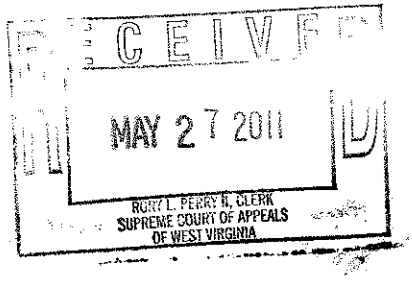
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 11-0839



CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM; AMALGAMATED BANK, AS TRUSTEE FOR THE LONGVIEW COLLECTIVE INVESTMENT FUNDS; and MANVILLE PERSONAL INJURY SETTLEMENT TRUST; derivatively on behalf of MASSEY ENERGY COMPANY;

Plaintiffs/Petitioners,

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. CHRISTOPER ADKINS; JEFFREY M. JAROSINSKI; M. SHANE HARVEY; and MARK A. CLEMENS;

Defendants/Respondents,

MASSEY ENERGY COMPANY, a Delaware Corporation,

Nominal Defendant/Respondent.

OPPOSITION TO MOTION TO SEAL RECORD

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National Public Radio, Inc. and The Charleston Gazette d/b/a The Daily Gazette Company, by and through undersigned counsel, urge this Court to deny Plaintiffs/Petitioners' Motion to Seal Record.

The sole argument presented by Plaintiffs/Petitioners in support of their Motion to Seal is that "significant parts" of the documents contain content disclosed under a confidentiality agreement or protective order "endorsed by the parties." Such an argument is insufficient both as a matter of law and of policy.

It is unsurprising the parties to this case "endorse" the secrecy orders; they likely would prefer to avoid any public scrutiny. Yet this Court is not obligated to pander to parties' desires to hide from public scrutiny. Massey Energy Company and its related entities form one of the largest employers in this State. As such, Massey's conduct, the sale or potential sale of the company, the required public disclosure of relevant information concerning the value of the company to shareholders so they can make informed decisions, and the actions of the parties in this case is of great interest and concern both to the citizens of West Virginia, and nationally as well.

In addition, there is a greater cause for public scrutiny of the filings in this matter in light of the April 5, 2010 explosion at Massey's Upper Big Branch mine. The suspicious circumstances surrounding that tragedy has resulted in numerous lawsuits, including the recently-filed suit alleging that the sale of Massey to Alpha will harm the ability of victims and their families to recover damages. *See* Ken Ward, Jr., Massey-Alpha Merger Situation Heating Up, Charleston Gazette Blog, May 23, 2011 (attached hereto as Exhibit 1). The filings in this case likely will shed new light on Massey's acts and or omissions in relation to the tragedy.

It is beyond cavil that the Press and the Public enjoy a strong, presumptive right of access to court records that is rooted in the need to preserve the integrity of, and the Public's confidence in,

the judicial system. It long has been recognized that, "it is of vast importance to the public that the proceedings of courts of justice should be universally known." *Cowley v. Pulsifer*, 137 Mass. 392, 393-94 (1884) (Holmes, J.). The Public must be assured that justice is served and that whatever decisions this Court makes are legitimate and supported by the record. Such assurance can be given only through transparency.[1] By guaranteeing access to documents relating to judicial proceedings to the Press and to the Public, this right ensures "that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Id.* at 394.

In light of the strong presumption of a right of access to court records, both as a matter of precedent and policy, the Plaintiffs'/Petitioners' argument that the record should be sealed merely because a protective order previously was agreed upon to expedite discovery plainly is insufficient grounds for the issuance of a sealing order. "A [F]irst [A]mendment right of access can be denied only by proof of a 'compelling government interest' and proof that the denial is 'narrowly tailored to serve that interest.'" *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989) (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982)); *see also Press Enterprise Co. v. Superior Court* 464 U.S. 501, 510 (1984) (same). To ensure judicial integrity and public confidence, the Court must open the record in this case to the Public.

