

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HUGH M. CAPERTON, HARMAN)	
DEVELOPMENT CORPORATION,)	
HARMAN MINING CORPORATION, and)	
SOVEREIGN COAL SALES, INC.,)	
)	Pre-Petition Matter No. _____
Plaintiffs below/Respondents,)	(Circuit Court of Boone County
)	Civil Action No. 98-C-192
v.)	Honorable Jay M. Hoke, Judge)
)	
A.T. MASSEY COAL COMPANY, INC.,)	
ELK RUN COAL COMPANY, INC.,)	
INDEPENDENCE COAL COMPANY, INC.,)	
MARFORK COAL COMPANY, INC.,)	
PERFORMANCE COAL COMPANY, and)	
MASSEY COAL SALES COMPANY, INC.,)	
)	
Defendants below/Petitioners.)	

**MOTION OF RESPONDENT CORPORATIONS
FOR DISQUALIFICATION OF JUSTICE BENJAMIN**

Submitted by

Robert V. Berthold, Jr., Esq. (W.Va Bar 326)
Berthold, Tiano & O'Dell
P.O. Box 3508
Charleston, West Virginia 25335
(304) 345-5700

David B. Fawcett, Esquire (Of Counsel)
Buchanan Ingersoll
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410
(412) 562-3931
Of Counsel

Counsel for Respondent Corporations

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HUGH M. CAPERTON, HARMAN)	
DEVELOPMENT CORPORATION,)	
HARMAN MINING CORPORATION, and)	
SOVEREIGN COAL SALES, INC.,)	
)	Pre-Petition Matter No. _____
Plaintiffs below/Respondents,)	(Circuit Court of Boone County
)	Civil Action No. 98-C-192
v.)	Honorable Jay M. Hoke, Judge)
)	
A.T. MASSEY COAL COMPANY, INC.,)	
ELK RUN COAL COMPANY, INC.,)	
INDEPENDENCE COAL COMPANY, INC.,)	
MARFORK COAL COMPANY, INC.,)	
PERFORMANCE COAL COMPANY, and)	
MASSEY COAL SALES COMPANY, INC.,)	
)	
Defendants below/Petitioners.)	

To: The Honorable Brent Benjamin
Justice of the Supreme Court of Appeals of West Virginia
Capitol Complex, Building 1, Room E-302
Charleston, WV 25305

**MOTION OF RESPONDENT CORPORATIONS
FOR DISQUALIFICATION OF JUSTICE BENJAMIN**

Pursuant to Rule 29 of the West Virginia Rules of Appellate Procedure, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. (collectively "Harman") respectfully move to disqualify Justice Brent Benjamin from participating in any decision related to the above-captioned litigation.¹ The confluence of facts surrounding the involvement of Massey's CEO in the recent Supreme Court election, in light of a 2002 jury verdict against Petitioners (hereinafter "Massey") and Massey's public avowal to appeal this case, give an appearance that could cause a loss of faith in the judicial system if Justice Benjamin were not to recuse himself in this matter.

¹ Hereinafter the lawsuit filed in the Circuit Court of Boone County, West Virginia at No. 09-C-192 shall be referred to as the "Harman Action"; and the seven week trial of the Harman Action shall be referred to as the "Harman Trial."

A reasonable person, considering the aggregate facts in this situation, would likely believe that *any* judge who received the kind of unprecedented support that was provided by petitioner Massey and its CEO would be tainted. The principle of Due Process requires that where such a shadow is cast over the objectivity of a member of the judiciary, so much so that the public would lose confidence in the fairness of the government, a justice should disqualify himself from participating in decisions related to parties for which he or she appears to hold a bias or on issues for which he or she retains interest. Keeping in mind that Due Process obliges the "appearance of justice to be satisfied," *State ex. rel. Brown v. Dietrick*, 191 W.Va. 169, 173; 444 S.E.2d 47, 51 (1994), we entreat Justice Benjamin to carefully consider the facts at hand and the merits of this argument, and disqualify himself from participation in decisions concerning Massey which relate to Harman and Mr. Caperton.

I. LEGAL PRINCIPLES

The concept that there are certain situations in which a judge or justice should be disqualified from ruling on certain matters before the court is rooted in one of the most essential American legal principles, that of Due Process under the law. Due Process, in its simplest form, requires that a person be confident of receiving a "fair trial in a fair tribunal." *Louk v. Haynes*, 159 W.Va. 482, 499, 223 S.E.2d 780, 791 (1976), *quoting Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444 (1927)

Due Process is the foundation of our legal system and the basis upon which our citizenry's confidence in the courts rests. Recognizing that justices are human and that extrajudicial circumstances may unfairly impinge upon their ability to be neutral in deciding a particular case, our courts have long acknowledged the notion of judicial disqualification or recusal. Under West Virginia law, disqualification is codified in Rule 29 of the West Virginia Rules of Appellate

Procedure, which reads in part: "A justice shall disqualify himself or herself, upon proper motion or *sua sponte*, in accordance with the provisions of Canon 3(E)(1) of the Code of Judicial Conduct. . ."

As Justice Maynard stated in *State ex. rel. Mantz v. Zakaib*, ___ W. Va. ___, 609 S.E.2d 870 (2004):

The United States Supreme Court has described the standard for recusal as whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality. The Supreme Court has stated that the goal is to avoid even the appearance of partiality. To be clear, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself.

Justice Maynard also stated in *Mantz* that the Code of Judicial Conduct specifically applies to justices of the West Virginia Supreme Court of Appeals. *Id.*, ___ W. Va. at ___, 609 S.E.2d at 874.

The West Virginia Code of Judicial Conduct Canon 3(E)(1) adopts its form and language almost verbatim from its federal counterpart, setting forth that a judge or justice should disqualify himself or herself in any proceeding where "the judge's impartiality might reasonably be questioned." Both the Canon language itself and the Commentary make it abundantly clear that the examples enumerated are by no means the only situations when impartiality may be questioned, and a judge may be disqualified "regardless of whether any of the specific rules in Section 3(E)(1) apply." *Commentary to Canon 3(E)(1), W. Va. Code Jud. Conduct*

Both the West Virginia Courts and the United States Supreme Court have held that an objective standard should be used to determine whether or not impartiality of a member of the judiciary may be reasonably questioned. This standard for disqualification is not whether the judge will actually be fair and unbiased, but "whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality." *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 108, 459 S.E.2d 374, 385 (1995); *Liljeberg v. Health Services*

Acquisition Corp., 486 U.S. 847, 860 (1988). See also *State ex rel. Mantz v. Zakaib*, ____ W.Va. at ____, 609 S.E.2d at 875 (2004).

Similarly, Canon 2 of the West Virginia Code of Judicial Conduct declares that "a judge shall avoid... the appearance of impropriety in all of the judge's activities," and specifies in Part A of that Canon, that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Thus, judges must recuse themselves not only when the judge "has a personal bias or prejudice concerning a party," but also when a judge's "impartiality might reasonably be questioned." The rules seek to preclude the *appearance* of unfairness which undermines confidence in the courts and the concept of Due Process itself.

The overwhelming facts and circumstances, outlined below, which connect the 2002 jury verdict in the above litigation with petitioner Massey's involvement in the 2004 judiciary election in which Justice Benjamin won his seat on the West Virginia Supreme Court of Appeals create reasonable and substantial, if not overwhelming, doubts whether Justice Benjamin – or any judge in his shoes – could be impartial and unbiased in adjudicating Massey's appeal in this matter. Harman does not at all question Justice Benjamin's integrity; we only argue that the facts, viewed objectively, reveal an *appearance* of unfairness. Due Process requires no more than the appearance of unfairness, under the circumstances, to necessitate disqualification.

