IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

MEMORANDUM OPINION

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STRINE, Vice Chancellor.

I. Introduction

The plaintiffs are stockholders of Massey Energy Company, a coal mining corporation with a controversial reputation. Convinced that it knew better than the public authorities charged with enforcing laws designed to make mining a safer and cleaner business, Massey management, with board knowledge, fostered an adversarial relationship with the company's regulators and accepted as ordinary the idea that the company would regularly be accused of violating important safety regulations. On April 5, 2010, a massive explosion occurred at Massey's Upper Big Branch mine in West Virginia and as a result, 29 miners died. Although the worst human and business loss in Massey history, it was not the first time that Massey miners had suffered death and serious injuries.

Amidst public concern about the human loss at Upper Big Branch, the stock market focused on what it does, thereby allowing profit seekers to buy and sell Massey stock based on their differing views about what this terrible event, and Massey's mode of operating, portended for the company's ability to generate future cash flows. Likewise, lawsuits and regulatory proceedings ensued, in which families of the lost and injured miners sought recompense and regulators sought to figure out exactly what caused the disaster. Inevitably, stockholders of Massey filed derivative suits, seeking to ensure that to the extent that Massey itself was harmed by the legal obligation to pay fines, judgments to the lost miners' families, and by the lost cash flows from the destroyed mine, the corporate directors and officers who managed the firm were held responsible for what the plaintiffs argued was a failure to make a good faith effort to make sure that Massey complied with mine safety regulations.

In an industry that was already consolidating, the weakened position of Massey attracted the interest of industry rivals. In the wake of the disaster, Massey's stock price fell dramatically and its shares were arguably trading at a discount to its coal reserves in comparison to its competitors who were not under a regulatory cloud. After a lengthy process in which Massey's openness to a strategic transaction was made public, Massey's stock rebounded as a result, and several bidders had a chance to conduct due diligence and to make a bid, Massey's "Board," which is comprised almost entirely of independent directors, entered into a "Merger Agreement" with Alpha Natural Resources, Inc., a mining company with a good reputation and track record for miner safety and regulatory compliance. Under the terms of that Agreement, each Massey share will be converted into the right to receive 1.025 shares of Alpha common stock and $10.00 in cash if the Massey stockholders approve the "Merger" at a vote scheduled for June 1, 2011. On the day the Massey Board unanimously approved the Merger, January 27, 2011, the Merger consideration amounted to a 25% premium over Massey's stock price based on the previous day's closing price of Massey and Alpha stock, a 95% premium over the closing price of Massey stock on October 18, 2010 before it was publicly reported that Massey was engaged in a strategic alternatives review, and even a 27% premium over Massey's stock price the day of the explosion at the Upper Big Branch mine.

The plaintiffs seek a preliminary injunction against the Merger because the Massey Board did not negotiate to have the pending "Derivative Claims" transferred into a litigation trust for the exclusive benefit of Massey stockholders. They argue that the Merger is unfair because it results in Alpha being able to acquire Massey without paying fair value for the economic value of the Derivative Claims. They buttress this argument with the undisputed fact that the Massey Board never attempted to value the Derivative Claims but proceeded on the assumption that the Derivative Claims would survive the Merger. The record indicates that the Massey Board might not have had a clear understanding of what survival of the Derivative Claims meant, with some directors seeming to realize that the Claims would pass to Alpha in the Merger, and others believing that the current derivative plaintiffs would be able to continue to prosecute those Claims for the benefit of Massey and its current stockholders alone.

As a matter of black letter law — see *Lewis v. Anderson* — the Derivative Claims will pass to Alpha in the Merger unless the Merger itself is merely a fraudulent attempt to deprive the Massey stockholders of their derivative standing, or the Merger is a mere reorganization that otherwise does not affect the Massey stockholders' relative ownership in the resulting corporate enterprise.[1] The Merger with Alpha is not a mere reorganization, and given the record here, it appears highly doubtful that the plaintiffs will be able to show that Massey's directors and officers sought to sell the company to Alpha solely in order to extinguish their potential liability for the pending Derivative Claims. Admittedly, there is a basis to conclude that the Massey Board perceived that the company's ability to prosper independently was impaired by its questionable reputation

[1] *Lewis v. Anderson*, 477 A.2d 1040, 1044 (Del. 1984) (citing 8 *Del. C.* § 259(a)); *id.* at 1047 (citing *Heit v. Tenneco*, 319 F. Supp. 884 (D. Del. 1970)); *see also Lewis v. Ward*, 852 A.2d 896, 902 (Del. 2004) (reaffirming *Lewis v. Anderson*).

for worker and environmental safety, and that the best way to secure value was to sell the company at a premium, for stock, to an industry rival with a better reputation in those areas and to allow current Massey stockholders to benefit from the immediate premium and the prospect that the combined asset base would generate solid profits and a higher market multiple under Alpha management. But the record does not suggest that it is likely that the Merger was inspired solely, or even in any material way, by a desire of the Massey directors to extinguish the Derivative Claims or to insulate themselves from liability. As a result, it seems likely in the end that Alpha will control the Derivative Claims, leaving the current derivative plaintiffs in the position of having to prove demand excusal as Alpha, not Massey, stockholders, and thus receive leave to proceed in a double derivative action on behalf of Alpha.[2] Although that is a possibility, it is not one that an objective mind ought to consider probable, given that the Alpha board has no exposure to liability for the Derivative Claims and the myriad of rational business reasons why Alpha may later decide that prosecuting those Claims does or does not make sense for Alpha as a corporation.

Most importantly, the determination of the fate of the Derivative Claims is not one that should or must be made right now. The Massey Board's failure to address the value of the Derivative Claims is regrettable in view of the economic impact the Upper Big Branch Disaster had on Massey. That the Board failed to do so upon the advice of outside advisors is even more surprising. Any board negotiating the sale of a corporation

[2] *Lambrecht v. O'Neal*, 3 A.3d 277, 282 (Del. 2010).

should attempt to value and get full consideration for all of the corporation's material assets.

But even acknowledging that mundane reality, the record will not support the issuance of a preliminary injunction. This record does not support the inference that the Derivative Claims are material in comparison to the overall value of Massey as an entity. The plaintiffs' argument that they are conflates the value of two different things: the potential diminution in value of Massey as a result of the consequences of the Upper Big Branch Disaster and the loss in public confidence in Massey's management (i.e., the "Disaster Fall-Out") on the one hand, and the value of the Derivative Claims, on the other. It is entirely possible that Massey suffered a material drop in value as a result of the Disaster Fall-Out, including the public skepticism about Massey management's capability to simultaneously operate profitably, safely, and lawfully. But it is also possible for the loss-offsetting value of the Derivative Claims to be immaterial in comparison to Massey's enterprise value. The extent to which current and former Massey fiduciaries can be held responsible to make Massey whole for fines, settlements, and diminished profits the company suffers as a result of the Disaster and related circumstances is affected by, among other things, the difficulty of showing that any of those fiduciaries acted with a wrongful state of mind necessary to prove them liable in view of the exculpatory provision in Massey's charter; the reality that if the fiduciaries are proven to have acted with the requisite state of mind to impose liability, then insurance proceeds may not be available to pay for a judgment; the questionable ability of even the wealthy members of the Massey Board to satisfy any judgment that would be material in relationship to the company's overall value; and the fact that most of the defendants in the derivative actions are independent directors whose motivation to tolerate unsafe operational practices for the sake of profits is tempered. For these and other reasons, it could well be that any rational assessment would place a value on the Derivative Claims that would be immaterial in relation to the value that Alpha is paying in the Merger. At best, these Claims might be thought a way to obtain some recoupment of the continuing costs Massey will incur as a result of the Upper Big Branch Disaster and the need to improve its relations with regulators and society, as a whole. Therefore, it is unlikely that Alpha viewed these Claims as an asset at all, but merely as having some potential to reduce the gravity of the Disaster Fall-Out Alpha was inheriting.

As a result, even when considering the merits prong of the injunction inquiry, the record does not persuade me that the Merger would, after a trial, likely be found to be economically unfair to the Massey stockholders.

Of course, the prudential judgment before me is not whether the Massey stockholders should be satisfied with the predicament Massey found itself in after the Disaster or even the Merger price. The question is whether there is a sound basis to enjoin the Massey stockholders from deciding for themselves whether to exchange their status as Massey stockholders for a chance to receive substantial value from a third party in an arms-length Merger. The record will not bear the inference that any bidder prepared to pay more has been prevented from doing so. The Massey Board seems to have exerted reasonable efforts to get the highest price it could from Alpha. If Massey stockholders believe that the company can do better by remaining independent, they have the uncoerced, informed chance to make that decision for themselves. If they choose to remain independent, the Massey stockholders will have the chance to enjoy the fruits of any derivative recovery secured on the company's behalf.

Given that reality, it would threaten more harm than good for me to usurp the ability of Massey stockholders to decide this economic question themselves. That is especially the case when it is possible to craft a monetary remedy in the event that it were found, on a full record, that the Merger was tainted by non-exculpated breaches of fiduciary duty. Likewise, if the plaintiffs are correct about their view of the facts and the law, then they will be able to continue to prosecute the Derivative Claims even after the Merger under their reading of *Lewis v. Anderson*[3] and a recent Supreme Court case, *Arkansas Teacher Retirement System v. Caiafa*,[4] they believe modifies *Lewis v. Anderson* in their favor. Because of these factors, the plaintiffs have not proven that the Merger's consummation presents them with a threat of irreparable injury.

II. A Roadmap

Even by the standards of this court, the record on this preliminary injunction motion is fulsome, a word that is often mistakenly used as a positive adjective. Given the need to decide this motion in a timely manner, this decision will concentrate on the issue the plaintiffs themselves choose as the central one: whether the failure of the Massey Board to secure the Derivative Claims for Massey's current stockholders justifies the entry of a preliminary injunction against Massey's Merger with Alpha.

[3] 477 A.2d 1040 (Del. 1984).
[4] 996 A.2d 321 (Del. 2010).

In their papers, the plaintiffs also make a cursory attempt to show that the Board failed to treat all bidders equally, did not seek out all logical acquirors, gave Alpha unreasonably preclusive deal protection measures, and failed to disclose to the Massey stockholders all material information about the proposed Merger. For reasons of economy, my factual findings address and reject these arguments, which are not borne out by the record, and which are not pressed hard by the plaintiffs.

In keeping with the plaintiffs' focus, this decision proceeds in the following manner. In the next section, I set forth the facts, applying the standard applicable to preliminary injunctions. In particular, I focus on: (i) Massey's business and its troubled regulatory and safety record before the Upper Big Branch Disaster; (ii) the Upper Big Branch Disaster and the ensuing Disaster Fall-Out; (iii) the Board's process leading to the signing of the Merger Agreement; and finally (iv) the extent to which the pendency of the Derivative Claims seems to have influenced that process and the resulting Merger Agreement.

I then address the primary argument of the plaintiffs, addressing in the first instance whether the plaintiffs have demonstrated that they are reasonably likely to succeed in showing that the Merger is tainted by breaches of fiduciary duty. Most importantly, I address whether the plaintiffs have demonstrated that they face a threat of irreparable injury and that the balance of the equities favors the issuance of an injunction.

III. Factual Background

As is required in considering a motion for a preliminary injunction, these are the facts that I conclude are likely to be found, based on the current record, after a trial in this matter.[5]

A. Massey Energy Company And Its Troubled Regulatory Past

Massey is the nation's sixth largest coal miner based on production and the nation's largest producer of Central Appalachian coal.[6]

From November 2000 to December 2010, Massey's CEO was defendant Don Blankenship. Although Massey, like most other public companies, had a majority of independent directors, Blankenship was, by any measure, a high profile and dominant CEO.[7] Blankenship was Massey's public face and he regularly sought (or was found by) the public spotlight.

Under what a key subordinate described as Blankenship's "autocratic" management style,[8] Massey grew from a company of 3,000 employees and a market cap of $758 million in 2000, to one with over 7,000 employees and a market cap of roughly $3.5 billion in 2010.[9] Massey had become de-unionized following a bloody strike in 1984 when Blankenship was the assistant to Morgan Massey, the founder's son and long-time CEO. When Blankenship became CEO himself, he continued to have an adversarial

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[5] *E.g.*, *Tate & Lyle PLC v. Staley Continental Inc.*, 1988 WL 46064, at *5 (Del. Ch. May 9, 1988).
[6] Compl. ¶ 20.
[7] Phillips Dep. at 12.
[8] Phillips Dep. at 12; *see also* Crutchfield Dep. at 30, 148; PX-64 (Liberty Diligence Presentation (January 18, 2011)).
[9] Inman Dep. at 10-11.

relationship with the United Mine Workers of America.[10] That anti-union position also colored his approach to safety at Massey's coal mines because Blankenship was of the opinion that governmental safety regulators were overly nit-picking when it came to inspecting non-union mines like Massey's. Blankenship was not quiet about his views and took a combative approach with the key federal agency charged with enforcing United States mining operations' compliance with federal safety regulations, the United States Department of Labor's Mining Safety and Health Administration (the "MSHA"), espousing the belief that when it came to a miner's safety, Blankenship knew best.[11] Indeed, in a 2005 internal memorandum that became controversial when it became public, Blankenship wrote:

> If any of you have been asked by your group presidents, your supervisors, engineers or anyone else to do anything other than run coal (i.e. – build overcasts, do construction jobs, or whatever), you need to ignore them and run coal. This memo is necessary only because we seem not to understand that the coal pays the bills.[12]

Claiming to have been misunderstood, Blankenship sent a follow-up memorandum days later, emphasizing that he did not mean to say profits came ahead of safety,[13] even though overcasts have an important safety function in mine ventilation systems.[14] But not all believed him, and at the very least it was rational for Massey managers and

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[10] Inman Dep. at 120-21, 125-26; PX-25 ("Bobby Inman Blames The Unions," THE TEXAS OBSERVER (April 19, 2010)).
[11] Blankenship Dep. at 69-73.
[12] PX-66 (Blankenship Memorandum To All Deep Mine Superintendents (October 19, 2005)).
[13] DX-8 (Blankenship Memorandum (October 26, 2005)) ("I would question the membership of anyone who thought that I consider safety to be a secondary responsibility.").
[14] Phillips Dep. at 35.

employees to perceive that if you wished to stay or get ahead at Massey under Blankenship, then the priority of profits over safety was one not to be questioned.

This perception that those who refused to ignore dangerous mining conditions faced the threat of adverse employment consequences was enhanced by the actual experience of one Massey in-house safety inspector. In a 2007 whistleblower's lawsuit, a West Virginia jury awarded that former Massey safety inspector a verdict of $2 million in punitive damages, back pay, and emotional and reputational damages after he was allegedly fired in retaliation for his reporting to the MSHA of unaddressed safety violations at a Massey mine.[15]

Of course, when a company has strong opinions about knowing better than the regulators, it is optimal to match that with a record of worker safety and environmental protection that is substantively spotless. But in the case of Massey, no such match existed, at least insofar as one credits actual judgments and other regulation-related losses suffered by the company under Blankenship's tenure as CEO.

In 2008, following a joint MSHA and FBI investigation into the causes of a 2006 fire at Massey's Aracoma mine in West Virginia that cost the lives of 2 Massey miners, Massey pled guilty to criminal charges including one felony count for willful violation of mandatory safety standards resulting in death, eight counts for willful violation of mandatory safety standards, and one count for making a false statement, and agreed to

[15] PX-2 ("Boone Man Awarded $2 Million in Wrongful Termination Suit," THE WEST VIRGINIA RECORD (June 28, 2007)).

pay a $4.5 million fine comprised of criminal fines and civil penalties.[16] After the plea, reports surfaced that Blankenship was told about the unsafe conditions that led to the fire at Aracoma by one of his "top troubleshooters" as few as six days before the fire at Aracoma, but took no action.[17]

In 2008, Massey also agreed to a $20 million settlement in a suit brought against it by the Environmental Protection Agency alleging 4,500 violations of Massey's Clean Water Act permits over a course of several years.[18] At the time, that payment represented the largest Environmental Protection Agency civil penalty ever levied against a company for wastewater violations.[19]

Further in 2008, as part of a West Virginia court-approved settlement of a 2007 derivative action accusing Blankenship and the rest of the Massey directors of failing to cause Massey to comply with applicable federal and state mine safety and environmental laws,[20] Massey had to form a new Board committee, the Safety and Environmental Committee, that was required to, among other things, give quarterly reports and safety updates to the Board on Massey's compliance with all applicable mine safety laws and regulations.[21]

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[16] PX-5 (Press Release, U.S. Attorney's Office (December 23, 2008)); PX-95 ("Upper Big Branch The April 5, 2010, explosion: a failure of basic coal mine safety practices" (May 19, 2011)) at 93.
[17] PX-95 at 93.
[18] PX-7 (Press Release of the Environmental Protection Agency (January 17, 2008)).
[19] *Id.*
[20] Massey Energy Co., Annual Report (form 10-K), at 32 (Mar. 2, 2009); PX-24 (*Manville Personal Injury Trust v. Blankenship*, Case No. 07-C-1333, "Settlement and Final Judgment" (June 30, 2008)).
[21] PX-24.

