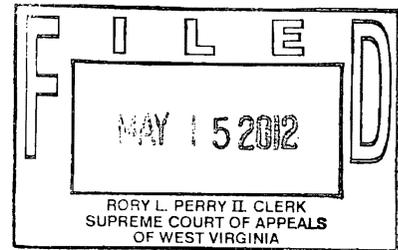


No. 11-1488



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Supreme Court of Appeals  
of West Virginia

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MANVILLE PERSONAL INJURY SETTLEMENT TRUST; AMALGAMATED BANK, as trustee for the  
LONGVIEW COLLECTIVE INVESTMENT FUNDS; and CALIFORNIA STATE TEACHERS' RETIREMENT  
SYSTEM,

*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,

*Respondents.*

On Appeal from the Circuit Court of Kanawha County No. 07-C-1333

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**BRIEF FOR RESPONDENTS**

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Petitioners, Manville Personal Injury Settlement Trust (“Manville”), the California State Teachers’ Retirement System (“CalSTRS”) and Amalgamated Bank, as trustee for the Longview Collective Investment Funds (collectively, “Petitioners”), appeal the September 29, 2011 Order of the Circuit Court of Kanawha County (the “Circuit Court”) dismissing the contempt proceeding initiated against 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<sup>1</sup> and Richard R. Grinnan (collectively, “Respondents”) and vacating the 2008 Order as against them (the “Circuit Court’s Order”). Respondents, by counsel, respectfully request that the Court affirm the Circuit Court’s Order.

### **STATEMENT OF THE CASE**

Petitioners, former shareholders of Massey Energy Company, now known as Alpha Appalachia Holdings, Inc. (“Alpha Appalachia”, “Massey” or the “Company”) appeal the order of the Circuit Court dismissing their contempt petitions and vacating the Circuit Court’s June 30, 2008 Order implementing the terms of the settlement of the underlying 2007 derivative action (the “2008 Order”). Although Petitioners spend almost one-third of their brief (“Petitioners’ Brief” or “Pts. Br.”) on the tragic explosion at Massey subsidiary Performance Coal Company’s Upper Big Branch mine (“UBB”) and Respondents’ purported noncompliance with the 2008 Order, these are not the issues before the Court in the instant proceeding.<sup>2</sup>

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<sup>1</sup> None of the undersigned counsel represents Defendant Elizabeth S. Chamberlin, and she has never appeared in this matter.

<sup>2</sup> To the extent Petitioners seek to invoke the specter that their contempt action is the only way to hold Respondents responsible for the UBB explosion, they are being disingenuous. Presently, throughout the country, there are numerous proceedings and investigations seeking to allocate responsibility, assign blame and compensate the victims and families of the tragic UBB

Rather, this proceeding seeks to answer two limited questions: Whether the Circuit Court erred in deciding that (1) Petitioners lost their standing to seek contempt against Respondents when they voluntarily relinquished their Massey shares in exchange for a substantial premium offered by the merger between Massey and Alpha Natural Resources, Inc. (“Alpha”); and (2) the Order upon which Petitioners’ civil contempt petitions are based must be vacated as against Respondents because Respondents, concededly, are no longer in a position to comply or to cause Massey to comply with the 2008 Order.<sup>3</sup> The Circuit Court was correct in its rulings. In arguing otherwise, Petitioners raise nothing new. Instead, Petitioners rehash arguments appropriately rejected by the Circuit Court, relying on cases that the court correctly found inapposite.

Pursuant to the express terms of the stipulation settling the underlying derivative action, which was agreed to and executed by Manville derivatively on behalf of Massey, Petitioners had only derivative standing, *i.e.*, standing to act on behalf of Massey, to enforce the

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explosion, which include (1) charges brought against former Massey employees by the U.S. Attorney’s Office for the Southern District of West Virginia (“U.S. Attorney”) and the grand jury; (2) Alpha’s payment of approximately \$209 million dollars pursuant to a non-prosecution agreement with the U.S. Department of Justice and the U.S. Attorney in connection with the UBB explosion, composed of approximately \$34.8 million in penalties to the U.S. Mine Safety and Health Administration, \$46.5 million in restitution to the families and/or victims of the UBB explosion, at least \$80 million in mine-safety improvements at all of Alpha’s underground mines (including former Massey-owned mines) and committing \$48 million to a charitable organization devoted to advancing efforts to enhance mine safety and health; (3) wrongful death actions against Massey and certain of its former directors and officers, including certain of the Respondents herein; and (4) potential suit by Alpha, which, by virtue of the Merger, now owns all derivative claims brought on behalf of Massey and thus has the ability to sue those responsible, if anyone, for damages to Massey.

<sup>3</sup> Because the Circuit Court’s Order should be affirmed for the reasons stated in this brief, Respondents do not respond to Petitioners’ allegations of noncompliance at this time. Despite Petitioners’ aggressive assertions, no finding has ever been made that any of the Respondents violated the 2008 Order, and no finding of contempt has ever been made. Respondents reserve their right to respond to the substantive allegations in the event the Court reverses the Circuit Court’s Order.

2008 Order. Even if Petitioners had a cognizable basis for direct standing that they did not release, they have failed to plead a direct claim.

Massey is a Delaware corporation; thus, any right of Petitioners to bring suit on behalf of Massey is governed by Delaware law. *State ex rel. Elish v. Wilson*, 189 W. Va. 739, 744-45, 434 S.E.2d 411 (1993). Under well-settled Delaware law, to have standing to maintain a derivative action, a plaintiff must maintain shareholder status throughout the entirety of the litigation. By virtue of the merger between Massey and Alpha, effective June 1, 2011, Petitioners ceased to own shares in the Company, and therefore, lost standing to maintain their contempt action.

Moreover, Petitioners' claims against Respondents for civil contempt fail because West Virginia law is clear that the purpose of civil contempt is to compel compliance with an operative court order, which Petitioners concede is impossible here. Respondents, post-merger, hold no position within the Company. As of the effective date of the merger, Massey's board was replaced by a board of directors elected by Alpha, as Massey's sole shareholder. The Massey Board now consists of a sole director who is not a party to this proceeding. Because compelling compliance is concededly impossible, any contempt proceeding would be criminal in nature, which Petitioners, as private parties, may not initiate.

As more fully set forth in Alpha's submission to the Court, Petitioners' civil contempt claims also fail because the 2008 Order was properly vacated as against Respondents. Alpha's amendment to Alpha Appalachia's Certificate of Incorporation rendered the Corporate Governance Agreement ("CGA") that became part of the 2008 Order inoperative. The CGA expressly permits the alteration or removal of "any [CGA] guideline . . . 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”. (JA000062.) Alpha, as the sole shareholder of Alpha Appalachia, and Alpha Appalachia’s board of directors (not including any of the former Massey directors or Respondents here) with the advice of counsel, complied with the removal procedure expressly provided for in the CGA to remove the provisions of the CGA and supplant them with Alpha’s own safety and environmental guidelines—the same guidelines that govern all of Alpha’s other subsidiaries. (*Id.*)

Accordingly, the Circuit Court did not err in dismissing Petitioners’ contempt petitions and vacating the 2008 Order.

