UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY

In re MASSEY ENERGY CO. SECURITIES LITIGATION	Civil Action No. 5:10-cv-00689
	CLASS ACTION
This Document Relates To:	The Honorable Irene C. Berger
ALL ACTIONS	Jury Trial Demanded

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE FEDERAL SECURITIES LAWS

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PRELIMINARY STATEMENT

Lead Plaintiff Commonwealth of Massachusetts Pension Reserves Investment Trust ("Massachusetts PRIT") and Plaintiff David Wagner, on behalf of the Class (collectively, "Plaintiffs"), respectfully submit this omnibus memorandum in opposition to Defendants' motions to dismiss Plaintiffs' Consolidated Amended Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint").[1]

The Complaint more than adequately details and alleges that senior executives and directors of Massey Energy Co. ("Massey" or the "Company") engaged in a fraud upon investors. In the wake of a tragic fire at Massey's Alma No. 1 mine ("Alma") in 2006, Defendants set out to convince the public that Massey had transformed itself into a mining company that put "safety first," before coal production. This false message was repeated throughout the Class Period, February 1, 2008 through July 27, 2010.

The Complaint includes detailed allegations and findings from an array of sources, all of which corroborate each other.[2] The Complaint alleges with specificity that at its most profitable and populated mines—and particularly at Upper Big Branch ("UBB")—Massey had significantly more serious safety violations than the national industry average. Basic safety procedures were ignored, especially when they interfered with production. A number of deceptive devices were in place at Massey's mines, designed to conceal the truth from regulators. Further, as to the one metric Defendants constantly used to buttress false claims of Massey's stellar safety record

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[1] Two motions to dismiss the Complaint for failure to state a claim were filed by Defendants Massey Energy Company ("Massey or the "Company") and Director Defendants Dan R. Moore, E. Gordon Gee, Richard M. Gabrys, James B. Crawford, Robert H. Foglesong, Stanley C. Suboleski, and Lady Barbara Thomas Judge (herein, the "Massey Br."); and Defendants Don L. Blankenship, Baxter F. Phillips, Jr., H. Eric B. Tolbert, and J. Christopher Adkins (herein, the "Off. Def. Br.").

[2] These sources include Congressional testimony; data published by the U.S. Mine Safety and Health Administration ("MSHA"); sixteen confidential witnesses ("CWs"); and pleadings, including a criminal indictment, filed in other related pending civil and criminal actions.

during the Class Period, the non-fatal days lost ("NFDL") rate, Massey eventually conceded the falsity of such statistics when they were significantly restated. In sum, there was a significantly increased risk of another tragedy, which would jeopardize Massey's expansion plan and financial condition and prospects, a material fact concealed from investors.

On April 5, 2010, there was a massive explosion at UBB resulting in the death of twenty-nine miners (the "Explosion"). The consequence has been numerous state and federal regulatory and criminal investigations, with no fewer than eighteen Massey executives—including Blankenship and Adkins—invoking their Fifth Amendment rights in connection with MSHA's interview process.

Defendants' motions are broadly premised on two unsupportable assumptions. First, that investors' "losses were caused by the market's negative reaction to an unforeseeable catastrophe." Massey Br. at 3. The Complaint, however, alleges in detail the extent to which a disaster was not unforeseeable, and that the findings thus far show the Explosion was the natural consequence of failure to abide by ***basic*** safety precautions. Second, Defendants argue the market was fully aware of the significant extent to which Massey was not complying with federal regulatory requirements during the Class Period. Yet, all they provide in support of that assertion is limited raw data about UBB from a database available through MSHA's website (hereinafter, "North Exhibits B-H"). North Exhibits B-H were assembled using a different database than the one Plaintiffs relied upon to allege statistical comparisons performed by their expert—a database not in existence during the Class Period. Also, the only purpose North Exhibits B-H serve is to challenge Plaintiffs' allegations that "the raw data does not lend itself to easy interpretation or analysis to provide the statistical comparisons alleged herein," ¶ 121, and that the market was not aware of those facts during the Class Period. As explained below, the

raw data proffered by Defendants is not sufficient to resolve those issues on this motion. To establish a "truth on the market" defense, corrective information must "credibly and intensely" enter the market, a fact-intensive query. For that reason, Plaintiffs have moved pursuant to Rules 12(d) and 12(f) of the Federal Rules of Civil Procedure to strike the exhibits.

As to the element of scienter, no Defendant refutes he or she was aware of Massey's woefully non-compliant safety record. Further, no Defendant addresses the corporate reporting system expressly designed to inform Massey's senior executives of precisely that type of information; the pervasive nature of the alleged deceptive conduct, at a time when the Company claimed safety was its number one focus; the magnitude of the restatement of Massey's NFDL rates; the invocations of Fifth Amendment rights, or other factors the Supreme Court has instructed must be analyzed holistically and with a view to applying common sense inferences.

As to materiality, beyond the baseless assumption that everyone knew of their wrongful conduct, Defendants argue that: (1) notwithstanding repeated, objectively verifiable statements that Massey was an industry leader in safety, the market somehow discounted those statements as too vague; and (2) boilerplate cautionary statements were sufficient to sanitize any misrepresentations. Neither argument holds water.

Defendants' efforts to deny Plaintiffs the presumptions of reliance available in federal securities actions are similarly meritless. The primary focus of most of the alleged misleading statements is Defendants' omission of material facts as to Massey's safety and compliance practices and, as noted above, Defendants have failed to establish any public knowledge of those practices.

Defendants also claim Plaintiffs have not adequately alleged loss causation. However, the Complaint alleges almost immediate public statements by analysts, regulators, and others

after the Explosion, attributing it to Massey's deficient safety practices, and how all subsequent disclosures, at a time Defendants were still countering the truth with more misrepresentations, related to those facts.

Defendants offer no argument as to the Complaint's control person allegations other than that they should be dismissed, because, they claim, the primary violation allegations are not properly pleaded. Both assertions are wrong.

Finally, if the Court believes there is any deficiency in the Complaint, a plethora of new information has been released since the Complaint was filed. Such information strongly supports the claims here, and can easily be incorporated into an amended complaint. Plaintiffs summarize those new facts in a separate exhibit as part of a request to file an amended complaint if the motions to dismiss are granted. But, for the foregoing reasons detailed more fully below, Defendants' motions to dismiss should be denied.

ARGUMENT

I. MATERIAL MISSTATEMENTS ARE SUFFICIENTLY PLEADED

To state a claim for a violation of the federal securities laws, a plaintiff must allege that a defendant made a materially false statement or omitted to state material information necessary to make statements made not misleading. *See* 15 U.S.C. §78u-4(b)(1). In addition, complaints governed by the PSLRA must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief … state with particularity all facts on which the

belief was formed." *Ottmann v. Hanger Orthopedic Grp.*, 353 F.3d 338, 343 (4th Cir. 2003). As summarized below, the Complaint here does so.[3]

A. Misstatements and Omissions About Safety Procedures and Compliance

After a fire broke out in 2006 at Massey's Alma No. 1 mine ("Alma"), in which two miners died, high-profile government investigations raised public concerns about Massey's mine safety practices. ¶¶ 5, 73-74. Evidence revealed that Blankenship's production-driven, safety-last mandates contributed to the Alma tragedy. ¶¶ 5-6, 75-76. The Department of Justice ("DOJ") filed criminal charges. ¶¶ 4, 74. Shareholders filed civil suits.[4] ¶¶ 8, 77. Two Massey Directors resigned in protest because of the Board's unwillingness to reform safety-related business practices—they refused to stand by while Massey's stock traded at a "Blankenship discount." ¶ 7. Massey pleaded guilty to ten criminal charges and paid the largest-ever settlement in the history of the coal industry arising out of reckless safety misconduct. ¶¶ 4, 80. Blankenship, Phillips, Moore, Gabrys, Crawford, Foglesong, and Subleski further agreed, and a Court ordered them, to reform safety policies by implementing corporate governance procedures aimed at enhancing mine safety monitoring processes and regulatory compliance. ¶¶ 8, 77-79.

In connection with these post-Alma fire reforms, and to bolster public perception, Defendants represented that Massey implemented "safety improvement initiatives." ¶¶ 11, 81, 232. They claimed to revamp Massey's "S-1, P-2, M-3" [safety first, production second, measurement third] program, and stressed that "safety first" was "not just a slogan" but "an integral part of [Massey's] daily routine." ¶¶ 11, 81, 232, 247, 291. They emphasized that

[3] The Complaint specifies each of the alleged misrepresentations and material omissions, specifying which of the Defendants was responsible for each statement, and then for each such statement, summarizing why it was false and/or misleading, with more precise references to more detailed facts in other parts of the Complaint. *See* Complaint ¶¶ 200-306. Citations to "¶ ___" herein refer to paragraphs of the Complaint.

[4] *See Manville Personal Injury Trust v. Blankenship*, No. 07-C-1333 (W. Va. Cir. Ct. Kanawha Cnty.) (the "Manville Action").

Massey managed mine safety risks and regulatory compliance through new rigorous standards and monitoring processes—a "well-developed process of … safety excellence." ¶¶ 78-79, 82, 232. Defendants portrayed these standards and processes as tightly controlled and supervised by the Board; the Safety, Environmental and Public Policy Committee ("SEPPC"), and the Hazard Elimination Committee.[5] ¶¶ 13, 77-79, 88, 232. Massey repeatedly emphasized that, after the Alma fire, its "formula for shareholder success" hinged on safety being its first priority over production. ¶¶ 82, 286-87. Defendants assured investors regularly that a reformed Massey had implemented a "culture of safety." ¶¶ 82-86, 202. These and similar statements were false and misleading when made during the Class Period. Each were lies that served as the foundation from which Massey created a false new public image, allowing the Company to raise capital and embark on expansion plans necessary to take advantage of surging global metallurgical coal demand. ¶¶ 13, 101-03, 338.

The Individual Defendants knew that there was a serious disconnect between the safety standards and image they publicly extolled, and the extent to which pervasive non-compliance—deviations from ***basic*** mine safety practices—became acceptable inside Massey's mines. ¶¶ 14-16, 90-99. Defendants' promises that Massey's new safety program was "one of the best in the industry, setting standards that far exceed federal and state requirements," and that the Company "pull[ed] together to create a culture of safety," are verifiably false. ¶¶ 11, 12, 85, 289, 291. As was reported in detailed mine safety reports received by the Individual Defendants on the SEPPC

[5] The SEPPC was enhanced pursuant to the terms of settlement in the Manville Action, in order to affect safety improvements in Massey mines through heightened substantive reporting and monitoring requirements. ¶¶ 8-9, 77-79, 317; *see also* Complaint Ex. D.

The Hazard Elimination Committee, announced on July 29, 2009, was purportedly "intended to reinforce Massey's members' ability to recognize and remedy potential violations of state and federal mining laws, educate members on recent changes to those laws, and enhance compliance throughout [Massey's] operations." ¶ 88. Defendant Adkins emphasized that Massey was "very excited about this new [Hazard Elimination Committee] safety program," adding: "We are confident that it will be very effective and enable us to take our safety performance to a new level." *Id.*

(¶¶ 18, 317; Ex. 2 to Complaint Ex. D), Blankenship's aggressive production targets and production-before-safety approach (¶¶ 90-100) resulted in so many severe violations of federal safety regulations that non-compliance became the rule, rather than the exception. ¶¶ 103-07, 122-30. Massey's Large mines[6]—*i.e.*, Massey's most profitable and populated mines—performed worse than the national industry average as measured by Significant & Substantial ("S&S) citations and Elevated Enforcement Actions ("EEAs"), the most severe of MSHA's sanctions.[7] ¶¶ 18, 122-30. Massey thus epitomized a culture of non-compliance, not safety. ¶ 103. The Company's systemic safety failures and existing operations gave rise to a heightened risk of mine worker injuries and loss of life, regulatory fines, work stoppages, legal claims, and catastrophic mine disasters that jeopardized Massey's financial condition and prospects, including its expansion plan. ¶ 206, 211, 338.

To conceal dangerous conditions at mines, a widespread unlawful early notification system ("ENS") was used to stymie MSHA safety inspectors and prevent the discovery of even more safety violations. ¶¶ 19-25, 159-72. Massey used secret radio channels and code words to alert miners to the presence of MSHA inspectors at mine entrances in order to allow miners to fix non-compliant conditions before inspectors could get underground. *Id.* "[M]anagement regularly violated the law concerning advance warning on inspector arrivals." ¶¶ 163-64. The DOJ has already criminally indicted one of Blankenship's personal confidants, Hughie Stover, in

[6] The term "Large" mines refers to mines at which there are at least 100 employees. This definition matches the classification used by MSHA to compare the safety performance of like mines. ¶ 120 n.29.

[7] An S&S violation is one that is "reasonably likely to result in a reasonably serious injury or illness under the unique circumstance contributed to by the violations." ¶ 111 (citing MSHA Fact Sheet 95-4). MSHA inspectors determine whether a violation is S&S or not. *Id.*

EEAs are prompted by violations of Sections 104(b), 104(d), and 107(a) of the Federal Mine Safety and Health Act of 1977. When MSHA issues an EEA, sections of a mine are shut down entirely and production is stopped. ¶ 114.

connection with the ENS, after Stover tried to destroy incriminating evidence in a trash compactor. ¶¶ 160-62.

