IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In re MASSEY ENERGY COMPANY DERIVATIVE AND CLASS ACTION LITIGATION	)	Case No. 5430-VCS

CO-LEAD PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND DEPOSITION TESTIMONY RELATING TO THE INVESTIGATION OF THE MASSEY ENERGY COMPANY ADVISORY COMMITTEE

DATED: May 12, 2011

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This motion to compel production of documents and for the continuation of the deposition of defendant Linda J. Welty is necessitated by Defendants' improper and unilateral decision that information at the very heart of this case is "beyond the scope" of discovery. Defendants' position should be summarily rejected.

The record will show that the board of directors of Massey Energy Company ("Massey" or the "Company") was so derelict in their duty to oversee proper operation of Massey mines that a catastrophic event was inevitable. That catastrophe came on April 5, 2010 with the tragic explosion at Massey's Upper Big Branch mine (the "UBB Disaster"). The UBB Disaster crystallized the long-standing criticism of Massey's safety practices by regulators and the press, which in turn created massive pressure on the Board to finally look in the mirror and see what their utter disregard for legal safety compliance had done to the Company.

In August 2010, the Board begrudgingly created an advisory committee (the "Advisory Committee"), consisting of two newly appointed directors, to "investigate" whether changes were necessary in Massey's management and operations and to "recommend" to the rest of the board whether the pending derivative claims against the Board and senior management should be pursued.

As the Advisory Committee began its work, the Board was deeply split on whether to sell the Company to someone who could actually repair the grievous damage done by the incumbents' prior misconduct. The Board's debates ended when they realized that the Advisory Committee's findings were likely to show that there were few,

if any, alternatives left to selling the Company and that the Committee might actually support the need to prosecute the derivative claims against them.

The Committee drafted an Interim Report, which was presented to the Board as a whole on December 20, 2010. *See* Calder Declaration Exhibit A (hereinafter "Calder Dec., Ex. ____). That Interim Report stated that the Committee had orally presented the status of its investigation and a preview to its recommendations a month earlier on November 20, just as the Massey sale process was getting underway. The November 20 oral update made clear that significant "change at the top" was necessary, and that the first step was for firebrand CEO Don Blankenship ("Blankenship") to leave the Company. Calder De., Ex. A at 5-6.

Defendants obviously realized that the writing was on the wall at that point. Less than two weeks later, on December 3, the board accepted Blankenship's "resignation" from the board and from his CEO position, and the quickly appointed Defendant Baxter Phillips, Blankenship's long-time second-in-command, to the position of CEO. On December 20, the Advisory Committee's work was suspended pending resolution of the corporate sale process. The merger with Alpha Natural Resources, Inc. ("Alpha") came to fruition soon thereafter, and the Advisory Committee's work was never completed.

Defendants have produced isolated documents reflecting the general progress of the Advisory Committee's investigation before the sudden suspension of its work in late December 2010. Defendants withheld all of the underlying documentation, including Committee member notes regarding interviews the Committee conducted with Massey management and mine personnel and an industry report that showed how unfavorably

Massey's safety practices compared with other coal companies from 2005 to 2009 (the "Miller Report"). Calder Dec., Ex. ! at 4, ¶7. These interviews and other investigative documents formed a significant part of the basis for the Advisory Committee's November 2010 oral recommendations to the Board and their December 2010 interim report.

Plaintiffs submit that the investigative documents withheld from production are highly relevant to the issues to be presented to the Court at the May 26, 2011 injunction hearing. At that time, Plaintiffs will show the Court that Massey was *in extremis* post-UBB disaster due to the many years of the board's deliberate indifference to safety at the Company, and that the Board knew that the only viable alternative left was to sell the Company. Plaintiffs will be arguing that the Alpha merger must be enjoined pending adjudication of the derivative claims, or at least that those claims should be set aside in a litigation trust and Plaintiffs permitted to pursue those claims rather than let Defendants' avoid any form of accountability by selling the Company to Alpha, which patently will not pursue the claims.

Defendants' answer to Plaintiffs' discovery demands has been that this information is beyond the scope of discovery in connection with the injunction. There is no rule in this Court that says Defendants get to decide what evidence Plaintiffs can present to the Court to support Plaintiffs' injunction and litigation trust arguments. Defendants should be ordered to produce the documents at issue and to produce Committee member Welty for further deposition so that she can be examined about these documents.

BACKGROUND

The Advisory Committee and Its Preliminary Report

On August 16, 2010, the Massey board passed a resolution creating the Advisory Committee composed of the two new directors added to the board that day – Linda J. Welty ("Welty") and Robert Holland. The Advisory Committee was charged with broad investigative responsibilities to make recommendations to the board on whether the claims asserted in this action and other derivative actions should be pursued. The Advisory Committee was also given the responsibility to advise the board on whether management and its policies should be changed.

