

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 11-1488

Manville Personal Injury Settlement Trust; §
Amalgamated Bank, as Trustee for the Longview §
Collective Investment Funds; and California State §
Teachers' Retirement System, §

Petitioners Below/Petitioners, §

v. §

Don L. Blankenship; Baxter F. Phillips, Jr.; E. §
Gordon Gee; Richard M. Gabrys; James B. §
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 Below/Respondents. §

(On Appeal From The Circuit Court of
Kanawha County No. 07-C-1333)

BRIEF FOR PETITIONERS

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INTRODUCTION

This is an appeal from the September 29, 2011 Order Granting the Individual Defendants' Joint Motions To Dismiss Plaintiffs' Petitions For Civil Contempt and To Vacate The 2008 Order As Against Them (the "Dismissal Order") of the Circuit Court of Kanawha County (Stucky, J.) ("Circuit Court") dismissing contempt proceedings initiated by Manville Personal Injury Settlement Trust ("Manville Trust"), Amalgamated Bank, as trustee for the Longview Collective Investment Fund ("Amalgamated Bank"), and California State Teachers' Retirement System ("CalSTRS").

I. ASSIGNMENTS OF ERROR

- A. **The Circuit Court Erred in Concluding that Civil Contempt No Longer Provided a Compensatory Damages Remedy for Previous Violations of a Circuit Court Order.**
- B. **The Circuit Court Erred in Concluding that Delaware Law Applied to a Stipulation that "Shall Be Considered to Have Been Negotiated, Executed and Delivered, and to be Wholly Performed, in the State of West Virginia, and the Rights and Obligations of the Parties to the Stipulation Shall be Construed and Enforced in Accordance with, and Governed by, the Internal, Substantive Laws of the State of West Virginia Without Giving Effect to That State's Choice of Law Principle."**
- C. **The Circuit Court Erred in Concluding that Petitioners Lacked Standing to Prosecute the Civil Contempt Proceeding and in Refusing Requested Discovery.**

II. STATEMENT OF THE CASE

This case arises out of a long history of corporate misconduct at Massey Energy culminating in the Upper Big Branch mine explosion on April 5, 2010. At issue is Respondents' refusal to comply with an Order issued by the Circuit Court mandating the monitoring of those violations and other safety issues.

A. Background to the 2008 Order

On July 2, 2007, Manville Trust commenced the underlying litigation in the Circuit Court derivatively on behalf of Massey Energy Company (“Massey” or the “Company”) for breach of fiduciary duties to the Company. The parties settled that case pursuant to a stipulation dated May 20, 2008 (the “Stipulation”). JA000034. After notice to Massey shareholders and a hearing, the Circuit Court approved the settlement and incorporated the terms of the Stipulation into its Order approving the settlement dated June 30, 2008 (“2008 Order”). *Manville Personal Injury Settlement Trust v. Blankenship*, 07-C-1333 (Cir. Ct. Kanawha Co. June 30, 2008). JA000030. This proceeding arises out of the failure of certain Massey Energy officers and directors to implement the clear mandates of the 2008 Order and the damages resulting from their contempt. JA000030.

Pursuant to the Stipulation, Massey Energy “agreed to make certain changes to its corporate governance policies and procedures relating to director oversight and conduct regarding environmental compliance and mine worker safety.” JA000044-45. Those changes are set forth in the Corporate Governance Agreement (“CGA”), attached as Exhibit 2 to the Stipulation, which provided that “shall each remain in effect for a period of five (5) years, subject to modifications permitted therein.” JA000062. The 2008 Order incorporates the Stipulation “as if it is set forth in its entirety . . . as operative terms and provisions of this Judgment, including the Massey Energy Company Corporate Governance Agreement appended thereto.” JA000031. It also incorporates “as if set forth in their entirety” the Circuit Court’s “findings of fact and conclusions of law as set forth on the record at the June 25, 2008 hearing on the final approval of the settlement stipulation.” JA000031.

At that final approval hearing, the Circuit Court found that the provisions of the Stipulation mandating reporting *to shareholders* regarding the Company's mine-safety and environmental compliance "certainly are designed to cause the Company to be more mindful of its violations and to be more mindful of its reforms and its strategy as we move forward, because they will not be closely held." JA000629 at 63:16-24 (emphasis added). The Circuit Court also found that these settlement provisions "are likely to enhance workers' safety and environmental protections and make the company *and its shareholders* less likely to be held liable or fined for violations in the future." JA000630 at 64:12-14 (emphasis added).¹

As discussed, the CGA's fundamental purpose was to implement a reporting system to deliver environmental and safety compliance information up Massey's corporate structure, from the mines to the Board, and ultimately, to the shareholders. A primary purpose of this system of monitoring, reporting, and disclosure was to ensure Massey's compliance with mine safety laws, rules, and regulations and to hold the Board accountable to the Company's shareholders for compliance.

¹ The quoted sections are part of the broader findings and conclusions stated by the Court at the final settlement hearing:

I think those are *[public] reporting requirements, certainly are designed to cause the company to be more mindful of its violations* and to be more mindful of its reforms and its strategy as we move forward, because they will not be closely held. They're going to have to be reported, according to the terms and conditions of this settlement.

I find that *these substantive reporting, management and monitoring requirements in this agreement are more likely to effect substantive change within the company that will benefit not only the company but its employees as well as the public.*

Again, I find that if you review the complaint together with the settlement terms, the Court finds that *these terms adequately address the alleged misconduct contained in the complaint.*

I find that the settlement provisions are likely to enhance workers' safety and environmental protections and make the company and its shareholders less likely to be held liable or fined for violations in the future.

JA000629-30 at 63:20-64:15 (emphasis added).

B. The Upper Big Branch Explosion

On April 5, 2010, an explosion at Massey Energy's Upper Big Branch Mine at Montcoal, West Virginia, killed 29 miners. Investigations subsequent to the disaster revealed systematic mine-safety compliance failures leading up to the explosion at Upper Big Branch and at other Massey Energy mines. *See, e.g.*, JA000015-19, JA000945-46 at ¶¶ 1-2, and JA000960-67.

C. The Rule to Show Cause and Subsequent Proceedings

From information disclosed in the immediate wake of the disaster, it became clear that the then-current members of the Massey Board had violated the terms of the Order. On April 15-16, 2010, Petitioner Manville Trust filed (1) a Motion for a Rule to Show Cause as to Why the Board of Directors of Massey Energy Company Should Not be Held in Civil Contempt in Case No. 07-c-1333 ("Massey I"), with a supporting memorandum, affidavit, and exhibits consisting of a total of 176 pages, based on alleged violations of the Order leading up to the explosion at Upper Big Branch ("Rule to Show Cause Motion") JA000005; and (2) a shareholder derivative complaint alleging continuous and systematic oversight failures by current and former officers and directors since May 20, 2008, *Manville Personal Injury Settlement Trust v. Blankenship*, No. 10-c-715 ("Massey II").