II. FACTS

The important facts are detailed below and divided into facts concerning (A) the Litigation; (B) the 2004 Election and (C) the Public's Perception.

A. The Litigation

The Harman Action was initiated on October 29, 1998 by the filing of a complaint alleging tortious interference and material misrepresentations by Massey leading to the destruction

and bankruptcy of Harman. Nearly four years of extensive discovery and pretrial procedures followed, including motions and actions filed by Massey in a variety of courts to have the case dismissed, moved, and/or removed from the jurisdiction of the Circuit Court of Boone County, West Virginia.² The attempts to have the Harman Action dismissed or transferred out of West Virginia were all rejected.³

The complaint alleges that a whole series of steps were taken over approximately a year's period which were unlawful. The background allegations are that LTV Steel was a large purchaser of metallurgical coal on an annual basis; that LTV Steel preferred a blend of coal for its coke ovens known as the Harman Blend that utilized a substantial amount of Harman Coal; that Massey wanted LTV to be a customer of its own; that Massey's various business solicitations of LTV over the years were rejected; and that, thereafter, Massey developed a scheme to solicit LTV's business while interfering with Harman so that, in the long run, Massey would gain access to Harman's coal reserves and would gain LTV as a client. As the scheme developed, Massey also sought to unlawfully create an opportunity to acquire the assets of Harman, i.e., the Harman Mine, for its potential to add to Massey's profits. For example, Massey threatened the Plaintiffs with protracted and expensive litigation if Harman did not give up the rights to its reserves, misrepresented its intention to settle any disputes by collapsing the deal after Harman had shut

² On December 29, 1998, Massey filed a Motion to Dismiss on the grounds that two of the plaintiffs in this tort action were parties to a previously filed contract case against a third party pending in Buchanan County, Virginia. On March 10, 2000, Massey filed a Notice of Removal to remove the Harman Action from the Circuit Court of Boone County, West Virginia to the United States District Court for the Southern District of West Virginia. On March 10, 2000, Massey filed a Motion for Change of Venue with the United States District Court for the Southern District of West Virginia to have the Harman Action transferred to the United States Bankruptcy Court for the Western District of Virginia where Massey had filed an adversary action in the bankruptcies that Harman filed in that venue.

³ The Motion to Dismiss was denied by the Honorable Jay M. Hoke of the Circuit Court of Boone County, West Virginia, in the latter part of 1999. The Motion for Change of Venue was denied as moot by the United States District Court on June 4, 2001. Contemporaneously, the District Court granted Caperton's and Harman's motions for abstention and remand. The United States District Court remanded the Harman Action to the Circuit Court of Boone County, West Virginia for all further proceedings.

down its operations in anticipation of a sale to Massey, and used confidential information obtained during settlement negotiations to purchase a "wall of coal" that rendered the Harman assets worthless to anyone other than Massey.

Importantly, the many acts and omissions which Massey committed which formed the basis of Harman's claims for tortious interference and fraud were committed by Massey's CEO or occurred at his direction. Not only was this proven affirmatively by the Plaintiffs, it was admitted by Massey during the trial testimony of Massey's CEO.⁴

On August 1, 2002, after a seven week trial in the Circuit Court of Boone County, West Virginia, the jury in the Harman Trial rendered a verdict in favor of Mr. Caperton and Harman and against Massey on findings of tortious interference with contractual relations, fraudulent misrepresentation, and fraudulent concealment.⁵ The jury awarded Harman \$34,696,000 in compensatory, consequential and punitive damages, and Mr. Caperton was awarded \$15,342,406.⁵

On August 15, 2002, the Honorable Jay M. Hoke entered a Judgment Order in the Harman Trial in favor of Harman and against Massey in the amount of the jury's verdict.⁶ On August 29, 2002, Massey filed a Motion for Judgment as a Matter of Law, Motion for New Trial or in the Alternative, Motion for Remittitur. In addition, it filed a Motion to Set Aside the Punitive Damage Award.

On June 30, 2004, Judge Hoke entered an Order denying Massey's Motion to Set Aside the Punitive Damage Award. This Order was amended on August 27, 2004 to correct certain

⁴ 7/22/02 Trial Transcript (Day 24), p. 25, l. 18 - p. 34, l. 5; p. 31, l. 2-4 (Don Blankenship: "You could save the jury a lot of time if you are looking for who made the decisions, because I made nearly all of them throughout this case."), Exh. 1

⁵ Harman Trial Verdict, Exh. 2

⁶ Judgment Order, Exh. 3

clerical errors made in the original order.⁷ On March 15, 2005, Judge Hoke denied Massey's Motion for Judgment as a Matter of Law, Motion for New Trial, or in the Alternative, Motion for Remittitur.

Before, during, and after the trial, Massey's CEO – who admittedly committed virtually all of the acts forming the basis of Plaintiffs' claims, was aggressively self-righteous. During his trial testimony, he volunteered testimony in which he criticized West Virginia juries, West Virginia's judicial system and the business climate in West Virginia. Massey's CEO also made it abundantly clear that Massey intended to appeal the verdict.⁸ One of the reasons given for appealing the verdict was that "it will play a role in further impoverishing the children of our state."⁹

B. The 2004 Election

On August 20, 2004, seven weeks after Judge Hoke denied Massey's Motion to Set Aside Punitive Damages, after Massey publicly avowed to appeal, and after Massey's CEO linked the verdict in this case to the future of West Virginia's children, a Section 527 organization¹⁰ called "And For The Sake Of The Kids" was organized and registered with the West Virginia Secretary of State.¹¹ On the very date of its registration with the West Virginia Secretary of State, "And For The Sake Of The Kids" received its first two contributions of \$500 and \$100,000 respectively from

⁷ Order denying Massey's Motion to Set Aside the Punitive Damage Award, Exh. 4

⁸ 8/5/02 Memo from D. Blankenship to Massey Employees, attached as Exh. "D" to Plaintiffs' Opposition to Defendants' Motion for Leave to Contact Jurors, attached hereto as Exh. 5.

⁹ *Id*

¹⁰ A Section 527 organization is so named because it is organized under Internal Revenue Code § 527 in order to receive and disburse funds to influence or attempt to influence the nomination, election, appointment or defeat of candidates for public office.

¹¹ West Virginia Secretary of State Registration for "And For The Sake Of The Kids," Exh. 6

Massey's CEO.¹² (According to its website, "And For The Sake Of The Kids" was devoted solely to defeating Justice McGraw¹³ ; nonetheless, television ads paid for by this 527 stated expressly, "Please vote Brent Benjamin for Supreme Court."¹⁴)

During the period of August 20, 2004 through December 31, 2004, "And For The Sake Of The Kids" received 38 contributions totaling \$3,623,500. Of this total, Don Blankenship, CEO of Massey Energy, made 13 contributions, totaling \$2,460,500 or approximately 69% of the group's total funding.^{15,16} The other 25 contributors paid in a total of \$1,163,000. These other

¹² Political Organization Report of Contributions and Expenditures, Form 8872, for the period August 20, 2004 through September 30, 2004, filed by "And For The Sake Of The Kids," Exh. 10

¹³ Adam Liptak, "Judicial Races in Several States Become Partisan Battlegrounds," The New York Times, 24 October, 2004, Exh. 7 Carol Morello, "W Va. Supreme Court Justice Defeated in Rancorous Content," The Washington Post, 4 November, 2004, Exh. 8 Tom Diana, "W Va. Coal Executive Works to Oust McGraw," Wheeling News-Register, 25 October 2004, Exh. 9; Deborah Goldberg, Sarah Samis, Edwin Bender and Rachel Weiss, "The New Politics of Judicial Elections 2004," Justice at Stake Campaign, pg. 4, Exh. 41.

