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IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

IN RE MASSEY ENERGY COMPANY DERIVATIVE AND CLASS ACTION LITIGATION	Consolidated C.A. No. 5430-VCS

CERTAIN MASSEY DEFENDANTS' ANSWERING BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Within three weeks of the April 5, 2010, explosion at Massey Energy Company's ("Massey" or the "Company") Upper Big Branch mine ("UBB"), Alpha Natural Resources, Inc.'s ("Alpha") board of directors approached Massey about a potential combination of the companies. At the time, Massey declined to engage in those discussions in view of recent events. Thereafter, in August 2010, Alpha made a non-binding proposal to acquire Massey for the equivalent of $37.19/share.

Ultimately, after months of exploring the Company's strategic alternatives—including a stand-alone option—and having engaged with at least five potential acquirers/partners, the Massey Board of Directors decided to accept an unusually rich bid from Alpha worth $69.33 a share (including $10 in cash for each share) (the "Proposed Transaction"). That price was some $32 a share higher than Alpha's first offer and over $14 more than a rival bid from Arch Coal, Inc. ("Arch") (the only continuing bidder at that point). The Proposed Transaction provides Massey stockholders with a substantial premium. (*See* Affidavit of Daniel R. Fischel ("Fischel Aff.") ¶¶ 9-10 & Ex. C; DX 14 at MEEDEL00001308)[1] Indeed, it was 27% higher than the price of Massey's stock

[1] Citations in the format "PX __" refer to the Appendix of Exhibits to Co-Lead Plaintiffs' Brief in Support of Preliminary Injunction. Citations in the format "DX __" refer to exhibits to the Transmittal Affidavit of Eric D. Selden, Esq., submitted contemporaneously herewith.

before the UBB explosion. (Fischel Aff. at Ex. C.) This price was viewed by analysts as an excellent deal for Massey stockholders. (*See id.* ¶ 9 n.7 ("The Board of Massey negotiated well, achieving a takeover premium on a stock that already had a takeover premium built in [to] its valuation.")[2] The vote was unanimous, including two directors, Robert Holland and Linda Welty, who are not defendants in Plaintiffs' derivative action.

Plaintiffs seek to enjoin this transaction rather than let the Massey stockholders decide whether to accept the merger, having been fully informed of all material facts by way of the April 29, 2010 Definitive Joint Proxy Statement/Prospectus (the "Proxy", PX 34). Plaintiffs' proffered rationale for this relief is that the Board breached its fiduciary duties by failing to value the derivative claims against various current and former directors and officers, which charge them with failure to monitor and address safety issues at Massey's mining operations. Moreover, Plaintiffs claim that Massey's directors rushed to sell the Company at an inadequate price in order to extinguish Plaintiffs' standing to pursue the pending derivative claims.

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[2] Additionally, ISS Proxy Advisory Services has concluded that: "The transaction offers a significant premium to Massey's share prices not just in the aftermath of the April 2010 mine explosion, but even to trading prices prior to that date. In light of this premium, the thorough negotiation process which garnered a final price significantly above the second-best bid, and the opportunity for current shareholders to continue to participate in the potential upside of the combined company, shareholder support for the transaction is warranted." (DX 3 at 6.)

Even if Plaintiffs could support such liability claims—and they cannot—there is no need to enjoin this merger in order to ensure the survival of those claims. Plaintiffs spend less than two pages of their 50 page brief on irreparable injury and half a page on the balance of hardship (Opening Brief in Support of Co-Lead Plaintiffs' Motion for a Preliminary Injunction (the "Brief" or "Pl. Br.") 47-49). There is a reason these arguments are so short: Plaintiffs have absolutely nothing to say on these subjects. As Plaintiffs themselves recognize, after the merger they will be free to attempt to prove that the transaction was a fraud and bring a direct claim against the former officers and directors on behalf of the former Massey stockholders. (Pl. Br. 4, 44 (citing *Arkansas Teachers Retirement Sys. v. Caiafa*, 996 A.2d 321, 323 (Del. 2010) ("*Countrywide*")).) This will permit the merger to close and yet offer the former Massey stockholders even better opportunities than the current derivative action does, since any recovery will go directly to them. Alternatively, if, notwithstanding the Supreme Court's recognition that selling directors have no duty to value derivative claims when considering whether to approve a merger, *In re Countrywide Corp. S'holders Litig.*, C.A. No. 3464-VCN, 2009 WL 846019 (Del. Ch. Mar. 31, 2009), *aff'd*, 996 A.2d 321, this Court finds there is a genuine issue as to whether the merger consideration was adequate in view of the Massey Board's not separately valuing the derivative claims, there can be a damages trial after the merger closes.

Still further options exist to pursue the derivative claims. Alpha's board presumably will give due consideration to prosecuting the derivative claims that Plaintiffs obviously believe to possess a substantial chance to produce a significant recovery. Plaintiffs or any other Alpha stockholder also can make a demand upon Alpha's independent board (which will not include any of the Individual Defendants) to bring an action, or any Alpha stockholder can seek to pursue the double derivative action recognized by the Supreme Court in *Lambrecht v. O'Neal*, 3 A.3d 227 (Del. 2010). Plaintiffs recognize that this path is available—an admission that is dispositive on the question of irreparable injury—but prefer a litigation trust to allow Plaintiffs' lawyers to make the business judgment conferred under Delaware law to the Alpha board.

Furthermore, it is clear that Plaintiffs will not give any consideration to whether pursuing the derivative claims is in the best interests of Alpha and Alpha's stockholders, including the former Massey stockholders they purport to represent. Based on their complete failure to even identify the offsetting liability issue, Plaintiffs have given no consideration to the potentially significant adverse financial impact to Alpha of a derivative action judgment against Massey's senior officers. There are multiple litigations and investigations pending against Massey arising out of UBB, all of which will be inherited by Alpha. Plaintiffs and their lawyers and expert have not analyzed how much a win in the derivative litigation

will cost Alpha in those other proceedings. As Delaware law has been clear for decades, plaintiffs in this context are not the appropriate parties to be making such decisions and deciding which course is in the best interests of Alpha and its stockholders, and Plaintiffs are surely not better situated than Alpha to make that business judgment.

Since the derivative claims will survive the merger, and since Plaintiffs will have the same director defendants' assets to pursue if there is a judgment against the Massey defendants after the merger there can be no irreparable harm and hence, no basis for the extraordinary relief of an injunction. Plaintiffs' other two alternatives should be non-starters. *First*, Plaintiffs suggest the Court create a "litigation trust" in order to ensure the derivative claims are not lost. However, they offer no authority for the creation of such a trust; nor any case where such a trust had been created. Indeed, such an unprecedented trust would deprive Alpha, which will own Massey, of the opportunity to have its independent board determine whether pursuit of the derivative claims is in the best interest of the stockholders of the combined entity—a right that exists under Delaware law to protect all Alpha stockholders (including the old Massey stockholders) from the pursuit of litigation that could harm the corporation rather than help it.

Second, Plaintiffs suggest that the Court enjoin the merger and proceed to an expedited trial on the derivative claims. (Pl. Br. 44.) However, such an

"expedited trial" would still take months as the legal issues (*e.g.*, demand futility under Court of Chancery Rule 23.1) and additional discovery are sorted out, and during that time, the Massey stockholders would, at a minimum, be deprived of the cash consideration and the realization of the synergies expected from the merger.

Indeed, Plaintiffs cannot demonstrate irreparable harm where, as here, stockholders have been fully informed on the issues Plaintiffs raise. The Proxy informs the Massey stockholders about the derivative suits and the nature of the claims asserted therein (*see* PX 34 (Proxy) at 125-29), and the directors' interests in those claims (*id.* at 16), explicitly alerts the stockholders, of the "Risk Factors," that Plaintiffs and others may lose standing to pursue the pending derivative actions, and that if those claims are pursued post-merger, any recovery would be to Alpha's benefit (46% of which will be owned by Massey stockholders), while if the derivative claims are not pursued, the value of those claims—which Plaintiffs claim are substantial—will be lost (with resulting benefits to the Individual Defendants). (*Id.* at 50.) Since the derivative claims will in all events survive the merger and the stockholders have been fully informed of the process, the interests of certain directors, the allegations made by Plaintiffs and the possible loss of any value in the derivative claims, it is they who should decide whether this merger takes place.

A preliminary injunction here would not only be an inappropriate remedy, but as we show below, Plaintiffs have not made the necessary showing of likelihood of success on the merits to warrant an injunction. Where the proposed transaction provides stockholders a substantial premium, that showing must be "particularly strong." *Next Level Commc'ns Inc. v. Motorola, Inc.*, 834 A.2d 828, 845 (Del. Ch. 2003).

Plaintiffs do not even try to argue that they would prevail if the business judgment rule applies to the Board's decision on the merger. Instead, Plaintiffs attempt to impose on Defendants the burden to demonstrate that the merger is entirely fair to stockholders. To do that, Plaintiffs must show that a majority of the of the Proposed Transaction. Plaintiffs fail to demonstrate that those Defendants faced any such disabling interest here. (*See infra* Argument Part I.A.1.) Plaintiffs in particular fail to demonstrate that Defendants faced a "substantial likelihood" that liability would be found against them in the derivative actions, *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984), and thus that they chose to merge with Alpha as an escape route from that liability. Plaintiffs spend most of their brief detailing Massey's mine accidents and safety violations record, and then assert that the Board "sat on its hands" and did nothing to prevent these incidents. This is outright false. As demonstrated in the affidavits of Stanley Suboleski and James

Crawford, directors responsible for monitoring Massey's safety environment, whose depositions Plaintiffs noticed but canceled at the eleventh hour, and contemporaneous minutes of the Board and the Safety and Environmental Committee (formerly known as the Safety, Environmental and Public Policy Committee) ("Safety Committee"), the Board was informed of the Company's safety record and reacted appropriately with questions and follow-up, receiving assurances and concrete evidence that the safety of the mines and miners were being addressed. (*See* Affidavit of Stanley C. Suboleski ("Suboleski Aff.")); Affidavit of James Crawford ("Crawford Aff.")); *see also* Affidavit of Richard M. Gabrys ("Gabrys Aff.") ¶ 17.) Massey's historical safety record in fact put it squarely within the norms for the industry. (*See infra* Statement of Facts ("SOF") pp. 16-17.) Plaintiffs fail to show, as they must, that the directors either "utterly failed" to implement a reporting system or "consciously failed to oversee" the safety issues. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006); (*see infra* Argument Part I.A.1.).[3]

[3] Plaintiffs will undoubtedly refer to the Governor's Independent Investigation Panel Report on UBB, issued May 19, 2011, which concluded that the tragedy at UBB was caused by an explosion fueled by coal dust, which had allegedly been allowed to accumulate by allegedly inadequate rock-dusting. Massey has disputed that conclusion. The issue here is not whether Massey's Performance Coal Company employees were responsible for the UBB explosion, but whether the Massey Board was aware of their alleged conduct and chose to do nothing about it. Notably, the Report does not implicate any Massey director in wrongdoing or suggest that the Board was aware of imminent problems at UBB, but ignored

Despite their failure to demonstrate a substantial likelihood of liability in the derivative claims, Plaintiffs nonetheless press ahead with their theory that the Board approved the merger at an inadequate price in order to relieve itself of potential liability on the derivative claims. But the record of lengthy and hard-fought negotiations that led to the merger agreement in this case disproves this theory. Faced with this unassailable process (*see infra* SOF pp. 27-46), Plaintiffs knew they had to conjure up a turning point—a "game changer" as they put it—an event that so struck fear in the minds of the Massey directors that it caused them to abandon what had, until then, been a deliberate, stockholder value-maximizing process of exploring strategic alternatives (including the Company's stand-alone prospects) in favor of a mad dash to sell the Company at any price. The so-called "game changer" that Plaintiffs came up with was a November 21, 2010 oral status update provided to the outside directors by Massey's Advisory Committee. But, in reality, this update by the Advisory Committee—which, true to its name, had no power to force the Board to take any action—revealed nothing new. At all time after its August 16, 2010 formation, the Board knew that the Advisory Committee had been chartered, among other things, specifically to make recommendations on how the Company should deal with certain derivative claims against the

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them. Indeed, other than a single quote from Mr. Suboleski regarding methane detection on the longwall, the Report does not even mention by name any of the outside director defendants in this action.

Company's directors and officers. So the notion that the Advisory Committee's November oral report raising issues about Blankenship's leadership without even discussing the directors shocked the directors into realizing they might be sued and prompted them to sell the Company is without merit. (*See* Pl. Br. 24.) What the record shows is that neither the Advisory Committee's November 21, 2010 status update nor anything relating to the pending derivative claims had anything to do with the Board's decision to approve the merger or the pace of the auction, which lasted over two more months. (*See infra* SOF pp. 35-37, 45-47.) Additionally, in ignoring the derivative claims in deciding whether to sell the Company, the Massey directors were following Cravath's advice to "assume that the derivative claims would survive the proposed business combination" and that they "should not consider the pending derivative claims in any decisions regarding any potential business combination."[4] (PX 34 (Proxy) at 78; Gabrys Aff. ¶ 15.)

In an attempt to cover all their bases, Plaintiffs pitch an alternate theory: that the UBB tragedy so thoroughly debilitated Massey that the necessity to sell the Company was a "foregone conclusion." (Pl. Br. 44.) But this apparent attempt to fit the circumstances of this case into the *Countrywide* framework upon which Plaintiffs rely makes no sense. For one thing, it directly contradicts the theory that Plaintiffs espouse in most of their brief: that the Massey directors' rush to relieve

[4] The record shows that derivative claims such as Plaintiffs have brought generally result in little monetary recovery. (Fischel Aff. ¶ 14.)

themselves of the potential derivative liability caused them to sell the Company at a price that did not appropriately value the Company's healthy stand-alone prospects, which Plaintiffs highlight in their brief (relying largely on Don Blankenship's testimony, no less). Apparently blind to this contradiction, a single page of Plaintiffs' brief both refers to the merger as an "unnecessary sale" and, a few lines down, argues that it was "necessitated" by Defendants' fraudulent conduct. (Pl. Br. 42.) Plaintiffs' various theories collapse under their own weight.