In addition to the illegal ENS, other deceptive tactics were used to mask the extent of Massey's systemic safety failures: Massey used unlawful policies to underreport lost-time incidents due to injuries and to understate non-fatal days lost ("NFDL") rates. ¶ 141-158. First, Massey frequently discouraged miners—through fear and intimidation—from filling out lost-time reports when they were injured. ¶¶ 141-58. Massey sent "Safety Directors" to hospitals to pressure miners hurt on the job to return to work immediately so that accidents would not get listed as lost time incidents. ¶¶ 142-44. When miners "got hurt, [they] were told not to fill out the lost time accident paperwork." ¶ 143. Second, Massey did not require that miners fill out lost-time reports when put on restricted work activity, ¶¶ 145-51, even though regulations required that such incidents be included in NFDL tallies. ¶ 118. Massey's management, including Blankenship, even encouraged miners to work "light duty" so that they would not fill out lost-time paperwork. ¶¶ 145-51. These improper policies regarding the non-reporting of injuries reduced the reliability of reported NFDL rates. ¶ 147. Massey's NFDL rates were ultimately restated on September 30, 2010. Massey Br. at 14 n.5. Massey's restated NFDL rates for 2007, 2008, and 2009 increased by 28%, 30%, and 40%, respectively. ¶ 135. But even these materially restated NFDL rates are false and misleading due to the foregoing unlawful NFDL-related reporting procedures. ¶¶ 141-51.

As a result of these deceptive practices and Massey's failure to implement basic safety systems codified to protect mine workers' lives, twenty-nine miners died in the Explosion. Preliminary findings conclude that the Explosion was the result of failures of basic safety systems and could have been prevented. ¶¶ 191-92. UBB was not adequately ventilated,

allowing explosive gas build up. ¶¶ 17, 28, 103-04, 181. Massey failed to meet federal safety standards for the application of rock dust, providing the fuel that propagated the Explosion. ¶¶ 197-99. Water sprays on equipment were not properly maintained and failed to function as they should have (such that a small ignition could not be quickly extinguished). ¶¶ 193-94. Multiple layers of protections intended to safeguard miners' lives failed at UBB, because of Massey's production-at-all-costs approach to running coal and pattern of non-compliance—precisely the information that the Complaint alleges was concealed from investors during the Class Period.

After the Explosion, the truth about Massey's profoundly reckless drive to produce profits above worker safety was revealed, with the press, analysts, and government investigators identifying—almost immediately, and continuing throughout the Class Period—the material facts Defendants misrepresented. Between April 6 and July 27, 2010, the market price for Massey stock declined significantly, but remained inflated until the end of that period as Defendants continued to misrepresent material facts about both pre-Explosion misconduct and the consequences of the Explosion. ¶¶ 329-66. Standard & Poor's cut Massey's credit rating, citing increased regulatory scrutiny that would reduce coal production and present headline risk. ¶ 334. Disclosure of Massey's ubiquitous regulatory violations prompted increased regulatory scrutiny on mining operations, leading to fines, mine shutdowns, production slowdowns, higher production costs due to increased safety-related expenditures, enormous litigation expenses, and headline risk, further damaging the Company's reputation. ¶¶ 189, 347, 363-64. Massey, subsequently, has reported revenue declines. ¶ 362. After the Class Period, Blankenship resigned and the Company sold itself. ¶¶ 33, 40-41, n.2.

B. The Materiality of Misstatements and Omissions Is Sufficiently Alleged

The materiality requirement poses a very low burden for Plaintiffs. "To fulfill the materiality requirement 'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" *Basic, Inc. v. Levenson*, 485 U.S. 224, 231-33 (1988) (quotations omitted). Thus, even at trial, plaintiffs only need to establish that "a reasonable investor, exercising due care, would gather a ***false impression*** from a statement, which would influence an investment decision." *Phillips v. LCI Int'l*, 190 F.3d 609, 613 (4th Cir. 1999) (quotations omitted) (emphasis added). Dismissals based on an absence of materiality "are disfavored in light of the fact-intensive nature of the materiality inquiry." *In re Sourcefire, Inc. Sec. Litig.*, No. JFM 07-1210, 2008 WL 1827484, at *1 (D. Md. Apr. 23, 2008) (citing *Dunn v. Borta*, 369 F.3d 421, 427 (4th Cir. 2004)).

1. Defendants Improperly Raise, and Fail to Establish, the "Truth-on-the-Market" Defense on This Motion

Defendants rely almost exclusively on a "truth-on-the-market" defense in their challenges to the sufficiency of many of the elements of Plaintiffs' claims.[8] However, Defendants fail to mention, let alone seek to meet, the burden they face in establishing this defense. As numerous courts have held, "any material information which insiders fail to disclose must be transmitted to the public with a degree of ***intensity*** and ***credibility*** sufficient to effectively counter-balance any misleading impression created by the insiders' one-sided representations." *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989)) (emphasis added) (cited by *Raab v. Gen'l Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993)). As such, "[t]he truth on the market defense is intensely fact-specific and is rarely an appropriate basis for dismissing a §10(b) complaint."

[8] *See* Massey Br. at 6-12 (material misstatement or omission); Massey Br. at 15-16 (reliance); and Massey Br. at 16-18 (loss causation).

Ganino v. Citizens Utils. Co., 228 F.3d 154, 167 (2d Cir. 2000); *see also In re Vivendi, Sec. Litig.*, 381 F. Supp. 2d 158, 181-82 (S.D.N.Y. 2003); *Saddle Rock Partners v. Hiatt*, No. 95-2326 GA, 1996 WL 859986, at *16 (W.D. Tenn. Mar. 26, 1996); *Wilkof v. Caraco Pharm. Labs.*, No. 09-12830, 2010 WL 4184465, at *4 (E.D. Mich. Oct. 21, 2010); *Plumbers & Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Arbitron Inc.*, 741 F. Supp. 2d 474, 485-86 (S.D. N.Y. 2010).[9]

The cases that Defendants cite are all inapposite. First, in each of those cases, the information at issue was disseminated by means of communication directed to and intended for the entire investment community, usually by the defendants themselves. Second, in each case, the information that was released was identical to, or functionally the same as, the specific information alleged to have been concealed or misrepresented, and did not have to be accessed and then aggregated from fragmentary bits in a complex and time-consuming fashion.[10]

Here, Plaintiffs allege: (1) certain statistics demonstrating that "when it came to the most serious types of regulations and violations, Massey epitomized a culture of non-compliance, not a culture of safety"; and (2) that "the raw data [on MSHA's website] does not lend itself to easy interpretation or analysis to provide the statistical comparisons alleged herein," providing

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[9] Indeed, even on summary judgment, "defendants bear a heavy burden of proof" on the defense. *Provenz v. Miller*, 102 F. 3d 1478, 1493 (9th Cir. 1996). *See also In re Columbia Sec. Litig.*, 155 F.R.D. 466, 482 (S.D.N.Y. 1994) (burden is "extremely difficult, perhaps impossible, to meet"); *In re Taxable Mun. Bonds Litig.*, No. MDL 863, 1994 WL 532079, at *5 (E.D. La. Sept. 26, 1994) ("staggering burden").

[10] *Phillips*, 190 F.3d at 617-8 (information contained in very news article quoting company officer that was basis for allegations; notwithstanding statement that company "was not for sale," defendant also stated there would be mergers in company's future and did not foreclose being a "seller"); *Recupito v. Prudential Secs., Inc.*, 112 F. Supp. 2d 449, 457 (D. Md. 2000) (very prospectus that was basis for allegations "specifically warned" of consequences of interest rates changes on CMBS market, notwithstanding contrary allegations); *Hillson Partners v. Adage Inc.*, 42 F.3d 204, 212 (4th Cir. 1994) (annual report to shareholders and Form 10-K disclosed specific problems plaintiffs alleged were concealed); *Raab*, 4 F.3d at 289 (company's press release disclosed information plaintiffs alleged was concealed); *Cooke v. Manufactured Homes*, 998 F.2d 1256, 1262 (4th Cir. 1993) (company's press releases announced declining revenues and increasing costs, and multiple news articles detailed company's financial problems, all of which plaintiffs alleged were concealed); *Longman v. Food Lion*, 197 F. 3d 675, 684-5 (4th Cir. 1999) (press release by union suing company and company press release, first discussing the suit then settlement of claims, fully disclosed allegations of labor law violations allegedly concealed).

specific reasons why that is so. ¶¶ 121-31. In response, Defendants improperly attach as exhibits screen-shots and printouts from MSHA's Mine Data Retrieval System ("DRS"), purporting to provide certain information relating to citations, violations, and accidents relating ***only*** to UBB, which they claim demonstrate that the truth as to "Massey's safety and compliance record was available to the market (and Plaintiffs) throughout the entire Class Period." Massey Br. at 8. *See* North Exhibits B-H.

Defendants argue they are permitted to submit this evidence outside the Complaint because: (1) "plaintiffs extensively relied upon MSHA's website, and the data available through it, in their Complaint (*see, e.g.*, ¶¶ 120-31)"; and (2) citing *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004), the Court may take judicial notice of statistics from a government website.

The Complaint, however, expressly alleges that its statistical analysis, containing much more information than that related to UBB, was derived not from the DRS but, rather, from MSHA's Open Government Data Sets ("OGDS"), which was not available until after the end of the Class Period.[11] Also, this case is unlike the situation in *Hall*, where the defendants provided the court with a "government statistic" reflecting a readily ascertainable piece of information missing from plaintiffs' complaint that, without dispute, was necessary to fully understand Plaintiffs' allegations. Nor did Defendants here submit a document that was clearly intended for investors containing the functional equivalent of the statistics that Plaintiffs alleged were improperly concealed during the Class Period, as in the cases they cite. Rather, they submitted raw data contained on a website that Plaintiffs did not reference or rely upon in their Complaint, in order to challenge the well-supported allegations that the statistics at issue can be derived from the information on MSHA's website only through a very time-consuming and "complex

[11] The OGDS was designed to make information available in a "more user friendly fashion" than the DRS. MSHA Sept. 9, 2010 Press Release, annexed to the Declaration of Joel H. Bernstein ("Bernstein Decl.") as Ex. A.

process," ¶ 121, and therefore could not have entered the market with a sufficient degree of credibility or intensity. As set forth in Plaintiffs' Motion to Strike filed concurrently herewith, this effort to have the Court take judicial notice of documents not integral to the Complaint and that raise an issue of fact on a motion to dismiss is improper.[12]

Plaintiffs dispute that North Exhibits B-H provide any support for the argument that the material omitted facts could have been readily calculated by a sufficient number of market participants so as to have affected Massey's stock price during the Class Period. To demonstrate this point, Plaintiffs are compelled to submit the accompanying expert Declaration of Professor R. Larry Grayson, Ph.D. *See* Bernstein Decl. Ex. B. Plaintiffs do so to show that North Exhibits B-H raise fact-based issues outside the Complaint that cannot be resolved on the present motions to dismiss.[13] Finally, if the Court were to find Plaintiffs' allegations on this issue insufficient, Plaintiffs submit that they could allege this material in an amended complaint, if provided the opportunity.

Briefly summarizing why North Exhibits B-H wholly fail to refute Plaintiffs' allegations, first, anyone wanting to analyze Massey's safety record would not focus on only one particular mine, as Defendants have. Instead, an analyst would need data regarding ***all*** of Massey's active mines during the period. Second, to come to any understanding as to Massey's relative safety

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[12] *See Hennessy v. Penril Datacomm Networks*, 69 F.3d 1344, 1354-55 (7th Cir. 1995) (while Form 10-K is normally subject to judicial notice, "there was considerable argument over [its] significance," prompting exclusion). Thus, as noted in Plaintiffs' Motion to Strike, the Court should not take judicial notice of North Exhibits B-H. The exhibits simply raise factual issues in dispute.

[13] In addition, if, as a result of Defendants' submissions, the Court chooses to convert either or both of the motions to dismiss to ones for summary judgment in order to consider North Exhibits B-H, Plaintiffs wish to provide their own evidence on this issue, including but not limited to the Grayson Declaration, to demonstrate that this issue could not be resolved on such a motion either. *See Orangeburg Pecan Co. v. Farmers Inv. Co.*, 869 F. Supp. 351, 359 (D.S.C. 1994) (before court can convert motion to dismiss into one for summary judgment, parties must have "reasonable opportunity to present all pertinent materials"). Under such circumstances, Plaintiffs also seek additional discovery on these issues. *See Nader v. Blair*, 549 F.3d 953, 961(4th Cir. 2008) ("Generally, a district court must refuse summary judgment 'where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition.'") (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)).

and compliance record, the raw data sets would need to be extracted from the DRS to determine necessary information as to, again, all of Massey's mines, normalized, and then aggregated in some statistically-usable fashion. One would then have to repeat that process for all similar mines against which a comparison was intended to be made. As Professor Grayson declares, "where comparisons are desired on several safety measures between a selected operator's mines and all similar-size mines in the underground coal sector for a given period of time, the amount of time and work effort required to get all the necessary information from the DRS [the only website operating during the Class Period] is indeed extensive."[14]

Courts uniformly hold that similar cases are too fact-intensive for the truth on the market defense to be resolved on a motion to dismiss. Thus, as to information in government filings, the court in *Wilkof* refused "to dismiss [a] matter based on Defendants' argument that documents such as the FDA Form 483s were public and could be accessed by shareholders." 2010 WL 4184465, at *4.[15] Further, when investors must search for information themselves and/or engage in complex and analytical procedures in order to arrive at any meaningful conclusions, courts have uniformly held that, at the motion to dismiss stage, the defendants have not met their heavy burden as to the truth on the market defense. *See In re Unisys Corp. Sec. Litig.*, No. CIV. A. 00-1849, 2000 WL 1367951, at *4 (E.D. Pa. Sept. 21, 2000) ("The GSA contract is not readily available on the GSA website, but rather an investor must pass through two other websites to see

[14] Defendants claim that Plaintiffs or their lawyers were able to "make sense of the public data for purposes of their Complaint." Massey Br. at 9. As the Grayson declaration makes clear, it is Professor Grayson, an expert in mine safety and engineering, who performed the statistical analysis referred to in the Complaint—a complex and time-consuming process. *See* Bernstein Decl. Ex. B.

