

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CALIFORNIA STATE TEACHERS'
RETIREMENT SYSTEM; AMALGAMATED
BANK, AS TRUSTEE FOR THE LONGVIEW
COLLECTION INVESTMENT FUNDS; and
MANVILLE PERSONAL INJURY
SETTLEMENT TRUST; derivatively on behalf of
MASSEY ENERGY COMPANY,

Plaintiffs/Petitioners,

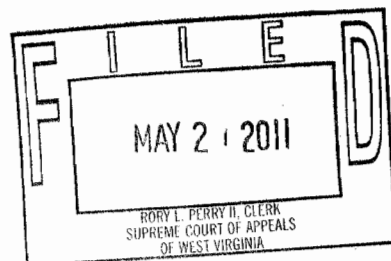
v.

DON L. BLANKENSHIP; BAXTER F. PHILLIPS,
JR.; DAN R. MOORE; E. GORDON GEE;
RICHARD M. GABRYS; JAMES B.
CRAWFORD; BOBBY R. INMAN; ROBERT H.
FOGLESONG; STANLEY C. SUBOLESKI; J.
CHRISTOPHER ADKINS; JEFFREY M.
JAROSINSKI; M. SHANE HARVEY; and MARK
A. CLEMENS;

Defendants/Respondents, and

MASSEY ENERGY COMPANY, a Delaware
Corporation,

Nominal Defendant/Respondent.



Appeal No. 11-0839

**JOINT RESPONSE TO EMERGENCY PETITION FOR A PRELIMINARY INJUNCTION
PURSUANT TO WEST VIRGINIA CODE SECTION 53-5-5**

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I. INTRODUCTION

The reality is that every merger involving Delaware public companies draws shareholder litigation within days of its announcement. An unseemly filing Olympiad typically ensues, with the view that speedy filing establishes a better seat at the table for the plaintiffs' firms involved.

In re Topps Co. Shareholders Litigation, 924 A.2d 951, 957 (Del. Ch. 2007).

The above is a quote from Vice Chancellor Leo Strine of the Court of Chancery of Delaware. Vice Chancellor Strine makes a blunt assessment of what is perhaps uncomfortable to say, but is in fact reality: that shareholder litigation is often a "race to the courthouse" by plaintiffs' firms concerned about positioning themselves to receive a larger portion of any attorneys' fees awarded. This is exactly what is occurring with the petitioners' Emergency Petition for a Preliminary Injunction ("Emergency Petition").

A class claim brought on behalf of Massey shareholders seeking to enjoin the merger of Alpha Natural Resources, Inc. ("Alpha") and Massey Energy Company ("Massey"), both Delaware corporations, has been actively litigated before Vice Chancellor Strine in the Court of Chancery of Delaware for months. In the class claim, styled *In re Massey Energy Company Derivative and Class Action Litigation*, Case No. 5430-VCS ("Delaware Action"), both Alpha and Massey are parties to the litigation. After weeks of document discovery, on April 26, 2011, Vice Chancellor Strine entered a scheduling order with respect to the Delaware plaintiffs' motion for a preliminary injunction, which had been filed on February 4, 2011. The scheduling order set an expedited discovery and briefing schedule, as well as a May 26, 2011 hearing on the motion for preliminary injunction. The May 26, 2011 hearing proceeded as scheduled and the parties are currently awaiting a written ruling from Vice Chancellor Strine, which the court indicated it will issue in advance of the scheduled June 1, 2011, shareholder vote.