Even were Plaintiffs correct that "entire fairness" applies, Plaintiffs have not demonstrated that Defendants will be unable to prove the "entire fairness" of the Proposed Transaction at trial, (*see infra,* Argument Part I.A.2.), and in any event, the appropriate remedy for such a claim is a money judgment for the difference between the "fair price" and the value of the merger consideration. *Reis v. Hazelett Strip-Casting Corp.*, C.A. No. 3552-VCL, 2011 WL 303207, at *15 (Del. Ch. Jan. 21, 2011). Because there is no risk of irreparable harm, the Plaintiffs preliminary injunction motion should be denied on that ground alone.[5]

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[5] With respect to Plaintiffs' original complaints about the deal protection terms of the merger agreement, Plaintiffs have waived these claims by failing to brief them. *See Emerald Partners v. Berlin*, C.A. No. 9700, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief."). These claims were, in any event, meritless. "The provisions that plaintiffs attack have been repeatedly upheld by this Court." *In re 3Com S'holders Litig.*, C.A. No. 5067-CC, 2009 WL 5173804, at *7 (Del. Ch. Dec. 18, 2009) (rejecting plaintiffs' allegations that directors breached their fiduciary duties by agreeing to termination fee, a no-shop provision,

STATEMENT OF FACTS

A. The Parties.

Massey is a publicly traded Delaware corporation with its headquarters and principal place of business in Richmond, Virginia, and its operations in West Virginia, Kentucky and Virginia. Massey produces, processes and sells bituminous coal of various thermal and metallurgical grades.

The Massey Board is comprised of nine members who have decades of experience as directors of major corporations. (*See, e.g.*, PX 55 (Inman) at 7-8;[6] Gabrys Aff. ¶ 3; *infra* n.15 (Holland)) Eight of the nine are outside directors;[7] some of these outside directors have extensive experience in the mining industry. (*See, e.g.*, PX 65 (Phillips) at 188; Crawford Aff. ¶ 2; Suboleski Aff. ¶¶ 5-8.) Baxter Phillips Jr., who was appointed CEO of Massey on December 3, 2010, after Don L. Blankenship resigned from that position, is the only inside director on the Board.

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and a match right). Nonetheless, the Affidavit by Daniel Fischel submitted by Defendants demonstrates that these terms of the merger agreement are reasonable and standard.

[6] In this brief, page numbers in citations to deposition transcripts included as exhibits to Plaintiffs' Opening Brief correspond to the page numbers of the transcript, not to the page numbers of the exhibit.

[7] These outside directors are James B. Crawford, General Robert H. Foglesong, Richard M. Gabrys, Robert B. Holland III, Admiral Bobby R. Inman, Dan R. Moore, Stanley C. Suboleski and Linda J. Welty.

Alpha is a publicly traded Delaware corporation with its headquarters and principal place of business in Virginia. Like Massey, Alpha produces, processes and sells bituminous coal of various thermal and metallurgical grades.

B. The Coal Industry.

The Proposed Transaction between Alpha and Massey is part of a wider trend in the coal industry towards consolidation. On May 12, 2009, Alpha entered into a merger agreement with Foundation Coal Holdings, Inc. ("Foundation") to combine the two companies in a $2 billion stock-for-stock transaction, which created, at that time, the third-largest coal producer in the United States. (PX 34 (Proxy) at 65.) On March 16, 2010, Massey entered into an agreement to purchase Cumberland Resources Corp. ("Cumberland")—then one of the largest privately held coal producers in the United States—and its affiliated companies for $960 million in cash and stock. (*Id.* at 66.) On May 2, 2011, Arch Coal Inc. ("Arch") agreed to acquire International Coal Group Inc. ("International Coal") for $3.4 billion, forming the second-largest metallurgical coal producer in the United States. (*See* Pl. Br. 5.) On December 3, 2010, Walter Energy Inc. agreed to acquire Western Coal Corp. for $3.3 billion. (DX 59 at 1.)

C. Massey's Strategic Planning.

Consistent with its fiduciary duties, Massey's Board has always explored opportunities to maximize stockholder value through strategic transactions. (*See, e.g.*, PX 38 (Blankenship) at 119-20, 128-29.) In late 2006 and early 2007, Alpha

engaged Massey in discussions about a potential strategic transaction. (*See* PX 39 (Crutchfield) at 52-61.) Ultimately, the Board terminated discussions after concluding that a potential transaction with Alpha was not in the best interests of Massey's stockholders at that time. (*See* PX 65 (Phillips) at 154; PX 38 (Blankenship) at 129-30.) Nevertheless, Massey continued to have numerous conversations with various companies about potential transactions right through to the April 5, 2010, explosion at UBB—the most notable of which were with Cumberland, culminating in one of the most important acquisitions in Massey's history just weeks prior to the UBB explosion. (*See, e.g.*, PX 34 (Proxy) at 66; *id.* (March 24, 2010 discussion of potential business combination with International Coal); DX 28 (March 28, 2010 email and discussion materials regarding potential business combination with Arch).)

D. Safety at Massey.

As detailed below, the record demonstrates that, throughout the relevant time period, the Massey Board took a proactive role in monitoring and ensuring that management responded appropriately to worker safety and compliance issues as they arose. Among other things:

- The Board requested and obtained over time increasingly more detailed reporting from management regarding: 1) the Company's safety and violation rates; 2) safety and violation rates broken out by individual subsidiaries; and 3) comparisons of Massey's record with that of its coal industry peers;

- In the years leading up to the UBB explosion, the reports to the Board indicated that while violations and penalties were increasing (spurred largely by the 2006 passage of the MINER Act), the rates of injuries at Massey's mines and average violations per inspection day were showing steady improvement and were either in line with, or better than, industry averages;

- At each of the Board and Safety Committee meetings during the relevant time, the directors engaged in robust discussion with management regarding, among other things: 1) specific measures being undertaken to address any identified safety and compliance issues; and 2) the details of fatalities and other serious accidents at Massey mines and the lessons learned and measures put into place to prevent future occurrences;

- In August 2009, in part as a response to the Board's continued concern over the increased number of MSHA violation and penalty assessments, Massey initiated a comprehensive "Hazard Elimination Program" designed to identify and address problem areas; and

- In 2009, the Board and management dramatically increased the frequency of third-party safety audits of Massey's mines—particularly those that the Company had identified as "target mines" due to higher than normal violation rates, including the UBB, Ruby Energy and Tiller # 1 mines—to assess, report upon and address safety compliance at those mines.

From May 21, 2008, to April 5, 2010—"the Relevant Period" according to Plaintiffs (TAC ¶ 4 n.1)—the Massey Board was regularly updated about safety and regulatory compliance at quarterly meetings of the Board and the Safety and Environmental Committee. (Pl. Br. 15; *see also* Suboleski Aff. ¶ 9; Crawford Aff. ¶ 4.) During that period, the Board met eight times, as did the Safety Committee. (TAC ¶ 141-42.) At each of these Board and Safety Committee meetings, Elizabeth Chamberlin, Massey's Vice President for Safety, "presented

detailed statistics about Massey's worker safety and safety compliance record . . . and briefed the Board about any serious accidents, safety training programs and safety enhancements". (Crawford Aff. ¶¶ 5, 19-32; *see also* Suboleski Aff. ¶ 10; Pl. Br. 5 n.47 (collecting safety presentations to the Safety Committee), 15 n.48 (collecting safety presentations to the Board).) During these presentations, the Board was provided with information about Massey's Non-Fatal Days Lost ("NFDL") incident rate, and Violations Per Inspection Day ("VPID") rate. (*See* Suboleski Aff. ¶ 10; Crawford Aff. ¶¶ 10, 13.) Both NFDL and VPID are industry-recognized metrics used to measure worker safety and regulatory compliance performance, respectively.[8] NFDL rates provide "a more reliable indicator of safety" because they track "the effect of safety practices on the health and well-being of miners". (Crawford Aff. ¶ 10)

The information presented to the Board at regular Board and Safety Committee meetings throughout the "relevant period" indicated "that Massey's overall safety performance (as measured by NFDL) and violations record (as measured by VPID) was steadily improving and consistent with, or better than, industry averages." (Crawford Aff. ¶ 14; Suboleski Aff. ¶ 14.) The Board was

[8] The NFDL incident rate represents the number of non-fatal injuries that result in days away from work, statutory days charged, or days of restricted work activity annually per 100 employees. (Crawford Aff. ¶ 10 n.1.) VPID measures the average number of violations issued by MSHA per inspection day (each day constitutes five on-site inspection hours). (*Id.* ¶ 14 n.3.)

regularly informed that Massey's NFDL rate was at a record best (*see, e.g.*, PX 75 at MEE-HUTT00000018, PX 79 at MEE-HUTT00000078), and that Massey's NFDL rate compared favorably to Massey's peers and industry averages (*see, e.g.*, PX 75 at MEE-HUTT00000019, PX 76 at MEE-HUTT00000037, PX 85 at MEE-HUTT00000417). With respect to VPID, the Safety Committee was informed that companies in "[t]he bituminous coal mining industry ha[d] a [rate of] 0.96 VPID in 2008" (DX 22 at MEEHUTT0326), and had a similar rate in 2009 (PX 85 at MEE-HUTT0419). Massey's VPID rate was consistent with the industry average rate during 2008 and 2009; it was slightly above the industry average in 2008 (1.03) and slightly below the industry average in 2009 (0.92).[9] (*Id.* at MEE-HUTT0435.)

In addition to this regular reporting of NFDL and VPID information, the Board was also informed of corrective and preventative actions being taken by management to address specific safety issues and incidents as they arose. (Suboleski Aff. ¶ 13.) Most notably, on August 1, 2009, Massey implemented a "Hazard Elimination Program," which was designed to "[r]ecognize and remedy potential violations of state and federal mining laws, educate [employees] on

[9] In a September 30, 2010 letter to stakeholders, Massey announced that it had determined that there had been errors in previously reported NFDL rates. (DX 7 at 11.) Massey restated its NFDL rates for 2007, 2008 and 2009 as 2.63, 2.52 and 2.33, respectively. (*Id.*) "[T]he revised NFDL rates for the 2007, 2008 and 2009 calendar years still rank better than the industry averages for those annual periods." (*Id.*)

recent changes to those laws, and enhance compliance [with those laws]." (PX 80 at MEE-HUTT0102; *see also* DX 22 at MEEHUTT0326, 329; DX 21 at MEE-HUTT095; Crawford Aff. ¶ 15.) The Board was also informed that the goal of the Hazard Elimination Program was to affect a "50% reduction of violations by [the end of 2009] as compared to the first half of 2009." (PX 80 at MEE-HUTT0102; *see also* Crawford Aff. ¶ 16.) Related to these efforts, Ms. Chamberlin reported to the Safety Committee on steps being taken to reduce violations at the Company's "[p]oorest performing sites."[10] (DX 62 at MEEDEL00023433.) The Committee was informed that UBB, among other mines, was being specifically targeted for "MSHA Violation Prevention" efforts as part of the Hazard Elimination Program. (PX 85 at MEE-HUTT0420.)

After the implementation of the Hazard Elimination Program in August 2009, the Board was updated on its progress. (*See, e.g.*, DX 24 at MEEHUTT0121.) In the months since its inception, the committee charged with

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[10] Even before the Hazard Elimination Program was implemented, the Board was informed of other violation-reduction and safety-improvement initiatives, which Plaintiffs have completely ignored. For example, at the May 18, 2009 Board Meeting, Massey's then-CEO reported "on the internal actions being taken by the Company to further reduce safety and environmental violations," including "how the Company assessed and reviewed each violation in an effort to further reduce violations." (PX 78 at MEE-HUTT067.) Similarly, at the February 2009 Safety Committee and Board meetings, Ms. Chamberlin described "what the Company was doing to address" injuries at the Company (DX 20 at MEE-HUTT0259) and reported on "what was being done to reduce [MSHA violations]" (DX 19 at MEE-HUTT055).

implementing the Hazard Elimination Program met several times and, among other actions: identified "top 10 violations within [each committee member's] area[] of responsibility *and* [developed] a plan of tangible actions to be taken to address the violations" (DX 25 at LW_DEL_00003076), and addressed "disciplinary actions taken against members responsible for receiving state and federal violations since August 1, 2009" (DX 26 at LW_DEL_00003078). *See also* Suboleski Aff. ¶¶ 15(d),(e). At the February 2010 Safety Committee meeting (the last meeting before the UBB explosion), the Safety Committee was advised that "[t]here was a 15% reduction of violations by year-end as compared with the first half of 2009 and a 20% reduction in penalties, in part due to the comprehensive Hazard Elimination Program implemented by the Company." (Crawford Aff. ¶ 34 & Ex. M at MEE-HUTT0410.)

In a further effort to address violations at Massey's operations, the Board and management enlisted the help of a third-party auditing firm, Pavlovich & Associates ("Pavlovich"), to conduct safety audits of individual mines and make recommendations on how to address issues identified during those audits. (Crawford Aff. ¶ 17; Suboleski Aff. ¶ 16.) Specifically, Pavlovich was asked to focus its attention on "target mines" based on their above-average volume of violations incurred and/or injuries suffered, which included the Tiller No. 1, Ruby Energy and UBB mines. (Crawford Aff. ¶ 35; Suboleski Aff. ¶ 25.) Pavlovich

reported to the Board that "[t]he Tiller #1 and Upper Big Branch Mines have systems or plans in place to effect changes and improvement in compliance levels." (Crawford Aff. ¶ 36 & Ex. M at MEE-HUTT0410.) To the extent Pavlovich found problems, the Board was informed that remedial actions had been or were being taken to fix them. For example, after Pavlovich identified a need for improved rock dust application at certain mines, including in certain areas of UBB, the Board was informed that "remedial action [had been taken] includ[ing] [deployment of] additional pod and sling dusters and reemphasis of existing rock dusting policies and regulatory requirements." (DX 57 (MEE-HUTT0393); DX 58 (MEE-HUTT0367).) Consistent with Pavlovich's findings, only "a few days before the UBB explosion, MSHA had its quarterly close-out with UBB management and determined that there was no major issue and the mine was in 'good condition.'" (Suboleski Aff. ¶ 30.)

E. The UBB Explosion and Ensuing Litigation.

On April 5, 2010, twenty-nine miners were killed in an explosion at the UBB mine. (Pl. Br. 17.) Neither MSHA nor the State of West Virginia has finished its investigation, and the "exact cause of the explosion at the Company's UBB mine is still unknown."[11] (TAC ¶ 84.) Massey has disputed this conclusion.

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[11] On May 19, 2011, the West Virginia Governor's Independent Investigation Panel released its report on UBB, stating that the cause of the UBB tragedy was an explosion fueled by coal dust.