¹⁴ See ads, Exh. 34.

¹⁵ Don Blankenship's contributions are listed below:

<u>Date</u>	<u>Contributor</u>	<u>Amount</u>
8/20/04	Don Blankenship, CEO, Massey Energy	\$ 500
8/20/04	Don Blankenship, CEO, Massey Energy	\$ 100,000
8/23/04	Don Blankenship, CEO, Massey Energy	\$ 200,000
8/30/04	Don Blankenship, CEO, Massey Energy	\$ 900,000
9/10/04	Don Blankenship, CEO, Massey Energy	\$ 155,000
9/16/04	Don Blankenship, CEO, Massey Energy	\$ 200,000
9/22/04	Don Blankenship, CEO, Massey Energy	\$ 85,000
9/23/04	Don Blankenship, CEO, Massey Energy	\$ 45,000
10/8/04	Don Blankenship, CEO, Massey Energy	\$ 80,000
10/15/04	Don Blankenship, CEO, Massey Energy	\$ 85,000
10/19/04	Don Blankenship, CEO, Massey Energy	\$ 60,000
10/22/04	Don Blankenship, CEO, Massey Energy	\$ 250,000
10/25/04	Don Blankenship, CEO, Massey Energy (This contribution is marked as a loan)	<u>\$ 300,000</u>
Total Blankenship Contributions		\$2,460,500

¹⁶ (Third Quarterly Report of Contributions and Expenditures, Form 8872, filed by "And For The Sake Of The Kids," Exh. 10; Post General Election Report of Contributions and Expenditures, Form 8872, filed by "And For The Sake Of The Kids," Exh. 11; Year-end Report of Contributions and Expenditures, Form 8872, filed by "And For The Sake Of The Kids," Exh. 12.

contributors included "Doctors for Justice" (\$745,000), and the Coal Association (\$223,000), with the remainder paid by smaller contributors, most of whom were tied to the coal industry.^{16, 17}

Massey's CEO actively solicited contributions from these other contributors.¹⁸

Statistics provided by The Center For Public Integrity, a nonprofit, nonpartisan organization that conducts investigative research and reports on public policy issues in the United States, including Section 527 organizations, demonstrate that Don Blankenship's individual contributions to "And For The Sake Of The Kids" are extremely disproportionate to contributions made by other individuals to other Section 527 organizations, both nationally and locally. For example, the next five highest individual contributions to a Section 527 organization in West Virginia after Don Blankenship's contribution of \$2,460,500 were \$5,000, \$5,000, \$4,250, \$3,164 and \$1,764 respectively.¹⁹ Nationally, "And For The Sake Of The Kids" was No. 26 in amount of money raised for a Section 527 organization during 2003 and 2004.²⁰ It was No. 5 nationally for amounts raised for purposes related to state elections, which in 2004 included significant gubernatorial elections.²¹

Considering the fact that a Presidential campaign was being held in 2004, and campaigns were being held in West Virginia for such offices as Governor, Secretary of State, Senate and House Delegates, the amount of the contributions from Massey's CEO to an organization devoted solely to defeating a Supreme Court Justice can only be described as stunning.

¹⁷ Paul J. Nyden, "Coal, Doctors' Groups Donated to Anti-McGraw Effort: Massey President Donald Blankenship Remains Largest Donor," reprinted from The Charleston Gazette, 17 January 2005, Exh. 13

¹⁸ See, e.g., letter from D. Blankenship to medical doctors within West Virginia, attached hereto as Exh. 14

¹⁹ "Major Individual Donors from West Virginia," The Center for Public Integrity, 2005, Exh. 15

²⁰ "2003-04 527 Activity," The Center for Public Integrity, 2005, Exh. 16

²¹ "2003-04 State 527 Activity," The Center for Public Integrity, 2005, Exh. 17

In addition to the contributions made to "And For The Sake Of The Kids," Mr. Blankenship also made certain expenditures "in support" of the candidacy of Brent Benjamin during the 2004 Election. These expenditures, consisting of radio and newspaper advertisements, campaign flyers, telephone calls to registered voters, mailings and other communications directly supporting the Benjamin Campaign,²² were reported by Mr. Blankenship to the West Virginia Secretary of State and totaled \$515,707.53.²³ Significantly, Mr. Blankenship is the only individual who filed expenditure reports in support of the Benjamin campaign.

²² Carol Morello, "W Va Supreme Court Justice Defeated in Rancorous Contest," The Washington Post, 4 November 2004, Exh 8; Tom Diana, "W Va Coal Executive Works to Oust McGraw," The Intelligencer/Wheeling News-Register, 25 October 2004, Exh 9.

²³ Blankenship's expenditures in support of Justice Benjamin are itemized as follows:

<u>Date</u>	<u>Payer</u>	<u>Payee</u>	<u>Purpose</u>	<u>Amount</u>
8/10/04	Don Blankenship	George Blankenship	Personal/Clerical	\$ 9,666 20
10/21/04	Don Blankenship	West Virginia Hospital Association	WV State Board of Nursing Mailing Labels	\$ 350 00
10/21/04	Don Blankenship	George Blankenship	Accounting Services	\$ 16,253 67
10/22/04	Don Blankenship	Lisa R. Adkins	Communications distribution-flyers etc supporting Benjamin	\$ 324 00
10/22/04	Don Blankenship	Mary Rose	Communications distribution-flyers etc supporting Benjamin	\$ 324 00
10/26/04	Don Blankenship	WXCC Radio	Advertisement	\$ 4,910 00
10/26/04	Don Blankenship	WBTH Radio	Advertisement	\$ 2,520 00
10/26/04	Don Blankenship	Logan Broadcasting Corp.	Advertisement	\$ 5,475 00
10/26/04	Don Blankenship	Campaign Broadcasting Corp.	Telecommunications	\$ 28,000 00
10/28/04	Don Blankenship	Campaign Broadcasting Corp.	Telecommunications/ Calls	\$ 67,090 00
10/28/04	Don Blankenship	Airam Media	WV TV Ads	\$ 250,000 00
10/29/04	Don Blankenship	Targeted Communications	Newspaper Ads	\$ 43,760 00
10/29/04	Don Blankenship	Williamson Daily News	Advertising	\$ 922 35
10/29/04	Don Blankenship	The Logan Banner	Advertisement	\$ 999 75
10/29/04	Don Blankenship	WJLS AM/FM	Advertisement	\$ 204 00
10/29/04	Don Blankenship	WMTD	Advertisement	\$ 1,080 00
10/29/04	Don Blankenship	RMS Strategies	Voter Opinion Survey	\$ 8,745 00
10/29/04	Don Blankenship	WXCC Radio	Advertising	\$ 148 10
10/29/04	Don Blankenship	Lisa R. Adkins	Communications, distribution-flyers etc supporting Benjamin	\$ 356 00

Other significant contributions were made to Justice Benjamin's campaign by persons and organizations connected with Massey. Excluding the various contributions by Don Blankenship, employees of Massey Energy or its subsidiaries made individual donations totaling at least \$30,500.²⁴

The "Benjamin for Supreme Court Committee" collected a total of \$845,504.02 from various individual contributors during the 2004 election period, including the above-referenced \$30,500 from employees of Massey or its subsidiaries.²⁵ In contrast, one person, Don Blankenship, personally paid \$515,707.53 in independent expenditures that benefited the Benjamin