### **NATURE AND STAGE OF PROCEEDINGS**

#### **I. BACKGROUND.**

On July 2, 2007, Manville commenced the underlying shareholder derivative litigation, filing a complaint on behalf of Massey alleging 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. On May 20, 2008, the parties executed a Stipulation of Settlement (the “Stipulation”), which provided for a broad 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 certain corporate governance changes. (JA000034-80.) Manville executed the Stipulation “derivatively on behalf of Massey”. (JA000040.) The agreed-upon corporate governance changes were set forth in the heavily negotiated Corporate Government Agreement (“CGA”), which was attached as Exhibit 2 to the Stipulation. (JA000061-69.)

The Stipulation provided for the release of all claims except those permitting the “Settling Parties to enforce the terms of the Stipulation or Settlement”. (JA000043 § 1.9.) The term “Settling Parties” is defined as “each of the Defendants and the Plaintiff [Manville] derivatively on behalf of Massey”. (JA000043 § 1.12.) The Stipulation also provides that “no right of any third-party beneficiary shall arise from this Stipulation”. (JA000052 § 8.10.) On June 30, 2008, the Circuit Court, per Judge Irene Berger, approved the Stipulation and dismissed Manville’s derivative claims with prejudice (together, the 2008 Order, the Stipulation and the CGA being the “Settlement”). (JA000030-33.)

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

On April 5, 2010, an explosion occurred at Massey subsidiary Performance Coal Company’s Upper Big Branch mine. Ten days later, on April 15, 2010, Manville filed a Verified Shareholder Derivative Complaint in the Circuit Court before the Honorable Charles King, Jr. (Case No. 07-C-715). In that action, Manville, also derivatively on behalf of Massey, alleged that certain former and then current members of the Board had violated their fiduciary duties by, among other things, failing to ensure that the Company complied with certain worker safety laws and failing to comply with the terms of the 2008 Order.<sup>4</sup> On April 16, 2010, in the Circuit Court of Kanawha County before the Honorable James C. Stucky, Manville filed a 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 (the “Old Petition”), alleging that certain of the Respondents (the then-members of the Board) were in

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<sup>4</sup> Beginning on April 23, 2010, four shareholder derivative suits alleging substantially similar claims to those pending before Judge King were filed in the Chancery Court of the State of Delaware. These cases were ultimately consolidated under *In re Massey Energy Company Derivative Litigation*, Case No. 5433-CC, which was later restyled as *In re Massey Energy Company Derivative and Class Action Litigation*, Case No. 5430-VCS (the “Delaware Case”).

violation of the 2008 Order because the Company's 2009 Corporate Social Responsibility Report "contains 'no report on the Company's . . . worker safety compliance'". (JA000012.) Manville styled its original motion for a rule to show cause as part of the underlying "Derivative Action". (JA000008.) Manville captioned Massey as a "[n]ominal [d]efendant". (*Id.*) In the first sentence of the Old Petition, Manville stated that it was seeking contempt "on behalf of Massey". (*Id.*)

On April 22, 2010, the Circuit Court entered the *ex parte* Rule to Show Cause Establishing a Scheduling Conference, finding and concluding that Manville had made a *prima facie* showing that the Directors had violated the 2008 Order and thus, the court would "conduct a hearing at which the Directors shall have an opportunity to show cause why they should not be held in civil contempt". (JA000184-85.) On May 3, 2010, the Directors filed a Motion to Vacate the April 22, 2010 Order, contesting the *ex parte* presentation of Manville's motion and arguing that it was procedurally improper for the Circuit Court to make a *prima facie* finding of civil contempt without Respondents having had notice or an opportunity to be heard. (JA000186-99.) By order dated July 29, 2010, the Directors' motion was denied.<sup>5</sup> (JAA000536-38.)

On June 9, 2010, Manville, joined by Petitioners CalSTRS and Amalgamated Bank, as trustee for the Longview Collective Investment Funds, amended its derivative

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<sup>5</sup> The Circuit Court's *prima facie* finding meant only that the Court had determined that a violation might have occurred based only on Manville's papers, taking Manville's allegations as true. (JA000263-65 (Pl.'s Resp. to Alleged Contemnors' Joint Mot. to Vacate); *see also* JA000276-78 (Tr. of July 13, 2010 Hr'g on Manville's Rule to Show Cause, Manville's Mot. to Compel and Defs.' Joint Mot. to Vacate).) The Circuit Court made no finding that a violation had occurred and, of course, would hold a hearing at which Respondents would have an opportunity to rebut Petitioners' allegations. (JA000330-32; *see also* JA001609-71 (Tr. of July 21, 2011 Hr'g on Defs.' Joint Mot. to Dismiss Plaintiffs' Pet. for Civil Contempt and To Vacate the 2008 Order as Against Them).)

complaint pending before Judge King, adding allegations relating to the Board's purported breaches of fiduciary duty.<sup>6</sup> On August 11, 2010, Manville moved to consolidate the action pending before Judge King with the contempt proceeding before Judge Stucky. (JA000839-50.) In its Motion to Consolidate, Manville stated that the contempt proceeding was brought "derivatively on behalf of and for the benefit of Massey Energy Company". (JA000840; *see also* JA000846.) By order dated December 20, 2010, Manville's motion was denied. (JA000929-31.)

### **III. THE MERGER BETWEEN MASSEY AND ALPHA.**

On January 28, 2011, Massey, Alpha and Mountain Merger Sub, Inc. ("Merger Sub"), a wholly owned subsidiary of Alpha created to effect the merger, entered into an Agreement and Plan of Merger (the "Merger Agreement"), pursuant to which it was agreed that 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").<sup>7</sup> (JA001403 § 1.01.) On May 16, 2011, Petitioners moved to enjoin preliminarily the Merger, unilaterally noticing a hearing on the motion to take place before Judge King on May 25, 2011. After Judge King notified the parties that he could not accommodate Petitioners' request for a hearing, Petitioners, on May 25, 2011, filed an Emergency Petition for a Preliminary Injunction Pursuant to West Virginia Code, Section 53-5-5 with this Court, requesting that it enjoin preliminarily the Merger. By order dated May 31, 2011, this Court denied Petitioners' petition and remanded the case back to Judge King.

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<sup>6</sup> On July 2, 2010, the defendants in the case before Judge King moved to stay it in favor of the Delaware Case. On June 24, 2011, those defendants moved to dismiss the Amended Complaint. The motions to stay and dismiss remain pending.

<sup>7</sup> On February 4, 2011, the plaintiffs in the Delaware Case (the "Delaware Plaintiffs") moved to enjoin preliminarily the Merger. By memorandum opinion dated May 31, 2011, the Chancery Court denied the Delaware Plaintiffs' motion. (JA001316-96.)