Although the Massey Board took action to comply with the 2008 derivative action settlement, and the Massey defendants cite other evidence that there was motion designed to improve Massey's compliance with safety regulations,[22] the number of safety violations assessed against Massey continued to mount. In fact, the number of MSHA-ordered citations for safety violations at Massey mines increased every year from 2005 to 2009.[23] In 2009 alone, the MSHA assessed 10,653 citations and orders against Massey for safety violations, an all-time high.[24] And, although Blankenship's centralized approach to managing the mines extended to decisions, large and small, about individual mines' compliance with safety and other federal and state regulations, the Massey Board did not direct any of its motion at him or other members of Massey's top management, opting instead to leave Blankenship at the helm.

Instead of ameliorating his attitude in response to Massey's many losses in legal proceedings, Blankenship's attitude towards regulators "deteriorated very sharply" in the months after President Obama's inauguration in January 2009 when key union players with ties to the 1984 union showdown at Massey entered prominent new roles at the MSHA.[25] Blankenship saw these new appointments as further evidence that the unions had taken control of the MSHA and were targeting Massey in an attempt to force its

[22] *See, e.g.,* Def. Ans. Br. at 14-15 (citing various actions taken by the Massey Board after the 2008 settlement designed to improve compliance with safety regulations, including its commission of a so-called "Hazard Elimination Program," "designed to identify and address problem areas").
[23] PX-10 (MSHA, Massey Energy — Civil Penalty Summary (April 5, 2010)).
[24] PX-8 (MSHA, Summary of Citations and Orders Issued to Massey Energy). No United States mining company had more safety violations on its record between the years 2000 and 2009 than Massey, despite the fact that Massey was only the nation's sixth largest coal producer. PX-12 ("W. Va. Mine Blast: Coal Firm Had Worst Safety Record," MSNBC (November 23, 2010)).
[25] Inman Dep. at 16.

mines to re-unionize.[26] At a 2009 Labor Day function in Washington, D.C., Blankenship again went on the offensive in a public display of his disdain for the MSHA and government-mandated safety regulations in general, telling a crowd that "I also know Washington and state politicians have no idea how to improve miner safety. The very idea that they care more about coal miner safety than we do is as silly as global warming."[27] Lead independent director and defendant Bobby R. Inman, although more measured in his mode of expression, agreed with Blankenship's assessment of the MSHA as being pro-union and acutely focused on Massey's non-union mines.[28]

B. The April 5, 2010 Explosion At Massey's Upper Big Branch Mine And Its Aftermath

Massey's Upper Big Branch mine in Montcoal, West Virginia is an underground bituminous coal mine that employed, in 2009, roughly 195 persons.[29] On April 5, 2010, a massive explosion at the Upper Big Branch mine claimed the lives of 29 miners. It was America's deadliest mining accident in 40 years.[30] Although the precise cause of the explosion may never be known with certainty,[31] at least one governmental investigation

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[26] *Id.*
[27] PX-25. Blankenship's views on the effect of human activity in producing global climate change are not free from rational, scientific dispute. *Cf.* William R. L. Anderegg, et. al., *Expert Credibility in Climate Change*, PNAS: Proceedings of the National Academy of the United States of America (June 21, 2010) doi: 10.1073/pnas.1003187107 (surveying 1,372 climate researchers, their publication and citation data, and showing that 97-98% of the most actively publishing researchers in the field support the tenets of anthropogenic climate change outlined by the Intergovernmental Panel on Climate Change).
[28] Inman Dep. at 17.
[29] PX-18 (Briefing, the MSHA on Disaster at Massey Energy's Upper Big Branch Mine-South) at 4.
[30] PX-3 ("Mine Safety Often a Battle Between Regulators and Companies," THE WASHINGTON POST (June 2, 2010)) at 1.
[31] Compl. ¶ 84.

— which released its final report in the midst of the parties' briefing of this motion — attributes the explosion in important ways to Massey's failure to comply with critical safety procedures.[32] That investigatory report, the "McAteer Report," was commissioned by former West Virginia Governor Joe Manchin in the days that followed the April 5, 2010 blast.[33] The McAteer Report concludes that the "prevent[able]" explosion at Upper Big Branch was caused by the failure of at least three "basic safety systems identified and codified to protect the lives of miners:"

> (i) the ventilation system required by federal regulations to prevent the build up of flammable methane gas in the mine did not adequately ventilate the mine;
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> (ii) Massey failed at Upper Big Branch to meet federal and state safety standards for the application of "rock dust," or crushed limestone that is required to be applied to underground mine surfaces to prevent the chances that coal dust will ignite; and
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> (iii) water sprayers on mining equipment designed to extinguish small ignitions and prevent nascent flames from spreading rapidly were not properly maintained and consequently failed.[34]

The McAteer Report deplored Massey's compliance with federal and state safety regulations. It observed that the Upper Big Branch mine suffered from "chronic" ventilation problems that were "common knowledge" to those who regularly worked in the mine.[35] The Report notes that the Upper Big Branch mine was cited *every month* of 2009 by federal and state inspectors for failures to comply with its regulator-approved

[32] PX-95.
[33] PX-95 (the "McAteer Report").
[34] *Id.* at 4.
[35] *Id.* at 59.

ventilation plan.[36] Moreover, as early as three months before the explosion at Upper Big Branch, an MSHA inspector noted during a routine inspection that although a foreman at Upper Big Branch had told his supervisor about malfunctions with the ventilation system, he was told by the supervisor "not to worry about it."[37] The McAteer Report finds that miners had voiced their concerns to senior management officials about the mine's inadequate ventilation in the months before the explosion and received the same answer: "Don't worry about it."[38]

The McAteer Report also condemned the inadequate rock dusting practices at the Upper Big Branch mine.[39] The Report concludes that a mine of Upper Big Branch's size "could justify a two-man crew assigned solely to rock dusting on at least two shifts each day" in order to comply with minimum federal and state law regulations, but that the procedures at Massey at the time of the explosion only called for one two-man crew which was responsible for rock dusting the entire mine on a part-time basis "with no set schedule and with faulty equipment."[40] According to the McAteer Report, testing performed by the MSHA after the explosion confirmed the inadequacy of rock dusting procedures at the Upper Big Branch mine. Of 1,803 dust samples taken from the mine, the MSHA found that 78.92% were not in compliance with federal regulations.[41] Indeed, in the 15 months that preceded the Disaster, federal or state regulators issued citations at

[36] *Id.* at 60.
[37] *Id.* at 63.
[38] *Id.* at 63.
[39] *Id.* at 50-59.
[40] *Id.* at 51.
[41] *Id.* at 53.

the Upper Big Branch mine for rock dusting violations *every month*, 40% of which were so-called "significant and substantial" violations.[42] A preliminary report by the MSHA following the explosion makes some observations similar to the McAteer Report. For example, the MSHA cited its issuance of 48 withdrawal orders at the Upper Big Branch mine in 2009 on the basis of "*repeated* significant and substantial violations that the mine operator either knew, or should have known constituted a hazard," "nearly 19 times the national rate" for that category of violation.[43] The MSHA's report also echoes the McAteer Report's finding that the Upper Big Branch mine was one "with a significant history of safety issues [and] a mine operated by a company with a history of violations . . . ."[44]

Because the Derivative Claims are directed at Massey's top management and the Board itself, what the McAteer Report concluded as to their potential responsibility for the conditions at the Upper Big Branch mine is relevant to considering this motion. The McAteer Report focused on Massey's senior management, in particular Blankenship, as the source of the Upper Big Branch mine's departure from government-mandated minimum safety standards designed to prevent exactly the type of tragedy that occurred on April 5, 2010. "There is an obvious disconnect," summarized the Report, "between the lofty safety standards extolled by Blankenship and the reality of conditions inspectors

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[42] *Id.* at 54.
[43] PX-14 (MSHA Briefing on Disaster at Massey Energy's Upper Big Branch Mine-South) at 5 (emphasis in original).
[44] PX-18 at 5.

and investigators found in the Upper Big Branch mine."[45] Although the Report admits that Massey management could, and did, point to new safety procedures such as requiring that miners wear "reflective clothing" as evidencing their sincere concern for miner safety, the Report concluded that Massey fell "woefully short" in more critical "basic areas of miner worker safety," such as adequate rock dusting and ventilation.[46] The McAteer Report concludes:

> Ultimately, the responsibility for the explosion at the Upper Big Branch mine lies with the management of Massey Energy. The company broke faith with its workers by frequently and knowingly violating the law and blatantly disregarding known safety practices while creating a public perception that its operations exceeded industry safety standards.
>
> The story of Upper Big Branch is a cautionary tale of hubris. A company that was a towering presence in the Appalachian coalfields operated its mines in a profoundly reckless manner, and 29 coal miners paid with their lives for the corporate risk-taking. The April 5, 2010, explosion was not something that happened out of the blue, an event that could not have been anticipated or prevented. It was, to the contrary, a completely predictable result for a company that ignored basic safety standards and put too much faith in its own mythology.[47]

In the weeks that followed the explosion at the Upper Big Branch mine, Massey stockholders filed multiple actions in both West Virginia and Delaware asserting the Derivative Claims.[48] In broad strokes, the Derivative Claims rest on allegations that certain current and former directors and officers of Massey breached their fiduciary duties during the period from May 21, 2008 to the present by (i) "chronically

[45] McAteer Report at 95.
[46] *Id.*
[47] *Id.* at 108.
[48] The Delaware derivative action was consolidated with this class action on October 21, 2010. *New Jersey Building Laborers Pension Fund v. Blankenship*, No. 5430 (Del. Ch. Oct. 21, 2010) (ORDER).

disregarding mining safety regulations and incurring nearly $27 million in assessed violations by the [MSHA], comprising a material portion of its net income in any given year; and (ii) consistently failing to adequately address poor safety conditions of its mines, culminating in (among other things) an explosion . . . that tragically killed 29 miners . . . and the destruction of hundreds of millions of dollars of shareholder value as Massey's stock price has plunged nearly 52% as of July 2, 2010."[49] The Board's independent directors retained the law firm of Cravath, Swaine & Moore as their counsel in the derivative actions in May 2010.

C. Massey Conducts A Review Of Its Strategic Alternatives And Enters Into The Merger Agreement With Alpha

On April 26, 2010, less than one month after the explosion at Upper Big Branch, Michael Quillen, the Chairman of the board of directors of Alpha Natural Resources, Inc., America's third largest producer of coal, approached Blankenship and expressed Alpha's interest in a possible business combination with Massey.[50] At the time of Alpha's initial approach, Massey's stock price had dropped from $53.05 on the last full trading day before the Disaster to $43.61.

This was not the first time Alpha had shown an interest in acquiring Massey. In 2006, Alpha had made a proposal that would have resulted in a new company that Alpha would manage, and one which the Massey stockholders would control two-thirds of the

[49] Verified Amended Shareholder Derivative Complaint ¶ 1 (July 7, 2010).
[50] PX-34 ("Massey Energy Company Definitive Proxy Statement" (April 29, 2011)) ("Proxy") at 66.

surviving company's stock.[51] Although Massey was able to extract Alpha's assent to a confidentiality agreement that contained a two-year reciprocal standstill provision that expired on January 12, 2009, the two companies were unable to agree on a transaction and the talks ceased.[52] One senses from the record that Blankenship had no desire to do a deal with Alpha or anyone else that resulted in him not being CEO of the resulting entity.

Although over the course of the next two years, between 2007 and 2009, representatives from Alpha and Massey had periodic telephonic conversations, it was not until Quillen's overture on April 26, 2010 that discussions about a possible business combination were once more undertaken in earnest.

Blankenship's response to Quillen was not warm. Although he told Quillen that he would inform the Board of Alpha's interest in pursuing a transaction, Blankenship made clear to Quillen his opinion that a combination was not in the Massey stockholders' best interests due to Massey's depressed stock price in the wake of the explosion at the Upper Big Branch mine. Apart even from the Disaster Fall-Out, Blankenship believed the valuation metrics used by Wall Street did not adequately take into account Massey's extensive coal reserves.[53] Again, I infer that Blankenship was not personally inclined to be a seller and give up running Massey. After Blankenship advised Massey directors Inman and Dan R. Moore about Quillen's overture, the Board met on May 3, 2010 to discuss Alpha's indication of interest, and agreed with Blankenship's assessment that a

[51] Crutchfield Dep. at 54-55.
[52] Proxy at 65.
[53] *Id.* at 66; Blankenship Dep. at 104-06.

sale or other business combination was not in the best interests of the Massey stockholders at that time.[54]

Undeterred, Alpha sent Massey a non-binding proposal on August 11, 2010 to acquire all of Massey's outstanding stock in an all stock merger that would have offered Massey stockholders $37.19 a share representing a 20% premium over Massey's then current stock price of $30.99, which had continued its downward trend since the Upper Big Branch Disaster.[55] The Board considered Alpha's proposal at its quarterly meeting in the middle of August, at which both Massey's outside legal and financial advisors were present.[56] The Board concluded that the Alpha proposal offered inadequate value and Blankenship informed Alpha to that effect in an August 23 letter, but further indicated that Massey was interested in exploring other potential business combinations on more favorable terms and upon a consideration of "other factors."[57] When asked by Alpha's CEO, Kevin S. Crutchfield, for an explanation as to what those "other factors" might be,[58] Blankenship responded 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."[59]

In response to the derivative actions filed against it, on August 16, 2010, the Board created an "Advisory Committee" comprised of two new independent directors appointed

[54] Proxy at 67.
[55] *Id.* at 68.
[56] *Id.*
[57] *Id.*; PX-43 (Letter from Blankenship to Crutchfield (August 23, 2010)).
[58] PX-44 (Letter from Crutchfield to Blankenship (August 25, 2010)).
[59] PX-45 (Letter from Blankenship to Crutchfield (August 27, 2010)); Phillips Dep. at 185; Proxy at 69.

the same day, Linda J. Welty and Robert B. Holland III, charged with making recommendations to the full Board regarding: (i) whether Massey should pursue the Derivative Claims resulting from the Upper Big Branch mine explosion; and (ii) whether Massey should undertake any changes in "management, operations, practice and/or policies."[60] The Advisory Committee retained Weil, Gotshal & Manges LLP as its counsel and began work shortly thereafter.

On September 13, Alpha followed its $37.19 bid with another non-binding offer to purchase Massey at $41.07 per share of Massey stock in an all stock merger which on that date represented a premium of 26% to Massey's then stock price of $32.49.[61] Discussions between the two companies continued for a time, but Massey's Board eventually concluded that Alpha's offer provided insufficient value.

Coincidental with dealing with Alpha, the Massey Board was also coming to grips with the post-Disaster challenge of operating Massey. In particular, even those who had shared Blankenship's jaded views of the MSHA, like lead director Inman, realized that the company had to regain the confidence of the market and company's regulators if it was to succeed going forward. Inman had a distinguished career in the United States Navy and the CIA that imbued him with a belief system about how organizations should deal with crises.[62] Consistent with his view that it is usually counterproductive to change leadership in the immediate wake of a crisis, Inman had publicly expressed his continued

[60] DX-6 ("Forming an Advisory Committee of the Massey Board of Directors" (August 16, 2010)).
[61] Proxy at 69.
[62] Inman Dep. at 47.

support for Blankenship after the Upper Big Branch Disaster[63] and even echoed Blankenship's views that the MSHA was biased against non-union mines like Massey's.[64] Inman and the Board therefore allowed Blankenship to be the public face of Massey in responding to the intense media and governmental scrutiny that followed the explosion.[65] But Blankenship's response to the Upper Big Branch Disaster was true to prior form, and he seemed to many to be more defiant and self-justifying than willing to accept any responsibility, telling a United States Senate subcommittee in May 2010 that when it came to Massey's "number of fatal[itie]s," Massey was just "average" given its size, and saying in a radio interview that Massey's history of safety violations was just "a normal part of the mining process."[66]

As autumn approached, however, and Blankenship gave another scathing appraisal of the MSHA at a Massey press conference,[67] Inman began to view it as time for Blankenship to move on, a view that was increasingly shared by other independent directors.[68] Inman was aware that Blankenship was strongly of the opinion that the best option for the Massey stockholders was for Massey to remain independent and that he, Blankenship, rather than the Board, should lead any consideration of an alternative.[69] Blankenship was espousing the bullish view that Massey had an intrinsic value of at least

[63] PX-25 at 1.
[64] *Id.*
[65] Inman Dep. at 47, 52-53.
[66] PX-12 at 2-3.
[67] Inman Dep. at 52, 152
[68] *Id.* at 120, 126.
[69] *Id.* at 113.