<u>Date</u>	<u>Payer</u>	<u>Payee</u>	<u>Purpose</u>	<u>Amount</u>
10/29/04	Don Blankenship	Mary A. Rose	Communications, distribution-flyers etc supporting Benjamin	\$ 354.00
11/2/04	Don Blankenship	Lisa R. Adkins	Communications, distribution-flyers etc supporting Benjamin	\$ 206.00
11/2/04	Don Blankenship	Mary A. Rose	Communications, distribution-flyers etc supporting Benjamin	\$ 170.00
11/02/04	Don Blankenship	Conquest Communications	Advertising	\$ 5,753.76
11/8/04	Don Blankenship	Conquest Communications	WV Mail Follow-up Program	\$ 500.00
11/8/04	Don Blankenship	George Blankenship	Accounting Services	\$ 3,287.50
11/11/04	Don Blankenship	George M. Blankenship, CPA	Accounting Services	\$ 23,076.53
11/15/04	Don Blankenship	Campaign Broadcasting Services	Telecommunication Calls	\$ 22,062.20
11/18/04	Don Blankenship	Steptoe & Johnson	Personal Consulting	\$ 21,169.47
Total Expenditures paid by Don Blankenship in support of Benjamin:				\$ 515,707.53

(State of West Virginia Campaign Financial Statements in Relation to 2004 Election Year, Form F-7B, filed by Don L. Blankenship, on the following dates: September 14, 2004 (Exh. 18); October 28, 2004 (Exh. 19); October 29, 2004 (Exh. 20); October 29, 2004 (Exh. 21); November 3, 2004 (Exh. 22); November 3, 2004 (Exh. 23); December 6, 2004 (Exh. 24))

²⁴ State of West Virginia Campaign Financial Statement (Long Form) in Relation to 2004 Election Year filed by Benjamin for Supreme Court on the following dates: September 14, 2004, Exh. 28 and October 26, 2004, Exh. 29

²⁵ State of West Virginia Campaign Financial Statement (Long Form) in Relation to 2004 Election Year filed by Benjamin for Supreme Court on the following dates: April 2, 2004, Exh. 25; May 3, 2004, Exh. 26; June 11, 2004, Exh. 27; September 14, 2004, Exh. 28; October 26, 2004, Exh. 29; December 3, 2004, Exh. 30; and March 31, 2005, Exh. 31.

for Supreme Court Committee²⁶ and personally paid \$2,460,500 to a Section 527 organization devoted to defeating Justice Benjamin's opponent, Justice McGraw.²⁷ The amounts contributed by Mr. Blankenship alone, either in direct or indirect support of Justice Benjamin, were nearly three times the combined amount contributed by all the other citizens in the State of West Virginia.

Until Mr. Blankenship's initial contribution to the Committee on July 7, 2004, the Benjamin for Supreme Court Committee had raised only \$25,275 through the primary election to June 11, 2004.²⁸ But, just one week after Judge Hoke denied Massey's Motion to Set Aside Punitive Damages, the contributions of Massey and its CEO jump-started the Benjamin campaign. Once Massey's CEO became involved, contributions rose dramatically. During July and August, contributions rose to \$341,204.00; in September to mid-October, contributions totaled \$233,610.00, and from mid-October to early November, contributions totaled \$199,055.02.²⁹

"And For The Sake Of The Kids" expended \$3,259,004 during the 2004 election.³⁰ Most of these expenditures were devoted to running a negative television ad campaign against Justice Benjamin's opponent, Justice McGraw.³¹ At least \$606,200 of the committee's funds went

²⁶ See Footnote 22

²⁷ See Footnotes 14 and 15.

²⁸ State of West Virginia Campaign Financial Statement (Long Form) in Relation to 2004 Election Year filed by Benjamin for Supreme Court on June 22, 2004, Exh. 27.

²⁹ State of West Virginia Campaign Financial Statement (Long Form) in Relation to 2004 Election Year filed by Benjamin for Supreme Court on the following dates: September 14, 2004, Exh. 28; October 26, 2004, Exh. 29; December 3, 2004, Exh. 30.

³⁰ "Committees Spending Money in West Virginia," The Center for Public Integrity, 2005, Exh. 32

³¹ See Footnote 15. See also, Paul J. Nyden, "Massey Energy CEO's Stock Sale Eclipses Profits," The Charleston Gazette, 21 November 2004, Exh. 33; Tom Diana, "W. Va. Coal Executive Works to Oust McGraw," The Intelligencer/Wheeling News-Register, 25 October 2004, Exh. 9; prints from televised advertisements, Exh. 34

to purchase television airtime for 10 anti-McGraw ads.³² The intensity of this negative campaign attracted substantial local and national attention, resulting in the 2004 election for West Virginia Supreme Court Justice being called one of the "nastiest" and "most expensive" judicial campaigns in the country.³³ In fact, of the 9,540 "attack" ads which aired nationally in 2004, 4,158 were shown in West Virginia.³⁴

Similarities in campaign rhetoric³⁵ and similarities between the ads produced by "And For The Sake Of The Kids" and the ads produced by the "Benjamin for Supreme Court Committee"³⁶ linked "And For The Sake Of The Kids" to the Benjamin for Supreme Court Committee in the public's eye. Although "And For The Sake Of The Kids" asserted it was not supporting Benjamin's campaign, some of its ads stated "Please vote Brent Benjamin for Supreme Court" and it did put up billboards reading "Who is Brent Benjamin?" which bolstered Benjamin's

³² Rachel Weiss, "Fringe Tactics: Special Interest Groups Target Judicial Races," The Institute on Money in State Politics, 25 August, 2005, pg. 18, Exh. 35

³³ "High Court, High Cost: Race to be State Justice as Pricey As It Is Messy," The Charleston Gazette, 4 October, 2004, Exh. 36; Kavan Peterson, "Cost of Judicial Races Stirs Reformers," Stateline.org, 5 August, 2005 (<http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=47067>), Exh. 37; Carol Morello, "Political Ads Aired in D.C. Target W.Va. Audience," The Washington Post, 1 November, 2004, Exh. 38; Andrew Welsh-Huggins, "State Judicial Races See Record Spending," Associated Press (<http://ilcampaign.org/press/news/judicial/articles/2004/2004-10-22StateJudicial.html>), Exh. 39; "Warren McGraw: Supreme Court Endorsement," The Charleston Gazette, 20 October 2004, Exh. 39; Carol Morello, "W.Va. Supreme Court Justice Defeated in Rancorous Context," The Washington Post, 4 November 2004, Exh. 8.

³⁴ Deborah Goldberg, Sarah Samis, Edwin Bender and Rachel Weiss, "The New Politics of Judicial Elections 2004," Justice at Stake Campaign, pg. 5, Exh. 41

³⁵ Mannix Porterfield, "Court's Actions Termed 'Outside W.Va. Values, 'Contrary to Law,'" The Register-Herald, 21 October 2004, Exh. 42; "Benjamin: Child Rapist Probation A Mistake," reprinted from The Register-Herald, 22 October 2004, Exh. 43; Toby Coleman, "New Ad Criticizes McGraw," West Virginia Justice Watch, 7 September 2004 (http://www.wvjusticewatch.org/election/display_news.cfm?ID=137), Exh. 44; Edward Peeks, "How Does Political Cash Help Uninsured?," The Charleston Gazette, 9 November, 2004, Exh. 60; Adam Liptak, "Judicial Races in Several States Become Partisan Battlegrounds," The New York Times, 24 October 2004, Exh. 7; Tom Diana, "W.Va. Coal Executive Works to Oust McGraw," The Intelligencer/Wheeling News-Record, 25 October, 2004, Exh. 9.

³⁶ See advertisements produced by And For the Sake of the Kids with those produced by the Benjamin Committee, Exh. 34

name recognition.³⁷ Both "And For The Sake Of The Kids" and "Benjamin for Supreme Court Committee" ads focused on the theme that Justice McGraw was too soft on crime and used the same decision Justice McGraw participated in (the Tony Arbaugh case) as an example.³⁸ Both advocated that McGraw's decisions were detrimental to business interests in West Virginia and detrimental to its economy.³⁹ It was also noted that in addition to "identical campaign themes," both groups used similar typefaces and color schemes in their ads.⁴⁰ During the 2004 election, "And For The Sake Of The Kids" alone ran 1,179 attack television ads against Justice McGraw.⁴¹

"And For The Sake Of The Kids" was not the only Section 527 organization that Mr. Blankenship funded. He also contributed \$100,000 to Citizens for Quality Health Care, whose total contributions of \$370,000 went to the marketing and placements of ads in this judicial election.⁴²

³⁷ "New Ads Criticize McGraw," West Virginia Justice Watch, 7 September 2004 (http://www.wvjusticewatch.org/election/display_news.cfm?ID=137), Exh. 44

³⁸ Adam Liptak, "Judicial Races in Several States Become Partisan Battlegrounds," The New York Times, 24 October 2004, Exh. 7; advertisements produced by And For The Sake Of The Kids and by the Benjamin Committee, Exh. 34; Carol Morello, "Political Ads Aired in D.C. Target W. Va. Audience," The Washington Post, 1 November 2004, Exh. 38; "Benjamin: Child Rapist Probation a Mistake," The Register Herald, 22 October 2004, Exh. 43; "New Ads Criticize McGraw," West Virginia Justice Watch, 7 September 2004 (http://www.wvjusticewatch.org/election/display_news.cfm?ID=137), Exh. 44; Brad McElhinny, "Next Court Race Could Be Just As Nasty," Charleston Daily Mail, 4 November 2004, Exh. 57

³⁹ Adam Liptak, "Judicial Races in Several States Become Partisan Battlegrounds," The New York Times, 24 October 2004, Exh. 7; Tom Diana, "W. Va. Coal Executive Works to Oust McGraw," The Intelligencer/Wheeling News-Register, 25 October 2004, Exh. 9; Mannix Porterfield, "Benjamin Faults McGraw's 'Extreme Judging,'" The Register-Herald, 21 October 2004, Exh. 42; Brad McElhinny, "Big-Bucks Backer Felt He Had To Try," Charleston Daily Mail, 25 October 2004, Exh. 47; Toby Coleman, "Coal Companies Provide Big Campaign Bucks: Massey CEO Gives \$1.7 Million to Anti-Warren McGraw Group," The Charleston Gazette, Exh. 48; "Massey CEO Speaks Out on Insurance and Tort Reform to Putnam County Rotarians," <http://www.putnamlive.com/rotaryblankenship.html>, Exh. 49; Edward Peeks, "How Does Political Cash Help Uninsured?," The Charleston Gazette, 8 November 2004, Exh. 60

⁴⁰ Phil Kabler, "Republicans Registered More New Voters," The Charleston Gazette, 26 October 2004, Exh. 45

⁴¹ Deborah Goldberg, Sarah Samis, Edwin Bender and Rachel Weiss, "The New Politics of Judicial Elections 2004," Justice at Stake Campaign, pg. 55-56, Exh. 41

⁴² Political Organization Report of Contributions and Expenditures, Form 8872, filed by Citizens for Quality Health Care on 2 December 2004, Exh. 46; Paul J. Nyden, "Coal, Doctors' Group Donated to Anti-McGraw Effort: Massey President Donald Blankenship Remains Largest Donor," The Charleston Gazette, 17 January 2005, Exh. 13

At least \$34,900 was spent to develop and run one general-election television ad attacking Justice McGraw.⁴³

Massey's CEO maintained throughout the campaign that he had personally contributed millions to defeat Justice McGraw and elect Justice Benjamin for economic reasons.⁴⁴ According to Mr. Blankenship, using the same language he used to describe the Harman verdict, Justice McGraw and his "anti-business rulings" created a hostile business climate.⁴⁵ Further, Mr. Blankenship apparently did not provide inordinate support in other state races for governor or state house seats, positions that clearly influence the state's "business climate."^{46 47} Similarly, his contributions to other political organizations simply do not compare in magnitude to his contributions to Justice Benjamin.⁴⁸

Furthermore, prior to the Harman verdict, it is believed that neither Mr. Blankenship nor petitioner Massey had ever made contributions near the magnitude they made in this election.

⁴³ Rachel Weiss, "Fringe Tactics Special Interest Groups Target Judicial Races," The Institute on Money in State Policies, p. 18, 25 August 2005, Exh. 35

⁴⁴ Brad McElhinny, "Big-Bucks Backer Felt He Had to Try," Charleston Daily Mail, 25 October 2004, Exh. 47; Tom Diana, "W. Va. Coal Executive Works to Oust McGraw," The Intelligencer/Wheeling News-Record, 25 October 2004, Exh. 9; Toby Coleman, "Coal Companies Provide Big Campaign Bucks," The Charleston Gazette, Exh. 48; "Massey CEO Speaks Out on Insurance and Tort Reform to Putnam County Rotarians," <http://www.putnamlive.com/rotaryblankenship.html>, Exh. 49; Edward Peeks, "How Does Political Cash Help Uninsured?," The Charleston Gazette, 9 November 2004, Exh. 60.

⁴⁵ Tom Diana, "W. Va. Coal Executive Works to Oust McGraw," Wheeling News-Register, 25 October 2004, Exh. 9; Scott Wartman, "Court Race Muddled by Attacks," The Herald-Dispatch, 1 November 2004, Exh. 50.

⁴⁶ Scott Wartman, "Court Race Muddled by Attacks," The Herald-Dispatch, 1 November 2004, Exh. 50; "Benjamin Must Keep Promise to be Balanced," The Herald-Dispatch, 5 November 2004, Exh. 51; Edward Peeks, "Judges Don't Make or Take Jobs," The Charleston Gazette, 26 October 2004, Exh. 52.

⁴⁷ Paul J. Nyden, "Other Coal Interests Spread Campaign Contributions," The Charleston Gazette, 17 October 2004, Exh. 53.

⁴⁸ The following are Mr. Blankenship's contributions to other political organizations in 2004:

West Virginians for Life Inc. PAC	\$5,000
West Virginia Republican State Exec Committee	\$20,000
A T. Massey Coal Company Inc. PAC	\$1,000

See Political Money Line search on Don Blankenship at http://www.fecinfo.com/cgi-win/x_allindiv.exe, Exh. 54.

After the Harman verdict, it is believed that Mr. Blankenship contributed more to effect a state court judicial race than any person ever, other than a person seeking his/her own election, in the history of West Virginia and, perhaps, the United States.⁴⁹

C. Public Perception of 2004 Election and Harman Case

The public, the press, political analysts, the West Virginia bar association, legislators and many others have questioned the motives behind Mr. Blankenship's contributions during the 2004 Supreme Court election and have linked his actions to the pending appeals of Massey in that court.⁵⁰ The following are just a sample of the range of statements made which question the integrity of our Court system:

His [Warren McGraw's] opponent, corporate attorney Brent Benjamin, was the favorite candidate of big business and big coal. One of his major backers was the CEO of Massey Energy Company, the largest coal producer in the region. The company happened to be fighting off a major lawsuit headed to the West Virginia Supreme Court. That prompted many in these parts to say that Massey was out to buy itself a judge... The more a judicial seat looks like any other political prize, the less people will trust their judges worries Deborah Goldberg from the Brennan Center for Justice at New York University. "It gives them the sense that justice is for sale. Their candidates are raising and spending huge amounts of special interest money, and for people who want to go in before a fair and impartial judge, their confidence level is greatly reduced. They begin to lose the sense of what the judiciary is all about. And they begin to see the judges as if they were just another politician." (William Kistner, "Justice for Sale," American RadioWorks, 2005, Exh. 55).

Blankenship has attracted recent national news coverage for becoming involved in the Supreme Court political campaign in West Virginia. Blankenship has contributed \$1.68 million to a group

⁴⁹ "Benjamin Makes History With GOP Court Bid," WCHS-TV8, Eyewitness News, 3 November 2004, Exh. 71; Rachel Weiss, "Fringe Tactics: Special Interest Groups Target Judicial Races," The Institute on Money in State Politics, pg. 5, 25 August 2005, Exh. 35; Adam Liptak, "Judicial Races in Several States Become Partisan Battlegrounds," The New York Times, 24 October 2004, Exh. 7.

⁵⁰ Carol Morello, "W Va Supreme Court Justice Defeated in Rancorous Content," The Washington Post, 4 November, 2004, Exh. 8; Paul J. Nyden, "Coal, Doctors' Groups Donated to Anti-McGraw Effort," Citizens for Clean Elections, reprinted from The Charleston Gazette, 17 January 2005, Exh. 13; Paul J. Nyden, "CEO's Stock Sale Eclipses Profits," The Charleston Gazette, 21 November 2004, Exh. 33.

running attacks ads against incumbent Warren McGraw, while promoting his Republican challenger Brent Benjamin for the 12-year term. While the donations were made in Blankenship's personal capacity, and not in the company's name, Massey has several cases heading toward appeal before the court, including a \$60 million judgment against it in a Boone County coal contract dispute. (Erik Schelzig, "Massey Earnings Fall Well Short of Wall Street Estimates," Associated Press, October 27, 2004, Exh. 56.)

Even the second-ranking energy sector is not immune to difficulties with the legal system. All but \$1 million of the contributions from the energy and natural resources sector came from Don L. Blankenship, president of Massey Energy Company and member of the U.S. Chamber of Commerce Board of Directors. Massey Energy is the focus of a lawsuit to be heard by the West Virginia Supreme Court, giving Blankenship a clear interest in the outcome of the race, if not ties to the larger lawsuit liability issue. (Rachel Weiss, "Fringe Tactics: Special Interest Groups Target Judicial Races," The Institute on Money in State Politics, 25 August, 2005, p. 4, Exh. 35.)

"It's an absolute disaster for the judiciary, and I don't know how we go about fixing it," [Former Supreme Court Justice Richard Neely] said. "It's a very, very worrisome problem. These ads and this kind of campaign works. Now every seat on the Supreme Court is for sale." Candidates in future court races will have almost no choice but to accept huge contributions that could influence their decisions, Neely said. "Judges will be required to dance with the one that brung them," he said. "A 12-year term makes you a little more independent than a short term would make you. But, at the end of the day, people tend to associate with and support the people who have helped them. When someone like Don Blankenship offers you \$3 million, you can't turn it down." (Brad McElhinny, "Next Court Race Could be Just As Nasty," Charleston Daily Mail, 4 November 2004, Exh. 57.)

The confluence of the immense amount of money spent on the 2004 West Virginia Supreme Court of Appeals race with the status of Massey's pending appeals, particularly the appeal in this case, also spurred significant press coverage and attention to this race by political, judicial and governmental analysts. Concerns over the following issues were highly publicized: (a) whether Mr. Blankenship was trying to directly influence a Supreme Court race⁵¹; (b) whether Justice

⁵¹ William Kistner, "Justice for Sale," American Radio Works, (<http://americanradioworks.publicradio.org/features/judges/>), Exh. 55, Brad McElhinny, "Next Court Race Could Be

Benjamin's decisions would be influenced by special interest money⁵²; (c) whether Justice Benjamin could remain impartial and independent in matters involving Massey⁵³; (d) whether Mr. Blankenship is using his wealth and power to change the make-up of the Supreme Court⁵⁴; and (e) whether the entire court was threatened by Mr. Blankenship's apparent disdain for Justice McGraw.⁵⁵

Some political analysts have concluded that Mr. Blankenship's efforts on behalf of Justice Benjamin were tied to the pending appeal. In an article written for the Institute on Money in State Politics, Rachel Weiss points out that: "Massey Energy is the focus of a lawsuit to be heard by the West Virginia Supreme Court, giving Blankenship a clear interest in the outcome of that race, if

Just As Nasty," Charleston Daily Mail, 4 November 2004, Exh. 57, Transcript from West Virginia Public Radio 10/27/04 Broadcast Re: Contributions to Supreme Court Race, (www.wvpubcase.org/radio/newsroom), Exh. 58; Toby Coleman, "Will Benjamin Be A Reliable Pro-Business Vote on WV Supreme Court? Some Fear He Will Defer to Big Money, His Election Backers," reprinted from The Charleston Gazette, 11 January 2005, Exh. 59; Edward Peeks, "How Does Political Cash Help Uninsured?," The Charleston Gazette, 9 November 2004, Exh. 60; Mannix Porterfield, "Warren McGraw Pulls Out 'Big Guns' in Whirlwind Tour," The Register Herald, 26 October 2004, Exh. 61; Evan Bevins, "Benjamin Law Should Determine Rulings," The Parkersburg News/The Parkersburg Sentinel, 4 November 2004, Exh. 62; Political Cartoon, Exh. 63; Toby Coleman, "Massey CEO Gives \$1.7 Million to Anti-Warren McGraw Group," 15 October 2004, Exh. 48; William Kistner, "Judges for Sale?," Marketplace (Minnesota Public Radio), 17 January 2005, Exh. 69

⁵² Rachel Weiss, "Fringe Tactics: Special Interest Groups Target Judicial Races," The Institute on Money in State Politics, 25 August 2005, pp. 3-4, Exh. 35; "March 2004 Survey Highlights: Americans Speak Out On Judicial Elections," Justice at Stake Campaign, Exh. 64; Toby Coleman, "Will Benjamin Be A Reliable Pro-Business Vote on Court?," The Charleston Gazette, 11 January 2005, Exh. 59; Juliet A. Terry, "Courting Change," The State Journal, 4 November 2004, Exh. 68

⁵³ Transcript from West Virginia Public Radio 10/27/04 Broadcast re: Contributions to Supreme Court Race," Exh. 58; Toby Coleman, "Will Benjamin Be A Reliable Pro-Business Vote on WV Supreme Court? Some Fear He Will Defer to Big Money, His Election Backers," reprinted from The Charleston Gazette, 11 January 2005, Exh. 59; Adam Liptak, "Judicial Races in Several States Become Partisan Battlegrounds," The New York Times, 24 October 2004, Exh. 7; "Nasty Supreme Court Race was Good Case for Nonpartisan Elections," The Register-Herald, 9 November 2004, Exh. 65; Joanne Doroshow, "Businesses' Push to Elect Judges Threatens Independence of Courts," USA Today, 28 October, 2004, Exh. 66

⁵⁴ Toby Coleman, "Will Benjamin Be Reliable Pro-business Vote on Court?: Some Fear He Will Defer to His Election Backers," The Charleston Gazette, 11 January 2005, Exh. 59; "Massey CEO Defends Contribution," Ohio Valley Environmental Coalition, reprinted from MetroNews Talkline, 26 October 2004, Exh. 67; Juliet A. Terry, "Courting Change," The State Journal, 4 November 2005, Exh. 68

⁵⁵ Juliet A. Terry, "Courting Change: Benjamin Hopes to Shine Light on Justice," The State Journal, November 4, 2004, Exh. 68

not ties to the larger lawsuit liability issue."⁵⁶ Deborah Goldberg of the Brennan Center for Justice at New York University, citing the Benjamin-McGraw race, said that the huge amount of special interest money in state judicial elections has given the public the sense that "justice is for sale" and that "judges are just another politician."⁵⁷

The West Virginia Bar Association also expressed deep concern for the appearance of impropriety which arose from the 2004 election:

With ads in the state Supreme Court race declared the "nastiest in the nation" by one legal group, the West Virginia State Bar is asking both candidates to tone it down. The Bar's Board of Governors unanimously passed a resolution at its weekend meeting, reminding the candidates of the ethical rules that govern judicial campaigns. "The nature and tenor of some of the campaigning and advertising for both candidates neither enhances the status of the judiciary nor the credibility of our system with the public at large," the resolution said. . . . The resolution notes that a judicial candidate "shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing."⁵⁸

Likewise, the citizens of West Virginia have raised similar questions regarding the ability of the court to remain fair and impartial in light of the significant contributions made by Mr. Blankenship and Massey. In letters to the editor like those below, radio call-in shows and other forums of public opinion, the general citizenry of West Virginia has raised the alarm that Mr. Blankenship is attempting to directly influence the Supreme Court of Appeals:

It's back to the "good ol' boy system" with the gall of Massey CEO Blankenship, Supreme Court Justice Maynard and newly elected

⁵⁶ Rachel Weiss, "Fringe Tactics: Special Interest Groups Target Judicial Races," The Institute On Money in State Politics, p. 4, 25 August 2005, Exh. 35.

⁵⁷ Synopsis of transcript from Marketplace (Minnesota Public Radio), 17 January 2005, Exh. 69.

⁵⁸ "Bar 'Unhappy' with Conduct in Race," The Charleston Gazette, 19 October 2004, Exh. 70. *See also*, "Benjamin Makes History with GOP Court Bid," WCHS-TV8 Eyewitness News, 3 November 2004, Exh. 71; "Voters Rule in Favor of Benjamin in High Court Race," Bluefield Daily Telegraph, 3 November 2004, Exh. 72.

Benjamin having a victory celebration together. . . This is called corporate welfare and it is the reason Massey bought a seat on the Supreme Court to go with the one they already have. (Mary Miller, Letter to the Editor, The Register-Herald, 19 November, 2004, Exh. 73).

Only his [Don Blankenship's] political favors will come from Brent Benjamin being that he donated almost \$3 million dollars in order to get him elected to the West Virginia Supreme Court. These favors will come in the fashion of environmental and workers rights judgments the Mr. "Child Protector" will rule on. (Dorman Sargent III, Letter to the Editor, The Charleston Gazette, 22 March, 2005, Exh. 74).

Massey Coal's Don Blankenship contributed \$2.5 million to defeat Warren McGraw, a judge who dared to defy the coal industry. The so-called "For the Sake of the Kids" Campaign was a sham, and the fact that it worked is a disgrace. . . It's time to start working for a clean elections law and get coal company money out of West Virginia politics. (William Dwyer, Letter to the Editor, The Charleston Gazette, 25 April, 2005, Exh. 75).

West Virginians know better than to allow out-of-state corporations to purchase a seat on the West Virginia Supreme Court. (Gregory A. Gelner, Letter to the Editor, Wheeling News-Register, 26 October, 2004, Exh. 76)

We don't like the idea of out-of-state interests trying to come in here and buy an election, and using our children as pawns in their scheme to do so when their real motive is their own economic interest. (James Stealey, Esquire, The Parkersburg News/The Parkersburg Sentinel, 3 November, 2004, Exh. 77.)

The appearance of impropriety in the 2004 election resulting from petitioner Massey, through its CEO's contributions, not only caught the attention of the press and campaign analysts, but apparently also drew the attention of the legislators of the State of West Virginia. Shortly after the election, a movement began in West Virginia to reform the public funding of election campaigns for certain offices, including Supreme Court Justice.⁵⁹ Accordingly, the

⁵⁹ Senate Bill No. 91, Exh. 78; "State Bar to Review Judicial Elections: Messy Matchup Between Benjamin and McGraw Cited," The Charleston Gazette, 5 November 2004, Exh. 79; Scott Finn, "Lawmakers Writing Bill to Limit

legislators supporting Senate Bill 91, introduced on February 9, 2005, concluded that current election finance laws "...effectively suppress the voices and influences of the majority of West Virginia citizens in favor of a small number of wealthy special interests..." [and] "...undermine public confidence in the integrity of public officials..."

The ultimate resolution of this proposed legislation culminated in the passage of House Bill 402 during the Fourth Special Session of the West Virginia Legislature, which Bill passed on September 13, 2005, in effect from the date of passage. This Bill was subsequently signed by Governor Joe Manchin on September 30, 2005. One stated intent of the aforesaid Bill was the following:

Prohibiting political organizations from accepting contributions in excess of \$1,000 before the primary and general election; making it unlawful to create more than one political organization with the intent to avoid or evade contribution limitations; and establishing an internal operating date.

It is quite clear from the facts and circumstances surrounding the Harman Action, the 2004 Judicial election and the reaction of the legislators, organizations, the public, and the media to that election, that there is certainly an appearance of impropriety.

III. LEGAL ARGUMENT

IN THE EYES OF THE PUBLIC, JUSTICE BENJAMIN'S IMPARTIALITY MIGHT REASONABLY BE QUESTIONED IN THIS CASE; THEREFORE, RECUSAL IS NECESSARY

Canon 3(E)(1) specifically provides that "[a] judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned ..."

Giving to 527 Groups," The Charleston Gazette, 10 January 2005, Exh. 80; Phil Kabler, "Election Bills Gain Committee's Endorsement," The Charleston Gazette, 8 February 2005, Exh. 81; Scott Finn, "Ireland Vows That She Will Clean Up West Virginia Elections," The Charleston Gazette, 14 January 2005, Exh. 82; Mannix Porterfield, "Lawmakers Call for Limits on So-called 527 Organizations," The Register-Herald, 6 December 2004, Exh. 83; Phil Kabler, "Legislators Discuss Campaign 'Loophole,'" The Charleston Gazette, 7 December 2004, Exh. 84

(Emphasis added). The drafters of Canon 3(E)(1) recognized that not all reasons for disqualification of judges or justices can fit into the examples enumerated in Canon 3(E)(1), since it would be impossible to anticipate all of the different circumstances in which a judge or justice would become disqualified. The Commentary to the Canon reads in part: "under this rule a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any specific rules in Section 3(E)(1) apply." This Court has acknowledged the importance of the "catch all" provision of Canon 3(E)(1), in particular, in bolstering public confidence in the courts. *See State ex rel. Brown v. Dietrick*, 191 W.Va. at 174, 444 S.E.2d at 52, quoting Professor Leslie Abramson's statement "that avoiding the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself." Thus, any set of facts or circumstances that lends an appearance of impropriety is reason enough for disqualification.

The United States Supreme Court has described the standard for recusal as whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). The Supreme Court stated that "the goal is to avoid even the appearance of partiality." *Liljeberg*, 486 U.S. at 860. To be clear, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself. *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. at 108, 459 S.E.2d at 385. Accordingly, the inquiry under Canon 3(E)(1) of the Code of Judicial Conduct turns on how the facts appear to an objective observer, which has been described by this Court as "the well-informed, thoughtful and objective observer." *Id.*

Moreover, the Fourth Circuit has held that the hypothetical reasonable observer in a judicial recusal matter is not the judge himself, or even a judicial colleague, but a person outside of the judicial system. *U.S. v. DeTemple*, 162 F.3d 279 (4th Cir. 1998), *cert. denied*, 526 U.S. 1137

(1999).⁶⁰ The court in *DeTemple* explained that since "judges are accustomed to the process of dispassionate decision making and keenly aware of their constitutional and ethical obligations to decide matters solely on the merits, they may regard asserted conflicts to be more innocuous than an outsider would." *Id.*, at 287. The question thus becomes whether an objective and well-informed observer, meaning the average well-informed West Virginian, would reasonably question Justice Benjamin's impartiality in a case involving Massey given that Massey's CEO has, in effect, invested over \$3 million of his own money to influence the outcome of one judicial race.⁶¹ The inescapable answer is undeniably yes. The affirmative answer to the query is further confirmed by the enormous amount of press this issue has garnered as indicated earlier in this brief. Consequently, the public's confidence in the state's highest court is at stake.