In the weeks following the explosion, beginning April 15, 2010, Massey stockholders filed derivative suits in West Virginia[12] and Delaware[13] state courts alleging, *inter alia*, that certain of Massey's directors breached their fiduciary duties by failing adequately to monitor the safety of Massey's operations.[14] On August 9, 2010, more than five months before the Merger Agreement was executed and well before bidding had commenced, Massey, in its quarterly report with the U.S. Securities and Exchange Commission ("SEC"), publicly disclosed to the market all pending litigation against the Company. (DX 5.) The report summarized the status of all legal proceedings then pending against Massey, including all derivative litigation pending in both West Virginia and Delaware. *Id.*

On August 16, 2010, the Massey Board created an advisory committee ("Advisory Committee"), which was charged with making recommendations to the Board regarding (i) whether the Company should pursue the derivative suits arising from the UBB explosion (the "litigation mandate") (PX 70 (Welty) at 36) and (ii) whether the Company should implement changes in management,

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[12] The West Virginia derivative suits were consolidated on July 1, 2010.

[13] The Delaware derivative suits were consolidated into this action on October 21, 2010.

[14] The current directors against whom the derivative claims are asserted are Messers Crawford, Gabrys, Moore, Phillips, and Suboleski, General Foglesong and Admiral Inman. Derivative claims are also asserted against former directors Blankenship, E. Gordon Gee, and Lady Barbara Thomas Judge.

operations, practices and/or policies (the "non-litigation mandate") (PX 70 (Welty) at 36-37). (DX 6 at MEEDEL00001733.) Contrary to Plaintiffs' claim, the Advisory Committee did not have authority to "prosecute the derivative claims" (Pl. Br. 46). (*See* DX 6 at MEEDEL00001733; PX 55 (Inman) at 169 (Q. You only gave them power to make recommendations? A. Correct.").) The Board appointed two new directors, Robert Holland and Linda Welty, to the Committee. (PX 62 at MEEDEL00023244-45.) Both Mr. Holland and Ms. Welty have extensive corporate experience.[15] Neither Mr. Holland nor Ms. Welty is a defendant in the derivative suits, nor has any tie to the defendants in the derivative suits.

The Advisory Committee retained independent counsel (Weil, Gotshal & Manges LLP) and shortly thereafter began its work. Early on, Admiral Inman offered to introduce Mr. Holland and Ms. Welty to Paul O'Neil, an old friend of the Admiral. (PX 55 (Inman) at 184.) Admiral Inman had approached Mr. O'Neil

[15] Mr. Holland is Executive Co-Chairman of Max Petroleum PLC, where he serves on the compensation committee and as audit committee chairman. Mr. Holland has also served as a director of the Financial Guaranty Insurance Corporation, Pier 1 Imports, Inc., and Affiliated Computer Services, Inc. From 2002 until 2006, Mr. Holland represented the United States on the Board of Executive Directors of the World Bank, where he also served on the audit committee. (*See* DX 1.) Ms. Welty has served in executive roles with Celanese, Hoechst, H. B. Fuller and Flint Ink, where she served as President and Chief Operating Officer from 2003 to 2005. Ms. Welty is also a director of Vertellus, where she serves on both the compensation and audit committees. (*See id.*; PX 70 (Welty) at 14-17.)

about joining the Massey Board to head the Advisory Committee because "he had the best reputation in the industry for focus on safety while he was CEO of Alcoa." (*Id.*) Mr. O'Neil declined because of other time commitments. (*Id.* at 185.) As Admiral Inman testified, from this conversation "came the idea that Massey would be served well over the long-term by having a blue ribbon panel." (*Id.* at 184.) Massey did not move forward with a Blue Ribbon Panel, not because, as Plaintiffs claim, they feared that a Blue Ribbon Panel would be critical of the Board (Pl. Br. 38), but because of timing. When the Advisory Committee raised the idea of a Blue Ribbon Panel to "assist in formulating recommendations of the Advisory Committee" at the November 21 Board meeting, the Committee itself "noted the likely necessity of deferring creation of such a panel if a transaction was likely." DX 13.

F. Massey Twice Rebuffs Alpha's Approaches in the Wake of the UBB Explosion.

1. *The Board Rebuffs Alpha's Initial Overture and Focuses Instead on Guiding the Company Through the Aftermath of the UBB Explosion.*

On April 26, 2010, less than a month after the UBB explosion, Michael Quillen, Chairman of the Board of Directors of Alpha, approached Mr. Blankenship to renew Alpha's previously expressed interest in a potential business combination with Massey. (PX 34 (Proxy) at 66; PX 38 (Blankenship) at 135-36; PX 39 (Crutchfield) at 82.) The timing of Alpha's approach, however, was

inopportune for Massey. Massey's Board and Massey management were fully engaged in dealing with the aftermath of the UBB explosion (*see* PX 65 (Phillips) at 167-68; PX 38 (Blankenship) at 136) and Massey's stock price was depressed as a result of the explosion (Pl. Br. 21). And beyond the explosion, Massey was only just embarking on the challenge of integrating its most recent acquisition, Cumberland, which had closed only a week prior to Alpha's approach. (PX 34 (Proxy) at 66.) With these factors in mind, and after considering Alpha's approach, the Board concluded that it was not in the best interests of Massey's stockholders to pursue discussions with Alpha at that time.[16] (PX 34 (Proxy) at 67.)

2. *Alpha Returns to the Massey Board with a Specific Proposal Offering $37.19 Per Share, But the Board Again Declines To Pursue a Transaction In the Absence of a Compelling Value Proposition for Massey's Stockholders.*

On August 2, 2010, four months after the UBB explosion, Kevin Crutchfield, Alpha's CEO, called Mr. Blankenship to reassert Alpha's interest in a

[16] Plaintiffs allege incorrectly that the "the May 3 . . . Board meeting minutes [do not] reflect any disclosure to the Board or discussion about Alpha's indication of interest." (Pl. Br. 37 n.160.) Plaintiffs cite to a version of the minutes that was produced in response to a Section 220 document demand from Plaintiff Hutt and redacted according to the scope of that demand, which did not encompass Massey's consideration of strategic alternatives. (PX 57 at MEE-HUTT00000177.) The version of the May 3 Board minutes produced to Plaintiffs in response to Plaintiffs' document requests *in this litigation* clearly shows the Board's discussion of Mr. Quillen's April 26, 2010 approach, flatly contradicting Plaintiffs' claim. (DX 31 at MEEDEL00001638.)

potential business combination. (PX 34 (Proxy) at 68; PX 39 (Crutchfield) at 111.) This call was followed up with a letter, on August 11, 2010, to Mr. Blankenship and Admiral Inman in which Alpha spelled out the terms of its proposal: Alpha proposed an all-stock transaction with an implied price of approximately $37.19 per Massey share. (PX 42; Pl. Br. 22.)

The Massey Board discussed Alpha's proposal during its regularly scheduled meeting on August 15, 2010. (PX 62 at MEEDEL00023250.) Contrary to Plaintiffs' contention that "the Board rushed to sell Massey on the quick and cheap so that they could extinguish [the derivative suits] and their potential liability" (TAC ¶ 6), at this meeting, the Board considered, for the first of many times the attractiveness of Massey's stand-alone position as an alternative to a sale of the Company. (PX 62 at MEEDEL00023258; DX 33 at MEEDEL00011473.) The Board also noted other potential strategic alternatives to a sale that had not yet been fully explored, including the possible acquisition of either International Coal or Southern Coal, one of the largest privately-held metallurgical coal producers in the United States. (PX 62 at MEEDEL00023250.) And the Board also discussed a preliminary expression of interest in the Company from ArcelorMittal, S.A. ("Arcelor"), a global steel company headquartered in Luxembourg. (*Id.*) Based on these discussions, the Board reached the unanimous view that the premium offered by Alpha was insufficient to complete a transaction

at that time. (PX 43.) Mindful, however, of "its fiduciary duty to serve the best interest of the stockholders," the Board affirmed its interest in exploring strategic opportunities and instructed management to do so. (PX 62 at MEEDEL00023250; PX 34 (Proxy) at 68.) In that connection, the Board retained Cravath, Swaine & Moore LLP ("Cravath") and UBS as its legal and financial advisors, respectively. (PX 62 at MEEDEL00023252.) On August 23, 2010, Mr. Blankenship communicated the Board's view to Mr. Crutchfield, acknowledged the Board's interest in further discussions, and enclosed with his correspondence a draft confidentiality and standstill agreement. (PX 43.)

In his August 23, 2010 letter, Mr. Blankenship explained that the Board's view on whether a transaction was in the best interests of Massey's stockholders would be influenced by "other factors" than the size of the premium offered. (*Id.*) By letter dated August 25, 2010, Mr. Crutchfield sought clarification from Mr. Blankenship on what these "other factors" were. (PX 44.) On August 27, 2010, Mr. Blankenship responded to Mr. Crutchfield's request by clarifying that "[t]he reference to other factors conveys the principle that any proposed combination of our two companies would be evaluated as a total package, and nothing more." (PX 45; *see also* PX 65 (Phillips) at 185.)

Despite Alpha's eagerness to commence discussions with Massey, Alpha was unwilling to agree to Massey's request for a confidentiality and standstill

agreement because, at the time, Alpha was considering making a hostile public offer for Massey. (DX 39 (Crutchfield) at 101, 131-32.) On August 30, 2010 and again on September 7, 2010, Mr. Crutchfield pushed Mr. Blankenship to move forward without any agreement in place.[17] (PX 34 (Proxy) at 69.) Mr. Blankenship, aware of the Board's "discomfort" in doing so (PX 62 at MEEDEL00023258) resisted. Unable to rush Massey into a discussion about selling the Company, Alpha upped the pressure with a renewed offer.

G. After a Third Approach From Alpha, Massey Redoubles Its Efforts to Explore All Strategic Options.

1. *Alpha Offers $41.07 Per Share.*

On September 13, 2010, in its most aggressive approach yet, Alpha sent a letter to Massey reiterating its interest in a strategic combination, improving its offer (which, at the time, represented an implied purchase price of $41.07 per Massey share), and demanding that Massey respond within a week, and engage in negotiations within two weeks. (PX 46; Pl. Br. 22.) Mindful of the possibility that Alpha might make an unsolicited public offer for Massey (*see, e.g.*, PX 38 (Blankenship) at 151-52; Gabrys Aff. ¶ 13), and concerned about the impact that would have on the Board's ability to maximize stockholder value in a transaction

[17] Far from perceiving the Massey Board as trying "to find a buyer at whatever price was available" (Pl. Br. at 3), Alpha, for its part, had doubts about the Board's willingness to pursue a transaction. (*See* PX 46 at MEEDEL00000092 (conveying Alpha's refusal to sign the confidentiality and standstill agreement "without a clear indication that a transaction is achievable").)

(*see, e.g.* PX 65 (Phillips) at 192-94, Gabrys Aff. ¶ 13), the Board concluded that it had to engage Alpha, even without the protection of a confidentiality and standstill agreement. Thus, Mr. Blankenship, on behalf of the Board, responded to Mr. Crutchfield's letter on September 17, 2010, and proposed to meet with Alpha on September 28, 2010. (PX 47.) Mr. Blankenship reiterated, however, that Alpha's "timing had not been opportune" in light of the UBB explosion, and that the value of Alpha's proposal remained far below what the Board considered to be worth pursuing. (*Id.*)

On September 22, 2010, the Board convened a special meeting to consider Alpha's September 13, 2010, proposal and to discuss its strategic alternatives. In order to be in a position to evaluate adequately the comparative value of any transaction to be considered, the Board emphasized at this meeting the importance of "preserving and building the value of the standalone option during the review process." (DX 34 at MEEDEL00001736.) The Board also reiterated its support for continuing discussions with International Coal about its potential acquisition by Massey. (*Id.*) The Board also discussed whether Alpha's September 13 proposal was "competitive with other alternatives available to the Company." (*Id.*) The Board concluded that neither the terms nor the timing of Alpha's proposal was in the best interests of Massey's stockholders. (*Id.*)

Nevertheless, in an effort to keep Alpha engaged, and in keeping with Massey's earlier agreement, representatives of Massey met with representatives of Alpha on September 28, 2010, to discuss Alpha's proposal. (PX 38 (Blankenship) at 165-66; PX 86.) To the Massey representatives at the meeting, it was clear from "the tone that Alpha was taking . . . that if [Massey] did not move forward . . . Alpha would be coming forth with a hostile bid." (PX 65 (Phillips) at 192-93; *see also* PX 38 (Blankenship) at 170.[18]) At the conclusion of the September 28, 2010 meeting, and in the days that followed, Admiral Inman continued to assure Alpha that the Board was willing to consider a business combination at the right price and at the right time, and updated Alpha on the steps being taken by the Board in that regard. (PX 86 at MEEDEL00000134; PX 34 (Proxy) at 70.)

2. *Massey Forms a Strategic Alternatives Review Committee.*

By early October, pressure from Alpha was continuing to mount, Arch and Arcelor had expressed interest in a possible transaction, and Massey was in conversations with International Coal about a possible acquisition of that company by Massey. (PX 34 (Proxy) at 71-72.) At the time, Admiral Inman was involved

[18] Indeed, this was the tone that Alpha intended to strike in its communications with Massey at this time. (*See* PX 48 (Crutchfield, recording an October 1 conversation he had with Inman, notes: "[t]o make it clear, I said that we would not wait for them to run their process and sit on our hands until the end of November.").)

in some, but not all of the discussions with these parties, and Mr. Blankenship was likewise involved with some, but not all of the discussions. (PX 55 (Inman) at 94.)

While Admiral Inman had no direct knowledge that Mr. Blankenship was opposed to a transaction, Admiral Inman believed Mr. Blankenship "was conveying his view that going alone offered the best prospect for Massey shareholders." (*Id.* at 102.) And, Admiral Inman was aware that Mr. Blankenship was expressing dissatisfaction with not being in charge of the process. (*Id.* at 110.) Thus, as Admiral Inman put it, this "helped . . . me move toward the decision to do [a] strategic alternative review committees [sic]. There would be no ambiguity about how we were going to examine all these processes." (*Id.*) "I believed that . . . the factor we had to keep our focus on throughout all of these discussions, what creates the most shareholder value for the Massey shareholders. And I was not prepared to do a premature closure on any of the options until we examined them." (*Id.*) The Strategic Alternatives Review Committee ("SARC") was thus established to allow the Company "to proceed with a full evaluation" of its options "while at the same time continu[e] the smooth operation of the Company and appropriately manag[e] the other risks faced by the Company." (PX 71 at MEEDEL00001740-41.)