The "emergency" here is of petitioners' own making. Petitioners failed to prosecute their claims for months. Then, on May 16, 2011, almost four months after the merger was announced, and with full knowledge of the Delaware Action and Vice Chancellor Strine's scheduling order, counsel for the Petitioners filed a motion for a preliminary injunction (based upon the discovery developed in the Delaware action). In a rush to beat their Delaware colleagues to the punch, counsel for the petitioners unilaterally noticed a hearing on the motion to take place before the Honorable Charles King, Jr. on May 25, 2011, one day before the hearing Vice Chancellor Strine had ordered in the Delaware Action. Because their request for a May 25, 2011 hearing could not be accommodated by the trial court on such short notice, the petitioners ignore jurisdictional prerequisites and now call upon this Court to enjoin the scheduled June 1 shareholder vote on the merger between Alpha and Massey under the guise that the lower court "refused" injunctive relief.¹

The proposed merger, which has been universally lauded by financial analysts, offers Massey's stockholders a substantial premium. (Respondents' Appendix Vol. I, Tab 3 at pp.1-2]. Alpha's final offer reflects a 95% premium over the closing price of Massey common stock on October 18, 2010, the day the Wall Street Journal reported that Massey was considering its strategic options, setting off rumors of a possible sale and a run-up in Massey's share price. Indeed, the merger consideration reflects a 27% premium over the intraday trading high of Massey stock on April 5, 2010, before the market knew of the explosion at Massey's Upper Big Branch mine. Moreover, each Massey stockholder will receive, in addition to \$10 for each share held, 1.025 shares of Alpha stock and the opportunity to participate in the growth of the value of that company.

¹ Petitioners appear to have requested that the trial court enjoin the merger and that this Court "enjoin the shareholder vote" (Petition at 2.) Because the approval of Massey's shareholders is required for the consummation of the proposed merger, there is no meaningful distinction between these requested forms of relief.

Petitioners' concern that under Delaware law Massey's claims against directors and officers will be lost if the merger closes is unfounded. As Vice Chancellor Strine recognized at the May 26 hearing, Delaware law provides post-merger options for petitioners to continue to attempt to pursue their claims against the officers and directors.² And it is a fundamental tenet of corporate democracy in this Country that stockholders have the right to decide whether or not the company whose shares they own should be sold. Plaintiffs' effort to prevent Massey stockholders from making this decision for themselves should be denied.

The petitioners' Emergency Petition should be dismissed as it is jurisdictionally improper, unnecessary, and substantively without merit.³

II. STATEMENT OF FACTS

A. The Shareholder Derivative Litigation

Following the Upper Big Branch disaster, numerous shareholder derivative actions were filed. On April 15, 2010, the Manville Personal Injury Settlement Trust filed this action, which was subsequently consolidated with multiple other shareholder derivative actions filed in West Virginia. However, the shareholder derivative actions were not confined to West Virginia. On April 23, 2010, the New Jersey Building Laborers Pension Fund commenced the first of a series of similar shareholder derivative actions that would later be consolidated into the Delaware Action.

On July 2, 2010, the respondents filed their Joint Motion to Stay this action until such time as there was a decision on the merits in the Delaware Action. Similarly, on July 19,

² Respondents expect that the transcript from the Delaware hearing will be available shortly, and we will provide it to the Court as soon as it becomes available.

³ Petitioners have also moved this Court to seal their petition and all documents appended to it and to order that all future pleadings and documents relating to their petition be sealed. Respondents respectfully request until 5:00 p.m. on Tuesday May 31 to review petitioners' filings and determine what, if any, documents should be sealed.

2010, the respondents filed motions to dismiss pursuant to Rules 12(b)(6) and 23.1 of the West Virginia Rules of Civil Procedure. Thereafter, until recently, the petitioners made no significant effort to prosecute their claim. Indeed, there was no docket entry between August 19, 2010 and May 2, 2011.

B. The Delaware Class Claim

On January 29, 2011, the proposed merger between Alpha and Massey was announced. On January 31, 2011, the plaintiffs in the Delaware Action moved to amend to add Alpha and Mountain Merger Sub, Inc. (a wholly owned subsidiary of Alpha created for the purpose of effecting the merger) as defendants and to assert class claims challenging and seeking to enjoin the merger. [Respondents' Appendix Vol. I, Tab 1]. Leave was granted and the Verified Shareholder Second Amended Derivative and Class Action Complaint was filed on March 11, 2011. [Respondents' Appendix Vol. I, Tab 2]. The purported class consisted of all Massey shareholders. [*Id.* at pp.80-81].