$90-100 a share — a range that exceeded Massey's highest ever trading price —[70] and that selling right after the Disaster was imprudent in light of the strong downward pressure the event had on Massey's stock price, which as noted, was trading in the lower to mid 50s in the days before the explosion but had dropped precipitously in its aftermath. Given Massey's tarnished reputation, Inman and the rest of the Board were not convinced that remaining independent was the best course, and there was a growing consensus among the independent directors that it was time for Blankenship, who by this point had "been demonized by the media," to step down.[71] Inman and the rest of the Board further believed that they, and not Blankenship, should assume the central role in considering and negotiating a strategic transaction with a third party acquiror, like Alpha, which had a strong reputation in the industry for safety and which could right the troubled Massey ship.[72]

To that end, Inman initiated several actions in the fall of 2010 to make clear to Alpha and anyone else who was interested in acquiring Massey that Massey was open and willing to consider strategic combinations, regardless if Blankenship was not.[73] First, Inman, as lead independent director, had back channel conversations with Alpha

[70] Blankenship Dep. at 105, 122. Massey's stock price briefly hit an all-time high of $91.54 on June 30, 2008. That lofty price was short-lived. Massey's stock price was only $62.27 on May 30, 2008, and was back down to $65.96 by August 30, 2008.
[71] Inman Dep. at 120. Inman had had several discussions with Blankenship about Blankenship's retirement as early as two years before the explosion at Upper Big Branch, but had ended those conversations in the aftermath of the Disaster so as not "to signal any lack of confidence in him." *Id.* But by the summer of 2010, Inman had resumed discussions about Blankenship's retirement, this time with fellow independent director Robert H. Foglesong. *Id.*
[72] McAteer Report at 104.
[73] Inman Dep. at 102, 110, 115 ("The issue was not letting [Blankenship] drive the process of deciding what was best for the company, them being acquired or remaining independent.").

representatives, without Blankenship, in which Inman assured Alpha that despite what Blankenship was saying, the Board was open and willing to consider strategic alternatives to a stand-alone plan.[74] For instance, Inman held a telephone call with Crutchfield on September 30, 2010 in which Inman urged Crutchfield to continue the dialogue about a strategic transaction between the two companies, and further emphasized that the decision about whether to proceed with a transaction was for the Board, not Blankenship, to make.[75] Second, on October 12, 2010, Inman called an executive session of the independent directors. The independent directors, representing a majority of the Board, unanimously resolved to establish a strategic alternatives review committee consisting of independent directors Inman and Richard M. Gabrys, as well as Massey's President and director Baxter F. Phillips, to consider Massey's strategic opportunities and further to make recommendations to the full Board about potential transactions.[76] Thus, the committee notably excluded Blankenship and instead included his subordinate. The strategic alternatives review committee retained Perella Weinberg Partners LP as its financial advisor.[77]

By the middle of October, Wall Street had gotten a whiff of what was going down between Alpha and Massey, and as a result of an October 19, 2010 article published in the Wall Street Journal, it became public knowledge that Massey was open to expressions

[74] *Id.* at 102-03.
[75] *Id.* at 103-06.
[76] Proxy at 72.
[77] *Id.* at 73.

of interest to engage in a business combination transaction.[78] One senses that the Massey Board was pleased with this, as it helped buttress Massey's stock price — which rose substantially — and created an incentive for rivals like Alpha to emerge and pay a higher price.[79]

On November 20, 2010, the independent directors met for dinner before the full Board's regular fourth quarter meeting scheduled for the next three days and were given a preliminary report by the Advisory Committee on the progress of its work.[80] The Advisory Committee relayed its observations that Massey's existing safety protocol across all mines at Massey was suboptimal, and further indicated its own concerns about Blankenship's continued employment as CEO given his demonization by the media and elected officials as a result of his defiant public profile,[81] brought further to prominence by a November 2010 press conference at which Blankenship again lambasted the MSHA.[82] The Board went so far as to have Inman express the independent directors' "unanimous view" to Blankenship that he ought to "stop his public assaults on [the] MSHA," a message that caused Blankenship, who was used to having his way when it came to deciding the course of Massey's public image, to become "exceedingly

[78] AX-4; DX-38 (Email from Hendriksen to Blankenship regarding Wall Street Journal article (October 20, 2010)); *see also* Fischel Aff. ¶ 9 (citing October 19, 2010 Wall Street Journal article).
[79] Indeed, Massey's stock price jumped from $30.77 on September 1, 2010 to $42.07 on October 29, ten days after the Wall Street Journal published its article on Massey's interest in doing a deal.
[80] Inman Dep. at 179-80.
[81] *Id.* at 182.
[82] *Id.* at 125.

distressed."[83] The Advisory Committee further relayed to the Board that it was not yet in the position to make recommendations about the pending Derivative Claims and their merit.[84]

At the quarterly Board meeting on November 21, Blankenship presented his 5-year strategic stand-alone plan for Massey.[85] Blankenship also expressed his continued dissatisfaction with what he perceived were "constraints" on his ability to "run the company as he wanted" and to continue his public fight with the MSHA.[86] Blankenship's long-time supporter, Inman, told Blankenship he should consider retiring if he was not comfortable with the situation.[87] Blankenship acceded, and the Board instructed counsel to draft a severance agreement, which when finalized, ultimately permitted Blankenship to receive roughly $12 million in severance.[88]

Later that same evening, on November 21, the strategic alternatives review committee met at a special Board meeting, at which Perella Weinberg presented the alternatives under consideration, including its view on the viability of Massey's stand-alone plan.[89] The strategic alternatives review committee instructed Perella Weinberg to solicit bids from Alpha, as well as three other potential strategic acquirors that had expressed an interest in acquiring Massey in the past, ArcelorMittal, S.A., Arch Coal, Inc., and WuSan International Steel. Perella Weinberg did so, and instructed the

[83] *Id.*
[84] PX-63 at 5.
[85] DX-10 ("Minutes of a regular meeting of the board of directors of Massey Energy Company held on Sunday, November 21").
[86] Inman Dep. at 130.
[87] *Id.*
[88] Compl. ¶ 138.
[89] DX-46 (Presentation Slides of Perella Weinberg (November, 21, 2010)) at 51.

potential acquirors, including Alpha, to submit their bids by December 10, 2010.[90] The Massey Board issued a formal press release on November 22, 2010 stating that although "there can be no assurance that this process will lead to the approval or completion of any transaction," it had "engage[d] in a formal review of strategic alternatives."[91] This provided another clear signal to any potential buyer that Massey was open to bids.

The Board then held a meeting on December 3, at which time it presented Blankenship with the proposed severance package, which Blankenship signed. Blankenship left both his position as CEO and as a Massey director that day.[92] The Board then appointed Phillips to the position of CEO.

On December 10, 2010, Arch submitted its initial bid of 1.535 Arch shares plus $21.60 in cash for each Massey share which, on the basis of the closing price of Arch's stock on that date, represented $70.89 for each Massey share.[93] One day later, Alpha submitted its revised bid of 1.05 shares of Alpha stock plus $5.00 in cash for each Massey share, which represented an implied purchase price of $60.51 per Massey share based on the December 10, 2010 closing price of Alpha's stock.[94] ArcelorMittal and WuSan never came through with bids.

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[90] Proxy at 75.
[91] DX- 48 (Massey Press Release (November 22, 2010)).
[92] Proxy at 76.
[93] DX-42 ("Project Mountain: Proposal Discussion Materials" (December 14, 2010)).
[94] DX-11 (Letter from Alpha to Massey (December 11, 2010)).

By January 3, 2011, both Alpha and Arch, the only two remaining bidders, had signed confidentiality and standstill agreements with Massey and commenced due diligence.[95]

The Board met on January 14 for a presentation by Perella Weinberg, and determined that the synergies that could be achieved through a combination with Alpha exceeded those that were possible or likely with Arch.[96] At the time of the meeting, Perella Weinberg advised the Board that as of January 12, 2011, the Alpha bid represented an implied purchase price of $74.70 and that Arch's bid was valued at $74.99.[97] The Board once again also considered Massey's stand-alone prospects and whether they were more favorable than the third-party offers. Perella Weinberg opined on the basis of a discounted cash flow analysis that both the Alpha and Arch bids materially exceeded the $68 per share price that represented, in its view, the "upper reach of what [Massey] could achieve" as a stand-alone entity.[98] Thus, Perella Weinberg concluded that Phillips' view that Massey's stock price could reach somewhere between $71 and $97 per share *by 2013* was overly optimistic[99] and was dependent on the market giving Massey the same multiple applied to competitors who did not have the cloud

[95] PX-87 (Confidentiality Agreement between Massey and Alpha (January 3, 2011)); Proxy at 79.
[96] Proxy at 81; Gabrys Aff. ¶ 9.
[97] DX-51 ("Project Mountain: Presentation to the Board of Directors" (January 14, 2011)).
[98] Inman Dep. at 213.
[99] Of course, if Massey stockholders received $74.70 from Alpha, largely in Alpha stock, they could also see that value grow if Alpha — which had a good reputation — was able to produce good results from the post-Merger Alpha.

caused by the Upper Big Branch Disaster over them.[100] In addition to Perella Weinberg's advice, the Board took into account that Massey had in the past rarely ever reached or exceeded its own projections.[101] Moreover, given the scrutiny that the company was facing in the wake of the Upper Big Branch Disaster and the challenge of changing regulatory and market perceptions of the company's competence and integrity, the Board saw the attainment of the top range of values Phillips suggested were available under a stand-alone option as difficult and doubtful, even with the departure of Blankenship. Thus, the Board concluded that a strategic transaction was the better route, and advised Perella Weinberg to instruct both Arch and Alpha to submit their best and final bids by January 24, 2011.[102]

Both Arch and Alpha submitted their final proposal on January 24, 2011. Arch dropped out of the running by reducing its bid to $55.50.[103] Despite that loss in leverage, the Board was able to negotiate a further increase in Alpha's already higher bid. Thus, Alpha's final bid was 1.025 Alpha shares plus $10.00 in cash for each Massey share.[104] This bid represented $69.33 per share based on Alpha's January 26, 2011 closing stock

[100] PX-67 (Massey Energy, Board of Directors Meeting on Strategic Plan Meeting Slides (December 20, 2010)); DX-12 (Email from Grinnan to Adkins (December 17, 2010)).
[101] *E.g.*, Inman Dep. at 160-61 ("[O]ver the last ten years of watching, Massey had almost never reached its projected goals."). Although the testimony that the Board viewed its own management's estimates skeptically is plausible given Massey's prior performance, it must be noted that the same directors who gave that testimony continued the same management in office for years, despite all the legal and safety troubles and despite viewing that management as unable to deliver on their promised numbers. This inconsistency gives color to the plaintiffs' view that the Massey Board was under Blankenship's thumb for many years.
[102] Proxy at 81.
[103] DX-54 (Letter from Arch to Perella Weinberg (January 26, 2011)) at 1.
[104] Proxy at 83.

price, a 25% premium to Massey's closing stock price on the same day of $55.26,[105] a 95% premium to Massey's last closing price before the October 19, 2010 Wall Street Journal article[106] reporting that Massey was exploring strategic transactions, and a 27% premium to Massey's stock price immediately preceding the explosion at the Upper Big Branch mine.[107] On January 27, the Board met and unanimously approved the Merger Agreement.[108]

The plaintiffs do not seriously contend that the sales process that the Board undertook was flawed in the sense that the Board breached its fiduciary duties in running the sales process, or in executing a Merger Agreement with unreasonable deal protection devices. Because the plaintiffs' talented and diligent counsel did not make any substantial argument in support of theories of this kind, I do not burden the reader with explaining why arguments that were not made will not sustain an injunction.

Nor have the plaintiffs come close to establishing a reasonable probability of success on the merits on their claim that the Massey directors breached their fiduciary duties by failing to disclose all material information in the definitive proxy statement. To a large extent, the plaintiffs merely seek to have the defendants make self-flagellating

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[105] *Id.*

[106] Fischel Aff. ¶ 9.

[107] I also note that had the Massey stock simply tracked the performance of the S&P 500 from the time the market closed on April 5, 2010 (the date of the Upper Big Branch Disaster) until the time the market closed on January 28, 2011 (the date the Massey Board signed the Merger Agreement), the Merger price calculated on January 28, 2011 still represented a premium of about 17.9% to the closing price of Massey stock on that date. A similar result is obtained if the Massey stock is assumed to have tracked the Dow Jones Industrial Average, in which case the premium on January 28, 2011 would have been about 17.7%. If the Massey stock tracked the better performing Dow Jones United States Coal Index, the deal price would still have represented a modest premium of about 6.9% on January 28, 2011.

[108] Proxy at 84.

disclosures about their alleged subjective motivations, a desire that does not support a disclosure claim.[109] The only disclosure issue the plaintiffs really focus upon is whether the proxy statement characterizing the Board's consideration of the Derivative Claims in

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[109] FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 17.10[C] at 17-26 (3d ed. 2009) ("[D]irectors need not engage in self-flagellation by admitting alleged corporate wrong-doing prior to an actual adjudication of the challenged conduct by a court of law.") (citing *Brody v. Zaucha*, 697 A.2d 749, 754 (Del. 1997); *Louden v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 145 (Del. 1997)). Specifically, the plaintiffs cannot plausibly argue that the proxy statement fails to disclose that the Board made its decision to sell the company because of the Advisory Committee's interim report given at the dinner meeting on November 20, 2010 ahead of its quarterly meeting held November 21-23. According to the plaintiffs, until the Board received the Advisory Committee's interim report, it had not committed to selling the company. Pl. Op. Br. at 24. But after the Advisory Committee told the Board that it had come to the preliminary conclusions that (i) Massey's existing safety operations were inadequate and needed to be overhauled; and (ii) that a change in top management, most notably a change in the CEO, was "required to rebuild [Massey's] reputation, regain the confidence of shareholders, regulators and public officials, and be in a position to enhance [Massey's] safety and compliance performance," the Board supposedly "realized Blankenship had to go" and, more importantly, rushed to sell the company for fear of liability on the Derivative Claims. Pl. Op. Br. at 24-25 (citing PX-63). I reject that argument as not being borne out by the record. By the time of its meetings on November 20 and 21, the Board was already aware that Blankenship had to go, and had discussed his retirement with him before the Advisory Committee was even formed. Inman Dep. at 120; Phillips Dep. at 204. The plaintiffs' theory that somehow the Advisory Committee's interim report, in which it admitted it had come to no conclusion about the merit of the Derivative Claims and would require at least three additional months to do so, caused the Board to go into crisis mode and rush to sell the company for fear of derivative liability is not a theory that that this record supports. For starters, Inman and the other independent directors had already been interested for some time in seeing if a strategic transaction might make sense as the best way for Massey to maximize value in a bad situation, and Inman had been in contact with Crutchfield and others at Alpha as early as September 2010 to emphasize the Board's willingness to consider a transaction, notwithstanding Blankenship's view that a transaction was not in the company's best interests. Inman Dep. at 100-06. Likewise, the fact that the Board decided to table the Advisory Committee's suggestion for a Blue Ribbon panel of safety experts seems to have been a decision based on the reality that Massey was in the midst of a strategic review process and such a panel could be a counterproductive deterrent to would-be acquirors, not one made because the Board was scared of the personal consequences if the Advisory Committee completed its work. Moreover, the Advisory Committee itself appreciated the Board's concern over the establishment of a Blue Ribbon panel at that sensitive time. PX-63 at 6, 10. That the Board took until January 27, 2011 to finalize a deal with Alpha, consider other bids, and bargained hard to get a good deal, also belies any hurried rush to merge so as to avoid either the outcome of a Blue Ribbon report, the Advisory Committee's own determination as to the Derivative Claims, or the procession of the derivative suits themselves.

its deliberations fairly describes what might happen to the Derivative Claims as a result of the Merger with Alpha. As will become clearer in the next section in which I discuss the Board's handling of the Derivative Claims in its Merger deliberations, the weight given to the Derivative Claims by the Massey Board is fairly and accurately described.[110] Moreover, the proxy statement makes clear that a vote for the Merger would likely result in control over the Derivative Claims passing to Alpha along with Massey's other assets:

> Although the underlying [D]erivative [C]laims against current and former Massey directors and officers would survive the closing of the [M]erger, the Massey [B]oard of directors has been advised (and for purposes of voting on the Merger stockholders should assume) that the plaintiffs in those pending cases would lose their standing to continue their suits on those [C]laims. If the [D]erivative [C]laims are not resolved prior to the effective time of the [M]erger, Alpha expects that the Alpha board of directors will consider whether to pursue these [D]erivative [C]laims. If . . . the Alpha board of directors determines not to pursue the [D]erivative [C]laims, current Massey stockholders who become Alpha stockholders may make a demand on the Alpha board of directors to pursue the underlying [D]erivative [C]laims or demonstrate to a court the futility of making a demand on the Alpha board. . . . Moreover, while recovery, if any, on the [D]erivative [C]laims obtained in the absence of the [M]erger would benefit only Massey, and indirectly as a result, its stockholders, if the [D]erivative [C]laims are successfully pursued following the effective time of the [M]erger, any recovery from them will benefit Alpha, and Massey stockholders will only own 46% of Alpha as a result of the [M]erger.[111]

Therefore, no Massey stockholder will vote for the Merger under the mistaken belief that the benefit of the Derivative Claims will belong only to the current Massey stockholders if the Merger closes. If a stockholder shares the plaintiffs' view and believes that Massey will do better by remaining independent and suing its fiduciaries, she can vote no.