THE PRESUMPTIVE RIGHT OF ACCESS

This Court has explained that, "[o]ne fundamental aspect of our Anglo-American system of

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[1] Rule 40(a) of the Rules of Appellate procedure states:

> "In all cases in which relief is sought in the Supreme Court, all pleadings, docket entries, and filings (hereafter "case records") shall be available for public access unless otherwise provided by law or by a rule of this Court, or unless otherwise ordered by the Court in accordance with this Rule."

justice is its openness. In *State ex rel. Herald Mail Co. v. Hamilton*, 165 W.Va. 103, 267 S.E.2d 544, 547-49 (W. Va. 1980), this Court traced the common law origins of the 'open courts' provision contained in our own and in other state constitutions. One reason for this provision, as was noted in *Hamilton*, 267 S.E.2d at 548, quoting 1676 Charter of Fundamental Laws, of West New Jersey, ch. XXIII, is to ensure 'that justice may not be done in a corner nor in any covert manner.'" *Daily Gazette Co. v. Committee on Legal Ethics of the W. Va. State Bar*, 174 W. Va. 359, 364, 326 S.E.2d 705, 710 (W. Va. 1984).

In West Virginia, there is a clear and unequivocal right of the Public to access court records. "The presumption of public access to court records exists in this state. According to *W.Va. Code* § 51-4-2 (1923), 'the records and papers of every court shall be open to the inspection of any person, and the clerk shall, when required, furnish copies thereof, except in cases where it is otherwise specially provided.'" *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W. Va. 611, 616, 520 S.E.2d 186, 191 (W. Va. 1999).

As held in *Syllabus* Points 4 and 5 of *State ex rel. Garden State Newspapers, Inc., supra*:

> "4. The open courts provision of Article III, Section 17 of the Constitution of West Virginia guarantees a qualified constitutional right on the part of the public to attend civil court proceedings.
>
> 5. "Unless a statute provides for confidentiality, court records shall be open to public inspection." Syllabus Point 2, in part, *Richardson v. Town of Kimball*, 176 W. Va. 24, 340 S.E.2d 582 (1986)."

This Court further explained that, "an important purpose of the open-court provision of our state constitution is to permit the public to attend both civil and criminal trials. We further recognized that 'the uniform interpretation of the mandate that the courts "shall be open" by those state courts called upon to construe the [open courts] provision in their constitutions is that this language confers

an independent right on the public to attend civil and criminal trials, and not simply a right in favor of the litigants to demand a public proceeding.' *State ex rel. Herald Mail Co. v. Hamilton*, 165 W. Va. at 110, 267 S.E.2d at 548 (citations omitted). *State ex rel. Garden State Newspapers, Inc, supra*, 205 W. Va. at 615-616, 520 S.E.2d at 190-91 (W. Va. 1999).

In addition to the foregoing clear law in this State, there are two other equally binding legal sources of the right of access to court records: the common law and the First Amendment. In both cases, there is a strong presumption in favor of access to court records, and the Plaintiffs/Petitioners have not met and can not meet the heavy burden required to overcome the right of access.

The common law right of access was recognized by the U.S. Supreme Court in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). Records are presumed to be open to the public, and the party seeking to overcome that presumption bears the heavy burden of showing that a significant interest justifies concealing the records from public view. *See Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988).

There also is a First Amendment right of access to records that has been extended to a variety of records. *See, e.g., Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988) (finding a First Amendment right of access to documents filed in a civil case in connection with a motion for summary judgment), and *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986) (finding a First Amendment right of access to documents filed in connection with plea and sentencing hearings in criminal cases). Where the First Amendment right of access applies, a court may restrict access only where there is a compelling governmental interest, and only where denial is tailored narrowly to serve that interest. *Stone v. Univ. of Maryland Med. Syst. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988). The party seeking closure has the burden of presenting *specific reasons* to justify a sealing order, and

the right of access cannot be overcome merely by a conclusory assertion. *Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004), quoting *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986).

Regardless of whether the right of access arises from state law, the First Amendment or the common law, the right of access "may be abrogated only in unusual circumstances." *Stone*, 855 F.2d at 182. No unusual circumstances are present here.

THE PARTIES CANNOT OVERCOME THE FIRST AMENDMENT RIGHT OF ACCESS TO THE RECORD IN THIS CASE

The more stringent First Amendment standard applies in this case. The First Amendment right of access applies in all cases where, as here, the documents at issue are important to the Public's understanding of the judicial proceeding. "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984). Openness became the standard for American court proceedings because it ensured that "the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

This Court will rely on the record – including pleadings, exhibits, and other evidence or materials submitted – to make its determinations in this case, and thus the record is essential to the public's understanding of the proceedings. The First Amendment standard therefore applies here, as it has been in other cases where the records sought were essential to the Public's understanding of the proceedings. *See Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988)

(finding a First Amendment right of access to documents filed in a civil case in connection with a motion for summary judgment); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986) (finding a First Amendment right of access to documents filed in connection with plea and sentencing hearings in criminal cases).

