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OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1488

MANVILLE PERSONAL INJURY SETTLEMENT TRUST; ET AL.,

PETITIONERS BELOW/PETITIONERS;

v.

DON L. BLANKENSHIP; ET AL.,

CONTEMNERS BELOW/RESPONDENTS;

and

MASSEY ENERGY COMPANY N/K/A ALPHA APPALACHIA HOLDINGS, INC., A DELAWARE CORPORATION,

NOMINAL DEFENDANT BELOW/ RESPONDENT.

BRIEF FOR RESPONDENT MASSEY ENERGY COMPANY

On Appeal from the Circuit
Court of Kanawha County
Honorable James C. Stucky
Civil Action No. -07-C-1333

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[1] Per West Virginia Rule of Appellate Procedure 3(a), Mr. Morag is designated counsel of record.

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Nominal Defendant Below/Respondent Massey Energy Company, which is now know as Alpha Appalachia Holdings, Inc. ("Massey" or "Alpha Appalachia"), respectfully submits this brief in response to the opening brief of Petitioners Manville Personal Injury Settlement Trust ("Manville"), Amalgamated Bank, as trustee for the Longview Collective Investment Funds, and California State Teachers' Retirement System (collectively "Petitioners") in support of their appeal from the September 29, 2011 Order Granting the Individual Defendants' Joint Motion to Dismiss Plaintiffs' Petition for Civil Contempt and to Vacate the 2008 Order As Against Them of the Circuit Court of Kanawha County which dismissed the contempt proceeding below ("Circuit Court's Order").

Alpha Appalachia joins in the brief of the Individual Respondents, including its specific responses to each assignment of error.[2] Alpha Appalachia writes separately in order to correct certain inaccuracies and omissions in Petitioners' brief with respect to the transaction between Alpha Natural Resources, Inc. ("Alpha") and Massey, as well as the actions taken following the merger by Alpha as the sole shareholder of Alpha Appalachia, which rendered the Corporate Governance Agreement ("CGA") incorporated as a part of the Circuit Court's 2008 Agreed Order and Final Judgment ("2008 Order") no longer operative.

STATEMENT OF THE CASE

In this appeal, Petitioners challenge the Circuit Court's Order dismissing Petitioners' contempt proceeding (the "Contempt Proceeding"). The Circuit Court concluded that the Contempt Proceeding, initiated derivatively on behalf of Massey to compel Individual Respondents' compliance with the 2008 Order effectuating the parties' settlement of an

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[2] The Individual Respondents are: Respondents 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.

underlying derivative action originally brought in 2007, should be dismissed, because, among other reasons, the Individual Respondents are no longer capable of complying with the 2008 Order. Having resigned and been removed as directors of Massey upon its merger with a subsidiary of Alpha, no Individual Respondent has been – since June 1, 2011 – in any position to direct what Massey (now Alpha Appalachia) does on any issue, thereby rendering them incapable of causing Massey to comply with the CGA incorporated into and approved by the 2008 Order. The Circuit Court's dismissal was also based on its determination that following the merger, the CGA became inoperative after Alpha amended Alpha Appalachia's Certificate of Incorporation (the "Charter Amendment") in order to integrate Massey's former operations and mines into Alpha's "Running Right" safety and environmental program, which governs Alpha's various existing operations and mines. In reaching its decision, the Circuit Court properly considered the circumstances that gave rise to the 2008 Order, and more importantly, the events following the entry of the 2008 Order that rendered future compliance with the 2008 Order impossible, rendering dismissal of the Contempt Proceeding appropriate.

On July 2, 2007, Manville commenced the underlying shareholder derivative litigation on behalf of and for the benefit of Massey, alleging that Massey's Board of Directors and certain of its officers breached their fiduciary duties by failing to cause Massey to comply with mine safety and environmental regulations and laws.

On May 20, 2008, the parties to the underlying litigation settled the derivative claims brought by Manville for the benefit of Massey by entering into a Stipulation of Settlement that included the CGA. (JA000034-69.) On June 30, 2008, the Circuit Court approved the settlement, entering the 2008 Order, which incorporated the CGA, and dismissed Manville's derivative claims with prejudice. (JA000030-33.)

The CGA includes provisions applicable to a publicly-traded company, as Massey was when the 2008 Order was entered, including: (a) maintaining a Safety, Environmental and Public Policy Committee comprised of at least three directors, including at least two independent directors from Massey's Board of Directors, and (b) annually publishing to all Massey shareholders a Corporate Social Responsibility report. (JA000062-69.) The CGA stated that it would continue in effect for five years "provided, however, that *any proposed guideline can be altered or removed if* the Board, in good faith and upon the advice of counsel, determines that *such guideline . . . conflicts with any amendment to the Company's Certificate of Incorporation* approved by the Company's shareholders." (JA000062) (emphasis added).