The memorandum and supporting evidence for a rule to show cause demonstrated that the named Respondents—the members of Massey Energy's Board of Directors (the "Director Respondents")—had violated the fundamental dictates of 2008 Order to enhance worker safety. As explained in the memorandum, "[f]undamental to the Order and Settlement's corporate governance changes is a reporting system to deliver compliance information up the corporate structure from the mines to the Board, and ultimately, to the shareholders. . . ." JA000010. Pursuant to that reporting system, particular individuals had specific roles as part of an overall

process to report on the Company's compliance with mine-safety laws rules and regulations. At the top, the responsibility fell on the Board of Directors to "make a Corporate Social Responsibility report to its shareholders on an annual basis that shall include, among other things, a report on the Company's . . . worker safety compliance." JA000011 (citing JA000063-64 at ¶ 5).

As explained by Petitioner's submission, the Corporate Social Responsibility Report ("CSRR") was devoid of any information on compliance, much less anything constituting a report. JA000012. Rather than report on compliance, the CSRR paid lip service to safety in the most general terms and included data on a single statistic, Company-wide Non-Fatal-Days Lost ("NFDL") incident rates. As Petitioner's submission explained, "NFDL incident rates measure days lost from injuries, not compliance with any, much less all, 'applicable mine safety laws and regulations'" as contemplated by the 2008 Order. JA000013. Moreover, Petitioner presented data from MSHA released after the Upper Big Branch explosion demonstrating that the reported NFDL incident rates correlated poorly to mine-safety compliance in terms of the number of citations and orders issued by MSHA at Massey mines. JA000013-14. Thus, the Board violated the plain edicts of the 2008 Order by failing to provide any report on compliance in the 2009 CSRR.

Petitioner also argued that because the CSRR represented the culmination of the 2008 Order's mine-safety compliance reporting system, the utter absence of compliance information suggested farther-reaching violations. JA000015. Data released by MSHA in the wake of the disaster supported this conclusion, and it was submitted to the Circuit Court along with statements by mine-safety experts explaining the systemic and serious nature of the mine-safety violations at Upper Big Branch in the months leading up to the explosion. JA000015-19.

Based on this factual predicate, Petitioner requested a rule to show cause and discovery to determine the full nature and extent of the Directors' non-compliance with the 2008 Order. JA000026. On April 22, 2010, the Circuit Court granted Petitioner's request and issued a Rule to Show Cause based on its finding that Petitioner had "made a *prima facie* showing that the Directors have violated" the 2008 Order. JA000184. Pursuant to the rule, the Circuit Court would conduct a hearing at a future date to be determined by the court at which the Director Respondents would have an opportunity to show cause why they should not be held in civil contempt. JA000184-85. The Circuit Court also set a scheduling conference for the following month. JA000185.

The Director Respondents filed a motion to vacate the Rule on May 3, 2010, JA000191-94, arguing that the *ex parte* presentation of the motion was improper under West Virginia Trial Court Rule 24.01(b).

On May 26, 2010, Petitioner filed and served requests for the production of documents concerning Director Respondents' compliance with the 2008 Order. JA000210. Director Respondents had flatly refused to produce any documents without making any specific objections as required by W. Va. R. Civ. P. 34(b). JA000231.

On July 6, 2010, Petitioners filed a motion to compel the production of documents and noticed that motion for the same date and time as Director Respondents' motion to vacate. JA000243.

On July 9, 2011, Petitioner filed a response to Director Respondents' motion to vacate. JA000257. In that response, Petitioner explained that "the proper means for initiating a civil contempt proceeding under West Virginia law is a rule to show cause issued pursuant to an *ex parte prima facie* showing." JA000261. The response further pointed out that "West Virginia

circuit courts have a ‘mandatory duty’ to issue a rule to show cause following a *prima facie* showing.” JA000260.

On July 13, 2010, the Circuit Court denied Director Respondents’ motion to vacate, but afforded the parties additional briefing on the Rule to Show Cause to be argued at a later hearing. JA000330 at 61:7-9, 61:22 and JA000331 at 62:1-5. The Circuit Court deferred adjudication of Petitioner’s Motion to Compel until that hearing, staying discovery in the meantime. JA000331 at 62:10-12.

In their July 23, 2010 Memorandum of Law in Opposition to Plaintiff’s Motion for an Order for a Rule to Show Cause and for Expedited Discovery, Director Respondents argued that they were not in contempt; that to the extent the CGA is ambiguous, its ambiguity precluded contempt; and that Petitioner cannot establish that Massey has been harmed. JA000343-51.

Petitioner filed a Memorandum in Further Support of the Court’s Rule to Show Cause on August 3, 2010. JA000539. In response to Director Respondents’ ambiguity argument, Petitioner presented authority supporting the appropriate standard: “[t]o avoid a finding of contempt, a party must make in good faith all reasonable efforts to comply with [the order]” and that “[a] party is required to comply substantially with the Court’s order, and [s]ubstantial compliance is found where all reasonable steps have been taken to ensure compliance: inadvertent omissions are excused only if such steps were taken.” JA000543 (citations and internal quotation marks omitted). Although Director Respondents attempted to reduce the contempt findings to a narrow question of whether the 2009 CSRR failed to “include ... a report on the Company’s worker safety compliance,” Petitioner’s memorandum stated that the deficiencies and inaccuracies in the CSRR suggest more far-reaching violations of the Order’s reporting requirements. JA000544-45. The facts presented demonstrated that Director

Respondents had substantially failed to implement the overall monitoring and reporting system as required by the Order. JA000545. The memorandum further pointed out that “the complete refusal of the Board to include anything scarcely representing a worker safety compliance report in the CSRR 2009 represents a substantial violation of the Order and Settlement” and that “this violation [was] made all the more egregious by the Company’s systematic noncompliance with worker safety laws, rules, and regulations in 2009, a year touted by [Director Respondents] as the ‘safest’ in Company history.” JA000549. In this context, the relevant standard would be whether Director Respondents had made a “good faith attempt . . . to comply” “or substantial compliance” with the Circuit Court’s order. JA000549.

On August 11, 2010, Petitioner Manville Trust filed a Motion to Consolidate Massey II with this action and noticed a hearing on that motion for August 20, 2010 at the same date and time as the hearing on the briefing on the Rule to Show Cause and Petitioner’s Motion to Compel. On August 18, 2010, Director Respondents filed an opposition to Petitioner’s motion to consolidate ahead of that hearing.

On November 22, 2010, the Circuit Court held a hearing in Massey I on the Defendants’ and Petitioner Manville Trust’s additional briefing on the Rule to Show Cause, Petitioner’s Motion to Compel the Production of Documents concerning Defendants’ efforts to comply with the June 30, 2008 Order, and Petitioner’s Motion to Consolidate Massey II and this action. The Circuit Court found that the Rule to Show Cause should continue and granted Petitioner’s Motion to Compel the Production of Documents. JA000921 at 60:5-6. The Circuit Court declined to consolidate Massey II with this action. JA000921 at 60:1-4.

D. The May 31, 2011 Petition and June 13, 2011 Rule to Show Cause

On May 31, 2011, Petitioners filed a new Petition for Civil Contempt (the “Petition”), JA000944, and on June 13, 2011, the Circuit Court issued a Rule to Show Cause returnable on October 24, 2011 (the “Rule”), JA001284. The Rule further set a scheduling conference for July 5, 2011. JA001285.