On April 26, 2011, Vice Chancellor Strine entered a scheduling order in the Delaware Action with respect to the plaintiffs' request to enjoin the merger. [Petitioners' Appendix at Tab 9]. The scheduling order established a discovery schedule for the request for injunctive relief, including document production and deposition deadlines. [*Id.*]. The scheduling order also set a briefing schedule on the plaintiffs' motion for preliminary injunction, including a hearing date of May 26, 2011. [*Id.*]. Beginning on March 1, 2011, substantial discovery took place in the Delaware Action, including the exchange of well over 330,000 pages of documents and the depositions of several executives and directors of Massey and the CEO of Alpha.

The plaintiffs' motion for preliminary injunctive relief in the Delaware Action was fully briefed. On May 26, 2011, Vice Chancellor Strine heard oral argument on plaintiffs'

motion for over three hours. Vice Chancellor Strine reserved decision and is preparing a written ruling that he expects to issue prior to the June 1 stockholder votes at Massey and Alpha.

C. The Petitioners' Motion for Leave to Amend Their Complaint and For a Preliminary Injunction

On May 2, 2011, the petitioners filed Plaintiffs' Motion for Leave to File Second Amended Verified Shareholder Derivative and Class Action Complaint. [Petitioners' Appendix at Tab 15]. In their proposed Second Amended Verified Shareholder Derivative and Class Action Complaint, just as in the Delaware Action, the petitioners sought to add Alpha and Mountain Merger Sub, Inc. as defendants and to assert class claims on behalf of Massey shareholders seeking to enjoin the merger between Alpha and Massey.⁴

On May 16, 2011, via email at 5:03 p.m., counsel for the respondents received Plaintiffs' Motion for a Preliminary Injunction. [Petitioners' Appendix at Tab 14]. Accompanying the motion for a preliminary injunction was a notice of hearing, setting for hearing on May 25, 2011 at 3:30 p.m. both the petitioners' motion for leave to file the Second Amended Verified Shareholder Derivative and Class Action Complaint and the motion for a preliminary injunction [Petitioners' Appendix at Tab 11]. Due to the pendency of the Delaware Action, including the previously scheduled May 26, 2011 hearing before Vice Chancellor Strine, the respondents jointly moved to cancel the May 25, 2011 hearing before the lower court. [Petitioners' Appendix at Tab 9]. Additionally, counsel for certain respondents informed the lower court that they were unavailable due to previously scheduled commitments. [Petitioners' Appendix at Tab 7].

⁴ Notably, Petitioners' combined stockholders represent only 0.35% of Massey's outstanding common stock. (Amended Verified Shareholder Derivative Complaint ¶¶ 7-9.)

On May 23, 2011, counsel for the parties were informed that, due to an ongoing murder trial, the lower court was cancelling the May 25, 2011 hearing. Thereafter, on May 25, 2011, the petitioners filed their Emergency Petition with this Court.

III. DISCUSSION OF LAW

A. **This Court Lacks Jurisdiction Because There Is No Order From the Lower Court Granting Leave to Amend or Refusing Injunctive Relief.**

The petitioners bring their Emergency Petition pursuant to Section 53-5-5 of the West Virginia Code, which states:

When a circuit court, or a judge thereof, shall refuse to award an injunction, a copy of the orders entered in the proceedings in court, and the original papers presented to the court or to the judge in vacation with his order of refusal, may be presented to the supreme court of appeals, or a judge thereof in vacation, who may thereupon award the injunction.

W.Va. Code § 53-5-5 (1923) (emphasis added). Section 53-5-5 does not create original jurisdiction in this Court, but is dependent on the lower court first refusing injunctive relief. *See Fredenheim v. Rohr*, 13 S.E. 193, 194 (Va. 1891) ("This statute confers no original jurisdiction upon one of the judges of this court to award an injunction, except in the case where the application has been made first to a judge of an inferior court, either in term or in vacation, and has been refused.").

As an initial matter, in their focus on Section 53-5-5, the petitioners have missed a critical point. The lower court never granted the petitioners leave to seek injunctive relief, much less refused such relief. On May 2, 2011, the petitioners filed Plaintiffs' Motion for Leave to File Second Amended Verified Shareholder Derivative and Class Action Complaint. In their motion to amend, the petitioners were seeking leave to add Alpha, a necessary and indispensable party, as a defendant. *See, e.g., Joseph v. Shell Oil Co.*, 498 A.2d 1117, 1125 (Del. Ch. 1985) ("It has been

held that a merger may not be enjoined unless both corporate parties to the merger are before the Court."); *State of West Virginia ex. rel. One-Gateway Assoc., LLC v. Johnson*, 542 S.E.2d 894 (W. Va. 2000) ("Under Rule 19(a) of the West Virginia Rules of Civil Procedure a party becomes an indispensable party if he has an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest."). The petitioners were then seeking to assert class claims on behalf of Massey shareholders to enjoin the proposed merger. [Petitioners' Appendix at Tab 15]. Counsel for the respondents informed counsel for the petitioners that they intended to oppose the petitioners' motion for leave to amend because of the class claim and identical relief being sought in the Delaware Action and because of the petitioners' delay in seeking the amendments.

The lower court never granted the petitioners leave to amend to add Alpha as a party defendant and to assert the class claim seeking to enjoin the merger. As a result, there was nothing more than a proposed Second Amended Verified Shareholder Derivative and Class Action Complaint before the lower court. Thus, in addition to the relief sought in their Emergency Petition, the petitioners would apparently have this Court directly grant them leave to amend pursuant to Rule 15 of the West Virginia Rules of Civil Procedure. This Court does not have jurisdiction to do so, and petitioners do not claim that Section 53-5-5 or any other statute confers that jurisdiction. Moreover, as Alpha is not a party to this Action, this Court lacks an indispensable party since the requested relief will clearly and substantially impact Alpha's rights. Alpha has not been given basic due process rights—notice and an opportunity to be heard—on whether its bargained for rights under the merger agreement could be prejudiced, and in connection with which its own shareholders will be meeting to vote on June 1.

Nonetheless, even assuming, *arguendo*, the Plaintiffs' Motion for Leave to File Second Amended Verified Shareholder Derivative and Class Action Complaint had been granted, this Court would still have no jurisdiction under Section 53-5-5 of the Code because there has been no refusal by the lower court to grant injunctive relief. The petitioners argue that the lower court's failure to act on their motion for preliminary injunction is, in effect, a refusal of injunctive relief. In support of this novel argument, the petitioners cite *Wheeling Park Comm'n v. Hotel and Restaurant Employees, Int'l Union, AFL-CIO*, 198 W.Va. 215, 479 S.E.2d 876 (1996). The petitioners' reliance on *Wheeling Park Comm'n* is misplaced.

In *Wheeling Park Comm'n*, the lower court issued an order enjoining union organizing activities at Oglebay Park, which was owned and operated by the Wheeling Park Commission. The lower court stated that it would not dissolve the injunction until it had an opportunity to review the legal nature of Oglebay Park, i.e., whether it was considered a "public forum" for purposes of First Amendment free speech analysis. The union appealed pursuant to Section 58-5-1 of the Code, which provided that "[a] party to a controversy in any circuit court may obtain from the supreme court of appeals ... an appeal from ... a judgment, decree or order of such circuit court ... dissolving or refusing to dissolve an injunction[.]" W.Va. Code § 58-5-1 (1925).⁵ Although there was no order from the lower court dissolving or refusing to dissolve the injunction, the Court held it had jurisdiction to hear the appeal. However, the Court was clear that jurisdiction would only be exercised and the merits of the matter reached if it would "do no harm to the party challenging jurisdiction." *Wheeling Park Comm'n*, 198 W.Va. at 220 n.4, 215, 479 S.E.2d at 881 n.4 (internal quotations and citation omitted). The Court expressly recognized that the exercise of jurisdiction could do no harm because the lower court had not applied the

⁵ Section 58-5-1 was amended in 1998. As part of those amendments, the language allowing for appeals from an order dissolving or refusing to dissolve an injunction was deleted.

appropriate legal principles in issuing injunctive relief in the first place. *See id.* In other words, the Court recognized that even if the lower court had entered an order refusing to dissolve the injunction, the issue before it would be the same. *See id.*

The facts of *Wheeling Park Comm'n* are inapposite to the situation presented here. First, unlike in *Wheeling Park Comm'n* where the exercise of jurisdiction could do no harm to the party challenging it, the petitioners are seeking to have this Court directly enjoin an \$8.5 billion merger, which will provide a substantial premium to Massey's stockholders. (Even doing so temporarily, as petitioners here purport to request, puts the proposed merger at risk.) Second, in *Wheeling Park Comm'n*, the Court had made a determination that it would not review the appropriateness of the injunction until it evaluated the legal nature of the park at issue. The Court was clear that it was reviewing the propriety of the lower court's refusal to dissolve the injunction. Here, there has been no "refusal" by the lower court to issue the injunction, only an indication that plaintiffs' eleventh hour attempt unilaterally to notice a hearing could not be accommodated. The petitioners have pointed to no authority for this Court's exercise of original jurisdiction where there is not at least a determination in some form or fashion from the lower court.

Moreover, it is a stretch for the petitioners to argue the lower court's inaction is an effective refusal of injunctive relief. It has been repeatedly recognized that lower courts have broad discretion in effectively and efficiently managing their trial docket. *See, e.g.,* syl. pt. 2, *B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W.Va. 463, 475 S.E.2d 555 (1996) ("Trial courts have the inherent power to manage their judicial affairs that arise during proceedings in their courts, which includes the right to manage their trial docket."). The petitioners filed their motion for a preliminary injunction on May 16, 2011. They did not file their memorandum of law in support of their motion until May 18, 2011, which was followed by the filing of an amended

memorandum of law on May 20, 2011. [Petitioners' Appendix at Tabs 6, 3]. And, they unilaterally noticed a hearing on their motion for May 25, 2011 at 3:30 p.m., a time when the lower court was in the midst of a murder trial that led to the lower court cancelling the May 25, 2011 hearing. The petitioners' argument that this is tantamount to the lower court refusing injunctive relief walks a dangerous path that effectively removes the jurisdictional lines between this Court and the lower courts of the State, as original jurisdiction could be created in this Court every instance in which a lower court cannot accommodate a party's unilateral, "eleventh hour" request for a hearing date or injunctive relief.

Accordingly, the necessary conditions for this Court's exercise of jurisdiction pursuant to Section 53-5-3 are not present. The lower court never granted the petitioners leave to file their Second Amended Verified Shareholder Derivative and Class Action Complaint asserting the class claims and injunctive relief they now bring in their Emergency Petition. Likewise, given that leave to file the Second Amended Verified Shareholder Derivative and Class Action Complaint was never granted, the lower court never made any determination or "refusal" to grant the injunctive relief sought. The petitioners' Emergency Petition should be dismissed.

B. TO THE EXTENT THIS COURT HAS ORIGINAL JURISDICTION OVER THIS MATTER, IT SHOULD ABSTAIN IN FAVOR OF THE DELAWARE ACTION.

It is a "long-understood notion that when a corporation forms under the laws of a particular state, the rights of its stockholders are determined by that state's law and that the chartering state has a powerful interest in ensuring that uniform interpretation and enforcement of its corporation law, so as to facilitate economic growth and efficiency." *In re Topps Co. Shareholders Litigation*, 924 A.2d at 953. As stated by the United States Supreme Court:

No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic

corporations, including the authority to define the voting rights of shareholders.

CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987). Petitioners concede that Delaware law governs. [Petitioners' Appendix, Tab 3 at p. 21 n.5.]

This Court has previously recognized that, even if possessing jurisdiction, West Virginia courts should abstain from deciding controversies involving the internal affairs of foreign corporations. In *Simms v. Garrett*, 114 W.Va. 19, 170 S.E. 423 (1933), former officers and directors of a Wyoming corporation were alleged to have wrongfully withheld books, records, and funds of the corporation. The majority of the stock of the corporation was owned by West Virginia citizens; all of the books, records, and funds were located in West Virginia; and all of the defendants were domiciled in West Virginia. Although this Court recognized it undoubtedly had jurisdiction to decide the dispute, this Court held that abstention in favor of Wyoming courts was the best approach:

Notwithstanding the existence of such jurisdiction, this court will refrain from exercising it when the court of the corporation's domicile is clearly indicated as the proper tribunal for determination of the controversy.

Id. at syl. pt. 2.

Here, the relief sought in the Emergency Petition is to enjoin the stockholders' vote on whether to approve the merger of Alpha and Massey, both Delaware corporations. Both parties to the merger are before a Delaware court, a court that has already conducted discovery, reviewed briefs, and heard argument concerning whether the merger should be enjoined and that is widely recognized as possessing special expertise in exactly these types of disputes.⁶ And a

⁶ Both federal and state courts across the country have acknowledged the Delaware Chancery Court's expertise in cases like this one, involving a Delaware corporation and Delaware corporate law. *See, e.g., Boland v. Boland*, 5 A.3d 106, 121 n.11 (Md. App. 2010) (“[T]he Maryland circuit courts do not have the broad expertise in corporation law that the Delaware Chancery Court has developed through many years of specialization.”);

class of Massey shareholders—identical to the class on whose behalf petitioners seek to act here (indeed, a class that includes the petitioners here)—is also before the Delaware court and seeking the same relief petitioners seek here. And unlike here, Alpha is a party to the Delaware proceeding, and accordingly has been afforded the right to be heard there. Under these circumstances, any decision to enjoin the stockholders' vote or the merger is best left for Vice Chancellor Strine in the Delaware Action.

C. Petitioners' Request for a Preliminary Injunction Should, In Any Event, Be Denied.

This Court should deny the Emergency Petition for the additional reason that petitioners cannot establish the requisites for a preliminary injunction. Despite petitioners' attempts to distinguish their claims from those being litigated in Delaware, the substance of petitioners' primary arguments are the same. For the reasons set forth in Certain Massey Defendants' Answering Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction ("Answering Brief"), petitioners cannot demonstrate a reasonable probability of success on the merits [Respondents' Appendix Vol. I, Tab 3 at pp.49-72]; that, absent an injunction, some irreparable harm will occur to them [*id.* at 76-81]; and that the harm petitioners may suffer in the absence of an injunction outweighs the harm to defendants and the Massey shareholders if relief is granted [*id.* at 81-82]. As set forth in the Answering Brief, petitioners effectively seek to take

