

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CATHY S. BATHON, CLERK
KANAWHA COUNTY CIRCUIT COURT

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

Plaintiffs,

v.

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

Defendants,

MASSEY ENERGY COMPANY, a
Delaware Corporation;

Nominal Defendant.

Case No.: 10-C-715

(Derivative Action)

VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT

This action seeks to hold the above-named Defendants personally accountable for the Upper Big Branch disaster and continuing significant violations of mine safety laws by Massey Energy Company and its various subsidiaries ("Massey Energy" or the "Company"). The Defendants are Chairman and Chief Executive Officer Don Blankenship and the rest of Massey Energy's current Board of Directors (the "Board") along with former director E. Gordon Gee and the Company's Chief Operating Officer, Chief Compliance Officer, General Counsel, and Senior Vice President of Group Operations (collectively, the "Individual Defendants"). Without this action, these Individual Defendants may escape personal responsibility, and the Company and its

shareholders will bear the full cost for their conscious disregard of their duties as officers and directors of the Company. Additionally, similar disasters will be more likely to recur. Because the entire Board faces a substantial likelihood of significant liability as a result of its role in the Upper Big Branch tragedy and the Company's continuing violations of state and federal law, its members are incapable of considering a demand to investigate and prosecute the claims asserted herein, and thus making such demand would be futile.

NOW COMES Plaintiff Manville Personal Injury Settlement Trust, derivatively on behalf of the Company, and files this Verified Shareholders' Derivative Complaint (the "Complaint") and in support hereof would show the Court as follows:

INTRODUCTION

1. This is a shareholder's derivative action brought on behalf of Massey Energy to assert all claims not released pursuant to the Agreed Order and Final Judgment, and its incorporated Stipulation of Settlement, entered on June 30, 2008 (collectively, referred to as the "Order" and incorporated herein by this reference) in the case of *Manville Personal Injury Trust, derivatively on behalf of Massey Energy Company v. Don L. Blankenship, Baxter Phillips, Jr., Dan Moore, Gordon Gee, Richard M. Gabrys, James Crawford, Bobby R. Inman, Robert H. Foglesong, H. Drexel Short, Jr., J. Christopher Adkins, Jeffrey M. Jarosinski, James L. Gardner, John C. Baldwin, Martha R. Seger and James H. Harless*, Case No. 07-C-1333.¹ That case was commenced on July 2, 2007 against Don Blankenship and the rest of the Company's directors and certain of its officers and former directors for breach of fiduciary duty arising out of their conscious failure to cause Massey Energy to comply with applicable environmental and worker-safety laws and regulations from August 11, 2005, until the date of filing.

¹ The Order is attached hereto as Exhibit 1.

2. As directors and/or officers of the Company, each of the Individual Defendants owes and owed to Massey Energy and its shareholders the fiduciary duties of loyalty, good faith, and due care in the management and administration of the affairs of the Company. These Individual Defendants have caused and will continue to cause severe injury to the Company by consciously ignoring Massey Energy's obligations to comply with federal and state law, thereby exposing the Company to a substantial threat of monetary liability for these legal violations. Relevant to the misconduct giving rise to this Action, members of the Board's Safety, Environmental and Public Policy Committee (the "SEPPC") (seven of the nine Board members) have undertaken additional responsibilities relating to the Company's compliance of mine safety laws and regulations, thereby increasing an already substantial likelihood of personal liability. The Individual Defendants' misconduct, as more fully described herein, involves a conscious disregard for their obligations as directors and officers of Massey Energy. Among other things, the Individual Defendants (a) consciously failed to ensure that the Company complied with laws and regulations designed to ensure worker safety, (b) consciously failed to implement effective controls to address unsound and illegal conditions and practices, or make reasonable inquiry in connection therewith, and/or (c) having knowledge of such unsound and illegal conditions, consciously failed to monitor or oversee the Company's operations and take steps to correct such conditions or practices.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this Action pursuant to the Constitution of the State of West Virginia and W. Va. Code § 56-3-33.

4. Venue is proper in Kanawha County pursuant to W. Va. Code § 56-1-1(a) because it is the judicial district in which Defendants Dan R. Moore and Stanley C. Suboleski reside and where facts and circumstances giving rise to this cause of action occurred. Massey

Energy does substantial business in Kanawha County, the location of its Massey Coal Services Headquarters. Through that subsidiary, Massey Energy directs much of its operations in the state.

5. The public interest of the State of West Virginia in having this controversy decided locally far outweighs any countervailing interest in having the case heard in another forum. Massey Energy and its subsidiaries—the majority of which (66 of 106) are West Virginia corporations—are some of the largest employers and landowners in the state and are significant contributors to the State’s economy.

6. This Action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have.

THE PARTIES

7. ***Plaintiff Manville Personal Injury Settlement Trust*** (“Plaintiff” or “Manville”) is a New York trust whose trustees are citizens of New York, Florida, and California. Manville owns over 1,000 shares of Massey Energy common stock and has continuously owned such shares since prior to August 11, 2005. Plaintiff brings this action derivatively in the right of and for the benefit of Massey Energy. Plaintiff will fairly and adequately represent the interests of Massey Energy and its shareholders in enforcing the rights of Massey Energy.

8. ***Nominal Defendant Massey Energy*** is a Delaware corporation that maintains its corporate headquarters in Virginia. Massey Energy is the largest producer of Central Appalachian coal, and one of the largest producers of coal in the United States. Massey Energy owns 23 processing and shipping centers (“Resource Groups”), the vast majority of which are located in West Virginia.

9. ***Defendant Don L. Blankenship*** (“Blankenship”) is a West Virginia citizen and currently a resident of Sprigg, West Virginia and has been a Massey Energy director since 1996.

Blankenship has served as the Company's Chief Executive Officer since November 2000 and as its President from November 2000 until November 2008. He has been Chairman of the Board since November 30, 2000, when the Company was spun off from the Fluor Corporation ("Fluor"). He has been Chairman and Chief Executive Officer of A.T. Massey Coal Company, Inc., the wholly owned and sole, direct operating subsidiary of Massey Energy, since 1992, and served as its President from 1992 until November 2008. Blankenship also served as President and Chief Operating Officer of A.T. Massey Coal Company from 1990 to 1991, and as its President from 1989 to 1991. He joined Massey Energy's subsidiary Rawl Sales & Processing Co. in 1982. Blankenship is presently Chair of Massey Energy's Executive Committee.

10. ***Defendant Baxter F. Phillips, Jr.*** ("Phillips") is a resident of Richmond, Virginia and has been a Massey Energy director since May 22, 2007. Defendant Phillips was elected President of the Company effective November 10, 2008. He previously served as Executive Vice President and Chief Administrative Officer of the Company from November 20, 2004 to November 2008. He served as Senior Vice President and Chief Financial Officer of the Company from September 1, 2003 to November 2004 and as Vice President and Treasurer from 2000 to August 2003. Mr. Phillips joined Massey Energy in 1981 and has also served in the roles of Corporate Treasurer, Manager of Export Sales, and Corporate Human Resources Manager, among others. Defendant Phillips is a member of the SEPPC and the Finance Committee.

11. ***Defendant Dan R. Moore*** ("Moore") is a resident of Richmond, Virginia and has been a Massey Energy director since 2002. A long-time friend of Blankenship and other Defendants in this action, Moore serves on each and every Board Committee. He is a member of the SEPPC, the Compensation Committee, the Governance and Nominating Committee, the

Executive Committee, and the Finance Committee. He also serves as Chair of the Audit Committee.

12. ***Defendant E. Gordon Gee*** (“Gee”) is a resident of Columbus, Ohio and was a Massey Energy director from 2000 until July 1, 2009. At relevant times hereto, Gee served as a member of the SEPPC, the Executive Committee, the Audit Committee, and the Governance and Nominating Committee.

13. ***Defendant Richard M. Gabrys*** (“Gabrys”) is a resident of Bloomfield, Michigan and has been a Massey Energy director since May 22, 2007. He has also served as a member of the SEPPC and the Governance and Nominating Committee since that time. At present, Gabrys is also a member of the Executive Committee and Chair of the Finance Committee.

14. ***Defendant James B. Crawford*** (“Crawford”) resides in Richmond, Virginia and joined the Massey Energy Board in 2005. At all times relevant to the claims asserted herein, he has served as a member of the SEPPC, and at some point after Gee’s retirement in July, 2009, Crawford became that Committee’s Chair. He is also a member of the Executive Committee, the Audit Committee, the Compensation Committee, and the Governance and Nominating Committee.

15. ***Defendant Bobby R. Inman*** (“Inman”) resides in Rowlett, Texas and has been a Massey Energy director since 1985. Inman serves as member of the Executive Committee and as a member of the Compensation Committee and the Governance and Nominating Committee. At present, he serves as the Company’s Lead Independent Director.

16. ***Defendant Robert H. Foglesong*** (“Foglesong”) is a resident of Williamson, West Virginia and has been a Massey Energy director since February 21, 2006. He is a member of the

Board's SEPPC, Executive Committee, Audit Committee, and Governance and Nominating Committee. He is also Chair of the Compensation Committee.

17. *Defendant Stanley C. Suboleski* ("Suboleski") is a resident of Midlothian, Virginia and was appointed to serve as a Massey Energy director in May 2008. From 1993 through 1997 and from 1981 through 1988, Suboleski held several positions with subsidiaries of Massey Energy. Following his retirement in December 1997 as Vice President, Operations-Strategy for A.T. Massey Coal Company, Inc. and President of United Coal Company, both subsidiaries of Massey, Suboleski served as a Professor and as the Department Head of Mining and Minerals Engineering at Virginia Tech from August 2000 to August 2001. Since August 2006, Suboleski has provided mining engineering consulting services to Massey. From December 2001 through May 2003, Suboleski served as Executive Vice President and Interim Chief Operating Officer of Massey Energy. Suboleski serves as a member of the SEPPC, the Finance Committee, and the Governance and Nominating Committee.

18. *Defendant J. Christopher Adkins* ("Adkins") is a resident of Danville, West Virginia and was promoted to the position of Massey Energy's Senior Vice-President and Chief Operating Officer on June 23, 2003. Adkins joined Massey Energy at its Rawl Sales subsidiary in 1985 to work in underground mining. Since that time, he has served in positions of increasing responsibility with Massey Energy, including section foreman, plant supervisor, President of Massey Energy's Eagle Energy subsidiary, Director of Production of Massey Energy Coal Services and, most recently, Vice-President of Underground Production. In his current position, Adkins is responsible for overseeing all mining and processing operations and reports directly to Defendant Blankenship.

19. ***Defendant Jeffrey M. Jarosinski*** (“Jarosinski”) is a resident of Powhatan, Virginia and has served as Chief Compliance Officer of Massey Energy since December 9, 2002 and Vice-President, Finance of Massey Energy since November 30, 2000. He also has served as Vice-President, Finance of A.T. Massey since September 1998. From November 30, 2000 through December 9, 2002, Jarosinski was Chief Financial Officer of Massey Energy and also served in that same role for A.T. Massey from September 1998 through December 9, 2002. Jarosinski was formerly Vice-President, Taxation of A.T. Massey from 1997 to August 1998 and Assistant Vice-President, Taxation of A.T. Massey from 1993 to 1997. Jarosinski joined A.T. Massey in 1988.

20. ***Defendant M. Shane Harvey*** (“Harvey”) is a resident of Hurricane, West Virginia and has served as the Company’s Vice President and General Counsel since January 2008. He previously served as Massey Energy’s Vice President and Assistant General Counsel from November 2006 until January 2008 and as Corporate Counsel and Senior Corporate Counsel from April 2000 until November 2006. Prior to joining Massey, Mr. Harvey was an attorney at the law firm of Jackson Kelly PLLC in Charleston, West Virginia from May 1994 until April 2000.

21. ***Defendant Mark A. Clemens*** (“Clemens”) is a resident of Cross Lanes, West Virginia and has served as Senior Vice President, Group Operations since July 2007. From January 2003 to July 2007, Clemens was President of Massey Coal Services, Inc. Clemens was President of Independence Coal Company, Inc., one of Massey’s operating subsidiaries, from 2000 through December 2002 and Massey’s Corporate Controller from 1997 to 1999. Clemens has held a number of other accounting positions with the Company, having first joined Massey Energy in 1989.

22. The Defendants named in paragraphs 9 through 21 are referred to as the “Individual Defendants.”

FACTUAL ALLEGATIONS

The Upper Big Branch Disaster and Red Flags in 2009 and 2010

23. On April 5, 2010, a massive explosion at Massey Energy’s Upper Big Branch mine (“Upper Big Branch”) claimed the lives of 29 miners and injured two others in what has been called the worst mining disaster in a generation. As a result of this disaster, mine infrastructure was destroyed, production came to a halt, and the officials for the Federal Mine Safety and Health Administration (“MSHA”) seized the mine. While the accident is still under investigation, some experts believe the extensive damage to the mine and its infrastructure suggests that this tragedy may have been caused by some combination of methane gas and float coal dust.

24. Since April 5, 2010, MSHA has made available to the public its complaints regarding severe and systematic non-compliance with mine-safety laws at Upper Big Branch. These records show that the number and severity of violations increased dramatically in 2009 and 2010. In 2009, MSHA complaints against Upper Big Branch more than doubled from 2008, to over 500, and proposed fines more than tripled to \$897,325. Upper Big Branch’s “serious and substantial” (“S&S”) citations in 2009 totaled 202, almost equaling the 204 S&S citations during the 24 months prior to December 2007, when the mine was placed on “pattern of violations” status (which status allows inspectors to shut down mining sections each time they find a serious violation). In just the first few months of 2010, Upper Big Branch has been the subject of 124 citations and 53 assessed penalties totaling \$188,769, according to MSHA records.

25. The records also show that MSHA has issued 61 withdrawal orders to Upper Big Branch since 2009, shutting down parts of the mine 54 times in 2009, and seven times so far in

2010. Of the 54 withdrawal orders issued during 2009, 48 of them occurred following express findings that the mine's operator, Performance Coal Company, exhibited an "unwarrantable failure" to comply with federal health and safety standards, and four involved a "failure to abate" problems identified in previous complaints. One of the most serious withdrawal orders was issued in December 2009 under a section of federal law allowing MSHA inspectors to respond to "imminent danger" that "could reasonably be expected to cause death or serious physical harm." Of the seven withdrawal orders issued in 2010, six involved "unwarrantable failures," and one resulted from a "failure to abate" the subject of previous complaints.

26. Commenting on the 61 withdrawal orders issued against Upper Big Branch since 2009, Celeste Monforton, an assistant professor at George Washington University and former policy advisor at MSHA, told Bloomberg News that the number of such violations was "like someone driving drunk 61 times." As reported in *The Charleston Gazette*, April 8, 2010, Tony Oppegard ("Oppegard"), a former MSHA staffer and longtime mine safety lawyer, described the 61 withdrawal orders as "way off the charts." "I've never heard of that many withdrawal orders in that short a period of time," he said. In comments to The Associated Press reported on April 6, 2010, Ellen Smith, editor of *Mine Safety & Health News*, expressed similar sentiments: "I've never seen that many [withdrawal orders] for one mine in a year," noting, "[i]f you look at other mines that are the same size or bigger, they do not have the sheer number of 'unwarrantable' citations that this mine has."

27. Notably, but for the fact that the Company had appealed all of Upper Big Branch's S&S withdrawal orders issued as of last September, the mine again would have met MSHA's criteria for "pattern of violations" status as it did in December 2007. Because the mine met the other nine criteria, one S&S withdrawal order would have triggered "pattern of

violation” status, but the Company avoided the pattern of violation status by appealing all 16 such withdrawal orders. Recently released data from MSHA shows that Massey Energy challenges approximately 74 percent of citations issued. On April 13, 2010, The Associated Press reported that a computer program used by MSHA to screen mines for violation patterns failed to include eight citations issued to the Upper Big Branch mine. Half of the eight citations involved problems with ventilation.

28. During the past 12 months, Upper Big Branch has been cited 38 times for “mine ventilation” violations and received 37 complaints of “accumulations of combustible materials,” both of which conditions have been implicated in the powerful explosion that occurred on April 5, 2010. Additionally, as reported on April 7, 2010 in *The New York Times*, two miners, interviewed on condition of anonymity for fear of losing their jobs, recounted how the mine had been evacuated for dangerously high methane levels in the past two months.

29. Robert Ferrier, a 27-year veteran of MSHA and now with the Mine Safety Program of the Colorado School of the Mines, called the ventilation problems “highly unusual” in comments to Bloomberg News: “They were not getting air into places they said they would.” Characterizing the nature of the violations, West Virginia University law professor and coal industry expert Pat McGinley, in an article appearing in *The Charleston Gazette* on April 8, 2010, commented, “We are not talking about parking tickets here. When a mine’s ventilation system isn’t working properly or there is an unacceptable accumulation of coal dust even for an hour, miners lives are put at risk.” Davitt McAteer, head of the MSHA under the Clinton administration, also called recent substandard-ventilation violations and other reported problems at Upper Big Branch “cardinal sins” in an interview with *The New York Times* reported on April 7, 2010. Characterizing the 58 violations last month alone, including the almost daily citations

related to improper ventilation or the dangerous accumulation of coal dust, McAteer told ABC News, "That's a red flag. That's saying, 'wait a minute, something's gone wrong here.'"

30. McAteer also spoke with The Associated Press about explosions and mine safety compliance issues as reported on April 6, 2010:

There are mines in the country who have operated safely for 20 years. There are mines who take precautions ahead of time. There are mines who spend the money and manpower to do it. Those mines don't blow up.

Kevin Stricklin, an administrator with MSHA, expressed similar sentiments in comments to *The New York Times* as reported on April 7, 2010: the magnitude of the explosion showed that "something went wrong here." "All explosions are preventable. It's just making sure you have things in place to keep one from occurring." Oppegard echoed that opinion on Monday, April 12, 2010, as reported in *The Charleston Gazette*: "It doesn't matter whether you had more or less violations than the average mine," he said. "This mine blew up. Mines don't blow up unless there were violations. This wasn't an act of God."

31. Massey Energy's statements after the explosion about MSHA violations rates at the mine also demonstrate inadequate mine safety compliance monitoring systems. On April 9, 2010, the Company issued a "Statement from Massey Energy Regarding Mine Safety" that stated in part that since January 2009 Upper Big Branch's rate of MSHA violations-per-day is "consistent with national averages." That statement was false according to Ellen Smith of *Mine Safety and Health News*. In comments to National Public Radio, she explained, "The industry average is actually 0.71, and that particular mine has 0.94 violations per inspection day So that mine is about 30 percent higher than the average underground bituminous coal mine."

Previous Litigation

32. On July 2, 2007, Manville commenced a shareholder derivative action in this Court against certain of the Defendants—Blankenship, Phillips, Moore, Gee, Gabrys, Crawford,

Inman, Foglesong, Adkins, Jarosinski, and Massey Energy as a nominal defendant (collectively, the “July 2, 2007 Defendants”)—and other current and former officers and directors of the Company (*Manville v. Blankenship*, Case No. 07-C-1333). The original Verified Shareholder Derivative Complaint (the “July 2, 2007 Complaint”) alleged numerous particular red flags concerning Blankenship’s and Company management’s willingness to consciously violate federal and state environmental and mine-safety laws, rules and regulations. The Original July 2, 2007 Complaint is attached hereto as Exhibit 2 and incorporated herein by this reference for the purpose of showing the latest possible date that the July 2, 2007 Defendants received actual notice of red flags and other relevant facts discussed therein, that is, the date of service on them. (The July 2, 2007 Complaint was personally served on Defendant Moore on July 9, 2007, and counsel for the remaining July 2, 2007 Defendants accepted service on July 19, 2007.)

33. After conducting discovery and additional investigation, Manville filed an Amended Shareholder Derivative Complaint on December 14, 2007 (the “December 14, 2007 Complaint”), which was duly served on all July 2, 2007 Defendants. The December 14, 2007 Complaint provided further detail regarding the red flags alleged in the July 2, 2007 Complaint and also set forth several additional ones. The December 14, 2007 Complaint is attached hereto as Exhibit 3 and incorporated herein by reference for the purpose of showing the latest possible date that the July 2, 2007 Defendants received actual notice of red flags and other relevant facts discussed therein, that is, the date of service on them.

34. After protracted negotiations over many months, the parties to *Manville v. Blankenship*, Case No. 07-C-1333, settled the litigation pursuant to the Order. The Order mandated particular Board-level corporate governance reforms to ensure, *inter alia*, Board-level monitoring of and enhancements to the Company’s compliance with environmental and mine-

safety laws and regulations, effective August 30, 2008. Defendants have been subject to the Order while serving as officer and/or directors of the Company. The Order deals extensively with obligations of members of the SEPPC, and seven of the nine current Board members are members of the SEPPC: Defendants Crawford (its Chair), Foglesong, Gabrys, Judge, Moore, Phillips, and Suboleski (collectively, the “SEPPC Defendants”). Defendant Gee was Chair of SEPPC prior to his retirement from the Board effective July 1, 2009.

35. The Order requires, *inter alia*, the creation of a Company-wide “Safety Compliance Officer” that “*shall report to the SEPPC*” unless the SEPPC consciously and knowingly chooses to alter the prescribed reporting structure.² Pursuant to the Order, Safety Compliance Managers for each of the Company’s Resource Groups are required to provide quarterly reports to the Safety Compliance Officer on each Resource Groups’ compliance with “worker and mine safety laws, rules and regulations.” By the Order, the Safety Compliance Officer, or a designee, “shall attend every meeting of the SEPPC and shall present a report thereto regarding the items under [his/her] purview.” Lastly, the Order requires that the SEPPC “reasonably inform the Board regarding the *Company’s compliance with all applicable mine safety laws and regulations*” via a “mine safety report” and that 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.*” (Emphasis added.)

² The Order obligates the members of SEPPC to keep themselves informed of the Company’s compliance with “all applicable mine safety laws and regulations” in order to keep other Board members “reasonably inform[ed].” The Order also requires that SEPPC members “develop goals for implementing enhancements to the Company-wide process utilized to monitor, count and report mine safety incidents and complaints.” Those “enhancements shall include audits by an external safety compliance auditor . . . at least once prior to the end of the second quarter of fiscal year 2009.” It also requires SEPPC members to “review the Company’s safety training programs annually and [to] recommend enhancements as appropriate” and “report to the Board annually on the key objectives and progress in such programs.” In so doing, SEPPC members shall consider “developing criteria and measurement protocols to assure that all responsible personnel, including contractors, know all compliance obligations related to their work.”

**Conscious Disregard of Sustained
and Systematic Violations of Mine Safety Laws**

36. In allowing Upper Big Branch to continue operations despite the glaring red flags of unsafe and unlawful mine conditions that arose during 2009 and the first quarter of 2010 (and given the countless, obvious red flags showing Blankenship's and Company management's willingness to systematically violate mine safety laws in the name of continued production), the Individual Defendants consciously breached fiduciary duties owed to the Company and its shareholders. They did so by failing to attempt to ensure that reasonable information or reporting system or controls existed, or having implemented such a system or controls, by consciously failing to monitor or oversee its operations, thus disabling themselves from being informed of risks or problems requiring their attention.

37. In light of the tragedy at Upper Big Branch and the open and obvious red flags that preceded it, the Board's latest Corporate Social Responsibility report speaks volumes regarding the Individual Defendants' conscious disregard for monitoring worker safety compliance, that is, it says nothing at all. Despite the reporting systems required by the Order, the Board's Corporate Social Responsibility Report ("CSRR 2009" attached hereto as Exhibit 4 and incorporated herein by reference) contains no "report on the Company's . . . worker safety compliance." In the space of just 5 pages (of the 25-page report) on "People" that discusses safety in general, compliance is mentioned only *once* and in the following context:

MINER Act Compliance

Congress passed the Mine and New Emergency Response (MINER) Act of 2006, amending the Federal Mine Safety and Health Act of 1977 to improve the safety of mines and mining. 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. We freely share our safety innovations with the mining industry.

CSRR 2009, at 8.

38. Given the Order, the above paragraph represents the culmination of Defendants' complete and conscious failure to monitor and oversee or even attempt to ensure the existence of a reasonable reporting system for mine safety compliance. The Order's mine safety monitoring and reporting system focuses on the transmittal of information via mine safety compliance reports through the Company's corporate structure. By virtue of the Order, the SEPPC is charged with overseeing that system because it is ultimately responsible to "reasonably inform the Board regarding the Company's *compliance with all applicable mine safety laws and regulations*," which in turn must make a report to the shareholders. That mandatory reporting system is structured as follows:

SEPPC to Board to Shareholders

The SEPPC shall use its judgment to determine the specific content and organization of its mine safety reports to the Board *to reasonably inform the Board regarding the Company's compliance with all applicable mine safety laws and regulations*. (Order, Stip., Ex. 2, at 4.)

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*. (*Id.* at 5.)

Safety Compliance Officer to SEPPC (Unless Restructured by SEPPC)

The Company shall create . . . a Vice President for Best Safety Practices ("*Safety Compliance Officer*") [who] *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 (*Id.* at 6.)

The [Safety] Compliance Officer[] shall have the *duty to examine and evaluate the adequacy and effectiveness of internal control procedures with regard to worker safety . . . compliance*. (*Id.* at 7.)

Safety Compliance Manager to Safety Compliance Officer

The Company shall also maintain full-time Environmental Compliance Managerial Positions and full-time Safety Compliance Managerial Positions to be responsible for its Resource Groups (together, the “Compliance Managers”). The *Compliance Officers shall appoint a number of Environmental and Safety Compliance Managers sufficient to ensure adequate coverage of the Company’s Resource Groups. (Id.)*

Each of the Compliance Managers shall, on a quarterly basis, prepare and submit to the Compliance Officers a report regarding the Resource Groups’ compliance with environmental, worker, and mine safety laws, rules and regulations. (Id.)

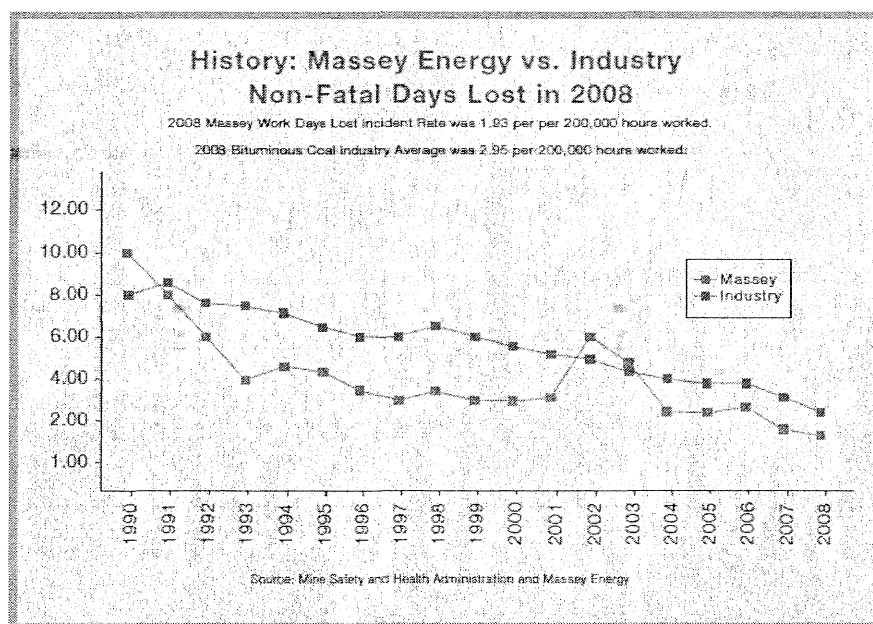
The Compliance Managers shall have the duty to examine and evaluate the adequacy and effectiveness of the Resource Groups’ internal control procedures with regard to worker safety and environmental compliance. (Id.)

(Emphasis added.)

39. As demonstrated by the failure of the Board to include a mine safety compliance report in the CSRR 2009 and as shown by the seriousness and frequency of MSHA complaints at Upper Big Branch during the period preceding the April 5, 2010 disaster, the Individual Defendants consciously disabled themselves from being informed about sustained and systematic compliance failures and also ignored open and obvious red flags.

40. Rather than reporting on mine safety compliance, CSRR 2009 devotes its five pages on People almost exclusively to the most basic, summary statistic of non-fatal days lost (“NFDL”) incident rates. Quite simply, NFDL incident rates measure days lost from injuries, *not compliance* with any, much less all, “applicable mine safety laws and regulations.” Rather, it is a single statistical value (readily manipulable across a company the size of Massey Energy) that by definition does not speak to fatalities, near misses, patterns of violations, S&S violations, or any other type of mine safety complaint, much less “the Company’s compliance with *all* mine safety laws and regulations.” As illustrated by the following charts, even a quick comparison of reported Company-wide NFDL incident rates to Massey Energy’s total MSHA citations and orders over time reveals that reported NFDL and compliance are poorly correlated. *Compare*

CSRR 2009, at 9 (charting Massey Energy vs. Industry NFDL rate in 2008 and over time) *with* Summary of Citations and Orders Issued to Massey Energy, CY 2000 to 2010, downloaded April 13, 2010 *available at* <http://www.msha.gov/PerformanceCoal/Massey%20Energy%20Violation%20Summary.pdf> (showing increasing rates of total MSHA citations and orders over time and dramatic inconsistencies between Massey Energy's NFDL rates and, for instance, the number of most serious § 104(d)(2) Orders issued).



MSHA Violation Summary for Massey Energy

Summary of Citations and Orders Issued to Massey Energy

CY	103(j) Orders	103(k) Orders	104(a) Citations	104(b) Orders	104(d)(1) Citations	104(d)(1) Orders	104(d)(2) Orders	104(g)(1) Orders	107(a) Orders	Total Citations and Orders
2000	0	7	4,237	14	17	24	19	3	10	4,331
2001	0	8	6,260	68	15	43	60	7	17	6,478
2002	0	7	5,078	62	21	41	48	6	15	5,278
2003	0	14	4,285	34	15	18	32	5	13	4,416
2004	0	21	4,353	46	14	34	19	7	8	4,502
2005	0	27	4,579	29	16	13	16	9	9	4,698
2006	0	47	5,362	71	19	74	88	12	9	5,682
2007	0	76	6,861	56	33	58	163	12	16	7,277
2008	0	100	9,812	59	25	40	114	29	23	10,202
2009	1	81	10,235	48	36	78	111	42	21	10,653
2010	0	27	2,205	6	8	7	53	6	3	2,315

*Excludes Contractors

41. Accordingly, to the extent that the Individual Defendants use Company-wide NFDL to monitor the “Company’s compliance with all applicable mine safety laws and regulations” as suggested by CSSR 2009, they have completely failed to attempt to ensure a reasonable information and reporting system exists. The Individual Defendants’ abdication of duty is further illustrated by the extent to which they have relied on Company-wide, rather than mine-specific, NFDL incident rates, and this is particularly true given the glaring red flags described above and data recently released by the MSHA. That data shows that NFDL incident rates for Upper Big Branch have been abysmal for the past two years, the same two years Defendants claimed were the safest in Company history.

42. For 2009, Defendants trumpeted that “Massey had recorded an all-time best NFDL incident rate (a measure of lost-time accidents) of 1.67” and noted that this rate was almost half the bituminous coal mining industry average of 2.95 for 2008. However, 2009 represented the second straight year that Upper Big Branch recorded an NFDL incident rate nearly twice the industry average and over three times the rate reported by Defendants as the Company’s overall NFDL. For 2008, a year that the Company touted as being the “safest” in its history, Upper Big Branch’s NFDL incident rate was 6.07, or *3.14 times* the Company’s overall NFDL. In 2009, Upper Big Branch’s NFDL incident rate was 5.81, or *3.47 times* the rate for the Company as a whole.

43. Data recently obtained by National Public Radio (“NPR”) from MSHA also demonstrates that Upper Big Branch is not the only Massey Energy mine with a high NFDL incident rate relative to the Company as a whole. Nor is it even the worst of Massey Energy’s mines in terms of NFDL. For 2009, touted by the Company as the “safest year in Company history,” 10 Massey Energy mines had above-average NFDL incident rates for their industry:

Four Massey mines had injury rates more than twice the national rate last year. The national rate is 4.03 injuries per 200,000 worker hours. Massey's Tiller No. 1 mine in Tazewell, Va., had the company's highest injury rate at 9.78. The other high injury mines are Slip Ridge Cedar Grove (9.18) in Raleigh, W.Va., M 3 Energy Mining's No. 1 (8.86) in Pike County, Ky., and Solid Energy Mining's Mine #1 (8.49), which is also in Pike County.

Together last year, the 10 Massey mines with above average injury rates received 2,400 safety citations.

Howard Berkes & Robert Benincasa, *Massey Mining Firm Had Numerous Safety Violations*, NPR Morning Edition, Apr. 13, 2010, <http://www.npr.org/templates/story/story.php?storyId=125864847>.

44. In the absence of the relief sought herein, the Individual Defendants may never be held responsible for the damage caused by their substantial failure of duty. Nor will they be prompted to change their behavior going forward. Indeed, Ellen Smith, managing editor of *Mine Safety and Health News*, expressed as much in a recent interview. According to Ms. Smith, given inadequacies in Federal enforcement systems:

"Curiously, the only individuals who might be held personally liable . . . for the current disaster are the mine supervisors and foremen," said Smith in a Friday [April, 9, 2010] editorial. "There are no provisions [pursuant to federal and state mine safety laws] to hold accountable those people who are responsible for safety policies and procedures, or the corporate executives who insisted it was more important to 'run coal' than to build ventilation controls, or the board of directors, which is ultimately responsible for the conduct of the corporation."

Mike Gorrell, *Experts: Miners don't have to die*, The Salt Lake Tribune, Apr. 11, 2010.

45. Smith further elaborated on this point during an interview with NPR a few days later: "There will be a different safety culture if they know that there's a chance that they might spend six months in jail or they might have charges personally brought against them," she said. "But at this point there is nothing in the [federal or state mine safety] law that would allow that to happen." Howard Berkes & Robert Benincasa, *Massey Mining Firm Had Numerous Safety*

Violations, NPR Morning Edition, Apr. 13, 2010, <http://www.npr.org/templates/story/story.php?storyId=125864847>.

46. In sum, this action is necessary, not only to hold wrongdoers accountable, but also to prevent future harm to the Company, its work force, and its shareholders.

**THE DEFENDANTS' FIDUCIARY DUTIES
TO MASSEY ENERGY AND ITS SHAREHOLDERS**

47. By reason of their positions as officers and/or directors of Massey Energy and because of their ability to control the business and corporate affairs of the Company, the Individual Defendants owed the Company and Massey Energy shareholders the fiduciary obligations of loyalty and due care. The Individual Defendants were and are required to act in furtherance of the best interests of the Company and its shareholders to benefit all shareholders equally, rather than to further their personal interests. Each director and officer of Massey Energy owes a fiduciary duty to the Company and its shareholders to exercise good faith and diligence in the administration of the affairs of the Company.

48. To discharge their duties, the Individual Defendants are required to exercise reasonable and prudent oversight and supervision over the management, policies, practices and controls of the Company. By virtue of such duties, the Individual Defendants were and are required to, among other things:

a. manage, conduct, supervise, and direct the business affairs of Massey Energy in accordance with all applicable laws (including federal and state laws, government rules and regulations, and the charter and bylaws of Massey Energy);

b. neither violate nor knowingly permit any officer, director or employee of Massey Energy to violate applicable laws, rules, and regulations;

c. remain informed as to the status of Massey Energy's operations, including its practices in relation to environmental compliance and employee safety, and upon receipt of notice or information of imprudent or unsound practices, to make a reasonable inquiry in connection therewith, and to take steps to correct such conditions or practices;

d. establish and maintain systematic and accurate records and reports of the business and affairs of Massey Energy and procedures for the reporting of the business and affairs to the Board, and to periodically investigate, or cause independent investigation to be made of, said reports and records; and

e. maintain and implement an adequate, functioning system of internal controls, such that Massey Energy's affairs and operations would be conducted in accordance with all applicable laws, rules, and regulations.

49. In addition, certain Individual Defendants assumed enhanced duties and responsibilities through their membership on the SEPPC. According to the Company's most recent Proxy Statement filed with the Securities and Exchange Commission ("SEC") on April 14, 2009, the SEPPC is tasked with the following duties and responsibilities:

The principal duties of the Safety, Environmental and Public Policy Committee are to:

- (a) review and make recommendations regarding our policies, programs, position and strategies in relation to safety, environmental and public policy issues deemed significant by the committee or which may be referred to the committee by the Board of Directors or by management;
- (b) review and make recommendations regarding safety, environmental, political, and social trends and issues as they may affect our operations and the operations of our subsidiaries;
- (c) review and make recommendations in respect of our general policy regarding support of business, charitable, educational and political organizations; and
- (d) review and make recommendations in respect of our safety, environmental and public policies and practices.

The Safety, Environmental and Public Policy Committee's responsibilities include:

- (a) making a *report to the Board of Directors on a quarterly basis regarding our compliance with worker safety and environmental compliance rules and regulations*;
- (b) developing goals for implementing enhancements to the process utilized to monitor, count and report environmental incidents and complaints;
- (c) determining the specific content and organization of our environmental compliance reports to the Board of Directors to reasonably inform the Board of Directors regarding our compliance with all applicable environmental laws and regulations, and any other applicable authority regarding environmental compliance;
- (d) *developing goals for implementing enhancements to the process utilized to monitor, count and report mine safety incidents and complaints and near misses with high potential for injury*;
- (e) determining the specific content and organization of its mine safety reports to the Board of Directors to *reasonably inform the Board of Directors regarding our compliance with all applicable mine safety laws and regulations*;
- (f) reviewing our safety training programs annually and recommending enhancements as appropriate;
- (g) reviewing our environmental compliance training programs annually and recommending enhancements as appropriate;
- (h) reporting to the Board of Directors annually on the key objectives and progress in our safety training programs and environmental compliance training programs;
- (i) recommending that the Board of Directors adopt quantitative goals, based on current technologies, for reducing environmental violations and mine safety incidents and near misses with a high potential for injury in connection with our operations;
- (j) selecting and retaining one or more independent auditing firms, at least once every two years, to conduct a comprehensive review and assessment of our operations as they relate to worker safety and environmental compliance and preparing and submitting to the Safety, Environmental and Public Policy Committee a report and recommendations;
- (k) reporting the findings of the auditing firm review and assessment to the Board of Directors;

- (l) having the authority to retain independent, outside consultants to assist the Safety, Environmental and Public Policy Committee with regard to the Safety, Environmental and Public Policy Committee's duties in connection with our compliance with environmental, worker, and mine safety laws, rules and regulations; provided that, before retaining any such consultant, the Safety, Environmental and Public Policy Committee will make a determination that the consultant is capable of exercising independent judgment; and
- (m) consulting with the Vice President for Best Environmental Practices, the Vice President for Best Safety Practices (or comparable positions) and the General Counsel regarding their duty and authority to create, implement and oversee a system by which corporate employees, suppliers, customers and advisor professionals can, on a confidential basis and without fear or reprisal, provide information concerning possible illegal or unethical conduct regarding our compliance with safety and environmental issues.

(Emphasis added.)

50. Similarly, certain of the Individual Defendants assumed heightened obligations by serving on the Governance and Nominating Committee. According to the Company's most recent Proxy Statement, the Governance and Nominating Committee included Director Defendants Crawford (Chair), Foglesong, Gabrys, Gee, Judge, and Moore. According to its charter, "[t]he primary responsibilities of the Committee are to oversee and monitor the Company's corporate governance policies and procedures and to regularly report the results of its activities to the Board."

51. Additionally, certain of the Individual Defendants assumed heightened obligations through their service on the Executive Committee. According to the Company's most recent Proxy Statement, the Executive Committee included Blankenship (Chair), Crawford, Gabrys, Gee, Inman, and Moore. According to the Company's website, the Executive Committee now consists of Blankenship (Chair), Crawford, Foglesong, Gabrys, Inman, and Moore. The Executive Committee exercises all of the power and authority of the Board of Directors in the management of the Company's business and affairs.

52. The Individual Defendants, because of their positions of control and authority as directors and/or officers of the Company, were able to and did, directly or indirectly, exercise control over the wrongful acts complained of herein.

53. The conduct of Massey Energy's directors and officers complained of herein involves conscious and sustained violations of their obligations as officers and directors of Massey Energy. Further, the Company's Board has turned a blind eye to the misconduct of Massey Energy's officers and has failed to take any legal action on behalf of the Company against them.

54. Each Defendant herein is sued individually as a conspirator, aider, and abettor, as well as in his or her capacity as a present or past officer and/or director of Massey Energy, and the liability of each arises from the fact that each has engaged in all or part of the unlawful acts, plans, schemes, or transactions complained of herein.

DERIVATIVE ALLEGATIONS

55. Plaintiff incorporates by reference all preceding and subsequent paragraphs as if set forth fully herein.

56. Plaintiff brings this action derivatively in the right and for the benefit of the Company to redress injuries suffered and to be suffered by the Company as a result of the breaches of fiduciary duty by Defendants.

57. Plaintiff will adequately and fairly represent the interests of the Company and its shareholders in enforcing and prosecuting its rights, and they have retained counsel experienced in litigating these types of actions.

58. Plaintiff is an owner of Massey Energy shares and has been an owner of Massey Energy stock during all times relevant to Defendants' wrongful course of conduct as alleged

herein. Plaintiff has held over 1,000 shares of stock in the Company since prior to August 11, 2005.

59. Plaintiff has not made any demand on the Company's Board to institute this action. As set forth below, such a demand would be a futile and useless act because the Board is incapable of making an independent and disinterested decision to prosecute this action.