In the May 31, 2011 Petition, Petitioners set forth deposition testimony and internal Massey documents regarding the Respondents² failure to follow the requirements of the 2008 Order by failing to implement the required monitoring, management, and reporting system. Specifically, in paragraphs 25-30, the Petition reads as follows:

25. Pursuant to the Order, Massey Energy is required to create a monitoring system whereby a “Vice President for Best Safety Practices (“Safety Compliance Officer”) . . . shall report to the SEPPC except to the extent that the SEPPC in its judgment otherwise delineates an alternative reporting structure for the Compliance Officers, including to whom within the Company the Compliance Officers shall report.” (CGA at 6.) However, Phillips, Massey Energy’s current President and CEO (and member of the SEPPC at the time of the Upper Big Branch explosion), testified that the Safety Compliance Officer contemplated by the CGA in fact never reported to the SEPPC as required by the Order. (Phillips Dep., May 10-11, 2011, 398:24, 399:4.) Rather, Chamberlin, the Safety Compliance Officer, reported directly to Blankenship. (*Id.*) Notably, the SEPPC never delineated this alternative reporting structure for Chamberlin; rather, it was dictated by Blankenship from the start. (*Id.* at 399:7-25.)

26. The Board also ignored the other “Corporate Compliance Management Positions” required under the CGA. (CGA at 6.) The CGA required that, in addition to the Safety Compliance Officer, “[t]he Company shall also maintain . . . full-time Safety Compliance Managerial Positions to be responsible for its Resource Groups.” (*Id.*) But, the Company never created or filled the positions. (Blankenship Dep., May 12, 2011, Ex. 13 at MEEDEL00097086 (Safety Department Structure chart).) Instead it continued to rely on its “Safety Directors,” who concerned themselves primarily with recording the numbers of work days missed due to injury, not legal compliance.

² The May 31, 2011 Petition named as contemnners the same Director Respondents named in the April 16, 2010 Petition in addition to Stanley C. Suboleski, M. Shane Harvey, Mark A. Clemens, Elizabeth S. Chamberlin and Richard R. Grinnan (collectively the “Respondents”).

(Phillips Dep. 378:8-379:3.) Massey's Safety Directors met monthly with Chamberlin and discussed the overall number of violations received with a focus on how much they were costing the Company, but without addressing what specific violations had occurred. (UBB Report 95.) There is no indication she was ever tasked with "examin[ing] and evaluat[ing] the adequacy and effectiveness of the Resource Groups' internal control procedures" – the full-time job of the Compliance Managers required under the Order. (CGA at 7 § C.2.)

27. Because of the Board's failures in this regard, the safety management, monitoring, and reporting system required under the CGA never materialized. As Phillips admitted in deposition testimony, nothing about Massey's safety organization was "materially different" after the 2008 Order and Stipulation. (Phillips Dep. 375:1-18) Accordingly, Blankenship, who remains an admittedly outspoken critic of mine safety regulations, remained at the helm of the Company's safety organization without Board oversight or control. (Blankenship Dep. 70:2171:12.)

28. Documents produced during the course of this and related litigation also reveal that Crawford, the SEPPC Chair, only asked for information to be reviewed about the safety compliance reporting system within the Company after the Upper Big Branch explosion and after the contempt proceeding first was initiated in this Court. (Blankenship Dep. Ex. 12 at 2 (Mins. of Special Mtg. of the Bd. of Dirs. of Massey Energy Co., May 3, 2010).) In response, "Mr. Blankenship indicated that a description of how the safety program is structured and how it works would be provided at the upcoming Board and Committee meetings to be held at The Jefferson [Hotel in Richmond, Virginia], May 16-18[, 2010]." (*Id.*)

29. What Blankenship explained to Crawford at that meeting was that he had created, implemented, and was overseeing an alternative safety compliance reporting organization implemented through a small "group" that he hand-selected and assembled. (*Id.* at 119:4120:12.) Specifically, Blankenship relied on the "collective judgment of the legal guy, Shane [Harvey], the electrical guy, [Keith] Hainer, and the operations guy, Chris Adkins" to make decisions about the Company's response to safety violations instead of the monitoring, management, and reporting system required by the Order. (*Id.* at 119:16-21.) Not surprisingly, the alternative system was built around challenging violations and tying them up in litigation to delay or avoid fines, not avoiding them through improved compliance. (Blankenship Dep. 114:18-116:12; UBB Report 77, 101.) Indeed, Chamberlin is reported to have said, when confronted with a violation, "Don't worry, we'll litigate it away." (UBB Report 77.) And the Board permitted it, failing to fulfill its particular obligations under the Order.

30. Blankenship's alternate safety compliance monitoring, management, and reporting system only changed sometime between August and

November 2010, several months after the Upper Big Branch explosion. (*See* Phillips Dep. Ex. 22 at 6; Blankenship Dep. 242:1025 (stating that the Upper Big Branch explosion motivated organizational changes, but it was a gradual process and “hard to say” when any particular change occurred).) Even then it remained under Blankenship’s control and was vastly different than that required under the Order. In particular, the Board still did not take charge of supervising the Safety Compliance Officer, or delineating an alternative reporting structure, and there was still no call for anyone to undertake the duties assigned the Compliance Managers. (Blankenship Dep. Ex. 13 at 4.)”

JA000954-57 at ¶¶ 25-30 (references to attachments omitted).

In their May 31, 2011 Petition, Petitioners also alleged and provided supporting documentation in the form of deposition transcripts and internal Massey documents that the Respondents did not follow the requirements of the 2008 Order in never implementing shareholder reporting requirements required by the Order. Specifically, in paragraphs 31-38, the Petition reads as follows:

31. Pursuant to the June 30, 2008 Order, the “Board shall make a Corporate Social Responsibility report to its shareholders on an annual basis that shall include, among other things, a report on the Company’s . . . worker safety compliance.” (CGA at 5 ¶ C.2.) The only data included in the 2009 Corporate Social Responsibility Report (the “CSR Report”), however, with regard to worker safety were statistics and a graph regarding Company-wide non-fatal days lost incident rates (or NFDL rates), statistics which Phillips admits are by no conceivable means a measure of compliance with applicable mine safety laws, rules, and regulations. (Phillips Dep. 389:2-5; 437:12-16; 437:24-438:4.) Moreover, these are statistics that the Company has significantly underreported in the past, as well as publicly displayed at Upper Big Branch, resulting in pressure on workers not to report injuries. (UBB Report 99.)

32. As the Court noted at the June 25, 2008 settlement approval hearing, the purpose of this compliance disclosure was to “cause the company to be more mindful of its violations” because investors would have ready access to the information. (Hr’g. Tr. at 63:22-64:2.) As detailed herein, the Contemners never became “more mindful” of violations and safety reforms.

33. As evidenced by the minutes of the SEPPC meetings, the Board sat idly by during presentations from Chamberlin regarding the escalating violations at the Company’s mines. These escalating violations should be viewed in the context that, whereas Massey Energy has over twenty Resource Groups, and most

Resource Groups have on average four to five mines, from the effective date of the Order in August 2008 until the explosion on April 5, 2010, the Performance Resource Group consisted of just one mine: Upper Big Branch. (Blankenship Dep. 285:13-24, Phillips Dep. 436:5-15.) But there is no indication of any concern from the Board or its SEPPC during presentations showing escalating injuries and violations at Upper Big Branch and other Resource Groups.

