



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE MASSEY ENERGY COMPANY :
DERIVATIVE LITIGATION AND : Consolidated
CLASS ACTION LITIGATION : C.A. 5430-VCS

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Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Thursday, May 26, 2011
12:38 p.m.

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BEFORE: HON. LEO E. STRINE, JR., Vice Chancellor.

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ORAL ARGUMENT ON PLAINTIFF'S MOTION FOR A PRELIMINARY
INJUNCTION

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

1 APPEARANCES:

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4 Grant & Eisenhofer, P.A.

5 -and-

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8 of the New York Bar
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10 -and-

11 KENT A. BRONSON, ESQ. (late arrival)
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14 Milberg LLP

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19 for Plaintiffs

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30 Robert H. Foglesong, Bobby R. Inman, James B.
31 Crawford, Stanley C. Suboleski, Lady Barbara
32 Thomas Judge, E. Gordon Gee, and Nominal
33 Defendant Massey Energy Company

34 KENNETH J. NACHBAR, ESQ.
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40 Jarosinski, and Baxter F. Phillips, Jr.

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1 APPEARANCES: (Continued)

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11 and Mountain Merger Sub, Inc.
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1 THE COURT: Good afternoon, everyone.

2 ALL COUNSEL: Good afternoon, Your
3 Honor.

4 THE COURT: Good afternoon,
5 Mr. Abrams.

6 MR. ABRAMS: Good afternoon, Your
7 Honor. Thank you for hearing us today.

8 May I start with just a few
9 introductions? At counsel table with me are Julie
10 North --

11 THE COURT CLERK: Please stand.

12 MR. ABRAMS: -- of Cravath; Ron Rolfe,
13 a recently retired Cravath partner; and Stu Gold from
14 Cravath.

15 MR. WOLFE: Your Honor, good morning.

16 THE COURT: Good morning.

17 Or good afternoon.

18 MR. WOLFE: May it please the Court.

19 Good afternoon. I'm sorry; you're
20 right.

21 Mr. Fischer and I here are for Alpha
22 Natural Resources. And I think you may recognize
23 somewhere back in the crowd here Mr. Lowenthal from
24 Cleary and his colleague, Boaz Morag.

1 THE COURT: Welcome, gentlemen.

2 MR. WOLFE: Thank you, Your Honor.

3 THE COURT: Thank you, Mr. Wolfe.

4 Mr. Grant.

5 MR. GRANT: Good afternoon, Your
6 Honor. I think you know Mr. Lebovitch, Ms. Miller,
7 and Ms. Caulder.

8 THE COURT: Good afternoon.

9 MR. GRANT: The regular team. That's
10 why I don't have to introduce them all the time.

11 So this is the time that's set for
12 plaintiffs' motion for a preliminary injunction
13 against the Alpha acquisition of Massey.

14 And as Your Honor knows, we've been
15 doing a number of -- of preliminary injunctions over
16 this last month or two. And sometimes when you're
17 running around to different cities taking depositions,
18 you have this fear that you wake up one morning and
19 you're not exactly sure, you know, what city you're
20 in. This case presents a slightly different
21 nightmare, and you wake up one morning and you're not
22 really sure what decade you're in. And I just have
23 sounds in -- in my mind about Sixteen Tons and
24 Tennessee Ernie Ford going on here.

1 And the reason I'm saying I'm not sure
2 which decade, we've come a long way in mining, in
3 safety, in health, in protection of the miners. And
4 we've come a long way in how a board looks at its role
5 and the role of the CEO. And I think in this case we
6 really go backwards a number of decades to the,
7 really, you know, coal baron era and the era of the
8 dictatorial CEO and the completely passive board. I'm
9 going to get back to that in a moment, but all of that
10 colors, I guess, my view of everything I'm going to
11 say today.

12 Now, I want to do something that I
13 don't usually do, which is jump right to the law,
14 because I think that the question that the defendants
15 have set up is -- is completely wrong on the standard.

16 There's one of two standards that the
17 Court needs to apply here: entire fairness, which
18 we've argued, or Revlon, which they haven't argued.
19 And the reason I say that is if you look at their
20 brief, starting now with the Massey brief, on page
21 21 -- I'm sorry. This is -- this is the Alpha brief.
22 On page 2 of that brief and again on page 21, 25, and
23 26 to 27 Alpha says that they offered to pay "a
24 substantial premium as a result of [the] public

1 auction process." That's on page 2.

2 On 21 they say ... "Alpha participated
3 in an auction for Massey."

4 On page 25 they say, "Massey was sold
5 in an auction with multiple bidders and potential
6 bidders."

7 On page 26 they say, "The result" of
8 the sale "was [from] a highly competitive auction
9"

10 Now, just because Alpha shouldn't be
11 alone here, let's talk about what Massey says about
12 this process. They talk about on page 66 of their
13 brief -- of their 13-point brief, no less, "... the
14 merger consideration is the result" --

15 THE COURT: Yeah. What was the font
16 on your reply? --6.2?

17 (Laughter)

18 THE COURT: You're trying to --

19 MR. GRANT: Your Honor, I would love
20 to do what the Ninth Circuit does and make a word
21 limit and have 14-point font type.

22 THE COURT: No. I'm somewhat distant
23 from your arguments, even though I believe that the
24 page wasn't that farther than this pad is from me

1 right now. But it just -- it --

2 MR. GRANT: I'm with you, which is why
3 I don't get anything that's not in 14-point type. I
4 passed 50, and that's it.

5 THE COURT: No. I wonder if you feel
6 like you live in a bigger house if you would get,
7 like, a telescreen with that kind of font, like a room
8 the size of a football field.

9 MR. GRANT: Right.

10 Anyway, on page --

11 THE COURT: You don't need to read
12 from the briefs. I understand they use the word
13 "auction."

14 MR. GRANT: They --

15 THE COURT: And -- but is this
16 really -- and I understand -- I mean, just so you
17 know -- and -- the idea -- if somebody is going to
18 come up and argue to me that -- that there's no, like,
19 way that this states -- the derivative case states a
20 Caremark claim, you know, that might not be the best
21 use of anyone's time.

22 (Attorneys Kent A. Bronson, Elizabeth
23 S. Metcalf, and Beth A. Keller entered the courtroom.)

24 THE COURT: Isn't the question here is

1 whether I'm supposed to enjoin this merger because
2 somehow the board didn't either obtain some sort of
3 payment from Alpha for these derivative claims or set
4 them aside; right?

5 MR. GRANT: Yes.

6 THE COURT: And I guess in the
7 standard of review you're saying somehow you -- it's a
8 Revlon violation if you didn't do that because you
9 didn't get the best price reasonably available.

10 MR. GRANT: Exactly. If Alpha wasn't
11 going to pay anything for them and said "Look, we're
12 not bringing them. This is ridiculous," then carve
13 them out before the merger and send them to the
14 shareholders.

15 THE COURT: And what you're saying, it
16 could be a more intense standard of review because a
17 majority of the board were directors in the derivative
18 suits. To the extent that there's a nonfrivolous
19 claim pled against them, they could face a material
20 risk of liability; and given the fact that the mine --
21 you know, if you can link them in some proximate way
22 to what happened at Upper Big Branch -- you've got the
23 payments to the miners' families, the regulatory
24 fines, and the lost profits for the mine -- and that

1 that's a big liability and that that was on their mind
2 and that there's evidence of this because their
3 lawyers proffered a draft of the merger agreement that
4 would have exculpated them for even willful
5 misconduct; right?

6 MR. GRANT: Exactly.

7 THE COURT: Well, let's assume -- so
8 you're -- even if you're in this favorable procedural
9 rubric, you're asking me to enjoin this transaction.
10 And how do I get to that point? That's what I'm
11 struggling with. I can accept the reality, for
12 example, that with respect to this case, that there's
13 a -- what would be, frankly, a threat of liability
14 that would well overwhelm my net worth. It's
15 pretty -- you know, it's large. And even with respect
16 to these wealthy folks, that this is not frivolous.
17 That doesn't necessarily translate into the fact that
18 this merger is mispriced in some way. And that's
19 where I'm -- what I'm struggling with.

20 MR. GRANT: Okay. Well, let's take on
21 that issue in -- in -- both ways.

22 THE COURT: Well -- and I don't
23 want -- but I want to tell you, in my mind, which is
24 you don't need to convince me, for example -- I mean,

1 I'll listen to your friends try to convince me that,
2 you know, they're going to get out on -- at the
3 complaint stage, you know, on a Caremark claim, you
4 know, because they get credit for having paper motion
5 after a record of violations and that, as I said -- I
6 mean, I -- I just am not -- I never -- I couldn't go
7 to my parents and say "All the kids were
8 shoplifting" -- not that I ever did that; but "All the
9 kids were shoplifting. All the other kids are toking
10 joints. All the other kids are going" -- you know,
11 "getting runs at the liquor store." And so yeah,
12 hey, we're just in there with all the other kids who
13 were doing that stuff. That's just pretty cool,
14 especially if I had already been incarcerated for
15 those offenses on prior occasions. You know, you get
16 less credit when you've been a prior -- you know,
17 previously convicted.

18 I mean, I don't know any of you --
19 many of you are corporate lawyers. You'll ask your
20 white collar criminal partners if -- even people who
21 have actually done more, you know, nonwhite collar
22 felonies, that calling into Court and telling it, you
23 know -- you know, when you've already been convicted
24 at your sentencing, it tends to wear -- the idea you

1 didn't know what was going on, it tends not just to be
2 quite as good an excuse when you're a recidivist.
3 There are states that actually put people in jail,
4 believe it or not. This is shocking sometimes for us
5 as business lawyers, to realize there are other
6 aspects of law where if you do things three times, you
7 can go to jail for your entire life.

8 And so -- you know, and hubris about
9 knowing better than the law tends to be -- you know,
10 when you've been previously convicted, I mean, tends
11 not to go over well if disaster happens.

12 So I kind of get all that, Mr. Grant,
13 is what I'm saying. And I want to concentrate with
14 you on the harder thing, I think, which is why I
15 would, one, take this out of the hands of the
16 stockholders you represent and, two, why wasn't it
17 priced into the merger for someone like Alpha.

18 MR. GRANT: Okay.

19 THE COURT: Because let me just say
20 this final thing. It seems to me that Alpha is going
21 to have a lot of the fallout to deal with itself as an
22 acquirer.

23 MR. GRANT: Right.

24 THE COURT: I mean, there's still

1 regulatory proceedings pending. I assume there are
2 miner family claims that are still pending. There's
3 the potential for punitive damage awards, all of which
4 would fall to Alpha. And this -- maybe -- why is it
5 that Alpha would view this, the derivative claims, as
6 an -- sort of independent asset like a store of gold
7 as opposed to looking at a huge liability that has all
8 kinds of components and might have, in coming up with
9 the calculus of how to size that liability, might have
10 some offsetting features like, you know, the leverage
11 that claims against former officers and directors give
12 you in negotiations over settlements with them, maybe
13 contributions from them? Frankly, if you do in the
14 worst case end up being held liable for punitive
15 damages because of intentional wrongdoing by time
16 management, the ability to recoup some of that loss
17 against them. You know, and -- and if that's the
18 case, how is it that this is not price?

19 MR. GRANT: Okay. Well, let's --
20 let's talk about that, because, you know, I'm -- I'm
21 accepting the things that you've kind of given me and
22 said, you know, they may talk you out of it and you
23 may have to reply --

24 THE COURT: Yeah.

1 MR. GRANT: -- but --

2 THE COURT: I promise that if they
3 convince me that, you know, it's just the easiest
4 Caremark claim ever to claim, if they convince me,
5 I'll tell you that.

6 MR. GRANT: So I want to even make the
7 -- the situation even tougher for me and kind of look
8 at page 4 and 5 of their -- of Massey's answering
9 brief where, interestingly enough, they go through
10 something that you just went through where they talk
11 about "Well, you know, if you really think about this
12 and you realize that there are multiple litigations
13 and investigations and everything else, in the end" --
14 they don't say it quite like this -- "we'd be idiots
15 to pursue this. I mean, we'd be handing everybody
16 else a complete roadmap to crucify us because we are
17 indemnifying all these folks. That would be awful."

18 So let's take that as a given, that
19 this claim is actually a detriment to them. They
20 don't want this. This is worth zero.

21 THE COURT: No. See, that's Massey's
22 people saying -- I mean, what --

23 MR. GRANT: No. This is Alpha saying
24 "This is a zero because I'm" --

1 THE COURT: No, no.

2 MR. GRANT: -- "stuck with the
3 liability" --

4 THE COURT: I don't -- I actually
5 don't think that it's quite as cartoonish as that. I
6 think what they're saying is this: "This is a
7 freakin' big mess." They agree with you on that.

8 MR. GRANT: Uh-huh.

9 THE COURT: They agree for -- you
10 know, however you would trace out the culpability
11 without getting into levels of scienter, an entire
12 mine was destroyed and that has an incalculable human
13 toll, and these things like today are almost profane
14 in a way. To talk about what happened to the
15 investors in this corporation is, you know -- compared
16 to the workers, it's nothing. But it's what we're
17 talking about today.

18 But I think their point is "We're an
19 acquirer, and we're going to come in and take this.
20 And all these fines and settlements and all that kind
21 of stuff, that's going to be on us. And it may be
22 that we have some potential to get back some of that.
23 We don't" -- "We don't exaggerate the extent to which
24 it's dollar-for-dollar, and we doubt it's anywhere

1 near dollar-for-dollar. And we may do that, but we
2 have to actually time when we do that because we can't
3 be idiots."

4 And that argument -- you actually make
5 the argument that is on my mind, which is the argument
6 that Alpha can't rush out first with these claims --

7 MR. GRANT: Even -- they can't even
8 collect on them because they have indemnification that
9 they're going to --

10 THE COURT: No, no. Let's go more
11 subtly through this. The primary argument was that if
12 you go out and prove that Don Blankenship, Admiral
13 Inman, and the rest of the board were knowingly
14 complicitous in a culture of law noncompliance and
15 proximately caused the -- you know, and their actions
16 were a proximate cause of the disaster at UBB and
17 other, frankly, injuries, also environmental
18 degradation and other things, you are going to plead
19 Massey as an entity, which will be bought by Alpha
20 into massive liability.

21 MR. GRANT: Right.

22 THE COURT: And the ability of those
23 defendants, even if you can go after them, right --
24 assume you can go after them, prove the scienter of

1 all the independent directors, the ability of them to
2 have the wherewithal to make you whole after all these
3 proceedings done which presumably have exhausted, you
4 know, the defense costs parts of the D and O
5 insurance. So that's -- that's gone -- and you
6 pleaded nonexculpated insurance behavior, right,
7 because it will be outside the insurance --

8 MR. GRANT: Right.

9 THE COURT: -- and you have to
10 retrieve not only the advancement costs because they
11 could potentially exceed the insurance and the
12 verdict -- you're not going to get dollar-for-dollar.

13 MR. GRANT: Correct.

14 THE COURT: But the point you make,
15 which I think is -- they would never go first with
16 that --

17 MR. GRANT: Well --

18 THE COURT: -- because you would
19 actually be proving yourself into the direct
20 liability. Well, if you don't do a merger, you
21 cannot -- you and Mr. Lebovitch and this Court has
22 high regard for you and your cocounsel -- you could
23 not responsibly ask for your derivative suits to go
24 forward on behalf of Massey first, because to the

1 extent you're representing the company and you were to
2 prove -- I mean, the more -- and that's the weird
3 thing. The more horrible you prove that the managers
4 were, the more you -- you increase the company's
5 liability under laws that are designed, frankly, to
6 protect society and other constituencies from overly
7 avid individual profit-seeking.

8 So you can't go forth. The main value
9 of the derivative suit is when you know what the
10 overall harm to the company is from its liability to
11 everybody else, you can seek indemnity from what you
12 would consider to be the real wrong to it; right?

13 MR. GRANT: I'm -- I'm not with you
14 there.

15 THE COURT: Okay. Well, tell me the
16 difference, because I don't --

17 MR. GRANT: No; I will.

18 THE COURT: -- I don't get the
19 difference between when the derivative suits would go
20 forward if Massey is stand-alone and when it would go
21 forward if Alpha buys Massey.

22 MR. GRANT: Sure. If Massey is
23 stand-alone, the derivative -- just like we did, for
24 example, in -- in the AIG case, the derivative claims

1 could potentially wait until the other problem -- so
2 I'm with you, but -- but I'm only with you halfway --
3 on Massey stand-alone.

4 THE COURT: Right.

5 MR. GRANT: On Alpha we have serious
6 problems, because Alpha in no way is going to pursue
7 these claims.

8 THE COURT: Tell me --

9 MR. GRANT: And I want -- and I want
10 to tie it back to something else --

11 THE COURT: And I -- and I understand
12 Admiral Inman, you know, said what he said. Admiral
13 Inman doesn't run Alpha. Also, Alpha is not -- and
14 I'm also putting aside the notion -- I mean, I
15 understand the notion, like, if you were a private
16 equity buyer who competes -- whose ordinary MO is, you
17 know, "Whoever loves you, Management, we're going to
18 love you just a little bit more"; that maybe going
19 after former management of a company is inconceivable.

20 What is in the record that suggests
21 that Alpha -- if Alpha suffers direct costs because
22 there's been a finding, for example, that punitive
23 damages ought to be imposed because of the serious
24 managerial scienster --

1 MR. GRANT: Okay.

2 THE COURT: -- why --

3 MR. GRANT: Several things.

4 THE COURT: -- why they wouldn't turn
5 around, then, and try to shift some of that liability
6 to --

7 MR. GRANT: First of all, because
8 they've indemnified them for lots of liability; and
9 there's a real open question of Delaware law if a
10 third party indemnifies, they may be able to indemnify
11 for more than the corporation itself. And so that's
12 out there.

13 THE COURT: Okay.

14 MR. GRANT: That's a real possibility.

15 THE COURT: Walk me through, then,
16 what they promised.

17 MR. GRANT: It's in 5 -- let me see.
18 It's in Section 5.05 where they promise they're going
19 to provide whatever indemnification they had before
20 the company, the -- the acquirer, you know, reads to
21 me, will provide -- the parent will provide that same
22 protection.

23 THE COURT: So whatever they had
24 before.

1 MR. GRANT: Well, except when it's
2 someone else -- in other words, if it's "to the
3 fullest extent allowed by law" or something like that
4 and it's the -- and it's the company itself, there's a
5 real question -- I mean, look, if -- if --
6 Mr. Blankenship's lawyer is here -- the other folks
7 want to stand up and say "No. We're telling you that
8 we are waiving any, you know, argument that we have
9 something beyond what Massey itself could do," then
10 that will take that little piece of my argument away;
11 but they won't do that. I assure you they won't do
12 that. So when they get up here, if I'm wrong --

13 THE COURT: Yeah.

14 MR. GRANT: -- prove me wrong.

15 THE COURT: I read Alpha as pretty
16 clearly saying they promised nothing more than that
17 Alpha as a purchaser would stand behind the
18 preexisting guarantees of Massey.

19 MR. GRANT: And that will be Alpha's
20 position. And I assure Your Honor that the position
21 of these other defendants will not be "Oh, they're
22 absolutely right. We're not getting anything more
23 than we would have gotten." And if I'm wrong, let
24 them stand up and say that.

1 THE COURT: Well, they'll have their
2 chance.

3 MR. GRANT: Right.

4 THE COURT: But, I mean --

5 MR. GRANT: I don't think they're
6 going to say that.

7 THE COURT: I think you've already
8 argued to me contrary to what you're arguing now.

9 MR. GRANT: Okay. The second part is
10 that the indemnification itself is, you know -- is
11 going to be limited. If there's a punitive damage
12 judgment, then, yes, maybe they can go after them.
13 But what if they settle the case? If they settle the
14 case, you know, with the government or someone else --
15 and a lot of these government investigations settle.
16 A lot of the other litigation against them will
17 settle. (Continuing) -- then that will be
18 indemnifiable. And that's specifically in here where
19 it says that -- let me make sure I get this -- that
20 the -- that the indemnification "shall survive the
21 Merger and shall not be amended, repealed or otherwise
22 modified in any [way]"

23 So, in other words, if they settle
24 these other litigations out there, they're stuck,

1 Massey is stuck and -- and Alpha is stuck indemnifying
2 any money that they would say -- that -- that these --

3 THE COURT: Why?

4 MR. GRANT: -- individuals --

5 THE COURT: Why?

6 MR. GRANT: -- would have to pay.

7 THE COURT: If they can prove that the
8 reason you had to settle was because of
9 nonindemnifiable behavior by the --

10 MR. GRANT: Because they wouldn't have
11 a judgment on that.

12 THE COURT: But they could -- they
13 could still sue and prove just like you would have to
14 do. And the other thing that they would have, which
15 you would have, is, they have leverage. One of the
16 things is how do you take out of Alpha's hands the
17 leverage to shift some of the cost of those
18 settlements to the individual defendants?

19 MR. GRANT: They didn't pay for that,
20 Your Honor.

21 THE COURT: Well --

22 MR. GRANT: Your Honor -- and let me
23 just tell you exactly why they didn't pay for it,
24 because I really want to make sure that this point is

1 made.