Applying the First Amendment principles, a sealing order could not be justified in this case. The Plaintiffs/Petitioners bear the heavy burden of articulating legal authority and facts demonstrating a compelling government interest in sealing the record in this case and demonstrating that the sealing order is tailored narrowly. *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986); *see also, Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."). They can do neither. In fact, the Plaintiffs/Petitioners have not put forth *any* legal authority,[2] nor have they alleged any government interest, let alone a compelling one. Their sole rationale is that an agreed protective order was entered in the lower court. The mere fact that the parties agreed to a protective order does not and cannot demonstrate a compelling governmental interest; to the contrary, this Court has a compelling interest in ensuring the Public's confidence in the integrity of the proceedings, and that confidence can be vindicated only if the proceedings and the records are made open to the Public.

Moreover, it is clear that the existence of a protective order governing documents produced in discovery is insufficient grounds for a sealing order. In *Rushford*, the court determined that documents in a civil case that were produced in discovery subject to a protective order nevertheless

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[2] Rule 40(d) of the Rules of Appellate Procedure states:

"The motion [to seal] must state the legal authority for confidentiality."

were subject to the First Amendment right of access. Although the documents were subject to a protective order during discovery, it was recognized that discovery is conducted in private and records may be gathered that never are used in court proceedings; the discovery process is wholly different from the process whereby a court rules on a motion. *See Rushford*, 846 F.2d at 252. The reasons for granting a protective order to facilitate pre-trial discovery are not necessarily sufficient to justify proscribing the First Amendment right of access to judicial documents. *Id.* at 254. In fact, it is highly unlikely that such a burden could be met, as the right of access serves the important public interest of inspiring confidence in the judicial system - a compelling government interest - in contrast to the purely private interest asserted by a party seeking to seal records.

Finally, any sealing order must be tailored narrowly. Therefore where, as here, a party seeks a comprehensive, blanket order sealing the entire record in the case, including the arguments of the parties, could not be considered narrowly tailored pursuant to any definition of that term.[3]

THE PARTIES CANNOT OVERCOME THE RIGHT OF ACCESS UNDER THE COMMON LAW RULE

Even at common law, Plaintiffs/Petitioners must demonstrate a "significant" interest to overcome the presumption in favor of access. Again, the mere fact that a protective order previously had been entered is not, in itself, a significant interest. *See Rushford*, 846 F.2d at 252-54; *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983) (confidentiality agreement does not affect public's right of access to court documents).

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[3] As stated by this Court, [T]he public's right of access should never be arbitrarily or summarily denied." *Daily Gazette v. Committee On Legal Ethics*, 174 W. Va. at 364, n. 9, 326 S.E.2d at 711, n. 9 (1984).

In a case similar to this one, the Court of Appeals for the Seventh Circuit found that the existence of a protective order in a shareholder lawsuit did not justify the sealing of records that were important to understanding the court's decision in the case. *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984). Similar to the reasoning in *Rushford*, the court found that the concerns that justify a protective order during discovery do not necessarily apply once a document becomes evidence in a case. *Id.* at 1310-11. The court found that if a party "believed that the protective order would protect its interest in confidentiality of the Report even after it was introduced into evidence . . . that belief was unreasonable." *Id.* at 1311. Any document that the court considered in arriving at its conclusion should have been open to inspection by the press. *Id.* at 1306-07. Such disclosure should be made even if the disclosure of information might result in civil liability for a party, as there is no general privilege analogous to the Fifth Amendment privilege against self-incrimination that applies in these types of cases. *Id.* at 1315; *see also Brown & Williamson*, 710 F.2d at 1179 (the fact that there may be information that would harm a company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court records).

Similarly, in *Joy v. North*, 692 F.2d 880 (2d Cir. 1982), another case involving a shareholder dispute, a party sought to have a report placed under seal. The party argued that the report contained a candid review of internal operations which, if made public, would adversely affect the company. The court lifted the seal, finding that, "a naked conclusory statement that publication of the Report will injure the bank in the industry and local community falls woefully short of the kind of showing that raises even an arguable issue as to whether it may be kept under seal. The Report is no longer a private document. It is part of a court record." *Id.* at 894.

It therefore is clear that the record in this case presumptively must be open and the Motion to Seal should be denied. No reasons that purportedly justify the protective order below are stated in Plaintiffs/Petitioners motion, and there does not appear to be any interest other than the convenience and expedience of the parties to justify the order. Convenience hardly meets the heavy burden required to outweigh the important and presumptive right of access. Therefore, the mere fact of the existence of the protective order below is insufficient grounds for sealing the record in this case.

CONCLUSION

Before it may issue a sealing order, a court must comply with substantive and procedural requirements. *See, e.g., Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004). Courts must provide interested parties an opportunity to challenge the sealing request, consider less drastic alternatives, and make specific findings that justify any sealing order, if one can be entered. *Id.* at 576. Decisions to seal records should not be made lightly. *Stone v. Univ. of Maryland Med. Syst. Corp.*, 855 F.2d 178 (4th Cir. 1988).

There is no reason to seal the entire record in this case. Even if this Court was to undertake a document-by-document review of all pleadings, evidence and other materials that are part of the record, there has been no demonstration of any compelling or significant interest in favor of secrecy that can overcome the presumption of access. The Court's interest - and its obligation - is to uphold the integrity of the judicial system and to preserve public confidence in the outcomes of the cases before it. This litigation is the result of a highly controversial sale of one of the state's largest companies. It also includes important records concerning that company's acts and omissions in one of the worst mining accidents in recent history.

If the Court seals the record and undertakes its review of the case in secret, the risk of losing the public's confidence in the judicial system is increased exponentially. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572. Keeping the record secret will foster suspicion among the public as to how this case was handled and why this Court rules as it will. There is no interest alleged that overcomes the presumption of access; on the contrary, the clear and compelling interest in this case is preserving the Public's confidence in the court system, an interest that requires this Court deny Plaintiff/Petitioner's Motion to Seal the Record.[4]

NATIONAL PUBLIC RADIO, THE DAILY GAZETTE COMPANY d/b/a CHARLESTON GAZETTE, Intervenors,
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[4] While the Motion to Seal is filed by the Petitioner, the documents and information sought to be kept secret are those of the respondents. Importantly, however, the respondents have not commented or joined in the Motion to Seal, or otherwise provided any basis for sealing the record. If respondents hereafter seek to file a pleading requesting the record be sealed, and the court allows such a pleading to be filed, Intervenors request a full and fair opportunity to address any purported rationale put forward by respondents.

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No. 11-0839

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Plaintiffs/Petitioners,

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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. CHRISTOPER ADKINS; JEFFREY M. JAROSINSKI; M. SHANE HARVEY; and MARK A. CLEMENS;

Defendants/Respondents,

MASSEY ENERGY COMPANY, a Delaware Corporation,

Nominal Defendant/Respondent.

CERTIFICATE OF SERVICE

I, Sean P. McGinley, counsel for National Public Radio, Inc. and The Daily Gazette Co. d/b/a Charleston Gazette, do hereby certify that on the 27th day of May, 2011, I served an exact copy of **OPPOSITION TO MOTION TO SEAL** upon the following parties via first class U.S. mail, postage prepaid, addressed as follows:

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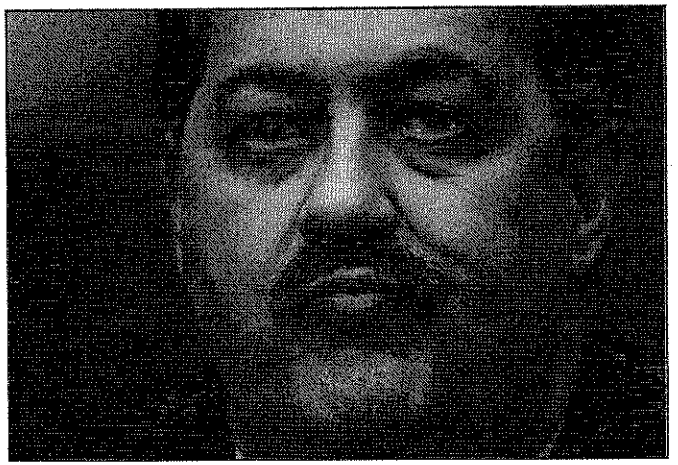
« Is MSHA feeling some heat over UBB report?
Documents: Alpha would have hired Blankenship »

Massey-Alpha merger situation heating up

May 23, 2011 by Ken Ward Jr.



As the June 1 date for shareholders of Alpha Natural Resources and Massey Energy to vote on Alpha's takeover of Massey, litigation over the potential $8 billion deal is definitely heating up.