34. What little discussion there is of safety compliance in the minutes suggests the Board not only tolerated, but embraced, Blankenship's and the Company's culture of promoting the appearance of safety while ignoring the real need for regulatory compliance. In the minutes for the November 9, 2008 SEPPC meeting, the Chair's summary of Chamberlin's remarks noted that the Mine Safety and Health Administration ("MSHA") had designated ten potential "pattern of violation" sites, but did not mention Massey's responsibility for three of the ten; he instead praised the Company for being on track for another "record year" of low (reported) injury statistics. (Mins. of Regular Meeting of SEPPC of Bd. of Dirs. of Massey Energy Co., Nov. 9, 2009, 1-3.)

35. The Board's inaction with respect to that data is consistent with Phillips' description, in his deposition, of other information showing rampant violations. According to Phillips:

- "The Board took 'no action' to ensure the safety of miners at the Company's Tiller Mine, which has an injury rate more than twice the national average and 40 percent higher than Upper Big Branch and has received hundreds of citations for violations that could pose an imminent threat to workers." (Phillips Dep. 73:18-75:5.)
- The Board knew that federal regulators were seeking to put the Tiller mine on "pattern of violations" status, which could easily shut down the mine, but took "no action" in response. (*Id.* at 75:9-24.)
- The Board took "no action" in response to the 573 MSHA citations and over \$1.6 million in fines issued the Company's Ruby mine in 2009 alone. (*Id.* at 76:22-77:23.)

Additionally, for years, the Board did nothing to address safety violations at the Company's Freedom Mine, which federal regulators ultimately ordered shut down for a "pattern of violations" on November 3, 2010. (Phillips Dep. 136:13-137:1, 137:20-24.) This occurred because MSHA found conditions "so persistent and dangerous that the mine had a high risk level for a fatal accident on any given day." (UBB Report 105 (internal quotation marks omitted).)

36. Instead of becoming more mindful of its safety violations, the Board ignored those violations and used the court-ordered CSR Report to paint a rosy and fundamentally misleading portrait of its safety practices. Not only does

the 2009 CSR Report not disclose the dramatic increase in violations across the Company and red flags of serious conditions at particular mines and Resource Groups, but it also boldly proclaims 2008 Massey Energy's "Safest Year Ever." (CSR Report 4.) The two sentences out of the entire report devoted to the Company's compliance, or lack thereof, with mine-safety law stated that:

"At Massey we have invested millions of dollars to acquire, develop and deploy the technology and equipment required by the Miner Act and other federal and state regulations. In addition, we continue to spend Massey's resources to develop innovative safety technology and programs that exceed regulatory requirements." (*Id.* at 8.)

37. The CSR Report thus creates the false impression that the Company not only fully met, but also exceeded, all applicable legal requirements. No one reading the CSR Report would have an inkling of the numerous serious violations and substantial fines that the Company received during the year. But as the Investigative Panel noted, "[t]here is an obvious disconnect between the lofty safety standards extolled by Blankenship and the reality of conditions inspectors and investigators found in the Upper Big Branch mine. . . . 'As for Blankenship's assertion that the company does not place profits over safety, again, evidence strongly suggests otherwise.'" (UBB Report 95.)

JA000957-62 at ¶¶ 31-37 (references to attachments omitted).

In their May 31, 2011 Petition, Petitioners alleged and provided supporting documentation in the form of deposition transcripts and internal Massey documents that the Respondents did not follow the requirements of the 2008 Order and that the UBB Report confirms the Respondents' violations of the 2008 Order. Specifically, in paragraphs 47-49, the Petition reads as follows:

47. The April 5, 2010 explosion at the Upper Big Branch mine brought to light a pattern of serious and systemic mine safety violations that confirms the Company's failure to implement the safety reforms mandated under the Order.

48. Indeed, the UBB Report details the manner in which Massey Energy's utter disregard for mine-safety laws ultimately claimed the lives of twenty-nine miners. In that regard, the Report set forth the following conclusions:

- "[Massey Energy's] history of inadequate commitment to safety coupled with a window dressing safety program and a practice of spinning information to Massey's advantage works against the

public statement put forth by the company that the April 5, 2010, explosion was a tragedy that could not have been anticipated or prevented.” (UBB Report at 96.)

- “In addition to inattention to basic safety standards, Massey exhibited a corporate mentality that placed the drive to produce above worker safety.” (*Id.* at 99.)
- “Ultimately, the responsibility for the explosion at the Upper Big Branch mine lies with the management of Massey Energy. The company broke faith with its workers by frequently and knowingly violating the law and blatantly disregarding known safety practices while creating a public perception that its operations exceeded industry safety standards.” (*Id.* at 108.)
- “The story of Upper Big Branch is a cautionary tale of hubris. A company that was a towering presence in the Appalachian coalfields operated its mines in a profoundly reckless manner, and 29 coal miners paid with their lives for the corporate risk-taking. The April 5, 2010, explosion was not something that happened out of the blue, an event that could not have been anticipated or prevented. It was, to the contrary, a completely predictable result for a company that ignored basic safety standards and put too much faith in its own mythology.” (*Id.*)

49. Significantly, safety violations have continued at the Company – even after the Upper Big Branch explosion. Less than a month after the tragedy, a MSHA “safety blitz” of another Massey mine resulted in twenty withdrawal orders and five citations. (*Id.* at 105.) During the same time period, MSHA gave the Company notice that it intended to put its Tiller No. 1 mine in Tazewell County, Virginia on a “pattern of violations” status. (David Knowles, *Massey Mine Faces Rare Shutdown for Safety Faults*, AOL News, May 13, 2010, at 1.) This same mine received eighty-two safety citations in the first four months of 2010, alone. (*Id.* at 2.) Thus, even after the Upper Big Branch disaster, there remains “strong evidence that Massey has not changed the manner in which it operates its mines.” (UBB Report 105.)

JA000966-67 at ¶¶ 47-49 (references to attachments omitted).

On June 13, 2011, the Circuit Court issued a Rule to Show Cause and Order Establishing a Scheduling Conference. JA001284. The Rule incorporated the court’s finding that Petitioners’ contempt petition constituted a *prima facie* showing that the Respondents have violated the 2008 Order in multiple respects. *Id.* In light of this showing, the Rule stated that

the court would conduct an October 24, 2011 hearing at which the Respondents would have the opportunity to show cause why the court should not hold them in civil contempt. JA001285.

E. The Alpha-Massey Merger

Alpha Natural Resources, Inc. (“Alpha”) purchased Massey Energy pursuant to a merger that closed on June 1, 2011 (the “Merger”). Massey Energy shareholders received 1.025 shares of Alpha common stock and collectively acquired a forty-six percent (46%) ownership stake in Alpha, which became the surviving company and owner of all of the former Massey Energy mines.

F. Rulings Before the Court

On June 22, 2011, Respondents filed a Joint Motion to Dismiss and to Vacate the Order to Show Cause and an accompanying Motion to Stay further proceedings until their Joint Motions were resolved. JA001287. On June 28, 2011, Alpha filed a Joinder and Motion to Stay Proceeding Pending Resolution of the Motion to Dismiss. JA001514. In the filing, Alpha “writes to apprise the Court” that it has unilaterally attempted to revoke the 2008 Order, particularly the incorporated CGA, by contriving to amend Alpha Appalachia Holdings, Inc.’s articles of incorporation to conflict specifically with the CGA. JA001521.