On June 1, 2011, Massey and Alpha stockholders gave their respective approvals necessary to complete the Merger. The Merger was completed later that day. (JA001408.) 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 would be 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 \$10.00 in cash. (JA001406 § 2.01(c).) 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 a 27% premium over Massey's stock price the day of the UBB explosion. (JA001319.) As of the effective date of the Merger, June 1, 2011, Petitioners ceased to own shares in Massey. Alpha became the sole shareholder of Massey, which was renamed Alpha Appalachia Holdings, Inc. (JA001408), and Massey's then-current Board was replaced by a board of directors elected by Alpha, as Massey's sole shareholder. The Massey Board now consists of a sole director (who is not a party here). (JA001405 § 1.06.)

**IV. PURSUANT TO THE EXPRESS TERMS OF THE CORPORATE GOVERNANCE AGREEMENT, THE CGA PROVISIONS WERE REMOVED.**

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". (JA000062.) 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”). (JA001539-41.) The Charter Amendment was filed with and accepted by the Delaware Secretary of State on June 2, 2011. (JA001543-45.)

In conjunction with the Charter Amendment, Alpha Appalachia’s Board of Directors (not including any of the former Massey directors or Respondents here), after receiving advice of counsel, determined that the corporate governance policies previously implemented pursuant to the CGA conflicted with the Charter Amendment. (JA001547-53.) The conflicting CGA policies, which amount to the entirety of the CGA, were thus rendered inoperative.

#### **V. THE NEW CONTEMPT PETITION.**

On May 31, 2011, Petitioners purported to file “individually and on behalf of all other similarly situated shareholders” a Petition for Civil Contempt (the “New Petition”, and together with the Old Petition, the “Petitions”) with the Circuit Court. (JA000945.) On June 13, 2011, Judge Stucky entered a rule to show cause, which was set for hearing on October 24, 2011. (JA001284-86.) On June 22, 2011, Respondents submitted a joint motion to dismiss the New Petition and to vacate the 2008 Order. (JA001287-1483.) On July 21, 2011, after full briefing, the Circuit Court held a hearing on Respondents’ motion. (JA001609-71.) On September 29, 2011, the Circuit Court, having received extensive findings of fact and conclusions of law from the parties (JA001674-706; *see also* JA001708-43) issued an order with detailed findings dismissing the Petitions and vacating the 2008 Order as against Respondents (JA001744-73). Petitioners now appeal the Circuit Court’s Order.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Rule 18(a) of the West Virginia Rules of Appellate Procedure sets forth the criteria to be used in determining whether oral argument is necessary. Pursuant to Rule 18(a), oral argument is unnecessary when, *inter alia*, “the dispositive issue or issues have been authoritatively decided” or “the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument”. W. Va. R. App. P. 18(a)(3)-(4) (2012). This appeal falls squarely within these criteria.

There are two, and only two, undisputed facts that are relevant to the resolution of this matter. On June 1, 2011, shareholders of Massey and Alpha gave their respective approvals necessary to complete the Merger and, as a result, Petitioners ceased to be shareholders of Massey, and thereafter, as a result of Alpha’s replacing Respondents, Respondents ceased to have any ability to comply with the 2008 Order or to cause Massey to comply. Those facts are dispositive because, under well-settled Delaware law, (1) when Petitioners ceased to be shareholders of Massey, Petitioners also ceased to have any standing to pursue their petitions for civil contempt before the lower court and (2) since Respondents no longer can comply with the 2008 Order or cause Massey to comply, the 2008 Order was correctly vacated as against Respondents.

Accordingly, given the above, and that the facts and legal arguments are adequately presented in the record before the Court, Respondents respectfully submit that oral argument would not aid in the decisional process and is unnecessary.

## SUMMARY OF ARGUMENT

Petitioners' claims fail for three reasons, each independently fatal. First, as of the effective date of the merger between Massey and Alpha, Petitioners, as plaintiffs suing derivatively on behalf of Massey, ceased to own shares in Massey and therefore lack standing as a matter of law to continue this action. Second, Petitioners were only able to enforce the Stipulation on behalf of Massey, and thus, Petitioners' attempt to enforce the Stipulation also fails. Third, even if this Court were to conclude that Petitioners have standing to sue, Petitioners' claims still would fail as a matter of law because Petitioners brought a civil contempt claim, and West Virginia law is clear that a finding of civil contempt is improper when, as here, compliance with the court's order is impossible. In light of these reasons, and each independently, the Circuit Court did not err in dismissing the Petitions and vacating the 2008 Order as against Respondents.

In this appeal, Petitioners argue that the Circuit Court erred in (1) deciding that Petitioners lack standing to enforce the Settlement; (2) applying Delaware law to determine the issue of Petitioners' standing; and (3) deciding that a civil contempt proceeding may properly be maintained only when the contempt is sought to compel compliance with an operative court order. (Pts. Br. 16.) None of these arguments has merit, and each should be rejected.

First, the instant action involves the adjudication of the rights and responsibilities of a corporation and its shareholders. Massey is a Delaware corporation. West Virginia law is clear that whether a shareholder may assert a claim on the corporation's behalf is governed by the law of incorporation. Thus, Delaware law governs whether Petitioners may assert claims on behalf of Massey. (*See infra* Parts I.A, I.B.)

Second, under the clear terms of the Stipulation, Petitioners sued and settled derivatively and had standing only derivatively on behalf of Massey to enforce the Settlement,

either through civil contempt or otherwise. Under black-letter Delaware corporate law requiring the continuous ownership of shares to maintain a derivative action, Petitioners lost this standing as of June 1, 2011, when Petitioners voluntarily relinquished their Massey shares in exchange for a substantial monetary premium. Petitioners' pleadings fall far short of meeting the showing required to establish the application of any exception to this rule. For this reason alone, Petitioners' claims fail. (*See infra* Parts I.A, I.C, I.D.)

Third, West Virginia contempt law is clear that the purpose of civil contempt is to compel compliance with an existing court order and that when compliance is impossible, civil contempt is improper. Petitioners concede, by virtue of the Merger, that Respondents' compliance with the 2008 Order is impossible. For this independent reason, Petitioners' claims fail and the 2008 Order was correctly vacated as against Respondents. (*See infra* Part II.)

## **ARGUMENT**

### **I. THE CIRCUIT COURT DID NOT ERR IN DECIDING THAT PETITIONERS LACK STANDING TO CONTINUE THEIR CONTEMPT ACTION.**

Petitioners contend that in “dismissing this proceeding, the Circuit Court mistakenly conflated Petitioners’ standing to bring the original derivative action” with “Petitioners’ standing to enforce the 2008 Order for the benefit of the Massey Energy shareholders bound by the 2008 Order”. (Pts. Br. 28.) It is Petitioners who are mistaken. The Circuit Court correctly ruled that Petitioners’ claims are derivative, and their right to bring claims on behalf of Massey, a Delaware corporation, is governed by Delaware law. In so deciding, the Circuit Court correctly rejected each of the theories of direct standing that Petitioners now raise. The Circuit Court further recognized that even if any of Petitioners’ theories of direct standing had merit, which they do not, the clear terms of the Stipulation preclude the arguments that Petitioners repeat here. Finally, the Circuit Court correctly ruled that

Petitioners lost their standing to continue their contempt claims on behalf of Massey when they ceased to be Massey shareholders.