Shortly after its formation, the Committee began its work. In October 2010, the Committee spent two days conducting interviews with Blankenship, other members of management, members of the board's Safety Committee, and several mine personnel (including foremen, superintendents and miners). The Committee also examined how other companies known to have outstanding safety records administered those safety programs.

The Massey board met from November 20 to November 23, 2011 to convene a review of strategic alternatives for the Company. Welty testified that at the November 20 session, she made an oral report to the board regarding the Committee's investigation thus far. Calder Dec., Ex. B at 70. Welty Tr. at 70. Her outline for her presentation to the board states that Massey was "plagued by a number of visible safety failures with high human cost and high business cost: Aracoma, UBB, Seng Creek, attempt to [shutdown] Freedom mine, restatement of injury statistics." Calder Dec., Ex. C, at LW

DEL 00000987. She also noted in her outline that the "[d]isrespect for [the Federal Mine Safety and Health Administration known as MSHA] top to bottom" had possibly led to a feeling of "'justified' disregard of MSHA policy." *Id.*

In an attempt to deal with these pervasive issues, the Committee wanted to engage outside safety consultants and to convene a blue ribbon panel of experts to help "overcome our lack of credibility with shareholders, regulators, employees, families, public officials, [and the] press." *Id.* The problem with doing so, however, was that no reputable expert would want to serve in such a capacity "without a change at the top" of Massey's management, *i.e.*, the removal of Blankenship from his positions in the Company and a jettisoning of Blankenship's old guard's style of confrontational tactics with regulators, the press and other interested constituencies. *Id.* at LW DEL 00000988. She concluded that Blankenship's "retirement" would be the least disruptive option to send the clear signal that the board was getting serious about change in the "tone from the top." *Id.*

The board obviously took a portion of Welty's recommendation to heart, because by December 3 – a mere 10 days after the November 20-23 board meetings – the board was formally approving the severance agreement they had negotiated with Blankenship. What they did not seek to implement, however, was a complete change in "tone from the top." With Blankenship out as CEO, they could have fully capitalized on Welty's recommendations and launched a nationwide search for a new CEO – one known for his or her heavy emphasis on safety and regulatory compliance. Instead, they appointed

defendant Phillips, who had been one of Blankenship's key executives for years, to be the new CEO. Calder Dec., Ex. D at 209.

Welty's preliminary conclusion that the only way for the Company to "move past the tragedy of UBB [and] improve its safety and regulatory performance" was to put in place a "new 'tone from the top'" clearly gave the board pause as to whether Massey could even continue as a stand alone company without a massive overhaul of all management. Calder Dec., Ex. A at 6. The board chose not to engage in such a massive overhaul, likely realizing that the albatross around the Company's neck was too large to overcome. They realized that the only real alternative left was to seek a sale of the Company. That is why they replaced Blankenship with Phillips, who clearly would not be regarded by anyone as a "change" from the past "tone," rather than look for a new CEO who might be able to bring regulators and investors around from their harsh views of Massey. And their most significant roadblock to a deal – Blankenship, who steadfastly rebuffed approaches from other companies post-UBB and adamantly stated that Massey was not for sale – was conveniently gone at the Committee's recommendation.

It is at this point that defendant Inman, who replaced Blankenship as the Chairman of the board, reached out to Alpha Natural Resources ("Alpha"). Alpha had been making overtures to acquire Massey since the UBB explosion, such overtures being rebuffed by Blankenship despite Inman's attempts to keep the Company's options open by maintaining a dialogue with Alpha. With Blankenship out of the way, Inman was free to pursue the sale transaction that the board obviously concluded was the only rational

alternative left to them. Within days, Massey was fully engaged in discussions with Alpha for a potential merger.

The Advisory Committee's December 20, 2010 report to the board seems to confirm this turn of events. The Advisory Committee noted the "significant developments" in "recent days" in the Company's review of strategic options. Calder Dec., Ex. A at 5. The Committee also stated in its December 20 report that "[f]ollowing the full presentation of these developments to the Board at its December 20th meeting, and if it appears that a sale of the Company is likely in the near term," the Committee recommended that its activities with regard to whether to purse the derivative claims be suspended for "an initial 30-day period." *Id.* The Committee never did resume its activities, as the merger with Alpha came to fruition shortly thereafter.

Defendants Withhold The Advisory Committee Investigative Materials

On Sunday, May 8, 2011, Plaintiffs' counsel wrote to defense counsel requesting the production of any notes or similar investigative materials that existed with regard to the Advisory Committee's investigative activities described in Welty's outline for her oral November 20, 2010 report to the board and in the Committee's December 20, 2010 written report to the board. Calder Dec., Ex. E. When that request went unanswered, Plaintiffs' counsel again requested the materials. Calder Dec., Ex. F. On May 9, 2011, counsel to defendant Welty responded that "the information you have requested is beyond the scope of the subject-matter of the hearing scheduled for May 26, 2011. Accordingly, we will not produce the requested documents at this time." Calder Dec., Ex. G.