On October 12, 2010, the independent directors resolved unanimously to establish a Strategic Alternatives Review Committee consisting of Admiral Inman, Mr. Gabrys and Mr. Phillips, who, collectively, were charged with overseeing and directing a process for the development, evaluation and negotiation of potential strategic alternatives. (*Id.*) The Committee members were selected because of their extensive knowledge of Massey and its operations, their financial and transactional expertise, and/or their prior experience on strategic alternative review committees at Massey. (*See* Gabrys Aff. ¶ 5; PX 65 (Phillips) at 187.)

The SARC wasted no time in meeting its charge, convening four times between October 14 and October 27, 2010. As its first order of business, the Committee set about retaining its own financial advisor—preferably a boutique firm that had not previously done work for Massey—to assist the Committee in reviewing any proposed transaction and in evaluating Massey's stand-alone position. (DX 36 at MEEDEL00191541; PX 34 (Proxy) at 72; PX 54 (Grace) at 62.) Over the course of the next two weeks, Committee members interviewed several nationally recognized firms for the role,[19] and ultimately selected Perella Weinberg Partners ("Perella") as its preferred advisor, subject to negotiating acceptable terms. (PX 92.) After Mr. Phillips had negotiated down Perella's requested success fee, the Board formally engaged Perella. (DX 40 at

[19] The firms interviewed included Centerview Partners, Lazard Freres & Co. LLC, Perella, and Evercore Partners. (DX 39; PX 65 (Phillips) at 190.)

MEEDEL00005593.) On October 27, 2010, the Committee held an organizational call with Perella. As reflected in notes of that call, they discussed, among other things, that "in Alpha's mind," the process should be "racing full speed ahead," while Massey's objective was to "slow down process w/o losing opport[unity]." (DX 41 at MEEDEL00129653.)

On October 18, 2010, before the SARC had commenced its formal review process, the Wall Street Journal reported that Massey was considering its strategic options. (DX 37.)

H. Massey Canvasses the Market for Potential Bidders, While Continuing to Evaluate Its Stand-Alone Options.

Following the Wall Street Journal article and the press that followed it (*see, e.g.,* DX 38), it was widely known that Massey was open to expressions of interest. (*See* PX 39 (Crutchfield) at 231-32 ("It was obvious there was a process going on because this thing leaked from day one. Everybody on the planet, as long as you were moderately awake, knew there was a process going on.")) Massey publicly announced that it was "engag[ing] in a formal review of strategic alternatives" on November 22, 2010. (DX 48.)

Throughout November, the SARC met frequently—including meeting with its advisors and with potential bidders—to explore thoroughly all strategic options. On November 2, 2010, the SARC and representatives of Perella met with Alpha to discuss Alpha's proposal. (*See* DX 44.) At the meeting, Alpha continued to press

for a specific timeline for negotiations, but Admiral Inman again declined to rush the process in which the Board was engaged. (PX 34 (Proxy) at 74; *see also* DX 44 at MEEDEL00129888 (notes of internal discussion after Alpha meeting reflecting topic "what is the rush").) Moreover, contrary to the assertion in Plaintiffs' Brief that, at the time "the Board had not decided to solicit proposals" and "was simply acting in response to Alpha's offer," the notes of an internal discussion with Perella on November 2 clearly indicate that one of the topics of that discussion was suggestions on "how [to] prosecute other alternatives." (*Id.* at MEEDEL00129889.) Among the alternatives listed were Arch and Arcelor. (*Id.*)

On November 10, 2010, Mr. Phillips met with a representative of Arch to discuss Arch's interest in a transaction with Massey. (PX 34 (Proxy) at 74.) After this meeting, Arch formalized its involvement in the process by submitting a written expression of interest to Massey. (DX 54 at MEEDEL00002599-600.) On November 12 and 18, 2010, the SARC and representatives of Perella met to prepare a presentation to the Board at the upcoming, regularly scheduled November 21, 2010 Board meeting. (DX 9; DX 45.) All of this had taken place before the supposedly "game-changing" Advisory Committee presentation.

On November 21, 2010, the Board met for its annual strategic planning meeting. During the meeting, Mr. Blankenship gave a presentation to the Board that set forth an overview of management's strategic five-year plan. (DX 10 at

MEEDEL00187705-06.) The Board "expressed skepticism that in the operating environment [Massey] w[as] in, that [Mr. Blankenship's plan] could be achieved." (PX 38 (Blankenship) at 210.) That evening, at a special meeting of the Board, Perella gave a presentation on the proposals under consideration by the SARC, which included the stand-alone plan. (DX 46 at MEEDEL00000870-71; DX 47.) Cravath then advised the Board on the various types of processes the Board could follow in assessing the strategic alternatives. (DX 47 at MEEDEL00187710.) The Board concluded that, because it "was not inclined at this point to put the Company up for sale," "it was not appropriate to have a broad auction." (*Id.*) Instead, "[s]ince the marketplace was aware that the Company was conducting a strategic review process"—due to the October 18, 2010 Wall Street Journal article—the Board opted to follow a process in which interested parties could participate if they elected to express an interest by a certain time. (*Id.*) Any offer, the Board concluded, would need to be "evaluated against [the Company's] stand alone plan" (*id.*), contradicting Plaintiffs' claim that after the November 21 meeting, "the Board saw no alternative but to sell the Company" (Pl. Br. 46).

After the meeting, Perella reached out to convey the framework of the formal bidding process to those parties that had already expressed interest in a transaction: Alpha, Arch, Arcelor, and Wusan Steel, a Chinese steel company,

which had contacted Perella in November.[20] (PX 34 (Proxy) at 75.) Perella informed those parties that had not already submitted written proposals to do so by December 10, 2010. (*See id.*) Alpha, which already had a proposal on the table, was invited to submit a further bid by the same date. (*Id.*)

After the full Board meeting had concluded on November 21, 2010, the Advisory Committee delivered an oral interim report to the outside directors of the Board. (*See* DX 4; PX 70 (Welty) at 68.) The Committee gave no indication whether it had even considered the issue of whether any claim existed against the outside directors. (*See* DX 60.) Rather, the Committee advised that "a change in top leadership" was required. (DX 13 at MEEDEL00137805.) Specifically, the Committee made a recommendation that the Board (i) at a minimum, should not re-nominate Mr. Blankenship for re-election to the Board at the Company's next annual meeting, then expected to be held in May 2011, and (ii) should assess whether Mr. Blankenship as Chairman and CEO provided the most viable option for Massey going forward. (DX 4.) The Committee's observation was "nothing new" to the Board; it "simply picked up on a sentiment that had often been expressed in the media and considered within Massey." (Crawford Aff. ¶ 45.) The Committee "did not make a recommendation to the board of directors to

[20] After discussions with Wusan, Perella determined that Wusan was not interested in pursuing a transaction for the entire Company, and thus Wusan was not involved further in the bidding process. (PX 34 (Proxy) at 75.)

remove Mr. Blankenship or request his resignation from his positions at Massey" (DX 4), contrary to Plaintiffs' version of events (Pl. Br. 24).[21]

Plaintiffs say that the Advisory Committee's November recommendations, including the need for a change in top leadership and the creation of a Blue Ribbon Panel, were a "game changer". (Pl. Br. 23.) The Board, Plaintiffs say, suddenly realized that Mr. Blankenship "had to go" and that its time for selling the company was short. (*Id.* at 23-26.) The problem with this theory is that it is without any basis in fact.

Various Board members had discussed retirement with Mr. Blankenship well before the November 21 Board meeting. (*See, e.g.*, PX 65 (Phillips) at 204; PX 38 (Blankenship) at 88; PX 55 (Inman) at 120, 118 (referring to a conversation between Mr. Blankenship General Foglesong).) In fact, Admiral Inman had even approached Paul Vining, who had been President of Patriot, around the time of the November Board meeting about replacing Mr. Blankenship. (PX 55 (Inman) at 137-39.) The fact is that Mr. Blankenship's resignation coincided with, but was not driven by the Advisory Committee's recommendation.

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[21] On December 20, 2010, the Advisory Committee delivered a written interim report to the outside directors. (DX 13.) The report reached no conclusion "as to whether there is a cause of action against any of the directors and officers named in the [derivative] Actions." (*Id.* at MEEDEL00137804.) The Committee informed the Board that "it will take an additional approximately three months of intensive work before the Committee will be in a position to make final recommendations to the Board." (*Id.* at MEEDEL00137804.)

Nor did the Advisory Committee's November recommendations make the Board realize that it had "no alternative but to sell", as Plaintiffs allege. (Pl. Br. 46.) The Board was not suddenly concerned that a Blue Ribbon Panel would target the Board. The possibility that a Blue Ribbon Panel, or indeed the Advisory Committee itself could "target" the Board existed from the day the Advisory Committee was established. (And Admiral Inman himself had suggested the possibility of a Blue Ribbon Panel early on.)

I. Blankenship Resigns But the Stand-Alone Plan Continues to Develop.

On December 3, 2010, after further discussions with Admiral Inman about his possible departure, Mr. Blankenship resigned. (PX 38 (Blankenship) at 88-89 ("Q: Was it your choice to retire? A: Yes, at least I gave them indication that that was my intention prior to having an acceptance of it or any indication from them that that was the plan.").)

Contrary to Plaintiffs' contention that after November 21, 2010, "there was never any serious consideration given to a stand along [sic] strategy" (Pl. Br. 41-42), one of the Board's main concerns after November 21—and particularly after Mr. Blankenship's resignation—was that the stand-alone plan would continue to be developed and considered as a serious alternative to any proposed transaction. In fact, Mr. Blankenship's departure was viewed as improving the viability of the stand-alone option. (*See* PX 55 (Inman) at 143; Crawford Aff. ¶ 43.) With new

management at the helm, the Board called on Baxter Phillips to present his vision of Massey's stand-alone plan at a December 20, 2010 special Board meeting. (*See* PX 65 (Phillips) at 278 ("The board had asked me, subsequent to Blankenship's departure, to revamp—look at the plan and give them my view to go forward, to carry the company forward.").) Mr. Phillips enlisted Seth Schwartz, "an expert in the coal markets," to assist him in developing and presenting the plan. (PX 65 (Phillips) at 285-87.)

J. Competitive Bidding Commences.

On December 10, 2010, Arch submitted its initial bid. Arch proposed 1.535 Arch shares plus $21.60 in cash for each Massey share (DX 54), representing an implied purchase price of $70.89 per Massey share, based on the December 10, 2010 closing price of Arch stock (DX 42 at MEEDEL00000990). On December 11, 2010, Alpha submitted a revised proposal. Alpha proposed 1.05 Alpha shares plus $5.00 in cash for each Massey share, representing an implied purchase price of $60.51 per Massey share, based on the December 10, 2010 closing price of Alpha stock. (DX 11.) No other bid was received at this time.[22] (PX 34 (Proxy) at 77.)

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[22] Despite Massey's best efforts to engage Arcelor in the formal bidding process, Arcelor never submitted a binding proposal. On December 14, 2010, after the December 10 deadline for initial bids had lapsed, the SARC encouraged Perella to continue to give Arcelor the opportunity to make a serious proposal. (DX 43 at MEEDEL00177355.) On December 20, 2010, Arcelor made a non-binding proposal to acquire Massey at a price in the range of $55 to $60 per

Meanwhile, Alpha internally was preparing for the very real possibility that it would launch a hostile bid for Massey. As one internal Alpha document put it, "management and our advisors are gearing up to be in a position to announce a hostile transaction as early as mid-December. Timing of an actual launch will depend on what we hear back from [Massey] after December 10 . . . . We have also begun contacting potential director nominees to [Massey's] board in a proxy contest." (DX 16 at ALPHA00122658.)

The SARC met with Perella on December 14, 2010, to consider the initial bids from Alpha and Arch. The implied purchase price of Arch's bid was higher than the implied purchase price of Alpha's bid, but in Massey's view the realizable synergies from a combination with Alpha were likely to be greater than those from a combination with Arch. (PX 34 (Proxy) at 77.) The Committee reiterated its desire for a "fiduciary out" provision in any merger agreement into which the Board might enter, which provision would allow the Board to consider a superior bid—should one emerge—after entering into a merger agreement. (*Id.*)

On December 15, 2010, Alpha gave the Board an opportunity to wrap up the sale of the Company: Alpha's advisor, Morgan Stanley, inquired as to whether

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Massey share, but did not specify the cash/stock mix of the consideration offered. Proxy at 78. Despite Arcelor's demonstrated reluctance to comply with the formal process established by the Board, Massey, through its counsel, offered Arcelor the opportunity to sign a confidentiality and standstill agreement and engage in the due diligence process, but Arcelor never signed the agreement, and subsequently dropped out of the bidding. (PX 34 (Proxy) at 79.)

Massey would forgo an extended process if Alpha were prepared to sign a definitive merger agreement within five days. (*Id.* at 78.) Massey was unwilling to compromise on the thoroughness of its process, and declined Alpha's request. (*Id.*)

The Board convened a special meeting on December 20, 2010, to consider whether the initial bids were sufficiently compelling to warrant moving forward with the bidding process, and to consider again Massey's stand-alone position. (PX 61; PX 65 (Phillips) at 278.) At the Board's request, Baxter Phillips gave a presentation of his vision of Massey's stand-alone plan. (*Id.* at MEEDEL00177363; *see also* PX 67.) According to that plan, if the market were to attribute Alpha and Arch's valuation multiples per ton of coal produced to Massey—a factor obviously not within Massey's control—Massey could achieve a share price of approximately $71 to $97 per share in 2013. (PX67 at MEEDEL009451; DX 12 at MEEDEL00009423.) At the Board's request, Perella also addressed the value of the stand-alone plan, concluding that, based on a discounted cash flow analysis, "the upper reach of what [Massey] could achieve" under the stand-alone plane was a value of $68 per share. (PX 55 (Inman) at 213.) The Board concluded that the proposals on the table and the stand-alone option warranted further exploration, and directed management to continue discussions with respect to such alternatives. (PX 34 (Proxy) at 78.) Immediately following

this meeting, Perella informed Morgan Stanley that Alpha did not have the highest bid and would need to improve its proposal significantly to remain competitive in the process. (*Id.*)

On January 3, 2011, by which time Alpha had finally entered into a confidentiality and standstill agreement (*see* PX 87), Massey, Alpha and Arch commenced exhaustive due diligence. (PX 34 (Proxy) at 79.)