Ehrenhaus v. Baker, Civil Action No. 08 CVS 22632, 2008 WL 5124899, *9 n.19 (N.C. Super. Dec. 5, 2008) (“[T]he North Carolina courts frequently look to Delaware for guidance on questions of corporate governance because of the special expertise and body of case law developed in the Delaware Chancery Court and the Delaware Supreme Court”); *City of Austin Police Ret. Sys. v. ITT Educ. Servs. Inc.*, No. 1:04CV0380-DFH-TAB, 2005 WL 280345, at *11 (S.D. Ind. Feb. 2, 2005) (“The Delaware courts in general, and the Chancery Court in particular, are well respected for their expertise in corporation law.”); *SSP Advisors, L.P. v. Salovarra*, No. MRS-C-88-03, 2003 WL 23517147, *5 (N.J. Super. Ch. Sept. 26, 2003) (“The Delaware Chancery Court is a particularly appropriate forum because it has a highly developed body of corporate law, and has been recognized as the ‘pacesetter’ in the field.”) (internal quotations omitted); *Teamsters Local Nos. 175 & 505 Pension Trust Fund v. IBP, Inc.*, 123 F. Supp. 2d 514, 519 (D.S.D. 2000) (“The Delaware Chancery Court, ‘through its daily interpretation of that law, has earned a reputation for its ‘expertise concerning corporate governance.’” (quoting *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 948 (7th Cir. 1994))

from Massey's stockholders the opportunity to decide for themselves whether the proposed merger should be consummated. This Court should reject that attempt.

Petitioners do assert that the Delaware plaintiffs missed what petitioners deem the "key fact . . . entitling Massey Energy shareholders to an injunction of the merger".⁷ [Petitioners' Appendix, Tab 2 at n.1.]. Namely, petitioners contend that Massey's decision to merge with Alpha as opposed to any other potential acquirer was all part of a secret pact (between Massey's lead outside director Admiral Bobby Inman and Alpha's CEO) to secure continued employment for the individuals at Massey that petitioners believe are directing the Massey internal investigation into the causes of the UBB explosion. But this claim fails for several reasons. First, Petitioner's argument is nonsensical: purportedly concerned that Alpha may employ individuals whose conduct petitioners' criticize, they demand an injunction that would ensure their continued employment by Massey. Second, the record flatly contradicts petitioners' claim. Alpha's CEO, Kevin Crutchfield, testified on May 10, 2011, that the decision whether to extend offers to the various individuals whom he discussed with Admiral Inman was "still a work in progress". [Respondents' Appendix Vol. VII, Tab 10 at Ex. 39 at p.145:13].⁸ Moreover, Admiral Inman testified that he had the same conversation with Steve Leer of Arch Coal (who at the time was among the parties that had expressed an interest in a potential transaction with Massey), thus negating any suggestion that these "social" considerations motivated Massey's merger with Alpha. [Respondents' Appendix Vol. VII, Tab 10 at Ex. 55 at p.145:13]. Third, Petitioner's theory that Inman sought the "social agreement" in order to retain "control" of the

⁷ Incidentally, the Delaware plaintiffs just this morning presented by letter petitioners' amended preliminary injunction brief to Vice Chancellor Strine. Therefore, it cannot be said that any arguments made to this Court have not also been presented to the Delaware court.

⁸ Moreover, petitioners' contention that all of the referenced individuals will be employed by Alpha post-merger is simply not true. However, because Alpha has not been made a party herein, it has not been afforded the opportunity to put evidence in the record to refute these claims.

internal investigation of UBB makes no sense. The ability to control Massey's internal investigation would have no effect on the defendants' potential liability on the derivative claims, since the findings of that investigation would not preclude other, outside investigations from reaching different conclusions and assigning culpability regardless of what Massey's own findings are. Indeed, at the time of Admiral Inman's discussions with Alpha and Arch, Massey's board had an Advisory Committee composed of independent directors who specifically were charged with investigating the underlying derivative claims, including the ones at issue in this case.⁹ Petitioner's secret pact theory, therefore, is at best frivolous and gets them nowhere.

Petitioners also assert different disclosure claims from those in Delaware.¹⁰ Petitioners' claims are, however, too little and too late. Petitioners contend that respondents failed to disclose certain information in the Form S-4 filed on April 21, 2011 with the Securities and Exchange Commission. In particular, petitioners claim that respondents failed to disclose certain assumptions purportedly relied upon by Massey's financial advisors in performing their analyses; "the reasons the Board decided to require that no consideration be paid by Alpha to Massey Energy or its shareholders for the derivative claims"; the estimated value of the derivative claims (including the contempt "claim"); and the available insurance for these claims.