Both Alpha and Respondents argue that, by virtue of the Merger, the Petitioners no longer own Massey shares and, therefore lack standing to assert claims on the Company’s behalf, and as a result Petitioners’ Petition, dated May 31, 2011, and Manville Trust’s previously filed Motion for a Rule to Show Cause, dated April 16, 2010, should be dismissed.

In their motions, Respondents rely on the Merger as the reason why—even assuming that Respondents intentionally refused to comply with the Circuit Court’s 2008 Order—the Circuit Court cannot, as a matter of law, hold them in civil contempt for their actions. Petitioners

responded that the Circuit Court has all the authority it needed to hold the Respondents in civil contempt and fashion an appropriate remedy to Massey Energy shareholders for compensatory damages.

III. SUMMARY OF ARGUMENT

The Circuit Court committed reversible error in three respects. First, it erroneously concluded that the only proper purpose for a civil contempt proceeding is to compel compliance with an existing court order. Thus, if as here, contemnors disable themselves from future compliance with an order, a previously filed valid civil contempt proceeding takes on a criminal nature warranting dismissal, even if the purpose of that proceeding is to compensate the aggrieved private litigants for the contemnors' violations of the order. Second, the Circuit Court erred in refusing to apply West Virginia law pursuant to a clear choice-of-law provision and without making a finding that one of the recognized exceptions warranted application of another state's law. Lastly, the Circuit Court based its finding that Petitioners lacked standing to prosecute the civil contempt proceeding below on incorrect conclusions as a matter of law, that is, that they had no legally cognizable interest in an order that required Respondents to make disclosures for their benefit.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The criteria set forth in West Virginia Rule of Appellate Procedure 18(a) do not apply to this Appeal, and the case should be set for Rule 19 argument because it involves assignments of error in the application of settled law and narrow issues of law. The Circuit Court's errors with respect to the distinction between civil and criminal contempt and application of choice-of-law provisions are narrow issues of law that also involve error in the application of settled law. Determinations underpinning the Circuit Court's conclusion that Petitioners lacked standing also

involve narrow issues of law—a petitioner’s legally cognizable interest in a court order and the characterization of claims as direct and derivative are both narrow issues.

V. ARGUMENT

A. **The Circuit Court Erred in Concluding that Civil Contempt No Longer Provided a Compensatory Damages Remedy for Previous Violations of a Circuit Court Order.**

In ruling that Respondents cannot be held in civil contempt, the Circuit Court misinterpreted and misapplied West Virginia law to the facts of this case. Purportedly in reliance on *State ex. rel. Robinson v. Michael*, 166 W. Va. 660, 670, 276 S.E.2d 812, 818 (1981), the Circuit Court concluded that the instant proceeding was converted into a criminal matter when the Respondents disabled themselves from their ability to comply with the 2008 Order. Indicating that it was concerned about the Respondents’ entitlement to “the same rights as other criminal defendants . . . [including the right] to be prosecuted by a state’s attorney,” the Circuit Court vacated its 2008 Order and dismissed this 17-month-old proceeding as soon as Respondents disabled themselves from their ability to comply with the 2008 Order. JA001772-73 at ¶ 100 (quoting *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) (internal quotation marks omitted)). The Circuit Court concluded that “[h]ere, 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.” JA001772 at ¶ 100. This is an incorrect statement of the applicable law.

1. Awarding compensatory damages to benefit a private litigant is an appropriate purpose for civil contempt

The Circuit Court vacated the 2008 order and dismissed the contempt proceeding on the grounds that Respondents were no longer in a position to cause the Company to comply with the 2008 Order, relying on *Robinson*, 166 W. Va. at 670, 276 S.E.2d at 818 for the proposition that “contempt is civil where the purpose to be served by imposing a sanction for contempt is to compel compliance.” JA001769 at ¶ 90. This is, however, an incomplete statement of West Virginia’s law of contempt and the holding in that case.

As explained by the *Robinson* case, the question of whether contempt is classified as civil or criminal depends on whether the purpose of the remedy is to benefit a private party by compensating them or coercing the contemner (civil) or punitive or to vindicate the Court’s authority (criminal):

The contempt is civil 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.

Id., 166 W. Va. at 670, 276 S.E.2d at 818 (citing *Gompers v. Bucks Stove and Range*, 221 U.S. 418 (1911); *People v. Court of Oyer & Terminer*, 101 N.Y. 245, 247, 4 N.E. 259 (1886)).

The purpose of a civil contempt proceeding is to preserve or enforce the rights of a private party and to compel obedience to a court order that benefits such party.

Id., 166 W. Va. at 672, 276 S.E.2d at 819.

The purpose of civil contempt is to benefit a private party. The court is, in effect, lending its authority to the private party to vindicate and assure the rights of the party.

Id., 166 W. Va. at 674, 276 S.E.2d at 820 (citing *Court of Oyer & Terminer*, 101 N.Y. 245 at 247, 4 N.E. 259)

The contempt is criminal where the purpose to be served by imposing a sanction for contempt is to punish the contemner for an affront to the dignity or authority of the court, or to preserve or restore order in the court or respect for the court.

Id., 166 W. Va. at 670, 276 S.E.2d at 818.

In explaining the distinction between civil and criminal contempt, the *Robinson* court quoted at length from *People v. Court of Oyer & Terminer*, 101 N.Y. 245, 247, 4 N.E. 259 (1886):

In one class are grouped cases whose occasion is *an injury or wrong done to a party who is a suitor before the court and has established a claim upon its protection; and which result in a money indemnity to the litigant, or a compulsory act or omission enforced for his benefit*. In these causes, the authority of the court is indeed vindicated, but it is after a manner lent to the suitor for his safety and vindication, for his sole benefit. *The authority is exerted in his behalf as a private individual, and the fine imposed is measured by his loss, and goes to him as indemnity, and imprisonment, if ordered, is awarded not as a punishment, but as a means to an end, and that end the benefit of the suitor in some act or omission compelled*, which are essential to his particular rights of person or of property The second class of cases consists of those whose cause and result are a violation of the rights of the public, as represented by their constituted legal tribunals, and a punishment for the wrong is in the interest of public justice, and not in the interest of an individual litigant. In these cases, if a fine is imposed, its maximum is limited by a fixed general law, and not at all by the needs of individuals, and its proceeds, when collected go into the public treasury, and not into the purse of an individual suitor. The fine is punishment, rather than indemnity, and, if imprisonment is added, it is in the interest of public justice, and purely as a penalty, and not at all as a means of securing indemnity to an individual. Necessarily, these contempts in their origin and punishment, partake of crimes, which are violations of public law, and end in the vindication of public justice.

Robinson, 166 W. Va. at 666 n.3, 276 S.E.2d at 816 n.3 (emphasis added).