On April 15, 2010, after an explosion at Massey's Upper Big Branch mine, Manville filed a new shareholder derivative suit on behalf of and for the benefit of Massey, alleging that certain Massey Board members and officers had violated their fiduciary duties by consciously failing to ensure that Massey abided by certain mine safety laws and by failing to comply with the Circuit Court's 2008 Order. That case remains before Judge King subject to a pending motion to dismiss. The next day, Manville also initiated the underlying Contempt Proceeding against the Individual Respondents by filing a Motion for an Order to Show Cause why they should not be held in civil contempt for failing to comply with the Circuit Court's 2008 Order. At that time, Massey was a publicly-traded company with over 100 million outstanding shares of common stock beneficially owned by a diverse group of shareholders, and whose nine-member Board of Directors was elected by those shareholders.

On June 1, 2011, Massey's shareholders voted overwhelmingly to approve a merger in which Massey became a wholly-owned subsidiary of Alpha. The merger closed that day and Massey is now known as Alpha Appalachia. As of the closing of the merger, Massey's then-

current Board, including Individual Respondents who were Massey directors, was removed pursuant to the terms of the merger agreement (JA001405 § 1.06), and was replaced by a Board of Directors elected by Alpha, Massey's sole shareholder after the merger. The post-merger Board consists of a sole director, Kevin S. Crutchfield, Alpha's Chief Executive Officer, who is not a party to the underlying proceeding and was never an officer, director or employee of Massey. (JA001404.)

Following the merger, Alpha determined that it would be in the best interests of Alpha Appalachia to ensure that Massey's operations and mines were operated in a manner that was integrated and consistent with how Alpha operates and manages its other operations. To that end, on June 27, 2011, Alpha, as Alpha Appalachia's sole shareholder, approved the Charter Amendment which resolved that Alpha Appalachia's safety, environmental or public policy practices, policies and guidelines thereafter be consistent with and modeled after the programs that governed Alpha's mining operations. (JA001539-41.) The Charter Amendment was filed with and accepted by the Secretary of State of the State of Delaware on June 28, 2011. (JA001543-45.) In conjunction with the Charter Amendment and consistent with the express provisions of the CGA, Alpha Appalachia's sole Director, after receiving the advice of counsel, determined in good faith that the corporate governance policies previously implemented pursuant to the CGA conflicted with the Charter Amendment. (JA001547-53.) Accordingly, the conflicting CGA policies, which comprise the entirety of the CGA, were thus rendered inoperative and removed – consistent the express provisions of the CGA itself governing permitted modifications to the agreement. Id.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a), oral argument is not necessary in this matter. The case is appropriate for a memorandum decision.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DISMISSED THE CONTEMPT PROCEEDING BASED ON ITS PROPER CONCLUSION THAT INDIVIDUAL RESPONDENTS' COMPLIANCE WITH THE 2008 ORDER WAS NO LONGER POSSIBLE AND, IN ANY EVENT, MOOT.

The Circuit Court correctly concluded that the civil Contempt Proceeding should be dismissed because future compliance with the 2008 Order by the Individual Respondents—the only proper purpose to be served by an order of civil contempt—was no longer possible after (i) the Individual Respondents' resignation and removal at the time of the merger from any position at Massey in which they would have the ability to cause Massey to continue to carry out the provisions of the CGA; and (ii) Alpha and Alpha Appalachia supplanted the guidelines of the CGA in favor of Alpha's "Running Right" program under which all of Alpha's mining operations, including Massey's former mines, are now being operated.

In challenging the Circuit Court's Order, Petitioners first assert that the "[Individual] Respondents disabled themselves from their ability to comply with the 2008 Order." Pet. Br. at 17. To the extent that Petitioners are suggesting that Individual Respondents voted in favor of the merger so that they would no longer be Massey directors and thereafter not be in a position to cause Massey to comply with the 2008 Order, and further that such motivation would provide grounds to pursue a proceeding for civil contempt, Petitioners' insinuation fails. First, the New Petition nowhere alleges that the merger transaction was pursued so that Individual Respondents would be disabled from complying with the 2008 Order. (JA000945-47). Second, Massey's many thousands of shareholders (the same parties in whose name Petitioners purport to pursue

claims against the Individual Respondents) overwhelmingly approved the $7 billion merger – a transaction that provided those shareholders with a considerable stock and cash premium for their Massey shares. Therefore, as the Circuit Court correctly concluded, Petitioners' continued efforts to compel the Individual Respondents' future compliance with 2008 Order via the contempt proceeding would have been inappropriate. (JA001768-73.)[3]

Petitioners next assert that Alpha "has unilaterally attempted to revoke the 2008 Order, particularly the incorporated CGA, by contriving to amend Alpha Appalachia['s] articles of incorporation to conflict specifically with the CGA." Pet. Br. at 15. Petitioners are mistaken. Alpha has not "unilaterally attempted to revoke the 2008 Order," which approved the CGA, but rather acted consistently with express terms of the CGA. Petitioners concede—as they must—that by its terms, the CGA "'shall each remain in effect for a period of five (5) years, ***subject to modifications permitted therein***.'" Pet. Br. at 2 (quoting the CGA, JA000062) (emphasis added). Petitioners fail to note, however, that the CGA to which Manville agreed expressly provides that "***any proposed guideline [in the CGA] 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 amendment to the Company's Certificate of Incorporation approved by the Company's shareholders***." (JA000062) (emphasis added). Thus, the CGA by its terms contemplated the possibility of changed circumstances and provided a mechanism for "permitted" "modifications" upon the conditions set forth in the agreement Manville signed and the Circuit Court approved in the 2008 Order.