The Board convened a special meeting on January 14, 2011, for an update on the strategic review process. The prevailing view at Massey continued to be that realizable synergies from a combination with Alpha were likely to exceed those from a combination with Arch. (PX 34 (Proxy) at 80-81; Gabrys Aff. ¶ 9 ("[W]e did not think the synergies [with Arch] could be achieved").) Furthermore, as Perella illustrated at this meeting, the implied purchase price of Alpha's December 11, 2010 bid was now $74.70, based on the closing price of Alpha stock on January 12, 2011, whereas the Arch bid, which had initially exceeded the Alpha bid, was worth $73.99 based on the closing price of Arch stock on January 12, 2011, due to the weaker performance of Arch's stock relative to Alpha's. (DX 51 at MEEDEL00001217-18.) The implied purchase price represented by each of these bids exceeded the present value of management's future estimates of Massey's stock price, discounted for the cost of equity, presented to the Board by Perella. (*Id.* at MEEDEL00001188.) Nevertheless, the Board continued its quest

to maximize stockholder value and directed Perella to seek best and final offers from both bidders by January 24, 2011. (PX 34 (Proxy) at 81.)

K. Massey Engages in "Tough Fought" Negotiations with Alpha.

Throughout January 2011, Massey negotiated vigorously with Alpha. (PX 39 (Crutchfield) at 181 ("[Baxter Phillips is] a tough negotiator. . .. [T]he whole process was actually tough fought and a challenging negotiation."); *id.* at 229 ("[T]here was a lot of give and take on a lot of issues in the heat of battle.").) At the center of this "hard-fought battle" (*id.* at 185), were the terms of the Agreement and Plan of Merger (the "Merger Agreement"). Ultimately, the parties settled on a Merger Agreement that included standard deal-protection mechanisms, including a "no-shop" provision (DX 55 (Merger Agreement) § 4.02), matching rights (*id.* § 4.02(d)) and a termination fee payable if Massey enters into an acquisition agreement for a superior proposal[23] (*id.* § 5.06(b)).

Under the Merger Agreement, Massey's directors, officers and employees are indemnified by Massey (not Alpha) for acts or omissions occurring before the merger to the same extent they were before the merger. (DX 55 §5.05(a).) With

[23] The fee is not payable if Massey's stockholders simply vote against the Merger Agreement. If, however, Alpha's stockholders fail to amend the Alpha certificate of incorporation to increase the number of shares of authorized Alpha common stock and to approve the issuance of shares of Alpha common stock pursuant to the Merger Agreement (effectively preventing the consummation of the Proposed Transaction), Alpha must pay a termination fee to Massey. (DX 55 § 5.06(e).)

respect to new claims, they are indemnified by Massey and Alpha to the same extent they were indemnified by Massey pre-merger. (*Id.* §5.05(b).) In other words, the Merger Agreement provides Defendants with no greater indemnity than they would have received if the Company continued as an independent entity.

L. The Board Agrees to a Merger with Alpha, After Extracting Even More Value For Massey's Stockholders.

1. *The Board Weighs Alpha's Proposal Against Arch's Proposal.*

On January 24, 2011, Alpha submitted a revised proposal. Alpha proposed 0.9707 Alpha shares plus $10.00 in cash for each Massey share, representing an implied purchase price of $65.00 per Massey share, based on the January 24, 2011 closing price of Alpha common stock. (DX 53 at MEEDEL0000983.) On January 26, Arch submitted a revised proposal that it characterized as its best and final offer. (DX 54 at MEEDEL00002591 ("[W]e are substantially complete with our negotiations").) Arch proposed 1.3755 Arch shares plus $10.00 in cash for each Massey share, representing an implied purchase price of $55.50 per Massey share, based on the January 26, 2011 closing price of Arch common stock. (DX 54 at MEEDEL00002591.)

On January 27, 2011, the Board convened a special meeting to consider the proposals. After extensive discussion, and advised of its fiduciary duties, the Board concluded that Alpha's proposal was superior to that of Arch. (DX 35 at MEEDEL00187574.) The Board based this conclusion on the fact that: (i)

Alpha's bid was significantly higher than Arch's bid; (ii) realizable synergies were likely to be greater with Alpha than with Arch and (iii) the Board was less confident in Arch's ability to close the transaction, operate the combined entity effectively, realize synergies and achieve their respective financial projections of cost savings. (*Id;* Gabrys Aff. ¶ 9.)

2. *The Board Weighs Alpha's Proposal Against Massey's Stand-Alone Plan.*

The Board then turned to weighing the two strategic alternatives: pursue a transaction with Alpha, or stand alone. Perella gave a presentation analyzing the Alpha proposal and comparing it to the stand-alone plan. (*Id.*) Perella's presentation indicated that, based on the projections in the stand-alone plan, the present value of Massey's future stock price was significantly lower than the value of the implied purchase price represented by Alpha's bid. (DX 14 at MEEDEL00001330.) The presentation also indicated that the valuation implied by Alpha's bid was at the upper end of management's valuation of Massey standing alone ($56-$70 per share). (*Id.* at MEEDEL00001331.) The Board then discussed the challenges of executing the Company's stand-alone plan. (*See* PX 55 (Inman) at 160-61 ("[O]ver the last ten years of watching, Massey had almost never reached its projected goals."); PX 65 (Phillips) at 250 ("[T]he ultimate value on [sic] the stand-alone plan was tainted by past company performance."); Suboleski Aff. ¶ 37 ("I thought there was just too much risk associated with the

standalone plan."); Gabrys Aff. ¶ 10 ("I did not have confidence that management could operate the Company on a stand-alone basis and generate the financial results that would be required to exceed the present and projected value of Alpha's merger consideration.").) This concern was shared by Perella. (PX 54 (Grace) at 64 ("[T]he company had a lackluster record when it came to meeting their plan or meeting analyst projections.").)

The Board then considered the factors weighing in favor of Alpha's offer, including "synergies, the strategic nature of the transaction, the value to be received by holders of Massey common stock," and "the opportunities for Massey stockholders to participate in the growth and opportunities of the combined company, the advantages that the combined entity would have over the Company as a stand-alone company," "the significant degree of closing certainty" provided by the terms of the Merger Agreement, and "the fact that Alpha will owe [Massey] a termination fee under specified circumstances." (DX 35 at MEEDEL00187575.)

3. *Massey Pushes Alpha to Trump its Already-Leading Bid.*

Before accepting Alpha's offer, and despite having a compelling bid from Alpha in hand, the Board took one last opportunity to improve the terms of Alpha's proposal. In a brief recess from the meeting, Admiral Inman called Mr. Crutchfield on behalf of the Board and indicated that if Alpha raised its proposal to 1.05 shares of Alpha common stock plus $10.00 in cash per Massey share, there was "a high degree of assurance that the board will go your way." (PX 39

(Crutchfield) at 214-15.) After internal consultation, Alpha responded by trumping its own bid with a new proposal of 1.025 Alpha shares plus $10.00 in cash per Massey share. (*Id.*) This final bid represented an implied purchase price of $69.33 per Massey share, which was almost double the purchase price represented by Alpha's initial August 11, 2010 bid. This final offer reflected a 98% premium over the unaffected opening price of Massey common stock on October 18, 2010, the day the Wall Street Journal reported on the strategic review process and set off rumors about a possible sale, and a 27% premium over the intraday trading high of Massey stock on April 5, 2010, before the market knew of the UBB explosion.[24]

Satisfied that the Alpha offer "was better than our most optimistic calculation of what we could accomplish" through the stand-alone plan (PX 55 (Inman) at 213-14), and also satisfied that there had been "plenty of opportunity for other bidders to come forward" (Gabrys Aff. ¶ 14), the Board unanimously voted to recommend to Massey's stockholders that they adopt the Merger Agreement. No director considered his potential liability arising from the derivative suits in connection with this decision. (*See* PX 55 (Inman) at 36-37; PX 65 (Phillips) at 298; Crawford Aff. ¶ 44; Gabrys Aff. ¶ 15; Suboleski Aff. ¶ 38.) As disclosed in the Proxy, the Board was advised by counsel that "it was

[24] The UBB explosion occurred near the end of the trading day on April 5, 2010.

unclear whether a business combination would affect any of Massey's pending derivative claims and that the [B]oard should assume that the derivative claims would survive the proposed business combination" and that the Board "should not consider the pending derivative claims in any decision regarding any potential business combination." (PX 34 (Proxy) at 78.)

Since the Board voted to recommend approval of the Merger Agreement, which was publicly announced on January 29, 2011, Massey has received no indication that a topping bidder will emerge. Since its announcement, the transaction has been recognized as an outstanding deal for Massey's stockholders. (*See, e.g.*, DX 2; DX 3.)

M. Neither Alpha Nor Massey Has Reached a Conclusion As To Whether To Pursue the Derivative Claims Against Massey's Directors and Officers.

The Advisory Committee has not reached a conclusion as to whether they will recommend to the Board that the derivative claims should be pursued by the Company. Nor has Alpha reached a conclusion as to whether it will pursue the derivative claims against any defendant should it control those claims after the closing of the Proposed Transaction. Kevin Crutchfield, Alpha's CEO, has testified that should Alpha take control of the derivative claims at the closing of the merger, Alpha would "make an assessment of what the allegations are and what to do with them post-close." (PX 39 (Crutchfield) at 236-37; *see also* PX 34 (Proxy) at 50.)

Massey has fully disclosed to its stockholders how the derivative claims were treated in the context of the transaction, and what affect the transaction may have on those claims. The Proxy Statement discloses: the existence of the derivative suits and the nature of the claims asserted therein (*see* PX 34 (Proxy) at 125-27); the directors' interests in those claims (*id.* at 16); the fact that Plaintiffs may lose standing to pursue the pending derivative claims (*id.* at 50); that if those claims are pursued post-merger, any recovery would be to Alpha's benefit because Massey stockholders will own only 46% of the combined entity (*id.*); and that if the derivative claims are not pursued, the value of those claims—which Plaintiffs claim is substantial—will be lost (with resulting benefits to the Individual Defendants). (*Id.*)

ARGUMENT

To obtain a preliminary injunction, Plaintiffs must demonstrate reasonable probability of success on the merits; that, absent the injunction, some irreparable harm will occur; and that the harm they will suffer in the absence of an injunction outweighs the harm to defendants if relief is granted. *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987). "This test is stringent and the relief is extraordinary." *State of Wis. Inv. Bd. v. Bartlett*, C.A. No. 17727, 2000 WL 238026, at *3 (Del. Ch. Feb. 24, 2000). Because there is no competing offer (and no likelihood of a topping bidder emerging), and because the Proposed Transaction will provide a substantial premium to Massey's stockholders,

Plaintiffs "must make a particularly strong showing on the merits to obtain a preliminary injunction because an injunction in such circumstances risks significant injury to shareholders." *Next Level Commc'ns Inc. v. Motorola, Inc.*, 834 A.2d 828, 845 (Del. Ch. 2003). Plaintiffs have not met their burden.

I. PLAINTIFFS DO NOT HAVE A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS.

A. The Board's Actions Are Reviewed Under The Business Judgment Rule.

"Under Delaware law a breach of fiduciary duty analysis in the context of a merger begins with the rebuttable presumption that a company's board of directors has acted with care, loyalty, and in 'good faith.'" *In re IXC Commc'ns, Inc. v. Cincinnati Bell, Inc.*, C.A. Nos. 17324, 17334, 1999 WL 1009174, at *4 (Del. Ch. Oct. 27, 1999). Under the business judgment rule standard of review, "the court merely looks to see whether the business decision made was rational in the sense of being one logical approach to advancing the corporation's objectives." *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 598 (Del. Ch. 2010). Only if the rule is rebutted does the burden shift to the defendants to prove to the "entire fairness" of the transaction. *Globis Partners, L.P. v. Plumtree Software, Inc.*, C.A. No. 1577-VCP, 2007 WL 4292024, at *5 (Del. Ch. Nov. 30, 2007).[25]

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[25] The Proposed Transaction, an 85% stock, 15% cash-for-stock merger of two unaffiliated, widely held corporations, with post-merger control of the combined entity remaining in a "large, fluid, changeable and changing market," *Arnold v. Soc'y for Sav. Bancorp., Inc.*, 650 A.2d 1270, 1290 (Del. 1994) (quoting

The essence of Plaintiffs' initial claim is that the Board breached its fiduciary duties by failing either to seek value for the derivative claims or by "preserving" the value of the claims by transferring them to a "litigation trust" pre-merger. These contentions have been considered and rejected by Delaware courts. Vice Chancellor Noble, in assessing the strength of such "failure-to-value" claims, found that these claims faced "poor prospects [for] success" and were of "minimal" "probable validity" because "[s]uccessful assertion of [them] would require [the plaintiffs] to overcome [the protections of the business judgment rule]." *Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *9-10. The Supreme Court affirmed the Vice Chancellor's decision, noting that "Delaware corporate fiduciary law does not require directors to value or preserve piecemeal assets in a merger setting." *Countrywide*, 996 A.2d at 322. These decisions reflect practice. "[T]arget boards and their financial advisors typically do not explicitly consider derivative and direct litigation claims when evaluating and negotiating acquisition agreements." (Fischel Aff. ¶ 15.) In fact, an analysis of transaction-related documents from 31 transactions involving "target companies that were plaintiffs in derivative or direct litigation at the time they entered into the acquisition" revealed "only one transaction in which parties purported to have

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Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 47 (Del. 1994)), does not implicate heightened scrutiny under *Revlon*. *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *5 (Del. Ch. Sept. 30, 2009).

explicitly taken into account the potential value of such litigation in evaluating and negotiating the merger consideration." (*Id.*)

As in *Countrywide*, "[t]o avoid the effects of Delaware law, the [Plaintiffs] reshape their fundamental complaints about derivative standing into [a number of] novel theories of direct liability." *Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *7. Plaintiffs contend that because Defendants had "a direct financial interest in a merger because they kn[e]w it w[ould] effectively end the prosecution of valuable derivative claims against them," the "entire fairness" standard should apply. (Pl. Br. 4.) Plaintiffs' argument is unsupported by law or fact.