Accordingly, under *Robinson* and every other West Virginia court to address the issue, “[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 [citing *Gompers*, 221 U.S. 418;

Hendershot v. Hendershot, 164 W. Va. 190, 263 S.E.2d 90 (1980)] *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* [citing *Court of Oyer & Terminer*, 101 N.Y. 245 at 247, 4 N.E. 259; *State ex rel. Floyd v. Watson*, 163 W.Va. 65, 254 S.E.2d 687 (1979)].” *Robinson*, 166 W. Va. at 670, 276 S.E.2d at 818 (emphasis added); *see also Floyd v. Watson*, 163 W. Va. 65, 70-71, 254 S.E.2d 687, 691 (1979). (“[C]ivil contempt proceedings do not seek to punish the defendant, but rather to benefit the complainant: the remedial measures applied are *either* compensatory *or* coercive; compensatory measures benefit the complainant directly, while coercive measures influence the defendant to act in a way that will ultimately benefit the moving party.” (emphasis added)); *United Mine Workers of Am. v. Faerber*, 179 W. Va. 73, 76, 365 S.E.2d 353, 356 (1986) (awarding costs, attorneys’ fees, and compensatory damages after the contemnor had purged himself of contempt by complying with the court’s order).

The Circuit Court acknowledged that “[t]he appropriate sanction in a civil contempt case is an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved by the failure of the contemnor to comply with the order.” JA001770 at ¶ 94 (citing *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)). However, the Circuit Court is mistaken that this sanction must be entirely prospective to “compel compliance with an existing order.” JA001770 at ¶ 93. This is a misstatement of West Virginia law as demonstrated by the quotations above from other cases on which the Circuit Court relies. Purportedly relying on *Robinson*, the Circuit Court erroneously concludes that “where compelling compliance is conceded to be impossible, there is no way in which the purpose of whatever sanction the court might impose could compel compliance.” JA001772 at 100. *Robinson*, in fact, says just the

opposite in discussing appropriate sanctions where the purpose is to compel compliance by the contemner (as opposed to compensate the aggrieved party) by clarifying that “the concern that an alleged contemner may not be able to purge himself of the contempt” alone does not convert the case to criminal contempt. Furthermore, *Robinson* holds that “the contemner should not be able to avoid the coercive purpose of civil contempt by his own misdeeds,” and “[s]uch actions on his part would not alone justify treating a civil contempt as a criminal one.” *Robinson*, 166 W. Va. at 671 n.11, 276 S.E.2d at 818 n.11.

The case of *Faerber*, 365 S.E.2d at 356, provides further clarification. In that case, there was “no reason to apply a self purging penalty, because the respondent has *already purged himself of the contempt* by complying with the court’s order” by drafting and filing certain emergency safety regulations with the court. *Id.* (emphasis added). Rather than dismiss the contempt proceedings, however, the Supreme Court of Appeals ruled that the appropriate relief was “a monetary fine in the nature of compensation or damages to the UMWA because of the respondent’s failure to comply with the order.” *Id.*

Here, as in *Faerber*, a self-purging penalty to coerce the Respondents to comply with the 2008 Order is unnecessary. However, the contempt here is far more egregious than in *Faerber* because unlike *Faerber*, who brought himself into compliance, the Respondents here have never complied with the Circuit Court’s order. Indeed, rather than comply, the Respondents agreed to the Merger, removing themselves as directors of the Company and thereby making their compliance with the 2008 Order impossible. Having made compliance impossible, the Respondents declared that their “inability to comply would provide a complete defense to any civil contempt finding with respect to existing noncompliance.” JA001509 at n.11.

Moreover, *Faerber* demonstrates that “existing noncompliance” is not a requirement for a West Virginia court to find that civil contempt has occurred and respond by fashioning a compensatory damages remedy to the aggrieved party. *Faerber*, 365 S.E.2d at 356. Indeed, the court in *Faerber* did so even after the contemner had brought himself into compliance. *Id.* It therefore follows that the Defendants, who have never complied, are even more deserving of such a result. The Circuit Court attempts to distinguish *Faerber* by noting that “[h]ere, 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.” JA001771-72 at ¶ 98. However, this was no more the reason that the proceeding below was initiated than when the *Faerber* proceeding was commenced, and punitive and compensatory remedies have distinct purposes under the law. *See Perrine v. E.I. du Pont de Nemours and Co.*, 225 W. Va. 482, 566, 694 S.E.2d 815, 900 (2010) (“Punitive damages are not designed to compensate an injured plaintiff for his/her actual loss; such compensation is achieved through compensatory, not punitive, damages.”)). The primary difference between *Faerber* and this case is that *Faerber*’s contemner brought himself into compliance, whereas here, the contemnners are attempting to escape responsibility by fleeing the scene entirely. As *Faerber* acknowledged, “[w]hile this Court always requires that its orders be promptly obeyed, this is even more true when the issue concerns the health or safety of the citizens of West Virginia.” *Id.* at 355.

Lastly, the seminal United States Supreme Court case of *Gompers v. Bucks Stove and Range*, 221 U.S. 418 (1911) relied upon by *Robinson* is instructive and provides practical advice for determining whether a claim is civil or criminal in nature:

The classification, then, depends upon the question as to whether the punishment is punitive, in vindication of the court’s authority, or whether it is remedial, by way of a coercive imprisonment, or a compensatory fine, payable to the

complainant. *Bearing these distinctions in mind, the prayer of the petition is significant and determinative.*

Gompers, 221 U.S. at 448 (emphasis added). Indeed, “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 . . . is one of the hallmarks of a civil contempt fine.” *State ex rel. UMWA Int’l Union v. Maynard*, 176 W. Va. 131, 136, 342 S.E.2d 96, 101 (1985). In both Petitions, the prayer is the same in requesting a rule to show cause, a show cause hearing to determine why Respondents should not be held in contempt of court for violating the 2008 Order, and expedited discovery. JA000005-6, JA000026. In addition to the prayer in the first Petition, the second Petition requested compensatory damages, costs, and attorneys’ fees. JA000969.

B. The Circuit Court Erred Both in Refusing to Apply the Choice-of-Law Provision and Failing Even to Properly Consider it.

The Circuit Court erred in applying Delaware law with respect to the proceeding to enforce the terms of the Stipulation in direct contradiction of its express provisions that it “shall be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of West Virginia, and the rights and obligations of the parties to the Stipulation shall be construed and enforced in accordance with, and governed by, the internal, substantive laws of the State of West Virginia without giving effect to that State’s choice of law principles.” JA001763 at ¶¶ 72-74. In so doing, the Circuit Court erred in refusing to apply the choice-of-law provision in the Stipulation and in neglecting to apply the appropriate standard for analysis.

West Virginia recognizes the presumptive validity of a choice-of-laws provision. *See General Elec. Co. v. Keyser*, 166 W. Va. 456, 462, 275 S.E.2d 289, 293 (1981); *Nickey v. Grittner*, 171 W. Va. 35, 297 S.E.2d 441 (1982). Generally, West Virginia will recognize the

parties' choice-of-law provision "unless the chosen state has no substantial relationship to the parties to the transaction or unless the application of the law would be contrary to the fundamental public policy of the state whose law would apply in the absence of a choice of law provision." *Bryan v. Mass. Mut. Life Ins. Co.*, 178 W.Va. 773, 777, 364 S.E.2d 786, 790 (1987).

Following Respondents' lead, the Circuit Court ignored the presumptive validity of the Stipulation's choice-of-law provision, and then, turned the two noted exceptions on their heads. JA001763-64. The sum total of the Circuit Court's analysis consisted of the following:

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.