2 You know, they say you don't look at
3 different, you know, assets of a company and you don't
4 say well, gee, how much is this asset worth, how much
5 is that asset worth? But what you do have to do when
6 you do a discounted cash flow is look at all the cash
7 flows. And they deliberately told their banker and
8 Alpha deliberately left out of their analysis any kind
9 of cash coming in from this litigation. So nobody
10 bothered to value it. It was not taken into account.
11 There was no way they could get it. And whether it be
12 under Revlon or under entire fairness --

13 THE COURT: But, I mean, I -- I have
14 to say, I -- I understand -- I mean, I'll wait to hear
15 from them whether they did that. I don't see anywhere
16 in the record where you've actually done that.

17 MR. GRANT: Oh, yes, there is, Your
18 Honor, absolutely.

19 THE COURT: Oh, no. I understand
20 Mr. Clarke's report. And I'm not -- I'll even grant
21 you that it seems to me that Mr. Clarke has plausibly
22 articulated a case for the damage to Massey as an
23 entity resulting from the UBB disaster and what I
24 maybe call the overall fallout, okay? That is a long

1 way from a valuation of the -- the derivative claims'
2 potential -- the recovery in the derivative claims
3 being able to correspond for that. That actually says
4 the gap, which is what is it that is likely -- what is
5 the injury that Massey suffered and, to some extent,
6 to which Alpha, therefore, will be buying and have to
7 take account for. And then you have to measure that
8 to what extent can that be reduced, that liability be
9 reduced or that loss be reduced by the derivative
10 claims, by getting recompense from those you would say
11 should be the ones responsible for --

12 MR. GRANT: So let's just think that
13 through. So there's approximately a billion dollars
14 in loss out there that they caused. So now they say
15 well, how much of that is collectible? And when you
16 look at everything the directors are getting, the
17 money that they put aside as part of the retirement
18 for Mr. Blankenship, the other stuff that's in there
19 for Mr. Phillips, let's say there's, you know, just in
20 Massey's stuff, 3 to 400 million. Then the question
21 is, these other folks, what kind of assets --

22 THE COURT: You think they have 300,
23 400 -- I mean, I don't know what -- what is
24 Blankenship's net wealth? Is that in the record

1 anywhere?

2 MR. GRANT: I don't know that it's in
3 the record. I will tell you that what he has between
4 his stock and his little rabbi trust that they set up
5 when he decided he was going to retire -- he wasn't
6 pushed out the door, of course. It was decided he was
7 going to retire in 12 days.

8 THE COURT: Well, these things tend to
9 coincide.

10 MR. GRANT: Yeah, exactly.

11 So, anyway, I'm telling you it's well
12 into nine figures, well into nine figures. And when
13 you look at the other stock that's owned and when you
14 look at other assets -- let's say there's 4 to
15 \$500 million among everyone there, okay? 4 to
16 500 million. So there's a billion in damages, 4 to
17 500 million, let's say, that's collectible, especially
18 when you add insurance on top of that.

19 So the question is --

20 THE COURT: But you can't.

21 MR. GRANT: -- okay --

22 THE COURT: But you can't add
23 insurance on top of that because -- the world in which
24 you get that is a world in which you prove they're

1 outside the scope of what the insurance will pay for;
2 right?

3 MR. GRANT: I -- I think, speaking
4 from a practical standpoint, yes. I don't think that
5 they are going to pay 4 to \$500,000 of their own money
6 unless that's shown. And then I think in that case
7 the insurance company, interestingly enough, will not
8 pay anything; but --

9 THE COURT: I mean, there are public
10 policy reasons why insurers don't do that; right? I
11 mean -- but -- and -- and what you'll have then is
12 likely the D and O policies will be exhausted -- if
13 you get to that stage, will be exhausted on defense
14 costs.

15 MR. GRANT: Probably. But it doesn't
16 matter whether it's 400, 500 or on top of that.

17 So there's this money out there that
18 is potential value.

19 THE COURT: Right.

20 MR. GRANT: And, Your Honor, I think
21 that you're conflating two things --

22 THE COURT: But then you're also --
23 you're assuming there, for example -- you're saying
24 Blankenship, you don't have a figure, but he's in the

1 nine -- I mean, these are numbers -- you know, they're
2 big figures. Nine-figure net wealth, closer to
3 nine -- closer to eight figures than ten figures;
4 right?

5 MR. GRANT: Let's assume he's about
6 two, two and a quarter.

7 THE COURT: So it's mostly
8 Blankenship.

9 MR. GRANT: It's about half
10 Blankenship, yeah.

11 THE COURT: Okay. And then the rest
12 you also have to deal with -- I think you would admit
13 that you're going -- the farther you get from a
14 manager role or a lead role on the board, the more
15 difficult it's going to get to prove the state of mind
16 necessary to get to a verdict; right?

17 MR. GRANT: The answer is it's more
18 difficult, but in this case I feel very comfortable
19 with it.

20 THE COURT: Well -- understand. And I
21 would say there are gradations. Someone like Inman
22 who has a deeper role on the board, longer standing,
23 more exposed than someone who's only been there three
24 or four years potentially. So there's gradations

1 within them.

2 But to assume that it's a slam --
3 because gross negligence doesn't get you there; right?

4 MR. GRANT: I'm -- I'm -- no; I'm --
5 yeah, it does not get me there. But I'm not assuming
6 that. Your Honor, if I can just go back and finish --

7 THE COURT: Okay.

8 MR. GRANT: -- addressing your
9 concern.

10 So I think you're conflating two
11 things. One is what is our potential damage damage
12 remedy and all that stuff. And it wipes the
13 defendants all out. It's -- you know, it is a
14 bet-your-wealth case.

15 The other is what did Alpha pay to
16 basically step in that role of ours and control that?
17 An the answer is they paid nothing. And we absolutely
18 have proved this, Your Honor. They -- we have
19 testimony from both Mr. Massey folks and Alpha folks
20 that there was no discussion about these, no
21 valuation, no anything. They did not value them.

22 THE COURT: No. I --

23 MR. GRANT: So what happens is --

24 THE COURT: I get -- I mean, I can

1 both accept that and not draw the same inference you
2 do --

3 MR. GRANT: Well, let me explain
4 why --

5 THE COURT: -- which is -- what you're
6 trying to push upon me from Alpha's perspective is
7 they're going to say "Oh, that's really cool"; right?
8 "We get the potential" -- they have -- let's assume
9 it's real. I mean, frankly, the idea that these
10 people have -- I mean, maybe they do. I mean, Inman's
11 probably a pretty wealthy guy; right or

12 MR. GRANT: And so is Lady Judge and
13 so is several of them. I mean --

14 THE COURT: Well, anyone named Lady
15 Judge has to be.

16 (Laughter)

17 MR. GRANT: I understand that.

18 THE COURT: The name.

19 MR. GRANT: We're talking about people
20 who have a tremendous amount of money, Your Honor.
21 Please don't underestimate that, because they really
22 do have it.

23 THE COURT: Okay. So they have dough.
24 So say they have half a billion dollars.

1 MR. GRANT: Okay.

2 THE COURT: Alpha's still got to look
3 at it that "To the extent that we're going to get to
4 half a billion dollars of getting it back from them,
5 that may also be because, you know, what's happened to
6 sort of trigger that is, you know, we've ended up
7 paying to miners' families \$150 million overall for
8 the lost lives. We've had regulatory fines of X and
9 Y. We have had to do the superzenith of operational,
10 you know, enhancements to get the Mine Safety
11 Administration, you know, going here. And when we
12 tally it all up, you know, this is a" -- "this is a
13 potential nice" -- "you know, we" -- "we will
14 certainly think about going after Blankenship and
15 Inman and all that kind of stuff; but the idea that
16 this is some sort of net asset we should have
17 separately paid for when we're assuming all the bad
18 stuff that comes with it is just not the way we look
19 at this transaction."

20 MR. GRANT: Okay. Your Honor, we need
21 to take a step back, because that is what Alpha may be
22 saying, but that's not what we're supposed to be
23 looking at. We're supposed to be looking at the
24 Massey directors and defendants and how they're

1 supposed to be acting.

2 THE COURT: I get -- and what I'm
3 trying to figure -- and what I also have to do here --
4 you're asking me to do something very, very powerful,
5 which is to take out of the hands of the actual
6 investors in this company the ability to make the
7 choice for themselves --

8 MR. GRANT: No, I'm not. Now, can I
9 stop you there? because that's not what I'm asking.

10 THE COURT: Well, I know you're asking
11 me to do something, which is to change the deal. And
12 maybe if Mr. -- you know, Mr. Wolfe and Mr. Lowenthal
13 stand up and say "Alpha's perfectly willing to give
14 away these claims and put them in a litigation trust,"
15 then we don't have anything to deal with. We could
16 just have a new deal and it goes forward; right?

17 MR. GRANT: Okay. So, no, Your Honor.

18 THE COURT: I take it they haven't
19 offered that up or you didn't ask for it or --

20 MR. GRANT: Well, I can't discuss
21 settlement discussions --

22 THE COURT: Well, I'm assuming --

23 MR. GRANT: -- with you, Your Honor.

24 THE COURT: -- if it was the basis of

1 your injunction, if you can get it without an
2 injunction and none of us had to be here before the
3 Memorial Day holiday, we would probably, you know --

4 MR. GRANT: I think that your
5 observations are probably quite accurate --

6 THE COURT: Right.

7 MR. GRANT: -- initially.

8 THE COURT: So that means Alpha maybe
9 thinks this is actually a -- not, like -- they may
10 have high regard for me and you, but they're just
11 somehow not willing to just reprice their deal.

12 MR. GRANT: No, Your Honor. That's
13 not what's going on. And -- and if I could just have
14 two moments to string a few thoughts together, I'd --
15 I'd really appreciate it, because I feel like we're
16 missing the boat here.

17 And I'm very, very concerned about
18 this, because, Your Honor, you know, you mentioned the
19 miners and what we're doing compared to that. I take
20 great pride in what we're doing here, because not only
21 am I trying to recover for the shareholders, but I
22 want the world to understand that Delaware will not
23 tolerate boards of directors who sit by and watch
24 people be put in mortal danger. And Your Honor has to

1 realize that, that the world is looking and watching
2 on this and what is Delaware going to do. And that's
3 why I'm pushing and that's why I'm pushing hard, and
4 that's why I'm maybe losing a little bit of my normal
5 sense of humor because I take that extremely
6 seriously --

7 THE COURT: Well, I don't think
8 anybody does. And it's pretty darn clear, despite the
9 cartoonish efforts of some people in academia to say
10 otherwise, that directors of Delaware corporations
11 have to comply with the law and that's why they can't
12 be exculpated.

13 MR. GRANT: No. They --

14 THE COURT: The issue today --

15 MR. GRANT: -- they don't. They get
16 to walk all the time. I mean --

17 THE COURT: That's a different issue
18 about people let them walk and whether the law allows
19 them to. There's all kinds of things. This is
20 humanity. Humanity's imperfect, but our law is very
21 clear. So don't make this about something that it's
22 not.

23 MR. GRANT: Well --

24 THE COURT: And I already started the

1 argument by indicating to you that you can accept for
2 purposes of this that I believe that the -- it's a
3 pretty silly argument on the part of defendants that
4 I'm supposed to decide this motion on the notion that
5 these directors -- you know, that a claim in the
6 derivative case is not going to be stated against them
7 such that they face discovery.

8 MR. GRANT: So then what happens?

9 THE COURT: So then you have to figure
10 out -- again, that's the question.

11 MR. GRANT: Okay. So I --

12 THE COURT: We're in a commercial
13 world. And if we want to be real about this, the
14 least sympathetic victims of this are the stockholders
15 on whose behalf the profits were sought at the expense
16 of the other constituencies.

17 MR. GRANT: With them --

18 THE COURT: And so --

19 MR. GRANT: -- completely unknowing
20 about it.

21 THE COURT: No, no. Wait a minute.
22 Your own pleadings, just so -- again, those of us,
23 when -- we all need to be worried about in the world
24 when we get on a moral high horse that we'll fall off

1 it. And from your own papers, which are very well
2 pled, any investor who was invested in Massey as of
3 the mid of the last decade of this century knew,
4 according to you, knew exactly the managerial culture
5 that it was buying into and knew, you know, according
6 to your own papers -- I'm taking into account your own
7 papers, because that's part of how you get to the
8 Caremark thing. They knew that you had people who
9 believed -- at the very best, thought their way of
10 doing it was better than the people charged with
11 enforcing the law.

12 MR. GRANT: I don't know how we said
13 that the shareholders knew that.

14 THE COURT: Well, you said it was
15 public knowledge. You're pleading all kinds of things
16 about public knowledge of Blankenship's attitudes
17 towards regulators and other people. And you plead
18 that.

19 And so let's deal in the world of gray
20 where people who invest in companies, who engage in
21 conduct that they may feel is loathful and -- and they
22 invest in companies maybe because those companies,
23 right, to the extent that Blankenship and Inman and
24 others knowingly kept costs lower than they would be

1 if you were running a safe mine, the excessive profits
2 went and benefitted investors. And that's why
3 externalities, which we call this -- that's the really
4 clinical term that we talk for the casualties, the
5 innocent victims of corporate misbehavior. That's
6 what we call them, externalities.

7 MR. GRANT: Okay. So --

8 THE COURT: That's injured workers.
9 That's the environment. So I get all this.

10 MR. GRANT: Okay.

11 THE COURT: So what we're talking
12 about here is not whether the law of Delaware in some
13 way exculpates these people. It does not. If they
14 purposely caused the corporation to violate the law,
15 they will have breached their fiduciary duties.

16 The issue is whether you get an
17 injunction against a merger. And you're asking me to
18 enjoin it and allow -- and prevent the current
19 stockholders from determining whether to merge.
20 And -- and that's where I'm still struggling with this
21 economic issue, Mr. Grant, which is Alpha paying for
22 this, like it's a -- like it's a pot of gold sitting
23 there separate from all the liability that it's taking
24 on because of what you rightly, you know, point to as

1 allegations of extremely outrageous behavior which may
2 have resulted in the deaths of, you know, working
3 people.

4 MR. GRANT: Okay. Can I -- can I work
5 through this with you? Because --

6 THE COURT: Yeah.

7 MR. GRANT: -- I -- I'm extremely
8 focused --

9 THE COURT: If you're going to put the
10 argument on a plane about the world is looking --
11 there isn't anything that the world needs to doubt
12 about Delaware law. You can only charter a Delaware
13 corporation to conduct lawful business by lawful
14 means.

15 MR. GRANT: Okay. So --

16 THE COURT: And you cannot be
17 exculpated if you consciously violate the law. So if
18 there's someone out there who has some different view,
19 then they are a wacky conspiracy theorist --

20 MR. GRANT: Well --

21 THE COURT: -- and needs to be
22 treated. And maybe the state will step up with a pot
23 of gold to treat them and cure them of that. But
24 let's stick to the focus of whether I should be taking

1 this out of the hands of stockholders in this
2 situation.

3 MR. GRANT: Okay. Let's talk about
4 the -- what the stockholders have to choose from,
5 okay? First of all, let me read to you, if you
6 wouldn't mind, from Admiral Inman's deposition
7 transcript, page 215, beginning at line 17.
8 "Somewhere in the process, Kevin Crutchfield," CEO of
9 Alpha, "called me, it's one of ... two communications
10 we have had, to say [that] they were considering an
11 option of a trust, and did I have an opinion. And I
12 said I didn't have an opinion because I didn't know
13 what it entailed, and that was the extent of it."

14 So actually Alpha thought about should
15 you, you know, push us there. And I don't know what
16 other discussions went on, but this was certainly
17 something that was raised.

18 Now, if we can talk about from the
19 perspective -- I really do get the perspective of
20 Alpha, I really do, which is why Alpha -- this is
21 never going to see the light of day if this goes to
22 Alpha. It will never see the light of day for all the
23 reasons you said. But let's talk about from Massey's
24 perspective, okay?

1 So Massey has this huge litigation
2 that is an asset. You can call it a -- a widget
3 producing -- a widget that's going to produce income.
4 There's potential dollars that come from it. And they
5 say -- and they have to say entire fairness. You keep
6 saying what I am going to prove, what am I going to
7 prove. I believe they have to prove. So we get --

8 THE COURT: Well, regardless of
9 whether it's entire fairness standard, you have to
10 prove the elements for getting an injunction.

11 MR. GRANT: Okay. So then the
12 question is well, what do they do with this asset?
13 What do they do with this income-producing property?
14 And what they say is "We do nothing. We don't get any
15 value whatsoever."

16 Now, we can say "Look, if" --

17 THE COURT: Just tell me how the
18 negotiations were supposed to go down on this.

19 MR. GRANT: I will absolutely do this.
20 They should have said "You know what" -- especially
21 after Crutchfield raised it, Inman would have said,
22 "You know what? You're right, Kevin. You're
23 absolutely right. This is something that really
24 belongs to the shareholders. It's really something

1 that's actually getting in our way because we have an
2 interest in it. Let's put it in a litigation trust
3 right now for the shareholders; and you really buy
4 what you're buying, which is coal assets, which is
5 coal mines and coal-producing properties, and you buy
6 that because that's the only thing you're valuing.
7 We'll sell that to you, and this can stay separate for
8 the shareholders."

9 THE COURT: The shareholder litigation
10 trust was also going to be set aside of merger
11 consideration to address liabilities?

12 MR. GRANT: Absolutely not. We don't
13 know that, but I will concede that there's no way that
14 that litigation trust will have taken on the
15 liabilities. But, Your Honor --

16 THE COURT: What I'm saying is we
17 don't know what the discussion was about, do we?
18 Because if the idea was let's carve this out and see
19 how it comes out --

20 MR. GRANT: No, that was not the
21 discussion. The question is why does Alpha get this
22 cheap? Alpha gets this cheap because of all the
23 problems it's having. Alpha gets this cheap because
24 of the UBB explosion, because of the horrible

1 relationship it has with MSHA, with all those things.
2 Because, you know, one of the things that they looked
3 at and the stand-alone plan is, "Look at what our coal
4 assets are worth if we were given the same multiple as
5 Arch was. Look at what our coal assets are worth if
6 we were given the same as" -- I'm forget the name of
7 the other entity. That was up at, like, 97 bucks or
8 91 bucks. "Look at what these assets are worth. Why
9 are these assets being discounted and bought at a
10 discounted price? Because we, the Massey board, have
11 screwed this up royally, because we have made it that
12 nobody values this in our hands.

13 "So, Alpha, you are getting a
14 discount. And the reason you're getting a discount is
15 because you're taking on these liabilities. You are
16 now going to take assets, coal assets, and get an
17 automatic gain because they're now going to be put in
18 responsible hands."

19 And let me tell you, Alpha is
20 responsible. If you look at their safety record,
21 they're pretty darn good.

22 "So we're going to put them in
23 responsible hands and make them worth more, but you're
24 going to pay a discounted price." Why? "Because

1 you're going to have to clean up our mess. You're
2 going to have to take care of all the fines. You're
3 going to have to take care of all the personal injury
4 actions. You're going to have to take care of, you
5 know, rebuilding the" -- "the relationships,
6 retraining all our people. You're going to have to
7 pay that, and that's why you're getting a discount."

8 So that is taken into account. It
9 can't double-charge that.

10 But then the question is what is going
11 to happen with the liability of these directors who
12 have huge responsibility? And when it's in their
13 hands, they say "No. We're going to protect ourselves
14 because we're going to make sure to push it to you,
15 not get anything for it. We're going to push it to
16 you. And we know that when you balance all this
17 stuff, there's no way you're going to bring it to us"
18 -- "against us."

19 THE COURT: So there's a hundred
20 million-dollar punitive damages award in 18 months --
21 the merger closes. 18 months, a hundred
22 million-dollar punitive damage award against Massey.
23 Alpha has to pay that. You would then say Alpha pays
24 that. To the extent that Alpha could go after the

1 culpable former Massey fiduciaries and obtain
2 recompense, they would not be permitted to do so.

3 MR. GRANT: No. What I'm telling you
4 is the following. And -- and I am telling you that
5 when they evaluated what is this company worth, they
6 looked at the assets they were getting. They looked
7 at how much they were paying. They saw a large delta.
8 They said, "That delta is what covers me for all these
9 liabilities for these problems. And I am going to
10 take a look at it and say 'Okay. What do I think the
11 personal injury stuff'" --

12 THE COURT: How do you know when they
13 sized the liability, then? If you're saying they
14 priced those liabilities, why wouldn't they price the
15 offsetting leverage of going after Blankenship and
16 Inman?

17 MR. GRANT: Because they had to give
18 indemnifications. And that is going to make that
19 whole --

20 THE COURT: They gave -- see, we're
21 back to that, because then -- and we'll get to this
22 whole issue of whether they somehow inadvertently gave
23 the thing.

24 If what they did was acknowledge that

1 up to the prior, you know, indemnification was that --
2 that was sort of basically, you know -- that was a
3 given, which is -- as you know, if a jury finds that,
4 you know -- we say, like -- what would we equate gross
5 negligence with? "You're a doofus"; right? That the
6 entire Massey thing was -- they were doofuses, but
7 that's what they were, doofuses, grossly negligent
8 fiduciaries. The derivative claims are worth nothing.
9 And so within the scope of the indemnity and the
10 exculpatory charter clause and all that stuff they're
11 worth nothing as an offset. But in the context where
12 I raise it, the punitive damage award against Alpha,
13 the ability to actually turn around to a Don
14 Blankenship and say "Hey, that hundred million-dollar
15 award, you better pay X of it or we're going to sue
16 you," that is a tool.

17 MR. GRANT: No.

18 THE COURT: No?

19 MR. GRANT: No.

20 THE COURT: Because?

21 MR. GRANT: No. For several reasons.

22 First of all, I do not agree with your analysis of the
23 jury finding. If the jury finds that the board
24 consciously failed to monitor or oversee its

1 operations -- they were -- consciously failed to
2 monitor -- in other words, if they weren't willful and
3 spiteful to say, you know, "I'm going to make sure you
4 got killed in that mine," but they were just to say
5 "Look, we know we have this obligation. We know that
6 there are problems there and we're just not doing
7 anything; we're going to sit on our hands," you could
8 easily wind up getting a verdict against them for a
9 Caremark violation without getting into the willful or
10 punitive stage there. So there --

11 THE COURT: No, no. Okay. Gotcha
12 there. So if you -- I'm not disagreeing with you.
13 What I'm saying is, then you -- when you're talking
14 about people consciously failing to follow the law, I
15 mean, I don't happen to think, having studied -- you
16 know, there are states of mind, gradations, mens rea,
17 if you like Latin, you know, that the model penal code
18 gets up there. Sort of knowing consciously violating
19 the law would be pretty close to being at the -- near
20 the zenith of what -- of -- of criminal culpability,
21 not near at the bottom. It goes beyond recklessness.
22 Consciously violating the law, consciously failing to
23 attend to the law. And so, again, that -- that's
24 light.

1 And what I'm saying is why wouldn't --
2 what you're saying is if Alpha suffers a verdict of
3 that in a direct case -- because the laws that have
4 been violated are laws designed to protect not
5 stockholders. They're designed to protect people who
6 are endangered by people pursuing profits. The reason
7 why workers are put at risk is because people seek to
8 put their own desire for profits ahead of the workers'
9 safety. The environment is polluted because people
10 would -- frankly, they get the profits and everybody
11 else bears the environmental degradation.

12 So Massey, right -- Alpha is going to
13 face these kinds of suits; right, Mr. Grant?

14 MR. GRANT: Yes, but you're missing
15 the point there. Can we just -- can we just
16 freeze-frame for a moment?

17 THE COURT: I'm trying to figure out
18 how I'm missing the point. Why did Alpha -- why did
19 they care about Don Blankenship if they're facing a
20 hundred million dollars' worth of liability? Why
21 would they mind shifting that to Don Blankenship to
22 the extent that they could?

23 MR. GRANT: Okay. Several reasons.
24 Okay. I'm taking this right on. Several reasons.

1 No. 1, when they did their analysis, they gave no
2 value to that right, okay? They said to themselves,
3 "You know what? We're not paying anything extra. We
4 don't care."

5 THE COURT: But paying extra -- again,
6 you're taking -- do you think that the derivative
7 claims are worth more than the liabilities Alpha is
8 buying?

9 MR. GRANT: Your -- Your Honor, that's
10 not the question.

11 THE COURT: It is the question.

12 MR. GRANT: No, it's not.

13 THE COURT: You're acting like it's
14 something separable rather than a loss, a liability
15 mitigation --

16 MR. GRANT: Yes, Your Honor. Let me
17 explain how. If you very simply say that "Okay. I've
18 analyzed the risk of this, of doing this acquisition.
19 There is \$300 million worth of potential risk out
20 there." And this happens all the time in -- in
21 transactions. "There's \$300 million of risk out
22 there. I am going to reserve for \$300 million worth
23 of risk. If it happens, great. I've already
24 reserved. I've taken it as goodwill. And whatever it

1 shows up on the balance sheet as part of the deal
2 price, I understand what that is. So I am paying for
3 that already. I understand that my \$62 a share, I
4 have to add another \$5 a share or \$3 a share for a
5 reserve fund to take care of that. So I'm looking at
6 paying \$65 a share. I am happy with this bundle of
7 assets, which does not include this derivative
8 action" --

9 THE COURT: Where in the agreement
10 does it say it does not include that? I mean, you're
11 inventing, right -- you know, you're making believe
12 that something you wish to believe is true and then,
13 you know --

14 MR. GRANT: No, I'm not.

15 THE COURT: -- your logic follows from
16 that.

17 MR. GRANT: I'm not.

18 THE COURT: Where in the -- if the
19 Alpha -- we wouldn't be having -- under your own
20 argument from you and Mr. Lebovitch, under your own
21 argument, if the Alpha-Massey merger agreement
22 deprived Alpha of the derivative claims, then you
23 would be -- you would be happy and you would be
24 absolutely right. What you're suggesting is that I

1 should assume that in reality that's how they priced
2 the merger and, therefore, strip them of this, even
3 though the merger agreement doesn't do it. And -- and
4 that's where --

5 MR. GRANT: No. I'm saying three
6 things on that. And -- and if I could get all three
7 out, because I'm getting very disjointed here, and so
8 it is a little frustrating.

9 The first thing is that when both
10 sides did their discounted cash flow analysis,
11 comparable company transaction, everything they did to
12 price this, nobody took into account the value of the
13 derivative claims. That is a fact. That is an
14 undisputed fact.

15 Point 2, okay. And that is that the
16 merger agreement doesn't talk one way or the other
17 about the -- about the -- about the derivative claims
18 and -- except to the extent it talks about
19 indemnification. And I seem to be a lot more
20 concerned about that than you.

21 And finally, if --

22 THE COURT: Well, what I've said --
23 and I'll -- well, just -- I don't want to -- and you
24 and Mr. Lebovitch can hand up later on when your

1 friends talk, after your -- the language that
2 supposedly concerns you.

3 MR. GRANT: Okay. Finally, the -- the
4 second -- the last part of it is that Your Honor keeps
5 looking at this -- and -- and it's just -- it's not
6 the appropriate perspective to look at it from Alpha.
7 I am not doubting that if they said "Look, we'll give
8 you these bundle of claims. You don't have to pay
9 anything for them. We'll give them to you," that
10 Alpha would say "Okay. You know what? It doesn't
11 cost me a cent. You'll give them to us. If I" -- you
12 know, "I don't think anything's going to come out of
13 them. I don't think I'm going to do anything with
14 them, but what the heck. It doesn't cost me storage.
15 It doesn't cost me anything else. Okay, fine. I'll
16 take them. I'll not refuse to take them."

17 And that was the discussion I just
18 kind of gave you between Crutchfield and Inman.

19 But the reason I'm saying the
20 perspective -- and that's why I think you got to turn
21 180 degrees on this, Your Honor -- is that the
22 question is what is Massey's obligation? And Your
23 Honor hasn't spoken an iota about Massey's obligation.
24 And if their -- if their obligation is "How do I get

1 the maximum value for my shareholders? How do I do
2 that?," then they had an obligation to do one of two
3 things. They either had to say, "You know what?
4 They're not valuing this at all. They didn't ask for
5 it. In fact, they even raised 'Do you want to go
6 stick it in a trust?' to say this is valuable. As
7 long as they say 'Look, I don't really need it. You
8 can stick it in a trust,'" Inman should have jumped
9 all over that and said "Absolutely, let's do it.
10 Let's put it in a trust," because once he does that,
11 then the negotiation is very different over price,
12 because one of the things that happens here is they
13 have a price, but then they're negotiating "Okay.
14 What's the" -- you know, "What's" -- "What's the
15 indemnification going to be here? We want you to
16 indemnify us even for unlawful acts."

17 So there's that discussion going on at
18 the same time that there's price -- you know, that
19 there's price discussion going on. So from Massey's
20 perspective, which is the entire focus that the Court
21 should have, not on Alpha's, if someone's not giving
22 you anything, what do you do to --

23 THE COURT: No. My focus on Alpha is
24 this -- twofold, which is one: I'm trying to figure

1 out from Massey's perspective how a skilled negotiator
2 is going to come and turn and basically say "See this
3 rotten bag of potatoes you're buying? It's actually,
4 you know" -- "you should actually think it's only 80"
5 -- "you know, 20 percent less rotten, and you should
6 pay a higher price" as opposed to trying to say -- I
7 mean, I don't think it's ideal -- I mean, I'm going to
8 deal with them -- ideal they handled it; but trying to
9 figure out -- I'm trying to figure out in my own mind,
10 honestly, and what I'm asking about is how you
11 actually kind of go with "Gee, we got this nifty
12 asset," when you're really talking about "No, we
13 don't. We have a big massive liability to" -- "and
14 some potential to reduce it by shifting accountability
15 to" -- you know, "to the people who caused it."

16 MR. GRANT: Okay. The axiom that
17 you're living with right there, which I believe is
18 incorrect -- and it's an axiom, so it's underlying the
19 whole argument -- is that this action, these
20 derivative actions were tied, in Alpha's mind, to the
21 potential liability that they faced. And I submit
22 that that is wrong.

23 THE COURT: Well, I think what you're
24 saying is -- I mean -- it may be that, as I said, it's

1 something that -- to take -- that I'm going to engage
2 with them on it -- that they should have actually
3 tested whether Alpha valued them at all by saying
4 "Give them to us."

5 MR. GRANT: Right. And, in fact,
6 Crutchfield offered that, said "Should we" -- I mean,
7 I read you the deposition transcript from Inman. He
8 said, "Should we" -- you know, "Should we just use a"
9 --

10 THE COURT: But, again, what does that
11 mean?

12 MR. GRANT: It means that they valued
13 them at nothing. So the question is what does Massey
14 have to do? Massey has an obligation to prove entire
15 fairness or, at a minimum, that they reasonably got
16 the best -- the most value around. And what they
17 could have done was pull those out of the deal and say
18 "We're going to put them in a litigation trustee and
19 the price is now \$10 a share, 1.," whatever it is,
20 "0125 in stock and a share of the litigation trust.
21 And that's how much it is worth."

22 THE COURT: You know -- but I've
23 got -- you've got other elements, which is, one, if
24 you're right and if you're right on some of the other

1 things, why not later on monetary damages? I mean --

2 MR. GRANT: Who gets them? How do I
3 get them?

4 THE COURT: Well, if you -- one, if
5 you prove under some of these things that supposedly
6 that the derivative claims still belong to the Massey
7 stockholders, you can continue to price them. If you
8 prove -- prove that the merger price is materially
9 tainted and, as a result, the merger is a breach of
10 fiduciary duty, you can recover under that theory
11 against them. An appraisal petition can be brought
12 even against Alpha, then, as the respondent, arguing
13 that they didn't pay fair value when they didn't take
14 into account the value of the derivative claims.

15 MR. GRANT: Your Honor, I don't
16 think --

17 THE COURT: As a result, then you can
18 get your trial later on. You know, you can get
19 damages for these things on a full record.

20 MR. GRANT: Well -- first -- well,
21 Your Honor, No. 1, appraisal is not viable. It's not
22 economically viable unless you have a large enough
23 body that's going to move forward. And most don't.
24 So let's -- you know, you asked me some questions

1 before and, you know, technically I could have
2 answered another way, but I said let's look at
3 reality. Appraisal is not a reality here, it's just
4 not. So let's put that aside.

5 So then we talk about the other
6 issues. And part of the problem is now -- and I will
7 move to kind of irreparable harm and -- and the
8 balance of the hardships -- is that the stockholders
9 don't know. If Your Honor will rule today that these
10 claims -- and let's maybe shift into Countrywide --
11 that these are now Countrywide claims, that these
12 claims are -- that based --

13 THE COURT: I'm not sure what a
14 Countrywide claim is.

15 MR. GRANT: Well, it -- it's the
16 Supreme Court's ruling in -- in what's known as the
17 Countrywide case, Arkansas Teachers.

18 THE COURT: Well --

19 MR. GRANT: So --

20 THE COURT: -- I still don't
21 understand what exactly they are because that -- I
22 mean, that was also a circumstance, right, where the
23 company -- what, did it sell itself for 2 bucks? And
24 it --

1 MR. GRANT: \$4 1/2 billion, Your
2 Honor. \$4 1/2 billion.

3 THE COURT: Yeah. But what was its
4 previous value?

5 MR. GRANT: 26 billion.

6 THE COURT: Okay.

7 MR. GRANT: Okay? But that question
8 wasn't how much money, because \$4 1/2 billion is still
9 a large chunk of money.

10 THE COURT: Is Country -- I mean,
11 there are a lot of questions. But Countrywide
12 reaffirms the -- the traditional Lewis versus Anderson
13 test, doesn't it?

14 MR. GRANT: In part, but that's not
15 why they went en banc.

16 THE COURT: Well, I don't know -- they
17 didn't -- I don't know that they put out an
18 explanation about why they went en banc.

19 MR. GRANT: Well, it's part of the
20 Court rules.

21 THE COURT: Well, okay. Then --

22 MR. GRANT: The Court rules are to the
23 extent -- I mean, because there's a number of ways
24 that you can have en banc. One of them is if there's

1 obviously 2 to 1, then they can ask that it be en
2 banc.

3 THE COURT: Had they originally been
4 en banc?

5 MR. GRANT: No. No. They heard the
6 argument with 3 and they moved it to 5, and yet it was
7 5-0. So the reason why one would do that is if
8 there's going to be a change in the law --

9 THE COURT: Maybe they felt that they
10 had left the other two out.

11 MR. GRANT: I -- I don't think that's
12 why, Your Honor. So no. I -- I think that --

13 THE COURT: I don't, either. And I'm
14 not going to speculate on that.

15 MR. GRANT: Well, actually --

16 THE COURT: But my point is --

17 MR. GRANT: Your Honor --

18 THE COURT: -- if -- if Countrywide
19 doctrine is doctrine and if it modifies Lewis -- which
20 it does not say that it's doing; but if it does, then
21 you'll, after a merger, still be able to pursue the
22 claims.

23 MR. GRANT: No. Here's the problem.
24 And if you'll let me tie it to the irreparable harm,

1 okay? What are the shareholders getting when they
2 vote? Do they -- are they getting the stock and the
3 cash as well as a continuation of the claim? Because
4 if they do that, they may vote Yes. In fact, I would
5 think they would vote Yes. Are they getting just the
6 cash and the stock and they're losing those claims
7 because Alpha now owns it? Well, then, they may vote
8 No. How do they know what they're getting? What's
9 the definitive ruling? And that's why this Court
10 must, one way or another -- if you're going to rule
11 against me, then at least say "Not only no injunction,
12 but you don't get these claims. They pass to Alpha,"
13 and that's it. So I can run to Dover and take it to
14 the Supremes, because you can't let them vote on the
15 idea "Well, maybe if it's proved later" or, you know,
16 "If I really start thinking about Countrywide, maybe
17 I'll let this go, maybe I won't." They don't know
18 what they're getting.

19 THE COURT: It's a world of
20 uncertainty. And I'm sorry. The idea that, one, if
21 you wanted a trial on this, you should have asked
22 beforehand; and, two, I don't think that's the way
23 it's ever been done.

24 MR. GRANT: I did ask -- I did ask for

1 a trial, and Your Honor on March 1 --

2 THE COURT: On the derivative claims?

3 MR. GRANT: Yes.

4 THE COURT: Yeah. Right. And -- and,
5 again, I don't really believe that anyone could
6 responsibly go forward with the derivative claims on
7 behalf of Massey -- Massey and do so in the best
8 interests of Massey's stockholders.

9 MR. GRANT: Which is why the Court
10 didn't give us a trial, presumably.

11 THE COURT: Right. Well, again --

12 MR. GRANT: But you can't say I didn't
13 ask for one.

14 THE COURT: But as a fiduciary matter,
15 I don't understand that point. And with respect to
16 the issue is, if you are right about your reading of
17 Countrywide and you're right that it applies here and
18 that Countrywide is a change to Lewis, you can -- the
19 Supreme Court will let you go forward in the future
20 and pursue monetary relief.

21 MR. GRANT: How does a shareholder
22 know that?

23 THE COURT: Well, shareholders have to
24 be disclosed the material facts about the world, which

1 include all kinds of uncertainties, which include --
2 you know, the reality of -- you know, I'm still
3 pondering what to do with the extra four and somewhat
4 months I have, because I have been -- you know, I --
5 I've been told that, you know, I wasn't even going to
6 have to worry about this argument.

7 MR. GRANT: I'm sorry. I'm not
8 following.

9 THE COURT: Well, the world was
10 supposed to have -- rapture.

11 (Laughter)

12 THE COURT: And now we got, like,
13 another four months or so and -- and --

14 (Laughter)

15 THE COURT: -- so, you know, there's
16 legal uncertainty.

17 I mean, what you're saying is that
18 there's a dispute about -- you know, the defendants
19 are going to dispute you -- you know -- that the
20 sole-purpose test has been satisfied. I think you're
21 arguing that your reading of Countrywide is something
22 different than a sole-purpose test now; right?

23 MR. GRANT: Yes. I've never claimed
24 that it was a sole-purpose test. In fact --

1 THE COURT: Well, it was -- no. I
2 mean, there was -- Lewis v Anderson did exist; right?

3 MR. GRANT: Absolute -- well, the
4 sole-purpose test is actually Chancellor Allen's ...
5 if I can remember which case -- Chancellor Allen's
6 case, Merritt versus Colonial Foods. That's really
7 the sole-purpose test.

8 THE COURT: No, no. The Lewis versus
9 Andersonersus Anderson and also Lewis versus Ward
10 reaffirmed Lewis versus Anderson.

11 MR. GRANT: Right.

12 THE COURT: And they both say --

13 MR. GRANT: Right.

14 THE COURT: -- that the only reason
15 for the merger is merely --

16 MR. GRANT: Right.

17 THE COURT: -- to extinguish the
18 derivative claim.

19 MR. GRANT: And the Supreme Court --

20 THE COURT: And what you're reading is
21 Countrywide, even though I believe it cites those
22 cases and it's -- Countrywide -- I admit --
23 Countrywide's a -- I'm not -- it -- it's -- it's
24 portent is not exactly plain to me, because I think

1 you're right to say that it can be fairly read as
2 expressing a spirit different than Lewis versus
3 Anderson but while still citing it. And I think
4 formally it stands for the proposition, as I
5 understand, that the objector did not make the
6 argument that the Lewis test was satisfied and then
7 saying that Lewis' inability, you know, gives you
8 this -- this chance to continue with the claims.
9 Right?

10 MR. GRANT: Yes.

11 THE COURT: So -- and so -- but if
12 that route is open to you, then it's open to you and
13 it's monetary relief.

14 MR. GRANT: Yes. But the -- the
15 shareholder has no idea --

16 THE COURT: But, see, that's the
17 normal --

18 MR. GRANT: -- what -- what is it --

19 THE COURT: You don't know the outcome
20 of the case.

21 MR. GRANT: Not the outcome of the
22 case. What they don't know is does one still exist?
23 Do I still have this contingent right to -- to --
24 to -- to a claim --

1 THE COURT: No.

2 MR. GRANT: -- that may or may not be
3 monetized?

4 THE COURT: They know you can litigate
5 about that.

6 MR. GRANT: No, they don't.

7 THE COURT: That's part of the
8 uncertainty, just like they won't know whether there
9 was an actual damages award. Part of the uncertainty
10 is, this is the law. Lewis and Countrywide are the
11 law. And this is, you know -- I mean -- are your
12 clients fighting a proxy contest? Are they making
13 arguments about this in the context of the vote?

14 MR. GRANT: No.

15 THE COURT: Well, they can; right?

16 MR. GRANT: Yes, they could go to the
17 expense of doing that. It's, again, not practical,
18 but they could go to the expense of doing it.

19 So let's go back to say what's the
20 alternative? So you let the vote go through. They --
21 let's say the deal passes, okay, the merger takes
22 place. Now we continue to litigate on and say okay.
23 We think this goes or not. And then what happens is
24 let's say the Court rules against us and says "No. I

1 think it's still Lewis versus Anderson." Alpha gets
2 the -- the claims. They never prosecute them. And,
3 once again, corporate boards that do wrongdoing, they
4 walk.

5 THE COURT: Well --

6 MR. GRANT: And that's what's going to
7 happen, Your Honor.

8 THE COURT: If -- well --

9 MR. GRANT: That's what is going to
10 happen without doubt.

11 THE COURT: Why would Alpha
12 stockholders not be unhappy if there's a massive
13 imposition of liability, such as a punitive damage
14 verdict or high settlements against Alpha and they
15 involve findings of, you know, serious complicity by
16 directors and officers, former directors and officers
17 of Massey? Why would Alpha stockholders not kick the
18 booty of their board if the board doesn't go after
19 them?

20 MR. GRANT: It's not going to happen.
21 And they --

22 THE COURT: Why?

23 MR. GRANT: They can't because you
24 know what? The board is independent of those things.

1 So the business judgment rule will govern --

2 THE COURT: Yeah, but --

3 MR. GRANT: -- and that will not
4 happen.

5 THE COURT: -- but in this environment
6 I think we probably share a view that there wasn't
7 some intrinsic change of -- of viewpoint by corporate
8 directors about classified boards in the last 10 years
9 that explains the diminishment in their number. We
10 probably would agree that it probably wasn't some sort
11 of religious conversion as opposed to stockholder
12 sentiment being expressed very seriously and directors
13 thinking, you know, "I can fight with the people who
14 elect me or I won't."

15 Why if, frankly, the company suffers
16 these kind of things and it's because of Blankenship?
17 Why wouldn't they go after him?

18 MR. GRANT: Because it's not going to
19 happen. I guarantee the Court it won't happen.

20 THE COURT: But they don't --

21 MR. GRANT: And then --

22 THE COURT: I see --

23 MR. GRANT: And then -- I'll answer
24 your question why it's not going to happen. Because

1 they're going to sit there and say No. 1, okay, "We're
2 going to wind up being in litigation with him over
3 the" -- "over what the meaning of the indemnification
4 is, and we're going to be paying both sides of that
5 and it doesn't make any sense."

6 No. 2, "We are going to tie up
7 management, you know, time which we could be figuring
8 out how to, you know, run more coal with this, and it
9 doesn't make any sense."

10 No. 3, "When we go to acquire another
11 coal company," because they've already told you
12 there's consolidation going on, "that other people
13 aren't going to really to want to sell to us because
14 they're going to see that we're willing to go to, you
15 know, other managers."

16 THE COURT: I see companies all the
17 time. And you -- we've both dealt with the
18 frustration of these advancement actions, for example,
19 where companies won't even give -- won't even honor
20 the advancement rights of former management.

21 MR. GRANT: And what does this Court
22 do every time those cases come? They order that they
23 give them advancement.

24 THE COURT: Right. But what I'm

1 saying is we've seen them mess around with former
2 management all the time in that kind of context.

3 MR. GRANT: Only when -- only when
4 they are the ones who had the little beef with them.

5 THE COURT: No. No. That's what I
6 mean. The beef often in those situations is "The
7 former management is accused of doing something icky,
8 and we don't wish to be associated with the ick."

9 MR. GRANT: Right.

10 THE COURT: "And our stockholders are
11 very angry about the ick."

12 MR. GRANT: No. The stockholders
13 aren't going to be angry. The stockholders bought
14 these assets at a discount.

15 THE COURT: Why wouldn't a rational
16 Alpha stockholder going forward, including under the
17 double derivative case the Supreme Court just decided,
18 your clients say "Wait a minute. We just did a
19 stock-for-stock deal. The benefit to us was getting
20 the stock and having good management that was going to
21 take care of that and they were going to wield all the
22 assets in our favor. They just hit for a couple
23 hundred million bucks in a punitive thing, and it was"
24 -- "there's findings by the jury that Blankenship and

1 Inman and other things were knowingly complicitous in
2 a culture of law noncompliance and the board has not
3 sought" --

4 MR. GRANT: Because you know what's
5 going to happen? They're buying this at a discount.
6 They're going to set aside a reserve. When all of
7 this comes down and they finish with it, you know what
8 they're going to say? "We're now going to release
9 another hundred million dollars of this reserve, and
10 it's actually going to add to our earnings for that
11 quarter," because it's going to wind up being better
12 off. And this whole thing is going to be buried.
13 They're not going to deal with it because they've
14 already set this money aside. And Blankenship and
15 company are going to walk.

16 Your Honor, we'll see what happens
17 three years from now --

18 THE COURT: I assume Blankenship --

19 MR. GRANT: -- but I will have the
20 transcript, because this is what's going to happen.

21 THE COURT: I assume Blankenship and
22 others are also being sued directly by miners.

23 MR. GRANT: I don't know that to be
24 true. I don't know. I'm not saying they don't. I

1 don't know that to be true.

2 THE COURT: Blankenship and -- they're
3 not naming Blankenship in the tort suits?

4 MR. GRANT: Your Honor, I do not know.
5 I'm not telling you yes. I do not know.

6 THE COURT: How many pending tort
7 suits are there? I mean, is everybody -- I mean, I
8 know it's within the statute of limitations still;
9 right?

10 MR. GRANT: Well, there's certainly at
11 least 29, you would think, of all 29 who died.

12 THE COURT: Well, no.

13 MR. GRANT: I think some have been
14 settled.

15 THE COURT: I mean, you wouldn't --
16 you wouldn't necessarily think that they had to file
17 by now, but ...

18 MR. GRANT: Oh, I would be surprised
19 if they hadn't. I don't know whether Blankenship is
20 being sued or not. If he is --

21 THE COURT: And is --

22 MR. GRANT: -- I'm sure he'll be
23 indemnified. I'm sure he'll be insured.

24 THE COURT: If he's being sued -- I

1 mean, that's one of the other issues when you
2 realistically appraise the value of the derivative
3 claim, which is, you know, for better or for worse --
4 in some ways it's better and some ways it's worse --
5 you know that the D and O policies will cover the
6 defense, in the first instance, probably of these
7 directors and officers; right? They get a chance to
8 make the case that they're not culpable.

9 So -- but what I'm asking is, you
10 know, are there criminal proceedings -- I mean, there
11 are -- there are other constituencies who have laws
12 for their benefit which I assume are -- they're going
13 to direct their ire at these officers and directors,
14 too.

15 MR. GRANT: I doubt it. I think
16 they'll just sue -- look, I think --

17 THE COURT: You don't think they're
18 going to sue Blankenship?

19 MR. GRANT: I think that will
20 happen -- they may sue Blankenship; they may not. But
21 what will happen, these things will get resolved and
22 the company will pay it. Blankenship will not be
23 paying a dime.

24 Now, let's talk about Blankenship for

1 a moment. When he decides he's going to retire, they
2 give him \$12 million that they didn't have to give
3 him. They gave him all sorts of other bennies. And
4 you know what they did? They put it in a rabbi trust.
5 They put it in, effectively, the same thing that I
6 want, a litigation trust. They put it there so that
7 you know what? Nothing could happen to it during the
8 merger. They took care of Blankenship. He's got
9 \$59 million in that trust. They took care of him, but
10 they didn't take care of the shareholders. They took
11 care of him because they're not saving that money.
12 They're not saying "Well, wait a minute. We'll hang
13 onto this money until we see what happens when that
14 all goes." They're protecting Blankenship. And
15 there's no reason to believe, this board, Alpha, no
16 one has done anything to indicate they will do
17 anything but continue to -- to protect Blankenship.

18 I mean, we're living in a fantasy land
19 to think anything else. The only way that this board
20 and Blankenship will ever be called to task is if Your
21 Honor either enjoins this merger or carves it out and
22 lets us continue to prosecute. There is no way Alpha,
23 given their indemnifications and the way that works;
24 there is no way that the current board, no one is

1 going to do anything unless you let us move forward.

2 But I'm telling you if you say, you
3 know, "Go forward with the merger," this thing will
4 die. It will die, and they will never be held
5 accountable, and they'll go the way Mozilla and the
6 Countrywide board did.

7 THE COURT: I don't understand how it
8 is that any tort plaintiffs are not going to target
9 Mr. Blankenship because of the -- because -- whether
10 this merger goes through or not, nor --

11 MR. GRANT: That will be covered by
12 liability insurance.

13 THE COURT: Well, if that's going to
14 be the case, that's going to be the case regardless
15 of -- of this. And if it's covered by liability
16 insurance -- I mean, the -- the principal value, I
17 think you're admitting, in the derivative claims is
18 to, frankly, make -- to the extent that the companies
19 had to directly suffer the costs of this, to make it
20 whole; right?

21 MR. GRANT: No. If Your Honor's
22 thinking that the principal amount of our damages is
23 what they're going to have to pay the miners'
24 families, then Your Honor is mistaken.

1 THE COURT: You're talking about the
2 lost profits from the mine.

3 MR. GRANT: Not just the lost profits
4 from the mine; the diminished value of the company
5 itself --

6 THE COURT: What? --from a trading
7 multiple discount where you'd have to sub -- you'd
8 have to segregate out -- you can't have the lost
9 profits twice as a -- you know, as a multiple discount
10 and directly; right?

11 MR. GRANT: I understand.

12 THE COURT: And you can't have the
13 delta between Gomer Pyle and the best manager. You
14 have to -- the delta has to be somehow theoretically
15 nonexculpated fiduciary breaching --

16 MR. GRANT: Your Honor, there's
17 \$165 million in damages that I believe have not been
18 covered by insurance. I believe that's the number
19 that came out there. And there's a certain amount
20 that's also -- that's been covered by insurance. And
21 then there are other issues like not being able to get
22 coal out of UBB anymore. And, you know, whether you
23 want to talk about just the lost coal that's still in
24 the ground or whether you want to talk about the

1 discount that the company's trading at, you can talk
2 about any of those things, there's lots and lots of
3 damages. Blankenship is never going to ever be held
4 responsible for those damages. He's just not. And
5 Your Honor is just going to give him a
6 get-out-of-jail-card-free here.

7 THE COURT: I'm not -- well, if that's
8 the way you wish to characterize what I'm doing, you
9 know --

10 MR. GRANT: Well, what Your Honor can
11 do is say --

12 THE COURT: -- that's not a very --

13 MR. GRANT: -- what should --

14 THE COURT: I mean, no. It's really
15 not a very persuasive way to argue, to suggest that
16 there's anything about our law or about the Court
17 that, by applying settled principles, somehow
18 exculpates people for -- for criminal behavior.
19 And -- and the Court and the State of Delaware did not
20 choose to elect any of these people for fiduciaries --
21 as fiduciaries, either. And, you know -- so let's,
22 you know -- let's try to focus on the law.

23 MR. GRANT: Well --

24 THE COURT: There are plenty means to

1 hold them accountable. And remember -- see, the other
2 thing about this is, your clients as stockholders,
3 it's good. They should be -- the reason why the
4 law -- the law encourages law compliance, even though
5 there's academic arguments that stockholders shouldn't
6 be able to wield law compliance arguments because it
7 could provide a windfall to them and because of the
8 obvious things we talked about before --

9 MR. GRANT: There's -- there's not --

10 THE COURT: -- which is that these
11 mining --

12 MR. GRANT: -- there's not a windfall.

13 THE COURT: -- these mining --

14 MR. GRANT: This is being sold at a
15 discount.

16 THE COURT: These mining safety laws
17 were designed to protect miners.

18 MR. GRANT: Correct.

19 THE COURT: And if they're too weak
20 and they don't hold someone like Mr. Blankenship
21 accountable, that is sad; but we're talking about the
22 corporate law now and about the -- what's going to
23 happen with the merger. And, you know, that's a
24 different thing.

1 So let's not act like this is about
2 that miners are not going to be able to file tort
3 claims against Don Blankenship or Bobby Inman, because
4 it's not.

5 MR. GRANT: Your Honor, can I -- if I
6 can read -- just want to make sure I have this cite
7 correct.

8 I want to cite another authority for
9 my proposition that this one is going to not move
10 forward. "There's also an issue of -- I really have
11 not known a lot of situations in real life where
12 acquirers would come in and what they turn to is the
13 prosecution of derivative claims. It's just really
14 not why people acquire companies, frankly. And what
15 they do is, frankly, if something is beat up --
16 potentially beat up -- you buy it at the beat-up
17 price."

18 I totally agree with the speaker.

19 THE COURT: Well, I'm sure --

20 MR. GRANT: -- which, of course --

21 THE COURT: -- I know who that is.

22 MR. GRANT: Yes. Which is, of course,
23 Your Honor at one of our earlier meetings.

24 THE COURT: But --

1 MR. GRANT: And that's exactly what
2 happened here. They are buying this company at a
3 beat-up price, at a huge discount so that they can --
4 so that they can cover those additional liabilities.

5 So then the question is what happens
6 with these derivative claims which really are not
7 going to be prosecuted, as Your Honor correctly
8 pointed out, by Alpha? If you are doing your job as a
9 director of Massey, you say, "Let me carve these out,"
10 whether we call them Countrywide claims or we just
11 carve them out. "Let me give them to someone who is
12 actually going to prosecute them in a way that will
13 maximize the return to the shareholders."

14 And that's what we're asking the Court
15 to do. The Court can either do it by enjoining this
16 transaction and having us renegotiate it or the Court
17 can say "I am using my equitable powers in saying that
18 you breached your fiduciary duty under" either
19 "Revlon" or "entire fairness, and I am carving this
20 out" or Your Honor can say --

21 THE COURT: Well, no, I can't do that
22 except -- I mean, there are all kinds of things I
23 suppose I'd like to be able to do, but I actually have
24 to apply the law. And I cannot grant an affirmative

1 injunction of affirmative relief except on undisputed
2 facts or after a trial. I -- all I can do -- nor
3 could I responsibly, to Massey, because it would be
4 crazy for Massey's investors who you represent, for me
5 to have an accelerated thing to prove what the direct
6 claims against the company -- the people bringing them
7 would like to have proven. That would be pretty
8 irresponsible for Massey's investors, and nor would it
9 be really much -- accord much with due process to have
10 a trial on these kind of complicated things before the
11 end of this year.

12 And so, you know, I can issue an
13 injunction and, you know, you can go forward. That's
14 the only thing, an injunction that would allow Alpha
15 to walk eventually, if it's sustained. And so I can't
16 make pretend deals.

17 I mean, if you could have made a
18 settlement with these folks, I suppose you would have
19 done that if it -- if it achieved your objectives.
20 And I'll grant you, like on the UBB thing, the lost
21 profits from that, what you would say is that one may
22 be an asset because there, they clearly paid nothing
23 if they -- you know -- in the sense that they view UBB
24 as a closed mine, that there's some potential there to

1 go off to Blankenship and others and seek lost
2 profits. Of course, the theory there has to be not
3 only that he wished to put the mine -- he wished to
4 put the miners -- to cut corners, right, it had to be
5 that he was -- I mean, remember, what he's probably
6 going to say in defense is "Well, I can't really reap
7 profits out of something I destroyed." And, you
8 know -- and that's going to be a difficult question;
9 right?

10 MR. GRANT: No. I don't have to go
11 that far. He can simply say "You know what? I think
12 that all of these safety violations and everything
13 else coming from the government are a conspiracy
14 between the United Mine Workers and President Obama
15 and, therefore, I'm going to ignore them because I am
16 sufficiently delusional that I truly believe that."
17 And the board sits there and says, you know, "All
18 hail, great Don Blankenship" and doesn't do anything
19 about it, and then in his mistaken belief -- paranoia,
20 he destroys that mine, I think yes, he is still held
21 accountable and I think the board is held accountable.

22 THE COURT: I'm not saying it's not
23 impossible. I'm saying I think you always have to --
24 look, I'm not -- I have to be the one who's objective

1 about this; right? There is some tension for a jury,
2 though, to be listening. You know, one of the first
3 things the defense would say is, you know, "They want
4 to say I intentionally violated the law such that I
5 took the material risk that the thing is going to blow
6 up, that I believed I was violating the law regularly.
7 And how could I" -- "What would my incentive to do" --
8 "be to make profits by taking a risk of destroying
9 that which makes the profits?"

10 There is a little bit of tension
11 there. And when you got to deal with the realities of
12 proving scienter, that has to be taken into account;
13 right?

14 MR. GRANT: No, I don't have to prove
15 scienter.

16 THE COURT: Well, you kind of do --

17 MR. GRANT: No, I don't.

18 THE COURT: Well, you do kind of have
19 an exculpatory charter provision; right? So you're
20 beyond gross negligence.

21 MR. GRANT: Yes.

22 THE COURT: And you're going to be
23 essentially in a situation where -- right, where some
24 conscious violation of a legal duty --

1 MR. GRANT: We're in the face of a
2 known duty, no action whatsoever was taken. And the
3 reason that he took no action whatsoever is even
4 though the government said "You have tens of thousands
5 of violations," he said, "I don't believe you because
6 you're just a giant conspiracy. You" -- you know,
7 "You were out there. You and" -- "and" -- "and the
8 President and the head of the United Mine Workers and
9 the head of the AFL-CIO, it's one giant cabal and
10 conspiracy."

11 THE COURT: And, you know, "I know
12 better" --

13 MR. GRANT: Right.

14 THE COURT: -- which is "I didn't want
15 to blow it up, but" --

16 MR. GRANT: "But I just knew better
17 than did you. So I ignored the law."

18 THE COURT: No. And I'm not saying --
19 what I'm saying is there is this -- you have to admit
20 one of the things -- and people who look at
21 motivations -- juries and things look at
22 motivations -- is, you know, the asset from which he
23 was trying to reap the profits was that which was
24 destroyed.

1 MR. GRANT: Yeah. I have no fear of
2 bringing this in front of a jury. When the jury sees
3 Don Blankenship, that will probably be enough. It
4 is -- it is -- well, it is what it is.

5 Your Honor, the last thing I wanted to
6 add on on what else Your Honor could do is, Your Honor
7 could take on right now the Countrywide issue and Your
8 Honor could say "I am looking at this," and based on
9 Countrywide, based on the Supreme Court's ruling and
10 holding there, that you could easily say that it was
11 the actions of this board in ignoring the safety
12 issues, in driving this company were the only way the
13 company could continue on is through a merger and say,
14 "Therefore, these claims are actually direct claims,
15 not derivative claims, and they will move forward."
16 And you could enjoin this for 15 days to let the
17 stockholders know that's what they're getting so that
18 they're getting the merger consideration plus they're
19 moving forward with that.

20 THE COURT: They wouldn't know
21 anything except that I -- I had said that.

22 MR. GRANT: I don't -- I don't
23 understand what that means, that they wouldn't know --

24 THE COURT: Well, I'm not -- as you

1 said, they even had -- in that case they went from
2 three members of the Supreme Court, who are empowered
3 to hear the thing, to five.

4 MR. GRANT: Right.

5 THE COURT: I'm not even one member of
6 the high court. I am just me, just Vice Chancellor
7 Strine. And I'm one member of the Court of Chancery.
8 And so if I issue that ruling, it does nothing to
9 really definitively settle the question.

10 MR. GRANT: No. It -- it does. It
11 says that then people know that this claim is going to
12 move forward as a direct claim. Now, what they know
13 is --

14 THE COURT: If I'm wrong, then it's
15 later --

16 MR. GRANT: There's -- you know, Your
17 Honor talked about knowledge and risk and all that.
18 So there is absolutely the knowledge that there is
19 risk involved with any litigation that, you know, it
20 may prevail or it may not. In fact, claims sell. You
21 know that there's a market for claims like that. So
22 people will try to figure out okay, what is it worth?
23 But they know that they will get some cash, some
24 stock, and, you know, a stub, a right that is an

1 inchoate right. It may be monetized; it may not. I
2 may sell it before, you know, it gets fully resolved.
3 They'll know they're getting something else. They
4 won't know the value of it, but they'll know they're
5 getting something else. But that will be a very big
6 difference --

7 THE COURT: No, but it won't -- what
8 I'm saying, it wouldn't know because -- it wouldn't
9 know anything other than that the trial court, you
10 know -- as far as I understand, nothing about
11 Countrywide -- there's a spirit around it, but it does
12 cite Lewis versus Anderson; right?

13 MR. GRANT: Well, the answer is yes.
14 Does it mention Lewis v Anderson there? Absolutely.
15 Does it extend and, I think, extend it clearly?
16 Absolutely. And, you know, it -- let's see if I can
17 find the exact quote for the Court.

18 It says that, you know, "We cannot
19 ignore the close connection between the wave's crest
20 and its underlying trough. No one disputes that
21 Countrywide needed to sell itself."

22 And then goes on to say when those two
23 things are tied together, when the -- you know, when
24 the -- the unlawful actions that drive the stock down

1 are also what says "Gee, I got to do a merger," that
2 that does not absolve the defendants of a -- you know,
3 of -- of liability. And I think that that is a
4 material fact that shareholders need to know. And I
5 think it is critical that the Court decide that now so
6 that when the -- when -- when the shareholders vote on
7 this, they know what they're getting.

8 THE COURT: But what I'm saying is a
9 more mundane point. Strine's decision would not be
10 the final decision. And so they would only know that
11 I had made that decision.

12 MR. GRANT: And that certainly alters
13 the total mix.

14 THE COURT: Okay. Why don't we do
15 this, for humanity's sake, 10 after 2:00 let's come
16 back. Thank you very much, Mr. Grant, for your
17 arguments, and you'll get time to respond to your
18 friends' points.

19 (A short recess was taken from 2:03
20 p.m. until 2:11 p.m.)

21 THE COURT: Mr. Abrams.

22 MR. ABRAMS: Your Honor, I propose to
23 address two points today, subject to the anticipated
24 humorous questions the Court will have regarding this

1 proceeding.

2 We're here today on what I thought was
3 a preliminary injunction application, which has now
4 morphed into an application for a declaratory judgment
5 on the Countrywide decision and a corresponding
6 request for an asset transfer from Massey or Alpha,
7 depending on timing, to the plaintiffs' lawyers.

8 There are two reasons that Your Honor
9 doesn't need to deal with this today. First, Your
10 Honor has correctly recognized there's no irreparable
11 harm posed by the consummation of the merger with
12 respect to the continued availability of the
13 derivative claims to be considered by the appropriate
14 person under any of several legal tests.

15 And, secondly, it's not necessary for
16 similar reasons for Your Honor to decide Countrywide
17 or litigation trust today. That can be decided in due
18 course. And subject to the disposition of that
19 ruling, the appropriate party can deal with the
20 derivative claims.

21 Your Honor correctly recognized early
22 on in the discussion with Mr. Grant that there are
23 multiple avenues for the continued prosecution and/or
24 recovery under the derivative claims. If Mr. Grant is

1 right, that there is a Countrywide exception -- we
2 obviously don't believe there is, and I think Your
3 Honor's got the correct reading of Countrywide. But
4 if he's right, some day, when Your Honor has more time
5 to think about this, after a full hearing and after
6 Your Honor gets the benefit of full briefing on what
7 Countrywide really means, Your Honor can decide. And
8 if he's right, his clients get to pursue the claims
9 directly. And, frankly, his clients are better off
10 with the merger consummated than the residual
11 opportunity to get whatever Mr. Grant can dig out of
12 the Countrywide claims in the event Your Honor and the
13 Supreme Court agree with his misconstruction of
14 Countrywide.

15 Secondly, of course, as Your Honor
16 recognized, we've got the Alpha board sitting there
17 with a full opportunity, following consummation of the
18 merger, to consider whether and when the claims should
19 be prosecuted. The Alpha board is commended under
20 Delaware law, which I heard precious none of from
21 Mr. Grant, with respect to 141(a), you know, 327 on
22 continuous ownership, 23.1 on demand requirements, to
23 say nothing of Lewis versus Anderson, Tooley,
24 Lambrecht, Lewis versus Ward.

1 You know, this is an asset that's
2 commended to the business judgment of the Alpha board.
3 And as Your Honor recognized, if the Alpha board does
4 nothing, they can be subject to a demand. If they
5 wrongfully refuse the demand, there's a remedy for
6 that. If they double --

7 THE COURT: But realistically
8 speaking, though, I mean, one, you know, if you had --
9 one of the problems we have in this area, obviously,
10 is that not all claims are the same. And that's where
11 I think, to some extent, a lot of the colloquy with
12 Mr. Grant was about. You know, I mean, if you had a
13 jury verdict that had a federal jury verdict against a
14 defendant -- a solvent defendant whose assets are, in
15 fact, frozen and it survived federal appellate review
16 and there's really just a frivolous cert. application
17 and it was for \$250 million and you have a \$1 billion
18 stock-for-stock merger, the fact that you did the
19 stock-for-stock merger and that the selling
20 corporation shareholders were going to get 46 percent
21 of the value of that wouldn't probably be a really
22 good argument, right, if you were defending that,
23 because the argument is, you know, wait a minute.
24 That's a -- that's a real asset and it doesn't come

1 with anything else.

2 Here, we have something more complex.
3 And it's not clear even how Countrywide -- the Supreme
4 Court in Countrywide looked at it. The so-called
5 asset is really bound up in a liability. To a large
6 extent, but not a perfect extent -- because I'm going
7 to -- I want to talk to you about Mr. -- Mr. Grant,
8 you know, just for people who -- who are unaware --
9 you know, the viewing audience on Courtroom Connect,
10 that when Mr. Grant read from something, he read from
11 something I said, right? And something I agree with.
12 (Continuing) -- that with respect to something like
13 the closing of -- of Upper Big Branch, that the
14 perspective of Alpha on that may very well be
15 different than the perspective of a Massey
16 stockholder.

17 And what I mean by that, Mr. Abrams,
18 is that Alpha -- and I think Crutchfield said for
19 very -- Alpha -- I mean, looking at UBB, there's a lot
20 of reasons why you wouldn't reopen it. Likely didn't
21 put any real values on the cash flows from UBB when
22 they purchased the corporation. And, thus, if all you
23 were talking about is going after people about the
24 lost profits from UBB, I, frankly, have to give

1 Mr. Grant some argument credence there. I mean,
2 there -- there they may be differently situated for a
3 lot of reasons. Just say "Sufficient unto the day is
4 the evil thereof. We didn't price this thing.
5 Frankly, it's a lost cause."

6 A little bit different if you start
7 get hitting with fines and other kinds of verdicts out
8 of Upper Big Branch and that result in pervasive
9 findings of wrongdoing and little different for me to
10 understand why they wouldn't go after and try to shift
11 the thing.

12 But the -- the problem we have on this
13 record is what the heck were your clients doing in
14 terms of not actually trying to address the situation
15 in some sort of way? I mean, even, for example,
16 saying to Alpha, you know, "Are you going to prosecute
17 these things? You need to make your own decision.
18 You need to assure us that you are." It's an awkward
19 situation because the majority of the board are the
20 defendants.

21 But this was not just some ordinary
22 thing. And what I have here is a record where your
23 clients somehow inadvertently, through one of the best
24 law firms in the country, asked for indemnification

1 for even willful misconduct. Don't get that but get
2 indemnification and then basically are told -- just
3 basically ignore the derivative claims, assume that
4 they survive and they do a deal. Why is that a good
5 process? It doesn't seem to me very good at all. And
6 isn't -- I mean, I hate to be -- because it's a really
7 respected law firm, but isn't Cravath representing the
8 defendants in the -- weren't they representing them in
9 the derivative case already?

10 MR. ABRAMS: A series of responses to
11 that, starting with the Countrywide Delaware Supreme
12 Court decision which held that target directors have
13 no individual obligation to value on an asset-by-asset
14 basis each asset of the company considering a
15 strategic transaction. We have an auction process --

16 THE COURT: The word is "a piecemeal
17 asset"; right?

18 MR. ABRAMS: Right. But Your Honor's
19 correctly recognized that at the stage of the
20 strategic option process undertaken by Massey, nobody
21 knew what the outcome would be with respect to
22 liability. There are at least 11 factors that I've
23 thought of that one would have to take into account
24 sensibly, if you're in the midst of a strategic

1 options process, before you decide to put that on hold
2 and then to -- and to go do a lengthy detailed
3 investigation. Your Honor has touched upon many of
4 the factors.

5 You got to know the scope of the
6 investigation, the depth of it, the time frame for it;
7 the liability finding one would think would have to be
8 pretty certain before you put on hold the type of
9 premium opportunity that was on the opportunity here.
10 You have to have an accurate measure of damages. You
11 have to know about the recoverability of the damages.
12 As Your Honor has pointed out repeatedly, you have to
13 know what the offsetting costs are going to be. You
14 have to think about the time frame for the sale
15 process and how that interacts with your internal
16 investigation. You have to know about the
17 attractiveness of the offers. You have to know what
18 the litigation benefit is relative to the deal
19 premium. You have to calculate exactly whether you
20 can keep control over the process or whether somebody
21 is going to come in and jump your process and commence
22 a hostile bidder, run a proxy contest, as Your Honor
23 recognized. And you have to think about the risk to
24 the stockholders of putting an internal investigation

1 on derivative claims in a highly uncertain context,
2 you know, on hold when the stockholders have an
3 opportunity to secure what was done here, which was a
4 27 percent premium over the pre-UBB price for the
5 company's stock.

6 So I can understand in a situation
7 like this where, given the alternatives and given the
8 stand-alone management plan and how it was being
9 valued by Perella, that the directors did not put on
10 hold the sale process and, instead, followed their
11 lawyers' advice to disregard the derivative claims.

12 THE COURT: But assuming it was not
13 put on hold --

14 MR. ABRAMS: Sure. I'm sorry.

15 THE COURT: -- you know, the only
16 affirmative action the directors took through their
17 agents was one that would have actually -- was to
18 negotiate for -- an indemnity, you know, for willful
19 misconduct. There -- there appears to have been no
20 attempt to, you know, talk about the derivative claims
21 in a way where, you know, you are going to go -- you
22 know -- even let's assume, for example -- and I
23 don't -- I think it's -- you know, it's something your
24 clients -- your -- your briefs make as a good case --

1 that this is actually good -- you know, in a bad
2 situation, this outcome of a premium to the
3 preaffected price -- you know, we're not going to get
4 into whether it's a premium to what it would have been
5 without the disaster. It's a disaster; but compared
6 to Countrywide, you know, on economic terms before the
7 stockholders, a better situation and then in Alpha's
8 hands you can capitalize on this. and because it's a
9 stock-for-stock merger, the Massey stockholders can
10 benefit from that.

11 So take that on its own terms. Why,
12 in the context of that, isn't there the -- the
13 requirement to make sure that you capitalize on all
14 the assets and to make sure, for example -- let's talk
15 about the UBB lost profits. That seems the hardest
16 one. (Continuing) -- that there is some assurance
17 that Alpha's actually going to go after that if it
18 turns out that this is a situation was one where
19 management is culpable?

20 MR. ABRAMS: We don't need to get a
21 contractual assurance or a businessman's assurance for
22 that because the Alpha board has the legal duty to
23 consider the value of the asset reflected in the
24 derivative claim. If we had pressed on -- on the

1 derivative claim and potentially disrupted the
2 process, who knows whether we would have gotten to \$69
3 at the time the -- the merger agreement was signed.

4 THE COURT: You're saying they have a
5 legal duty as Alpha directors to consider, you know,
6 bringing such a suit in the future.

7 MR. ABRAMS: Absolutely. There's no
8 impediment to the Alpha board deciding exactly what
9 it's going to do. We have no agreement, arrangement,
10 or understanding with them.

11 THE COURT: But as I say, this is a
12 situation where you -- it's -- it's -- you know, and
13 it gets -- again, it gets complex, which is -- you
14 know, did Alpha pay, you know -- if Alpha pays nothing
15 for -- on any assumption of future cash flows for UBB,
16 right, it's arguably differently situated than
17 somebody's who's already an existing stockholder or
18 expected them to suffer the loss; right? Which is it
19 went into this saying "As to Upper Big Branch, we're
20 certainly not pricing this deal on the assumption that
21 we're making coal, we're running coal there" -- "ever
22 there in the future. And so that portion of the
23 purchase price of Massey for, you know, any profits
24 out of" -- "we're pricing at zero."

1 And the overall situation -- this is
2 where a lot of my colloquy got to with Mr. Grant --
3 is to the extent that there's value in the -- in
4 the -- in the derivative claim besides the lost
5 profits -- and this is where it gets to be a very
6 complex matter -- it's more in the offset, which is
7 Alpha suffering costs where -- this is where Alpha
8 really just has to look at it as a liability and
9 saying, you know, "Not only are we going to get no
10 profits out of Upper Big Branch, we are likely to
11 suffer ongoing, you know, costs as a company. And
12 that's a liability we're taking on and we have to
13 price that." And where if you take away from them the
14 derivative right to do the offset, you're arguably
15 changing the deal.

16 But Mr. Grant's point is, you know,
17 where is the negotiating force on behalf of the
18 stockholders? And even he said "Assign to us a lost
19 profits claim for the UBB. We understand why you need
20 to deal with them on the other things. Assure us
21 somehow you're going to pursue this, because you can
22 actually" -- "you're not actually going to pay us for
23 the lost profits claim" or even to have at least
24 engaged in some of negotiation over it.

1 MR. ABRAMS: The reason that Massey
2 didn't do that -- and there's no record evidence on
3 this. But thinking of this as an academic matter or
4 hypothetical, Massey should not have attempted to do
5 that because that would have lowered the price. To
6 the extent Massey makes the arguments that Mr. Grant
7 is making regarding the potential exposure and
8 recovery on the derivative claims, they are
9 exacerbating the problem that Massey/Alpha has to face
10 on the other side with respect to the government
11 investigations, the criminal investigations, the
12 environmental issues, the wrongful death suits, the
13 plethora of civil suits that are pending. And nobody
14 knew what the answer to that question was in the midst
15 of the process.

16 THE COURT: No. But I think what
17 the -- what the plaintiffs are saying is -- let's
18 assume you don't know and you are in this situation
19 where, you know, in some ways the plaintiffs in this
20 case should want the value of the derivative claims to
21 be lower than is the maximum they could conceivably
22 be, because to the extent that they could be more
23 maximum because the company's going to bear direct
24 costs, that's not good for you as an investor.

1 MR. ABRAMS: Absolutely.

2 THE COURT: And -- but in a world of
3 uncertainty, though, one of the ways you proceed is
4 how do you preserve the optionality when it makes
5 sense, right, and in terms of this process and the
6 board did nothing? Again, what they did do in the
7 face of uncertainty was initially take a pass at
8 getting indemnified for willful misconduct. That's
9 the one thing that we knew they took a pass at.
10 That's the only thing they did.

11 MR. ABRAMS: A, the record is not that
12 the board took a pass. Some lawyer at Cravath took a
13 pass --

14 THE COURT: Okay. Well, let's just --

15 MR. ABRAMS: -- on behalf of the
16 board. But --

17 THE COURT: But a draft went to Alpha
18 with that in it; right?

19 MR. ABRAMS: Right.

20 THE COURT: I mean, talk to me a
21 little bit about the thinking around derivative suit
22 defense counsel rather than counsel for the safety --
23 that committee -- or the committee that was set up to
24 look at it, which I assume was different counsel?

1 MR. ABRAMS: Yes. That's Weil
2 Gotshal.

3 THE COURT: Well, why wasn't Weil
4 Gotshal at some point --

5 MR. ABRAMS: I'm sorry. Weil Gotshal
6 had the advisory committee, not the --

7 THE COURT: Okay, the advisory
8 committee. Why wasn't Weil Gotshal or somebody else
9 employed to address that? And because, remember,
10 you're arguing two things, which create a bit of
11 cognitive dissidence. The board was entitled to rely
12 upon Cravath's advice about the derivative claims and
13 to do that in good faith; but that Cravath, in a
14 spontaneous uprising not inspired by clients, asked
15 for the acquirer to indemnify for willful misconduct.
16 There's a little bit of tension between those two;
17 right?

18 MR. ABRAMS: And Cleary caught it,
19 struck it; and we ended up with 5.05(b) which
20 Mr. Grant has patently mischaracterized and hasn't
21 read to Your Honor. And I think Your Honor's read it
22 before this argument because Your Honor seems to have
23 a pretty good handle that 5.05(b) --

24 THE COURT: Well -- and Mr. Grant

1 wanted to know -- you read it -- your clients
2 understand that it only gives them whatever indemnity
3 Massey was able to give them under the law?

4 MR. ABRAMS: Including, as is set
5 forth in 5.05(b) in a parenthetical, that that
6 indemnification is subject to applicable Delaware law.
7 They're simply wrong on their reading --

8 THE COURT: Right. But it's not what
9 Alpha could give as a third party. They're only
10 backing up whatever Massey could have given.

11 MR. ABRAMS: In accordance with
12 Delaware law.

13 THE COURT: Right.

14 MR. ABRAMS: Your Honor's point from
15 extended discussion is there's not going to be
16 indemnification for bad faith conduct or, you know, a
17 Caremark --

18 THE COURT: And your clients
19 understand that.

20 MR. ABRAMS: Absolutely. It's
21 unequivocal in what 5.05(b) says. And I didn't hear a
22 single quotation from 5.05(b) from plaintiffs' counsel
23 and there's nothing in their papers that coherently
24 deals with the literal language of 5.05(b).

1 So indemnification, whatever was tried
2 by some lawyer at Cravath in sending over whatever
3 merger agreement was sent over doesn't matter because
4 505(b) says what it says. And Your Honor and I agree
5 on the Delaware law limitation and the Massey-related
6 limitation on indemnification that's available.

7 So that gets us to the question of
8 whether we had some affirmative duty to try and
9 procure value from Alpha in the negotiations. And I
10 believe that had we tried to do so, we would have lost
11 value for the stockholders because Alpha would have
12 realized that transferring the assets to a litigation
13 trust to allow Mr. Grant to control it whenever he
14 wants with whatever charges he wants to make
15 dissipates value for Alpha and, therefore, leads to a
16 lower merger price and that hurts my stockholders.

17 So there are lots of ways to test the
18 fairness --

19 THE COURT: Well, what is the
20 deposition testimony about a litigation trust about,
21 by the way?

22 MR. ABRAMS: It has to do -- and if
23 Mr. Grant had been as fulsome with the Court as he
24 normally is, he would have said that this was the

1 conversation between Crutchfield and Inman which
2 occurred at some point in February or May -- February
3 or March, after the January 27 approval of the merger
4 agreement, in which the issue of a litigation trust
5 came up. And, you know --

6 THE COURT: So the merger agreement's
7 --

8 MR. ABRAMS: -- that doesn't have
9 anything to do with the --

10 THE COURT: The merger agreement's
11 already been signed?

12 MR. ABRAMS: Absolutely.

13 THE COURT: Had the plaintiffs already
14 argued -- begun arguing for a litigation trust?

15 MR. ABRAMS: I mean, I don't know if
16 Your Honor wants me to go into settlement issues or
17 not.

18 THE COURT: No, no. We're not going
19 to into settlement issues. I'm going into had they
20 actually brought a motion and said "Look, we're going
21 to try to enjoin the merger and" -- "until these
22 claims are set aside in a litigation trust"?

23 MR. ABRAMS: To be honest, I'd have to
24 go back and look at the sequence of the filing of the

1 complaint. As Your Honor knows, we've gone a long way
2 from originally challenging the deal on deal
3 protection measures, now into a request for a
4 litigation trust or a Countrywide exception finding.

5 The point is that in the merger
6 negotiations the litigation trust didn't come up and
7 it shouldn't have come up, from Massey's perspective,
8 because we would not want to do anything that would
9 suggest to Alpha that Alpha would not have the ability
10 to make the business judgment about whether and when
11 to pursue the derivative claims against the directors.

12 THE COURT: Well, but what I'm asking
13 you about now is, Mr. Grant pointed to a conversation
14 between Mr. Inman and Mr. Crutchfield about a
15 litigation trust in which Mr. Crutchfield seems to
16 raise it with somewhat of an open mind.

17 MR. ABRAMS: And -- and --

18 THE COURT: And Mr. Inman ... I forget
19 what exactly the words were, but it seemed to be like
20 "Nah, don't really want to do that" kind of thing.

21 MR. ABRAMS: My understanding of the
22 deposition, as Mr. Grant read it into the record and
23 my recollection from reading it, is that Inman didn't
24 know anything about it and the issue didn't go any

1 further.

2 THE COURT: Okay. That Inman just
3 didn't know about it, that Crutchfield raised it --

4 MR. ABRAMS: Yes.

5 THE COURT: -- or something?

6 MR. ABRAMS: After the merger
7 agreement was negotiated.

8 So the real issue here is whether Your
9 Honor is going to adhere to the perspective you
10 employed in Union Illinois and other decisions which
11 focuses on the outcome of a sale process that's the
12 best indicator of value. I respectfully submit that
13 in a transaction where Alpha has overbid by
14 effectively 25 percent on the next highest bid -- and
15 there's no attack today on how the process was
16 actually implemented in terms of what Perella did and
17 what the board did to procure additional value, and
18 we've heard nothing about how Admiral Inman managed to
19 get a fourth topping bid by Alpha on the day the
20 merger agreement was finally approved.

21 So we've got, you know, a very
22 substantial premium and a great deal for the
23 stockholders. And the only thing Your Honor has to
24 decide today, "Am I going to decide on a truncated

1 factual record, under the time pressures associated
2 with a preliminary injunction application, whether I'm
3 going to overturn decades of Delaware law, you know,
4 in the" -- "in the 27 years since Lewis versus
5 Anderson" --

6 THE COURT: I'm glad that you -- you
7 and Mr. Grant are providing such nonstark Manakian
8 things.

9 MR. ABRAMS: Well, if Your Honor --

10 THE COURT: I believe on one hand I've
11 allowed a return to, you know, conditions which, you
12 know, my whole life's philosophy finds abhorrent on
13 the one hand for Mr. Grant; and on your hand I'm going
14 to overturn decades of Delaware law.

15 MR. ABRAMS: But the majority
16 recognize --

17 THE COURT: I'm actually seeing it in
18 a bit less -- more nuanced way than perhaps either --

19 MR. ABRAMS: Lewis versus Anderson was
20 decided in 1984, 27 years ago. And I thought Your
21 Honor had recognized in the discussion with Mr. Grant
22 that Countrywide --

23 THE COURT: I believe Men at Work was
24 on the charts then. I'm not sure all was good. I did

1 have bangs still, though.

2 MR. ABRAMS: Right. The point is that
3 if -- if his reading of Countrywide is right, then
4 we're in a lot different world than Lewis versus
5 Anderson, Tooley, Lambrecht. We've got 141, 327, 259
6 issues, none of which are addressed in Countrywide.
7 So that leads me to think, you know, his proposition
8 of Countrywide is pretty remote.

9 THE COURT: There is something -- you
10 would admit that the calculus for Alpha going forward
11 when it has not paid anything for an asset, that it's
12 a very different calculus to decide to sue Blankenship
13 and Inman for lost profits for, you know -- we're not
14 going to get any mine -- any coal out of Upper Big
15 Branch, that that is something where they say "Look,
16 we didn't pay for that. We knew going in that Upper
17 Big Branch is gone." That's a different perspective
18 than somebody who actually bought and invested in a
19 corporation when Upper Big Branch was functioning and
20 when it arguably is not functioning anymore because
21 of, you know, culpable decisions by management; right?

22 MR. ABRAMS: You say for purposes of
23 this question.

24 THE COURT: Well, but -- well, let's

1 assume for that. Assume for purposes of this that
2 there's actual -- that there are -- that, one, that
3 the net wealth of defendants -- that there is -- this
4 is being moderate -- a quarter of a billion dollars of
5 net wealth and there's a couple directors good for
6 that and that there's a 75 percent chance, given all
7 the government investigations, that yeah, they can be
8 proximately linked to the destruction of that, such
9 that you have to -- you'd have to value the claim at,
10 you know -- upwards of 150 million bucks.

11 MR. ABRAMS: When are we making this
12 determination, Your Honor?

13 THE COURT: Well, what I'm saying is
14 you got -- this was a big deal. Every single one of
15 your testifying directors agreed it was a big deal.
16 One of the reasons why they didn't want to sell right
17 in the wake of it was because the stock price went
18 down so much. You've got the cognitive -- you know,
19 there's a lot of cognitive dissidence; right? The
20 directors who just believed in the team for many years
21 and then the reason why the high end of their
22 stand-alone plan can't be achieved is what?

23 MR. ABRAMS: The stand-alone plan was
24 valued by Perella --

1 THE COURT: The reason why you
2 couldn't -- the upper -- the value that Phillips and
3 all those guys couldn't achieve was what? All the
4 directors were saying "Our boys had been missing their
5 numbers for years." I mean, I -- you know, our boys,
6 our dudes, our team that took the wonderful approach
7 to government, they not only have been doing their
8 wonderful approach to -- with the mining regulators,
9 they'd been apparently, according to Mr. Inman and
10 others, they just been missing their numbers all those
11 years.

12 MR. ABRAMS: Which is --

13 THE COURT: Which, again, you know,
14 for a judge -- these are not confidence-inspiring, you
15 know, kind of inconsistencies.

16 And what I'm saying is one can believe
17 a world where the directors got the most out of what
18 they could and where it is still short of what
19 should -- what the company should have sold for and
20 that the gap is attributable to nonexculpated breaches
21 of fiduciary duty. Not the delta -- it's a very
22 complicated question, because it's not the ideal
23 management. It's not even the gap between, you know,
24 reasonably confident management and negligent

1 management, reasonably confident management and
2 grossly negligent management. It has to be that delta
3 of diminution of value that relates to nonexculpated
4 breach of fiduciary duty.

5 MR. ABRAMS: Right.

6 THE COURT: But there is some portion
7 of that, there is conceivable in a situation where you
8 do a merger, it's the right thing to do and where the
9 acquirer in the merger, because of the nature of some
10 of that gap, doesn't ever actually have a rational
11 incentive to seek that back.

12 MR. ABRAMS: That -- that class claim
13 is before us. The question for Your Honor today is
14 are you going to enjoin a \$7 billion deal in order to
15 reach an accelerated determination on a Countrywide
16 exception or a litigation trust? And the answer to
17 that has to be no on the basis of Delaware law. The
18 answer ought to be that Your Honor could decide at a
19 later stage whether Mr. Grant is right on his
20 Countrywide argument or I am and whether a litigation
21 trust under these extraordinary facts is appropriate.

22 The one thing you shouldn't do, as
23 Your Honor has recognized repeatedly in, you know --
24 in decades of being on the bench, is that you don't

1 gamble with other people's money. Some really smart
2 judge said that in Netsmart, and that's exactly what
3 Mr. Grant is trying to do here today.

4 THE COURT: So you're saying in terms
5 of, for example, this -- the lost profits issue, if
6 you were to actually say later on, that one, that's
7 something that -- if that's really something that
8 should properly belong to the Massey stockholders,
9 then a later monetary damages award clearly can
10 quantify that.

11 MR. ABRAMS: Yes. He's teed up the
12 loyalty claim. He's got two loyalty claims. One is
13 that there was a disqualifying interest as a result of
14 the liability exposure on Caremark; and the second is
15 exactly the claim Your Honor set up, which is that
16 there was disloyal initiative, they say on and after
17 November 21, to put the bum's rush on the sale process
18 in order to escape the prospect of personal liability.

19 We have answers, as Your Honor knows,
20 to both of those arguments; but the question for today
21 is: Do they have a probability of success on those
22 arguments? We say no. But more importantly, is there
23 irreparable harm here if those claims are allowed to
24 continue? Your Honor and I deal every day with

1 post-transaction money damages cases arising out of
2 loyalty violations. So there's no basis under those
3 claims to enjoin this transaction. And as I've
4 pointed out, the Massey stockholders are going to be
5 better off taking the merger consideration and then
6 allowing the litigation process to play out and see
7 whether Mr. Grant gets to control the determination of
8 how much money to try and take out of my clients,
9 Mr. Blankenship's, and the other officers' and
10 directors' pockets or whether that decision is going
11 to be properly commended under Delaware law to Alpha
12 and whether Alpha legally exercises its discretion in
13 that regard.

14 The point is, as Your Honor has
15 recognized, that you don't need to stop the
16 transaction in order to preserve remedies. The -- the
17 derivative claims are not being extinguished legally
18 or practically. They're an asset that's going to be
19 held by a Delaware corporation that's a party to this
20 lawsuit. And we have plenty of time after the deal
21 closing to sort out whether we're going to, you know,
22 ingraft a new meaning on the Countrywide case or, for
23 the first time, to my knowledge, anywhere, set up a
24 litigation trust.

1 THE COURT: We wouldn't be ingrafting
2 a new -- whatever -- it's pretty new. And so whatever
3 meaning it has --

4 MR. ABRAMS: No, it is -- it would be
5 a new one because this issue has actually been
6 addressed twice in California in -- in Countrywide
7 litigation that the plaintiffs have not bothered to
8 disclose to Your Honor. There is a California state
9 court decision, which has rejected precisely the
10 argument that is being advanced here. There is a
11 California federal court case --

12 THE COURT: Involving Countrywide
13 itself?

14 MR. ABRAMS: Involving Mr. Grant and
15 Countrywide directors. There's a federal court
16 decision, and there is now a pending appeal before the
17 Ninth Circuit that Mr. Grant is pursuing. I had not
18 heard of it until yesterday and Your Honor's never
19 heard about. So it is a new interpretation, and there
20 have been a number of --

21 THE COURT: Well, no. I mean, I --
22 you -- you won't concede that Countrywide has a feel
23 of being on the road to somewhere a little bit
24 different than Lewis versus Anderson?

1 MR. ABRAMS: No. I do not concede
2 that.

3 THE COURT: Then what do you treat it
4 as? --discomfiture?

5 MR. ABRAMS: I think if you parse
6 through the language and understand the significance
7 of what the Court was talking about with respect to
8 the claims that were at issue, which were subject to
9 the settlement and which hypothetically could have
10 been brought, you have to come to the conclusion that
11 the Supreme Court was focused on the continuation of
12 direct claims.

13 And the reason that there are a
14 multitude of reasons, all of which are examined at
15 great length in the pending Ninth Circuit appeal that
16 Mr. Grant hasn't told you about; but the -- the core
17 reasons are that the last paragraph of Countrywide --
18 there are two sentences right in the middle of the
19 paragraph that I'm sure Your Honor has dialed in on.
20 And those sentences refer to fraud claims. Those
21 aren't derivative claims. They're direct claims. And
22 what the Supreme Court is saying in Countrywide is
23 that properly pleaded, which wasn't the case in that
24 context, but properly pleaded direct claims for fraud,

1 which are coupled with the merger, survive the
2 transaction. There's no suggestion under Countrywide,
3 properly read, that there's a new, marvelous carve-out
4 from the two limited exceptions in Lewis versus
5 Anderson.

6 And the reason that you come to that
7 conclusion is not only the literal language itself but
8 you look at the citations to authority employed by the
9 Supreme Court. And in the critical portion of the
10 case where -- of the opinion where earlier the Supreme
11 Court is focusing on direct claims, there are two
12 citations to Braasch. Braasch is a direct case. It's
13 not a derivative case. So I think -- believe the
14 author of the opinion clearly understood that he was
15 saying that, properly pled, direct claims are going to
16 continue.

17 The other reason that I've mentioned
18 that Countrywide can't possibly have the
19 interpretation ascribed to it by Mr. Grant is that it
20 sets on its ear Lewis versus Anderson, which is cited
21 correctly and discussed properly in the earlier
22 portion of the Countrywide opinion. Lambrecht came
23 out three months in an en banc decision after
24 Countrywide. Is there any reference to this new

1 Countrywide exception that Mr. Grant is relying on in
2 Lambrecht? Absolutely not. Is there any discussion
3 in Countrywide about Tooley and wouldn't the
4 transformation of derivative claims into direct claims
5 do violence to the Tooley doctrine of what constitutes
6 a derivative claim? Absolutely.

7 With no reference to Tooley and no
8 discussion about the implications under 259 of
9 stripping assets away in the derivative context, which
10 is what he's asking to do, Countrywide can't possibly
11 have that meaning. And I'm prepared to address that
12 argument at whatever length Your Honor wants. I just
13 don't think you need to do it. And in an expedited
14 case where, regardless of where Your Honor --

15 THE COURT: Well, it sounds like --

16 MR. ABRAMS: -- ought to come out on
17 Countrywide, it's a money damages claim.

18 THE COURT: It sounds like one of the
19 things that I -- I suspected is true, is that reading
20 a decision dealing with an objection to a settlement,
21 that there's -- there's context there that one needs
22 to explore, somewhat akin to, like, a literary
23 scholar, to get a sense of exactly what that decision
24 means.

1 MR. ABRAMS: I -- I have a
2 plain-meaning argument with respect to Countrywide
3 that I'm quite happy to present to Your Honor. I have
4 a nuanced policy-based argument that you've heard as
5 well. I can deal with this any way; but what -- but
6 what Mr. Grant is not entitled to today is try and
7 force Your Honor to make a snap judgment in the
8 context of a PI and to grant, as Your Honor recognized
9 initially, final relief in the form of transferring a
10 current asset of Massey and a prospective asset of
11 Alpha over into Mr. Grant's possession.

12 THE COURT: Fraud claims -- these are
13 fraud claims, again, belonging to investors of
14 Countrywide?

15 MR. ABRAMS: Yes.

16 THE COURT: But, like, under the
17 securities laws?

18 MR. ABRAMS: They're -- they're
19 described as direct claims in Countrywide against the
20 Countrywide directors. Mr. Grant has got an
21 argument --

22 THE COURT: I'm just trying to figure
23 out -- maybe I'm letting my curiosity about the law,
24 you know -- because I thought there was some spirit of

1 the Supreme Court that says like this: If you wreck
2 an asset such that it used to be worth 55 bucks per
3 share and it's now worth \$3 and the asset essentially
4 has to be sold at \$3, you don't get a free lunch. And
5 there are a lot -- that's what I said. There are some
6 unanswered questions about it, because you can
7 actually say under -- what's weird about that is --
8 is, you know, it doesn't necessarily -- that -- that
9 description doesn't necessarily fit within Lewis
10 versus Anderson, which requires a determination that
11 the merger was being done solely to extinguish the
12 derivative claims.

13 This seems to -- you had to sell
14 because you've essentially destroyed the asset, which
15 may be a new test. And I know there are reasons to
16 distinguish it here in the sense there's been a lot of
17 harm; but the reality is there's a lot of value being
18 reaped in the merger, and that's not like Countrywide.
19 In some sense the acquirer is not really going to go
20 after the delta between \$3 and 55. The acquirer is
21 going to take it at \$3 and go forward. And that you
22 shouldn't get off the hook for the difference between
23 the 55 and the \$3 and that our law doesn't allow you
24 to get off the hook.

1 MR. ABRAMS: I agree with that. And
2 the extra sentence Your Honor needs to add, as is set
3 forth in Countrywide, is that if the plaintiff had
4 properly pleaded a direct claim that tied the
5 misconduct to the -- the price decline, then you get
6 to continue the claim. The whole point of Countrywide
7 is to continue direct claims that are properly
8 pleaded. And Lewis versus Anderson and the two
9 exceptions are correctly recited in Countrywide; but
10 the opinion makes clear in the second half -- and
11 especially in the concluding paragraph -- that the
12 Supreme Court is concerned about making sure people
13 understand that direct claims are not going to expire
14 in the merger.

15 Now, if that's a debate that Mr. Grant
16 and I can have --

17 THE COURT: But the way you typically
18 would have had to think about the direct was that the
19 merger price itself was unfair because of the failure
20 to, honestly, in that situation, allocate the -- the
21 derivative claims to the selling stockholders or
22 something like that. That's sort of Mr. Grant's
23 point.

24 MR. ABRAMS: That's the third claim

1 that we have here today. That's -- we've got a
2 Caremark-related liability claim that disqualifies
3 people. We have a loyalty claim associated with
4 expedited pursuit of a merger to extinguish liability.
5 Those are two loyalty claims that are laid out as
6 class claims in this complaint and which we all agree
7 are going to survive the merger. And I believe -- and
8 I hope Your Honor believes -- that those are claims
9 that are subject --

10 THE COURT: But Countrywide was a
11 settlement -- I mean, that's what I'm trying to figure
12 out what the relief would be -- would be ...

13 MR. ABRAMS: In Mr. Grant's context,
14 if you have properly pleaded direct claims of a
15 loyalty violation -- and there are two of them here --
16 or if you have a properly pleaded claim of a failure
17 to value an asset -- we dispute whether there's that
18 legal obligation -- those are class claims which,
19 under Countrywide, continue after the merger.

20 THE COURT: If they are fraud claims,
21 how are they direct claims?

22 MR. ABRAMS: We don't know, because
23 there was no properly pleaded claim in Countrywide;
24 but there are --

1 THE COURT: Yeah. But I thought the
2 implication of the Supreme Court really was people did
3 devastatingly stupid and, you know -- let's -- and
4 allegedly illegal things which breached their
5 fiduciary duties and destroyed the value of this
6 company. That would typically be a derivative claim.

7 MR. ABRAMS: And the Supreme Court
8 was --

9 THE COURT: And because of -- but
10 because they did that, it went from 55 bucks' worth --
11 you know, whether it was ever worth 55 -- I mean, one
12 of the problems with people who do fraud things, they
13 pump up the value of things beyond what it's worth and
14 then, you know, it was never really worth that.

15 But put that aside and say they
16 destroyed real value. There's a big delta there and
17 that the people should be accountable to the real
18 parties in interest for the loss. That's not really
19 an attack under Parnes on the fairness of the merger
20 price; right? It's so much -- it's as heck, these
21 things should survive.

22 MR. ABRAMS: Again, what are "these
23 things"? Are they the derivative claims or the direct
24 claims? I say they're the individual claims.

1 Mr. Grant has this novel interpretation of
2 Countrywide, rejected now by two California courts --

3 THE COURT: No. I'm just trying to
4 figure out what the -- you know, that's why I asked
5 whether they were 10b-5 claims, whether they were, you
6 know, other kinds of securities law claims. They
7 would typically be the fraud claims you would have,
8 and it would be as an investor and they're not
9 fiduciary based.

10 MR. ABRAMS: Supreme Court opinion has
11 two sentences, which, to my understanding, describe
12 the types of claims that could be raised.

13 THE COURT: Okay.

14 MR. ABRAMS: Regardless, I think the
15 Supreme Court was saying as a matter of law that
16 direct claims survive a merger; derivative claims
17 don't. The Supreme Court in Countrywide explicitly
18 correctly describes the Lewis versus Anderson two
19 exceptions and doesn't go on, as you would expect a
20 Supreme Court opinion that effectively expanding or
21 overruling Lewis versus Anderson and Tooley, to go on
22 and address a variety of other issues.

23 But, again, Your Honor is justifiably
24 curious about the meaning of Countrywide. And we

1 don't need to decide that today in the crucible of a
2 preliminary injunction, when we all recognize that
3 full briefing to Your Honor at whatever schedule you
4 want, particularly taking into account the Ninth
5 Circuit appeal that is now pending, you know, may be
6 appropriate and -- to decide who's --

7 THE COURT: Because then I'll have the
8 forensic insight into my Supreme Court from the
9 Ninth Circuit.

10 MR. ABRAMS: I know Your Honor's views
11 on --

12 THE COURT: No. I have no -- no
13 disrespect to the Ninth Circuit.

14 MR. ABRAMS: Right.

15 THE COURT: But, I mean, you know, I
16 hesitate to speculate about anyone else's mindset.
17 But I -- I do live a little closer to Dover.

18 MR. ABRAMS: I think we both
19 understand the implications of a pending appeal in the
20 Ninth Circuit on an important Delaware law issue.
21 And, Your Honor --

22 THE COURT: Well, they could certify
23 it over, too.

24 MR. ABRAMS: That's one of the issues

1 that's been presented in the Ninth Circuit, although
2 I'm told by the people who are defending the appeal
3 that they anticipate the Ninth Circuit will consider
4 it. The briefing was done on May 4th. To my
5 knowledge, there is no oral argument date set in the
6 Ninth Circuit.

7 But we now have two California federal
8 court decisions that, on an undisclosed basis to the
9 Court, have rejected precisely the argument here. We
10 have a California state court opinion which has
11 rejected the litigation trust. So that's why I
12 suggest the relief being asked for here is -- is novel
13 and has been rejected in three California Court
14 decisions.

15 So the ultimate issue for Your Honor
16 to decide is do you stop a \$7 billion deal in order to
17 decide on an expedited basis who's going to control a
18 chosen action that's going to exist after the merger,
19 it's not going to be legally extinguished. If
20 Mr. Grant is right, he can pursue it after the closing
21 of the merger. If he is wrong, as I'm sure Alpha and
22 I believe, then the Alpha board's going to decide,
23 subject to potential judicial supervision, on how they
24 deal with the demand, how they reject the demand, how

1 they make a decision and whether a double derivative
2 case is appropriate in this context.

3 The short answer is there are lots of
4 avenues for this Court to continue to entertain the
5 possibility of providing relief on the -- the
6 appropriate treatment by the appropriate person at the
7 appropriate time of the derivative claims.

8 Thank you, Your Honor.

9 THE COURT: Thank you, Mr. Abrams.

10 MR. ABRAMS: Your Honor, would you be
11 interested in the three California Court decisions I
12 mentioned?

13 THE COURT: I'll read them. I can't
14 promise to be interested.

15 (Laughter)

16 MR. ABRAMS: (Handing document)

17 MR. LOWENTHAL: Good afternoon, Your
18 Honor.

19 THE COURT: Good afternoon.

20 MR. LOWENTHAL: Mitch Lowenthal from
21 Cleary Gottlieb for Alpha. I just want to focus on
22 irreparable harm and balance of hardships.

23 THE COURT: Well, I want you to focus
24 a little bit -- I take it no value was placed on

1 future cash flows in terms of mining profits from the
2 Upper Big Branch mine by your client in assessing
3 the --

4 MR. LOWENTHAL: I -- I do not know the
5 answer to that.

6 THE COURT: Well, your --

7 MR. LOWENTHAL: I believe that there
8 was value placed on all of Massey's reserves, not some
9 piece of them. That's my belief, No. 1.
10 No. 2 --

11 THE COURT: So that the total -- there
12 was no deduct for the reserves at -- at Upper Big
13 Branch.

14 MR. LOWENTHAL: There certainly was in
15 the S-4, I believe for both investment bankers but
16 certainly for Alpha's, a valuation based upon all of
17 Massey's reserves, without any carve-out for any
18 particular piece --

19 THE COURT: Mr. Crutchfield testified,
20 though, I believe, that may not -- not going to open
21 Upper Big Branch.

22 MR. LOWENTHAL: I think what
23 Mr. Crutchfield's testimony was that the portals that
24 were used that led to the deaths of these miners under

1 his watch will never be used again.

2 THE COURT: Just the portals.

3 MR. LOWENTHAL: Yes.

4 THE COURT: Okay.

5 MR. LOWENTHAL: I do not believe that
6 there was any questioning one way or the other about
7 whether reserves at that site are forever unavailable.
8 I do know that in connection with Massey's own
9 valuations, they did assume that at some point that
10 there would be mining. I don't believe even they
11 thought they would go through the existing portals,
12 but there would be efforts made to seek value from
13 those reserves.

14 Going back to the -- the central
15 question, because in -- in the real world, Your Honor
16 is, of course, correct that the derivative claims are
17 part of the -- all facts that give rise to potential
18 causes of actions against individuals and give rise to
19 claims against the company; they go both ways. The
20 DCFs and the comparable transactions and comparable
21 companies, there was no deduction for those
22 liabilities, either. That was part of the bundle of
23 six that Alpha and all the other potential and actual
24 bidders for Massey were presented with. And they had

1 to evaluate what the total operation was worth,
2 because they didn't buy some pieces and not others;
3 they bought everything. That's the way the
4 transaction and any transaction operates.

5 So when Mr. Grant was telling you that
6 nobody cared about these claims, he didn't say that
7 with respect to any citation in the record. And I
8 don't want to go beyond the record, but nobody was
9 blind in understanding something that was obviously of
10 major importance to this company, to the community in
11 which it operates, and to the investment community.
12 They were not blind to it.

13 THE COURT: Can -- can you go over
14 your understanding of the indemnity that your clients
15 have granted?

16 MR. LOWENTHAL: Yes. And I don't
17 think that this -- well -- yes. There are two
18 provisions in the merger agreement that deal with
19 indemnity. One is 5.05(a), and the second is 5.05(b).

20 5.05(a) is the provision that
21 addresses causes of action existing prior to the
22 signing of the merger agreement. There is no dispute
23 that these derivative claims were existing prior to
24 the merger agreement. And 5.05(a) says that the

1 indemnity for those claims and any others presigning
2 of the merger agreement will remain postmerger
3 Massey's obligation. Obviously Massey will be a
4 subsidiary of Alpha, but it will be Massey's
5 indemnification. That's my view. That's what we
6 argued in our brief to Your Honor, and that's what
7 Massey argued in their brief to Your Honor at pages
8 42 --

9 THE COURT: So there is no indemnity
10 from Alpha as a parent company --

11 MR. LOWENTHAL: On these claims, no,
12 no. And the two signatories to that contract agree
13 that that is how it reads.

14 There is a separate provision,
15 5.05(b), which applies to claims threatened or brought
16 after the signing of the merger agreement. Even
17 with -- and that's the one that you heard discussion
18 about the draft going back and forth. The agreement
19 that was reached is an agreement that says even with
20 respect to those claims, the indemnity is no broader
21 in scope than the indemnity that Massey could have
22 given in the first place. It's just that that
23 indemnity will have a bigger credit because Alpha,
24 too, will -- in terms of its financial wherewithal,

1 will be behind it. But the scope of the protection
2 does not change. It's the same.

3 You know, we've spent an awful lot of
4 time talking about well, what does it mean? And much
5 of the plaintiffs' papers were why Alpha wouldn't want
6 to bring these claims because we're going to have to
7 indemnify for a settlement or a judgment. That is
8 not, with due respect, debatable. 104 -- 5(d) makes
9 it abundantly clear. It's not that Alpha doesn't want
10 to indemnify for those claims, it can't. These are
11 derivative claims. These are claims of the company.
12 You can't pay for a settlement or a judgment for those
13 claims because the beneficiary is the company. So
14 it -- it -- it --

15 THE COURT: I think the --

16 MR. LOWENTHAL: The only thing --

17 THE COURT: I think the issue was
18 this, to some extent, is would the company -- Massey
19 as an entity, as I -- I thought and I'm assuming your
20 clients did due diligence -- is suffering some very
21 serious tort claims as a result of, you know, the
22 human loss and suffering at Upper Big Branch --

23 MR. LOWENTHAL: Of course.

24 THE COURT: -- that those cases may be

1 settled -- they may -- I have a hard time
2 understanding, given things, that there aren't
3 plaintiffs out there who probably have named
4 individual fiduciaries of Massey in those and that
5 those cases may be settled by the company and that the
6 existence of the indemnity protection would influence
7 Alpha not to seek any recompense for that from the
8 individuals.

9 MR. LOWENTHAL: Well, I think --

10 THE COURT: So do -- if you had to do
11 -- so do, say, a direct tort claim by victims, it's
12 brought against Blankenship, Inman, and Massey. Okay.
13 So there's \$20 million. Massey ends up settling it
14 for \$20 million; that they pay the whole thing and
15 that the deal will be -- we'll never go after Inman
16 and we'll never go after Blankenship and that there
17 will be no proven, you know, anything that's not
18 exculpated because it will be a settlement.

19 MR. LOWENTHAL: Okay. I just want to
20 separate the two types of claims. The claims that are
21 brought on a derivative basis here and here in West
22 Virginia are claims of Massey. As to those claims,
23 the settlement or judgment in those claims, that
24 funding cannot come from Massey or from Alpha.

1 What Your Honor is now talking about
2 is third-party claims, the liabilities. And with
3 respect to those, yes, the -- the -- my friends on the
4 other side are not unhappy that Alpha has to assume
5 those liabilities. They just want to take the upside
6 from the pursuit of the derivative claims and keep
7 that for themselves and allow Alpha to be stuck solely
8 dealing with the liabilities. And when Your Honor
9 gives --

10 THE COURT: No, no. What I'm -- and
11 what I'm thinking about here, what I'm trying to get
12 at in terms of the pricing of these is this,
13 Mr. Lowenthal: How does the indemnity given by Alpha
14 affect the offsetting potential of the derivative
15 claims to reduce the liability to Massey?

16 MR. LOWENTHAL: I'm not --

17 THE COURT: Here's -- which is part of
18 what -- part of what the derivative claims, to the
19 extent they have value in them, is to diminish the --
20 the liability that arises out of Upper Big Branch;
21 right? So that's why I said. Take a direct claim. A
22 miner's family wins a \$20 million judgment or
23 settlement, more likely. Mr. Grant, I think, and I
24 would and you would agree that it's much more likely

1 that, you know, a lot of times you settle these
2 things. \$20 million.

3 MR. LOWENTHAL: Uh-huh.

4 THE COURT: Alpha now has to do that.
5 Does the indemnity affect the ability of Alpha to go
6 after Inman and Blankenship and make them contribute
7 to the settlement?

8 MR. LOWENTHAL: The only impact I
9 could see, Your Honor, is that having to fund that
10 indemnity would make it more likely that Alpha would
11 seek to recoup what it had to pay, not less likely,
12 not less likely.

13 The third-party claims are there.
14 They are there. The issue presented here and that the
15 plaintiffs are arguing is that the derivative claims
16 that the Massey stockholders beneficially own as a
17 result of their stock holding of Massey are somehow in
18 Alpha's hands going to be foolishly wasted. That is
19 the question.

20 And what Your Honor is simply saying
21 is that that's one side of the coin; that if, in fact,
22 Alpha, because it observed -- will own Massey and
23 Massey will be paying these claims, it will have an
24 incentive to pursue them. On the other hand, Alpha

1 will also, as would any fiduciary, as would Massey
2 directors or a special litigation committee, if they
3 put one -- set one up, would have to decide what is in
4 the best interests of the stockholders overall.

5 They may decide, as Your Honor was, I
6 think, adverting to, that there are benefits to
7 holding these claims over as a sort of Damocles to --
8 over these people to help them see the benefit of
9 cooperating with investigators because that might
10 reduce -- might help themselves; but it might, more
11 importantly, reduce the exposure that the company
12 might face. It might be useful for them to enter into
13 tolling agreements for the purpose of making sure
14 there isn't a limitation issue and try and work
15 through these other claims in a way that will least
16 damage the owners of Alpha postmerger, which will
17 include all of Massey stockholders as well. In their
18 hands, those claims might be the most -- the claims
19 might be most potently pursued because Alpha will
20 control all of Massey's records and have access to its
21 employees. It may well be the most -- the best
22 vehicle for pursuing these claims.

23 THE COURT: But you're saying the
24 indemnity -- again, in my situation -- I'm trying to

1 posit --

2 MR. LOWENTHAL: Sorry.

3 THE COURT: -- if you have to settle
4 these things --

5 MR. LOWENTHAL: Uh-huh. "these
6 things" being third-party claims.

7 THE COURT: Yes -- well, no, because
8 look, I think whether -- whether the plaintiffs would
9 agree with me or not, one of the -- you know, the
10 larger purposes of many of these kinds of derivative
11 claims is as a kind of imperfect way of making
12 something less bad.

13 MR. LOWENTHAL: Uh-huh.

14 THE COURT: It's not that it's
15 something that is ever going to be good or a positive
16 asset. It's that if you can hold the real people
17 responsible for, you know, legal judgments and other
18 things that the company has suffered, then it's less
19 bad.

20 If, as a result of the indemnity,
21 Alpha is never going to be able to make it less bad if
22 it settles cases, then how was any value given to
23 this?

24 MR. LOWENTHAL: I guess, Your Honor,

1 the items that I mentioned all are tools that Alpha
2 can use to make it less bad. It is not just -- I
3 mean --

4 THE COURT: But a settlement by Massey
5 on its own in a case would not, in your view, preclude
6 Massey from claiming over, saying "We had to pay this
7 and, frankly, there have been" -- "we believe, you
8 know, after looking at the record now, you're
9 culpable. And we had to file" -- "we can't" -- "we
10 had to pay this because it was indefensible, and there
11 have been findings by regulators and others. It's
12 indefensible. You engaged in nonexculpated conduct,
13 and we're seeking recompense for the settlements we've
14 had to pay."

15 MR. LOWENTHAL: That's Mr. Grant's
16 pleading.

17 THE COURT: That's Mr. Grant's what?

18 MR. LOWENTHAL: Pleading. That's what
19 the -- that's --

20 THE COURT: Well, no. What I'm saying
21 is Alpha -- see, the argument Mr. Grant makes to me is
22 that Alpha will never do that.

23 MR. LOWENTHAL: He -- he's said that
24 repeatedly, but I guess I have to -- I really put down

1 a marker here. We're talking about a board that he
2 concedes to be absolutely independent and
3 disinterested, a board that this record indicates has
4 utterly no relationship with any of the people whose
5 conduct they would be considered. The only -- the
6 only reasons that he gives why this board would stare
7 in the face of what he says are fabulously valuable
8 claims is, one, that there is this indemnity, which,
9 no matter how you look at it, is just for the
10 advancement of defense costs which, if the claims are
11 proven, we get back. And I must say I'm not sure what
12 else. I mean -- I guess I do know what else.

13 The other reason is is because he
14 essentially says that there are powerfully good
15 reasons why the board might decide not to bring them.
16 Well, if so, there're powerfully good reasons for the
17 benefit of his clients as well, unless the board, this
18 independent, disinterested board, makes a decision
19 that is not in accordance with the law, in which case
20 he has the right under Lambrecht to seek to -- to --
21 to pursue these claims. The risk is that the board
22 will do the right thing one way or the other.

23 If I could tell Your Honor today,
24 which I can't because it's for the board to decide and

1 they haven't. But if I could tell Your Honor today
2 Alpha has decided to pursue these claims with vigor
3 and Mr. Wolfe and Mr. Fischer and myself are going to
4 prosecute them, that would be the end of this matter.

5 THE COURT: Well, you'd be pretty
6 excited about that.

7 MR. LOWENTHAL: I would be pretty
8 excited. Actually, I want to take that back. I
9 really think that this is very serious.

10 THE COURT: Especially --

11 MR. LOWENTHAL: I think this is very
12 serious. And I didn't mean to make --

13 THE COURT: I --

14 MR. LOWENTHAL: -- any humor about it.

15 THE COURT: It is, but --

16 MR. LOWENTHAL: But what's the risk?
17 I can't say that now, but I can say that that decision
18 is going to be made by a disinterested board who are
19 acting as fiduciaries and will take into consideration
20 all those beneficiaries to whom they're responsible.
21 That should equally be a show-stopper, because there
22 is no question under 259(a) that this claim will pass,
23 just like all assets and liabilities will.

24 THE COURT: But part of what the

1 plaintiffs say, though, is nobody on the other side of
2 this pushed at all on the notion that -- you know, for
3 example, that to the extent that it was depressing the
4 price by Alpha looking at this overall situation, that
5 really there was value to those claims so there's the
6 ability to recoup some of this damage.

7 MR. LOWENTHAL: The record doesn't
8 permit one to say that, in my view, with respect to
9 the Alpha side. It does not. You know, the one
10 tidbit that you got, Your Honor has heard an awful lot
11 about today is this testimony from Mr. Inman or
12 Admiral Inman in which he says that -- he talks about
13 a conversation with Mr. Crutchfield. The plaintiffs
14 did not ask Mr. Crutchfield any questions on this
15 subject, none whatsoever. And what Mr. -- Admiral
16 Inman says in the immediately next question and answer
17 is that the conversation was sometime in February or
18 March. The complaint in this case had already been
19 filed. It seeks a trust. That's the only testimony
20 on this subject. My clients were not blind to the
21 existence of litigation, which is all over the S-4 and
22 is all over Massey's '34 Act filings before them, both
23 upside and downside. And it is not fair to say that,
24 you know, we didn't see this. We did.

1 And if, as the plaintiffs say, there
2 is significant value in these claims, there is no
3 reason to presume that a disinterested board is not
4 going to pursue them. I said the only risk is that a
5 disinterested board might conclude that it is more
6 harmful to the company to pursue them. And under
7 Delaware --

8 THE COURT: How about the reality that
9 boards -- this isn't generally -- it's actually -- I'm
10 going to say something that, when I say it, has an
11 element of absurdism about it, which is that American
12 boards of directors don't make money by litigation.
13 They certainly litigate a lot. But do they actually
14 in -- in -- in -- we're still clearly No. 1 in
15 litigation if we're -- we might be in decline in other
16 things, but in litigation, we're pretty much
17 preeminent still.

18 That it's just not the kind of thing.
19 Like, the board -- you can say it all you want, but
20 the Alpha board is not going to go after lost profits
21 from Upper Big Branch.

22 MR. LOWENTHAL: Your Honor, if what
23 Your Honor is doing is saying that based upon past
24 experience in other circumstances you reached a view

1 that --

2 THE COURT: I haven't reached a view.
3 I'm just trying to -- tell me when. I mean, you know,
4 there is this old Bangor Punta doctrine, too. You
5 know, to hurt our heads even more, we -- we wheel out
6 occasionally. And -- and it is kind of -- it does
7 kind of hurt your head, I mean, which is the idea if
8 you pay, basically, for something, you've already got
9 the discount.

10 Mr. Grant, to some extent, adverted
11 to, you know, the economic proposition of that, which
12 is, you know, if -- if -- if Alpha can reopen and --
13 and use some of the reserves, it could use them; but
14 it's not looking to the past, it's not looking at
15 "Okay. Well, the next three years we're not going to
16 be making profits at Upper Big Branch. Let's go sue
17 Blankenship for that."

18 MR. LOWENTHAL: If -- if that is what
19 happens and if that is inconsistent with the law,
20 there is a remedy. Lambrecht makes that clear.

21 THE COURT: What you're saying is --

22 MR. LOWENTHAL: If --

23 THE COURT: -- Alpha will have a duty
24 to all of its stockholders. And if it --

1 MR. LOWENTHAL: If it --

2 THE COURT: -- if its response goes
3 outside the business judgment rule, then, you know --

4 MR. LOWENTHAL: Absolutely. There's
5 no question about that. Absolutely.

6 THE COURT: It would be a business
7 judgment rule analysis, though; right?

8 MR. LOWENTHAL: Certainly -- to my
9 knowledge, yes. On this record, absolutely. There is
10 no conflict. There's no relationship. These -- to
11 put it mildly, there was an arm's length relationship.
12 There was more than a healthy amount of skepticism, as
13 you saw from the record. Alpha refused to sign a
14 confidentiality agreement and standstill until three
15 weeks before we signed the merger agreement because
16 Alpha was prepared to go directly to stockholders.
17 This is hardly a cozy relationship.

18 In contrast, an SLC, which is
19 permitted under the law, are people who are picked by
20 the existing directors, who, outside of the SLC, sit,
21 cheek by jowl, with them on board. And under an SLC
22 approach, the Court obviously plays a role. And it
23 isn't to determining who the people are and are there
24 conflicts and their process. The Court may look into

1 their business judgment. But even if the Court were
2 to do that, presumably the Court would take into
3 account the whole picture and whether it would make
4 sense to the -- the shareholders as a whole to bring
5 these claims.

6 And on this record -- and I'm not
7 saying that in a way to -- to criticize the plaintiffs
8 in the sense they didn't make a good record. On this
9 record the evidence is powerful that the Alpha board
10 is precisely capable of making those decisions.

11 I guess -- I think -- I hope that that
12 answers the Court's questions with respect to the
13 indemnity and where [sic] it means.

14 Let me also just say a moment, because
15 I think everybody always likes to talk about, you
16 know, just, if nothing else, its name, the Bangor and
17 Aroostook Line.

18 One, it's clear it's not Delaware law.
19 Lewis could not have been clearer.

20 Two, the circumstances in that case
21 are in which the seller is alleged to have engaged in
22 misconduct. Nobody is accusing the seller here, which
23 would be Massey stockholders, from engaging in
24 misconduct. That, indeed, Footnote 20 of the Lewis

1 decision --

2 THE COURT: Okay.

3 MR. LOWENTHAL: -- makes specifically
4 that point. That's who is on the other end of one of
5 those claims, and that is not what this -- what this
6 case is about.

7 Your Honor brought up appraisal. We
8 brought up appraisal.

9 THE COURT: You're hoping for an
10 appraisal case.

11 MR. LOWENTHAL: The -- I'm not hoping
12 for. As a matter of fact, I'm not hoping for --

13 THE COURT: I mean, it is a little --
14 there are a lot of barriers to bringing an appraisal
15 case and they've been brought successfully, but
16 clearly they're not class claims, either; right?

17 MR. LOWENTHAL: They're not class
18 claims as I know them; but to the extent Mr. Grant is
19 right and that there was substantial value on the
20 table, there is motivation in this case to bring them.
21 And the issue in connection with irreparable harm is
22 that there is a vehicle in which, if people wish and
23 conclude it is to their benefit, they can. If they
24 choose not to, I don't see how that can be taken by a

1 court of law as being satisfaction of irreparable
2 harm, because people will choose not to bring these
3 claims.

4 The only other thing I want to say
5 about irreparable harm, if Your Honor will, is I don't
6 want to wade into the Countrywide issue. It seems
7 clear to me, with due respect, something for another
8 day. But what I hear Mr. Grant saying in terms of why
9 he wants you to give what -- forgive me -- what, to
10 me, seems like an advisory opinion on a claim that
11 hasn't been brought in -- in a case that isn't here
12 yet; but there's a risk, because if the shareholders
13 know that they have this direct claim, they would be
14 more motivated to vote No -- to vote Yes.

15 Well, I mean, is his concern that --
16 he wants to enjoin this transaction. On the other
17 hand, he's worried that maybe the shareholders won't
18 vote for it. I think that that is an irreconcilable
19 conflict. In any event, what will happen to the
20 claims is bolded risk factors in -- in the S-4 as to
21 which there was no commentary, I think appropriately,
22 from the plaintiffs today.

23 And to the extent they're right and
24 there are direct claims to be pursued, that will only

1 be to the further benefit of Massey stockholders.
2 They're not going to be harmed by that. So there's no
3 reason, it seems to me, whatsoever for, in effect,
4 turning this proceeding into something that is --

5 THE COURT: Well, you mean they're not
6 going to be harmed by what? --a determination that
7 derivative claims go forward?

8 MR. LOWENTHAL: There's nothing in the
9 S-4 that would lead them to believe that there -- no
10 proxy goes into this level of detail, that "There's
11 derivative claims. There's direct claims. You may
12 win on this." There is a risk factor that says "These
13 derivative claims will pass to Alpha. It's up to the
14 Alpha board to decide what it will do. You can't be
15 sure what the Alpha board will do. If it chooses not
16 to, you have" -- I mean, it goes through all of that.
17 No -- not even acknowledgment of that risk factor
18 disclosure, much less a criticism of it. There's
19 nothing that says "and then, in addition, you're going
20 to get something which you might not." Nothing.
21 Nothing was --

22 THE COURT: Well, you say is no one
23 will vote for this under the illusion that they get
24 this plus the derivative claims, for sure.

1 MR. LOWENTHAL: There's no illusion
2 about that. If you vote for this, they will get it.
3 What it seems the plaintiffs are arguing today is they
4 may vote for this under the illusion that they'll only
5 get \$10 a share, you know, 1.025 Alpha shares worth
6 whatever it is, \$7 billion, plus the ability to
7 recover on these derivative claims "but we didn't tell
8 you there's an added benefit. You may also have a
9 direct" --

10 THE COURT: May also get that.

11 MR. LOWENTHAL: Yeah. I don't see how
12 that is a basis for preventing them from voting in the
13 first place.

14 That's all I wanted to say on
15 irreparable harm.

16 Your Honor, on balance of hardships,
17 any stopping of this transaction, I mean, it -- it is
18 with the height of irony. We have a company, a buyer,
19 who -- no one is perfect, but it is extolled for how
20 it manages its operations, including how it addresses
21 employee safety. We have plaintiffs who have made
22 very sharp allegations about existing leadership. It
23 is hard for me to understand how it could be in the
24 best interests of Massey shareholders to force them to

1 continue under the existing arrangements if the
2 plaintiffs' allegations are true. That's from the --
3 from -- from the Massey side.

4 From the Alpha side, though, the
5 balance of hardships, I think, are -- is palpable. We
6 are, I think -- we not only will own the asset, but we
7 will own the liabilities. And there are meaningful
8 tools that Alpha can use to manage those liabilities.
9 And that is something that it clearly bargained for.
10 And to change the merger agreement by saying that the
11 vote is not about selling all of Massey but just some
12 of it, one, it changes the deal; but, two, it takes
13 from Alpha something that does have serious value.

14 Thank you, Your Honor.

15 THE COURT: Thank you.

16 Mr. Grant.

17 MR. LOWENTHAL: Oh ... Never mind.

18 Never mind.

19 MR. GRANT: Mr. Lowenthal mentioned
20 claims would be more valuable in his hands because
21 they'll actually have Massey's records. I just call
22 the Court's attention to Footnote 16. I wonder if
23 he'll get the minutes that are turned over in the 220
24 action or whether he'll get the minutes that are

1 turned over in the other action, because there seem to
2 be various versions of the minutes. So I just
3 bookmark that one as a potential warning that we
4 actually get those, Mr. Lowenthal.

5 MR. LOWENTHAL: (Inaudible)

6 MR. GRANT: The -- here's -- here's
7 the problem that we have, Your Honor. We -- we have a
8 company -- let's say it's worth a hundred, for a round
9 number. And because of bad things that the board
10 does, the company's now worth 30. And then Alpha
11 comes along and says "I want to buy it for 60."

12 So what happens is the shareholders
13 who had something for a hundred are damaged to the
14 tune of 40. First it was down to 70, but then it was
15 fortuitous enough that someone was willing to pay
16 more. So they're damaged for 40.

17 Now, they say "I need to be
18 recompensed for that damage, and the only opportunity
19 that I have is to go after the board that caused that
20 damage." Now, if there's an unequivocal agreement
21 that says the claims against the board for that damage
22 remain with the shareholders, then I am at the point
23 that I am prepared to concede, let this go to a vote.

24 But I'm not hearing that. What I'm

1 hearing is "You don't get that ability to go after
2 them and that that was something that was transferred
3 to Alpha." And it was transferred for no value
4 whatsoever.

5 THE COURT: Well --

6 MR. GRANT: And I further submit --

7 THE COURT: There's a point where -- I
8 think you heard the -- I think you heard the first,
9 that it was transferred to Alpha. I don't think you
10 heard the concession that it was for no value.

11 MR. GRANT: No. I am now stating that
12 there is no value paid. And the reason there's no
13 value paid is because the record evidence shows that
14 that wasn't looked at. And what happened is, Alpha
15 says, "I am getting something that's being sold at a
16 discount. I am buying for 60 something that used to
17 be worth a hundred and in my hands will probably be
18 worth 80 or 90. I'll never get it all back, but in my
19 hands I can do things with these Massey assets that
20 make" -- "make it more valuable because I'm better in
21 safety, I'm better in all those kinds of things."