The importance of public confidence in the judicial system, and the negative effect of judges hearing cases involving persons who have made large contributions⁶² to judicial elections, let alone the effect of contributors on the scale of Mr. Blankenship, is explained at great length in the Report of the American Bar Association Commission on the 21st Century Judiciary, entitled "Justice in Jeopardy":

The importance of public confidence in the court is difficult to overstate. The ability of the courts to serve their purpose in a constitutional democratic republic turns on the public's acceptance

⁶⁰ *DeTemple* is a case involving a motion for the recusal of a Federal District Judge pursuant to 28 U.S.C.A. 455(a), which reads in pertinent part as follows: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The language of 28 U.S.C.A. 455(a) is identical in pertinent part to Canon 3(E)(1). Section 455(a) has been interpreted as requiring recusal in questionable cases. See *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995) (holding "if the question of whether §455(a) requires disqualification is a close one, the balance tips in favor of recusal.")

⁶¹ As set forth previously in detail, Mr. Blankenship spent \$2.5 million to defeat one candidate, while at the same time spending an additional half million dollars to support the other.

⁶² The Report of the American Bar Association Commission on the 21st Century Judiciary entitled "Justice in Jeopardy" discussed *large* contributors. However, Mr. Blankenship's contributions both in favor of Justice Benjamin's campaign and against Justice McGraw's campaign were nothing short of *enormous*. In fact, the amount of money personally contributed by Mr. Blankenship toward the election of Justice Benjamin is absolutely stunning in the eyes of any reasonably objective observer.

and support. Without it, an otherwise sound judiciary cannot long endure.

* * *

Such developments threaten to poison public trust and confidence in the courts, by fostering a series of perceived improprieties: that judges are less than independent and impartial, that justice is for sale, and that justice is available only to the wealthy, the powerful, or political and racial majorities.

Along those same lines, the West Virginia Legislature has declared that a contribution of One Thousand Dollars (\$1,000.00) per judicial candidate is the permissible limit for contributions which, presumably, do not create the possibility of undue influence. That notwithstanding, the amount and timing of the contributions in this case by one man certainly suggests grounds for disqualification. Respondents believe that confidence in our Supreme Court could be affected should Justice Benjamin remain on this case.

The United States Supreme Court has strongly emphasized the importance of maintaining public confidence in our governmental system. In cases involving the restriction of campaign financing and contributions, the Court called the prevention of the erosion of public confidence in the electoral process an important governmental interest. *E.g., McConnell v. Federal Election Comm'n*, 540 U.S. 93, 95 (2003).

Succinctly, as Judge Maynard stated in *Mantz*, "To be clear, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself."

IV. CONCLUSION

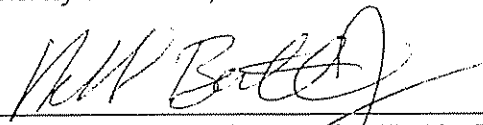
In no way do corporate respondents question Justice Benjamin's integrity, or his desire to do what is right and fair. Respondents merely put forth the proposition that a reasonable person, in possession of the facts set forth in this brief, would believe that *any* judge would be

unable to be fair and impartial in this appeal. We know that Justice Benjamin is keenly aware of his constitutional and ethical obligations to decide matters solely on the merits as stated in *DeTemple, supra*, and do not doubt that he would strive to uphold those obligations in this case, but again, we must look at the facts through the eyes of the "well-informed, thoughtful and objective observer," not Justice Benjamin's or even one of his colleagues on this Court. That is precisely why this Court has held that Canon 3(E)(1) may, at times, bar judges and justices from participating in proceedings where they have no actual bias and would do their very best to be fair, but for the court "to perform its high function in the best way, justice must satisfy the appearance of justice." *Louk v. Haynes*, 159 W.Va. 482, 499, 223 S.E.2d 780, 791 (1976). Thus, disqualification is called for where there exists an appearance of bias, whether or not the judge or justice would actually be biased, prejudiced or unfair. Accordingly, Respondents respectfully submit that Canon 3(E)(1) should disqualify Justice Benjamin from hearing the case *sub judice*, and Justice Benjamin should recuse himself from the case in order to promote confidence in the judiciary and to avoid even the appearance of partiality.

Respectfully submitted,

Dated: October 19, 2005

By:


Robert V. Berthold, Jr., Esquire (W.Va. I.D. #326)
BERTHOLD, TIANO & O'DELL
P.O. Box 3508
Charleston, WV 25335
(304) 345-5700

Of Counsel:

David B. Fawcett, Esquire
BUCHANAN INGERSOLL
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410
(412) 562-3931
Attorneys for Corporate Plaintiffs

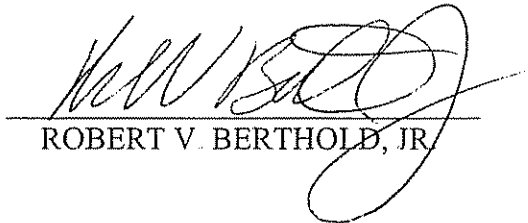
CERTIFICATE OF SERVICE

I hereby certify this 19th day of October, 2005 that a true and correct copy of the foregoing has been served this date U.S. Mail, postage pre-paid, upon the following:

Michael J. Farrell
Charlotte A. Hoffman
Farrell, Farrell & Farrell, L.C.
914 Fifth Avenue
P.O. Box 6457
Huntington, WV 25772-6457

Bruce E. Stanley, Esquire
Tarek F. Abdalla, Esquire
Reed Smith LLP
435 Sixth Avenue
Pittsburgh, PA 15219

Ancil G. Ramey, Esquire
Steptoe & Johnson
P.O. Box 1588
Charleston, WV 25326-1588



ROBERT V. BERTHOLD, JR.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HUGH M. CAPERTON,
HARMAN DEVELOPMENT CORP.,
HARMAN MINING CORP., and
SOVEREIGN COAL SALES, INC.,

Plaintiffs below/Movants,

v.

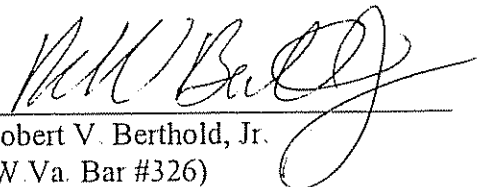
Pre-Petition Matter No. 05-128
(Circuit Court of Boone County
Civil Action No. 98-C-192)

A.T. MASSEY COAL COMPANY, INC.
ELK RUN COAL COMPANY, INC.,
INDEPENDENCE COAL COMPANY, INC.,
MARFORK COAL COMPANY, INC.,
PERFORMANCE COAL COMPANY, INC., and
MASSEY COAL SALES COMPANY, INC.,

Defendants below/Respondents.

VERIFIED CERTIFICATE

I, Robert V Berthold, Jr., pursuant to Rule 29(c) of the West Virginia Rules of Appellate Procedure, do hereby verify that I have read the foregoing Motion of Respondent Corporation for Disqualification of Justice Benjamin and that, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and is submitted respectfully for consideration.


Robert V. Berthold, Jr.
(W.Va. Bar #326)