**A. The Circuit Court Correctly Held that Petitioners' Claims Are Derivative.**

Despite purporting to bring their New Petition “individually and on behalf of all other similarly situated shareholders” (JA001761 ¶ 68 (citing New Petition at 2)), it is clear that Petitioners' claims are derivative. As acknowledged in the Stipulation, Manville commenced the underlying claims in the proceeding below derivatively on “behalf of nominal defendant Massey Energy Company' to remedy damages allegedly suffered by Massey”. (JA001753 ¶ 36 (citing Stipulation at 2).) Consequently, Manville stipulated and agreed to the Settlement “derivatively on behalf of Massey”. (*Id.* ¶ 38 (citing Stipulation at 7, 10).) The “Settling Parties” were defined as “each of the Defendants and the Plaintiff derivatively on behalf of Massey”.<sup>8</sup> (*Id.* ¶ 39 (citing Stipulation ¶ 1.12).)

Moreover, as the Circuit Court recognized, Manville has stated that it was acting “derivatively on behalf of Massey” in every one of its numerous filings before the announcement of the Merger. (JA001754 ¶ 42.) Manville styled its original motion for a rule to show cause as part of the underlying “Derivative Action”. (JA000008.) Manville stated in the first sentence of the Old Petition that it was seeking contempt “on behalf of Massey”. (*Id.*) Petitioners captioned Massey as a “nominal defendant” in both Petitions. (JA001754 ¶ 42.) In its Motion to Consolidate, Manville explicitly argued that the contempt proceeding was brought “derivatively on behalf of and for the benefit of Massey Energy Company”.<sup>9</sup> (JA000840; *see also* JA000846.)

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<sup>8</sup> 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 (1970).

<sup>9</sup> The Circuit Court noted that Manville also stated that it was seeking contempt “on behalf of Massey” in its First Set of Requests for the Production of Documents, both of its motions to

Petitioners also concede, as they must, that Petitioners CalSTRS and Amalgamated Bank were not parties to the Stipulation (Pts. Br. 27, 28-29), nor was any other former Massey shareholder. The only way that CalSTRS and Amalgamated Bank have standing to enforce the Settlement by civil contempt or otherwise is through a derivative suit. *See In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 598-99 (Del. Ch. 2007).

In an attempt to retain standing after the Merger, Petitioners now purport to bring their contempt claims as a class action (JA001761 ¶ 68), but it is clear from the harm that Petitioners allege that Petitioners' claims are derivative. Petitioners contend that the "gravamen of [their] claims are direct" because the "heart of the 2008 Order is a reporting and disclosure obligation" that the corporation owed "directly to shareholders". (Pts. Br. at 29.) Petitioners cite *Albert v. Alex. Brown Management Services, Inc.*, Civ. A. 762-N, 2005 WL 2130607, at \*12 (Del. Ch. Aug. 26, 2005), arguing generally that claims against directors and officers for fraudulent omissions and misstatements are usually direct claims. (Pts. Br. 30.)

Despite their prose, Petitioners have not pleaded a direct claim. As recognized by the Circuit Court, "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". (JA001761-62 ¶ 68 (internal quotations omitted).) In *Albert*, the defendant Managers' failure to honor their disclosure duties inflicted independent "harm . . . to the unitholders" and as a result, "the unitholders would receive any recovery, not the

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compel the production of documents, its response to Respondents' joint motion to vacate and in its memorandum of law in further support of the Circuit Court's rule to show cause. (JA001754 ¶ 42.)

[partnership]”.<sup>10</sup> 2005 WL 2130607, at \*12-13. “Moreover, the partnerships were not harmed by the alleged disclosure violations.” *Id.* at \*12. In finding the claims to be direct, the *Albert* Court held that “[i]n order to show a direct injury under *Tooley [v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004)]*, a [shareholder] ‘must demonstrate that the duty breached was owed to the [shareholder] and that he or she can prevail without showing an injury to the [company]’”. *Id.* Petitioners here cannot make such showing. Nor have they pleaded such in either Petition.

In the New Petition, the only harm Petitioners allege is that “Defendants’ alleged breaches of the 2008 Order ‘led directly to the massive explosion at Massey Energy’s Upper Big Branch mine’”.<sup>11</sup> (JA001762 ¶¶ 69.) Although Petitioners fail to specify who was harmed, theirs is clearly an allegation of direct harm to Massey. Any harm that Massey’s shareholders allegedly suffered is derivative of the harm allegedly suffered by Massey.<sup>12</sup> The disclosure violations that Petitioners now contend are the “gravamen” of their claims are, in fact, the “purported breaches of the 2008 Order”, which Petitioners pleaded led to direct harm to Massey. Thus, the Circuit Court correctly held that “regardless of whether Plaintiffs could assert a direct claim, . . . the claim [Petitioners] have, in fact, asserted is derivative”. (JA001762 ¶ 70.)

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<sup>10</sup> *Albert* involves partnerships, but the court relied on both corporate and partnership case law because “the determination of whether a claim is derivative or direct in nature is substantially the same” under each. 2005 WL 2130607, at \*12.

<sup>11</sup> Manville did not allege any harm to either Massey or its shareholders in the Old Petition and, instead, argued that it did not have to establish harm. (JA000544, *see also* JA000556 at n.6.)

<sup>12</sup> The Circuit Court also noted that “in the suit these [Petitioners] maintain before Judge King, filed April 15, 2010, [Petitioners] allege that that the Upper Big Branch explosion harmed Massey and seek to recover damages for that harm derivatively”. (JA001762 ¶ 69.)

**B. The Circuit Court Correctly Held that Delaware Law Governs Whether Petitioners May Assert Claims on Behalf of Massey.**

Massey is a Delaware corporation. Thus, the Circuit Court correctly held that “Delaware law applies to the issue of whether former Massey shareholders have standing to assert a claim on behalf of Massey”. (JA001693 ¶ 75; *see also Elish*, 189 W. Va. at 744, 746, 434 S.E.2d at 416, 418 (holding that “the local law of the state of incorporation should be applied to determine who can bring a shareholder derivative suit” “unless another state has a more substantial connection or the application of the other state’s law would be contrary to our public policy”).) Because “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”, a West Virginia court will apply the law of incorporation absent extremely compelling public policy considerations. *Elish*, 189 W. Va. at 745, 434 S.E.2d at 417.

As the Circuit Court recognized, the Stipulation’s choice-of-law clause is of no moment to the applicable law governing the rights that a shareholder has with respect to the corporation. (JA001763 ¶ 73; *see also* Restatement (Second) of Conflict of Laws § 302 & cmt. a (1969) (noting that under the “internal affairs” doctrine, the law of the jurisdiction of a corporation governs “the relations inter se of the corporation, its shareholders, directors, officers or agents”).)<sup>13</sup> On the issue of who has standing to sue, West Virginia’s interest in ensuring the safety of its miners is not an overriding concern (Pts. Br. 26), as it would be perhaps on an issue of what law should govern liability in the pending wrongful death actions.

