 W. Va. 660, 276 S.E.2d 812 (1981)).) Plaintiffs, on the other hand, contend “[c]ompensatory damages are available through civil contempt proceedings under well-settled West Virginia law”. (Pls. Br. 10.)

91. Plaintiffs conflate two distinct issues: whether civil (rather than criminal) contempt is appropriate and whether a compensatory fine is an appropriate sanction for civil contempt.

92. Under *Robinson*’s “purpose test”, which the West Virginia Supreme Court has repeatedly cited and reaffirmed, *see, e.g., Lawyer Disciplinary Bd. v. Sigwart*, 216 W. Va. 212, 214, 605 S.E.2d 587, 589 (2004), “whether a contempt is civil or criminal depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate”. Syl. pt. 1, *Robinson*, 166 W. Va. at 660, 276 S.E.2d at 813.

93. Where the purpose served by the sanction “is to compel compliance with a court order by the contemner so as to benefit the party bringing the contempt action”, the proceeding is a civil contempt. *Id.* at syl. pt. 2.

94. After setting forth the “purpose test”, *Robinson* then “proceeded to illustrate . . . the different sanctions that mark the distinction between civil and criminal contempt: “[t]he appropriate sanction in a civil contempt case is an order that incarcerates a contemner for an indefinite term and that also specifies a reasonable manner in which the contempt may be purged thereby securing the immediate release of the contemner, or an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved by the failure of the contemner to comply with the order”. *State ex rel. UMWA Int’l Union v. Maynard*, 176 W. Va. 131, 135, 342 S.E.2d 96, 100 (1985) (*quoting Robinson*, 166 W. Va. at 670, 276 S.E.2d at 818) (internal citations omitted)).

95. Which sanction, if any, is appropriate in a civil contempt proceeding is a different question from whether a civil contempt proceeding is appropriate. Assuming that the underlying purpose is to “is to compel compliance with a court order”, a court may determine the amount of the fines to be imposed on the contemnor to compel present or future compliance by reference to the damage suffered by the aggrieved party for past non-compliance and order those fines paid to the aggrieved party as a form of compensation, *see Czaja v. Czaja*, 208 W. Va. 62, 74 n.37, 537 S.E.2d 908, 920 n.37 (2000). The fact that the amount of the fine is determined by reference to the damage a party has suffered (rather than an arbitrarily selected amount) or paid to the aggrieved party (rather than into the court) does not mean that the purpose of the fine is not to compel compliance.

96. For example, in *Czaja*, the West Virginia Supreme Court addressed the nature of a contempt proceeding in which fines were imposed, at a rate of \$50 per offense, for “thirteen instances of refused [parental-child] visitation”, which, the Court noted, the contemnor “could not have been found by the circuit court to be capable of purging [because] . . . visitation had already been denied”. *Id.* at 73, 537 S.E.2d at 919. The Court determined that the proceeding was properly one for civil contempt. As the Court explained, because “the contempt ruling arose from, and was directed at, compelling compliance with an existing order concerning visitation [which continued in force] to be afforded Appellee, the purpose of the sanction was clearly consonant with the objectives underlying civil contempt”. *Id.* at 75, 537 S.E.2d at 921. Thus, because the fines, while determined with reference to completed conduct, were primarily aimed at “compelling [future] compliance”, the contempt was still civil in nature.

97. Plaintiffs, citing *Floyd v. Watson*, 163 W. Va. 65, 254 S.E.2d 687 (1979), argue, in essence, that because they seek compensatory fines and compensatory fines are an appropriate civil contempt sanction, civil contempt is appropriate. As the West Virginia Supreme Court has noted “[w]hereas we previously looked to the penalty imposed (e.g. jail term with opportunity for purging vs. without and determinate vs. indeterminate sentencing) in labeling contempt matters, this Court altered that approach beginning with *Robinson* and now examines the purpose of the sanction, rather than the sanction itself, to identify the nature of the contempt ruling. *Cf. Floyd*, 163 W. Va. 65, 73-74, 254 S.E.2d 687, 692 to *Robinson*, 166 W. Va. at 670, 276 S.E.2d at 818.” *Czaja*, 208 W. Va. at 75 n.38, 537 S.E.2d at 921 n.38.

98. Plaintiffs also rely on *United Mine Workers of Am. v. Faerber*, 179 W. Va. 73, 365 S.E.2d 353 (1986), in which compensatory fines were imposed, although the

contemner had already complied with the order. Again, however, when determining the nature of the contempt proceeding, the Court made that determination, citing *Robinson*, with reference to the underlying purpose of the sanction. *Id.* at 75-76, 365 S.E.2d at 355-56 (“Where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order, the contempt is civil.” (quoting *Robinson* at syl. pts. 1 and 2)). Because “the contempt action was brought . . . to enforce an order of the Court . . . this case squarely fits the test set out in [*Robinson*] syllabus point 2 as one of civil contempt”. *Id.* Here, in contrast, the purpose of the contempt action is not to “compel compliance with a court order”, but rather to punish those no longer able to secure compliance.

99. Plaintiffs’ reliance on various federal contempt cases (Pls. Br. 11-12) is also unavailing. *Robinson*’s “purpose test” controls this issue. See *Maynard*, 176 W. Va. at 136 n.4, 342 S.E.2d at 101 n.4 (1985) (rejecting respondent’s reliance on federal cases, noting that “their analysis of the civil/criminal contempt dichotomy does not comport with our contempt law”).

100. *Robinson* is clear that the purpose of civil contempt is to “compel compliance with a court order”. *Robinson* at syl. pt. 2. Here, where compelling compliance is conceded to be impossible, there is no way in which the purpose of whatever sanction the court might impose could be to compel compliance. Thus, under *Robinson*, any contempt would be criminal in nature, which Plaintiffs, as private parties, may not initiate. See *State ex rel. Koppers Co. v. Int’l Union of Oil, Chem. & Atomic Workers*, 171 W. Va. 290, 293, 298 S.E.2d 827, 829 (1982) (“Indirect criminal

contemnors are entitled to the same rights as other criminal defendants . . . [including the right] to be prosecuted by a state's attorney.”).

**III. THE 2008 ORDER SHOULD BE VACATED AS AGAINST DEFENDANTS.**

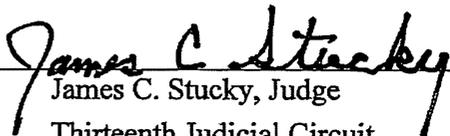
101. Because Defendants no longer have the ability to cause Massey to comply with the 2008 Order, and, in addition, because the CGA is inoperative, this Court finds that the 2008 Order should be vacated as against Defendants, and it is.

**CONCLUSION**

WHEREFORE, based upon the foregoing findings and conclusions, the Individual Defendants' Joint Motions to Dismiss Plaintiffs' Petitions for Civil Contempt And to Vacate the 2008 Order as Against Them hereby is **GRANTED**. It is **ORDERED** that these contempt proceedings are terminated in their entirety and further **ORDERED** that this matter be stricken from the Court's active docket and the Proposed Case Scheduling Order is rejected. It is further **ORDERED** that the 2008 Order be vacated as against Defendants.

The Court notes the objection of any party aggrieved by this Order. The Clerk is directed to send certified copies of this order to counsel of record.

Entered this 29<sup>th</sup> day of September 2011.

  
James C. Stucky, Judge  
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 6TH  
DAY OF OCTOBER, 2011  
Cathy S. Gatson CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA