IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MANVILLE PERSONAL INJURY TRUST, derivatively on behalf of MASSEY ENERGY COMPANY, Plaintiff, vs. DON L. BLANKENSHIP; BAXTER PHILLIPS, JR.; DAN MOORE; GORDON GEE; RICHARD M. GABRYS; JAMES CRAWFORD; BOBBY R. INMAN; ROBERT H. FOGLESONG; H. DREXEL SHORT, JR.; J. CHRISTOPHER ADKINS; JEFFREY M. JAROSINSKI; JAMES L. GARDNER; JOHN C. BALDWIN; MARTHA R. SEGER; and JAMES H. HARLESS, Defendants, MASSEY ENERGY COMPANY, a Delaware Corporation, Nominal Defendant.	Case No. 07-C-1333 Honorable James Stucky (Derivative Action)

PLAINTIFF'S MOTION FOR AN ORDER FOR A RULE TO SHOW CAUSE AS TO WHY THE BOARD OF DIRECTORS OF MASSEY ENERGY COMPANY SHOULD NOT BE HELD IN CIVIL CONTEMPT AND FOR LEAVE TO CONDUCT EXPEDITED DISCOVERY

NOW COMES Plaintiff, Manville Personal Injury Settlement Trust, by and through its counsel, and hereby moves this Court 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:

1. Scheduling a rule to show cause hearing to determine why Defendants should not be held in contempt of court for violating the June 30, 2008 Agreed Order and

Final Judgment;

2. Granting leave and setting a schedule for expedited discovery to enable Plaintiff to seek the expedited discovery–including the production of documents from Defendants, the deposition of key individuals, and such other discovery as is usual and necessary–to determine whether Defendants have violated the June 30, 2008 Agreed Order and Final Judgment; and

3. Granting such other and further relief as the Court deems just and proper.

WHEREFORE, for the showing made by and reasons contained in Plaintiff's Memorandum of Law in Support of Its 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 Plaintiff's Response to Defendant's Motion to Dismiss and its attached and incorporated Affidavit of A. Andrew MacQueen, Plaintiff respectfully requests that this Court grant Plaintiff's Motion.

Dated this the 15th day of April, 2010.

PLAINTIFF,

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MANVILLE PERSONAL INJURY TRUST, derivatively on behalf of MASSEY ENERGY COMPANY, Plaintiff, vs. DON L. BLANKENSHIP; BAXTER PHILLIPS, JR.; DAN MOORE; GORDON GEE; RICHARD M. GABRYS; JAMES CRAWFORD; BOBBY R. INMAN; ROBERT H. FOGLESONG; H. DREXEL SHORT, JR.; J. CHRISTOPHER ADKINS; JEFFREY M. JAROSINSKI; JAMES L. GARDNER; JOHN C. BALDWIN; MARTHA R. SEGER; and JAMES H. HARLESS, Defendants, MASSEY ENERGY COMPANY, a Delaware Corporation, Nominal Defendant.	Case No. 07-C-1333 Honorable James Stucky (Derivative Action)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS 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

Plaintiff Manville Personal Injury Settlement Trust ("Plaintiff" or "Manville"), on behalf of Massey Energy Company ("Massey Energy" or the "Company"), and by and through its undersigned counsel, hereby submits this Memorandum in Support of its Motion for an Order for a Rule to Show Cause as to Why the Board of Directors[1] of Massey Energy Company Should

[1] Plaintiff moves for an order for a rule to show cause regarding civil contempt of the current members of the Board of Directors (the "Board")—Don L. Blankenship ("Blankenship"), its Chairman; Baxter Phillips, Jr.; Dan R. Moore;

Not Be Held in Civil Contempt for violating the Court's Agreed Order and Final Judgment in the above-styled action, entered on June 30, 2008 (the "Order"), which incorporated by reference the Stipulation of Settlement, dated May 20, 2008 (the "Stipulation"), as operative terms and provisions (collectively, the "Order and Stipulation" attached hereto as Exhibit A and incorporated by this reference).

Plaintiff further moves for leave to conduct discovery on an expedited basis into nature and the extent of the Directors' and the Company's compliance, or lack thereof, with the Order and Stipulation in anticipation of the hearing on the rule to show cause. In support of this motion, Plaintiff states as follows:

I. FACTUAL BACKGROUND

A. Background on the Litigation

Plaintiff, a Massey Energy shareholder, commenced this litigation against the above-named Defendants on July 2, 2007 derivatively on behalf of the Company. Plaintiff alleged that the Defendants had breached their fiduciary duties to the Company for consciously failing to implement adequate internal controls to ensure the Company's compliance with worker safety and environmental laws and regulations. Over the course of nearly a year the parties litigated the case while attempting to negotiate a possible resolution. Those negotiations were ultimately successful, and the parties entered into the Stipulation on May 20, 2008.

After notice and a hearing on the terms of the Stipulation, this Court issued the Order on June 30, 2008 incorporating by reference "as operative terms and provisions" the Stipulation. (Order ¶ 1.) Pursuant to the Stipulation, Massey Energy "agreed to make certain ***changes to its***

Richard M. Gabrys; James B. Crawford; Bobby R. Inman; Robert H. Foglesong; and Stanley C. Suboleski (collectively the "Directors")—except for Lady Barbara Thomas Judge. As a member of the Massey Energy Board, Lady Barbara Thomas Judge is subject to the Order; however, Plaintiff is not seeking a rule to show cause as to why she should not in held in contempt for violation until there is an agreement as to a feasible and efficient means for serving her with the Motion and this supporting Memorandum. Plaintiff reserves all rights to submit an amended motion and/or to move to amend such rule as the Court may order so as to include Lady Judge.

corporate governance policies and procedures relating to director oversight and conduct regarding environmental compliance and mine worker safety, including: (i) implementing limitations on the length of service of and enhanced membership and meeting attendance requirements for members of the Safety, Environmental and Public Policy Committee ('SEPPC') of its Board of Directors; (ii) granting the SEPPC authority to retain independent, outside consultants to assist it with its duties; (iii) requiring that the SEPPC recommend enhancements to the Company's safety and environmental procedures and reporting, including shareholder reporting; (iv) establishing certain safety and environmental compliance oversight positions; and (v) implementing enhanced employee reporting mechanisms for safety and environmental issues." (Stipulation, Section 2.1, at 11-12 (emphasis added).) Those changes are set forth in the corporate governance agreement, attached as Exhibit 2 to the Stipulation, which "shall each remain in effect for a period of five (5) years, subject to modifications permitted therein." (*Id.*)

B. The Reporting System Mandated by the Order and Settlement

Fundamental to the Order and Settlement's corporate governance changes is a reporting system to deliver compliance information up the corporate structure from the mines to the Board, and ultimately, to the shareholders. Pursuant to this system, members of the SEPPC are obligated to "reasonably inform the Board regarding the Company's ***compliance with all applicable mine safety laws and regulations***" via a "mine safety report," and ***"[t]he 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.***" (Stipulation, Ex. 2, at 4-5.) The SEPPC receives compliance information from a Company-wide "Safety Compliance Officer"—a position created pursuant to the Order and Settlement—who "shall report to the SEPPC" unless the SEPPC determines to alter the prescribed reporting

structure. (*Id.* at 6.) Under the Order and Settlement, 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." (*Id.*)

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.) Under the system, the Safety Compliance Officer receives compliance information from Safety Compliance Managers for each of the Company's Resource Groups, who "shall, on a quarterly basis, prepare and submit to the [Safety] Compliance Officer a report regarding the Resource Groups compliance with . . . mine safety laws, rules and regulations." (*Id.* at 7.) Part of the Safety Compliance Officer's duties under the Order and Settlement is to "appoint a number of . . . Safety Compliance Managers sufficient to ensure adequate coverage of the Company's Resource Groups. (*Id.* at 6.).

Pursuant to the terms of the Order and Settlement, the mandated 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.)

C. Violation of the Order and Settlement's Reporting System Provisions

Despite the reporting systems required by the Order, the Directors' Corporate Social Responsibility Report ("CSRR 2009") (Affidavit of A. Andrew MacQueen in Support of Motion for Order for Rule to Show Cause ("MacQueen Aff.," Ex. 1) attached hereto as Exhibit B and incorporated herein by this 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" discussing safety in general, compliance is mentioned ***only once*** and in the following context:

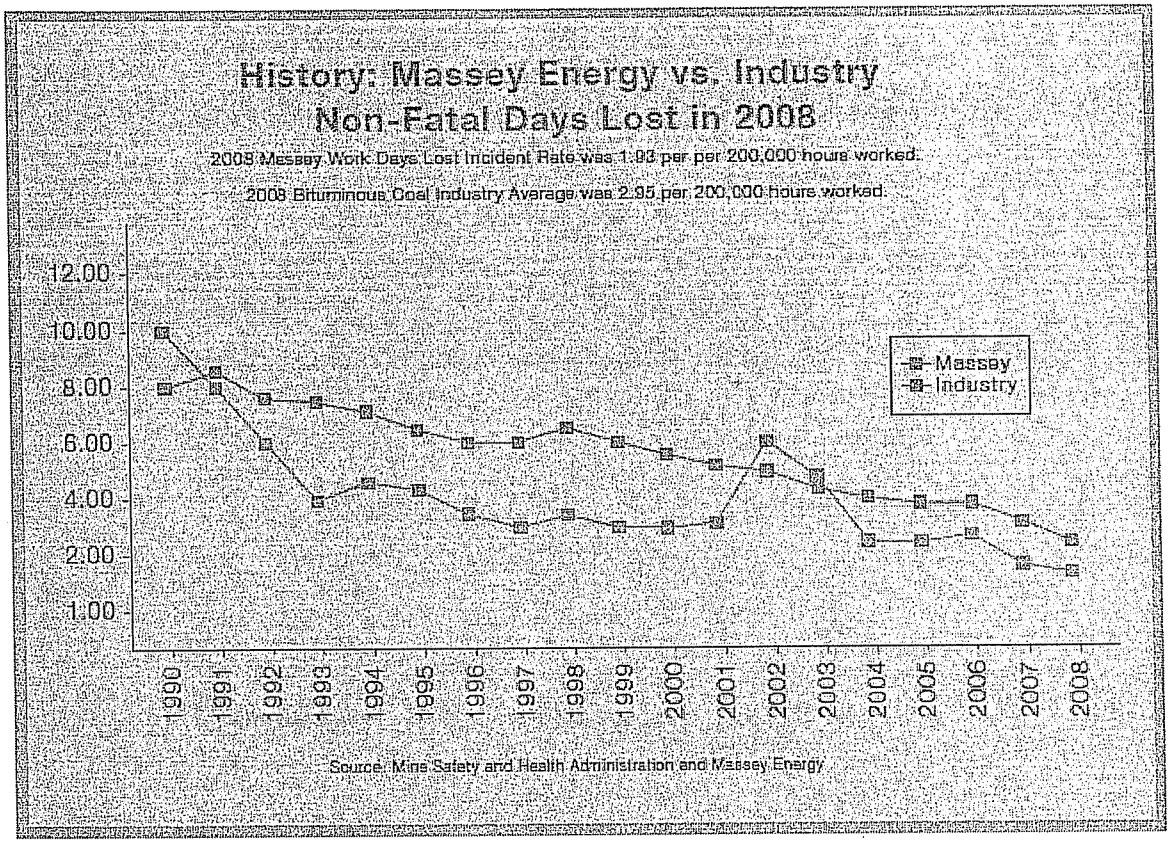
MINER Act Compliance

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.

(MacQueen Aff., Ex. 1, CSRR 2009, at 8.) There is no mine safety compliance report as required by the Order and Settlement, and no substantive information on compliance is provided.

Instead of discussing mine safety compliance, CSRR 2009 devotes its discussion of safety almost exclusively to the most basic, summary statistic of non-fatal days lost ("NFDL") incident rates. NFDL incident rates measure days lost from injuries, not compliance with any, much less all, "applicable mine safety laws and regulations." Rather, NFDL is a single statistical value that by definition speaks nothing of fatalities, near misses, patterns of violations, "serious and substantial" 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 legal 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). (MacQueen Aff., Ex. 2.)



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	78	6,861	56	33	56	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

D. Facts Probative of Additional Violations

Because the Board's mine safety compliance report to shareholders in CSRR 2009 represents the culmination of the mine-safety-compliance reporting, the absence of any such information suggests fundamental violations of the Order and Settlement's compliance reporting system. The serious and systematic complaints of mine safety violations at the Upper Big Branch mine preceding the explosion that took 29 Massey Energy miners' lives on April 5, 2010 only strengthens that inference. Indeed, the following facts regarding the surge in mine safety violations at Upper Big Bend raise serious doubts as to the Board's good faith compliance with the Order and Settlement's reforms aimed at improving mine safety:[2]

- 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. ("MacQueen Aff.," Ex. 3.)

- 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). (MacQueen Aff., Ex. 4.)

- 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. (MacQueen Aff., Ex. 2.)

- 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. (MacQueen Aff., Ex. 5.)

- Of the 54 withdrawal orders issued during 2009, 48 of them occurred following express findings that the mine's operator, Performance Coal Company (a Massey

[2] Other provisions of the Order and Settlement addressing mine safety include, *inter alia*, the following: the SEPPC must "develop goals for implementing enhancements to the Company-wide process utilized to monitor, count and report mine safety incidents and complaints . . . and near misses with a high potential for injury" (*id.* at 4); such "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." (*id.*); the SEPPC "shall review the Company's safety training programs annually and shall recommend enhancements as appropriate" and "report to the Board annually on the key objectives and progress in such programs" (*id.* at 5.); in so doing, the SEPPC shall consider "developing criteria and measurement protocols to assure that all responsible personnel, including contractors, know all compliance obligations related to their work" (*id.*).

Energy subsidiary) exhibited an "unwarrantable failure" to comply with federal health and safety standards, and four involved a "failure to abate" problems identified in previous complaints. (MacQueen Aff., Ex. 5.)

- 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." (MacQueen Aff., Ex. 5.)

- 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. (MacQueen Aff., Ex. 5.)

- 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. (MacQueen Aff., Ex. 4.)

- 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. (MacQueen Aff., Ex. 6.)

According to experts in the field of mine safety, this pattern of complaints should have served as red flags of serious conditions warranting immediate attention. 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, stated to Bloomberg News that the number of such violations was "like someone driving drunk 61 times." (MacQueen Aff., Ex. 4.)

As reported in the April 8, 2010 *The Charleston Gazette*, Tony Oppegard ("Oppegard"), former MSHA staffer and longtime mine safety lawyer described the 61 withdrawal orders as "way off the charts." (MacQueen Aff., Ex. 5.) "I've never heard of that many withdrawal orders in that short a period of time," he said. (MacQueen Aff., Ex. 5.) 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." (MacQueen Aff., Ex. 7.)

Regarding the ventilation issues, Robert Ferrier, a 27-year veteran of MSHA now with the Mine Safety Program of the Colorado School of the Mines, called the reports "highly unusual" in comments to Bloomberg News, noting that "[t]hey were not getting air into places they said they would." (MacQueen Aff., Ex. 4.) West Virginia University law professor and coal industry expert Pat McGinley characterized the nature of these violations as follows in an article published in *The Charleston Gazette* on April 8, 2010: "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." (MacQueen Aff., Ex. 5.)

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 6, 2010. (MacQueen Aff., Ex. 3.) Characterizing the 58 violations last month alone, including the almost daily citations related to proper 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.'" (MacQueen Aff., Ex. 8.) 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.

(MacQueen Aff., Ex. 6.)

Kevin Stricklin, an administrator with MSHA, expressed similar sentiments in comments reported in *The New York Times* on April 6, 2010: the magnitude of the explosion showed that "something went very wrong here." (MacQueen Aff., Ex. 3.) "All explosions are preventable. It's just making sure you have things in place to keep one from occurring." (MacQueen Aff., Ex. 3.) Oppegard echoed that opinion as reported in *The Charleston Gazette* Monday, April 12, 2010: "It doesn't matter whether you had more or less violations than the average mine. This mine blew up. Mines don't blow up unless there were violations. This wasn't an act of God." (MacQueen Aff., Ex. 9.)

Inaccurate statements regarding MSHA violations at Upper Big Branch further support a finding that the Directors have violated the Order and Settlement's provisions. On April 9, 2010, the Company issued a "Statement from Massey Energy Regarding Mine Safety" stating, in part, that since January 2009 Upper Big Branch's rate of MSHA violations-per-day is "consistent with national averages." (MacQueen Aff., Ex. 10.) That statement was false according to Ellen Smith of *Mine Safety and Health News*. In comments to National Public Radio ("NPR"), 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." (MacQueen Aff., Ex. 11.)

Other statements by the Company support a finding that the Directors have violated the Order and Settlement's provisions for mine safety compliance reporting as well. For instance, the Company has trumpeted that it "had recorded an all-time best NFDL incident rate (a measure of lost-time accidents) of 1.67" for 2009 and noted that this rate was almost half the bituminous coal mining industry average of 2.95 for 2008. (MacQueen Aff., Ex. 12.) 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. (MacQueen Aff., Ex. 13.) In fact, Upper Big Branch's NFDL incident rate was 5.81 for 2009, or ***3.47 times*** the rate for the Company as a whole. *Id.* For 2008, another year touted as the "safest" in Company history, Upper Big Branch's NFDL incident rate was 6.07, or ***3.14 times*** the Company's overall NFDL. (*See* MacQueen Aff., Exs. 1 and 13.)

E. Plan to Mitigate Lost Production Increases Risk of Similar Disasters

On April 8, 2010, Massey Energy issued a "Statement to Shareholders Regarding Upper Big Branch Explosion," in which the Company stated that it is currently planning to ramp up production at its other mines:

> ***We are currently working on plans to mitigate the lost production at UBB by increasing production at other mines.*** We have a significant amount of mining equipment available that can be deployed as well as mines where we can produce additional coal similar in quality to that of UBB. We also anticipate that because of our mitigation efforts, as well as attrition at other mine locations, we will be able to put to work the vast majority of UBB miners not working due to the accident.

MacQueen Aff., Ex. 14, Massey Energy Company, Current Report (Form 8-K), at Ex. 99.5 (Apr. 9, 2010) (emphasis added).)

The Company's decision to ramp up production at its other mines is significant because those other mines have safety records as bad – or worse – than Upper Big Branch. According to an article by the *Washington Independent*, Upper Big Branch "doesn't even rank first among the Massey-owned underground mines with the most safety violations this year. That distinction goes to Freedom Mine #1, in Pike County, Ky., which tallied 187 such citations, according to documents posted by the Mine Safety and Health Administration. Among the infractions, investigators cited accumulations of combustible materials and a failure to maintain

escapeways." (MacQueen Aff., Ex. 15, Mike Lillis, *Dozens More Massey Mines Cited as Unsafe*, The Washington Independent, *available at* http://washingtonindependent.com/81604/dozens-more-massey-mines-cited-as-unsafe) (last visited Apr. 12, 2010).) According to the article, "[o]ther notable Massey-controlled mines currently in operation include" the following:

- The Justice # 1 Mine in Boone County, W.Va. [o]perated by the Independence Coal Company, the project has been hit with 115 safety violations this year, including citations surrounding air-quality detectors and ventilation plans. . . .
- The Alloy Powellton Mine in Fayette County, W.Va. [r]un for Massey by the Mammoth Coal Company, the operation has received 80 citations this year, including those targeting its plan to control methane buildup. . . .
- The Slip Ridge Cedar Grove Mine in Martin County, Ky., which has attracted 40 citations this year, including problems with combustible material found too close to ventilation fans. . . .

(*Id.*)

Data recently obtained by 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 industry and the Company as a whole. Nor is it even the worst of Massey Energy 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.

(MacQueen Aff., Ex. 11, Howard Berkes & Robert Benincasa, *Other Massey Mines Showed A Pattern Of Violations*, NPR Morning Edition, Apr. 13, 2010, http://www.npr.org/templates

/story/story.php?storyId=125864847.) Higher NFDL incident rates necessarily mean a likelihood of accidents as production at these mines increases.

II. LEGAL STANDARD

A party seeking to initiate a contempt proceeding is generally required to make a *prima facie* showing. *In re Res. Tech. Corp.*, (C.A. No. _____), 2008 U.S. Dist. LEXIS 104758 (N. D. Ill. Dec. 23, 2008) ("In the absence of any binding authority, the Court believes that it ought to be sufficient to initiate a civil contempt proceeding against a non-party if there has been a showing of a party's noncompliance with a court order and enough evidence of the non-party's involvement to call for further inquiry — in other words, something along the lines of a *prima facie* showing.")) Likewise, courts have required a *prima facie* showing that a court order has been disobeyed for the moving party to be entitled to discovery in contempt contexts. *N.W. Controls, Inc. v. Outboard Marine Corp.*, 349 F. Supp. 1254, 1256 (D. Del. 1972). A *prima facie* showing simply means "evidence of such nature as is sufficient to establish a fact and which, if unrebutted, remains sufficient for that purpose." *Hiram Walker & Sons, Inc. v. Kirk Line, R.B. Kirkconnell & Bro., Ltd.*, 963 F.2d 327, 331 n.5 (11th Cir. 1992) (quoting *Miller v. Norvell*, 775 F.2d 1572, 1574 (11th Cir. 1985)); *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981) ("The phrase '*prima facie* case' . . . describe[s] the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue.").

III. ARGUMENT

A. This Court Has Retained Jurisdiction Over the Parties for Purposes of Implementing and Enforcing the Settlement

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

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

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

(Order at ¶ 10.)

Jurisdictional clauses such as this one "are often found in court settlement orders, and are widely enforced." *Mercier v. Blankenship*, 662 F. Supp. 2d 562, 573 (S.D.W. Va. 2009) (denying plaintiffs' attempt to collaterally attack the terms of the Stipulation and Order in this case); *see also Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994) (explaining that "the court's 'retention of jurisdiction' over the settlement . . . may, in the court's discretion, be one of the terms set forth in the order"); *Ruskay v. Waddell*, 552 F.2d 392, 394 n.4 (2d Cir. 1977) (noting that general releases of this type are commonly granted in the settlement of derivative suits). Indeed, in *Mercier*, the court stated, with reference to this Court and the Settlement in this case, that "whether the parties to [the] settlement approved by [this Court] have complied with the terms of their agreement" is a matter "properly reserved by [this Court] for [this Court's] review." *Mercier*, 662 F. Supp. 2d at 573. Therefore, this Court has jurisdiction to consider Plaintiff's motion.

B. Plaintiff Has the Right to Enforce the Terms of the Settlement

The parties' Stipulation provides, in ¶ 1.9, that Plaintiff, as a "Settling Party," did not release its right to enforce the Stipulation or the Settlement:

> "Released Claims" shall collectively mean all claims (including "Unknown Claims" as defined in ¶ 1.13 hereof), or causes of action, that have been or could have been asserted by Plaintiff derivatively on behalf of Massey or by Massey against Defendants or Related Persons in the Litigation, or any of them, that are based upon the facts, transactions, events, occurrences, acts, statements, omissions or failures to act that were or could have been alleged in the Litigation through May 20, 2008, provided however, that ***the Released Claims shall not include the right of the Settling Parties to enforce the terms of the Stipulation or Settlement.***

Stipulation ¶ 1.9 (emphasis added.) Therefore, Plaintiff has the right to bring this motion to enforce the terms of the Stipulation and Plaintiff's motion is properly before this Court.

C. Plaintiff Has Made a *Prima Facie* Showing of Contempt

1. This Court Has Authority to Hold the Defendants in Civil Contempt for Violating the Order

"Courts in West Virginia have long enjoyed contempt powers." *Boarman v. Boarman*, 556 S.E.2d 800, 805 (W. Va. 2001) (citing *State ex rel. Robinson v. Michael*, 276 S.E.2d 812, 841 n.1 (W. Va. 1981) ("The right of this court to punish for [contempt] is inherent and essential for its protection and existence.")). Whether contempt is civil or criminal "depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate." *State ex rel. Robinson*, 276 S.E.2d at 818. Contempt is deemed civil "where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order." *Id.* However, "[c]ivil contempt proceedings, although primarily remedial, also 'vindicat[e] . . . the court's authority' . . . . " *Czaja v. Czaja*, 537 S.E.2d 908, 920 n.37 (W. Va. 2000) (quoting *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 845 (1994)).

To demonstrate civil contempt, the movant is *not* required to prove that the violation was willful or intentional. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) ("The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act.") (internal citations omitted); *see also United States v. United Mine Workers*, 330 U.S. 258, 303, 304 (1947); *see also Leisge v.*

Leisge, 296 S.E.2d 538, 541 (Va. 1982) ("The sanctity and enforceability of a civil judgment should not hinge upon the mental state of an unsuccessful litigant.").

A civil contempt finding must be based upon clear and convincing evidence that the parties violated a definite and specific court order and the parties had knowledge of the order. *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 590 (6th Cir. 1987). Once this *prima facie* showing is made by the challenging party, the burden shifts to the defending party to show that he or she was unable to comply with the Court's order. *Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992).

2. Defendants Have Breached the Terms of the Stipulation and Thereby Violated the Order

An order issued by a court must be obeyed unless it is reversed. *United States v. United Mine Workers of America*, 330 U.S. 258, 293 (1947). A litigant may be held in contempt if the opposing party shows that "he violate[d] a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." *SEC v. First Fin. Group of Texas, Inc.*, 659 F.2d 660, 669 (5th Cir. 1981). Unless a party obtains a stay of the order, actions in violation of the order may result in contempt sanctions. *See Ragar v. Ramsay*, 3 F.3d 1174, 1180 (8th Cir. 1993); *In re Carrico*, 206 B.R. 447, 454 (S.D. Ohio 1997).

Contracts of compromise and settlement are construed and enforced like any other contract. *See Floyd v. Watson*, 254 S.E.2d. 687, 690 (W. Va. 1979). Thus, when a settling promisor has contracted to do a particular act and fails to do what he is contractually bound to do, a breach occurs. *See Jefferson Cooperage Co. v. Getzendanner*, 182 S.E. 90, 90-91 (W. Va. 1935). "A breach of contract consists of failure to observe a contractual obligation, whether that failure is active or passive." *Holland v. Cline Bros. Min. Co., Inc.*, 877 F. Supp. 308, 316 (S.D.

W. Va. 1995). As set forth above, Defendants have breached the terms of the Stipulation and thereby violated the Order.

D. This Court Has Authority to Order Expedited Discovery Regarding Defendants' Violations of the Order

Courts routinely grant parties reasonable discovery when a contempt action has been filed for breach of a court's order. *See, e.g., Skinner v. Uphoff*, 410 F. Supp. 2d 1104, 1111 (D. Wyo. 2006) (granting prisoners, who had filed a contempt action against prison officials, the right to engage in reasonable discovery in connection with their motion, including the right to exceed the number of interrogatories set by Local Rule if necessary); *Ginest v. Board of County Comm'rs of Carbon County, Wyoming*, 306 F. Supp.2d 1158, 1159-60 (D. Wyo. 2004) (granting prisoners, who had filed a contempt action alleging violations of a consent decree, the right to engage in reasonable discovery); *In The Matter of Litigation Relating to Conditions of Confinement At Montana State Prison*, No. CV 93-46-H-LBE (D. Mont. Jul. 7, 2000) (granting prisoners the right to engage in discovery in connection with their duty to monitor defendants' compliance with a court order); *Dickerson v. Castle*, Civ. A. No. 10256, 1991 WL 208467, at *1 (Del. Ch., Oct. 15, 1991) (allowing parties to take discovery with respect to plaintiff's motion to show cause why the defendants should not be held in civil contempt based on their alleged violations of the settlement agreement requiring defendants to address "problems including overcrowding, medical treatment, legal access and environmental conditions" in Delaware prison facilities); *Ruiz v. McCotter*, 661 F. Supp. 112, 115-16 (S.D. Tex. 1986) (holding show cause hearing regarding plaintiff's motion that defendants be ordered to show cause based on their alleged violation of the courts order for certain reforms to the Texas prison system, at which the parties "produced nearly 200 exhibits and the testimony of thirty-one witnesses, including several experts and prisoners").

Therefore, this Court has authority, pursuant to its contempt powers, to order discovery to inquire into the extent of Defendants' breach of the Settlement and consequent violation of the Order and to determine the appropriate sanction for that violation.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests the Court enter an Order:

a. Scheduling a rule to show cause hearing to determine why Defendants should not be held in contempt of court for violating the June 30, 2008 Agreed Order and Final Judgment;

b. Granting leave and setting a schedule for expedited discovery to enable Plaintiff to seek the expedited discovery–including the production of documents from Defendants, the deposition of key individuals, and such other discovery as is usual and necessary–to determine whether Defendants have violated the June 30, 2008 Agreed Order and Final Judgment; and

c. Granting such other and further relief as the Court deems just and proper.

Dated: April 16, 2010

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CERTIFICATE OF SERVICE

I, A.A. MacQueen do hereby certify that, on this 16th day of April, 2010, I caused the foregoing Plaintiff's Motion for an Order for a Rule to Show Cause Why the Board of Directors of Massey Energy Company Should Not Be Held in Civil Contempt for Violations of the Order and Final Judgment and For Leave to Conduct Discovery on an Expedited Basis has been served by mailing same upon the following counsel of record:

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