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<sup>13</sup> Petitioners’ assertion that the Circuit Court did not properly consider the Stipulation’s choice-of-law provision (Pts. Br. 23-24) is baseless. The Circuit Court did not ignore the presumptive validity of the choice-of-law provision (*id.* 24), but rather correctly decided that the provision does not govern (JA001763 ¶ 73).

Petitioners' reliance on *Tyson* is misplaced. *Tyson* is a Delaware case governed by Delaware law, which does not involve a conflict-of-law issue. Moreover, the language upon which Petitioners rely is from the portion of the court's opinion dealing with the breach of contract claim, *Tyson*, 919 A.2d at 599, which is not relevant here. Regardless, even if relevant, that language establishes only that, *under Delaware law*, multiple shareholders can join a derivative claim to assert a claim on the corporation's behalf. It does not establish that by entering into a settlement agreement of a derivative claim with a choice-of-law provision, the law governing the corporation's former shareholders' rights with respect to the corporation is determined by application of that provision.

Petitioners' contention that the Circuit Court failed to consider whether public policy considerations require the application of West Virginia law rather than Delaware law (Pts. Br. 25-26) also fails. The Circuit Court considered Petitioners' public policy arguments and correctly rejected them as insufficient. (JA001763-64 ¶ 74 (“As in *Elish*, however, Plaintiffs have failed to identify a sufficient public policy reason for West Virginia law to be applied over Delaware law.”); *see also 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.”).) Notably, none of the Petitioners is a resident or citizen of West Virginia. Moreover, “[t]his is not the ‘extremely rare situation’ that would require deviation from” the rule that Delaware law, the law of the place of incorporation, governs Petitioners' right to bring this action on behalf of Massey. (JA001763 ¶ 74.)

**C. The Circuit Court Correctly Held that Under the Terms of the Stipulation, Petitioners Do Not Have Standing To Enforce the Settlement Other than Derivatively on Behalf of Massey.**

The Circuit Court correctly ruled that Petitioners failed to plead any cognizable theory permitting them to continue their contempt action directly. Even if they had, by the clear terms of the Stipulation, Petitioners released any claim of standing to enforce directly the Settlement.

1. The Circuit Court did not err in deciding that Petitioners do not have standing other than as provided for in the Stipulation.

Petitioners raise various theories that they argue confer standing upon them to enforce directly the Settlement. The Circuit Court properly rejected all of them.

Petitioners' contention that they have standing because the Circuit Court "retained jurisdiction over the parties for purposes of the implementation and enforcement of the Settlement" (Pts. Br. 26-27 & n.3) is misguided and unavailing. As the Circuit Court explained, "[i]t is undisputed that this Court has jurisdiction to decide these motions" but jurisdiction is not at issue; rather, "[t]he issue for the Court's consideration . . . is whether [Petitioners] have standing to seek contempt now that they no longer own Massey shares". (JA001761 ¶ 66.)

Petitioners also argue, relying on *United Mine Workers of America v. Faerber*, 179 W. Va. 73, 365 S.E.2d 353 (1986), that "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". (Pts. Br. 26.) Petitioners again miss the point. Respondents do not dispute that generally a party to an underlying action has standing to enforce a court order entered in its favor in that action. Here, however, Petitioners do not have standing to enforce the Settlement *directly*, because the underlying action is a derivative action, in which case, the law is clear that "the corporation 'is the real party in interest, the stockholder being at best the nominal plaintiff'".

(JA001755 ¶¶ 45-47 (citing *Ross*, 396 U.S. at 538-39).) Accordingly, as the Circuit Court explained, “[Petitioners’] reliance on [*Faerber*] is misplaced because [*Faerber*] did not involve derivative litigation”. (*Id.* ¶ 48.)

Petitioners also contend that (1) the 2008 Order “is a final, nonreviewable order that Respondents cannot now challenge” (Pts. Br. 28) and (2) they have standing because they have a “legally cognizable interest” in ensuring compliance with the Settlement because “Petitioners are bound by and intended beneficiaries of the 2008 Order” (*id.* at 27-28). After extended analysis, each of these arguments was correctly rejected by the Circuit Court. (JA001756-61 ¶¶ 52-65.) The Circuit Court rejected Petitioners’ argument that the 2008 Order was an adjudication that Manville could pursue its contempt claim on Massey’s behalf because unlike in *Salazar v. Buono*, 130 S. Ct. 1803 (2010), the case upon which Petitioners rely for this argument, 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”. (JA001757 ¶ 56.) In any event, the Circuit Court found that the Stipulation’s “no admission of liability” clause specifically prohibits Petitioners’ argument.<sup>14</sup> (JA001758 ¶ 57.) And “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”. (JA001757 ¶ 54.)

The Circuit Court also correctly rejected Petitioners’ argument that they “have a ‘legally cognizable interest’ in the Settlement sufficient to confer standing upon them”. (JA001758 ¶ 58.) Petitioners argue that their interest derives from the fact that they are “bound

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<sup>14</sup> “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*’”. (JA001758 ¶ 57 (quoting Stipulation ¶ 8.2).)

by and intended beneficiaries of the 2008 Order”. (Pts. Br. 27.) As the Circuit Court explained, that Massey’s shareholders may have benefited from the Settlement does not establish that every Massey shareholder is an intended beneficiary of the Settlement, such that they can directly enforce the Settlement. (JA001759 ¶ 60.) They are not. Regardless, even if Petitioners could independently establish such a right, which they cannot, the Stipulation’s “no-third party beneficiary” clause removes it. (*Id.*)<sup>15</sup>

The Circuit Court also correctly rejected Petitioners’ claim that their status as shareholders at the time of the Settlement is sufficient to confer a “legally cognizable interest” on them, finding inapposite each of the cases upon which Petitioners rely. (JA001759-61 ¶¶ 62-64.) As the Circuit Court explained, none of the cases cited by Petitioners supports their argument that shareholders who are bound by and benefit from a settlement that is entered derivatively on behalf of a company have the right to enforce that settlement *directly*. (*Id.* ¶¶ 62-63.) Nor do they cite a case stating that *former* shareholders continue to have a “legally cognizable interest” even after surrendering their shares. (*Id.*) With the exception of *Tyson*, which is inapposite for the reasons explained *infra*, none of the cases relied upon by Petitioners involves shareholders seeking to enforce derivative settlements. In fact, none involves derivative litigation at all. As the Circuit Court explained, each of the three federal cases that Petitioners cite concerns whether a litigant has constitutional standing under Article III to challenge a government action, which “is fundamentally different from the issue here, which is whether a derivative settlement confers a ‘legally cognizable interest’ on a corporation’s former shareholders”. (JA001760 ¶ 63.) Consequently, the Circuit Court found unpersuasive all of the cases cited by Petitioners below (*id.* ¶¶ 63-64), which are the only cases which Petitioners rely upon here (Pts. Br. 27-28).

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<sup>15</sup> The Stipulation provides “that no right of any third-party beneficiary shall arise from this Stipulation”. (JA001750 ¶ 23 (quoting Stipulation ¶ 8.10).)