22 And so I'm looking at it okay. I'm
23 paying 60. I need to set a reserve because there are
24 going to be the other issues. So I'm still getting

1 something maybe that's worth 85 that I'm paying 65
2 for. So it's a good deal for me. And that's why I
3 don't really need this -- these derivative claims,
4 these claims against Massey's board, because I'm
5 already recompensed for those -- for that because I am
6 buying at a discount. And that's the problem here --

7 THE COURT: Wait. What -- what --
8 what Mr. Lowenthal points out is that Lewis versus
9 Anderson are -- I mean, not -- the other -- the other
10 Lewis, I think -- takes a contrary view, which is that
11 as to someone who is a third-party acquirer, they can
12 buy the asset. And to the extent that they're --
13 they've bought it and there's an ability to wield the
14 cause of action, they can wield it and that they're
15 assumed to have, you know, purchased that; and that if
16 we can actually sue the former management, they can
17 sue the former management and, therefore, the purchase
18 price takes into account that.

19 MR. GRANT: Okay. Well, let's talk
20 about that for a moment. I think we have a couple
21 things moving against that. The first is, in fact,
22 Bangor Punta, which we can talk good law and not good
23 law on that. But let's talk about the -- the logic
24 behind it, which says if I buy something that's

1 damaged goods because I'm already buying at a
2 discount, I can't then turn and say "Hey, you need to
3 compensate me because these are damaged goods." The
4 people who need to be compensated are the people who
5 owned good goods that then became damaged goods. And
6 that is a concept that Delaware certainly has.

7 The next concept --

8 THE COURT: Yeah. I think the issue,
9 there again, is this -- and I understand the Bangor
10 Punta line. What Mr. Lowenthal says, it's inequitable
11 if you buy something at a depressed price from the
12 actual seller and then turn around and say "You ran
13 this Volkswagen into the ground and I'm going to sue
14 you for the difference between this and a new
15 Volkswagen" but that that's different when you buy a
16 public company. The directors are not the sellers,
17 and they can't whine about this if the new buyer turns
18 around and says -- wields an asset that was purchased.

19 MR. GRANT: But that assumes that that
20 asset was purchased.

21 THE COURT: Well, it does. That's
22 where the complexity comes in, right, which is
23 whether, as a matter of theory -- how you think of
24 this -- you're thinking of it, you know, not --

1 from -- from the perspective of people bringing a
2 derivative claim. And that's the only involvement
3 that they have, is to bring the derivative claim. It
4 is an asset. From the standpoint of Alpha, it's a
5 much more complicated thing bound up in buying a
6 whole -- the -- all the sum total of Massey's assets.

7 MR. GRANT: That's where I firmly
8 disagree, because they never thought they were doing
9 that. They never took that into account. They -- the
10 way they took into account is said "We are buying
11 these damaged goods and we're going to have to set a
12 reserve for damaged goods." They never said "but,
13 aha, we have an offset to some of the damaged goods
14 through this derivative action." There is no evidence
15 whatsoever that they gave any value --

16 THE COURT: Where is the reserve --

17 MR. GRANT: -- in their thinking that
18 they --

19 THE COURT: Where is the reserve kept?

20 MR. GRANT: You'll see as soon as the
21 deal closes. There will be reserves set, Your Honor,
22 guaranteed. They have to under accounting rules. But
23 they never -- there was no evidence anywhere that will
24 show that when they looked at it they said "Aha, we'll

1 be able to lower the reserve that we have to take
2 because we will be getting something back in this
3 derivative action."

4 But if Your Honor gives me one
5 moment --

6 THE COURT: Sure.

7 MR. GRANT: -- there is a case,
8 Bomarko versus IT Telecharge. And there the CEO
9 committed breaches when it came to a company with
10 regard to their financing. And that kind of drove the
11 price down. And then finally they sold that company
12 for, like, 30 cents on the dollar. And Vice
13 Chancellor Lamb said --

14 THE COURT: Is that a cement company?
15 Was that a cement company?

16 MR. GRANT: I'm told a telecom
17 company.

18 MR. GRANT: Vice Chancellor Lamb says
19 that the merger price could be fair if you didn't look
20 back and kind of saw what happened, because it really
21 was worth 30 cents at that time. They paid 30 cents,
22 but he says you got to look back at the breach and say
23 "But wait a minute. That breach drove the price down
24 and because of that, you sold cheap and you still have

1 a cause of action."

2 THE COURT: Did he enjoin the merger?

3 MR. GRANT: I need some help. No. I
4 think it was postclosing on --

5 THE COURT: So he allowed a damages
6 award against the directors for selling at too low a
7 price; right?

8 MR. GRANT: Yeah, but I don't think
9 the merger itself was challenged. This is
10 postclosing. So what I'm saying, Your Honor, is if
11 someone could assure that we have this damage action,
12 then I'm okay with saying --

13 THE COURT: But I think that's the
14 assurance -- I mean, what we can't assure is that you
15 win.

16 (Laughter)

17 THE COURT: You know --

18 MR. GRANT: No.

19 THE COURT: -- I think -- I think the
20 assurance is that if you can actually show that, you
21 know --

22 MR. GRANT: Not if they say that the
23 claim was sold to Alpha. That's the problem. They
24 say the claim was sold to Alpha.

1 Again, I want to turn this back --

2 THE COURT: This is the same situation
3 which is -- again, I don't really -- that's why I was
4 complicating it with the real -- some of the
5 real-world considerations, which is I give it to you
6 that it's more -- I think it less likely, let's just
7 say, to be -- far less likely that Alpha would
8 undertake on its own an affirmative pursuit to recoup
9 lost profits for lack of mining Upper Big Branch for a
10 couple years --

11 MR. GRANT: Correct.

12 THE COURT: -- than it would be for
13 Alpha to consider if they nailed in direct claims
14 to -- to consider taking that out of Blankenship's and
15 Inman's hide to the extent that they could.

16 MR. GRANT: Well, again, we should
17 talk about whether they can, because I'm still not the
18 convinced. Maybe we should move right to the
19 indemnification now, because 5.05(b) says "... each of
20 Parent and the Surviving [Company]" -- so now all of a
21 sudden we have Alpha -- "shall indemnify and hold
22 harmless, to the fullest extent the Company would have
23 been permitted to do so under applicable Law"

24 And then over on the next page (ii),

1 which are things they can do, is any action under
2 "this Agreement or any of the transactions
3 contemplated hereby"

4 So that sounds to me that if these
5 guys sold for too little because they didn't, you
6 know, get anything for the damages, that they're
7 indemnifying for that.

8 MR. ABRAMS: Are going to tell him the
9 parenthetical?

10 MR. GRANT: No idea what parenthetical
11 you're referring to.

12 But the point is that they can --
13 they're going to wind up indemnified in a lot of
14 different ways.

15 I also think that Delaware law will
16 allow them to indemnify on the personal injury. If
17 they settle for \$20 million, that Delaware law is
18 going to allow them to indemnify that and not say that
19 that is something that is unindemnifiable. And so --

20 THE COURT: What I was asking
21 Mr. Lowenthal -- and I'm not exactly sure I got a
22 clear answer from him, to be fair to you; but -- is
23 Massey concludes that it needs to settle with the
24 miners because when it looks at the record and all

1 kind of stuff, it just -- it can't -- I mean, Alpha
2 decides when it looks at the record, the -- the -- the
3 state investigation findings, other things, it looks
4 at itself, it can't defend the suits and it settles
5 with plaintiffs. Why is it that the indemnification
6 bars them from turning around and saying to
7 Blankenship and Inman, "Your, you know, consciously
8 wrongful behavior was the reason we were exposed to
9 liability, and we are suing you to cover the costs we
10 had to cover"? And if they prove that, why can't they
11 do it?

12 MR. GRANT: They -- if they prove that
13 the company would be forbidden from indemnifying for
14 those acts, then --

15 THE COURT: Yeah. That's what they
16 said, is they would say "We paid" -- "Quite frankly,
17 the only thing we settled" -- "we actually didn't
18 settle as to you. We settled on our own behalf
19 because we looked at the objective record and the
20 objective record is, you know, whatever the reg" --
21 regulators have done" -- "and we've done it and we've
22 sadly come to the conclusion that, frankly, we cannot
23 defend a trial in front of a jury."

24 MR. GRANT: Right. "So we settled and

1 we got a release and we're coming after you for" --

2 THE COURT: "We are not getting you a
3 release. We are coming to you because the company
4 just made the plaintiff" -- you know, "We paid the
5 plaintiff to go away" --

6 MR. GRANT: Right. "So we settled the
7 action." In settling the action --

8 THE COURT: No; the action against the
9 company.

10 MR. GRANT: You also -- that's not
11 real. They would settle against all defendants and
12 say "We're going to go against you for contribution.
13 Codefendant, we're going to go against you for
14 contribution." And then they would have to go and say
15 that --

16 THE COURT: Right. And what I'm
17 saying is, and they would have to go and say that "The
18 behavior of certain individuals was a
19 nonexculpated" -- not exculpated by the 102(b)(7)
20 clause -- "breach of fiduciary duty, and it was as a
21 result of that that the company was forced to incur
22 the damage of paying the settlements, and we want our
23 money back. And we want our advancement back and
24 everything else."

1 MR. GRANT: "And, by the way, we're
2 going to advance your costs again to defend against
3 that."

4 THE COURT: Well, they're
5 contractually bound to do that.

6 MR. GRANT: I understand. Of course,
7 they did.

8 THE COURT: But the point is once you
9 get -- the good thing about life is, once you get one
10 judgment against somebody, you know ...

11 MR. GRANT: Well, but --

12 THE COURT: Part of the leverage
13 aspect that can come up with Mr. Lowenthal is you
14 actually sit down and talk turkey with Mr.
15 Blankenship, Mr. Inman, and others and you say "Here
16 is the reality. 29 miners have died. Here's these
17 findings. There's two ways to play this. And
18 there's" -- as you understand, there can be ways in
19 which you get value from the claims, right, that have
20 nothing to do with ultimately bringing them.

21 MR. GRANT: And -- right. And
22 actually that's what'll happen. They will wind up
23 getting settled for "You'll cooperate in our defense
24 with us" and everything else, and they'll put on a

1 little show and no money will pass.

2 But I go back, again, Your Honor, you
3 keep thinking of this from Alpha's standpoint. I
4 understand why it's nice that Alpha got these. They
5 didn't pay for them. They didn't want them, but now
6 that they got them, they want to keep them.

7 But I keep going back to say that it
8 would be error to look at this from Alpha's standpoint
9 because that's not who the player is. The player here
10 is what did the Massey board do? Did they make any
11 effort to get value for this? Did they point out to
12 Alpha why it would be so great for them to have it
13 and, therefore, should they give a little more? If
14 Alpha said "No, we don't really want them," did they
15 explore the idea of that "Okay. Well, how about we
16 carve it out and we put this into a litigation trust
17 for our shareholders?" What did they do to try to
18 create value?

19 And the answer is "We're interested in
20 this transaction. We did nothing to create value
21 because it would save our own hides." And that is a
22 violation of both Revlon as well as entire fairness,
23 and that's where this case has to be decided. The
24 problem is they are presenting -- because they

1 breached their fiduciary duty, they're presenting the
2 shareholders with a Hobson's choice. They said,
3 "Here, you can wind up having a company that would be
4 better off running this" -- "these assets than what we
5 are, but you got to let us off the hook because the
6 alternative is if you say no, you shouldn't be let off
7 the hook. Then you can't sell the company and you
8 can't make any, you know" -- "any additional money
9 from it, you can't benefit from these assets in other
10 hands." So what you have to do here is you are forced
11 to vote Yes because you have absolutely no other
12 alternative.

13 And they can't put the shareholders in
14 a position where they prefer their own interest over
15 the shareholders so that they give them a choice so
16 the shareholders must vote Yes to take the deal which
17 then lets them walk away scot-free. And that's what
18 they've set up, and that's what's wrong with this
19 problem.

20 THE COURT: Well -- but there could be
21 circumstances where a board doesn't do what it should
22 and you still probabilistically concluded it -- it --
23 it had no negative economic outcome.

24 MR. GRANT: No. What could happen

1 here is the board could cause huge economic damage and
2 say "But if you want to get some of that damage that
3 we caused back, you're going to have to vote Yes, and
4 voting Yes gives me a get-out-of-jail-card-free."

5 THE COURT: A world in which there's
6 some free opportunity -- I mean, believe me, you know,
7 I would much prefer to have done other things with the
8 time I spent reading these papers than think about
9 this. So if you and Mr. Lowenthal had been able to
10 work out something where his clients were happy and
11 you were happy, I would have been very happy.

12 MR. GRANT: And I would have been able
13 to do that had Massey folks not breached their duty
14 and stood in the way of that.

15 THE COURT: Well, you know, I don't
16 know about that because what I'm saying is, you know,
17 what I don't know of how is -- how -- I'm not
18 empowered -- no one's magically entitled me to issue a
19 remedy whereby Alpha has to buy this under different
20 conditions than it promised.

21 MR. GRANT: Yes, you do have the
22 ability to do that, Your Honor. You can say "Look,
23 here's the story. They" -- you can declare that
24 Massey breached -- the Massey directors breached their

1 fiduciary duty. You can say that they wound up
2 getting no value for this, that it was an interested
3 transaction because they were on -- on both sides
4 because -- because they -- they need to show entire
5 fairness now because they were certainly the ones at
6 risk; and that "If you want to move forward, I will
7 allow you to move this deal forward and go to a
8 shareholder vote if you, Alpha, will carve that out."

9 THE COURT: I understand that you --
10 that --

11 MR. GRANT: You have the equitable
12 power to do that.

13 THE COURT: I am empowered only to do
14 this and only this: I'm empowered to enjoin an
15 existing transaction and then the -- then I decide
16 rather than the Massey stockholders whether that
17 transaction should go forward. If in the wake of that
18 a different deal is made, I suppose everybody's happy,
19 but I can't assume that.

20 And what I'm saying is you and
21 Mr. Lowenthal had time. If you guys want to go out in
22 the hallway, your clients and things, figure you can
23 work this out, that's good. Then it's on you. But I
24 got to issue an injunction one way or the other. And

1 I'm not assuming that, you know, if wishes were
2 horses, we could ride away; right?

3 But I can't assume that magically
4 everybody's going to embrace your notion. In fact, I
5 would have thought that if they would have, they would
6 have settled. I get settlements all the time, you
7 know, on the eve of an injunction where, you know --
8 so there's no free opportunity to give an injunction
9 where your -- where the clients you represent get the
10 chance to take the merger consideration and have the
11 derivative claims. That's some other deal. Right?

12 MR. GRANT: That was an alternative
13 that the Massey directors were obligated to explore.
14 They failed to explore that. Now what they want to do
15 is say "We failed to explore that. Too bad. Let's
16 move forward and you deal with a Hobson's choice. You
17 got one choice to vote for this deal or you know what?
18 We're back in charge and going to continue to run this
19 into the ground."

20 In fact, continue to run this into the
21 ground, do you know that they wound up -- I don't know
22 if I have that -- they wound up having another mine --
23 in the last couple days they just put out an 8-K --
24 that is going to have to wind up being closed --

1 THE COURT: How does that --

2 MR. GRANT: -- because of that.

3 THE COURT: How does that affect the
4 balance of the harms? Because, you know, you have
5 done a -- I think a -- a typically masterly job, you
6 and Mr. Lebovitch, of compiling very powerful
7 evidence, so powerful that I started with telling you
8 at the beginning of this that you didn't have to tell
9 me about how -- you know, that you could plead out a
10 Caremark claim. Enjoining this perpetuates these
11 folks in management.

12 MR. GRANT: That's the Hobson's
13 choice. That's exactly right. "We ran this into the
14 ground" -- and this is what Countrywide addresses.
15 "We ran into this the ground such that you have to do
16 a deal, Shareholder; but in order to do this deal, you
17 got to let us walk." That's what they're telling you.
18 That's the problem that they're setting up.

19 THE COURT: But I --

20 MR. GRANT: That's the problem --
21 that's where I got upset at what Delaware law says,
22 because they can do that. They can now put you in a
23 situation where these assets are far more valuable to
24 the shareholders in -- in Alpha's hands than Massey's

1 hands; but in order to do that, you got to let the
2 Massey directors walk. That is an inherent problem
3 that cannot be Delaware law, because it's an
4 inefficient economic result and it is an unjust
5 result.

6 So a --

7 THE COURT: But I think what --

8 MR. GRANT: -- a judge sitting in
9 equity has to have some power to remedy that.

10 THE COURT: But I think what
11 Mr. Lowenthal and Mr. Abrams said, there are avenues
12 under Delaware law to deal with that, which is if you
13 believe this is mispriced and tainted, you then pursue
14 a damages claim. And on that basis you say from the
15 selling directors, "You pay the difference between
16 what Alpha should have paid and they did pay and as a
17 current Alpha stockholder, too." If you think Alpha
18 is not maximizing the value of the company as they
19 should in exercising fiduciary duty by not going after
20 these guys after the merger, you go after them and
21 that there're actually more than one route, and all of
22 those involve an award of money damages; but they
23 would do it after a full record and trial, and that
24 exactly what you say should happen can happen. It may

1 take longer and you may win or lose, but those routes
2 are available.

3 MR. GRANT: Well, those routes are
4 available if the Court says there is a damage action.

5 THE COURT: But that's --

6 MR. GRANT: But if the Court's not
7 willing to say there's a damage action, then --

8 THE COURT: The Court doesn't tell you
9 up-front provisionally about whether you're going to
10 win a judgment.

11 MR. GRANT: They say "You lose, but
12 you have not given up these rights to move forward."
13 And that's the problem, is --

14 THE COURT: No. No. Nobody -- I
15 mean, nobody is saying -- I mean, these are not
16 tested -- these are, in fact, tested or actually
17 mostly intended, I think, to apply after things close
18 and to determine whether they go forward. And you
19 always have risks of whether you're going to win.

20 MR. GRANT: It's not -- it's not the
21 win whether we can prove our case. The problem is if
22 the Court says later on "I'm sorry. You don't have
23 standing. I think that those" -- "that those" --
24 "those damages claims went with the" -- "with the

1 assets and" -- "and we're" -- "are gone as part of the
2 merger," then it's, like, "Okay. Well, you just say
3 well, balance of harms. I mean, how can I" -- "how
4 can I enjoin this deal when you have a damage remedy?"

5 But if the Court's not willing to say
6 unequivocally that "You have a damage remedy. Now,
7 you may win; you may lose, but at least you still have
8 this claim to move forward," if the Court's not
9 willing to go that far, then I don't understand how
10 you balance that.

11 THE COURT: Okay.

12 MR. GRANT: I don't think I have
13 anything else to add, unless Your Honor has any
14 questions.

15 THE COURT: Anything further?
16 Anything further from anyone else?

17 MR. LOWENTHAL: No, Your Honor.

18 THE COURT: Thank you very much,
19 Counsel. It's an interesting case. I will
20 actually -- I will burden you with something in
21 writing. I hope -- I may actually smell a few, you
22 know, charcoal briquettes. I hope that won't
23 influence the outcome.

24 But, seriously, it's a very

1 interesting situation. One wishes it were less
2 interesting for the people who were the most directly
3 affected; but I appreciate Mr. Grant's, Mr. Abrams',
4 and Mr. Lowenthal's patience with my questions. And I
5 will give you a timely answer.

6 Enjoy the heat. It feels kind of a
7 little bit -- I guess it's appropriate as we go to
8 Memorial Day that it does feel like summer swelter in
9 the Mid Atlantic.

10 Mr. Abrams? You -- you concluded --
11 your clients concluded that they support a
12 litigation -- liquidation trust or a litigation trust;
13 right?

14 MR. ABRAMS: Sorry --

15 THE COURT: No?

16 MR. ABRAMS: -- Your Honor.

17 Consistent with disclosing to the
18 Court the existing pending litigation in foreign
19 jurisdictions, I want to report to the Court that we
20 understand that the West Virginia Supreme Court is
21 going to be considering this weekend a motion for a
22 preliminary injunction to enjoin the stockholder vote
23 and/or to require the formation of a litigation trust.
24 This expedited appeal before the West Virginia Supreme

1 Court arises out of the inability of the trial court
2 handling the West Virginia derivative case to
3 entertain the injunction application. Our papers are
4 due tomorrow at noon, I believe. And the West
5 Virginia Supreme Court scheduling order provides
6 that -- does not provide for an oral argument and does
7 specify that the West Virginia Supreme Court will
8 inform the parties in writing of whatever decision is
9 forthcoming by that Court.

10 And I just wanted to report on the
11 existence of --

12 THE COURT: Okay.

13 MR. ABRAMS: -- yet another lawsuit
14 that we're dealing with simultaneously.

15 THE COURT: Why don't you-all, you
16 know, figure out some means over the weekend -- you
17 can deliver to my home or whatever -- to ring my
18 chimes, as it were, if I need to know about
19 developments in that. I mean, I, you know -- because
20 we will be working to give you an answer; and if
21 something happens there where, you know, I'm doing
22 something futilely, I could -- when I would prefer to
23 be doing something else and my law clerk would, then I
24 would want to know. Otherwise I'll just assume I have

1 to give you a decision.

2 MR. ABRAMS: Thank you, Your Honor.

3 THE COURT: Thank you.

4 (Court adjourned at 3:48 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 4 through 172 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 27th day of May 2011.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
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