DEMAND FUTILITY ALLEGATIONS

60. At the present time, Massey's Board of Directors consists of the following nine Defendants: Blankenship, Crawford, Foglesong, Gabrys, Inman, Judge, Moore, Phillips, and Suboleski. To properly allege that demand on the Board would be futile, Plaintiff need only show that *five* of these *nine* Board members is either interested or not independent. As an initial matter, seven of the Company's nine Board members serve on the SEPPC.³ As explained more fully below, the SEPPC Defendants, who collectively comprise more than a majority of the Board, face a substantial likelihood of liability for failing to effectively exercise their oversight responsibilities in good faith. Alternatively, the Board is incapable of independence because (1) its members are beholden and/or dominated by Defendant Blankenship, or (2) because its members have personal and professional entanglements compromising their ability to objectively consider a demand.

Demand Is Excused Where a Majority of the Board Faces a Substantial Likelihood of Liability for Failure to Discharge Their Oversight Obligations in Good Faith

61. As a result their service on the SEPPC, the SEPPC Defendants face a substantial likelihood of liability because they either (a) were informed of serious safety violations at Upper Big Branch and other Massey mines by virtue of the reporting mechanisms set forth in the Order

³ As noted previously, these Board members are referred to herein as the "SEPPC Defendants."

and consistently ignored same, *or* (b) violated the Order by failing to comply with its provisions. In either case, the SEPPC Defendants face a substantial likelihood of liability in connection with their service on the SEPPC since at least 2009.

62. According to its Charter, the responsibilities of the SEPPC includes:

- a. taking steps to “reasonably inform the Board regarding the Company’s compliance with all applicable mine safety laws and regulations”;
- b. “report[ing] to the Board on a quarterly basis regarding the Company’s compliance with worker safety and environmental compliance, rules, regulations, and goals”; and
- c. “[r]eview[ing] the Company’s safety training programs annually and . . . recommend[ing] enhancements as appropriate.”

63. In light of these responsibilities and by virtue of the Order, the SEPPC Defendants would have been apprised of increasing safety concerns at the Company’s mines, including Upper Big Branch. Indeed, in 2009 alone, the Upper Big Branch mine was cited by regulators for more than 500 safety violations. At least 202 of these were S&S citations, meaning the violation was reasonably likely to result in serious injury. Even more troubling, in the last 12 months, Upper Big Branch has received 37 violations for failing to follow a mine-ventilation plan to control accumulations of combustible materials. Twelve of these violations were issued just last month. While investigations into the deadly blast remain ongoing, it has been widely reported that the April 5, 2010 explosion was caused by a build-up of methane gas and coal dust, conditions that could have been mitigated through the implementation of an effective ventilation plan.

64. Significantly, the safety violations alleged herein were so pervasive that they could not have been the result of an isolated failure of oversight. Indeed, the wrongdoing in question is strongly suggestive of a corporate culture that regularly and consciously ignores sustained and systematic red flags that the Company's mining operations are in violation of state and federal mine safety laws and therefore unreasonably unsafe. In light of the number, duration, and severity of the violations, as well as the responsibilities outlined in the SEPPC Charter, the facts compel the conclusion that the SEPPC Defendants had to have known about the frequency and extent of the safety violations in question. Notwithstanding this knowledge, the SEPPC Defendants have failed to take steps to ensure and/or improve the Company's compliance record.

65. In terms of damages, the personal liability now facing the Individual Defendants on the Board is staggering. Due to the frequency and severity of the safety violations at Upper Big Branch, the Company may face "deliberate intent" or *Mandolidis* claims by the families of the mine workers who lost their lives. Lost production at the mine could cost the Company upwards of \$50 million according to Standard & Poor's. In addition, the Company is almost certain to face securities fraud lawsuits, state and federal investigations, fines, heightened regulatory scrutiny, loss of goodwill, and reputational harm.

66. In sum, because the allegations described herein are closely tied to the SEPPC Defendants' dereliction of duty related to their service on the SEPPC, the SEPPC Defendants are incapable of reaching a disinterested decision as to whether or not to commence the instant litigation.

**Demand Is Excused Where a Majority of the Board Is
Beholden to Another Director Who Is Interested or Not Independent**

67. In addition to the above, the Board cannot be relied on to act independently because it is dominated by and/or beholden to Defendant Blankenship, a director who is both interested and not independent.

Blankenship is Interested and Not Independent

68. Defendant Blankenship lacks independence for purposes of demand futility because, as CEO of Massey Energy, his principal occupation and means of earning a living are through his employment with the Company. According to public filings made with the SEC, Blankenship, during fiscal years 2004 to 2008, received in excess of \$38.5 million in salary and other compensation from Massey Energy. As a result of this lucrative employment relationship, Blankenship has received and will continue to receive valuable financial benefits from the Company, benefits that would be lost if this employment relationship were to be severed or otherwise impaired.

69. In addition, the Company's latest Proxy Statement serves as an admission that Blankenship lacks the requisite independence to consider a demand: "Don L. Blankenship is not independent because of his employment as our Chief Executive Officer."⁴

70. Blankenship also faces a substantial likelihood of personal liability, in similar fashion to the SEPPC Defendants, for the Upper Big Branch disaster and may also face personal liability to the victims' families because of the manner in which he runs and/or oversees Massey Energy's subsidiaries. In this regard, Blankenship was sued by the widows of the miners killed in the Aracoma Alma mine fire of 2006. The case against him survived motions to dismiss and

⁴ Massey Energy Corporation, Definitive Proxy Statement (Schedule 14A), at 12 (Apr. 14, 2009) (incorporated herein by reference).

for summary judgment. Significantly, he is the central component in the Company's entire operations and has admitted as much in sworn deposition testimony:

Q. Okay. Getting back to you, Mr. Blankenship, and your daily job, understanding that no day is the same, it seems to me that you're kind of a hands-on kind of guy. Would you say that's a fair description of the way you operate?

A. As CEO, yes.

* * *

Q. Okay. And if something happens at a particular mine or resource group that's unusual, such as an environmental violation or something, you're immediately made aware of that, aren't you?

A. Supposed to be.

Q. Okay. And it works that way usually I would take it, doesn't it?

A. Well, typically on an environmental violation, you know, a non-significant environmental violation, I would get a report the following day or the next day that shows that it happened. If we had a significant issue, I would know about it.

Q. Okay. Like if the DEP was about to shut a mine down, you would be told that immediately or as soon as possible, wouldn't you?

A. Yes.

Q. Okay. And then you would make decisions and take actions that you felt would be appropriate to abate the problem?

A. I would cause such actions to be taken, yes.

71. While the testimony above concerned alleged environmental misconduct, it logically follows that Blankenship received similar notice when the Company received citations for serious worker safety violations, such as the 202 S&S citations in 2009. Charged with knowledge of these and likely other citations including mine ventilation-related citations, Blankenship, like the SEPPC Defendants, failed to act. He therefore faces a substantial likelihood of liability rendering him interested for purposes of demand futility.

The Board is Beholden to and/or Dominated by Blankenship

72. Blankenship, as Chairman of the Board, Chairman of the Company's Executive Committee, and the Company's CEO, is singularly the most powerful person at Massey Energy. As such, he is in a position to and does exercise control over the Company and all aspects of its business. This domination and control, as well as the Board's unyielding loyalty to Blankenship, is evidenced by a June 13, 2007 letter of resignation written by former Company Board members Daniel Loeb ("Loeb") and Todd Swanson ("Swanson"). In the letter, Loeb and Swanson stated in relevant part:

The Board clearly shared our view as to the attractiveness and importance of such a transaction, but its misguided insistence on keeping [Blankenship] in place as CEO outweighed strategic considerations and prevented the consummation of a deal that would have been in the best interest of all shareholders.