Again, Petitioners' continued reliance on *Tyson* is likewise misplaced. *Tyson* involves 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. As the Circuit Court explained, "*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". (JA001760 ¶ 64.) *Tyson* is further inapposite because the settlement at issue there did not contain a "no third-party beneficiary" clause and because the *Tyson* shareholders still owned shares in the corporation whose settlement they sought to enforce, which Petitioners do not. (JA001760-61 ¶ 64; *Tyson*, 919 A.2d at 571 & n.4.) Moreover, the language from *Tyson* that Petitioners repeatedly quote (Pts. Br. 29) is from the portion of the court's opinion dealing with the breach of contract claim, which is not relevant here, *Tyson*, 919 A.2d at 599. With respect to the attempted contempt claim, the court "easily dismissed" plaintiffs' claim as "procedurally improper" and stressed the derivative nature of the contemplated contempt motion. *Id.* at 598-99. In any event, even if Petitioners were able to establish that any of their aforementioned theories had merit, Petitioners lost that standing when they surrendered their Massey shares as of the date of the Merger.<sup>16</sup> And, even if Petitioners had some basis on which to proceed directly, they have not done so. Whether Petitioners could have asserted direct claims is irrelevant. All that matters is the nature of the claims that Petitioners have, in fact, asserted. As discussed *supra*, the claims that they have alleged are derivative.<sup>17</sup>

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<sup>16</sup> "The legal effect of the Merger is no different than if, for example, [Petitioners] had sold their Massey shares in the market, not in connection with the merger." (JA001757 ¶ 54.)

<sup>17</sup> Petitioners' suggestion that the West Virginia Supreme Court has recognized an exception to the general rule that a shareholder derivative recovery is paid to the aggrieved corporation in certain cases (Pts. Br. 30-31) is of no moment. Delaware, not West Virginia law applies. Regardless, the issue at hand is not to whom recovery is to be paid, but rather whether Petitioners have standing to pursue a claim on behalf of Massey.

2. The Circuit Court did not err in deciding that Petitioners released any claim of direct standing to enforce the Settlement.

Even if any of Petitioners' theories of direct standing had merit, Petitioners' claims fail because the right to enforce the Settlement was retained only derivatively on behalf of Massey. The Stipulation released all claims except those permitting "the Settling Parties to enforce the terms of the Stipulation or Settlement". (JA001753 ¶ 39 (quoting Stipulation at ¶1.9).) The term "Settling Parties" is defined as "each of the Defendants and the Plaintiff derivatively on behalf of Massey". (*Id.* ¶ 39 (quoting Stipulation ¶ 1.12).) Therefore, the terms of the Settlement, stipulated and agreed to by Manville, expressly provide that the only parties that can enforce the Settlement are Massey's shareholders "derivatively on behalf of Massey". (JA001750 ¶ 21 (quoting Stipulation ¶ 1.9).) In light of the clear terms of the Stipulation, the Circuit Court properly concluded that Petitioners released any claim of direct standing and thus can bring an action to enforce the Settlement only "derivatively on behalf of Massey".<sup>18</sup> (JA001754 ¶ 41.) The cases Petitioners cite concerning the court's duty to protect the integrity of its decrees (Pts. Br. 26-27) have no bearing on whether Petitioners are the proper party to enforce the Settlement, which other than derivatively, they are not.

**D. The Circuit Court Correctly Decided that Petitioners Lost Their Derivative Standing When Massey and Alpha Merged. The Circuit Court Correctly Decided that Petitioners Failed To Plead Facts Sufficient To Allege that an Exception to Delaware's Standing Rule Applies or To Warrant Discovery.**

Petitioners, acknowledging that under Delaware's "continuous ownership" rule,<sup>19</sup> they no longer have standing to seek contempt on behalf of Massey, argue that they are entitled

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<sup>18</sup> In arguing alternative theories of direct standing, Petitioners fail to mention, let alone refute, that by the clear terms of the Stipulation, the only right that Petitioners had to enforce the Settlement was "derivatively, on behalf of Massey". (*See* Pets. Br. 26-31.)

<sup>19</sup> 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

to discovery to determine whether the Merger was undertaken “‘merely’ to deprive the Massey stockholders of their standing to sue derivatively” (Pts. Br. 31 (quoting *In re Massey Energy Co. Deriv. Litig. & Class Action Litig.*, C.A. No. 5430-VCS, 2011 WL 2176479, at \*30 (Del. Ch. May 31, 2011)), despite having participated in the deal-related discovery that was had in Delaware.<sup>20</sup> The Circuit Court correctly denied Petitioners’ claim that they are entitled to discovery to determine the applicability of this exception because Petitioners’ pleadings are insufficient to make even a *prima facie* showing that the “fraud exception” applies. (JA001766-68 ¶¶ 81-87.)

Before being entitled to discovery, Petitioners must adequately plead that the “fraud exception applies”. (JA001766 ¶ 81.) 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). (JA001766 ¶ 81.)

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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)). This “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). On June 1, 2011, the effective date of the Merger, Petitioners ceased to own shares in the Company. (JA001765 ¶ 79.)

<sup>20</sup> On February 4, 2011, the Delaware plaintiffs moved to enjoin preliminarily the Alpha-Massey Merger. This motion was denied by memorandum opinion dated May 31, 2011, after discovery was had (which Petitioners here possess). *In re Massey Energy Co.*, 2011 WL 2176479, at \* 2.

Even assuming Petitioners had adequately pleaded that Respondents faced a substantial likelihood of liability on Petitioners' claims, the Circuit Court correctly held that "neither the Old nor the New Petition pleads sufficient facts to establish the application of the 'fraud exception'". (*Id.* ¶ 82.) Petitioners' "single conclusory, allegation" that the Merger was "aimed at escaping [Petitioners'] liability for additional shareholder derivative claims" "falls far short of meeting [Petitioners'] pleading burden under Rule 9(b)". (JA001766-67 ¶¶ 83-84.) Moreover, the Circuit Court recognized that other than facts going to the former directors' alleged liability, Petitioners' "have not alleged a single fact . . . from which it could be inferred that [Respondents] were motivated by their potential liability here (or on any other derivative claim)" to accomplish a merger. (JA001767 ¶ 84.)

The Merger was negotiated over a number of months at arm's length and as the Circuit Court recognized, "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". (*Id.* ¶ 85; *see also In re Massey Energy Co.*, 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").) Thus, the Circuit Court properly held that Petitioners have not adequately pleaded the applicability of the "fraud exception" and are not entitled to discovery on that issue.

## II. THE CIRCUIT COURT CORRECTLY HELD THAT THE 2008 ORDER SHOULD BE VACATED AS AGAINST RESPONDENTS.

The Circuit Court did not err in dismissing the Petitions and vacating the 2008 Order for the independent reason that Respondents no longer have the ability to comply or to cause Massey to comply with the 2008 Order.<sup>21</sup> In arguing otherwise, Respondents misinterpret the relevant law and cite to inapposite and obsolete authority.