[15] *See also Staehr v. Hartford Fin. Servs. Grp.*, 547 F.3d 406, 432 (2d Cir. 2008) ("shareholders would not have been on the lookout for unpublicized state court pleadings or obscure state regulatory filings"); *Ganino*, 228 F.3d at 168 (court could not hold that information in SEC filings of company's contractor were conveyed with sufficient "intensity and credibility" as to dispel the alleged false impression); *DeMarco v. Robertson Stephens Inc.*, 318 F. Supp. 2d 110, 122 n.5 (S.D.N.Y. 2004) (referring to Form 114 filings with the SEC, which are public documents, court held that "[f]iling a relatively inaccessible form with a government agency disclosing" the alleged omitted information "is not, at least as a matter of law, a corrective to" the alleged misleading statements).

the contract"); *Citiline Holdings v. Istar Fin. Inc.*, 701 F. Supp. 2d 506, 514-15 (S.D.N.Y. 2010) ("isolated data points" and "scattered disclosures" insufficient to meet burden on defense) (citing cases); *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1159-60, and n.32 (C.D. Cal. 2008) ("*Countrywide*") ("Of course, it is ***possible*** that a hedge fund somewhere had a computer analyzing the loan detail tables in all these prospectuses …. Defendants are not entitled to such speculation.") (emphasis in original).

Additionally, Plaintiffs allege Defendants engaged in intentionally deceptive conduct, such as instituting the ENS to alert miners to the arrival of regulatory officials to deceive them as to regulatory compliance, ¶¶ 159-72, and manipulating NFDL rates. ¶¶ 141-58. Thus, even if a hypothetical investor would have been able to obtain statistics relating to Massey's relative safety and compliance record during the Class Period: (1) those statistics were still materially inflated; and (2) they would not have revealed the intentionally deceptive conduct.[16]

Finally, Defendants fail to demonstrate that any investor or analyst was aware of the material omitted information. That it would likely have been improper for Defendants to have attempted to introduce such evidence, if they had it, simply emphasizes the point that this is not a proper issue for resolution on this motion.[17]

2. Misstatements Were Subject to Objective Verification and Thus Are Not Puffery

The Court should reject Defendants' argument that the "puffery" rule should apply to Massey's professed commitment to corporate safety values and industry leadership in safety.

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[16] *See Countrywide*, 588 F. Supp. 2d at 1160 n. 32 ("Even then … the data Countrywide used to generate those tables was faultier than a market participant would realize").

[17] Also, it would be improper and unfair if Defendants inject new arguments for the first time in their reply papers, without affording Plaintiffs an opportunity to submit a sur-reply, even putting aside the propriety of any attempt to introduce additional documents not relied upon in the Complaint. *See Goldsboro City Bd. of Ed. v. Wayne Cnty. Bd. of Ed.*, 745 F.2d 324, 327 n.3 (4th Cir. 1984); *Dettlaff v. Holiday Inns, Inc.*, No. 5:98-CV-359, 2000 WL 33682679 at *3 (E.D.N.C. 2000).

Massey Br. at 7. First, context is important when considering the materiality and falsity of challenged statements. *Myers v. Lee*, No. 1:10CV131 (AJT/JFA), 2010 WL 2757115, at *4 (E.D. Va. July 12, 2010).[18] As Plaintiffs allege, after the Alma fire and subsequent investigations and findings, bringing with it the public threat of a drag on production and other significant economic consequences, it was critical to assure investors that "safety first" was "far more than a slogan." ¶¶ 11, 86, 291, 296, 314. Thus, Massey repeatedly assured investors that safety was now first priority, that new and improved safety standards "far exceeded" regulatory requirements, and that its "safety performance outpace[d] the industry." ¶¶ 12, 82, 85, 202, 232, 247, 254, 260, 267, 291, 296, 298, 303, 340.[19] Massey relentlessly sought to expand operations and used these claims of safety as a competitive basis to do so. ¶¶ 101-02, 226, 232. Just as Massey benefited from its reputation for safety after the Alma fire, its securities traded at a significant premium. ¶ 328. Thus, Defendants' "affirmative characteriz[ations]" of Massey's purported reformed and thriving new "culture of safety," ¶¶ 202, 230-32, 247, 254, 260, 267, 274, 289, 291, 296, 298, 301-03, "declare[d]" that subject "to be material to the reasonable shareholder." *In re Ambac Fin. Grp., Inc. Sec. Litig.*, 693 F. Supp. 2d 241, 271 (S.D.N.Y. 2010) (quoting *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 282 (3d Cir. 1992)).

Defendants cite *Longman*, but fail to acknowledge its holding that representations otherwise characterized as puffery can be actionable when the statement is both "factual and

[18] *See also Cooke*, 998 F.2d at 1259 (statements shares for repurchase were "an attractive investment in light of the Company's strong earnings prospects for the future" were material in light of total mix of information); *Scritchfield v. Paolo*, 274 F. Supp. 2d 163, 175-76 (D.R.I. 2003) ("a company's statements that it is 'premier,' 'dominant,' or 'leading' must not be assessed in a vacuum); *Casella v. Webb*, 883 F.2d 805, 808 (9th Cir. 1989) (representation that an investment was "a sure thing" was "to be evaluated in context").

[19] *Atlas v. Accredited Home Lenders Holding Co.*, 556 F. Supp. 2d 1142, 1155 (S.D. Cal. 2008) (frequency of statements shows they are "among the most important information looked to by investors").

material" and its falsity can be proven. *Id.* at 683.[20] Here, while representing to investors that all "mining operations adhere[d] to stringent safety standards," the Individual Defendants knew that, in fact, Massey's mines often violated federal safety regulations, that certain of Massey's mines were even in "crisis situations," ¶ 178, and that Massey used deceptive tactics to hoodwink MSHA inspectors and underreport NFDL rates. ¶¶ 28, 141-172. Massey's professed corporate commitment to safety and supposed status as an "industry leader" in "safety excellence" can be factually disproven.[21]

Finally, where statements, even if general, are so divergent from the concealed facts, those statements are materially misleading. *See Countrywide*, 588 F. Supp. 2d at 1144 ("[T]he [complaint] adequately alleges that Countrywide's practices so departed from its public statements that even 'high quality' became materially false or misleading; and that to apply the puffery rule to such allegations would deny that 'high quality' has any meaning.").[22] Here, Plaintiffs have not only sufficiently pleaded the extent to which Massey's safety and compliance record was significantly worse than the national average, in sharp contrast to Defendants' representations, but that Massey also employed deceptive tactics to cover up the extent to which worker safety was being jeopardized. ¶¶ 141-72. Massey's undisclosed "safety" practices so

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[20] *See also Dunn*, 369 F.3d at 431 ("when a proposed seller…does not simply magnify in opinion the advantages which [an article] has but invents advantages and falsely asserts their existence, he transcends the limit of 'puffing'') (quotations omitted); *In re SemGroup Energy Partners, L.P. Sec. Litig.*, 729 F. Supp. 2d 1276, 1294 (N.D. Okla. 2010) ("optimistic statements may be actionable where material, non-disclosed information undermines the truth of those statements.").

[21] Massey's mines had an extremely poor safety record well below the national average as measured by the most critical safety regulatory metrics. ¶¶ 124-30. UBB, for example, received 223 more citations and orders than the national average in 2009 and 26.36 more EEA. ¶¶ 184, 186. *Wilkof*, 2010 WL 4184465, at *2, *4 (issue of whether alleged misrepresentation that company was "substantially cGMP compliant" was "issue subject to objective verification" and not puffery); *In re ValuJet, Inc. Sec. Litig.*, 984 F. Supp. 1472, 1477-78 (N.D. Ga. 1997) (statement touting company's safety record as "among the very best" was material).

[22] *Cf. In re Dura Pharm., Inc. Sec. Litig.*, 452 F. Supp. 2d 1005, 1033 (S.D. Cal. 2006) (because "the facts alleged . . . lead to a strong inference there was no reasonable basis for believing such statements to be true . . . the puffery rule does not insulate Defendants from liability" under the securities laws.).

deviated from public representations that even statements like "safety is job one" and "safety is first priority" became materially misleading.[23]

3. Defendants' Falsely Touted "Record Low" NFDL Rates to Support Statements as to Massey's Safety Record, Without Disclosing Other Metrics That Belied Such Statements

Defendants challenge the allegation in ¶ 204 as to deception relating to the "import of NFDL rates insofar as such rates do not measure compliance with any federal safety regulations." Massey Br. at 11. However, the specific allegation in ¶ 204 refers back to Section IV. G of the Complaint, which compared the almost perfect inverse relationship between Massey's "record low" NFDL rates and its very high citations and orders. ¶ 139. Thus, as that section of the Complaint concluded, "Defendants' disclosure of NFDL rates during the Class Period was a materially insufficient means to inform investors of the overall safety of Massey's operations." ¶ 140. Accordingly, whatever may be said as to the technical accuracy of Defendants' disclosures, the clear "import" of their statements was that Massey's NFDL rates served as an adequate proxy for the strength of safety procedures, such that when Massey claimed a "positive' safety record followed by a statement of a low NFDL rate, investors could be assured there was no other material fact belying that claim. As courts have long held, "even literally true statements are actionable where they create a false impression." *In re Terayon*

[23] The statements that the court in *Longman* found to be puffery, in contrast, claimed that the company's employees were well paid and that its customers would find its stores clean and otherwise suited to their needs. These statements were made at a time when none of these beliefs were a material concern to investors, the first set of statements did not even bear on plaintiffs' claims, and plaintiffs presented no facts to suggest that the statements were false. 197 F.3d at 684 n.2 & 685. In *In re Ford Motor Co. Securities Litigation*, 381 F.3d 563 (6th Cir. 2004), the alleged statements deemed immaterial were couched in terms of what Ford "want[ed]," which "would not be interpreted by an investor as a representation that its products achieve that objective or its suppliers maintain the quality standards it asks." *Id.* at 571. Further, broad statements about the quality and safety of all Ford cars were not deemed materially false where a purported defective third-party component affected only a single Ford model. Plaintiffs here allege, by contrast, that Massey's own practices and ensuing safety problems affected nearly every one of the Company Large underground and surface mines, and culminated in the Explosion. ¶¶ 122-30, 173-87. The statements in *Anderson v. Abbott Labs*, 140 F. Supp. 2d 894 (N.D. Ill. 2001), had nothing to do with the claims in the action, relating to undisclosed problems with the FDA. They simply claimed that the company was a "leader" and suggested it was poised for potential growth. *Id.* at 905.

Commc'ns Sys., No. C 00-1967, 2002 WL 989480 (N.D. Cal. Mar. 29, 2002) (citing *Kaplan v. Rose*, 49 F.3d 1363, 1372 (9th Cir. 1994); *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 200 n.20 (3d Cir. 1990). "The disclosure required by the securities laws is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead prospective buyers." *McMahan & Co. v. Wherehouse Entertainment*, 900 F.2d 576, 579 (2d Cir. 1990).[24]

Indeed, it is not enough for information disclosed to be accurate; it must also be sufficiently complete to not create a misimpression, because the "duty to speak the full truth arises when a defendant undertakes a duty to say anything." *Martin v. Pepsi-Cola Bottling Co.*, 639 F. Supp. 931, 936 (D. Md. 1986) (citations omitted).[25] Having made positive representations as to the results of Massey's safety initiatives, and then presented a metric that purported to demonstrate those results, Defendants had an obligation to state all material facts that called that representation into question.

4. Massey's Risk Disclosures About Regulatory Violations Were Inadequate

Defendants contend Massey sufficiently disclosed its significant pattern of regulatory non-compliance through the following boilerplate risk disclosure: "even with our substantial efforts to comply with extensive and comprehensive regulatory requirements, violations during mining operations occur from time to time." Massey Br. at 9. This is just sophistry. First, the clear impression created by this representation is that Massey's compliance problems were of an occasional nature, the inevitable result of no mining company being able to achieve a record of

[24] *See Phillips*, 190 F.3d at 613 ("If a reasonable investor, exercising due care, would gather a false impression from a statement, which would influence an investment decision, then the statement satisfies the initial element of a § 10(b) claim").

[25] "Silence, or omission to state a fact, is proscribed … where the defendant has revealed some relevant, material information even though he had no duty (*i.e.*, a defendant may not deal in half truths)." *In re Credit Suisse First Boston Corp. Sec. Litig.*, No. 97-4760, 1998 WL 734365, *6 (S.D.N.Y. 1998) (citing *First Virginia Bankshares v. Benson*, 559 F.2d 1307, 1314 (5th Cir. 1977)); *see also Schlifke v. Seafirst Corp.*, 866 F.2d 935, 944 (7th Cir. 1989) ("incomplete disclosures, or 'halftruths,' implicate a duty to disclose whatever additional information is necessary to rectify the misleading statements.").

perfection. However, belying that message, well-pleaded allegations establish that Massey performed significantly worse than the national average at its Large mines as measured by S&S citations and EEAs. ¶¶ 124, 127. Second, Massey did not make "substantial efforts to comply," but rather substantial efforts to evade MSHA regulations. ¶¶ 19-25, 159-72.

Similarly, generic disclosures of future risks—*e.g.*, "operations are subject to certain events and conditions that could disrupt operations, including ... explosions [and] natural disasters"—***if*** Massey failed to adequately comply with "laws and regulations," Massey Br. at 9, 17, failed to address the high-level of risk associated with the then-existing non-compliant state of Massey's mines. *Sourcefire*, 2008 WL 1827484, at *5 ("there is a difference between language bespeaking caution of hopeful corporate predictions and the failure to disclose known material facts and data …. Usually, cautionary language as such is not per se dispositive of this inquiry") (citations and quotations omitted).[26]

For these same reasons, Blankenship's statements in April 2008 that Massey's "expansion projects are continuing on [their] original schedule" are also misleading. The generic risk disclosure Defendants trot out to defend their representation, which is predicated on hypothetical violations—*i.e.*, "MSHA or other federal or state regulatory agencies may order certain of [Massey's] mines to be temporarily or permanently closed," Massey Br. at 10—utterly failed to disclose the actual heightened risk of regulatory fines, work stoppages, legal claims, and ***mine disasters*** that threatened the reported expansion schedule, given Massey's actual concealed record of significant non-compliance. It also failed to warn investors of the enhanced risk of those things happening in light of Massey's active and deceptive efforts to avoid compliance

[26] *See also Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1127 (7th Cir. 1993) ("A prospectus stating a risk that such a thing ***could*** happen is a far cry from one stating that this ***had*** happened. The former does not put an investor on notice of the latter.") (emphases in original); *Berson v. Applied Signal Tech.*, 527 F.3d 982, 986 (9th Cir. 2008); *Feiner v. SS&C Techs., Inc.*, 11 F. Supp. 2d 204, 209 (D. Conn. 1998); *In re Rediff.com India Ltd. Sec. Litig.*, 358 F. Supp. 2d 189, 211-12 (S.D.N.Y. 2004).

with applicable regulation—*e.g.* the ENS. To be a "meaningful" risk disclosure, such disclosure "must discredit the alleged misrepresentations to such an extent that the 'risk of real deception drops to nil.'" *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983, 1033 (S.D. Cal. 2005) (citation omitted); *In re TCW/DW N. Am. Gov't Income Trust Sec. Litig.*, 941 F. Supp. 326, 330-31 (S.D.N.Y. 1996) (denying motion to dismiss because although defendants clearly and accurately depict type of risk borne, they did not accurately depict extent of risk).[27] Defendants do not to point to any Massey risk disclosure that accurately described the extent of the risks posed by known safety violations and deceptive acts to neutralize regulatory supervision.

5. Defendants' Fraudulent Acts Cannot Be Deemed Immaterial

Incredibly, Defendants argue the intentionally deceptive acts Plaintiffs allege—the ENS, discouraging injured minors from filling out required NFDL incident reports, and falsifying NFDL reports—were immaterial to investors. Massey Br. at 12. While premised on Defendants' baseless contention that the market was aware of Massey's significant number of regulatory citations, even if that were true, this is yet another fatuous argument. Defendants are comparing concealing a failure to comply with safety regulations with concealing an active deceptive effort to undermine those rules. "[I]t is plainly material to investors that executives of a company are acting fraudulently. First, executives who act fraudulently may subject their employer to a risk of legal action, and may also use their employer's resources for their own ends, not to benefit shareholders. Second, executives who commit fraud are likely to be terminated. When those executives are valuable to a company's continued success, as

[27] The only case Defendants cite in support of their argument, *Recupito*, is inapposite. Massey Br. at 10. In *Recupito*, investors were specifically warned that changes in interest rates would affect the value of subordinated CMBS and the ability to purchase additional CMBS, "the very risks Plaintiff claims were not disclosed." *Id.* at 457. Here, Massey never disclosed that the likelihood of mine closure or some other adverse event was increased due to unlawful practices that concealed safety risks, as Plaintiffs allege. Also, Part I.B.1., *supra*, fully refutes Defendants' repeated argument that its compliance record was "publicly accessible through MSHA's website." Massey Br. at 8.

[Blankenship], [Massey's] CEO, likely was, this possibility is plainly material to investors." *In re Comverse Tech., Inc. Sec. Litig.*, 543 F. Supp. 2d 134, 151 (E.D.N.Y. 2008).[28] In any event, the extent to which investors would deem that additional quantum of fact material is not an issue that can be decided on this motion. *See Sourcefire*, at *1 (*citing Dunn*, at 427).

II. THE COMPLAINT SUFFICIENTLY ALLEGES SCIENTER

Plaintiffs' allegations, particularly when reviewed holistically, provide a strong inference of scienter that outweighs any plausible contrary inferences Defendants assert. The facts include:

- SEPPC members regularly received detailed mine safety reports informing them of Massey's worse than national average fatality record and greater than national average S&S citations and EEAs, including an astounding number of UBB withdrawal orders, and provided reports to the Board (¶¶ 18, 120, 122, 124-30);

- Safety was critical to Massey's core operations and the deviation between representations of a focus on, and stellar achievements in, safety and Massey's actual record was extreme; Defendants were the highest ranking executives specifically tasked with safety compliance; and Blankenship was a "hands-on" manager who closely monitored mine operations (¶¶ 9, 68, 41-44, 46-52);

- The alleged deceptive practices designed to mask Massey's priority of production before safety, supported by numerous CWs who are corroborated by each other and others, were pervasive throughout the Company (¶¶ 312-13);

- Blankenship, Adkins, and at least eighteen other executives invoked their Fifth Amendment right against self-incrimination in the investigation of the Explosion (¶¶ 26, 190);

- A criminal indictment was filed against Stover, Chief of Security at Massey's Performance Coal subsidiary and Blankenship's personal driver and bodyguard, for participating in and ordering the destruction of documents about the ENS (¶¶ 21, 22, 309);

- The magnitude of the downward restatement of yearly NFDL rates, with which Massey had sought to burnish its safety reputation, disclosed months after the

[28] *See also Chris-Craft Inds. v. Piper Aircraft Corp.*, 480 F.2d 341, 406 (2d Cir. 1973) ("One who intentionally violates the law or shows a willful disregard for it is usually a poorer risk than one who acts without a full appreciation for the seriousness of his conduct.").

Explosion, when Massey was subject to numerous investigations, was significant (¶¶ 134-35); and

- The need to maintain investor confidence by promising a new and improved safety approach, to aggressively pursue production and expansion, to avoid claims Massey violated the Manville Settlement, and, for two defendants, to obtain increased incentive compensation, provided the motive to conceal Massey's actual safety record and procedures, and add to the inference of scienter (¶¶ 11-14, 77, 81, 120-32, 210-11, 350).

A. Legal Standard

"The Fourth Circuit has held that scienter under the PSLRA may be alleged by 'pleading not only intentional misconduct, but also recklessness.'" *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 368 (D. Md. 2004) (quoting *Ottmann*, 353 F.3d at 344).[29] The Fourth Circuit also requires "a flexible, case-specific analysis" when "examining scienter pleadings." *Ottmann*, 353 F.3d at 345-46. "[W]hile particular facts demonstrating a motive and opportunity to commit fraud … may be relevant to the scienter inquiry, the weight accorded to those facts should depend on the circumstances of each case." *Id.*

When determining whether a complaint adequately pleads scienter, courts must "accept all factual allegations in the complaint as true." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). "The inquiry is whether ***all*** of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Id.* at 310 (emphasis in original); *Matrix Capital Mgmt. Fund, LP v. BearingPoint Inc.*, 576 F.3d 172, 182 (4th Cir. 2009).[30] The inference that the defendant acted with scienter need not be irrefutable, *i.e.*, of the "smoking-gun" genre, or even the "most plausible of competing inferences." *Tellabs*, 551 U.S. at 323-24 (citation omitted). While the

[29] The Court has "defined a reckless act in the § 10(b) context as one 'so highly unreasonable and such an extreme departure from the standard of ordinary care as to present a danger of misleading the plaintiff to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" *Id.*

[30] *See also In re MicroStrategy, Inc. Sec. Litig.*, 115 F. Supp. 2d 620, 631 (E.D. Va. 2000) ("otherwise unremarkable facts may take on added significance when combined with each other").

"court must consider plausible nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff," the inferences supporting liability need only be as strong. *Id.* at 310. In other words, a tie goes to the plaintiff. *See Lormand v. U.S. Unwired*, 565 F.3d 228, 254 (5th Cir. 2009); *Comm'cns Workers of Am. Plan for Employees' Pensions & Death Benefits v. CSK Auto Corp.*, 525 F. Supp. 2d 1116, 1119 (D. Ariz. 2007).

While the Officer Defendants disparage allegations of facts from which scienter can be "indirectly" inferred (and, as noted below, ignore "direct" evidence"), Off. Defs. Br. at 8, circumstantial evidence, analyzed based on "logic, common sense, and human experience," repeatedly have been found more than sufficient. *MicroStrategy*, 115 F. Supp. 2d at 630-31; *In re Scientific Atlanta, Inc. Sec. Litig.*, 754 F. Supp. 2d 1339, 1361 (N.D. Ga. 2010).[31]

B. Reckless Disregard of Red Flags Strongly Supports an Inference of Scienter

1. Plaintiffs Allege Numerous Clear Red Flags

Where there are numerous and repeated red flags that should have placed a defendant on notice as to the unreliability of public statements, there is a strong basis to infer scienter. The Fourth Circuit "afford[s] these allegations substantial weight." *Matrix*, 576 F.3d at 186, 188.[32] Notwithstanding Defendants' sweeping rhetoric to the contrary, Massey Br. at 2, the Complaint clearly alleges red flags. *See, e.g.*, ¶ 178 ("[a]s further reported in the *Washington Post*, Oppegard also stated that, with regard to the number of withdrawal orders issued at [UBB] in

[31] Indeed, "it must be remembered that a plaintiff generally must frame the facts respecting the defendant's mental state (*i.e.*, the scienter element of the claim) without the benefit of discovery, and therefore, most often, allegations about a defendant's culpable state of mind must be drawn from limited state of mind evidence augmented by circumstantial facts and logical inferences." *Arnlund v. Deloitte & Touche LLP*, 199 F. Supp. 2d 461, 475 (E.D. Va. 2002).

[32] *See also MicroStrategy*, 115 F. Supp. 2d at 651; *In re ArthroCare Corp. Sec. Litig.*, 726 F. Supp. 2d 696, 725 (W.D. Tex. 2010); *Jones v. Corus Bankshares, Inc.*, 701 F. Supp. 2d 1014, 1024 (N.D. Ill. 2010); *CMNY Capital, L.P. v. Deloitte & Touche*, 821 F. Supp. 152, 166 (S.D.N.Y. 1993); *In re Rent-Way Sec. Litig.*, 209 F. Supp. 2d 493, 508-09 (W.D. Pa. 2002). The red flag allegations in *Matrix* were dissipated by factors not present here, such as the defendant company "struggling to integrate thirty worldwide acquisitions," which impacted its ability to accurately interpret the red flags. *Matrix*, 576 F.3d at 188.

2009 and 2010, "***You're past the point of a red flag and you're really in a crisis situation.***") (emphasis added); *see Jones*, 701 F. Supp. 2d at 1024.

As alleged, the red flags that Defendants knowingly or recklessly disregarded that would have alerted them to Massey's noncompliance with safety regulations consisted of fatality, S&S citations, and EEA data, which indicated that Massey was worse than the national average. ¶¶ 120-32, 173-87. In particular, UBB received almost daily citations for poor ventilation or dangerous buildups of coal dust, which signaled something was wrong. ¶ 182.[33] As shown below, the Complaint more than sufficiently alleges that this information was available to each Defendant and should have placed them on notice of Massey's material noncompliance with safety requirements. ¶ 322.[34]

2. Defendants Had Information That Contradicted Public Statements

After the Alma fire, Massey agreed to many safety-related corporate governance reforms such as an "enhanced" SEPPC charged with providing detailed mine safety reports to the Board. ¶¶ 8-9. The SEPPC, comprised of the Director Defendants and Phillips, ¶¶ 42, 46-52, 316, was responsible for enhancing Massey's processes "to monitor, count and, report safety incidents" and was to inform the full Board (including Blankenship (¶ 41)) of compliance with mine safety

[33] Red flags raised but recklessly disregarded by Defendants include, among others: (1) Since 2000 and before the Explosion, 23 Massey miners were killed, more than at any other company (¶ 122); (2) S&S citations at Large underground and surface mines were higher than the national average (¶ 124); (3) Company-wide rate for EEAs was 42% and 138% higher than the national industry average in 2008 and 2009 (¶ 128-30); (4) "[i]n 2009, MSHA citations at [UBB] more than doubled from 2008 to more than 500, and proposed fines more than tripled to $897,325" (¶ 175); (5) "in 2009 MSHA issued 202 S&S citations to [UBB], almost equaling the 204 S&S citations issued to [UBB] during the 24 months prior to December 2007, when the mine was placed on pattern of violations status" (¶ 175); and (6) MSHA records show that 61 withdrawal orders were issued at UBB in 2009, shutting down parts of UBB 54 times. MSHA also issued numerous withdrawal orders in the first 3 months of 2010, shutting UBB down 7 times. ¶ 176.

[34] Significantly, none of Defendants challenge the claim that they were aware of these particular red flags. As such, they concede that issue. *See In re MoneyGram Int'l, Inc. Sec. Litig.*, 626 F. Supp. 2d 947, 983 n.35 (D. Minn. 2009) ("Defendants do not challenge the individual defendants' knowledge of the relevant alleged facts. Rather, defendants argue only that such knowledge does not permit a strong inference of scienter. Therefore, the court's scienter analysis applies equally to all defendants"); *Lefkoe v. Jos. A, Bank Clothiers*, No. WMN-06-1892, 2007 WL 6890353, at *6 (D. Md. Sept. 10, 2007).

laws and regulations. ¶¶ 77-78, 317; Ex. 2 to Ex. D at 4. The SEPPC received quarterly safety reports from Massey's Compliance Officer which included comprehensive analyses of the number and type of safety incidents, including S&S citations and EEAs. ¶¶ 9, 18, 78; Ex. 2 to Ex. D at 7. Additionally, the SEPPC was responsible for "develop[ing] goals for implementing enhancements to the Company-wide process utilized to monitor, count and report mine safety incidents and complaints … and near misses with high potential for injury," ¶ 78, and for creating a system for employees to report safety misconduct. ¶ 79. Thus, based on quarterly reports they received, the SEPPC and Blankenship were aware of pervasive noncompliance with safety regulations but failed to disclose this noncompliance to the public. ¶¶ 78, 317.

Courts have often held that directors who sit on a committee that is tasked with monitoring detailed aspects of a company, in this case safety metrics, can be presumed to have become aware of red flags that provide a strong inference of scienter. *See, e.g.*, *In re Abbott Labs. Deriv. S'holders Litig.*, 325 F.3d 795, 806 (7th Cir. 2003) ("Where there is a corporate governance structure in place, we must then assume the corporate governance procedures were followed and that the board knew of the problems and decided no action was required."); *In re Countrywide Fin. Corp. Deriv. Litig.*, 554 F. Supp. 2d 1044, 1062 (C.D. Cal. 2008) (same). Indeed, in *In re Pfizer Inc. S'holder Deriv. Litig.*, 722 F. Supp. 2d 453, 461 (S.D.N.Y. 2010), the court held there was a "substantial likelihood" the directors knew of the wrongdoing based upon "corporate integrity agreements," which are analogous to the Manville Settlement:

> There is no reason to believe this reporting requirement was not fully complied with, thus guaranteeing that each member of the board was bombarded with allegations of continuing misconduct of the very kind that the prior settlements looked to the board to prevent.

Id.

As for any argument that the Board or the SEPPC, whose core responsibility was to restore compliance with safety regulations after the consequences of the Alma fire, would not discuss unusually high regulatory violations, citations, and fatalities, all of which could potentially shut down Massey's mines, ¶¶ 122, 124-31, "[t]his argument is patently incredible." *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 943 n.21 (9th Cir. 2003).

3. Safety Was a Core Part of Massey's Business, the Individual Defendants Were the Primary Persons Charged with Safety Responsibilities, and Public Statements about Safety Sharply Deviated from the Truth

"Problems with a [core part of the business] with a major impact on revenues are more likely to support a strong evidence of scienter." *MicroStrategy*, 115 F. Supp. 2d at 639 (quoting *Greebel v. FTP Software*, 194 F.3d 185, 206 n.18 (1st Cir. 1999)). Although the Fourth Circuit has not expressly ruled upon the core operations doctrine, it is applied by many courts,[35] though often depending on the circumstances, with other factors.[36]

Here, compliance with safety regulations was critical to Massey's revenue stream during the Class Period, given: (1) the severe economic consequences to a mining company that violates those rules: and (2) the regulatory spotlight put on Massey after the Alma fire. ¶¶ 208, 244, 279, 314. Indeed, it was for those reasons that Massey agreed to the enhanced SEPPC and related

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[35] *See, e.g.*, *Crowell v. Ionics, Inc.*, 343 F. Supp. 2d 1, 53 (D. Mass. 2004); *Sgalambo v. McKenzie*, 739 F. Supp. 2d 453, 481-83 (S.D.N.Y. 2010); *In re Tel-Save Sec. Litig.*, No. 98-CV-3145, 1999 WL 999427, at *5 (E.D. Pa. Oct. 19, 1999); *In re Elec. Data Sys. Corp. Sec. & "ERISA" Litig.*, 298 F. Supp. 2d 544, 557 (E.D. Tex. 2004); *Schleicher v. Wendt*, 529 F. Supp. 2d 959, 974 (S.D. Ind. 2007); *In re Sears, Roebuck & Co. Sec. Litig.*, 291 F. Supp. 2d 722, 727 (N.D. Ill. 2003); *South Ferry LP, #2 v. Killinger*, 542 F.3d 776, 785-86 (9th Cir. 2008); *SemGroup*, 729 F. Supp. 2d at 1298-1300.

[36] Three ways in which a plaintiff have been found to have sufficiently alleged scienter based upon a core business, consistent with *Tellabs*, include allegations: (1) "in any form along with other allegations that, when read together, raise an inference of scienter that is 'cogent and compelling, thus strong in light of other explanations.'" (citation omitted); (2) that "are particular and suggest that defendants had actual access to the disputed information"; or (3) that "in rare circumstances where the nature of the relevant fact is of such prominence that it would be 'absurd' to suggest that management was without knowledge of the matter." *South Ferry*, 542 F.3d at 785-86.

safety reforms. ¶ 77. Emphasizing the point, Massey publicly touted safety initiatives and its "safety first, production second" program, ¶ 11, a key feature in press releases, annual reports, and annual corporate social responsibility reports (initiated pursuant to safety reforms agreed to in the Manville Settlement) issued throughout the Class Period. ¶¶ 11, 230, 291, 301.

Added to those facts are the following additional allegations. First, as established above the SEPPC and the Board had "actual access to [the] disputed information." *South Ferry*, 542 F.3d at 786. Second, Blankenship, Tolbert, Adkins, and Phillips were Massey's highest ranking officers directly involved with safety issues during the Class Period. ¶¶ 41-44. A high level position within a company may be considered in establishing scienter "in light of the totality of the circumstances." *Royal Ahold*, 351 F. Supp. 2d at 376.[37]

Blankenship served as Massey's CEO, President, and Board Chairman, and, as such, received reports from the SEPPC. ¶ 41. He and other high-level executives were intimately involved in Massey's day-to-day operations. CW12, a direct report to Tolbert, stated Blankenship and senior managers regularly tracked lost-time incidents reports. ¶ 137. In fact, Blankenship was self-described as "hands on" at Massey and was considered a micromanager of every mine. ¶¶ 3, 69. Production figures were sent to Blankenship every several hours and if production stopped for any reason, he demanded an explanation. ¶ 91. Blankenship kept himself apprised of production through direct lines to Massey's mines, installing a "red phone" in "one of the managers' offices" at UBB. ¶ 91. He signed off on new hires, purchases, and

[37] *See also, e.g.*, *Semgroup*, 729 F. Supp. 2d at 1298 ("relevant factor"); *Jones*, 701 F. Supp. 2d at 1028-29; *In re Juniper Networks, Inc. Sec. Litig.*, 542 F. Supp. 2d 1037, 1048 (N.D. Cal. 2008); *Commc'ns Workers of Am.*, 525 F. Supp. 2d at 1121.

discussed safety in press releases, investor conferences, CSSRs, and annual reports. ¶¶ 69, 202, 219, 247, 252, 294.[38]

Phillips was Massey's President, Director, Senior Vice President, and Chief Administrative Officer. ¶ 42. Phillips often discussed Massey's safety performance and improvement initiatives with investors and served on the SEPPC. ¶¶ 42, 87, 203, 239, 268, 274. Tolbert was Massey's CFO and Vice President, and, as such, would have been required to be aware of actual and potential penalties for safety violations which impacted the Company's financials. ¶¶ 43, 91, 175-76.[39] Adkins was Massey's Senior Vice President and COO, and, as such, oversaw all mining operations and reported directly to Blankenship. ¶ 44.[40]

Added to those factors is the magnitude of the divergence between Defendants' repeated statements touting Massey as a "leader in safety" that prioritized safety, ¶¶ 82, 202-03, 212, 219, 231-32, 247, 252, 254, 273, 289, 294, 296, 301, 303, 340, and the concealed facts as to Massey's fixation on production over safety, as reflected in above-average rates of fatalities, S&S citations, and EEAs, particularly as to UBB ("ticking time bomb" (¶ 174)), all corroborated by a substantial number of CWs (*see infra*) and Congressional testimony. ¶¶ 93-107.[41] This factor also relates to NFDL rates, which Defendants repeatedly used to support their false claims but were later restated and shown to have been inflated by 28%, 30%, and 40%, respectively, for

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[38] *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1234 (9th Cir. 2004) ("It is reasonable to infer that the Oracle executives' detail-oriented management style led them to become aware of the allegedly improper revenue recognition of such significant magnitude the company would have missed its quarterly earnings projection but for the adjustments"); *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 278 (3d Cir. 2006) ("hands on" management supported finding of scienter); *In re Worldcom, Inc. Sec. Litig.*, 294 F. Supp. 2d 392, 416 (S.D.N.Y. 2003) ("hands-on management" supported strong inference); *Jones*, 701 F. Supp. 2d at 1029.

[39] *Countrywide*, 588 F. Supp. 2d at 1196 ("as CFO, Sieracki was directly responsible for Countrywide's financials [which] depended on Countrywide's operations").

[40] *Miss. Public Employees' Ret. Sys. v. Boston Scientific Corp.*, 523 F.3d 75, 91-92 (1st Cir. 2008) (Defendant was COO and point person as to affected area of company and so "would presumably have been aware" of ongoing monitoring of issue).

[41] "Taking the CAC as a whole, Plaintiffs have created a cogent and compelling inference of a company obsessed with …production and market share with little regard for the attendant risks, despite the company's repeated assurances to the market." *Countrywide*, 588 F. Supp. 2d at 1186.

2007, 2008, and 2009, ¶¶ 30, 134-35, notwithstanding that calculating them was a matter of simple arithmetic. ¶ 133. *See Matrix*, 576 F.3d at 184 ("Inferential weight may be attributed to the magnitude of these errors"); *Royal Ahold*, 351 F. Supp. 2d at 376 ("the magnitude, pervasiveness, and repetitiveness of the violations 'serves to amplify the inference of scienter to be drawn") (quoting *MicroStrategy*, 115 F. Supp. 2d at 636) (simplicity of accounting principles another factor)). This factor also relates to the pervasiveness of the deceptive conduct, discussed *infra*.

The foregoing factors, particularly combined with others discussed below, provide for a compelling inference of scienter.

C. Sufficiently Pleaded Allegations Based upon CWs Provide Strong Support for Pervasiveness of Deceptive Conduct and a Strong Inference of Scienter

The Complaint supports a strong inference of scienter by providing CW statements that corroborate allegations of Massey's disregard for mine safety and deceptive efforts to undermine safety regulations through the ENS, and an unlawful lost time incident reporting policy.

While the Officer Defendants rely on *Higginbotham v. Baxter Int'l*, 495 F.3d 753, 757 (7th Cir. 2007), Off. Def. Br. at 7, numerous courts have expressly declined to follow the "discount" of CWs articulated in that decision.[42] In *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 712 (7th Cir. 2008), the Seventh Circuit sharply limited the scope of *Higginbotham*, explaining that it was a case where plaintiffs only described the CWs as "three ex-employees" and "two consultants." The plaintiffs in *Makor* had sufficiently pleaded scienter where "multiple confidential sources corroborated much of the information" and the complaint

[42] *See, e.g.*, *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1240 (11th Cir. 2008); *N.J. Carpenters Pension & Annuity Funds*, 537 F.3d 35, 52 (1st Cir. 2008); *Mishkin v. Zynex Inc.*, No. 09-cv-00780-REB-KLM, 2011 WL 1158715, at *7 (D. Colo. Mar. 30, 2011); *Silverman v. Motorola, Inc.*, No. 07 C 4507, 2008 WL 4360648, at *14 (N.D. Ill. Sept. 23, 2008); *Lefkoe v. Jos. A. Bank Clothiers*, No. WMN-06-1892, 2008 WL 7275126, at *7 (D. Md. May 13, 2008); *Rosenbaum Capital, LLC v. McNulty*, 549 F. Supp. 2d 1185, 1192 (N.D. Cal. 2008).

"contains allegations from numerous confidential sources, provides job descriptions that suggest that the sources would have personal knowledge of the facts alleged and, in many cases, provides multiple sources to corroborate facts." *Id.*[43] As such, the court expressly held that "the absence of proper names does not invalidate the drawing of a strong inference from informants' assertions." *Id.* The Fourth Circuit also holds CWs' allegations sufficient, so long as the sources are described with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged. *Teachers' Ret. Sys. of La.*, 477 F.3d 162, 174 (4th Cir. 2007).

As set forth below, the Complaint satisfies that standard. Plaintiffs have provided a sufficient description of the Complaint's sixteen CWs, including their positions and dates of employment,[44] which support their bases of knowledge, as well as corroborative facts from Congressional testimony, and the government indictment of Stover. *See*, *e.g.*, ¶¶ 92, 148, 312-13. As such, these facts should be considered by the Court in assessing the adequacy of Plaintiffs' scienter allegations. In summary, such facts are as follows:

- Ten CWs provided corroborating statements that production, not safety, came first at Massey—CW 1 (¶ 93); CW 2 (¶ 96); CW 4 (¶ 96); CW 5 (¶ 95); CW 6 (¶97); CW 7 (¶ 97); CW 8 (¶ 98); CW 9 (¶ 94); CW 10 (¶ 99); and CW 11 (¶ 102).

- Five CWs described the ENS at various mines, including use of the "Montcoal station" and code words—CW 4 (¶ 167); CW 6 (¶ 170); CW 8 (¶ 169); CW 15 (¶ 168); and CW 16 (¶ 171). These statements are corroborated by the Stover indictment (¶¶ 22-3, 160-64) and Congressional testimony from Mullins (¶ 166), Main (¶ 172), Quarles (¶ 312), and Stewart (¶ 312).

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[43] The Officer Defendants misquote *Makor* for the proposition that the Seventh Circuit concluded that CW allegations must be discounted. Off. Def. Br. at 7. In fact, the court was merely describing the holding of *Higginbotham*, a case it expressly did not follow. *Makor*, 513 F.3d at 712.

[44] Positions and Employment Dates, all covering the post-Alma fire period during which Massey sought to recast its safety image: CW 1 (¶ 69); CW 2 (¶¶ 96, 149); CW 3 (¶ 92); CW 4 (¶¶ 96, 167); CW 5 (¶ 95); CW 6 (¶¶ 97, 170); CW 7 (¶ 97); CW 8 (¶ 98); CW 9 (¶ 94); CW 10 (¶ 99); CW 11 (¶ 102); CW 12 (¶ 137); CW 13 (¶ 151); CW 14 (¶ 156); CW 15 (¶ 168); and CW 16 (¶ 171).

- Four CWs support allegations that NFDL rates were false because of unlawful tactics discouraging lost-time reports—CW 2 (¶ 149); CW 4 (¶ 148); CW13 (¶ 151). CW statements concerning NFDL rate manipulation are corroborated by the restatement of NFDL rates (¶¶ 30, 134); and Congressional testimony from Harris, Nelson, Roberts, and Blankenship (¶¶ 143-47).[45]

- CW 12 stated NFDL rates were tracked regularly by Blankenship and senior management. (¶ 137).

- CW 1 (¶ 69) and CW 3 (¶ 92) describe Blankenship's control over Massey's operations—such as his being a micromanager and receiving production reports approximately every two hours. Testimony from Blankenship, Stewart, and Gillenwater (¶¶ 68, 70, 72), and a *Vanity Fair* article (¶ 70) corroborates.

- Four CWs stated miners were afraid to raise safety concerns out of fear of being fired, because those who did were fired—CW 4 (¶ 148); CW 13 (¶ 151); CW 14 (¶ 156). Congressional testimony from Nelson corroborates. ¶ 153.

In light of the widespread and consistent reports by CWs and others as to the alleged wrongful practices, it must be assumed on this motion they were pervasive throughout Massey's mines.[46] Indeed, "the complaint portrays a fraud so massive and pervasive throughout [Massey] that it strongly supports 'an inference that fraud or recklessness was afoot', and this serves to amplify the inference of scienter to be drawn.'" *Royal Ahold*, 351 F. Supp. 2d at 377 (quoting *MicroStrategy*, 115 F. Supp. 2d at 636-37.[47]

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[45] On May 20, 2011, the President of the United Mine Workers of America, Cecil Roberts, testified that Massey miners are offered light duty work when injured, so that lost time incidents would not be reported. ¶ 145. Directly after Roberts testified, Blankenship provided testimony as to the "light duty" procedure for injured workers and did not dispute Robert's testimony on Massey's policy to discourage the completion of lost time incident reports. ¶¶ 146-47. *See U.S. v. Peel*, 06-CR-30049-WDS, 2007 WL 2126257, at *3 (S.D. Ill. July 23, 2007) ("[S]ilence qualifies as an admission because [the] accusation is the type of statement that a party normally would respond to if innocent.") (quoting *U.S. v. Ward*, 377 F.3d 671, 676 (7th Cir. 2004).

[46] *See In re Providian Fin. Corp. Sec. Litig.*, 152 F. Supp. 2d 814, 824 (E.D. Pa. 2001) ("Although it is conceivable that the alleged illegal or fraudulent conduct was isolated, in making all reasonable inferences in the plaintiffs' favor, it must be inferred that the misconduct was more than isolated and contributed significantly to Providian's financial performance and customer base"); *Countrywide*, 588 F. Supp. 2d at 1186.

[47] *See also Countrywide*, 588 F. Supp. 2d at 1194 (The alleged practices related to issues that "were so fundamental" to the company, "and on such a broad scale, [and] should have been so apparent that it would be difficult to conclude that those Defendants at the top levels of … management did not know what was going on.") (quotations and citations omitted).

D. Invocation of the Fifth Amendment Right by Certain of the Defendants and Massey Executives Supports an Inference of Scienter

Blankenship, Adkins, and at least sixteen other executives have invoked their Fifth Amendment right against self-incrimination in connection with the investigation following the Explosion, further bolstering a strong inference of scienter. ¶¶ 26, 190. Courts have drawn adverse inferences against parties where they refuse to testify in actions related to them.[48] Thus, the invocation of Fifth Amendment rights here provides circumstantial evidence the Individual Defendants had knowledge of dangerous, non-compliant mine conditions before the Explosion.

E. "Motive" Is Sufficiently Pleaded as Additional Evidence of Scienter

Plaintiffs need not allege any motive to establish scienter. *See Tellabs*, 551 U.S. at 325. The Fourth Circuit, even before *Tellabs*, also rejected a categorical approach that would require pleading "particular types of facts that would or would not show a strong inference of scienter," such as motive and opportunity. *Ottmann*, 353 F.3d at 344-45. Nevertheless, the Complaint identifies Defendants' particularized motive to mislead investors, which strengthens the cogent inference of scienter created by the factors identified above. *Id.*

The Complaint alleges in detail that, after the Alma fire, Defendants were motivated to conceal Massey's "production-at-all costs approach to running coal" and below-national average safety record, ¶¶ 14, 120-32, because "Massey's effort to re-brand itself as a safety-conscious company was critical to its ability to position itself to benefit from unprecedented global demand for metallurgical coal." ¶ 13. Defendants needed to conceal the fact that Massey never "pull[ed] together to create a culture of safety," ¶ 11, to keep an aggressive accelerated production schedule on track, ¶¶ 210-11, and to maintain the "goodwill [Massey had earned]

[48] *See, e.g.*, *ePlus Tech. v. Aboud*, 313 F.3d 166, 183-84 (4th Cir. 2002) (assertion of Fifth Amendment privilege "provides additional, and quite substantial, support for" claim defendant engaged in pattern of racketeering activity); *Burrell v. Virginia*, 395 F.3d 508, 515 (4th Cir. 2005); *SemGroup*, 729 F. Supp. 2d at 1299 (court may make adverse inferences based on assertion of the Fifth Amendment privilege).

with regulators and the investing public by promising a new and improved approach to safety." ¶ 81.

The Complaint further alleges that, to establish the supposed success of post-Alma fire "safety improvement initiatives," ¶¶ 11-13, Defendants were motivated to—and did—materially understate NFDL rates and conceal other safety metrics such as S&S violations and EEAs. ¶¶ 30, 134. Such misrepresentations and omissions strategically created the public impression that Massey operated its most profitable mines safely—consistent with a "safety first" policy. ¶ 219.

Disclosure of Massey's "production-first" philosophy would have "jeopardize[d] the Company's aggressive expansion program … intended to increase production in order to take advantage of strong and growing demand for metallurgical coal." ¶ 338. It also would have also called into question compliance with the Court-ordered terms of the Manville Settlement, ¶¶ 77, 350, subjecting Massey to further judicial, regulatory, and media scrutiny.[49] Indeed, the Manville Defendants were specially motivated to conceal Massey's unreformed safety practices to avoid being named Contemnors, as they are now.[50]

Particularized corporate motives such as those alleged here demonstrate scienter. *See, e.g.*, *MicroStrategy*, 115 F. Supp. 2d at 643, 648 (particularized allegations that company was "further motivated [by a desire] … to portray the Company favorably with actual and potential creditors from whom MicroStrategy needed to borrow funds" sufficient) (citations and quotations omitted); *In re Telxon Corp. Sec. Litig.*, 133 F. Supp. 2d 1010, 1029 (N.D. Ohio

[49] Counsel for each of the defendants in the Manville Action signed on their behalf the Court's Agreed Order and Final Judgment entered on June 30, 2008. The June 30, 2008 Order incorporated by reference the terms of the settlement in the Manville Action, entered into on May 20, 2008. The defendants in the Manville Action include Don L. Blankenship, Baxter F. Phillips, Jr., Dan R. Moore, Richard M. Gabrys, James B. Crawford, Stanley C. Suboleski (collectively, the "Manville Defendants"). The Manville Defendants are also named as Defendants here.

[50] On April 22, 2010, the Circuit Court of Kanawha County, West Virginia issued an order to show cause why the Manville Defendants should not be held in contempt for violating the Manville Settlement. Amid this news, Massey's stock fell nearly 2% on heightened volume of more than 10 million shares. ¶ 350.

2000) (Even if such allegations are insufficient alone, "Court cannot ignore the fact that Telxon and its officers were in a very difficult position, facing unusual pressures to perform during the class period").[51]

Blankenship and Adkins each had an additional motivation to materially understate NFDL rates: higher incentive bonus award compensation. ¶ 214.[52] These motive allegations provide additional support for scienter. *See Tellabs*, 551 U.S. at 325. Although on its own incentive compensation may be inadequate, after *Tellabs* courts have found that it may add to a strong inference of scienter when considered in totality with other allegations. *See In re JPMorgan Chase & Co. Sec. Litig.*, No. 06 C 4674, 2007 WL 4531794, at *8 (N.D. Ill. Dec. 18, 2007) (desire to "increase [ ] incentive compensation and to guild [sic] reputation are important considerations."); *Garden City Emps. Ret. Sys. v. Psychiatric Solutions*, No. 3:09–00882, 2011 WL 1335803, at *59 (M.D. Tenn. Mar. 31, 2011) (allegations that defendants' "executive compensation was directly tied to PSI's financial performance," were, together with other allegations, sufficient to allege scienter); *Goldstein v. MCI WorldCom*, 340 F.3d 238, 250 (5th Cir. 2003) (finding sufficiently particularized allegations that if company's stock dropped, defendant stood to lose millions in compensation).[53]

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[51] *See also In re Williams Sec. Litig.*, 339 F. Supp. 2d 1206, 1234 (N.D. Okla. 2000) ("WCG's continued viability was dependent upon certain measures of WCG's financial performance"); *Brumbaugh v. Wave Sys. Corp.*, 416 F. Supp. 2d 239, 253 (D. Mass. 2006) (defendants "had 'more than the usual concern[s] by executives' to increase the value of [the company's] stock") (citation omitted); *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571(RJH), 2004 WL 876050, at *8 (S.D.N.Y. Apr. 22, 2004) (defendants sought to expand their enterprise).

[52] Specifically, 75% of Blankenship's incentive bonus award compensation was based upon target NFDL rates; 25% of Adkins' award was based upon target NFDL rates. ¶¶ 324-26; ¶ 145 (Roberts' testimony referring to "troublesome" incentives this provided).

[53] "Simple greed is a powerful motivator …. Personal profit, coupled with professional motives to hide internal weaknesses and paint a rosy picture of the restructuring lend weight to not only a cogent inference of scienter, but a compelling one in light of the alternative suggested by defendants—that the misstatements and errors were due to bungling management." *Norfolk County Ret. Sys. v. Ustian*, No. 04-1255-AA, 2009 WL 2386156, at *10 (N.D. Ill. July 28, 2009); *see also In re Lattice Semiconductor Corp. Sec. Litig.*, No. 07-C-7014, 2006 WL 538756, at *19 (D. Or. Jan. 3, 2006) ("Defendants argue that many of these alleged motives—keeping the stock price high, raising capital, increasing the value of stock options and other executive incentives—are normal goals of

The cases the Officer Defendants cite, Off. Def. Br. at 7-8, predate *Tellabs*, including the Fourth Circuit's decision in *Phillips*, which does not support ignoring the motive allegations here. *Phillips* merely held that allegations of motive based on executive compensation incentives are "standing alone" insufficient to plead scienter. Here, the Complaint sufficiently alleges that the motive of all Defendants was to gild the Company's reputation after the Alma fire, expand Massey's operations in order to benefit from surging global demand for metallurgical coal, ¶¶ 81-103, and, as to Blankenship and Adkins, to relentlessly maximize production and their own executive compensation. In totality with other allegations, this is sufficient to raise a cogent inference of scienter.

F. Plaintiffs' Allegations Are the Only Plausible Inference as Defendants Provide No Competing Inferences

When all of the allegations of scienter are read together and accepted as true, one would deem the inference of scienter "at least as compelling as any opposing inference." *Tellabs*, 551 U.S. at 324. The Officer Defendants offer no counter-inferences and may not do so for the first time on reply; and Massey and the Director Defendants confine their argument to the idea that they had a nonculpable state of mind with regard to the ENS, light duty work policy, and false NFDL rates. Massey Br. at 13-14.

First, Massey and the Director Defendants argue the Complaint alleges Stover was the only person who operated the unlawful ENS. Massey Br. at 13. But nowhere does the Complaint allege Stover was the mastermind of the scheme, as opposed to a mere participant. ¶¶ 22-24, 160, 309. Plaintiffs specifically allege Stover was "very close to Blankenship" and served as Blankenship's bodyguard and personal driver. ¶¶ 24, 160. Given their relationship, there is a strong inference Stover acted on behalf of Blankenship. *See, e.g.*, *Royal Ahold*, 351

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every business … [however] when viewed in the totality of all the other allegations, [they] add additional weight to the inference of scienter.").

F. Supp. 2d at 381 (executive falsified records; allegations he was CEO's "right-hand man" and had "a close and long-standing relationship" with CEO, helped support strong inference CEO participated in fraud); *cf. Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1106 (10th Cir. 2003) (CFO's awareness of fraud "reduce[d] the likelihood [CEO] was ignorant of the fact.")

Moreover, Stover, who only worked for Performance Coal (which operated UBB), ¶¶ 160, 309, could not have possibly orchestrated the ENS at all of Massey's mines—at least not without the assistance of senior management. Congressional testimony, along with half a dozen former Massey miners, have provided details of the ENS in practice at Massey's Black Castle and Seng Creek mines.[54] Further, there is no basis to conclude that Stover would benefit from creating and running the unlawful ENS without informing Massey's management. *Matrix*, 576 F.3d at 183 (under *Tellabs*, courts afford allegations the "inferential weight warranted by context and common sense"); *South Ferry*, 542 F.3d at 784 ("In assessing the allegations holistically as required by *Tellabs*, the federal courts certainly need not close their eyes to circumstances that are probative of scienter viewed with a practical and common-sense perspective.").

Next, Massey and the Director Defendants wrongly contend Plaintiffs cannot demonstrate scienter because there are no allegations that: (1) they "oversaw the filling out of paperwork by injured miners or were aware of any policy discouraging it"; or (2) Blankenship "knew about, or recklessly disregarded, the failure to fill out reporting paperwork." Massey Br. at 13-14. However, Massey and the Director Defendants need not have looked over the shoulders of each miner to know the filling out of reporting paperwork was being discouraged. The culture of deception and noncompliance came from the top down, demonstrated by Blankenship's October 2005 memo instructing miners "to ignore" safety concerns to "run coal"

[54] *See* ¶¶ 20, 165-71, 312.

because coal "pays the bills." ¶¶ 5, 75-76.[55] And, Massey miners did not benefit from not filling out lost-time reports, but did so only out of fear of reprisal from superiors. ¶¶ 148, 151, 156-57. Former employees, including CWs and those who testified before Congress, described policies discouraging workers from filling out NFDL reports at the West Cazy, UBB, Road Fork #51, and Keppler mines. ¶¶ 31, 96, 143-44, 148-49, 151, 313. For instance, at the West Cazy mine, there was a "big board" on-site that tallied the days lost, which had the effect of pressuring workers to refrain from reporting incidents to keep the number on the board low. ¶ 149. This Company-wide policy discouraging regulatory compliance could not have been orchestrated without coordination by senior management. *Countrywide*, 588 F. Supp. 2d at 1194. Together with other detailed allegations, including that Blankenship was very "hands on" in terms of production, these allegations provide a strong inference that he and the Individual Defendants knew or recklessly disregarded Massey's unlawful incident reporting policies. *Supra* Parts II.B & II.C.[56]

Lastly, Defendants claim that Plaintiffs do not allege any facts indicating Defendants "knew or had reasons to suspect, prior to September 30, 2010, that Massey's reported NFDL incident rates were inaccurate" or that "there were lapses in the reported NFDL incident rates." Massey Br. at 14. However, first, as discussed in Part II, *supra*, the significant magnitude of the restatement of NFDL rates, which were used to tout Massey's "excellent" safety record, and the lack of any complexity in calculating NFDL rates, provides an inference of scienter. Second, the Complaint alleges "Blankenship and other executives" reviewed "daily" reports on lost-time incidents. ¶ 137. While negligence might explain missing a minor discrepancy between incident

[55] As demonstrated, representations that this culture had been reversed during the Class Period were false.

[56] Also, as noted above, Blankenship testified in Congress immediately after testimony of the policy discouraging the completion of incident reports and, though he discussed Massey's "light duty" procedure for injured workers, he did not challenge that testimony. ¶¶ 146-47. *See U.S. v. Peel*, 2007 WL 2126257, at *3 (quoting *U.S. v. Ward*, 377 F.3d at 676).

reports and reported NFDL rates, here the restatement was significant—up to 40% in 2009—and increased every year, such that the danger of misleading investors should have been obvious. *See Ottmann*, 353 F.3d at 348 (monitoring important metric "on a monthly basis" adds to inference misstatements were made "at least recklessly").

Defendants also rely on *Matrix*, 576 F.3d at 187, for the proposition that the restatement was a ***timely*** disclosure of "lapses in its reporting procedures," which suggests a good faith mistake. Massey Br. at 14. However, the restatement of NFDL rates can hardly be considered timely here. Such disclosure was made almost six months after the Explosion, years after the first misstated rate was published, and only after Defendants knew they were being carefully investigated. A much stronger inference is that all Defendants knew the manipulation of NFDL rates would be discovered and so announced a restatement to deflect suspicion of deceit.

In sum, at the very least, as to the three items on which Defendants challenge scienter allegations, they have failed to establish counter-inferences ***more*** compelling than the inference created by all of the factors in the Complaint, particularly when viewed holistically as required.

III. PLAINTIFFS ARE ENTITLED TO A PRESUMPTION OF RELIANCE

While reliance is an essential element of a claim for securities fraud, *e.g.*, *In re Mutual Funds Inv. Litig.*, 566 F. 3d. 111, 118 (4th Cir. 2009), it may be presumed in either of two circumstances. First, it may be presumed that investors would have relied upon material information that was required to be disclosed but was omitted. *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 153-54 (1972). Second, where there is an efficient market for a company's securities, investors who purchase at the publicly-traded price are presumed to have relied upon public misrepresentations, because the information is presumed to be reflected in the securities' market price. *Basic*, 485 U.S. at 246. Both presumptions are applicable in this case.

Defendants contend the *Affiliated Ute* presumption is unavailable because this case does not arise "primarily" from a failure to disclose, and that Massey "had no duty to disclose" the true facts about its compliance with regulatory requirements. Massey. Br. at 15. Neither contention has merit. Unlike *Cox v. Collins*, 7 F.3d 394 (4th Cir. 1993), or the cases on which it relies, this action does primarily involve omissions. The "46 pages worth of alleged misrepresentations" Defendants point to are primarily alleged to be misleading due to the omission of material facts about Massey's safety and compliance practices. *See* ¶¶ 204, 211, 213, 215, 221, 229, 234, 240, 242, 248, 255, 258, 261, 264, 269, 272, 275, 284, 293, 297. Defendants' reliance upon *Raab*, to argue they had no duty to disclose the alleged material misrepresentations, is misplaced. The true facts about Massey's operations were not publicly available at the time of the alleged misrepresentations. *Supra* Part I.B.1.

Defendants' attack on the fraud on the market presumption of reliance under *Basic* fares no better. The Complaint pleads facts sufficient to allege that Massey's shares traded in an efficient market, so as to invoke *Basic's* presumption of reliance. ¶¶ 378-79. Defendants do not challenge the sufficiency of these allegations or the applicability of the presumption. Rather, the entire argument is derivative of their erroneous "truth on the market" defense, Massey Br. at 16, which is also without merit. *Supra* Part I.B.1. Defendants have thus failed to rebut the fraud on the market presumption of reliance, and their motion to dismiss on this ground must also fail.

IV. LOSS CAUSATION IS ADEQUATELY PLEADED

In order to plead loss causation, the Complaint need only provide defendants with notice of plaintiffs' theory of damages, including "some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharms. v. Broudo*, 544 U.S. 336, 347 (2005). Establishing loss causation requires plaintiffs to allege facts to show that the misrepresentation or omission was "one substantial cause of the investment's decline in value." *Mutual Funds*, 566 F.3d at

128. Loss causation may be shown by alleging that the stock price declined when material conditions concealed by the alleged fraud were revealed to the market, or by alleging that defendants' fraud concealed material risks that ultimately manifested, causing a decline in the stock price. *Teachers' Ret. Sys.*, 477 F.3d at 187-88 & n.3. Plaintiffs need only plead sufficient detail to "enable the court to evaluate whether the necessary causal link exists." *Id*. at 186. As with other elements of Plaintiffs' claim, the well-pled factual allegations supporting loss causation must be taken as true, together with all reasonable inferences flowing therefrom. *See, e.g.*, *Tellabs*, 551 U.S. at 322. The Complaint meets and exceeds these requirements. ¶¶ 328-71, 378-79.

Initially, the Complaint alleges that by omitting material information about its safety and compliance record and practices, the true extent of risks to Massey's operations were concealed and induced investors to purchase stock at a higher price than it would have traded at had complete information been known to the market. ¶¶ 200-01, 328. Defendants' omissions inflated Massey's stock price by causing price increases on favorable news to be higher, and declines on unfavorable news to be less severe than they would have been had the true state of Massey's safety practices been known. *See, e.g.*, ¶¶ 200-01, 205-06, 218, 222, 235, 238, 251, 256, 259, 262, 276, 281, 328; *see Schleicher v. Wendt*, 618 F.3d. 679, 683-84 (7th Cir. 2010) (explaining how omissions inflate stock price by preventing declines that would occur with disclosure of true conditions).

Plaintiffs allege the Class was injured when the artificial inflation in Massey's share price was eliminated as the result of price declines accompanying news of the true state of the Company's operations, including disclosures that revealed material facts concerning safety compliance practices that were previously omitted, as well as the falsity of Defendants'

misrepresentations about those matters, or identified the operational and financial impact of bringing its operations into compliance with regulatory requirements. The Complaint describes five specific sets of events by which this artificial inflation was removed from the price of Massey shares. ¶¶ 329-66. These allegations detail that the truth was disclosed over a period of time and that the result in each instance was a decline in the price of Massey's stock. The Fourth Circuit has held allegations of this type sufficient to plead loss causation. *Katyle v. Penn Nat'l Gaming*, 637 F. 3d 462, 472 (4th Cir. 2011) ("that the truth gradually emerged through a series of partial disclosures and that an entire series of partial disclosures [prompted] the stock price deflation") (bracketed text in original) (quoting *Lormand*, 565 F.3d at 261); *accord Dura*, 544 U.S. at 342.[57] In addition to identifying the partial disclosures that caused injury to the Class, the Complaint extensively details Massey's repeated false denials of safety and regulatory problems after the Explosion, and explains how these assertions forestalled greater declines in Massey's share price and kept the price of its shares artificially inflated even as news of the extent of safety and regulatory problems was revealed. ¶¶ 330, 332, 339-42, 348, 351-55, 359; *see Schleicher*, 618 F.3d at 683-84.

The events that injured Class members by correcting the price of Massey shares to eliminate fraud-caused inflation are summarized in a chart at ¶ 333, and described in detail at ¶¶ 334-66. These allegations identify the events which caused investors' losses, explain their connection to the alleged omissions and misrepresentations, quantify the drop resulting from the alleged event, and provide comparative information showing the movement of the market as a whole and a relevant peer index on the same day to demonstrate that the price declines resulted

[57] *See also Countrywide*, 588 F. Supp. 2d at 1201 ("corrective disclosures were made over an extended period of time and often in combination with alleged further misrepresentations that dampened the disclosures' price effects. The point, however, is that the price of [the] securities dropped as the disclosures accumulated"); *Moneygram*, 626 F. Supp. 2d at 984.

from the alleged Company-specific news, and not from trends or conditions generally affecting the market or the industry that day. ¶ 333. These allegations are sufficient. *See, e.g.*, *Mutual Funds*, 566 F.3d at 128; *In re Motorola Sec. Litig.*, 505 F. Supp. 2d 501, 545 (N.D. Ill. 2007).

In particular, the Complaint alleges the following corrective events:

- The Explosion itself was a tragic and immediate manifestation of the extent and magnitude of the risks that had been concealed from investors. Together with statements by government regulators, mineworkers, and the media regarding longstanding and undisclosed safety violations, the Explosion caused Massey's share price to decline by 17.3%, as compared with a 0.4% drop in the market generally and an 8% decline among coal industry stocks.[58] ¶¶ 333-38.

- Inspections and investigations of other Massey operations after the Explosion led to additional disclosures that revealed a willful disregard of safety and regulatory requirements was not confined to UBB. These disclosures led to a further decline of 9.5% in Massey share value as compared with a decline of 0.2% in the market generally and 3.6% among coal industry stocks. ¶¶ 333, 344-46.

- Massey's earnings report for the first quarter of fiscal 2010 ("Q1'10") alerted investors to expect $80-$150 million in additional expenses as a result of the Explosion, quantifying for the first time the immediate financial impact of its illegal and unsafe mining practices. ¶¶ 333, 347. This revelation, together with news that the Circuit Court of Kanawha County issued an order to show cause why Massey should not be held in contempt for violating the Manville Settlement, caused Company shares to drop by another 2% on April 22, 2010, compared with a slight increase in the market and a flat trading day for coal stocks. ¶¶ 333, 347, 349-50; ¶ 77 & Ex. D.

- Revelations that the Company was facing criminal probes by the FBI and DOJ as a result of the regulatory and safety problems that had been fraudulently concealed from investors provided a further manifestation of the hidden risks arising from defendants' misconduct. These disclosures caused additional declines of 11% and 10% in the price of Massey shares on April 30 and May 17, 2010 respectively, as compared with a decline of 1.7% and an increase of 0.1% in the market generally on those days, and declines of 2.3% and 3.1% among coal stocks those days. ¶¶ 333, 356-61.

- Massey's earnings report for the second quarter of fiscal 2010 ("Q2'10") revealed that the correction of safety and regulatory violations would have a much bigger impact on production rates and mining expenses than the market was previously led

[58] As explained in the Complaint, many coal companies were also adversely affected by news of the Explosion. ¶ 333 n.40. Therefore, the Complaint provides comparative price information for both the S&P 500 and a relevant index of publicly traded coal companies.

> to believe, leading to lower earnings guidance that provided yet another manifestation of the risks concealed by Defendants. These disclosures caused an additional 6.6% decline in the price of Massey shares on July 27, 2010, compared with declines of 0.1% in the market as a whole and 3.3% among coal stocks. ¶¶ 333, 362-66.

In attempting to discredit these allegations, Defendants rely heavily on the recent Fourth Circuit opinion in *Katyle*, which arose from the alleged concealment that a leveraged buyout ("LBO") transaction would not close as planned. Defendants' reliance on *Katyle* is misplaced, because the key to that decision was the fact that "the market had been questioning the viability of the LBO" well ***before*** the Class Period even began, leading to significant price declines that fully apprised investors at the outset of the Class Period of the risks that the transaction would not close as planned. 637 F.3d at 477-78 ("The market well understood the risk. The alleged disclosures told the market nothing factually about the deal's prospects that it had not already heard, repeatedly."). Here, by contrast, there were ***no*** disclosures prior to the Explosion that alerted the market Massey's safety and compliance record was much worse than represented nor that it faced heightened risks as a result.

Moreover, the Fourth Circuit was careful to point out that—in contrast to the case at bar—*Katyle* was "not about materialization of a concealed risk." *Katyle*, 637 F.3d at 477. "In such a case, the plaintiffs would not need to identify a public disclosure that corrected the previous, misleading disclosure because the news of the materialized risk would itself be the revelation of the fraud that caused plaintiffs' loss." *Id.* at n.10 (quotations omitted). That is precisely the circumstance here. Plaintiffs allege Defendants fraudulently concealed and downplayed risks to the safety of miners and the extent to which Massey was not in compliance with regulatory requirements, thereby concealing conditions that were likely to—and ultimately did—lead to mining accidents, reduced production, increased operating and regulatory costs, and lower profits. The Explosion was clearly within the foreseeable "zone of risk" concealed by the

misrepresentations and omissions. *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005); *In re Vivendi Universal, S.A. Sec. Litig.*, 634 F. Supp. 2d 352, 367-69 (S.D.N.Y. 2009) (plaintiffs may allege broad concealed risk which need not have one-to-one correspondence to alleged concealed facts). ¶¶ 100, 108, 174-87, 192.

Defendants' incorrectly assert that the stock drop following the Explosion is not a proper measure of damages because the cause of the Explosion is, they argue, unknown. Massey Br. at 17. The Complaint sufficiently alleges the Explosion was caused by unsafe conditions and outrageous regulatory violations concealed by Defendants. ¶¶ 173-99; *supra* Part I.A. Numerous analysts, media outlets, and government officials reached the same conclusion almost immediately after the Explosion and said so publicly.[59] ¶¶ 334-38. Defendants' assertion that loss causation cannot be established until the cause of the Explosion is conclusively established simply raises a fact issue. It provides no reason to dismiss this case for lack of loss causation. *See, e.g.*, *Motorola*, 505 F. Supp. 2d at 546 (where plaintiff shows "significant aspects of the still-concealed fraud in fact provided the catalyst for [the event causing the stock drop] there is no good reason why the [event] should not serve as a disclosure in which 'the relevant truth begins to leak out.'") (quoting *Dura*).

Neither are Defendants correct that loss causation cannot be established because the Company warned of the risk of explosion, for the reasons previously noted. *Supra* Part I.B.4. Hence, the immediate price decline after the Explosion stands as a proper measure of damages. *Teachers' Ret. Sys.*, 477 F.3d at 188 n.3.

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[59] *In re Enron Corp. Sec., Deriv. & ERISA Litig.*, Civ-A-H013624, 2005 WL 3504860, at *16 (S.D. Tex. 2005) ("the market may learn of possible fraud from a number of sources: *e.g.*, from whistleblowers, analysts' questioning financial results, resignations of CFOs or auditors, announcements by the company of changes in accounting treatment going forward, newspapers and journals, etc.").

Defendants' contention that stock price declines accompanying news of regulatory violations and unsafe conditions at Massey mines are insufficiently corrective is also without merit. Masse Br. at 17-18. Defendants' argument is based on the conclusory assertion that the information reported by the media was "available and knowable" to the market. As such, it is wholly derivative of their "truth on the market" defense which, as previously shown, is both incorrect and incapable of resolution on the pleadings. *Supra* Part I.B.1. Moreover, the alleged stock price declines following news of regulatory violations plainly demonstrate that the information was ***not*** previously known to the market because, if it had been, Massey's share price would not have declined in response.[60] *Katyle*, 637 F. 3d at 473 ("if investors already know the truth, false statements won't affect the price.") (quoting *Schleicher*, 618 F.3d. at 681); *Asher v. Baxter Int'l*, 377 F.3d 727, 734 (7th Cir. 2004) (rejecting truth on market defense because "[i]f this is so, however, it is hard to understand the sharp drop in the price of its stock").

Defendants' hodgepodge of conclusory attacks on other alleged price declines contributing to Class damages fare no better. Defendants' arguments all flow from the mistaken assumption that none of the events "was the subject of any misrepresentation alleged in the Complaint" but relate to "some other negative information about the company." Massey Br. at 18. But Defendants are wrong. Each alleged event was the direct and proximate result of unsafe conditions and regulatory violations at mines that had been concealed from investors, and each event alleged revealed either the existence of those conditions or reflected the materialization of

[60] Defendants offer no other explanation for the alleged price declines and even if they had it would not change the result because the Court cannot make factual findings on the pleadings regarding the relative force of different events on the stock price. *Mutual Funds*, 566 F.3d at 128; *e.g.*, *In re Century Aluminum Co. Sec. Litig.*, 749 F. Supp. 2d 964, 975 (N.D. Cal. 2010); *Immune Response Corp.*, 375 F. Supp. 2d at 1025. It is defendants burden to come forward with evidence on summary judgment or at trial of other reasons for the stock price decline; it is not plaintiffs burden to negate all other possible reasons for the drop. *Motorola*, 505 F. Supp. 2d at 551; *In re Salomon Analyst Metromedia Litig.*, 544 F. 3d 474, 483 (2d Cir. 2008); *Miller v. Asensio & Co.*, 364 F.3d 223, 232 (4th Cir. 2004) ("plaintiff need only prove that defendant's misrepresentation was a ***substantial*** cause of the loss by showing a 'direct or proximate relationship between the loss and the misrepresentation.'") (citation omitted) (emphasis in original).

the risks that had been concealed or falsely minimized by Defendants' efforts to cover up those conditions. As such, the stock drops that occurred following these events were caused by Defendants' fraud and provide a proper measure of damages in this action.[61] Price declines following news of impending rating agency downgrades based on production losses resulting from "increased regulatory scrutiny," ¶ 334, criminal investigations into willful disregard of mine safety laws, ¶¶ 357-60, lowered profits resulting from costs associated with the Explosion, ¶ 347, and rising expenses due to "increased regulatory enforcement actions," ¶¶ 362-65, are all sufficient to support loss causation.[62]

The Fourth Circuit's opinion in *Mutual Funds* is instructive. *Mutual Funds* arose from a claim that Janus Capital Management (the operator of the Janus family of mutual funds) was illegally permitting market timing transactions and late trading in its funds while telling investors it was not. The Fourth Circuit held plaintiffs had adequately pled loss causation based on stock price declines accompanying news that the New York Attorney General had sued Janus for permitting those transactions to occur, and news of lowered profitability resulting from regulatory fines and reduced assets under management. 566 F.3d at 128-29. Similarly, here, Massey told investors it was operating mines safely when it was not, and the price declines

[61] *See, e.g.*, *Mutual Funds*, 566 F.3d at 128-29 (stock price decline following news of regulatory fines and decreased profitability resulting from concealed regulatory violations sufficient to plead loss causation); *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 287 (S.D.N.Y. 2008) (stock drops following announcement of investigation into subject of alleged misrepresentations sufficient to plead loss causation); *In re Parmalat Sec. Litig.*, 375 F. Supp. 2d 278, 305-06 (S.D.N.Y. 2005) ("allegation that the defendant's misrepresentation concealed the subject that caused the loss was sufficient" to plead loss causation.)

[62] *See, e.g.*, *Mutual Funds*, 566 F.3d at 128-29; *Parmalat*, 375 F. Supp. 2d at 305-06 (loss causation adequately pled where defendants concealed company's inability to service debt, the company suffered a liquidity crisis, and the company's stock price declined); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, No. 05 Civ. 1898, 2005 WL 2148919, at *12 (S.D.N.Y. Sept. 6, 2005) (stock drops on news of lowered earnings expectations, loss write-offs and downgraded credit ratings sufficient to plead loss causation).

accompanying news of regulatory investigations and reduced profitability are also sufficient to plead loss causation.[63] *Id.*

The numerous safety violations reported after the Explosion arose from and disclosed conditions that existed—and had been concealed—prior to the Explosion. ¶¶ 335, 346. Defendants suggestion that the stock price declines following these disclosures cannot establish loss causation because the Complaint does not allege concealment of "these particular violations" is both contrary to law and factually incorrect. Massey Br. at 19. The Fourth Circuit has expressly rejected the "fact-for-fact" pleading requirement for loss causation that Defendants demand here.[64] *See Katyle*, 637 F. 3d at 472. The Complaint pleads that the violations arose from longstanding practices at Massey mines that were entirely inconsistent with defendants' numerous boasts about the Company's purported compliance with safety and regulatory requirements. The discovery of these violations following surprise inspections of Massey mines after the Explosion revealed to the market that the Company's illegal and unsafe practices were not isolated to UBB, causing stock price declines that also stand as a proper measure of damages in this action. *Mutual Funds*, 566 F.3d at 128-29.

Defendants' final attack on loss causation simply misrepresents both the Complaint and their own prior statements. Massey Br. at 19. When Massey issued 1Q'10 earnings, it increased

[63] Just as Janus' profits were derived from the amount of assets it had under management (566 F.3d at 129), Massey's profitability was derived from how quickly it could produce coal. ¶¶ 61, 89-92, 102. When Janus became the subject of regulatory scrutiny arising from the illegal and misleading trading practices in its funds, investors fled its mutual funds, the amount of assets under management declined, profits fell, and its stock price declined. When Massey became subject to stepped-up regulatory enforcement after the Explosion, it was forced to slow production to correct the unsafe conditions and regulatory violations at mines, profits fell, and the Company's stock price declined. As in *Mutual Funds*, this price decline is a proper measure of damages caused by concealment of the manner in which Massey mines were operated.

[64] The "fact for fact" theory of pleading of loss causation found support for a short time in the Fifth Circuit, requiring plaintiffs to plead a stock price decline that followed a corrective disclosure that was a "mirror image" of alleged misleading statements. Even the Fifth Circuit ultimately retreated from this draconian position, however, recognizing it gave defendants too much control to avoid liability for securities fraud by simply lying about the reasons for an event that caused a stock drop, then coming clean much later, after the share price had already been corrected to reflect the anticipated impact of the event on a Company's financial condition. *See Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 230-34 (5th Cir. 2009); *Motorola*, 505 F. Supp. 2d. at 546.

its coal production forecast costs of $49-$52 per ton to $54-$57 per ton. When asked why, Blankenship told investors it was due to increased labor costs, not an expectation of increased safety or regulatory expenses after the Explosion. ¶ 348. The clear implication was those latter expenses would be minimal and, as reflected in favorable reports of Wall Street analysts, those assurances maintained the price of Massey shares at an inflated level. *Id.* When Massey reported 2Q'10 earnings, it revealed production costs had risen to more than $59 per ton as a result of "increased regulatory enforcement actions and related temporary shutdowns" and other factors arising from the unsafe and illegal conditions at its mines revealed after the Explosion, and told investors that costs would significantly increase and production would decrease for the foreseeable future. ¶¶ 363-64. The stock price decline resulting from these disclosures is also compensable as an element of damages under either the materialization of risk or corrective disclosure theory of loss causation. ¶ 365; *Mutual Funds*, 566 F.3d at 128-29.[65]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motions to dismiss in their entirety. In the event the Court grants any of the motions in whole or in part, Plaintiffs respectfully request leave to amend pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.[66]

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[65] In addition to claims under Section 10(b), Plaintiffs assert claims under Section 20(a) against the Individual Defendants as "controlling persons" of Massey. Because the Individual Defendants do not contest they were controlling persons of Massey at all relevant times, Massey Br. at 19-20, and the Complaint states claims for primary violations, the Court should uphold the associated controlling person claims. *See Stumpf v. Garvey*, No. 03-CV-1352 PB, 2005 WL 2127674, at *13 n.16 (D.N.H. Sept. 2, 2005) (Section 20(a) claim upheld where challenged solely on ground that no 10(b) claim was stated); *Brumbaugh*, 416 F. Supp. 2d at 259 (same); *Mutual Funds*, 566 F.3d at 131 (once predicate violation is established, "assessing control person liability is 'not ordinarily subject to resolution on a motion to dismiss.'") (quotations omitted).

[66] The Complaint is Plaintiffs' first consolidated complaint. Any pleading deficiencies the Court finds can be readily cured by amendment. Plaintiffs offer additional facts that could be alleged in a second amended complaint in Bernstein Decl. Ex. C. Dismissal with prejudice is therefore improper. *See Weirton Health Partners, LLC v. Yates*, No. 5:09CV40, 2010 WL 785647, at *7 (N.D. W. Va. Mar. 4, 2010) (granting leave because "Rule 15(a)

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grants the court broad discretion, and a court should grant leave to amend absent an improper motive such as undue delay, bad faith, or successive motions to amend that do not cure the alleged deficiency.") (citing *Ward Elec. Serv. v. First Comm'l Bank*, 819 F.2d 496, 497 (4th Cir. 1987)); *Lumbermens Mut. Cas. Co. v. Peirce, Raimond & Coulter, P.C.*, No. 1:09CV52, 2009 WL 3335275, at *2 (N.D. W.Va. Oct. 15, 2009) ("this Court concludes that the plaintiff has not exhibited any undue delay, bad faith, or dilatory motive. Moreover, … this Court cannot conclude that the plaintiff's amendment would be futile, as it raises substantive issues that this Court cannot dismiss upon cursory review.").

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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