We reported earlier today on a lawsuit filed in Boone County by families of some of the miners who died in Massey's Upper Big Branch Mine Disaster related to the proposed purchase of Massey by Alpha. Basically, this suit alleges that the transaction is a great deal for Massey insiders — who stand to profit greatly from it — and puts at risk the ability of the victims' families to recover from lawsuits over the April 5, 2010, explosion. The suit alleges:

[Massey] is a corporation with considerable assets, including some of the best coal reserves in the central Appalachian region.

As a result of the misconduct and mismanagement of the insider defendants... all assets of [Massey] are being transferred to Alpha in the merger. In doing so, the insider defendants, as well as other members of management, including former CEO Don Blankenship, are liquidating risk into cash and are able to walk away from the merger with substantial amounts of cash while the plaintiff creditors will have nothing more than unsecured claims against a highly leveraged, cash-poor company.

And over at NPR, Howard Berkes reported today on what he called "last-ditch attempts by some Massey shareholders to block the deal.

Howard explained:

The lawsuits are so-called "derivative" suits in which shareholders assert they must sue on behalf of the company, and to protect the company's value, because of alleged misbehavior by the directors and officers.

UPDATED: The Wednesday hearing referenced by NPR has been postponed, according to the office of Kanawha Circuit Judge Charles King.

The hearings in West Virginia Wednesday and Delaware Thursday seek preliminary injunctions blocking the merger, which is expected to be approved at shareholders meetings June 1.

Most of the court documents in both cases are sealed but NPR has obtained subpoenas issued to former Massey CEO Don Blankenship and current Chief Operating Officer Chris Adkins. Both involve appearances at Wednesday's hearing in Kanawha County Circuit Court in Charleston, West Virginia.

Some lawsuits by shareholders were filed prior to the Upper Big Branch disaster and settled, while others were filed just after the disaster, and still more have been filed directly regarding the proposed deal with Alpha. A rundown of them all is available in Massey's most recent quarterly report to shareholders and the U.S. Securities and Exchange Commission.

And, as SEC filings continue to pile in regarding the merger, some are providing more details about Blankenship's departure from Massey. One in particular is interesting:

The plaintiffs in In re Massey Energy Company Derivative and Class Action Litigation filed a submission on May 15, 2011, in support of their request for equitable relief, including a preliminary injunction enjoining the consummation of the proposed merger of Massey Energy Company (Massey) and Mountain Merger Sub, Inc., a wholly owned subsidiary of Alpha Natural Resources, Inc. (Alpha). In that submission, the plaintiffs alleged, among other things, that the definitive Proxy Statement filed by Massey and Alpha with the Securities and Exchange Commission (SEC) on April 29, 2011, which we call the Proxy, was false and misleading because it allegedly omitted certain facts that plaintiffs contend are material. One of the plaintiffs' contentions centers around the work of an Advisory Committee formed by the board of directors of Massey in August 2010 to investigate, among other things, derivative claims relating to the safety of the work conditions at Massey. This committee consisted solely of the two members of Massey's board of directors who had been appointed in August 2010. The plaintiffs allege that the Proxy failed to disclose, but should have, that the committee made an oral report to the Massey board of directors at a dinner meeting on November 21, 2010. ***According to the plaintiffs, the oral report by the committee indicated to the remaining board members that the committee might recommend that derivative claims be pursued against them, and that those directors might become subject to "grueling" examination by third parties the committee was considering retaining to examine Massey's safety practices. The plaintiffs also allege that the committee recommended that Mr. Blankenship be removed, and that this was the reason he submitted his resignation on December 3, 2010.*** *Finally, the plaintiffs allege that the foregoing led the board of directors of Massey to conclude that they had no alternative but to sell Massey to a third party.*

Massey disputes the plaintiffs' characterizations of these events. While the committee provided an oral update to the independent members of Massey's board of directors on November 21, 2010 after the meeting of the full board of directors had been concluded, the update made no conclusions about whether or not the derivative claims should be pursued, and stated that the committee's investigation was ongoing. Massey further believes that there is no connection between the committee's oral update and the decision made by the board of directors to pursue a sale, or agree to a sale, of the company. ***While the oral update of the committee included a recommendation that at a minimum the board of directors not re-nominate Mr. Blankenship for re-election to the board of directors at the company's next annual meeting then expected to be held in May 2011, and assess whether Mr. Blankenship as Chairman of the Board and Chief Executive Officer provided the most viable option for Massey going forward, the independent members of Massey's board of directors did not make any decision on this matter and did not make a recommendation to the board of directors to remove Mr. Blankenship or request his resignation from his positions at Massey.***

Stay tuned ...