At her deposition on May10, 2011, Welty testified that she took notes of the interviews that the Committee conducted in its investigation and that she turned those notes over to defendants' counsel in this matter. Calder Dec., Ex. B at 52-53. Plaintiffs' counsel asked defense counsel if they were in possession of the notes; they confirmed that they were. *Id.* at 54. Defense counsel then stated that "we disagree as to whether [the notes] are producible in connection with this preliminary injunction hearing." *Id.* When Plaintiffs' counsel tried to confirm that the objection to the production of these notes was based upon defense counsel's view of the scope of the injunction hearing, Delaware counsel for Massey stated that "Your statement addresses some, but not all, of the grounds that we believe justify continuing with the document production that has been made to date, and not making further document production in response to the request made on Sunday. We'd be happy to address that issue with you off the record at your convenience." *Id.* When Plaintiffs' counsel tried one last time to get Massey's counsel to state for the record what his objection was to producing the requested documents, Massey's counsel stated that "You have the document production that we think is appropriate at this stage in light of the requests that have been made so far." *Id.* In response to one last question looking for a yes or no answer to whether defendants were producing the notes, Massey's counsel stated "I'm happy to address all these issues off the record with you at your convenience."

At the end of examination, Plaintiffs' counsel asked if defense counsel had brought the notes at issue with them to the deposition. When they responded that they had not, Plaintiffs' counsel informed them that Plaintiffs' counsel would raise the issue

with the Court and that the Welty deposition was not actually closed due to this open issue. Massey's counsel then stated "We understand you've reserved your rights to seek further discovery on these matters and seek to recall the witness. Pending a ruling of the court, we're going to regard this deposition as complete." Calder Dec., Ex. B at 126-27.

It is that final refusal by Massey's and Welty's counsel to produce the documents at issue absent a court order to do so that has necessitated this motion.

ARGUMENT

I. DEFENDANTS MAY NOT UNILATERALLY DETERMINE THE SCOPE OF DISCOVERY

It is beyond peradventure that "[t]he scope of discovery pursuant to Court of Chancery Rule 26(b) is broad and far-reaching ... [and] renders discoverable any information that 'appears reasonably calculated to lead to the discovery of admissible evidence.' Consequently, absent injustice or privilege, the Rule instructs the Court to grant discovery liberally." *Omnicare, Inc. v. Mariner Health Care Mgmt. Co.*, C.A. No. 3087-VCN, 2009 WL 1515609, at *3 (Del. Ch. May 29, 2009) (quoting *Pfizer, Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *1 (Del. Ch. Dec. 8, 1999)). Rule 26 requires only that the discovery sought be "relevant *to the subject matter in the pending action*" in order to be properly discoverable. (Emphasis added.) Only when the discovery propounded is the equivalent of a "fishing expedition" looking for new and unrelated claims or is motivated by "purposes ulterior to the litigation" does the Court consider exercising its discretion to limit discovery on relevance grounds. *Id*. at *3 (quoting *Plaza Sec. Co. v. Office*, 1986 WL 14417, at *5 (Del. Ch. Dec. 15, 1986)).

Here, the discovery that Plaintiffs have sought is clearly relevant, if for no other reason than the fact that the Advisory Committee was tasked to recommend to the board whether the derivative claims asserted in this action should be pursued. The Committee's other major task – to make recommendations on how to overhaul the Company's troubled management practices – led to the board's hasty removal of Blankenship and quick

pursuit of the merger that the injunction motion seeks to prevent, giving a separate but equally strong ground for the relevance of these documents.

Defendants' only stated ground for withholding the documents – to the extent that they were willing to go on the record with their position – is that these documents are "beyond the scope of the injunction hearing." Plaintiffs' are unaware of any ruling by the Court as to what issues it is willing to entertain at the injunction hearing. Moreover, Plaintiffs are within their rights to seek to enjoin the merger on any legally cognizable ground that they choose to articulate to the Court. It is the epitome of highhandedness and in flagrant violation of Chancery Court Rules for defendants to unilaterally limit the scope of discovery that Rule 26 otherwise permits. Their only permissible recourse, if they felt that the issues at the injunction hearing truly were to be as narrow as they believe/want them to be, was to seek a protective order. They did not do so, invoking self-help instead and simply refusing to give Plaintiffs the documents based upon vague statements about the "scope" as they see it but refuse to define on the record.

Plaintiffs' respectfully submit that defendants should not be rewarded for their tactics in violation of the Chancery Court Rules and should be ordered to produce the requested documents and deponent.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court order defendants to produce the notes and other investigative materials (including the Miller Report) of the Advisory Committee no later than May 13 and that they be required to

produce defendant Welty for a continuation of her deposition in Wilmington, Delaware on May 14.

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