[110] Proxy at 78.
[111] *Id.* at 50.

D. The Board's Consideration Of The Derivative Claims In The Merger Negotiations

Because the Board's treatment of the Derivative Claims in the Merger negotiation process is so central to the plaintiffs' motion, I discuss that subject separately now.

As noted, the Advisory Committee gave the Board a report on the status of its work at the Board's dinner meeting on November 20, 2010, in which it advised the Board that it had not come to any conclusion with respect to whether the Derivative Claims against the directors and management were meritorious and should therefore be pursued.[112] One month later, on December 20, 2010, the Board met for a special meeting at which its outside legal counsel, Cravath, was present.

As is disclosed in the proxy statement,[113] Cravath advised the Board that although it was unclear whether a business combination would affect the pending Derivative Claims, the Board should assume that the Derivative Claims would survive a combination such as the one that was being discussed with Alpha and Arch.[114] Cravath further advised the Board that such survival should not play any role — one way or the other — in their deliberations about whether or not to approve a potential business transaction.[115] The obvious purpose of this advice was to make sure that the Board did not improperly consider their personal interests as defendants in derivative suits asserting the Derivative Claims when deciding whether the Merger was in Massey's best interests. All of the Board were defendants in those actions other than Advisory Committee

[112] PX-63 at 5.

members Holland and Welty. Thus, Cravath wished to make sure that the Board considered the Merger without regard to its effect on themselves.

But, the reality is that Cravath was the same law firm that was representing the Massey Board in defense of the Derivative Claims. It was therefore an awkward source of advice for the Board in considering what consideration, if any, to give to the Derivative Claims in negotiating the Merger. No doubt the better practice would have been for the Advisory Committee to have had its own independent counsel, Weil Gotshal, provide the Board with advice on this subject.

One additional facet of the record that bears mention is the extent to which Cravath was clear in informing the Board just what "survival" of the Derivative Claims in this context meant. That is, the Massey directors' testimony does not uniformly manifest the understanding that in the event that Massey was acquired, the Derivative Claims themselves would likely pass, as all assets would, to the third-party acquiror, thus extinguishing the Massey stockholders' standing to continue the Derivative Claims solely for the benefit of the Massey stockholders.[116] This possible confusion may well explain the record's clarity on the point that the Massey Board did not engage in a valuation of the Derivative Claims individually, and at most assumed either that their value was baked

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[113] Proxy at 78.
[114] Phillips Dep. at 298; Inman Dep. at 43-44; PX-61 (Minutes of a Special Meeting of The Board of Directors of Massey Energy Company (December 20, 2010)) at 4; PX-68 (Email from North to Rolfe (October 21, 2010)).
[115] Proxy at 78; Phillips Dep. at 298-99.
[116] Inman Dep. at 44 (Q. "Who to your understanding would be prosecuting with the [derivative] case [after the [M]erger with Alpha]? A. "I haven't a clue.").

into the total purchase price to be paid by an acquiror, or that the Derivative Claims had no independent value to an acquiror.[117]

The plaintiffs make much of this gap and the failure of the Board to receive a valuation of the Derivative Claims as an "asset" of Massey for which value should be paid by Alpha or Arch. For reasons I later explain, I do not perceive this void as being poorly motivated. No rational inference emerges from the record that the Board or its advisors viewed the Derivative Claims as being valuable or something a rational acquiror would pay for, except in the sense of having some value in potentially reducing the Disaster Fall-Out that any acquiror of Massey would assume. Likewise, despite an aspect of the record I soon discuss, I perceive no basis to infer that the Massey Board members were secretly harboring a fear for their net wealths because of the pending Derivative Claims, and viewed the transaction as a way to ease those fears. The record simply does not surface such a motivation, and the fiduciary most targeted by the Derivative Claims, Blankenship, left the Board on December 3, 2010 and was not a fan of selling the company.

Thus, although it would have been better for the Board to have received clearer advice from a more independent source, the Board's ultimate decision about whether to sign the Merger Agreement does not seem to have been influenced in any material manner by a desire to limit the Board's exposure to the Derivative Claims. Of course, none of this is to say that the Disaster did not play into the Board's evaluation of Massey's value, both for purposes of negotiating a deal and for evaluating Massey's

[117] Phillips Dep. at 302-03.

stand-alone potential. Massey faced a large credibility deficit following the Upper Big Branch Disaster, and its stock price had suffered as a result. The Board rightly saw a combination with a third-party acquiror with a good reputation for safety, like Alpha, as an opportunity to change the dynamic at Massey in a plain way.

In reaching my conclusions about the effect of the Derivative Claims on the board's deliberative process, I have carefully considered the plaintiffs' argument that a January 2011 draft of the Merger Agreement, written by Cravath, supports the inference that the Board sought to sell the company to avoid personal liability for the Derivative Claims. At a dinner meeting between the two CEOs on January 11, Crutchfield relayed to Phillips his belief that the draft's indemnification provision that arguably required Alpha to indemnify the Massey directors and management for "willful acts of misconduct," was "obnoxious."[118] In fact, however, "willful acts of misconduct" was Crutchfield's lay description of what the draft merger agreement actually provided.[119] The Cravath draft did not use that term at all. Rather, the draft Cravath sent to Alpha was one that required Alpha to indemnify the Massey defendants for any claim asserted against them in their capacity as Massey directors or officers "to the fullest extent permitted by Law."[120] Alpha's counsel flagged this as something that would need to be changed in any definitive merger agreement because the draft merger agreement's indemnification provision arguably could have allowed Alpha, because it was a third-

[118] PX-52.
[119] Crutchfield Dep. at 192.
[120] DX-50 (First Draft Merger Agreement by Cravath, Swaine & Moore (January 10, 2011)) § 5.05(b).

party and not Massey itself, to indemnify former Massey management and directors beyond the extent Massey itself would have been permitted under Delaware public policy and statutory law. To wit, Crutchfield's advisors must have told him that the draft arguably could have required Alpha to indemnify Massey fiduciaries for breaches of the fiduciary duty of loyalty involving scienter, such as claims involving willful misconduct. Massey conceded this point in the negotiations, and the issue was resolved when both parties agreed to an indemnification provision that would require Alpha to indemnify the Massey directors and officers, "from and after the Effective Time,"[121] only "to the fullest extent [Massey] would have been permitted to do so under applicable Law (for the avoidance of doubt, subject to the limitations on [Massey's] ability to indemnify its directors and officers under Section 145 of the DGCL)."[122] Thus, Alpha's obligation to indemnify was expressly limited by the extent to which Massey itself could have legally indemnified the Massey directors and officers had it remained independent — limitations that precluded Massey from indemnifying its fiduciaries for derivative settlements or judgments, bad faith misconduct, or other wrongdoing involving scienter.[123] Massey, for

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[121] Merger Agreement § 1.03 ("The date and time [on which the Certificate of Merger is filed with the Secretary of State of Delaware or the date on which the parties agree in the Certificate of Merger] is referred to as the 'Effective Time'.").

[122] Merger Agreement § 5.05(b); Crutchfield Dep. at 192.

[123] 8 *Del. C.* §§ 145(a), (b); *see also* FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 4.12 (3d ed. 2009) ("It is important to keep in mind the distinctions between indemnification with respect to third-party actions and indemnification with respect to derivative actions. Section 145(b) permits indemnification *only of expenses* in derivative suits and *does not authorize indemnification of judgments or amounts paid in settlement* in derivative suits.") (emphasis in original); § 4.12 ("Section 145(a) permits indemnification of officers, directors, employees, or agents for attorneys' fees and other expenses, as well as judgments or amounts paid in settlement in civil cases. Section 145(a) applies only to third-party actions--not to actions brought by or in the right of the corporation.

its part, as an Alpha subsidiary, would continue, too, to maintain its current obligations under its certificate of incorporation existing at the time of the Merger to indemnify Massey directors and officers.[124] Massey's certificate of incorporation already guaranteed its directors and officers legally maximal advancement and indemnification rights. Massey's certificate also contained an exculpatory provision authorized by 8 *Del. C.* § 102(b)(7).

As a result, the final Merger Agreement only had Alpha provide a guarantee that Alpha would accord the Massey directors and officers with the same protection they were afforded by Massey's certificate of incorporation. This did not immunize Massey directors or officers from liability to Massey or Alpha for non-exculpated breaches of fiduciary duty that harmed Massey. Although this exchange adds color to the plaintiffs' view that the directors were worried about personal liability for the Derivative Claims, I do not perceive it as skeptically as they do. It is typical for counsel for a seller to bargain for indemnity and the Cravath draft, although having an arguably unsavory effect, was amended when the problem with it was pointed out and, more important, there is no evidence that the Massey Board itself urged that this aggressive position be taken.

The person seeking indemnification *must have acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation*. In criminal cases, indemnitees may be indemnified for fines and costs if, in addition to the foregoing standard of conduct, they did not have reasonable cause to believe their conduct was unlawful.") (emphasis added) (internal citations omitted).

[124] *Id.* § 5.05(a).

IV. Analysis

A. Procedural Standard

In order to succeed on their preliminary injunction motion, the plaintiffs must demonstrate: (i) a reasonable probability of success on the merits; (ii) that they will suffer irreparable injury if an injunction does not issue; and (iii) that the balance of the equities favors the issuance of an injunction.[125]

B. The Plaintiffs Fail To Establish That They Have A Reasonable Probability Of Success On The Merits

In determining whether the plaintiffs have demonstrated a reasonable probability of success on the merits, I take into account the unusual context presented. As indicated, the major issue here is whether the defendants breached their fiduciary duties by entering into a Merger Agreement with Alpha that did not secure full value for the Derivative Claims. The plaintiffs argue that because a majority of the Massey Board was named as defendants in the Derivative Claims, the Merger itself is subject to the entire fairness standard. Moving beyond their standard of review argument, the plaintiffs say that the Merger price is materially suspect because of the Board's failure to value the Derivative Claims. In so arguing, the plaintiffs essentially embrace the holding of the Supreme Court's decision in *Parnes v. Bally Entertainment Corp.*,[126] which permits a plaintiff to attack a merger directly if the target board agreed to a materially inadequate, and therefore unfair, price because the price did not reflect the value of certain assets — in

[125] *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998).
[126] 772 A.2d 1243 (Del. 1999).

this case, the Derivative Claims.[127] The plaintiffs claim that this is such a situation and that the Merger consideration is materially inadequate because Alpha is not paying fair value for the Derivative Claims, which the plaintiffs suggest are worth over $1 billion by equating their worth to the total harm worked to Massey by the Upper Big Branch Disaster, i.e., the Disaster Fall-Out.

The Massey defendants' papers have not been as helpful as they might be in addressing this argument because they depend largely on the strained notion that there is no reason to think that any Derivative Claim against a Massey director or officer could survive a pleading challenge, much less provide a basis for ultimate liability. That notion is not one, as I shall indicate, that I accept as resting on a realistic appraisal of the record. More helpful are their other arguments, which are buttressed by more realistic and balanced arguments by Alpha about the Derivative Claims, that focus on the facts regarding the process leading to the Alpha Merger and the reality that the consummation of the Merger does not end the Massey defendants' exposure to derivative liability.

To begin my consideration of whether the plaintiffs have demonstrated a reasonable probability of success on the merits that the defendants breached their fiduciary duties by entering into the Merger Agreement with Alpha, I note that there is some force to the plaintiffs' argument that the entire fairness standard applies because a

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[127] *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243 (Del. 1999); *see also Golaine v. Edwards*, 1999 WL 1271882, at *6 (Del. Ch. Dec. 21, 1999) ("As I read [*Parnes*], it says that if the side transactions were not so costly that they enable the plaintiffs to allege that the consideration offered to the target stockholders was reduced to an unfair level, then a price attack on them must be labeled derivative and extinguishable by the merger. If the side transactions are alleged to have reduced the consideration offered to the target stockholders to a level that is unfair, then an attack is labeled as individual because it goes directly to the fairness of the merger.").

majority of the Massey Board faced a substantial likelihood of liability on the basis of the Derivative Claims, the Merger could be perceived as lessening the chances for prosecution of those Claims, and thus the Merger could be seen as according to Massey directors a benefit that is not shared equally with other Massey stockholders.[128]

But, for reasons I now explain, I am not persuaded that the Massey directors are likely to be found to have committed any more than a breach of the duty of care in their negotiation of and entry into the Alpha Merger. Before focusing specifically on the Derivative Claims' role in the Merger itself, I note again that the Massey Board and its advisors appear to have exercised reasonable, good faith efforts to get as favorable a deal as they could extract from Alpha. Contrary to what the plaintiffs say, I do not draw the inference that the Board rushed into the arms of Alpha in order to end the Derivative Claims. Rather, the Board took its time, compared what could be achieved for the Massey stockholders from remaining independent to merging with someone else like Alpha, and reached a reasoned determination that a merger with Alpha was in the best interests of the Massey stockholders. Throughout the process, the Massey Board appears to have bargained hard to get a good price and obtained a value that seems quite respectable when considered in view of the best estimates of Massey's discounted cash flow stand-alone value[129] and in light of other market transactions.[130]

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[128] Pl. Op. Br. at 36-37 (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983)).
[129] Inman Dep. at 213.
[130] Fischel Aff. ¶ 10; Ex. D ("Premiums Paid in Completed Precedent Transactions January 1, 2008-April 14, 2011").

With that foundation in mind, I now focus specifically on whether the Board likely breached its fiduciary duties and entered an unfair Merger Agreement by failing to secure the purported value of the Derivative Claims for the Massey stockholders. As will be seen, even if the Massey defendants face a non-frivolous threat of personal liability because of the Derivative Claims and would bear the burden to show that their actions were entirely fair in connection with the Merger, I am not convinced that after trial the defendants would likely fail to show that the Merger was economically fair to Massey's stockholders. But of course, that need and does not mean that the Board and its advisors addressed the Derivative Claims in an ideal manner.

1. The Derivative Claims Likely Do State A Claim For Director Oversight Liability Under *Caremark*

In concluding that the Massey defendants' conduct did not likely result in an unfair Merger price, I begin by accepting a proposition of the plaintiffs that the defendants themselves, understandably, do not. That is that the plaintiffs in the pending derivative actions asserting the Derivative Claims have pled a non-frivolous claim that independent members of the Massey Board have engaged in non-exculpated breaches of fiduciary duty that can be proximately linked to the Upper Big Branch Disaster. That is even more the case as to current Massey director, Inman, and former Massey director and CEO, Blankenship, given their more intensive role in Massey's management.