The essential inquiry in analyzing a disclosure claim is whether the alleged omission or misrepresentation is material or, in other words, whether there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable

⁹ Petitioners, are fully aware of this as they were permitted to participate in the Delaware depositions so long as they did not ask duplicative questions. Tellingly, petitioners did not ask Mr. Crutchfield or Admiral Inman a single question about the "social" theory they claim the Delaware plaintiffs missed. Petitioners likewise failed to ask a single question relating to their claim (discussed below) that Respondents failed to disclose financial assumptions upon which its financial advisors relied.

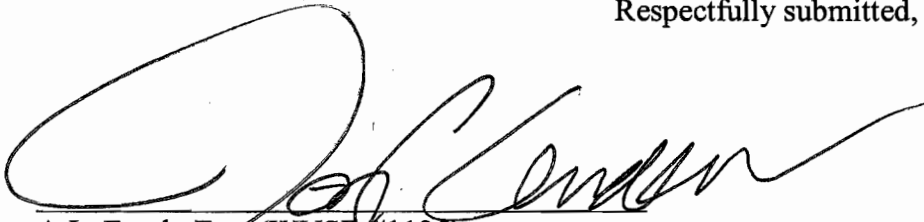
¹⁰ Petitioners also contend that their motion for civil contempt in *Manville Personal Injury Trust v. Blankenship, et al.*, Case No. 07-C-1333, pending in the Circuit Court of Kanawha County before Judge Stucky somehow relates to this proceeding. It does not. Indeed, petitioners' attempt to consolidate this matter with the contempt proceeding was rejected by Judge Stucky.

investor as having significantly altered the total mix of information made available.” *In re Cogent, Inc. S’holder Litig.*, 7 A.3d 487, 509 (Del. Ch. 2010) (quoting *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994)) (internal quotation marks omitted). It is well established that “[d]irectors do not need to disclose . . . all information about a particular subject, or even information that is simply helpful if it does not meet the above standard”. *Id.* With respect to petitioners’ claims regarding the failure to include certain assumptions relied upon by Massey’s financial advisors, Delaware law requires disclosure of only a “fair summary” of the investment banker’s work, *In re Cogent*, 7 A.3d at 511, and the Proxy provides a fair summary of Perella Weinberg’s analysis. Respondents need not have disclosed “the reasons the Board decided to require that no consideration be paid by Alpha . . . for the derivative claims” because there was no such decision. “[P]roxy materials are not required to state . . . plaintiff’s characterization of the facts.” *In re MONY Group, Inc. S’holder Litig.*, 853 A.2d 661, 682 (Del. Ch. 2004). In addition, there is no obligation to value or disclose the value of each asset in the company. See *In re Countrywide Corp. S’holders Litig.*, C.A. No. 3464-VCN, 2009 WL 846019, at *7-8 (Del. Ch. Mar. 31, 2009). Indeed, the Proxy Statement fully informs the stockholders of the status of the derivative claims and pending actions, the legal advice given to the Massey Board of Directors about those claims, and the fact that while the petitioners here and others believe that those claims have significant value, the Company might not achieve any recovery from those claims post merger (*id.* at 50).

V. CONCLUSION

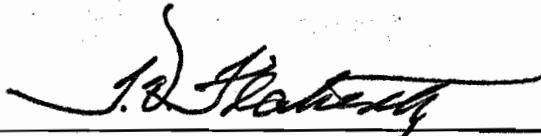
For the above reasons, the respondents respectfully request the petitioners' Emergency Petition be dismissed and any and all relief sought therein be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Jonathan L. Anderson, do hereby certify that I have served a true and exact copy of the foregoing *Joint Response to Emergency Petition for a Preliminary Injunction Pursuant to West Virginia Code Section 53-5-5* upon counsel of record via e-mail and/or first class United States Mail on this the 27th day of May, 2011:

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