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[3] To the extent Petitioners imply that the Individual Respondents influenced Alpha to approve the Charter Amendment and Alpha Appalachia's judgment to remove the provisions of the CGA, there is no basis for such an allegation. It is undisputed that having been removed at the time of the merger and resigned from Massey's Board, no Individual Respondent was in a position to influence the decisions taken by Alpha and Alpha Appalachia following the merger to adopt the Charter Amendment and to make the judgment that the guidelines of the CGA resulted in a conflict with Alpha's "Running Right" program and thus rendered inoperative in light of such conflict.

The merger of Massey with Alpha presented just such a change in circumstance. At the time the CGA was signed as a part of the settlement of the underlying 2007 shareholder derivative action, Massey was an independent publicly-traded company with over 100 million outstanding shares of common stock beneficially owned by a diverse group of shareholders, and whose Board of Directors was elected by those shareholders. However, upon consummation of the merger, Massey (now Alpha Appalachia) became a wholly-owned subsidiary of Alpha with one shareholder and one director. Massey's former mining operations are now integrated with and operated as part of Alpha's numerous other mining operations.

To facilitate and effectuate the post-merger integration of Massey and Alpha, in particular to conform Massey's safety, environmental and public policy practices and guidelines to Alpha's "Running Right" mine safety regime and program, Alpha, as Massey's sole shareholder, approved the Charter Amendment providing that the former Massey mining operations be managed consistent with Alpha's mines. (JA001539-41.) The CGA defers to a duly enacted amendment of the Alpha Appalachia Certificate of Incorporation, determined in good faith and with the advice of counsel to be in conflict with the CGA guidelines, as occurred here. The CGA's provisions and guidelines have thus been duly "removed"—precisely as permitted by the CGA—in favor of Alpha's "Running Right" safety methodology and programs.

Finally, contrary to Petitioner's allegation that the Charter Amendment was an after-the-fact contrivance, it has always been Alpha's expressed intent that, after the merger, Alpha would operate the newly-acquired Massey mines consistent with Alpha's established safety and environmental policies and practices. Alpha's CEO, Kevin S. Crutchfield (who is now also Alpha Appalachia's sole Director) testified on this subject ***before*** the merger closed at a deposition attended by Petitioners' counsel as follows:

> Q: Was there a need to implement [Alpha's] running right safety program in the Massey mines?
>
> A: It doesn't really matter whether it's a need or not. That's what we're going to do, that's how we run the company. It's just part of our template, it's part of our operating model. So we will implement it starting the day of closing [of the merger]. . . . I believe that we will implement our running right methodology and system across all Massey mines at closing, and I believe that the safety performance of those mines will improve as a direct consequence of that.

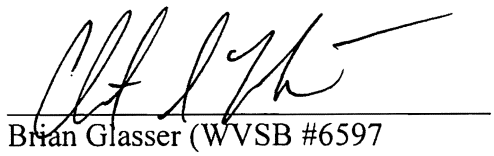
(JA001529-30.) That Alpha carried through on its intent, publicly announced before the merger, to integrate Alpha's and Massey's operations and mines under Alpha's "Running Right" program defeats Petitioners' unsupported conspiracy theory that Alpha's actions were undertaken to relieve Individual Respondents—none of whom remain directors of Alpha Appalachia—of potential and speculative liability for civil contempt.

Having acknowledged that Individual Respondents are no longer in any position to direct safety, environmental or public policy practices at Alpha Appalachia, Pet. Br. at 17, Petitioners cannot establish that the Circuit Court erred in dismissing the civil Contempt Proceeding. At the time the Circuit Court considered the issue, a proceeding to compel compliance with the CGA served no purpose because the Individual Respondents were no longer in a position to comply with the 2008 Order and the CGA itself had been rendered inoperative in accordance with its own terms, making future compliance with the 2008 Order by the Individual Respondents impossible and moot in any event.

CONCLUSION

For these reasons and the reasons set forth in the Individual Respondents' brief, the Circuit Court's Order should be affirmed.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **BRIEF FOR RESPONDENT MASSEY ENERGY COMPANY** was served upon Counsel, via US Mail as set forth below, this 15th day of May, 2012:

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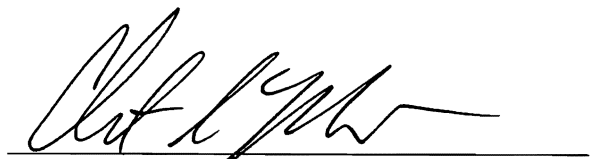

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