(Emphasis added.)

73. Additional evidence that Blankenship dominates the Board is found in 2007 deposition testimony from Jeff Gillenwater, Massey's current Vice President for Human Resources:

- Q. Well, you – you made reference to a Compensation Committee that – that establishes benefits and wage rates.
- A. **Yeah, I –**
- Q. Is that the Compensation Committee?
- A. **That's the Compensation Committee of – of the Board of Directors, of which Mr. Blankenship is the chairman of.**
- Q. And who else is on that committee?
- A. **I know Admiral Inman is on that committee. I don't know the other individuals that are on that committee, on the Board.**
- Q. Do you know whether they set a wage rate for these individual resource groups?

- A. **I would say that the chairman, Mr. Blankenship set – set the wage rates through his leeway that the Compensation Committee affords him.**

(Emphasis added.)

74. This testimony is critical because it suggests that Blankenship's control extends to Board committees, including those on which he does not serve and that are purportedly "independent."⁵ Significantly, four of these 2007 Compensation Committee members, namely Defendants Inman, Crawford, Foglesong, and Moore, remain on the Board today. In light of the fact that Blankenship dominated Inman, Crawford, Foglesong, and Moore in 2007, there is a substantial likelihood that he continues to do so today. Therefore, at a minimum, Inman, Crawford, Foglesong, and Moore are beholden to and/or dominated by Blankenship, effectively giving Blankenship control over the Board because, including himself, he controls five of Massey's nine directors.

Additional Facts Concerning Directorial Interest and Independence

75. In addition to the demand futility allegations above, the following facts create the inference that various individual Board members are interested and/or not independent:

- a. ***Defendant Phillips*** lacks independence by virtue of his position as an employee of the Company and in light of the Company's admission to that effect in its latest Proxy Statement;
- b. ***Defendant Moore*** is not independent because his company, Moore Group, Inc., sells vehicles and services to Massey Energy;

⁵ See e.g. Massey Energy Company, Definitive Proxy Statement (Schedule 14A), at 12 (Apr. 15, 2008) ("The members of the Compensation Committee are Bobby R. Inman (Chairman), James B. Crawford, Robert H. Foglesong and Dan R. Moore. William R. Grant, Daniel S. Loeb and Martha R. Seger are former directors who also served as members of the Compensation Committee during 2007. The Board of Directors has determined that each of the members of the Compensation Committee is "independent" under the general independence tests in the listing standards of the NYSE and the independence standards set forth in our *Corporate Governance Guidelines* .") (incorporated herein by reference).

c. **Defendant Foglesong** is not independent because he is founder and CEO of the Appalachian Leadership Education Foundation, a non-profit that Massey Energy has pledged \$500,000 to over five years;

d. **Defendant Suboleski** is not independent because he is a former employee of Massey Energy and receives consulting fees from the Company; and

e. **Defendant Inman** is not independent due to his long-standing tenure as a member of the Company's Board of Directors.

76. Additionally, the Company's purportedly "independent" directors lack the ability to impartially consider a demand because the investigation and prosecution of this case could jeopardize their lucrative director compensation packages. As noted in the Company's latest Proxy Statement, the Directors are handsomely compensated for their service:

Name	Fees Earned	Stock Awards	All Other Compensation	Total
James B. Crawford	\$118,000	\$106,096	\$2,256	\$226,352
Robert H. Foglesong	\$115,500	\$77,213	\$1,950	\$194,663
E. Gordon Gee	\$106,000	\$108,620	\$4,641	\$219,261
Bobby R. Inman	\$127,500	\$108,620	\$5,399	\$241,519
Lady Judge	\$76,000	\$67,756	\$1,102	\$144,858
Dan R. Moore	\$140,000	\$108,620	\$3,587	\$252,207
Stanley C. Suboleski	\$51,000	\$68,046	\$542	\$119,588

CLAIM FOR RELIEF

Breach of Fiduciary Duties Against the Individual Defendants

77. Plaintiff incorporates by reference all prior paragraphs as if fully set forth herein.

78. The Individual Defendants each owed and/or owes Massey Energy and its shareholders the highest fiduciary duties of good faith, loyalty, fair dealing, due care, and trust in managing and administering the Company's affairs.

79. The Individual Defendants had and have a duty to the Company and its shareholders not to consciously disregard the duties of loyalty, care, and good faith and ensure the Company was operated in a prudent and lawful manner. The Individual Defendants also had and have an affirmative obligation to implement and maintain an internal control system to uncover unsafe working conditions which they should have known existed. Moreover, where, as here, “red flags” are present, corporate management, such as the Individual Defendants, must take steps to address such problems or issues.

80. As detailed herein, the Individual Defendants consciously failed to fulfill their fiduciary obligations to the Company and its shareholders. Among other things, the Individual Defendants:

- a. failed to ensure that the Company complied with its legal obligations and requirements;
- b. completely failed to implement an information system and/or controls upon receipt of notice of information of unsound and illegal conditions and practices, and to make reasonable inquiry in connection therewith; and
- c. having knowledge of such unsound and/or illegal conditions, consciously failed to monitor or oversee the Company’s operations and take steps to correct such conditions or practices.

81. As alleged in detail herein, the Individual Defendants abdicated their responsibilities at the Company and made no good faith effort to fulfill their fiduciary duties. The Individual Defendants did nothing about problems that they knew existed throughout the Company. As a direct and proximate result of the Individual Defendants’ conscious breaches of their fiduciary duties, Massey Energy has suffered and continues to suffer significant damages.

As a result of the misconduct alleged herein, the Individual Defendants are liable to the Company.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and judgment, as follows:

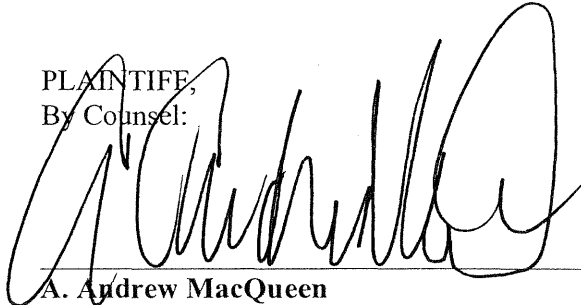
- A. Authorizing the maintenance of this action as a derivative action, with Plaintiff as derivative Plaintiff;
- B. Declaring that the Individual Defendants have violated their fiduciary duties to the Company;
- C. Awarding against all of the Individual Defendants and in favor of the Company for the amount of damages sustained by the Company as a result of the Individual Defendants' breaches of fiduciary duties;
- D. Awarding to Plaintiff the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses; and
- E. Granting such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff demands trial by jury on all claims asserted herein.

Dated: April 15, 2010

PLAINTIFF,
By Counsel:

A large, stylized handwritten signature in black ink, appearing to read 'A. Andrew MacQueen', is written over a horizontal line.

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