The plaintiffs acknowledge that the Derivative Claims center on the allegation that directors and officers of Massey breached their fiduciary duties by failing to make a good faith effort to ensure that Massey complied with applicable laws designed to protect the safety of miners.[131] In particular, the plaintiffs allege that Blankenship knowingly flouted applicable miner safety laws, believing he knew better about how to run mines safely than the MSHA, and more blatantly, made the conscious choice to put miners at risk in order to cut cost-corners and up mining profits. The plaintiffs thus allege that Blankenship himself, and others on his management team, fostered a business strategy expressly designed to put coal production and higher profits over compliance with the law. The plaintiffs argue that Blankenship did not hide his disdain for the company's regulators and caused Massey to take an openly aggressive attitude with the MSHA. Even after Massey had already pled guilty to criminal charges for willful violations of mining safety laws and falsification of evidence, settled a claim with the Environmental Protection Agency for a record sum, and suffered a punitive damages award for firing a whistleblower, Blankenship publicly stated that the idea that governmental safety regulators knew more about mine safety than he did was silly.[132]

The plaintiffs allege that the independent directors of the Massey Board did not make a good faith effort to ensure that Massey complied with its legal obligations. Rather than respond to numerous red and yellow flags by aggressively correcting the management culture at Massey that allegedly put profits ahead of safety, the Board allowed itself to continue to be dominated by Blankenship. Although the defendants point to a lot of motion by the independent directors, some of which resulted from a 2008 court-ordered settlement, the plaintiffs in turn point to evidence creating a plausible

[131] Pl. Op. Br. at 31-34; Compl. ¶¶ 191-195.
[132] PX-25.

inference that the independent directors of Massey did just that — go through the motions — rather than make good faith efforts to ensure that Massey cleaned up its act. Notably, the plaintiffs point to evidence that in the wake of pleading guilty to criminal charges and suffering liability for numerous violations of federal and state safety regulations, Massey mines continued to experience a troubling pattern of major safety violations.[133] But, instead of using their supervisory authority over management to make sure that Massey genuinely changed its culture and made mine safety a genuine priority, the independent directors are alleged to have done nothing of actual substance to change the direction of the company's real policy. In support of that argument, the plaintiffs cite to evidence that Massey was experiencing an increase in 2008 and 2009 in the number of violations of safety regulations;[134] that Massey was continuing to engage in adversarial tactics toward the MSHA;[135] that important safety rules were regularly flouted;[136] that increases in violations assessed to the company were attributed to improper political motives on the part of regulators rather than genuine concerns about mine safety;[137] and, perhaps most

[133] PX-8 (MSHA, Summary of Citations and Orders Issued to Massey Energy) (showing that the total number of MSHA-imposed citations for violations of safety regulations rose in 2009 in comparison to 2008).
[134] PX-13; PX-14 at 4; PX-15 (Letter from CtW Investment Group to Massey stockholders (April 29, 2010)); PX-19 ("U.S. Closed Massey Mine 61 Times Since January 2009," BLOOMBERG (April 9, 2010)) (noting that the number of violations cited by MSHA in 2009 doubled from the previous year); PX-26 ("Safety Violations at Massey Mines Skyrocket: 130 in Week Since Accident," HUFFINGTON POST (April 15, 2010)) (reporting on the basis of MSHA records that the MSHA cited 130 "significant and substantial" violations at "dozens of Massey's mines from April 6 to April 14 [2010] . . . . [and that this number] . . . exceeds the number of violations found at those same mines for the *entire* month of March [2010]") (emphasis in original).
[135] *E.g.*, PX-3; PX-11 ("Mines Avoid Crackdowns by Challenging Safety Citations," THE WASHINGTON POST (April 10, 2010)).
[136] *E.g.*, PX-23; McAteer Report.
[137] *E.g.*, PX-25.

damning of all, to the McAteer Report's conclusion that the Disaster at Upper Big Branch was caused not by a freak and unavoidable accident, but instead by a corporate culture premised on the view that the company's management knew better than the law about what was necessary to run safe mines.[138]

In the limited amount of time I have had to consider this preliminary injunction motion, it would be hazardous and imprudent to make any broad pronouncements on the ultimate fate of the plaintiffs' Derivative Claims. But, I believe that I can safely say the following.

Although the ultimate ability of the plaintiffs to prove that the Massey directors and officers breached their fiduciary duty by knowingly failing to discharge their duty to try to make sure that Massey complied with its legal obligations is difficult to predict,[139] there seems little doubt that a faithful application of the plaintiff-friendly pleading standard would preclude a dismissal of their claims at the pleading stage. In their injunction papers, the Massey defendants have pointed understandably to evidence that the Massey Board was involved in considering safety issues in the period leading up to the Upper Big Branch Disaster and had taken steps to improve the company's safety record.[140] In particular, they tout the reality that there was evidence on some metrics that Massey had improved its safety record so that it was in the great middling of American

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[138] McAteer Report.

[139] Indeed, as the court observed in *Caremark*, a claim that directors are liable for employee failures is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996).

[140] Def. Ans. Br. at 14-19.

coal operators in terms of committing violations of mining safety laws.[141] The independent directors say they were actually heartened by some metrics of Massey's improved safety performance and the fact that although Massey's level of violations was increasing markedly, including so-called "serious and substantial" violations, this was simply because the MSHA had stepped up its enforcement efforts across the coal mining industry.[142]

At a trial when a crucial issue would be the state of mind of each individual defendant charged with a *Caremark* violation, these arguments would require careful consideration. At a pleading stage, however, they are of little moment in light of the particularized facts pled by the plaintiffs. Despite the straw man arguments of certain academics,[143] Delaware law does not charter law breakers. Delaware law allows corporations to pursue diverse means to make a profit, subject to a critical statutory floor, which is the requirement that Delaware corporations only pursue "lawful business" by "lawful acts."[144] As a result, a fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law.[145]

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[141] Def. Ans. Br. at 17 (citing PX-85 for proposition that Massey's "Violations Per Inspection Day" 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).").
[142] Crawford Aff. Ex. F ("Minutes of a Regular Meeting of the Board of Directors of Massey Energy Company Held on Monday, February 16, 2009") at 9.
[143] *E.g.*, Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 16 (2006) (arguing that a fiduciary can act "loyally" toward a Delaware corporation while consciously causing the corporation to act illegally and ignoring that Delaware corporations are only permitted by state charter to undertake lawful business by lawful means).
[144] *See, e.g.*, 8 *Del. C.* § 101(b) ("A corporation may be incorporated or organized under this chapter to conduct or promote any *lawful* business or purposes, except as may otherwise be provided by the Constitution or other law of this State.") (emphasis added); 8 *Del. C.* § 102 ("It shall be sufficient to state [in a corporation's certificate of incorporation], either alone or with

Regrettably, a myriad of particularized facts have been pled that create a pleading-stage inference that the top management of Massey did just that. The objective facts are that Massey had pled guilty to criminal charges, had suffered other serious judgments and settlements as a result of violations of law, had been caught trying to hide violations of law and suppress material evidence, and had miners suffer death and serious injuries at its facilities. Instead of becoming a corporation with a new attitude and commitment to safety that won recognition for that change from its regulators, Massey continued to think it knew better than those charged with enforcing the law, and in fact, often argued with the law itself.[146] Following that continued period of adversarialness, the Upper Big

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other businesses or purposes, that the purpose of the corporation is to engage in any *lawful* act or activity for which corporations may be organized under the General Corporation Law of Delaware, and by such statement all *lawful* acts and activities shall be within the purpose of the corporation . . . .") (emphasis added); *see also* Leo E. Strine, Jr. et. al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 649 (2010) (citing ROBERT CHARLES CLARK, CORPORATE LAW § 1.2, at 18 (1986) (stating that a corporation's purpose is to "maximize the value of the company's shares, subject to the constraint that the corporation must meet all its legal obligations to others who are related to or affected by it").

[145] *See, e.g., Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 131, 163-64 (Del. Ch. 2004) (holding that if directors engaged in unlawful bribery in order to obtain government permits, they had violated their "duty of loyalty" and further opining that "[u]nder Delaware law, a fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity"); *Guttman v. Huang*, 823 A.2d 492, 506 (Del. Ch. 2003) ("[O]ne cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey."); *see also* Leo E. Strine, Jr. et. al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 651 (2010) (citing *TW Servs., Inc. v. SWT Acquisition Corp.*, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989) (describing the duty of loyalty as requiring directors to attempt to "manage the corporation within the law, with due care and in a way intended to maximize the long run interests of shareholders")); 8 *Del. C.* § 102(b)(7).

[146] Massey ranked first among the entire coal industry in appealing MSHA citations, contesting 34% of its alleged violations in 2009, compared to an industry-wide average of just 27%. PX-11. The MSHA, in a United States Department of Labor briefing on the Upper Big Branch Disaster, observed that "[o]ne tactic used by mines with troubling safety records to avoid potential pattern of violation status [that would subject the mine to more intense regulatory scrutiny and allow the MSHA to order a withdrawal of miners wherever a significant and

Branch Disaster occurred, Massey miners have lost their lives at other facilities, and the MSHA has alleged that serious safety violations and an attitude of law-flouting has continued at other Massey facilities.[147]

To be plain, when a company already has been proven to have engaged in illegal conduct, it is a high risk strategy for it to embrace the idea that its regulators are wrong-headed and to view itself as simply a victim of a governmental conspiracy. Relatedly, when a company has a "record" as a recidivist, its directors and officers cannot take comfort in the appearance of compliance motion at the pleading stage, when the plaintiffs are able to plead particularized facts creating an inference that the Board and management were aware of a troubling continuing pattern of non-compliance in fact and of a managerial attitude suggestive of a desire to fight with and hide evidence from the company's regulators. As a kid, most of us are taught that it is not a good excuse to argue with the rules. Telling your parents that all the kids are getting caught shoplifting, cheating, or imbibing illegal substances is not, fortunately, a good excuse. For fiduciaries of Delaware corporations, there is no room to flout the law governing the corporation's affairs.[148] If the fiduciaries of a Delaware corporation do not like the applicable law, they

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substantial violation is found until it is remedied] is contesting large numbers of their significant and substantial citations. . . . [C]ontesting large numbers of significant and substantial violations enables operators with troubling safety records to avoid potential pattern of violation status." PX-18 at 4, 7.

[147] PX-18; PX-19; PX-2; PX-23 ("Massey Mine Workers Disabled Safety Monitors," NPR (July 15, 2010)); PX-26; PX-28 ("Documents Show Continual Dangers in West Virginia Mine," USA TODAY (April 14, 2010)).

[148] *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 650 (2010) ("For a corporate director knowingly to cause the corporation to engage in unlawful acts or activities or enter an unlawful business is disloyal in the most fundamental of senses.").

can lobby to get it changed. But until it is changed, they must act in good faith to ensure that the corporation tries to comply with its legal duties.

It may well be that after a trial, the Massey directors and officers will be found to have acted in a manner that does not subject them to liability under the *Caremark* standard. But for purposes of this motion, candor requires acknowledging that the plaintiffs have likely pled Derivative Claims that would survive a motion to dismiss, even under the heightened pleading standard applicable under Rule 23.1.

2. <u>The Plaintiffs Conflate The Value Of The Derivative Claims With The Loss In Massey's Stand-Alone Value In The Wake Of The Upper Big Branch Explosion</u>

The problem for the plaintiffs, however, is that my assessment that their Derivative Claims would survive a dismissal motion if Massey remained a stand-alone company does not equate to a belief on my part that those Claims are a material asset that Alpha is not paying fair value for in the Merger Agreement with Massey.

The plaintiffs make a plausible case that Massey, as a profit-making corporation, suffered a serious financial injury because of the Upper Big Branch Disaster and the market's perception in the wake of that Disaster that Massey's management approach was risky and that its cash generating potential should be accordingly discounted. As Massey's own public filings indicate, the company has already taken a charge to earnings of $166.6 million on account of the Disaster and will continue to suffer the loss of earnings from the Upper Big Branch mine itself,[149] as the company, as well as its hopeful acquiror, will have to be very careful about how it mines the Upper Big Branch reserves

[149] PX-32 (Massey Energy Company Annual Report (Form 10-K/A) (April 19, 2011)) at 8.

and will never again utilize the portals used by the lost miners.[150] Massey's costs in terms of fines and settlements on account of the Upper Big Branch Disaster and other issues relating to mine safety may well continue to mount. Because of Massey's track record, the market may also harbor the rational belief that Massey cannot run its mines both safely and profitably.

The plaintiffs' expert, David G. Clarke, totals up the lost value attributable to "the breaches of fiduciary duty by the Massey [B]oard of directors and officers alleged in the operative complaint" as being in the range of $900 million to $1.4 billion.[151] The problem for the plaintiffs is that Clarke is not measuring the value of their Derivative Claims. Clarke is instead measuring the aggregate negative financial effect on Massey that the Upper Big Branch Disaster and its Fall-Out has caused.

The Derivative Claims are at best a way for Massey to offset some of the Disaster Fall-Out by requiring Massey's directors and officers to indemnify the company. A period of extended study would be required to identify all the reasons why one cannot equate the offsetting value of the Derivative Claims with the Disaster Fall-Out. But even under time pressure, one can confidently say there is likely a very large gap between those values.

Begin with the reality that in the absence of an improper motive or facts showing self-interest, when management decisions do not turn out well and a company suffers a loss in profits (or a decline in its trading multiple), this does not ordinarily translate into

[150] Blankenship Dep. at 76; Crutchfield Dep. at 81.
[151] PX-94 (Expert Declaration of David G. Clarke) at 4.

any basis to hold corporate fiduciaries liable in damages.[152] An essential purpose of the business judgment rule is to free fiduciaries making risky business decisions in good faith from the worry that if those decisions do not pan out in the manner they had hoped, they will put their personal net worths at risk.[153] If it were to turn out here, for example, that the Massey directors and officers acted in a good faith belief that they were attempting to operate the company lawfully and safely, but that their good faith efforts at compliance did not succeed, the Derivative Claims would fail.[154]

That is so for several well understood reasons. In the first instance, the business judgment rule would itself act to preclude any claim based on simple negligence against the Massey directors in that capacity.[155] The Massey charter also includes an exculpatory charter provision insulating the directors from claims of even gross negligence. As a result, in order to receive a monetary judgment against the Massey directors and officers, the plaintiffs will have to prove that the directors and officers acted with scienter.[156] That

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[152] *Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1051 (Del. Ch. 1996).
[153] *Id.* at 1052.
[154] *Caremark*, 698 A.2d at 971 ("[O]nly a sustained or systematic failure of the board to exercise oversight — such as an utter failure to attempt to assure a reasonable information and reporting system exists — will establish the lack of good faith that is a necessary condition to [director oversight] liability.").
[155] *See, e.g.*, *Citron v. Fairchild Camera and Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989) ("The standard for determining 'whether a business judgment reached by a board of directors was an informed one' is *gross negligence*.") (citing *Smith v. Van Gorkom*, 488 A.2d 858, 873 (1985)) (emphasis added).
[156] 8 *Del. C.* § 102(b)(7) ("[S]uch provision [in the certificate of incorporation eliminating or limiting the personal liability of a director for a breach of that director's fiduciary duty] shall not eliminate or limit the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; . . . (iv) for any transaction from which the director derived an improper personal benefit."); *see also In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 752 (Del. Ch. 2005) ("'The purpose of Section 102(b)(7) was to *permit*

reality also exists because of the *Caremark* decision itself, which our Supreme Court has embraced as setting the liability standard in this context.[157] The *Caremark* liability standard is a high one, and requires proof that a director acted inconsistent with his fiduciary duties and, most importantly, that the director *knew* he was so acting.[158] For obvious reasons, the motive of independent directors to put profits ahead of compliance with the law is weaker than for managers and thus the challenge for a plaintiff to convince a fact-finder of any specific independent director's culpability has to be regarded as at best difficult.