1. *"Entire Fairness" Does Not Apply.*

Application of the "entire fairness" standard is not warranted by the factual record before the Court. The Board was advised by its legal counsel, Cravath, that "it should not consider the pending derivative claims in any decision regarding any potential business combination." (PX 34 (Proxy) at 78.) The record demonstrates the Board acted in conformity with that advice. *See* 8 *Del. C.* § 141(e); *Brehm v. Eisner*, 746 A.2d 244, 261-62 (Del. 2000). The record establishes that the Board was subjectively well motivated and acted appropriately throughout Massey's consideration of its strategic alternatives, engaging in "tough fought" negotiations. (*See supra* SOF pp. 42-43.) There is nothing in the record to suggest—not one fact—that the Board acted out of self-interest in negotiating the Merger Agreement and voting to recommend to Massey's stockholders that they adopt it.

In re Lear Corp. S'holder Litig., 967 A.2d 640, 654-55 (Del. Ch. 2008) ("Courts should . . . be extremely chary about labeling what they perceive as deficiencies in the deliberations of an independent board majority over a discrete transaction as not merely negligence or even gross negligence, but as involving bad faith.").

Plaintiffs' prime example of conduct supposedly motivated by bad faith is unavailing. Plaintiffs assert that the "Board . . . attempt[ed] to secure the broadest extent of indemnification possible to protect themselves against the derivative claims." (Pl. Br. 27.) This is false. In the first draft Merger Agreement sent by Massey's lawyers to Alpha's lawyers, the provisions regarding indemnification contained very common language requiring Alpha and Massey to indemnify the directors "to the fullest extent permitted by Law." (DX 50 at MEEDEL02679.) Because Delaware law arguably does not limit third-party indemnification of directors and officers, as opposed to corporate indemnity of its own directors and officers, the effect of this provision would potentially have been to render all conduct indemnifiable. This provision was corrected in the draft Merger Agreement sent back by Alpha's lawyers (DX 52 at MEEDEL02817), and the issue never again was raised in the negotiations. More importantly, this indemnity would only have been "from and after the Effective Time." (DX 55 (Merger Agreement) § 5.05(b).) Indemnification for the derivative claims is covered by

Section 5.05(a), which provides that Defendants will continue to be indemnified by Massey post-merger to the same extent they were pre-merger.

Defendants will not receive a material benefit from the Proposed Transaction that is not shared by Massey's stockholders. *Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002). Contrary to Plaintiffs' assertions, the Proposed Transaction will not "effectively end the prosecution" of Plaintiffs' derivative claim. Upon completion of the merger, Massey will become a wholly owned subsidiary of Alpha, which "may enforce [the derivative claims] by the direct exercise of its 100 percent control." *Lambrecht v. O'Neal*, 3 A.3d 227, 288 (Del. 2010). The record demonstrates that Alpha has not reached a conclusion as to whether it will pursue the derivative claims. (*See supra* SOF pp. 47-48.)

Plaintiffs state that it is "just dumb" to think that Alpha would prosecute the derivative claims because the Merger Agreement obligates it (by which Plaintiffs actually mean Massey, as Alpha's wholly owned subsidiary) to indemnify the Defendants. (Pl. Br. 48.) Apparently lost on Plaintiffs is that they seek to assert derivative claims for "bad faith" conduct that "gives rise to liability for a breach of the duty of loyalty." (Pl. Br. 30.) Such claims are not indemnifiable. 8 *Del. C.* § 145. Equally unavailing is the contention that Alpha "simply will not" assert the claims because "a number of the Massey Defendants will continue to work for Alpha following the Merger." (Pl. Br. 48.) It is not uncommon for corporations,

acting in the best interests of their stockholders, to take actions adverse to their employees, and there is no reason to doubt the ability of the Alpha Board of Directors (which no Massey director will be joining) to take that decision.[26]

In any event, if Alpha refuses to assert the derivative claims, Plaintiffs can, as they recognize, "initiate a new double-derivative suit against the Alpha board, demanding that they pursue claims against the former Massey directors and officers (including those still with Alpha post-merger)." (Pl. Br. 48.) Plaintiffs do not deny the availability of such a double-derivative action. (*Id.*) They protest that the possibility of a double derivative action "does not mean it is the only available course of action" (*id.*), which, true or not, does not change the fact that the Director Defendants are not "escap[ing] liability for the derivative claims asserted against them" (*id.* 29) through the Proposed Transaction. The Director Defendants will remain at risk of Alpha asserting the claim or, failing that, of Plaintiffs (or other stockholders) initiating a double derivative claim. Thus, the Proposed Transaction will not "effectively end the prosecution" (*id.* at 4) of the derivative claims.

[26] Plaintiffs also assert that the doctrine articulated in *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co.*, 417 U.S. 703 (1974), would bar recovery by Alpha "because Alpha benefited from the Board's breaches of fiduciary duties in obtaining Massey at a depressed sale price." (Pl. Br. 48-49.) The Delaware Supreme Court rejected this argument in *Lewis v. Anderson*, 477 A.2d 1040, 1050-51 (Del. 1984).

Furthermore, even if the Proposed Transaction would "effectively end the prosecution" of the derivative claims, this "benefit" must be material to the director to trigger "entire fairness" review, *Orman*, 794 A.2d at 23. For this benefit to be "material," the Directors must face a "substantial likelihood" of liability on Plaintiffs' claims. *Globis Partners*, 2007 WL 4292024, at *6.[27] They do not. Plaintiffs' derivative claims are *Caremark* claims.[28] *See In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996). To establish personal liability for a *Caremark* claim, Plaintiffs must demonstrate that "(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006). Plaintiffs rarely meet this standard. "[O]versight [liability] 'is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a

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[27] *Globis Partners*, which involved a cash-out merger (and pre-dated *Lambrecht*), did not address the effect of the ability of a stockholder-plaintiff to continue to assert claims on behalf of a corporation whose stock the stockholder no longer owned on the determination of the appropriate standard of review.

[28] Plaintiffs also assert a derivative claim for waste allegedly arising out of the approval of Mr. Blankenship's retirement agreement. (TAC ¶ 199.) Plaintiffs do not mention this claim in their Opening Brief. By limiting their arguments to only their *Caremark*-based derivative claims, plaintiffs have waived any waste-related arguments on this preliminary injunction motion.

judgment.'" *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 125 (Del. Ch. 2009) (quoting *Caremark*, 698 A.2d 959, 967 (Del. Ch. 1996)).

Although the distinction is drawn poorly in Plaintiffs' Third Amended Complaint and Opening Brief, Plaintiffs' *Caremark* claim consists of two distinct claims. Plaintiffs allege that the Director Defendants had knowledge of numerous "red flags" allegedly indicating "that the Company was habitually failing to comply with mine health and safety regulations." (TAC ¶ 171(i).) Plaintiffs also allege that the Director Defendants had knowledge that "Massey's record of flagrant violations of mine health and safety laws was particularly egregious at the UBB mine." (Pl. Br. 11-12.) Plaintiffs allege that the Director Defendants took no meaningful action to correct either alleged problem. (*Id.* at 12; TAC ¶ 171(i).) The alleged consequence with respect to the former was that Massey incurred millions of dollars in fines. The alleged consequence with respect to the latter was the April 5 explosion at UBB. Defendants do not face a "substantial likelihood" of liability with respect to either claim.

(a) No Director Defendant Faces A Substantial Likelihood Of Liability On Plaintiffs' Claim That Defendants Consciously Failed To Correct Massey's Alleged Habitual Failure To Comply With Mine Health And Safety Regulations.

No Director Defendant faces a substantial likelihood of liability on Plaintiffs' claim that Defendants consciously failed to correct Massey's "habitual[] fail[ure] to comply with mine health and safety regulations" for three reasons.

First, claims based on conduct occurring before May 20, 2008 are discharged by release and barred by *res judicata*. As Plaintiffs recognize in their Opening Brief (Pl. Br. 15-16), in 2008 Massey settled derivative claims brought in West Virginia state court alleging that certain of Massey's current and former directors and officers had breached their fiduciary duties by, among other things, failing to monitor and oversee Massey's employees, resulting in fines for violations of safety laws, rules and regulations (the "2008 Settlement"). The 2008 Settlement provided for a broad release of all claims "that have been or could have been asserted by Plaintiff derivatively on behalf of Massey or by Massey . . . based upon the facts, transactions, events, occurrences . . . or failures to act that were or could have been alleged in the Litigation." (DX 17 (Manville Settlement) ¶¶ 1.9, 1.13.) The 2008 Settlement releases claims against all derivative Defendants. (*Id.* ¶¶ 1.1, 1.4, 1.8 and 1.10.) This Court is required to give the 2008 Settlement the same preclusive effect the judgment would have in West Virginia. 28 U.S.C. § 1738; *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 369, 373 (1996). Under West Virginia law, a court-approved settlement is a final adjudication on the merits that has preclusive effect. *State ex rel. Queen v. Sawyers*, 133 S.E.2d 257, 261 (W. Va. 1963). Despite the fact that liability cannot be predicated on conduct occurring before May 20, 2008, Plaintiffs improperly rely on such conduct to establish a "substantial likelihood" of liability. (*See, e.g.*, Pl. Br. 7

("Consider a 2005 memorandum Blankenship wrote to Massey mine superintendents.")[29]; 9 ("In January 2006, Massey's lax safety compliance led to tragedy at Massey's Aracoma Coal Co. mine"); 32 ("For more than *five years*, Massey has incurred record numbers of citations for serious safety hazards").)

Second, the employee conduct and associated fines that serve as the predicate for Plaintiffs' *Caremark* claim are qualitatively different from those that traditionally give rise to *Caremark* liability. The fines complained about here are routinely incurred by all coal-mining industry participants, so much so that the *average* company in the industry experiences nearly one violation per inspection day. (*See supra* SOF at p. 17.) Allowing this type of employee conduct to serve as the predicate for the imposition of *Caremark* liability would vastly expand the scope of such liability, making directors of any company in this industry subject to personal liability for fines routinely assessed by industry regulators. The Court should decline Plaintiffs' invitation to expand *Caremark* liability in this way.

Additionally, the record shows that Massey's violation history was not exceptional for the coal-mining industry. Plaintiffs make much of the absolute

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[29] Although liability cannot be based on the 2005 memorandum, it is worth mentioning that Plaintiffs' characterization of Mr. Blankenship's 2005 memorandum is inaccurate. In actuality, the memorandum addressed unnecessary construction jobs that were being undertaken (*i.e.*, ones that did not contribute to the company's current mining activities, or to safety). Moreover, Plaintiffs fail to mention that, due to the realization that the memo might be misconstrued, Mr. Blankenship a week later sent a follow-up memorandum re-emphasizing that safety was the company's first priority. (DX 8 at ARACOMA 008442.)

number of safety violations incurred by Massey. (*See, e.g.*, Pl. Br. 16.) But Massey is an extremely large mining operator. The relevant consideration is not the absolute number of violations, but rather the violations issued per inspection day, as this measure takes into account the enforcement climate in which the industry operates and allows meaningful comparisons to be made across companies in the industry. The record shows that Massey's general safety record is consistent with or better than the coal mining industry. (*See supra* SOF at pp. 16-17.)

In an effort to establish that Massey had an extremely poor safety record and that the Board was aware of this, Plaintiffs misrepresent the content of documents produced to them in this litigation. For example, Plaintiffs contend that "[i]n February of 2009, the Board learned that flagrant violations and penalties were skyrocketing (five-fold and three-fold, respectively), overall violations were up almost 30%, and the Company received a Pattern of Violation designation." (Pl. Br. 32.) This is false. In fact, the Board was informed that these things were occurring *industry-wide*, not with respect to Massey in particular. (Crawford Aff. Ex. F at MEE-HUTT00000059.) Similar misrepresentations and omissions occur repeatedly in Plaintiffs' Third Amended Complaint (DX 56), even after Defendants pointed out these issues in their motions to dismiss Plaintiffs' Consolidated Complaint. That Plaintiffs are forced

to rely on such tactics to support their claims is itself strong evidence that Defendants do not face a "substantial likelihood" of liability on them.

Third, to establish liability, Plaintiffs must prove that Defendants "'took no action to respond to'" the "red flags" with which they were presented, s*ee Guttman v. Huang*, 823 A.2d 492, 507 n.36 (Del. Ch. 2003) (quoting *Ash v. McCall*, C.A. No. 17132, 2000 WL 1370341, at *15 (Del. Ch. Sept. 15, 2000)), and Plaintiffs cannot make that showing. The record makes clear that to the extent issues were reported to the Board, the Board was advised that remedial action had been or was being taken.[30] (*See supra* SOF pp. 17-20; Suboleski Aff. ¶¶ 10, 13-15, 30; Crawford Aff. ¶¶ 5, 9, 15-19, 22-37, 40.) This precludes liability under *Caremark*. *In re Verifone Holdings, Inc. S'holder Derivative Litig.*, Nos. C 07-6347 MHP, C 07-6140 MHP, 2010 WL 3385055, at *7 (N.D. Cal. Aug. 26, 2010) ("[The company's] response [to alleged 'red flags'] cannot be ignored merely because it was from management, and not from the Board or Audit Committee. The Board need not separately respond if the company has already implemented corrective measures.").[31]

[30] Plaintiffs heavily rely on the testimony of Massey's new CEO, Baxter Phillips, Jr., who testified that he did not recall what specific remedial measure was taken with respect to specific problems, which Plaintiffs present as evidence that no remedial measures were taken. The record shows, however, that the Board was informed of extensive remedial measures.

[31] Plaintiffs suggest that various other "facts" are "[f]urther evidence of the insidious effects of the 'just run coal' environment" at Massey. (Pl. Br. 8.) None

(b) No Director Defendant Faces A Substantial Likelihood Of Liability On Plaintiffs' Claim That Defendants Consciously Failed To Prevent the UBB Explosion.

Plaintiffs' claims with respect to the UBB explosion fare even worse than their claims with respect to safety issues generally. Although the Governor's Independent Investigation Panel's report (which is but the first of a number of reports that will analyze the causes of the explosion) states that the cause of the UBB tragedy was an explosion fueled by coal dust, which had been allowed to accumulate by inadequate rock-dusting, at the time the Board voted on the Proposed Transaction, this report had not been released. It cannot, therefore, serve as a basis to establish that the Board faced a "substantial likelihood" of liability on the derivative claims at the time.