JA001763 at ¶ 72. To support this summary analysis, the Circuit Court cited *State ex rel. Elish v. Wilson*, 189 W. Va. 739, 434 S.E.2d 411 (1993) for the proposition that "[t]he local law of the state of incorporation should be applied to determine who can bring a shareholder derivative suit." Syl. Pt. 2, *id.* The Circuit Court further reasoned, "[t]hat 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 become governed by West Virginia law." JA001763 at ¶ 73.

The Circuit Court's analysis in this regard is based on fundamental misconceptions. This is not a situation where a Delaware corporation "entered into *an* agreement governed by West Virginia law." Rather, the Stipulation embodied the settlement of a prior shareholder derivative claim, and as such, represents "an agreement between the company and its shareholders, on the one hand, and the company as embodied in its board, on the other." *In re Tyson Foods, Inc.*, 919 A.2d 563, 599 (Del. Ch. 2007). Such a "settlement, entered into by a

minority shareholder on behalf of the company, should be enforceable by another minority shareholder” since “[t]o object that plaintiffs in the two actions have differing names would reduce the institution of derivative litigation to a rigid formalism.” *Id.*

That Stipulation—*that* agreement between the company and its shareholders, on the one hand, and the company as embodied in its board, on the other—“shall be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of West Virginia, and the rights and obligations of the parties to the Stipulation shall be construed and enforced in accordance with, and governed by, the internal, substantive laws of the State of West Virginia without giving effect to that State’s choice of law principles” by its express terms. JA000052 at ¶ 8.12.

Accordingly, the Stipulation’s West Virginia choice-of-law provision has presumptive validity, and West Virginia law will govern performance, the rights and obligations of the parties, and the Stipulation’s enforcement unless (1) “the chosen state has no substantial relationship to the parties to the transaction” or (2) “the application of the law would be contrary to the fundamental public policy of the state whose law would apply in the absence of a choice of law provision.” *General Elec. Co.*, 166 W. Va. at 462, 275 S.E.2d at 293 (citing Section 187(2) of the Restatement (Second) of Conflict of Laws).

The Circuit Court did not analyze the applicability of either of these two exceptions, and instead, it based its ruling on a more general rule from the *Elish* case, which involved no choice-of-law provision whatsoever, much less a shareholder derivative settlement agreement subject to a very explicit choice of law provision. Contrary to Respondents’ characterization of its holding, *Elish* does not stand for the categorical proposition that the local law of the state of incorporation applies to determine who can bring a shareholder derivative suit. JA001503-04 at

n.7. Rather, the *Elish* court reaches this conclusion after finding merely “no identifiable public policy reason for West Virginia law to be applied over that of Delaware” based on the facts of that case. *Elish*, 189 W. Va. at 745, 434 S.E.2d at 417. Here, however, the public policy reasons underlying West Virginia’s presumption of validity for choice-of-law provisions (see also *Elish* factor number), taken together with its interest in seeing the State of West Virginia’s court order obeyed and the State’s interest in the safety and health of its coal miners at Massey and Alpha mines doubly warrants application of West Virginia law to the Stipulation.

C. The Circuit Court Erred in Concluding that Petitioners Lacked Standing to Prosecute the Civil Contempt Proceeding.

1. Petitioners are the Proper Parties to Prosecute the Civil Contempt Proceeding Under West Virginia Law

Under West Virginia law, a party to the original action seeking to enforce a court order benefitting that party is the appropriate party to prosecute a civil contempt proceeding. *See Faerber*, 179 W. Va. at 76, 365 S.E.2d at 356 (explaining that a “contempt action . . . brought by . . . a party to the original action, to enforce an order of the court which benefited [that party] . . . squarely fits the test . . . as one of civil contempt”). Additionally, the West Virginia Rules of Civil Procedure provide that “[w]hen an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party.” W. Va. R. Civ. P. 71.

Because the Circuit Court has retained jurisdiction,³ it has not only the right, but the duty, to protect the integrity of the 2008 Order with its inherent contempt powers. *See, e.g.*,

³ Pursuant to the 2008 Order, this Court has retained jurisdiction over the parties for purposes of the implementation and enforcement of the Settlement:

Without affecting the finality of this Judgment in any way, his Court hereby retains continuing jurisdiction over: (a) implementation and enforcement of the terms of the

Stotts v. Memphis Fire Dep't., 679 F.2d 541, 557 & n.16 (6th Cir. 1982) (a court “has an independent duty to ensure that the terms of the decree are effectuated” and “to protect the integrity of its decree,” especially upon motion of a party), *rev'd. on other grounds sub nom., Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 81 L. Ed. 2d 483, 104 S. Ct. 2576 (1984). Moreover, the Circuit Court’s continuing duty in this regard exists irrespective of whether the remedy is “retrospective” or “prospective.” *Id.* (“If a violation had been established, the remedy would have embodied retrospective as well as prospective relief.”) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S. Ct. 2362, 2372, 45 L. Ed. 2d 280 (1974)). Indeed, “[a] court must be able to protect the integrity of a stipulation of dismissal that is functionally equivalent to a consent order or consent decree when it has retained jurisdiction and a party alleges that another party is not obeying the terms of the agreement.” *Washington Hosp. v. White*, 889 F.2d 1294 (3d Cir. 1989) (vacating district court’s denial of third-party beneficiary’s motion to enforce court-ordered stipulation and remanding to resolve ambiguity of its terms).

In this proceeding, Petitioner Manville Trust was a *named* party in the underlying action for whose benefit the Order was entered, and the other Petitioners—CalSTRS and Amalgamated Bank—as shareholders of Massey Energy were parties for whose benefit the Order was entered. Indeed, Petitioners are bound by and intended beneficiaries of the 2008 Order, and therefore have the requisite “legally cognizable” interest that the United States Supreme Court and the

Settlement and this Judgment; and (b) the Settling Parties for the purposes of implementing and enforcing the Stipulation and Judgment.

JA000033 at ¶ 12.

West Virginia Supreme Court of Appeals both have repeatedly found sufficient to confer standing to seek to enforce a valid court order or prosecute a claim of civil contempt. *See Salazar v. Buono*, 130 S. Ct. 1803, 1814-15 (2010) (holding that “[a] party that obtains a judgment in its favor acquires a ‘judicially cognizable’ interest in ensuring compliance with that judgment” and [h]aving obtained a final judgment granting relief on his claims, [the plaintiff] had standing to seek its vindication.”); *see also Allen v. Wright*, 468 U.S. 737, 763, 104 S. Ct. 3315 (1984) (ruling that plaintiffs’ right to enforce a desegregation decree to which they were parties is “a personal interest, created by law, in having the State refrain from taking specific actions”); *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 731 F. Supp.2d 15, 20 (D.D.C. 2010) (“Here, the plaintiffs obtained a judgment in their favor . . . and are seeking judicial review challenging whether the Service complied with the remand order. Therefore, plaintiffs have demonstrated constitutional standing.”).