Even as to someone like Blankenship, there is a distance between pleading a claim of conscious flouting of the law for the sake of generating profit and proving that claim after a trial. Failure to see grey is often an impediment to clear reasoning, even on a

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shareholders — who are entitled to rely upon directors to discharge their fiduciary duties at all times — to adopt a provision in the certificate of incorporation to exculpate directors from any personal liability for the payment of monetary damages for breaches of their duty of care, but not for duty of loyalty violations, good faith violations and certain other conduct.'") (quoting *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001)) (emphasis in original); *Production Resources Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 777 (Del. Ch. 2004) ("One of the primary purposes of § 102(b)(7) is to encourage directors to undertake risky, but potentially value-maximizing, business strategies, so long as they do so in good faith."); Anne Tucker Nees, *Who's the Boss? Unmasking Oversight Liability Within the Corporate Power Puzzle*, 35 DEL. J. CORP. L. 199, 219 (2010) ("[A]n oversight claim brought under the duty of loyalty or good faith requires a plaintiff to prove that a director took (or failed to take) a certain action in bad faith against the corporation or with a conscious disregard of a duty.").

[157] *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) ("We hold that *Caremark* articulates the necessary conditions predicate for director oversight liability: (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. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.") (emphasis in original) (internal citations omitted).

[158] *Id.*

moral level. Subterranean mining will never be a risk-free or entirely clean business. That is a reality and every self-aware adult in this intensely energy-consuming society has coal on his conscience.[159] It may be that a fact-finder will conclude that Blankenship knowingly encouraged law-breaking and that his actions proximately caused the Upper Big Branch Disaster. But it takes a more certain and judgmental mind than mine to conclude such an eventuality is probable, or to even hazard a guess at the chances. To that point, consider this reality. There is a fair amount of tension in the idea that Blankenship's business plan was to generate higher profits by knowingly taking risks that could result in the destruction of the Upper Big Branch mine. Even assuming, as one cannot before hearing and carefully weighing all the evidence, that Blankenship had no real concern over worker safety and was willing to lose a life here or there, that is different than knowingly endangering the mine itself because doing that would destroy the very asset from which Blankenship was seeking to generate profits.[160] There is another reality, which is that however hands-on he was, Blankenship was not directly in charge of any mine and this distance will obviously play a role in any future trial.

Let us complicate things further. From the perspective of Massey as a business and its stockholders as investors, it is hardly clear that it is in its interest for it to be

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[159] Although it was even more true when George Orwell made this point, see GEORGE ORWELL, THE ROAD TO WIGAN PIER (Harcourt Books 1958) (1937), it remains so. *See* United States Energy Information Administration, *Electric Power Monthly: May 2011 Edition*, May 13, 2011, *available at* http://www.eia.gov/cneaf/electricity/epm/epm_sum.html ("Year-to-date, coal-fired plants contributed 45.9 percent of the power generated in the United States.").

[160] *See, e.g.*, PX-30 ("Our sales plan for the balance of 2010 [before the Upper Big Branch Disaster happened] was to ship approximately 1.6 million tons of metallurgical coal from the Upper Big Branch mine. In order to offset some of the production lost from the Upper Big Branch mine, we developed plans to increase production at other locations.").

proved that its directors and officers caused the corporation to engage in pervasive violations of the law. Such proof could expose the entity, and thereby indirectly its stockholders, to severe financial harm in the form of large judgments and fines, potentially including punitive damages awards.[161]

That is why the notion that a third-party acquirer like Alpha would "pay" for these claims is dubious. If Alpha acquires Massey, it will acquire along with Massey's assets, the responsibility for Massey's pre-existing obligations and liabilities.[162] The purpose of the mine safety laws is not to protect Massey and its stockholders, it is to protect miners. The purpose of the environmental laws is not to protect Massey and its stockholders, it is to protect the environment. Against what are these laws directed? The answer is obvious: the incentive for entities to generate externalities in their pursuit of profits.[163]

If the Merger is consummated, Alpha can expect to continue to have to address the direct claims against Massey of lost and injured miners, the regulatory inquiries of the MSHA and West Virginia state authorities, and other elements comprising the Disaster Fall-Out. To the extent that Alpha or another acquiror would "pay" for the value of the

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[161] As we shall see, the plaintiffs, in arguing that Alpha would have no rational incentive to pursue the Derivative Claims post-Merger, agree with this point.
[162] 8 *Del. C.* § 259(a).
[163] *See, e.g.*, Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23, 29 (1996) (noting that the "goal of government regulation of pollution is to force polluters to bear the full costs of their activities," rather than allowing those costs, or "externalities," to be borne by society at large); Margaret Tortorella, *Will the Commerce Clause "Pull the Plug" on Minnesota's Quantification of the Environmental Externalities of Electricity Production?*, 79 MINN. L. REV. 1547, 1549 (1995) (citing WILFRED BECKERMAN, PRICING FOR POLLUTION 24, 25 (2d ed. 1990)) (observing that economic theory provides insight "into the need for governmental regulation of externalities" in the energy industry because "[w]hen economic activity affects external environment, the market mechanism fails to reach the social optim[al] [allocation of resources] because society, rather than the economic actor, bears the cost of production.").

Derivative Claims, it would be in the sense of figuring out the extent to which a recovery against the derivative defendants would offset the likely continuing costs to Alpha of remedying, to the extent possible, the Disaster Fall-Out. For example, can it, by lawsuit or negotiations, obtain some recompense from Blankenship or others to cover some of the costs of settlements to the lost miners' families? That is, it would be more a consideration for Alpha in determining how much of a liability wildcard it was acquiring by purchasing Massey than a selling point for Massey in deal negotiations. The Derivative Claims are, in essence, just one part of the calculation of how big a liability Alpha is purchasing.

In that regard, this context is importantly distinct from other cases where it is unrealistic to think that an acquiror will pursue claims against the selling corporation's management. In *Golaine v. Edwards*,[164] for example, the argument was that the acquiror was asked and agreed to permit the selling corporation's financial advisors to receive an additional $20 million in fees for their role in negotiating the transaction.[165] That $20 million, the plaintiffs argued, could have gone into the price paid to the selling corporation's stockholders.[166] In that context, it is unrealistic to think that the buying corporation will pursue the derivative claims because the $20 million paid to the financial advisors of the target was simply part of the overall deal price and if the $20 million should have gone to the selling stockholders instead, it would still have had to be paid by

[164] 1999 WL 1271882 (Del. Ch. Dec. 21, 1999).
[165] *Golaine v. Edwards*, 1999 WL 1271882 (Del. Ch. Dec. 21, 1999).
[166] *Id.* at *3.

the buyer, and thus the buyer is not well positioned to recover in equity after a deal closes because it would receive a windfall.[167]

The situation here is quite different. Alpha has to deal with all of the Disaster Fall-Out and Massey's unique approach to dealing with regulators. This will almost certainly require Alpha to pay settlements, fines, and remediation costs. To the extent that the direct actions against Massey result in findings that Massey, as a corporation, consciously violated the law, Alpha has a rational incentive to shift as much of that liability to the former Massey directors and officers as can efficiently and realistically be achieved. If Alpha does so, it would not be in the position of seeking any windfall, given that it assumed the risks that came with buying Massey and was simply using one tool belonging to Massey to reduce the harm to it.[168] Alpha's own pre-existing stockholders will also likely be watching the Merger integration process and ask questions if Alpha is exposed to liability and lost profits because of Massey's past conduct and does not seek some recompense if that can be obtained. Alpha's board will have a fiduciary duty to all its stockholders, including the former Massey stockholders who as a result of the Merger

[167] *Id.* at *6 ("If the side transactions are part of an acquiror's total acquisition costs, it seems unlikely that the acquiror cares all that much about how its total costs were allocated. If the target board wishes to increase payments to insiders in order to allocate more of the total acquisition costs to them rather than the public stockholders, the acquiror will most likely be indifferent, unless the allocation is proposed so crassly or is so disparate as to raise the specter of meritorious stockholder suits attacking the merger.").

[168] *See Lewis v. Anderson*, 477 A.2d at 1050 (stating that after a derivative claim passed from the target to the acquiror in a merger, it would not result in a windfall to allow the acquiror to pursue that claim nor run afoul of the *Bangor Punta* doctrine because the acquiror would "be simply pursuing [the target's] assets and minimizing its liabilities," and the assets "necessarily included the [derivative] claim") (citing *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Company*, 417 U.S. 703 (1974)).

will become Alpha stockholders, to use all its assets in a good faith pursuit of profit and its actions will be subject to great scrutiny. This, therefore, is a quite distinct one from the context where plaintiffs argue that the total consideration paid by an acquiror should have been allocated differently between the selling stockholders and the seller's management.

In acknowledging what seems to me to be an economic reality, I do not mean to applaud how the Massey Board dealt with the Derivative Claims in considering whether to sell the company. It appears that counsel for the Board was so influenced by the fact that a majority of the Board were defendants in the Derivative Claims that counsel essentially told the Board not to give any weight to the pendency of those Claims in determining whether to do a deal with Alpha. Although the record is not clear, the plaintiffs themselves embrace the notion that the Board was told that the Claims would survive the Merger but that control over the Claims would pass to Alpha.[169] The defendants also admit that the Board did not value the Derivative Claims and that the Advisory Committee set up to investigate whether Massey should pursue those Claims stopped its work when the Merger negotiations got serious.[170] As a result, one cannot conclude that the Massey Board was presented with a reasoned analysis of the "value" of the Derivative Claims.

Given the seriousness of the Upper Big Branch Disaster and the regulatory issues facing Massey, the Board's failure to consider this question is concerning. Although for

[169] Pl. Op. Br. at 26-27.
[170] Def. Ans. Br. at 48, 50.

reasons I have already explained, I cannot conclude that the Board likely entered the Merger for the purpose of insulating itself from the Derivative Claims, and although the Board acted in good faith upon the advice of counsel, this failure generates credibility questions in an environment already fraught with them. No doubt the better practice would have been to have had the Advisory Committee, whose members are not defendants in the actions based on the Derivative Claims, consider the extent to which the Derivative Claims were an economic asset (even in the sense of arguing to Alpha that its concerns about ongoing liability were overstated because of the possibility to shift costs to the derivative action defendants), with the advice of the Advisory Committee's own advisors, who were not in the awkward position of also representing Massey Board members in the Derivative Claims, like Cravath.

But even acknowledging that the Board's approach fell short of the ideal and might even arguably be characterized as a breach of the duty of care, that does not do much to help the plaintiffs obtain an injunction preventing the Massey stockholders from deciding for themselves whether to approve the Merger with Alpha. Although the plaintiffs push the proposition that the Massey directors were motivated by a desire to diminish their exposure to liability for the Derivative Claims, I do not believe the injunction record bears out that proposition. Indeed, to the extent the record supports any inference, it is that the independent directors were led to believe that the Derivative Claims would survive the Merger and that, to the extent they had value, it was not value that was material, at least for purposes of securing a deal with Alpha. For better or worse, the record does not suggest that the independent directors of Massey feared that their net wealths were at risk or that their decision to sell to Alpha was colored by such a fear. In so finding, I note that the Massey director most clearly targeted by the Derivative Claims was Blankenship, who resisted the idea of a Merger, was pushed aside by the Board majority in the negotiation process, and left the Board on December 3, 2010, ten weeks before the final deal was inked on January 28, 2011.

The plaintiffs also push the proposition that Alpha itself is highly unlikely to pursue the Derivative Claims in its own self-interest. In support of that proposition, they rely on the ever-quotable lead independent director for Massey, Inman, who testified this way in his deposition:

> Q. To the extent that it would be Alpha itself that would have to prosecute the [D]erivative [Claims] against you, do you see that as a likely outcome?
>
> A. No.[171]

The plaintiffs argue that Alpha will buy Massey on the cheap and has no incentive to pursue the Derivative Claims.

As a factual matter, the plaintiffs have failed to prove that Inman's view is Alpha's. The record does not support an inference that Alpha has made any commitment to Massey Board members not to pursue the Derivative Claims if that is in Alpha's best interest.[172]

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[171] Inman Dep. at 45; *see also* Crutchfield Dep. at 232 (Q: "During your negotiations of the Merger with Massey, did you have any discussions about the value of the [D]erivative [Claims] that are being asserted by the Massey shareholders?" A: "No.").

[172] Indeed, it can support a contrary inference. Crutchfield Dep. at 236 (noting that the Alpha board has not made any decision regarding whether it will pursue the Derivative Claims and that such a decision will be made by the Alpha board post-Merger).

As an economic matter, the plaintiffs' argument that Alpha will never press the Derivative Claims is also suspect. I assume it is conceivable that a certain class of buyers would, because of its ongoing business, be unlikely to sue the past management of a firm it purchased. Think of private equity firms who compete by cultivating a reputation for doing well by the management teams of companies they acquire. That this rationale would apply to a company like Alpha seems unlikely and is not supported by rational argument by the plaintiffs.[173] Indeed, the numerous instances in which this court has decided cases in which acquirors denied advancement for legal fees to predecessor managers seems to belie the idea that acquirors will ignore their economic self-interest in this context.[174]

More probable, however, is that Alpha will have to make a difficult business calculation about the extent to which it goes after Massey's former management.[175]

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[173] In candor, I concede that it may be unlikely for Alpha or another acquiror in the wake of the McAteer Report to sue former Massey fiduciaries in a case solely for lost profits due to lost coal production at the Upper Big Branch mine. Alpha may more likely accept that as done and move forward. But if Alpha, on account of acquiring Massey, suffers adverse damage awards (including punitive damages), regulatory fines, and even potential criminal penalties, because Massey managers are deemed to have acted with scienter, Alpha would have a strong incentive to go after these former Massey fiduciaries to recoup these costs. If those fiduciaries do not settle on terms acceptable to Alpha, Alpha has every rational reason to press *all* claims, including for lost profits, if that promises cost-effective and meaningful value.

[174] *E.g.*, *Tafeen v. Homestore, Inc.*, 2004 WL 556733, at *1 (Del. Ch. Mar. 22, 2004) ("This is yet another case seeking advancement or indemnification of legal expenses . . . brought by a former officer of a Delaware company . . . . Content to adopt advancement and indemnification bylaws drafted with holes large enough to drive a truck through, the defendant company (*like so many others in this Court of late*) suddenly 'finds religion'-insisting on a rigorous interpretation of its loosely written bylaws [in order to deny advancement].") (emphasis added).

[175] Crutchfield indicated in his deposition that he was unsure what the Alpha board might do in regards to the Derivative Claims. Crutchfield Dep. at 236-37 ("[I]n retaining some control over activities of the organization on a go-forward basis would be our, I think, preferred outcome so that we can make an assessment of what the allegations [in the Derivative Claims] are and what

Proving former management liable for running a law-violating company may not be an optimal profit-maximizing move for the current owner of that company.

One cannot even rationally determine what the potential derivative liability is until the direct liability Massey faces is determined. But to the extent that fact-finders actually find Massey liable for criminal acts or civil violations committed with scienter (i.e., punitive damages), Alpha would have a rational incentive to pursue the Derivative Claims against Massey's former directors and management as a way to mitigate the losses it would incur as a result of Massey's liability for its directors' and managers' pre-merger conduct. The indemnification provision in the Merger Agreement on which the plaintiffs so heavily depend to support their argument that Alpha has no incentive to prosecute the Derivative Claims does not in fact, help them. Alpha only promised to indemnify the Massey Board and management to the extent Massey itself could have and did in fact do so.[176] Because Massey could not indemnify members of the Massey Board or management for actions not taken "in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation,"[177] or for judgments in a derivative case,[178] Alpha would have no obligation to indemnify

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to do with them post-close. . . . [But] I don't know what the board might do [with the Derivative Claims].").

[176] Section 5.05(b) of the Merger Agreement expressly limits Alpha's obligation to indemnify the Massey Board and management to the extent permitted by 8 *Del C.* § 145. Merger Agreement § 5.05(b).

[177] 8 *Del. C.* § 145(a). As noted, Massey's certificate of incorporation already includes a provision that indemnifies the Massey Board and management "to the fullest extent authorized by the Delaware General Corporation Law . . . ."). Massey's Certificate of Incorporation art. 15.

[178] 8 *Del. C.* § 145(b) (providing the general rule that a corporation may not indemnify its directors and officers in a derivative action "in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation").

Massey's former directors and management for wrongful acts, whether civil or criminal, committed with scienter. Alpha remains free to cause Massey to sue the former members of the Massey Board and management for non-exculpated breaches of fiduciary duty that harmed Massey. This, of course, is the identical posture the derivative plaintiffs are now in.

Assuming, therefore, that Massey is determined to be liable to miners and their families for violating the criminal law, and if the outcome of those proceedings suggests that top level Massey fiduciaries were responsible, it is not clear why Alpha would not seek to offset the costs to itself of those violations by suing previous management if by doing so it had a realistic chance of obtaining some meaningful recovery. The plaintiffs, somewhat puzzlingly, respond by arguing that Alpha would have no real incentive to prosecute the Derivative Claims because its very prosecution of them could increase the direct Massey liability that Alpha will inherit as a result of the pending or contemplated criminal and civil lawsuits against former Massey directors and officers for pre-merger conduct:

> Even if Defendants' contentions that the indemnification provisions would not serve as a disincentive to Alpha to pursue the [D]erivative [Claims] were true, there are other practical realties that would dissuade Alpha from prosecuting the [C]laims. As both the Massey Defendants and Alpha acknowledge, findings of fact in litigation of the [D]erivative [Claims] could have serious implications for the pending securities cases and criminal investigations Alpha will inherit from Massey upon the closing of the [M]erger. *If Alpha were to pursue the [D]erivative [Claims] with the other litigation and investigations pending, it might weaken its ability to avoid paying on assumed Massey litigation liabilities.*[179]

[179] Pl. Rep. Br. at 10 (emphasis added).

But the same realities would face Massey if Massey were to remain an independent company and the Massey stockholders continued the Derivative Claims. In other words, to the extent that the plaintiffs argue that Alpha would have no rational incentive to prosecute the Derivative Claims it will inherit as a result of the Merger until the direct actions against Massey are concluded because doing so would help make out other cases that would peg liability on Alpha as Massey's acquiror, so too would (*or should*) the plaintiffs, as fiduciaries for other Massey stockholders, be reluctant to prosecute the Derivative Claims they claim are so valuable until the direct claims against Massey are resolved. That is, the reality in either a Merger or non-Merger world is that much or perhaps most of the Derivative Claims' value is to reduce to some extent the liability Massey faces as a corporation. Thus, the Derivative Claims should follow, rather than precede, the resolution of the key direct suits and regulatory proceedings.

Therefore, the problem for the plaintiffs is that Alpha would face all the barriers previously identified to the same extent that the current Massey stockholders would, such as the need to prove scienter, as well as then come up against a few other factors. For one thing, if the Disaster Fall-Out is really above $1 billion as the plaintiffs' expert suggests, how likely it is that one can actually collect a judgment in that amount against the derivative action defendants? The plaintiffs' expert does not take this consideration or other related ones into account in valuing the Derivative Claims, and instead simply assumes that the value of the Derivative Claims equates with the Disaster Fall-Out. But to actually place a value on the Derivative Claims themselves, numerous issues of this kind must be considered. Start with the independent director issue. How many are likely to actually be held liable under a scienter-based standard?

Add in the reality that if one proves that a fiduciary acted with scienter, one has typically proven that the defendant has acted outside the coverage D & O insurers provide for judgments.[180] Thus, when an actual judgment is secured, the defendants themselves and not their insurance companies would be the source of payment. Even if a defendant like Blankenship has a high personal net wealth, is it high enough to provide a material level of recoupment, particularly if the company has to go after him for the judgment and also to recoup the legal fees it will have to advance for his defense?

And if the hope is to settle for the full amount of the D & O insurance, it appears that the total amount of applicable coverage for all of the derivative action defendants is $95 million,[181] which is not a trifle but is also not material in the context of an $8.5 billion Merger. Anyone who has dealt with coverage questions and insurance carriers would also tell you that a scenario in which the D & O insurers in the "tower" would easily pay out anywhere near the full amount of the policy in a quick and low-cost way to Alpha is more the stuff of dreams than of real life. Given that Alpha would be looking to insurers for future coverage, it would likely also consider the extent to which current recompense would affect its future rates.

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[180] *See, e.g.*, Matthew L. Jacobs & Kristina Filipovich, *Director and Officer Liability Coverage—The Basics*, 774 PLI/Lit 137, PLI Order No. 14269 (2008) ("Typical exclusions [from D&O insurance coverage] include acts arising out of, based upon, or attributable to gaining any personal profit or advantage, payments to an insured of any remuneration by an entity without the previous approval of security holders or members, and committing any deliberate criminal or deliberate fraudulent act.").

[181] Fischel Aff. ¶ 38.

In this regard, I also note the absence of any substantial argument from the plaintiffs that the Derivative Claims are really of material value in the context of a transaction like the Alpha Merger. Massey's consideration of a strategic transaction has been public since at least October of last year.[182] This opened the door to a low-cost overture by any of its many industry competitors or a private equity firm. Given economic realities, it seems unlikely that the market was unable to price the value of the Derivative Claims in a rational way. If another market player really believed that Alpha was paying too low a price because it was possible to purchase Massey for more because a purchaser could obtain a collectible judgment against former Massey fiduciaries for over $1 billion in the Derivative Claims, that player has had, and continues to have, a rational opportunity to buy Massey for itself. As the plaintiffs acknowledge, well-funded industry rivals like Archer and the global giant, ArcelorMittal, took a look at Massey, were able to get due diligence on Massey, its assets and liabilities including the value of the Derivative Claims, and did not offer the value Alpha did. The plaintiffs respond that there was also non-public information about Massey unavailable to those who did not come forward to make a serious overture and obtain due diligence. But they also admit that: (i) the serious bidders, like Alpha and Arch, were able to do due diligence on the Upper Big Branch Disaster and Massey's safety performance, and did so; and (ii) that the public record on Massey's approach to safety and regulatory relations was a rich one. Information does not seem like a genuine barrier in this circumstance.

[182] DX-38.

The reason no such player has emerged is likely not because the Derivative Claims are being ignored, but because acquirors look at the Derivative Claims rationally not as an independent asset, but as at best a liability-reducing factor. One would suspect that if the Derivative Claims possessed the value that the plaintiffs and their expert ascribe to them — i.e., up to $1.4 billion — that rational would-be acquirors would have emerged and offered a price for Massey that materially exceeded what Alpha is set to pay under the Merger Agreement. It is likely, however, on account of what has actually transpired since the Alpha Merger has been made public, that potential acquirors of Massey do not share in the plaintiffs' optimistic valuation, a valuation that is flawed for the reasons I have discussed.

Moreover, any purchaser of Massey would recognize that a primary challenge will be to instill a new culture in the company that better fosters safety and a constructive relationship with the company's regulators, with the goal of generating profits in a durably sustainable manner.[183] This may well involve the expenditure of greater resources on safety and other near-term investments.[184] That ongoing operational challenge would come alongside the requirement to address the myriad of direct legal proceedings brought by tort plaintiffs and regulators, proceedings that may themselves also have the effect of eating into any of the insurance that might go to paying a settlement on the Derivative Claims. Put bluntly, those who the laws were intended to

[183] Crutchfield Dep. at 42-43.
[184] *Id.* at 40-41 (noting that as soon as the Merger closes, Alpha will begin to implement its own safety compliance program at Massey mines and that this process will "take several months" and is likely to require a period of "disruption" to coal production due to the time necessary to retrain workers).

protect may come first, ahead of the stockholders of the corporation who violated those laws.

For all these reasons, the plaintiffs have not convinced me that it is likely the Merger with Alpha is unfairly priced because the Derivative Claims have not been separately valued. On this record, I cannot conclude that it is probable that the Derivative Claims have a value that is material in relation to the value of Massey as an entity. In so finding, I again note that there is a difference between the economic harm that Massey suffered as a result of the Disaster Fall-Out and the value of the Derivative Claims.

We do not live in a perfect world and the ability of human institutions to do full justice will always fall short of the ideal. That Massey might be selling to Alpha at a price lower than it would have had the company been better managed is an idea one can embrace without also then concluding that there is a basis to conclude that the Merger with Alpha ought to be enjoined.[185]

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[185] The plaintiffs point out that one consequence of the loss of confidence the stock market had in Massey management in the wake of the Upper Big Branch Disaster was a decline in the company's trading multiple. The plaintiffs argue, with a rational basis, that Massey now trades at a discount to its fundamental earnings potential in comparison to other industry competitors because those competitors are judged to have a more sound approach to operating a coal company in a durably safe and profitable manner than Massey does. PX-94 at 8.

But although this may in fact be a market reality, it seems to me doubtful that this translates into a basis for a future damage award in a derivative case. An entertainment restaurant corporation whose non-executive Chairman is Warren Buffett and whose CEO is Jimmy Buffett might well trade at a higher multiple than its competitors because the market perceives it to be run by financial geniuses who are better than most. Its rivals may trade at lower multiples because they have more ordinary management or even because some have management that is perceived to be poor in quality. Such deviations would not ordinarily provide the basis for any imposition of fiduciary liability.

In a derivative suit, there is no doubt that Massey fiduciaries could face large liability claims. For example, it is plausible for Massey to seek to hold managers culpable if their non-exculpated breaches of fiduciary duty proximately caused the Upper Big Branch Disaster. Such proof could subject them to hundreds of millions of dollars in liability for items such as lost mining profits and the cost of settlements and fines. PX-32 at 8; PX-94 at 14. But the notion that a derivative judgment could be premised on the delta between Massey's trading multiple under the former fiduciaries and what it would be under non-breaching fiduciaries is not immediately plausible. There are numerous problems with such an adventurous approach, not the least of which is that the only damages that could be awarded would be based on an estimate of the extent to which the defendants' non-exculpated breaches affected the multiple, not the extent to which the market's overall assessment of their competence diminished the multiple. That is, to the extent that the market simply viewed the Massey management as grossly negligent or incompetent, that would provide no basis for an award, and it would be incredibly difficult to figure out what portion of the delta was attributable to what factors. Not only that, to the extent that the delta was attributable to other more traditional subjects of a damages award, such as lost profits from the Upper Big Branch mine or fines or settlement costs, that would have to be accounted for in order to avoid double counting. Given these factors, I am not convinced that an award of this type could be based on anything other than speculation.

This brings up another mundane, but important reality. The stockholders of Massey had an annual opportunity to elect directors. If the plaintiffs' rendition is correct — and it has plausibility — it was publicly and widely known that Massey took an adversarial approach to its relation to its regulators and had suffered adverse legal judgments and excessive miner injuries for years. The plaintiffs, as investors, continued to invest in a company they say was well known to treat its workers and the environment poorly and that viewed laws as something to avoid, rather than to comply with in good faith.

The primary protection for stockholders against incompetent management is selecting new directors. It may well be that the corporate law does not make stockholders whole in situations like this when it is alleged that corporate managers skirted laws protecting other constituencies in order to generate higher profits for the stockholders. If that be so, it should be no surprise as any human approach to justice will always fall short of the ideal. It also may be that if stockholders come out a bit worse, then justice is in fact done. Remember that to the extent that Massey kept costs lower and exposed miners and the environment to excess dangers, Massey's stockholders enjoyed the short-term benefits in the form of higher profits. The very reason for laws protecting other constituencies is that those who own businesses stand to gain more if they can keep the operation's profits and externalize the costs. Thus, the stockholders of corporations, especially given the short-term nature of holding periods that now predominate in our markets, have poor incentives to monitor corporate compliance with laws protecting society as a whole and may well put strong pressures on corporate management to produce immediate profits. William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1284 (2002) ("For equity investors in recent years, the practice of shareholder value maximization has not meant patient investment. Instead, it has meant obsession with short-term performance numbers."). Stockholder pressure to produce profits might increase the already well-known risk that profit-seeking entities have incentives to take the profits of their operations for themselves and externalize the risk of operations to others, be it to their workers or society as a whole in the form of environmental degradation.

This is not to say that our law does not permit Massey to recoup its proven lost profits and injury if it can link them to non-exculpated breaches of fiduciary duty by its directors and officers. It does. *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008) (citing *Stone ex rel. AmSouth*

That is especially so for another reason, which I now explain.

C. The Plaintiffs Have Failed To Show That They Face Irreparable Injury Because A Later Award Of Monetary Relief Can Make Them Whole

This court will not lightly grant a preliminary injunction. That important restraint will only be imposed if: (i) a failure to do so presents a threat of irreparable injury; and (ii) the balance of harms weighs in favor of granting the injunction.[186] Here, neither factor weighs in favor of an injunction.

Initially, the plaintiffs themselves essentially admit that a later award of monetary damages can make Massey and its current stockholders whole. As the plaintiffs read *Parnes v. Bally Entertainment Corp.*[187] and its progeny, they can sue the Massey directors in a direct action for breach of their fiduciary duties in approving the Merger with Alpha. If they can prove that the directors acted in bad faith to approve the sale of Massey at a materially inadequate and therefore unfair price to Alpha because the Merger price did not reflect the value of the Derivative Claims, then they can obtain a monetary judgment against the Massey directors.[188] Similarly, appraisal is available to dissenters

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Bancorporation v. Ritter, 911 A.2d 362, 367 (Del. 2006); *Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001); *Guttman v. Huang*, 823 A.2d 492, 501 (Del. Ch. 2003)). But it is to say that to the extent that there is some residual damage to the corporation in a situation like this when the pursuit of profit for stockholders resulted in damage to other constituencies that is not capable of remediation, that might be thought to act as a useful goad to stockholders to give more weight to legal compliance and risk management in making investment decisions and in monitoring corporate performance. In the end, the most sympathetic victims here were not stockholders, they were Massey's workers and their families, who suffered injuries and lost lives and loved ones, and the communities who have suffered because of environmental degradation due to of the company's failure to meet its legal responsibilities.

186 *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).

187 722 A.2d 1243 (Del. 1999).

188 *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1245-46 (Del. 1999).

in the Alpha Merger.[189] As a result, appraisal petitioners can argue that the Merger price did not constitute fair value because the Merger price did not adequately account for the value of the Derivative Claims belonging to Massey.[190] Although these routes to recovery may be difficult to navigate, they may be traveled, and at their end is the possibility for monetary relief that would make the current Massey stockholders whole.

As the plaintiffs point out, they may also be able to continue to press the Derivative Claims as derivative claims even after the consummation of the Merger with Alpha.[191] To do so, the plaintiffs will likely have to satisfy a very strict test articulated by our Supreme Court over a quarter century ago in *Lewis v. Anderson*,[192] and reaffirmed in *Lewis v. Ward*.[193] That test permits a derivative plaintiff to continue to prosecute claims on behalf of the selling company "(i) if the merger itself is the subject of a claim of fraud, being perpetrated merely to deprive shareholders of the standing to bring a derivative action; or (ii) if the merger is in reality merely a reorganization which does not affect plaintiff's ownership in the business enterprise."[194] The Merger is not a

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[189] *See* 8 *Del. C.* § 262(b)(2); Merger Agreement § 2.01(e) (outlining the procedure for stockholders seeking appraisal under the Merger Agreement).
[190] *See, e.g.*, *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137 (Del. 1989) (holding that the trial court properly considered the value of a pending derivative action in determining the fair value of a dissenting stockholder's shares in an appraisal action under 8 *Del. C.* § 262); *Delaware Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290 (Del. Ch. 2006) ("[I]t is relevant to consider the value of claims belonging to [an] entity, as they are an asset of the firm that is part of its value.").
[191] It is settled law in Delaware that where, as a result of a merger, a plaintiff stockholder ceases to hold shares in the corporation on whose behalf it asserted a derivative action, the plaintiff stockholder loses his standing to continue to maintain the derivative action. *Lambrecht v. O'Neal*, 3 A.3d 277, 284 (Del. 2010) (citing *Lewis v. Anderson*, 477 A.2d 1040 (Del. 1983)).
[192] 477 A.2d 1040 (Del. 1983).
[193] 852 A.2d 896, 902 (Del. 2004).
[194] *Lewis v. Ward*, 852 A.2d 896, 902 (Del. 2004) (citations omitted).

reorganization, and thus the only recognized exception that could arguably apply is the fraud exception. In *Arkansas Teacher Retirement System v. Caiafa* (the so-called *Countrywide* case),[195] a case that the plaintiffs themselves cite with approval,[196] the Supreme Court recently reaffirmed that test once again.[197] Therefore, if the plaintiffs are able to prove on a full record that the Merger with Alpha was undertaken "merely" to deprive the Massey stockholders of their standing to sue derivatively,[198] then they will be entitled to continue the Derivative Claims notwithstanding the fact that as a result of the Merger, they will no longer hold Massey shares.[199]

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[195] 996 A.2d 321 (Del. 2010).
[196] Pl. Op. Br. at 42 (citing *Arkansas Teacher Ret. Sys. v. Caiafa*, 996 A.2d 321, 323 (Del. 2010)) ("*Countrywide*").
[197] *Countrywide*, 996 A.2d at 323-24 (citing *Lewis v. Anderson*, 477 A.2d at 1049) ("Other than in instances of fraud or reorganization, a plaintiff loses standing to maintain a derivative suit where the corporation, in which the plaintiff holds stock, merges with another company.").
[198] *Lewis v. Ward*, 852 A.2d at 905.
[199] The plaintiffs argue that in *Countrywide*, the Supreme Court sought to modify the standard set forth in *Lewis v. Anderson* in a manner favorable to them. Specifically, the plaintiffs say that target stockholders in a merger do not lose standing to pursue derivative claims post-merger "where the complaint adequately alleged that the board of directors' pre-merger breaches [of fiduciary duty] reflected misconduct so injurious to the company that it led to the subsequent merger, even in the absence of any claim [that the board fraudulently negotiated or priced the merger transaction]." Pl. Op. Br. at 43 (quoting *Countrywide*, 996 A.2d at 322). That is, the plaintiffs argue that where the target board and management engage in pre-merger fraudulent or other severely injurious conduct such that that conduct leaves a sale of the company as the only viable option, the target stockholders can continue to prosecute derivative actions against the former target board and management, with the benefit of that recovery flowing only to the former target stockholders, notwithstanding the fact that under the loss-of-standing rule articulated in *Lewis v. Anderson*, the target stockholders would be prevented from doing so.