West Virginia law is clear that whether contempt is criminal or civil “depends upon the purpose to be served by imposing a sanction for the contempt”. *State ex. rel. Robinson v. Michael*, 166 W. Va. 660, 670, 276 S.E.2d 812, 818 (1981); *see also Czaja v. Czaja*, 208 W. Va. 62, 73 n.37, 537 S.E.2d 908, 919 n.37 (2000). “[C]ontempt 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”. *Robinson*, 166 W. Va. at 670, 276 S.E.2d at 818 (citations omitted). Put simply, the purpose of civil contempt is to “compel compliance with a court order”.<sup>22</sup> *Id.* Accordingly, “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”, and thus, any contempt could not properly be civil. (JA001772 ¶ 100.)

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<sup>21</sup> The former Massey director Respondents ceased serving as directors as of the effective time of the Merger. (JA001768 ¶ 88.) Petitioners concede that the non-director Respondent currently employed by Alpha is not in a position to cause Massey to comply. (*Id.*) Moreover, the CGA is no longer operative pursuant to a properly executed amendment to Alpha’s Certificate of Incorporation as allowed under the CGA’s amendment provision. (*Id.* ¶ 89.) As set forth more fully in Alpha’s submission to the Court, Petitioners’ claim that the Alpha action was a contrivance is plainly false since the action was based on the terms of the CGA itself.

<sup>22</sup> By contrast, “[c]ontempt 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.*

Despite agreeing that Respondents' compliance with the 2008 Order is impossible (Pts. Br. 21), Petitioners argue that imposing a civil sanction (namely a compensatory fine) is appropriate (*id.* at 18). To that end, Petitioners quote extensively from portions of the *Robinson* decision that illustrate the types of sanctions that are appropriate for either civil or criminal contempt. (*Id.* at 19-20 (arguing that an "appropriate sanction in a civil contempt case" is an "***an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved***" (citing *Robinson*, 166 W. Va. at 670, 276 S.E.2d at 818)).) As the Circuit Court explained, however, Petitioners "conflate two distinct issues: whether civil (rather than criminal) contempt is appropriate and whether a compensatory fine is an appropriate sanction for civil contempt" (JA001769 ¶ 91) when in fact, "[w]hich sanction, if any, is appropriate in a civil contempt proceeding is a different question from whether a civil contempt proceeding is appropriate" at all (JA001770 ¶ 95).<sup>23</sup> Respondents do not dispute that a court in a civil contempt proceeding may determine the amount of fines to be imposed by reference to the damage caused to the aggrieved party (rather than an arbitrarily selected amount) or that such fine can be paid to the aggrieved party (rather than to the court) so long as the purpose of the fine is to compel compliance. *See Czaja*, 208 W. Va. at 73 n.37, 537 S.E.2d at 919 n.37.

Petitioners also confuse the focus of the contempt analysis. Petitioners urge the Court to look to the nature of the sanction imposed, rather than the purpose of the sanction, to

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<sup>23</sup> Petitioners also overstate the influence of *People ex rel. Munsell v. Court of Oyer & Terminer*, 4 N.E. 259 (N.Y. 1886), in *Robinson*'s development of the distinction between civil and criminal contempt. The *Oyer & Terminer* quotation cited by Petitioners appears, without comment from the *Robinson* Court, in a single footnote to further contextualize the Court's discussion of *State v. Irwin*, 30 W. Va. 404, 4 S.E. 413 (1887)—a case which "recognized the existence and validity of the distinction between civil and criminal contempt". *Robinson*, 166 W. Va. at 664, 276 S.E.2d at 815. The Court goes on to criticize and distinguish *Irwin* from *Robinson*, noting that *Irwin* "severely restricted" the role of civil contempt such that "[t]he effect of the case . . . was to end civil contempt for a period of time in this State". *Id.* at 665-66, 276 S.E.2d at 815-16.

determine the classification of the contempt. (Pts. Br. 20-21 (“[R]emedial measures applied [in civil contempt] are *either* compensatory *or* coercive”; whereas, criminal contempt sanctions “punish the defendant.” (citing *Floyd v. Watson*, 163 W. Va. 65, 70-71, 254 S.E.2d 687, 691 (1979)).) The Circuit Court, however, correctly found that *Robinson* marked a change in West Virginia courts’ approach to categorizing contempt. (JA001771 ¶ 97). After *Robinson*, the purpose of the sanction, not the sanction itself, governs. *Czaja*, 208 W. Va. at 74 n.38, 537 S.E.2d at 920 n.38 (“Whereas 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.” (comparing *Floyd*, 163 W. Va. at 73-74, 254 S.E.2d at 692, with *Robinson*, 166 W. Va. at 670, 276 S.E.2d at 818)). Thus, looking to the purpose of the sanction, a court first determines the nature of the contempt, which then “determines the type of sanction which is appropriate”. *Robinson*, 166 W. Va. at 670, 276 S.E.2d at 818.

Petitioners, relying primarily on *United Mine Workers of America v. Faerber*, 179 W. Va. 73, 365 S.E.2d 353 (1986), also argue that the “Circuit Court is mistaken that [a civil contempt] sanction must be entirely prospective to ‘compel compliance with an existing order’” (Pts. Br. 20) because “‘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” (*id.* at 22). The Circuit Court correctly found, however, that *Faerber* is inapposite to the facts at hand. (JA001771-72 ¶ 98.) Petitioners argue that because this Court classified *Faerber* as a civil contempt case although a compensatory fine was imposed notwithstanding that the contemner had already rectified his noncompliance, it follows that “existing

noncompliance” is not a requirement for a finding of civil contempt and corresponding compensatory damages. (Pts. Br. 22.) Petitioners further argue that the Circuit Court’s “attempt[] 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” was misplaced because that was “no more the reason” in *Faerber*. (*Id.* (internal citations omitted).)<sup>24</sup>

Petitioners misinterpret both *Faerber* and the Circuit Court’s reasoning. *Faerber* reinforces *Robinson*’s holding by looking to the purpose of the fine, which was coercive not punitive or merely compensatory, to determine that the contempt was civil. *Faerber*, 179 W. Va. at 75-76, 365 S.E.2d at 355-56 (quoting *Robinson* at syl. pts. 1 and 2). The Court found that the “contempt action was brought . . . to enforce an order of the Court . . . [t]herefore, this case squarely fits the test set out in [*Robinson*] . . . as one of civil contempt”. *Id.* at 76, 365 S.E.2d at 356. In *Faerber*, unlike here, the Court was concerned with ensuring future compliance with a court order that the contemner was capable of complying with thereafter. *Id.* at 76-77, 365 S.E.2d at 356-57. Indeed, the order at issue in *Faerber* required Respondent Faerber, then-Commissioner of the West Virginia Department of Energy to enforce statutes requiring certain safety measures in coal mines, and clearly, additional compliance was necessary as this Court imposed a deadline for all mines to be in compliance with the emergency regulations finally issued by Faerber’s commission. *Id.* Tellingly, the Court in *Faerber* declined to hold Respondent Lay, Jr., Director of the Division of Mines and Minerals, in contempt since he “did not have authority on his own to comply with the Court’s order”. *Id.* at 74 n.1, 365 S.E.2d at 354