In its Order dismissing this proceeding, the Circuit Court mistakenly conflated Petitioners’ standing to bring the original derivative action leading to the 2008 Order with Petitioners’ standing to enforce the 2008 Order for the benefit of the Massey Energy shareholders bound by the 2008 Order. *See* JA000031 at ¶ 3. The resulting 2008 Order is a final, nonreviewable order that Respondents cannot now challenge. Because Manville Trust was a party to the action and was a Massey Energy shareholder for whose benefit the 2008 Order was entered, Manville Trust has standing to seek its vindication. *Buono*, 130 S. Ct. at 1814-15; *Faerber*, 179 W. Va. at 76, 365 S.E.2d at 356.

Because the 2008 Order was entered in favor of Massey Energy shareholders that are still bound by its terms, Petitioners CalSTRS and Amalgamated Bank likewise have standing to seek its enforcement, together with Manville Trust. W. Va. R. Civ. P. 71 (“When an order is made

in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party.”) As the resolution of an underlying shareholder derivative action, the 2008 Order was made in favor of Petitioner CalSTRS, Amalgamated Bank, Manville Trust, and other Massey Energy shareholders and is therefore enforceable by them. *In re Tyson Foods, Inc.*, 919 A.2d 563, 599 (Del. Ch. 2007) (recognizing that a prior shareholder derivative settlement, “although embodied in a court order, represented an agreement between the company and its shareholders, on the one hand, and the company as embodied in its board, on the other” and concluding that a “settlement, entered into by a minority shareholder on behalf of the company, should be enforceable by another minority shareholder” since “[t]o object that plaintiffs in the two actions have differing names would reduce the institution of derivative litigation to a rigid formalism.”).

Moreover, at the heart of the 2008 Order is a reporting and disclosure obligation from Respondents to Massey Energy’s shareholders. The ultimate purpose of Massey’s company-wide mine-safety compliance reporting system, which was fundamental to the 2008 Order, is that obligation for the Massey Board to disclose the Company’s mine-safety compliance to Massey’s shareholders. JA000011 (citing JA000063-64 at ¶ 5). As such, the Board’s disclosure obligation under the 2008 Order is a duty owed *directly* to shareholders, and the Board’s failure to make this report has been a focus of the instant civil contempt proceeding since it was initiated on April 16, 2010. Accordingly, the gravamen of these claims are direct.

The Circuit Court’s reliance on *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004), in concluding that Petitioners’ claim is *only* derivative is misplaced. Indeed, although the Circuit Court recognized that Petitioners “are correct that a plaintiff may assert both direct and derivative claims in the same case,” it nonetheless dismissed the

proceeding for the reason that “the issue before the Court is . . . whether Plaintiffs have established a cognizable basis upon which they could proceed directly and whether they have, in fact, asserted a direct claim.” JA001762-63.

The Circuit Court’s conclusion that Petitioners have no cognizable basis upon which they could proceed directly is simply wrong. Claims against officers and directors for the failure to disclose information to shareholders “when they had a duty to disclose it and made other misleading or fraudulent statements, in violation of their contractual and fiduciary duties” are generally direct claims. *Albert v. Alex. Brown Mgmt. Services, Inc.*, CIV.A. 762-N, 2005 WL 2130607, at *12 (Del. Ch. Aug. 26, 2005). In such cases, the best remedy is usually to force the disclosure of the information; however, where the passage of time since the alleged wrongdoing would make that remedy inadequate “the court may find it appropriate to grant monetary damages” directly to the shareholders. *Id.* at *13.

Additionally, courts have provided for an exception to the general rule that a shareholder derivative recovery is paid to the aggrieved corporation in circumstances similar to this case. *See* Shareholder Deriv. Actions L. & Prac. § 7:6 (2010) (explaining that “[i]n some cases, courts have been willing to depart from the conventional rule that only the corporation may benefit from a judgment in a derivative suit and to order instead that damages be paid directly to certain of the corporation’s shareholders” and discussing the various scenarios where courts have found such exception appropriate). The West Virginia Supreme Court of Appeals has recognized that such an exception can be warranted based on the particular facts and circumstances in some cases. *See, e.g., Chounis v. Laing*, 125 W. Va. 275, 23 S.E.2d 628, 640 (1942). As succinctly summarized in the Court’s Syllabus, the facts of *Chounis v. Laing* represented one such scenario

where the departure from the usual rule was appropriate, and the court afforded shareholders with a direct recovery:

Ordinarily in a derivative suit instituted by stockholder in behalf of himself and other stockholders similarly situated, recovery, if any, should be awarded to the corporation.

Where more than 95 per cent of stockholders had consented to settlement making partial restitution for illegal diversion of corporate assets by officers and directors of corporation, a personal recovery by [a] stockholder who did not consent to such settlement was justified notwithstanding general rule requiring that such award be in favor of the corporation.

A stockholder, however small his holdings, is entitled to relief against officers and directors of corporation for breach of their trust in such capacities upon a proper showing of his right to such relief.

Chounis, 23 S.E.2d at 629-30. Thus, Petitioners are entitled to recover directly even for derivative claims upon a proper showing and, accordingly, the Circuit Court's order should be reversed and this case remanded for further proceedings. Even if the Court were to entertain Respondents' derivative standing argument, the current record before the Court would not enable it to determine if an exception should apply that would afford Petitioners a direct remedy under West Virginia law.

2. Even if Delaware law were to apply, and only derivative claims and remedies were at issue, dismissal is not warranted.

Even Respondents will acknowledge that there is an exception to the general rule of post-merger shareholder-derivative standing, by which Petitioners retain standing to pursue claims following a merger if Petitioners "are able to prove *on a full record* that *the Merger* with Alpha was undertaken 'merely' to deprive the Massey stockholders of their standing to sue derivatively." *In re Massey Deriv. Litig. & Class Action Litig.*, 2011 WL 2176479, *30 (Del. Ch. May 31, 2011) (emphasis added). Nonetheless, Respondents asked the Circuit Court to

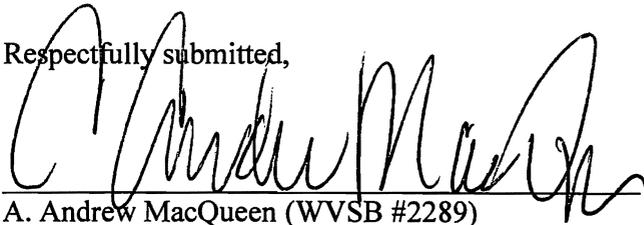
dismiss this case before such record could be established. The Circuit Court granted Respondents' request without affording Petitioners an opportunity to submit facts to demonstrate their standing to pursue claims on behalf of Massey Energy based on its (erroneous) rulings that Delaware law would apply to this case and that only derivative claims were at issue. In the event that the Circuit Court's legal rulings are upheld in these respects, Petitioners respectfully request that the case be remanded with instructions to permit the Petitioners to submit proof of their standing to assert the derivative claims post-merger based on a full record.

VI. CONCLUSION

For the above reasons, the Circuit Court's decision should be reversed.

Dated March 30, 2012

Respectfully submitted,



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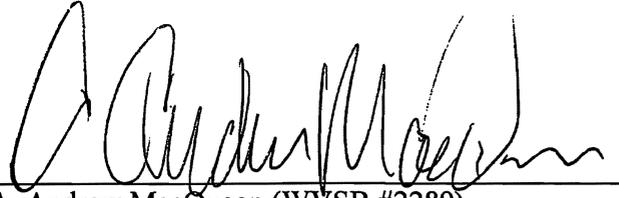
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