But, the plaintiffs' reading of *Countrywide* seems strained. The plaintiffs overlook the fact that the Supreme Court specifically cited *Lewis v. Anderson* for its articulation of the two exceptions to the general rule that stockholders lose standing to continue derivative actions where their status as stockholders of the company on whose behalf they are suing is terminated as a result of a merger unless they show that the merger itself was fraud perpetrated merely to deprive them of their standing or that the merger was only a reorganization. *Countrywide*, 996 A.2d at 322-23 (citing *Lewis v. Anderson*, 477 A.2d at 1049). If what the Supreme Court intended to do in *Countrywide* was to, as the plaintiffs in effect urge, create a third category of exception to the general rule articulated in *Lewis v. Anderson*, such intent is not obvious from a plain reading of *Countrywide*, especially in light of an even more recent Supreme Court case, *Lambrecht v. O'Neal*, in which the Supreme Court again cites *Lewis v. Anderson* as the settled law. *Lambrecht v. O'Neal*, 3 A.3d 277, 284 n.20 ("*Lewis v. Anderson* recognizes *only two exceptions* to this loss-of-standing rule: (1) where the merger itself is the subject of a claim of fraud, being perpetrated merely to deprive shareholders of their standing to bring the derivative action, or (2) where the merger is essentially a reorganization that does not affect the plaintiff's relative ownership in the post-merger enterprise.") (emphasis added).

What *Countrywide* seems to be saying is that a board may not immunize itself from liability by ruining a corporation's value, and then selling the wreckage to a third-party who is acting in good faith. The Supreme Court appears to have perceived that there was a factual basis for the fraud exception in *Lewis* to apply but that the objector had failed to invoke that exception in a fair and timely manner. To that point, the Supreme Court found that "[t]he extent of the Countrywide directors' allegedly fraudulent conduct and breach of fiduciary duties by failing loyally to oversee the company's practices in good faith would have necessitated (a) corporate rescue; and (b) individual legal protection. A merger was one of few available alternatives that met both of those objectives after the board's allegedly fraudulent schemes bankrupted a multibillion-dollar company." *Countrywide*, 996 A.2d at 323. "No one disputes," the Supreme Court goes on to say, "that Countrywide *needed* to sell itself, *and at a price significantly below its recent share price*." *Id.* (emphasis added). Further supporting the view that the Supreme Court was suggesting that the *Lewis v. Anderson* test might have been satisfied, rather than that it should be modified, is the fact that the Supreme Court treated the sale of Countrywide as being inseparable from the Countrywide directors' pre-merger fraudulent conduct, and cited *Braasch v. Goldschmidt* for support: "Delaware law recognizes a *single*, *inseparable fraud* when directors cover massive wrongdoing with an otherwise permissible merger. . . . [A]fter allegedly intentionally engaging in fraudulent conduct that caused the stock price to plummet near bankruptcy, *Countrywide directors would understandably seek an acquirer to effect a merger that would extinguish potential derivative claims* . . . . Whether this plausible scenario reflects this board's single, cohesive plan or merely ties together, like patchwork, a snowballing pattern of fraudulent conduct and conscious neglect, the result is the same and would not fairly constitute a proper discharge of the fiduciary duties of directors of a Delaware corporation." *Id.* at 323-24 (citing *Braasch v. Goldschmidt*, 199 A.2d 760, 764 (Del. Ch. 1964)) (emphasis added). Although finding that the objector had not framed its objection properly under *Lewis* as a claim that the merger was a fraud designed to extinguish standing to maintain the derivative claims, the Supreme Court made plain that "an otherwise pristine merger cannot absolve fiduciaries from accountability for fraudulent conduct that necessitated the merger." *Id.* at 323.

That statement embeds an important issue that might not have applied as to Countrywide. If an acquiror gets a bargain basement price for an asset in part because of former fiduciary wrongdoing and can enjoy use of the asset *without* bearing any material costs going forward as a result of that prior wrongdoing, the acquiror is unlikely to pursue those claims and it may be equitable to allow the selling stockholders to receive the claims.

The problem in that kind of allocation in a situation like that involving Alpha's purchase of Massey is that Alpha has good reason not to value the Derivative Claims as a "separate asset" from the assets and liabilities it is purchasing. Alpha will bear important ongoing costs to remedy the Disaster Fall-Out. The Derivative Claims are a tool by which Alpha can mitigate

And another recent Supreme Court decision identified another route, however difficult passage on it may be. In *Lambrecht v. O'Neal*,[200] our Supreme Court made clear that the stockholders of a corporation sold in a merger for stock of another corporation have standing to ask the acquiring corporation's board to press claims belonging to the acquired corporation.[201] In this situation, that means that Massey stockholders who become stockholders of Alpha may press Alpha to bring the derivative claims on Alpha's

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that liability. To divest Alpha of that tool and shift it to the Massey stockholders alone is therefore problematic as a matter of equity. So too would be exposing the Massey defendants to liability both to the former Massey stockholders and to Massey, through its new owners.

Moreover, the record in this case does not support the notion that the Massey Board's pre-Merger conduct necessitated the Merger with Alpha. Indeed, the record supports the inference that the Massey Board considered its stand-alone plan as being a viable option, but on the basis of the company's tarnished reputation and history of missing management's projections, determined that pursuing the profitable stand-alone plan was not the best choice available. On a more fact specific level, I also note the comparatively happy situation of the Massey stockholders to those of Countrywide. Countrywide was sold for $7.16 per share after the defendants' conduct allegedly caused Countrywide's stock price to plummet from a high of over $40. "Bank of America Buys Countrywide," NPR, *available at* http://www.npr.org/templates/story/story.php?storyId=18022987 (Jan. 11, 2008). On the day the Massey Merger Agreement with Alpha was reached, Massey stockholders stood to receive $69.33 per share in total value, a 27% premium to the price of Massey before the Upper Big Branch Disaster. That is a huge economic difference, and suggests that however serious the Disaster Fall-Out is, they were not nearly as material to Massey's overall value as the mismanagement and wrongdoing alleged to have occurred at Countrywide.

But, the key bottom line point about the meaning of *Lewis v. Anderson* is one that is undisputed. If the plaintiffs are correct and *Countrywide* did modify *Lewis v. Anderson* to allow them to keep the Derivative Claims for Massey stockholders, then the closing of the Merger does not threaten irreparable injury. Similarly, if *Countrywide* can be read as saying that the objector could have, but failed to mount, a viable direct challenge to the merger due to the failure of the selling board to obtain value for claims arguably worth more than the merger price, the plaintiffs can pursue that theory of *Countrywide* after closing. In so concluding, I decline the plaintiffs' invitation for this court to give hasty, emergency final rulings on such issues, which are traditionally determined after a merger has been consummated.

[200] 3 A.3d 277 (Del. 2010).

[201] *Lambrecht*, 3 A.3d at 286 ("Delaware case law clearly endorses the double derivative action as a post-merger remedy.").

behalf in a so-called double derivative action.[202] If the Alpha board refuses demand wrongfully or the plaintiffs can plead adequately demand futility, they may be able to proceed in a double derivative action on Alpha's behalf.[203] In identifying this route, I acknowledge that a recovery on behalf of Alpha, which will be owned only 46% by Massey's current stockholders, is not the same as a recovery on behalf of the current Massey stockholders alone, but such a recovery would nonetheless benefit Massey stockholders as new Alpha stockholders.[204] I also acknowledge the difficulty that new

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[202] *Lambrecht*, 3 A.3d at 282 (citing *Rales v. Blasand*, 634 A.2d 927, 934 (Del. 1993)).
[203] *Id.* at 286 n.31 (citing *Rales*, 634 A.2d at 934)).
[204] Further candor requires acknowledging that the stock for stock nature of a merger would not fully ameliorate the harm if a selling board does not seek full value for a materially valuable derivative claim. Consider the (admittedly unlikely) situation in which a target company, before a $1 billion stock for stock merger in which stockholders of the target company would own 50% of the stock in the resulting corporation, had secured a federal District Court judgment against a former fiduciary for embezzling the substantial sum of $250 million that has withstood Court of Appeals review and a weak *certiorari* petition has been filed that will almost certainly be denied shortly after the merger closes. Assume that the target company had further attached property of the defendant worth well over $250 million. In that situation, one can see the substantial unfairness that would result if the target company's board of directors failed to seek and obtain value for the $250 million and merely gave it away for free. Of course, once the surviving corporation executes on the judgment, it will receive the $250 million, and the former target company stockholders will, by virtue of their stock holdings in the surviving corporation, inevitably benefit from a half-interest in that $250 million. But, even under that hypothetical, the target company stockholders would be out $125 million in value, a material sum in relation to the overall deal price of $1 billion.

But that situation is importantly distinct in a key sense from what is at stake in this case. In the hypothetical, the claim is a pure asset. In this case, the Derivative Claims are not a freestanding asset because they are bound up with ongoing responsibilities the acquiror, Alpha, is buying with Massey, and their value is difficult, if not impossible, to untangle from the Disaster Fall-Out liability. The plaintiffs wish to leave Massey stockholders with the Derivative Claims but Alpha with the Disaster Fall-Out. That is a different deal. Alpha might well, one suspects, be happy to acquire all of Massey's assets and liabilities *other than* the Upper Big Branch assets and liabilities, including the Derivative Claims, and to leave the Upper Big Branch assets and liabilities behind in a stripped down, free-standing Massey. If such a merger was proposed, I suspect that lawyers for the lost miners and other possible victims of the Upper Big Branch Disaster would cry fraudulent conveyance because the entity holding the Upper Big Branch assets and the Derivative Claims would not be credit-worthy to answer their claims.

stockholders of an acquiror will have in arguing that the board of the acquiror, which typically will have no exposure to liability for the pre-merger derivative claims and will typically be dominated by independent directors, cannot impartially decide whether a suit is in the best interests of the acquiror, which will be the relevant metric.

To the extent that the plaintiffs would argue that any of these paths to monetary relief are difficult, I cannot part company with them. But such relief is potentially available and thus there is no threat of irreparable injury.

D. The Balance Of The Equities Weigh Against An Injunction Because The Stockholders Are Empowered To Decide For Themselves Whether To Approve The Merger

The difficulty of actually recovering a judgment on the Derivative Claims that would be material in relation to Massey's overall value also weighs heavily on my mind in assessing the balance of equities.

The Massey stockholders are well positioned to determine for themselves whether to accept the Alpha Merger. They can turn it down, continue as Massey stockholders, and enjoy or suffer as the case may be the outcome that comes from the status quo, including the net benefits or costs that come from the regulatory and legal proceedings involving the company — including from the outcome of the Derivative Claims. Or the Massey stockholders can decide that a deal with Alpha at price that is a premium to the price at which Massey was trading the day of the Upper Big Branch Disaster is, in a world of risk, the better bet, especially given the chance to benefit if Alpha's management approach enables the Massey coal reserves to be more safely and profitably extracted. Because it is the Massey stockholders' capital at stake and not mine, I am chary to substitute my judgment. The plaintiffs are institutional investors and could make their case to turn down the Merger at the ballot box. They are not well positioned to have this court risk the benefits the Alpha Merger promises to Massey stockholders by enjoining the Merger, and taking that decision out of the stockholders' own hands.

Nor is their some cost-free way to an injunction. Alpha argues with considerable force that it may well choose to sue former Massey fiduciaries if that is in its interest as an acquiror. To enjoin the Merger unless Alpha transfers the rights to the Derivative Claims to a litigation trust on behalf of the Massey stockholders would allow Alpha to walk away.[205] Whether Alpha would actually do so is, of course, unclear, but I find no reason in equity to conclude that Alpha would not have a good faith basis for doing so. There are easily imaginable circumstances in which Alpha would sue the former fiduciaries of Massey to recover for judgments and other costs it will incur as Massey's new owner, or even as leverage in dealings with former Massey fiduciaries over obligations such as advancement. One could imagine circumstances in which the principal value of the Derivative Claims Alpha has inherited against former Massey fiduciaries is in reducing the costs to Alpha of honoring advancement and indemnification obligations Massey owed to them.[206] A judicial order enjoining the

[205] I cannot order affirmative relief at this stage. I can only grant a preliminary injunction against the Merger.

[206] In a hard-fought settlement involving AIG, part of the value received by the derivative plaintiffs for AIG was an agreement by the company's former CEO, Maurice Greenberg, to resolve claims he had against the company for advancement and indemnification. American International Group, Inc., Current Report (Form 8-K), at 1, Ex. 10.1 at 1 (Nov. 25, 2009) (announcing the settlement of the then-pending dispute among AIG, its former Chairman Maurice Greenberg, and others, and attaching the memorandum of understanding for the settlement that includes a provision in which "[Greenberg] further hereby release[s] and forever

Merger unless Alpha is willing to buy Massey in a deal in which it assumes the Disaster Fall-Out liability, but does not acquire any of Massey's right to offset that liability by seeking indemnification from Massey fiduciaries (i.e., the Derivative Claims), is an injunction requiring Alpha to accept a different transaction than that which was negotiated through an arms-length process. This is not a situation where the record bears the inference that Alpha was somehow knowingly complicit in some breach of fiduciary duty by the Massey Board; rather, the record indicates that Alpha was fended off by Massey over an extended time period, was subjected to a competitive bargaining process, and was pressed to pay a high value for Massey. To upset Alpha's expectations would justifiably allow it to terminate the Merger Agreement.

In so concluding, I also take into account the plaintiffs' argument that I should put the Merger on ice, and rush to hold a trial on the Derivative Claims before the Merger Agreement's drop dead date of January 27, 2012.[207] There are a variety of reasons why that is neither practicable nor equitable. For one thing, it would seem to be extremely disadvantageous to Massey as a stand-alone entity for Derivative Claims that seek to hold fiduciaries liable to indemnify Massey if Massey is held liable to others to go forward ahead of those direct claims. Even if one could, as I cannot in good conscience, put aside that reality, there are also the questions of fairness to the defendants in addressing such important Claims in an imprudently hasty manner and the costs to Massey stockholders

discharge[s] AIG from any claims, debts, demands, rights or causes of action or liabilities whatsoever that [Greenberg] may have in the future against AIG for advancement, indemnification or contribution.").

[207] Merger Agreement § 7.01(b)(ii).

of not closing the Merger now. To delay the deal not only defers their receipt of the Merger consideration, it also continues Massey under management the plaintiffs themselves do not consider sound, and defers, and therefore endangers, the ability of Alpha management to manage the Massey assets and to capitalize on potential synergies for the benefit of all its post-Merger stockholders, including the current Massey stockholders.

In my judgment, therefore, issuance of an injunction threatens more harm to Massey stockholders than its potential benefits to them. Massey stockholders who are persuaded that they will yield more value if the company remains independent and the Derivative Claims proceed are free to take action even more formidable than a preliminary injunction, by casting their ballots against the Merger and defeating it at the polls.

V. Conclusion

For all these reasons, the plaintiffs' motion for preliminary injunction is DENIED. IT IS SO ORDERED.