Even leaving the causation issue aside, Plaintiffs cannot establish that Defendants face a "substantial likelihood" of liability on this record. Despite Plaintiffs' unsupported assertions to the contrary, the record reflects that to the

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of these allegations supports liability for Defendants on Plaintiffs' derivative claims. Plaintiffs point to the alleged "practice of above ground workers alerting those down in the mines . . . in order for them to quickly turn on or deploy safety equipment that had been idle so as not to interfere with production." (*Id.*) Nothing in the record supports that this was Massey's "practice." (Suboleski Aff. ¶28.) Plaintiffs also suggest that Massey excessively appeals fines. (Pl. Br. 10.) But whether a citation is appealed has no bearing on whether remedial action with respect to that citation is taken. Under the relevant federal law, appealing a citation does not relieve a company from its obligation to abate the condition that resulted in the citation while the appeal is pending. (*See* 30 U.S.C. §§ 814(a), 814(h) (1977); Suboleski Aff. ¶ 26.)

extent the Board was informed of problems at UBB, the Board was informed that remedial measures had been or were being taken. (*See supra* SOF pp. 17-20; Suboleski Aff. ¶¶ 10, 13-15, 30; Crawford Aff. ¶¶ 5, 9, 15-19, 22-37, 40.) Indeed, even assuming for argument only that inadequate rock-dusting were related to the explosion, the Board had been specifically informed that efforts were being made at UBB to ensure that workers were complying with rules and regulations relating to rock dusting. More broadly, the Board was informed that UBB was being targeted for active violation reduction efforts. (*Id.*) Accordingly, Plaintiffs will be unable to prove that Defendants failed to ensure that remedial action was taken in response to the supposed "red flags." *In re Verifone*, 2010 WL 3385055, at *7.

Thus, the benefit from the "effective end" of the derivative claims, if any, is insufficient to give rise to a disabling conflict of interest. Accordingly, "entire fairness" does not apply.

2. *Even If "Entire Fairness" Applies, Plaintiffs Have Not Established A Reasonable Likelihood That Defendants Will Be Unable To Meet Their Burden Of Proving Fairness At Trial.*

"Entire fairness" review encompasses "two basic aspects: fair dealing and fair price." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1162 (Del. 1995) (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983)). Fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the

directors and the stockholders were obtained." *Id.* Fair price "relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock." *Id.* Although at trial Defendants would bear the burden of proving "entire fairness," because this a preliminary injunction motion, plaintiffs "must carry the burden of showing such a lack of fairness in the [Proposed Transaction] as to establish a reasonable likelihood that the defendants will be unable to meet their burden of proving fairness at trial." *T. Rowe Price Recovery Fund, L.P. v. Rubin*, 770 A.2d 536, 553 (Del. Ch. 2000). Plaintiffs have not met their burden.

(a) Fair Price.

Plaintiffs have failed to establish a reasonable likelihood that Defendants will be unable to meet their burden of proving fair price at trial. Plaintiffs contend that Defendants will not be able to prove fair price primarily because (1) the derivative claims were given "away for no value" and (2) the Board improperly rejected the "standalone plan that could provide far greater value than the merger consideration." (Pl. Br. 40.) Plaintiffs' contentions are without merit.

As a preliminary matter, Plaintiffs' assertions that the derivative claims are worth between $900 million to $1.4 billion dollars are not credible. Plaintiffs' purported expert arrived at this by assuming that, despite the many obstacles Plaintiffs confront, there is a 100% certainty that Defendants will be found liable

for the alleged damages and that Defendants have assets sufficient to satisfy a ten figure judgment.[32] (PX 94 at ¶8.) Even if there were any basis in the record to believe that these underlying assumptions are true, which there is not, Mr. Clarke's report should not be relied upon because he admits that he has not had "sufficient time to conduct a thorough analysis of the information which has been provided to date" and that his report reflects only his "preliminary" opinion and is based on inadequate information. (PX 94 at ¶10.) If this were not enough, Mr. Clarke valuation contains serious errors. Mr. Clarke arbitrarily departs from his own proposed valuation formula, adding hundreds of millions in damages. (*See* Fischel Aff. ¶ 33 n.35.) He also claims that the cost of increased regulatory scrutiny of the Company attributable to the UBB explosion is more than $450 million, even though this figure is based on nothing more than his unsupported assumption that "increased regulatory scrutiny" is responsible for one-quarter of the increase in Massey's mining costs and his guess that any cost associated with increasing regulatory scrutiny is due entirely to the UBB explosion. The little data Mr. Clarke has gleaned from the record relates to the regulation of surface mining

[32] Plaintiffs have not offered any evidence regarding the net worth of the defendants. The relevant insurance policies provide only $95 million in coverage, and the carriers have reserved their rights with respect to certain of the claims. (Affidavit of Koorosh Talieh ("Talieh Aff.").)

even though there is no surface mining at UBB and compliance with a safety law that was enacted prior to the UBB explosion. (PX 94 at ¶ 35.)

Plaintiffs appear to contend that the derivative claims were "given away" because no specific consideration was assigned to them. But in transactions such as the Proposed Transaction, consideration is never assigned on an asset-by-asset basis. (*See, e.g.*, DX 15 (Healy) at 15) The issue, instead, is whether the total consideration offered by Alpha is a "fair price" for Massey as a whole. There is a broad, active and fluid market for Massey's stock. Plaintiffs' derivative claims were public for months prior to the signing of the Merger Agreement. (*See supra* SOF p. 21) Thus, to the extent these claims had value, their value to the Company had been weighed by the market and was reflected in Massey's stock price.[33] (*See* Fischel Aff. ¶ 12.) Thus, this price should presumptively be considered a "fair" price for the purposes of "entire fairness" analysis. *Kahn v. Tremont Corp.*, C.A. No. 12339, 1996 WL 145452, at *9 (Del. Ch. March 21, 1996), *rev'd on other grounds*, 694 A.2d 422 (Del. 1997). The merger consideration represents a premium to that price ranging from substantial to tremendous, depending on the

[33] Analysis of Massey's stock indicates that the market had a bleak assessment of the derivative claims. A study of Massey stock returns following derivative litigation-related events shows that a "significant stock price increase occurred on October 19, 2010 [and that increase] . . . is likely attributable to the report by *The Wall Street Journal* that Massey was reviewing strategic alternatives" and that the cumulative residual return across all event dates is negative and not statistically significant. (Fischel Aff. ¶ 16.)

calculation method used, including as compared to Massey's price before the UBB explosion (*See supra* SOF 46; Fischel Aff. ¶ 9 & Ex. C), which strongly indicates that it is fair. Indeed, when the premium is calculated "on a 90-day basis (i.e., relative to a pre-run-up stock price), the premium offered in the Massey transaction exceeds the premium in approximately 96% of" recent proposed and completed acquisitions of large U.S. companies. (Fischel Aff. ¶ 10 & Ex. D.)

Moreover, the merger consideration is the result of a public auction. That the "transaction price was forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair." *Van de Walle v. Unimation, Inc.*, C.A. No. 7046, 1991 WL 29303, at *17 (Del. Ch. March 7, 1991); *Union Illinois 1995 Inv. Ltd. Partnership v. Union Fin. Group*, *Ltd.*, 847 A.2d 340, 357 (Del. Ch. 2004) ("Therefore, I conclude that the price for UFG that resulted from the auction preceding execution of the Merger Agreement is the most reliable evidence of fair value."). That no other bidder has emerged is further evidence that the price is fair. *Cinerama*, 663 A.2d at 1177. In addition, the SARC's financial advisor, Perella, conducted extensive analyses, based on various recognized valuation bases, and concluded that the price was fair, which is also considered strong evidence of fair price. *Id.* Plaintiffs do not challenge

Perella's independence or competence, and their expert does not purport to opine on the fairness of the consideration.

Although Plaintiffs claim that a sale was necessary because of "Defendants' inability to find a stand-alone strategy for Massey that would bring Massey into compliance with safety laws and make it a viable mine operator" (Pl. Br. 3), Plaintiffs contend that the stand-alone plan offered better value for Massey's stockholders (*id.* 5; 40-41). Plaintiffs' primary authority for their position is Massey's former Chairman and CEO Don Blankenship, who does double-duty for Plaintiffs as both their chief villain and their valuation expert. Based on Defendant Blankenship's opinion, Plaintiffs state that the fair value for Massey in December 2010 was "up to $100 per share." (*Id.* 40.) (During December 2010, Massey was trading between $49.60 and $53.67.) Plaintiffs are wrong. Although Blankenship is entitled to his opinion, tellingly there was no bid even remotely approaching what Plaintiffs claim to have been the fair price, *Van de Walle*, 1991 WL 29303, at *18. The Board thoroughly considered the benefits and risks of standing alone (*see supra* SOF pp. 28-46) and made the clearly correct decision to recommend to Massey's stockholders that they accept Alpha's offer.

(b) Fair Dealing.

Plaintiffs have also failed to establish a reasonable likelihood that Defendants will be unable to meet their burden of proving fair dealing at trial. Plaintiffs' primary argument is that the "process . . . was flawed by the Board's

utter failure to even attempt to assess the value of the derivative claims" (Pl. Br. 39.) This contention is meritless.

Effectively, Plaintiffs contend that the Board breached its duty of care by failing to inform itself "of all material information that is reasonably available to [it]." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 368 (Del. 1993). But a complete analysis of the merits of the derivative claims was not reasonably available to the Board. The Advisory Committee had stated that it would take three months of intense work to complete its analysis. (*See supra* SOF 36 n.21.) In addition, the cause of the UBB explosion—the sine qua non of determining responsibility for it—was not yet (and still is not definitively) determined. It would not have been reasonable for the Board to have ceased consideration of its strategic alternatives until this information became available. And, ultimately, it would not have mattered, since Alpha was prepared to make a hostile bid.

Even if this issue were relevant to the fair dealing analysis, it will not preclude Defendants from proving the "entire fairness" of the transaction at trial. A board need not show that it conducted in-depth analyses of the value of each asset in the company to prove fair dealing. In the same way that the Board was not obligated to value individually each mine in the Company, the Board was not obligated to conduct an analysis of the value of claims for and against the Company in the context of the merger negotiations.

Plaintiffs' remaining contentions are without merit. Plaintiffs suggest that the timing of the transaction was driven by "[t]he Board's overriding mission—sell before the Advisory Committee can report and without addressing the derivative claims against them." (Pl. Br. 39.) Plaintiffs' assertion is illogical under the facts as characterized by Plaintiffs, and, in any event, unsupported by the record. The Advisory Committee was just that, an *advisory* committee, which only had power to make recommendations to the Board. Furthermore, Plaintiffs contend that, after hearing the Committee's November update to the independent directors, "[t]he Board promptly shut down the Advisory Committee." (*Id.*) How could it be, then, that the Board's "overriding mission" was to "sell before the Advisory Committee [could] report"? In fact, nothing in the record suggests that Defendants "manipulated the timing of a transaction to benefit itself at the stockholder's expense." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1172 (Del. 1995).

The record shows that all other "entire fairness" factors weigh in favor of Defendants:

- Initiation—Plaintiffs themselves note that the Proposed Transaction was initiated by Alpha's overtures in the wake of the UBB explosion—hardly what would be expected if the "Directors . . . sought a quick sale of the Company to avoid liability." (Pl. Br. 18.)

- Negotiations—The record shows that the negotiations were "tough fought" and clearly conducted at arm's length. (*See supra* SOF pp. 42-43.)

- Structure—The structure of the merger reflects fair dealing. If the Defendants truly had wanted to escape derivative liability, they would have demanded a cash-out merger, so as to deprive Plaintiffs of their ability to pursue their claims double-derivatively post-merger, which, the record shows, is not what happened.[34]

- Disclosure to the directors—Directors Holland and Welty were aware of the pending derivative suits and the potential effect of the Proposed Transaction on them.

- Approval of the directors—Directors Holland and Welty, neither of whom is a defendant in the derivative claims (and who, as the sole members of the Advisory Committee, Defendants supposedly rushed to sell the Company to avoid answering to) voted to recommend that Massey's stockholders accept Alpha's offer.

- Disclosure to the stockholders—The proxy statement fully discloses the consequences of the Proposed Transaction for the derivative claims, enabling stockholders to make their own decision.

Thus, Defendants will be able to prove the "entire fairness" of the transaction at trial.

[34] Plaintiffs make passing reference to the deal being "locked up with a termination fee equal to $251 million, which is about 4% of the transaction value." (Pl. Br. 39.) The termination fee here, $251 million, is approximately 3.5 percent of the total transaction value (not 4 percent as plaintiffs claim). Delaware courts routinely uphold termination fees ranging in the range of 3-4 percent of deal value. *See, e.g.*, *In re Dollar Thrifty*, 14 A.3d 573, 614 (Del. Ch. 2010) (termination fee of 3.5 percent of deal value (or 3.9 percent taking into account a promise to pay certain expenses) was "a relatively insubstantial barrier . . . to any serious topping bid"). (S*ee also* Fischel Aff. ¶¶ 18-28.)

B. Plaintiffs Have Not Demonstrated A Reasonable Probability Of Success On The Merits Of Their *Countrywide* Claim.

As an alternative to their "entire fairness" claim, Plaintiffs contend that the merger should be enjoined pending trial of the derivative claims, their derivative claims placed in a "litigation trust" or "simply convert[ed] . . . to direct claims that are not subject to the [continuous ownership] rule of *Lewis v. Anderson*" because "the directors' breaches of fiduciary duty . . . 'have necessitated (a) corporate rescue; and, (b) individual legal protection.'" (Pl. Br. 42 (quoting *Countrywide*, 996 A.2d at 323), 44.)

The claim the Supreme Court theorized might exist in *Countrywide* requires that "massive wrongdoing" essentially destroy the value of the company, which then be sold in a fire-sale merger. *Countrywide*, 996 A.2d at 323 ("A merger was one of few available alternatives that meet both of those objectives after the board's allegedly fraudulent schemes bankrupted a multibillion-dollar company."). In fact, Countrywide had a market capitalization of approximately $26 billion in 2007, yet was sold for merger consideration of just $4.1 billion in 2008—a completely different financial outcome for the Countrywide stockholders in comparison to the superb financial outcome generated by the Massey Board through the Alpha merger agreement.

Given their arguments with respect to "entire fairness," this creates a dilemma for Plaintiffs, from which they do not escape. Plaintiffs are left to argue

simultaneously (in support of their *Countrywide* theory) that the record shows that the "the board of directors' pre-merger breaches . . . caused the circumstances making a salvage-job merger necessary" (Pl. Br. 42-43), and (in support of their "entire fairness" theory) that "the Board indefensibly agreed to an unnecessary sale" rather than executing the "standalone plan that was not a complex or risky roadmap to growth but rather based on the simple increasing demand for one of Massey's core products" (*id.* 42). On top of the foregoing irreconcilable contradiction, Plaintiffs' suggestion that, "[t]he precise factual scenario envisioned by the Supreme Court in *Countrywide*" (*id.* 44) exists here is directly contradicted by the record. *Countrywide* requires the plaintiffs to demonstrate that "the directors prospectively sought and approved a merger, <u>solely to deprive stockholders of standing to bring a derivative action</u>." 996 A.2d at 23 (emphasis added). There is no evidence or even a legitimate inference that the Massey directors approved the Alpha merger to defeat the derivative claims. Instead, the competent evidence in the record is undisputed that the Massey directors did not consider the derivative claims in approving the merger.

Accordingly, Plaintiffs have no probability of success on the merits of their *Countrywide* claim.

C. The Board Did Not Breach Its Duty Of Candor.

Plaintiffs' disclosure claims have no chance of success on the merits. "Directors of a Delaware corporation are under a fiduciary duty to disclose fully

and fairly all material information within the board's control when it seeks shareholder action." *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 509 (Del. Ch. 2010). The essential inquiry in analyzing a disclosure claim is whether the alleged omission or misrepresentation is material such that there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *Id.* Here, the disclosures in the Proxy plainly satisfy the Directors' fiduciary duties; and Massey adequately disclosed Plaintiffs' theories in a separate securities filing. (DX 4.)

1. *The Proxy Thoroughly Discloses The Board's Decision-Making Process.*

Plaintiffs first argue that the Proxy is deficient because it fails to disclose "that it was after the November 21 dinner meeting where the Advisory Committee previewed its interim report that the decision to sell was truly made." (Pl. Br. 45.) As a factual matter, the 19-page Background of the Merger section makes clear that the Board's decision to merge with Alpha was not reached after this dinner. Rather, as the Proxy recounts, negotiations between Massey and Alpha took place over several months, beginning months before this dinner and ending months later with the Massey Board agreeing to the merger on January 27, 2011. (*See* PX 34 (Proxy) at 80-84.)

Plaintiffs are simply wrong that the Proxy fails to disclose "why [the] decision to sell the Company was truly made." (Pl. Br. 45.) This is perplexing as an initial matter, because the Proxy discloses in considerable detail why the decision to merge with Alpha was made. (*See* PX 34 (Proxy) at 87-92.) Plaintiffs argue that the Proxy is inadequate because it does not disclose their own unsubstantiated and speculative theory of why the Board *actually* agreed to the merger with Alpha. However, "proxy materials are not required to state . . . plaintiff's characterization of the facts." *In re MONY Group, Inc. S'holder Litig.*, 853 A.2d 661, 682 (Del. Ch. 2004).

Plaintiffs' arguments that the Proxy should have disclosed their conspiratorial allegations that the Board *really* approved the merger in order to avoid the Advisory Committee's (impossible) prosecution of derivative claims against them, and that the Board *actually* forced Don Blankenship into retirement to facilitate this outcome, are similarly misplaced. Again, this requested "disclosure" would merely constitute the sort of "self-flagellation" not required by Delaware law. *Id*. This is especially true where, as here, such "disclosures" would amount to the Board's "implicating itself in a breach of fiduciary duty from surrounding facts and circumstances prior to a formal adjudication of the matter." *Stroud v. Grace*, 606 A.2d 75, 84 n.1 (Del. 1992). In any event, the 8-K Massey filed on May 19, 2011 sets forth Plaintiffs' allegations. (DX 4.)

2. *The Board Provided All Material Information Regarding The Derivative Claims.*

In their final disclosure claim, Plaintiffs assert that the Proxy "creates the misleading impression that the value of the derivative claims will be recouped by Alpha after consummation of the merger, and was therefore appropriately excluded from the Board's analysis of the merger." (Pl. Br. 46.) As a preliminary matter, the Proxy clearly contains extensive disclosure about the derivative claims and how the consummation of the merger may affect them, including the theoretical possibility that if the claims are not pursued post-merger the Massey stockholders may lose what Plaintiffs claim is a very valuable asset and Defendants may theeby receive a benefit. (*See supra* SOF p. 48.) In any event, Plaintiffs' claim is without merit because Delaware law does not require proxy materials to espouse the novel legal theories advanced by plaintiffs' lawyers. While Plaintiffs argue throughout their brief that the Board violated its fiduciary duties by failing to value the derivative claims (*see, e.g.*, Pl. Br. 39-40), this claim, as shown supra, is meritless. In fact, Plaintiffs do not really raise a disclosure claim, but instead put forward a substantive, and unavailing, fiduciary duty claim under the guise of a disclosure claim. The law is clear, however, that proxy materials need not contain "disclosures" that would implicate the Board "in a breach of fiduciary duty from surrounding facts and circumstances prior to a formal adjudication of the matter." *Stroud*, 606 A.2d at 84 n.1. This Court should

reject Plaintiffs' opportunistic attempt to recast their novel and unpersuasive fiduciary duty claim as a disclosure claim.

II. THERE IS NO RISK OF IRREPARABLE HARM IF THE PROPOSED TRANSACTION IS NOT ENJOINED.

To demonstrate irreparable harm, "a plaintiff must present an injury of such a nature that no fair and reasonable redress may be had in a court of law and must show that to refuse the injunction would be a denial of justice." *In re Acquila, Inc. S'holders. Litig.*, 805 A.2d 184, 194 (Del. Ch. 2002) (internal quotations ommitted). Plaintiffs have not made that showing.

No harm can flow from allowing adequately informed stockholders the opportunity to express their views. Plaintiffs have not demonstrated any disclosure deficiency. Thus, "the vote will be a valid and independent exercise of the shareholders' franchise, without any specific preordained result which precludes them from rationally determining the fate of the proposed merger." *In re IXC Commc'ns*, 1999 WL 1009174, at *1. In circumstances such as these, there is "no basis to intervene to frustrate the exercise of the shareholder franchise in law or equity." *Id.* Massey's stockholders can decide for themselves whether to accept Alpha's offer or to reject it if they believe it does not adequately compensate them for the transfer of the derivative claims to Alpha's control. If Massey's stockholders believe that Alpha's offer is inadequate, they can vote against the Merger Agreement and exercise their right of appraisal under Section

262 of the DGCL. 8 *Del. C.* § 262; *Norberg v. Young's Mkt. Co.*, C.A. Nos. 11208, 11253, 1989 WL 155462, at *5 (Del. Ch. Dec. 19, 1989) (denying motion for a preliminary injunction and noting that if plaintiffs believe that the consideration offered in the merger is inadequate, they are entitled to seek an appraisal for their shares pursuant to 8 *Del. C.* § 262).

Plaintiffs claim that absent an injunction Massey's stockholders will be irreparably injured by Plaintiffs' "loss of derivative standing upon consummation of the Merger." (Pl. Br. 47.) This is incorrect. Because *Lambrecht* makes clear that Massey's stockholders will be able to replead their claims double-derivatively, to the extent they remain stockholders in the combined entity, Massey's stockholders will not be irreparably injured. As this Court has noted, *Lambrecht* "remedies much of the inequity resulting from the standing-based extinction of all stockholder derivative actions that resulted from strict adherence to the legalistic approach taken in *Lewis v. Anderson*," *Hamilton Partners, L.P. v. Englard*, 11 A.3d 1180, 1206 (Del. Ch. 2010).

There are two exceptions to the rule that "a merger which eliminates a derivative plaintiff's ownership of shares of the corporation for whose benefit she has sued terminates her standing to pursue those derivative claims," *Lewis v. Ward*, 852 A.2d 896, 900-01 (Del. 2004): "(i) if the merger itself is the subject of a claim of fraud" or "(ii) if the merger is in reality merely a reorganization which

does not affect plaintiff's ownership in the business enterprise," *Kramer v. W. Pac. Indus, Inc.*, 546 A.2d 348, 354 (Del. 1988). The first exception (the only one even possibly applicable here) "requires a showing that the *sole basis* . . . to enter the merger was to divest the plaintiff of derivative standing." *Globis Partners*, 2007 WL 4292024, at *8 n.56 (quoting *Lewis v. Ward*, C.A. No. 15255, 2003 WL 22461894, at *5 (Del. Ch. Oct. 29, 2003), *aff'd*, 852 A.2d 896 (Del. 2004)). The record does not support any such conclusion. Moreover, where it is shown that one of the exceptions applies, the appropriate relief is not injunctive. If a plaintiff can demonstrate that one of the exceptions applies, then the plaintiff's derivative claim is not subject to dismissal for lack of standing. *See, e.g.*, *Lewis*, 852 A.2d at 898.

Effectively conceding that they cannot show that either standing-loss exception applies, Plaintiffs seek to offer novel ways in which this Court may accomplish the same result, either by enjoining the merger pending an "expedited trial" of their derivative claims; placing the claims into a "litigation trust"; or ordering that they be converted to direct claims.

There is no basis to enjoin the merger. If Plaintiffs are correct that the "entire fairness" standard applies to the Proposed Transaction, and, if Defendants are unable to prove the "entire fairness" of the Proposed Transaction because the merger consideration does not adequately reflect the value of the derivative

claims, Defendants will be liable to Massey's stockholders for the difference between the "fair price" and the merger consideration the stockholders actually received. *Reis*, 2011 WL 303207, at *15. "[T]his Court will not issue an injunction for claims in which the plaintiffs have an adequate remedy at law in the form of an action for money damages." *Rovner v. Health-Chem Corp.*, C.A. No. 15007, 1996 WL 377027, at *12 (Del. Ch. July 3, 1996). Nor does Plaintiffs' *Countrywide* theory provide a basis upon which to enjoin the merger. If Plaintiffs' reading of *Countrywide* is correct (it is not), and the effect of a fiduciary duty breach that destroys the value of a company, resulting in a fire-sale, is to transform pending derivative claims to post-merger direct claims, then the consummation of the merger will have no effect on Plaintiffs' ability to continue to assert them.

Even the correct reading of *Countrywide* provides no basis for an injunction. In *Countrywide*, the Supreme Court affirmed the Chancery Court's approval of a settlement that released direct claims asserted by Countrywide's stockholders alleging that the merger consideration was inadequate because it did not sufficiently value the derivative claims (*Caremark* claims against Countrywide's directors) that were then pending, noting also that the merger would terminate the stockholders' derivative standing. *Countrywide*, 996 A.2d at 322. The Supreme Court then, in *dicta*, suggested that there might exist a post-merger *direct* recovery claim based on "a single, inseparable fraud when directors

cover massive wrongdoing with an otherwise permissible merger" *id.* at 323, citing *Braasch v. Goldschmidt*, 199 A.2d 760, 764 (Del. Ch. 1964), which involved a direct fraud claim to set aside a merger. Plaintiffs mischaracterize this *dicta* as a suggestion that the court "would permit shareholder derivative suits to proceed where the complaint adequately alleged that the board of directors' pre-merger breaches reflected misconduct so injurious to the company that it led to the subsequent merger." (Pl. Br. 42-43.) But, as the closing paragraph of the *Countrywide* opinion makes clear, the post-merger direct recovery claim based on "a single, inseparable fraud" and continued derivative standing through the application of the traditional "fraud" standing-loss exception are two different things. *Countrywide*, 996 A.2d at 323 ("TRS did not present this claim [the direct claim based on a 'single, inseparable fraud'] to the Vice Chancellor, *nor* did it present us with the proper vehicle to consider whether TRS meets the fraud exception to maintain a post-merger claim." (emphasis added)). Plaintiffs have not asserted the direct "single, inseparable fraud" claim suggested in *Countrywide* (nor could they on this record). Even if they had *and* even if they had a reasonable probability of success on it, *and* even if loss of derivative standing represented irreparable harm, there still would be no basis to enjoin the merger, because it is a direct claim that would survive the merger.

Plaintiffs request for a "litigation trust" is simply a request for post-merger standing by another name. Plaintiffs do not cite a single case in which a Delaware court has imposed a "litigation trust" to allow post-merger pursuit of derivative claims, and none exists. Because Plaintiffs have not satisfied either one of the two standing-loss exceptions and Plaintiffs' attempted circumlocutions have no merit, Plaintiffs' request should be denied.

III. THE BALANCE OF HARDSHIPS WEIGHS STRONGLY IN FAVOR OF DENYING PLAINTIFFS' MOTION.

This Court has repeatedly held that the balance of hardships weighs against injunctive relief when enjoining a transaction could endanger the stockholders' ability to receive a premium for their shares. Delaware courts are especially cautious when an injunction "would deprive . . . shareholders of the benefits of the merger transaction without offering them any realistic prospect of a superior alternative, or, for that matter, any alternative." *In re Wheelabrator Technologies Inc. S'holders Litig.*, C.A. No. 11495, 1990 WL 131351, at *9 (Del. Ch. 1990).

The Proposed Transaction was announced over three months ago. That announcement was proceeded by a public auction. Plaintiffs do not assert in their Opening Brief that any term in the Merger Agreement has precluded a topping bidder. After the Merger Agreement was signed, the other primary bidder, Arch, announced that it will buy International Coal Group, Inc. for $3.4 billion. Plaintiff suggests that if the Proposed Transaction is enjoined pending an "expedited" trial

on the derivative claims, their victory "could incent additional bidding at higher prices." (Pl. Br. 44.) That is, at best, a highly speculative benefit to be weighed against putting the consummation of a transaction that will provide Massey's stockholders with a substantial premium at risk. Even if an injunction does not completely compromise the Proposed Transaction, "if the Court enjoins the Merger, Massey's stock price may fall substantially below the value of the merger consideration, harming Massey's shareholders." (Fischel Aff. ¶ 31.)

"Decisions in these terms are not for courts but for businessmen and women." *Lennane v. Ask Computer Sys., Inc.*, C.A. No. 11744, 1990 WL 161094, at *1 (Del. Ch. Oct. 19, 1990). "[T]he bottom line is that the public shareholders will have an opportunity [] to reject the merger if they do not think the price is high enough in light of the Company's stand-alone value and other options." *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1023 (Del. Ch. 2005).

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' request for a preliminary injunction.

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