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<sup>24</sup> In fact, as explained *infra*, the Circuit Court distinguished *Faerber* because the sanction imposed therein was intended to ensure future compliance with an operative court order, which Petitioners concede (Pts. Br. 21) is not possible here. Petitioners do not respond to this distinction.

n.1. Contrary to Petitioners' assertion otherwise (Pts. Br. 22), the possibility of future compliance is what distinguishes *Faerber* from the instant proceedings.<sup>25</sup>

Similarly, in *Czaja*, this Court explained that where the purpose of a compensatory fine for violations incapable of being purged is directed at compelling compliance with an existing order, the proceeding is properly one for civil contempt. 208 W. Va. at 74-75, 537 S.E.2d at 920-21. In *Czaja*, the Court determined that the proceeding was one for civil contempt and approved a compensatory fine awarded in connection with prior violations of a visitation order, which remained in force and capable of being complied with thereafter. *Id.* As the Court explained, because “the contempt ruling arose from, and was directed at, compelling compliance with an existing order . . . the purpose of the sanction was clearly consonant with the objectives underlying civil contempt”. *Id.* at 75, 537 S.E.2d at 921. A purely compensatory purpose, as Petitioners claim to seek here, does not, however, comport with “the objectives underlying civil contempt”. Thus, here, where Petitioners concede that compliance is impossible (Pts. Br. 21), thereby rendering any coercive purpose impossible, any contempt would be criminal, which, as the Circuit Court correctly held, Petitioners, “as private parties, may not initiate” (JA001772).

Petitioners' selective quotation of a footnote in *Robinson* to the effect 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”, and that “the contemner should not be able to avoid the coercive purpose of civil contempt by his own misdeeds” which actions “would not alone justify treating a civil contempt as a criminal one” (Pts. Br. at 20-21), is likewise unavailing.

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<sup>25</sup> The *Robinson* Court noted that “distinguishing the purpose to be served by imposing a sanction for the contempt” is a common area of confusion in West Virginia contempt law. *Robinson*, 166 W. Va. at 662, 276 S.E.2d at 814.

First, the *Robinson* Court was concerned that the alleged contemner might not have had the ability to pay the entirety of the amount owed under the court order at that time, which “concern alone” the court held “does not convert the case to criminal contempt” because “[s]ome other manner of compliance may be mandated”. *See Robinson*, 166 W. Va. at 671 n.11, 276 S.E.2d at 819 n.11. Here, no alternative or incremental method of compliance can be mandated, rendering any compliance impossible. Second, the *Robinson* Court explained that where a contemner’s misdeeds are “designed to frustrate the intent and purpose of the order”, such actions “would not alone justify treating a civil contempt as a criminal one”. *Id.* (quotation and citation omitted). While Petitioners suggest that Respondents “disabled themselves” from complying with the 2008 Order (Pts. Br. 17), the facts demonstrate otherwise. Petitioners do not directly allege that the Merger was undertaken to frustrate Respondents’ ability to comply with the 2008 Order. Nor could they; such is evident from the lengthy negotiations with Alpha, the substantial premium that the merger consideration provided to Massey shareholders and the fact that it was Alpha, pursuant to the Merger Agreement, not Respondents, that removed Respondents as directors.<sup>26</sup>

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<sup>26</sup> Petitioners’ citation to *Gompers v. Buck’s Stove and Range Co.*, 221 U.S. 418 (1911), and *State ex rel. UMWA Int’l Union v. Maynard*, 176 W. Va. 131, 342 S.E.2d 96 (1985), are similarly unavailing. First, the issues in those cases were not the issue before this Court and do not provide guidance beyond what the *Robinson* Court stated. *Robinson*, 166 W. Va. at 670, 276 S.E.2d at 818 (citing *Gompers*, 221 U.S. 418). *Gompers* addressed the distinction between criminal and civil contempt in order to decide whether the proceeding was for criminal contempt separate from the underlying litigation or part of the underlying proceeding and hence “ended with the settlement of the main cause of which it is a part”. 221 U.S. at 451-52. The Supreme Court decided it was the latter. *Id.* In *UMWA Int’l Union v. Maynard*, the issue was whether “the circuit court had [the] authority to impose a prospective penalty [payable to the State] in an indirect criminal proceeding”. This Court decided the circuit court did not have such jurisdiction. 176 W. Va. at 137, 342 S.E.2d at 102. Moreover, *Gompers* and similar cases relating to the federal court’s interpretation of distinctions between types of contempt have been rejected by this Court. *See Maynard*, 176 W. Va. at 136 n.4, 342 S.E.2d at 101 n.4 (holding that “[w]e do not find these federal decisions to be persuasive” because “their analysis of the civil/criminal contempt dichotomy does not comport with our contempt law”). *See also Dodson v. Dodson*, 380 Md. 438, 448, 845 A.2d 1194, 1199-200 (2004) (noting the holding in *Gompers*

(JA001319; JA001405 § 1.06.) Accordingly, because Respondents no longer have the ability to comply or to cause Massey to comply with the 2008 Order and because the CGA is inoperative, the Circuit Court did not err in vacating the 2008 Order as against Respondents.

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and stating that “the classification of contempts has plagued the courts of this country on innumerable occasions and that the approach employed in numerous cases elsewhere, including decisions by the United States Supreme Court, is unacceptable” but that Maryland “law concerning contempt is clear . . . that the purpose of civil contempt is to coerce present or future compliance with a court order, whereas imposing a sanction for past misconduct is the function of criminal contempt” and that “[a]lthough we have repeatedly stated that the sanction in civil contempt actions is ‘remedial,’ our opinions have explained that ‘remedial’ in this context means to coerce compliance with court orders for the benefit of a private party or to issue ancillary orders for the purpose of facilitating compliance or encouraging a greater degree of compliance with court orders. We have not used the term ‘remedial’ to mean a sanction, such as a penalty or compensation, where compliance with a prior court order is no longer possible or feasible” (internal citations omitted)).

**CONCLUSION**

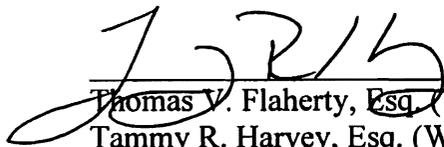
For the foregoing reasons, Respondents respectfully request that the Circuit Court's affirm the dismissal of the Petitions and vacating of the 2008 Order as against Respondents.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, A.L. Emch, do hereby certify that service of the foregoing *Brief for Respondents* was made upon counsel of record this the 15<sup>th</sup> day of May, 2012 via first class United States Mail, postage prepaid, in an envelope addressed as follows:

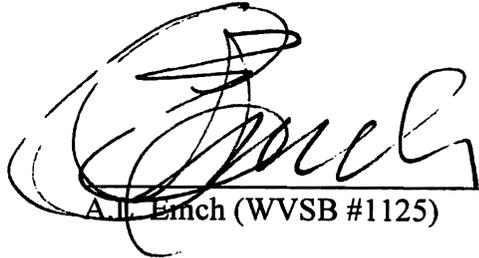
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