

**IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA**

**DELORICE BRAGG, individually and as  
Administratrix of the Estate of Don Israel Bragg,  
and  
FREDA HATFIELD, individually and as  
Administratrix of the Estate of Ellery Hatfield,**

**Plaintiffs,**

**v.**

**Civil Action No. 06-C-372-P**

**ARACOMA COAL COMPANY, INC.,  
MASSEY ENERGY COMPANY,  
A.T. MASSEY COAL COMPANY, INC.,  
and DON L. BLANKENSHIP,**

**Defendants.**

**PLAINTIFFS' MEMORANDUM OF LAW  
IN JOINT OPPOSITION TO THE MOTIONS OF  
DON L. BLANKENSHIP, MASSEY ENERGY COMPANY,  
AND A. T. MASSEY COAL COMPANY, INC.  
TO DISMISS PLAINTIFFS' COMPLAINT**

AND NOW come Delorice Bragg, individually and as Administratrix of the Estate of Don Israel Bragg, and Freda Hatfield, individually and as Administratrix of the Estate of Ellery Hatfield (“Plaintiffs”), by and through their undersigned counsel, and submit the following Memorandum of Law in Joint Opposition to the Motions of Don L. Blankenship, Massey Energy Company, and A.T. Massey Coal Company, Inc. to Dismiss Plaintiffs' Complaint.<sup>1</sup>

**I. INTRODUCTION**

On January 19, 2006, Don Bragg and Elvis Hatfield, after experiencing at least one hour of the most horrendous pain and suffering imaginable, died of asphyxiation and carbon

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<sup>1</sup> The Motion to Dismiss Defendants Massey Energy Company, Inc. and A.T. Massey Coal Company, Inc. and the Motion to Dismiss Defendant Don L. Blankenship are hereinafter referred to as “Massey Motion” and “Blankenship Motion” respectively.

monoxide poisoning at Aracoma's Alma Mine No. 1. Eleven months later, their widows, on their own behalf and as the administratrices of their deceased husbands' estates, filed suit against Aracoma as well as Massey Energy Company and A.T. Massey Coal Co., Inc., and the president and chief executive officer of those two companies, Don L. Blankenship.

While Aracoma has filed an Answer to the Complaint, Massey Energy, A.T. Massey (the “Massey Defendants”) and Mr. Blankenship have all moved to dismiss the Complaint as to each of them, contending that, as a matter of West Virginia law, the widows have failed to state a claim upon which relief can be granted.

While a motion to dismiss is intended to test the legal sufficiency of a claim, Mr. Blankenship has chosen to introduce evidence outside the pleadings, ostensibly seeking to convert these proceedings into a motion for summary judgment.<sup>2</sup> Inasmuch as the same legal theory which supports the widows' claims against him also supports the claims against Massey Energy and A.T. Massey, the widows respectfully submit that the present challenges to the Complaint must fail and this case, upon the conclusion of fact discovery, must be allowed to proceed to a jury for a trial on the merits.

More specifically, as discussed below, Mr. Blankenship is the top executive at Massey Energy and at A.T. Massey, but he does not hold any officer position at Aracoma. Rather, as Aracoma freely admits, it is a subsidiary of Elk Run Coal Company, which has not been named as a defendant in these proceedings.

The sum and substance of the widows' claims against Mr. Blankenship, Massey Energy and A.T. Massey all stem from the same operative factual allegations -- that Mr. Blankenship,

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<sup>2</sup> The widows welcome this opportunity to address the notion that Mr. Blankenship, in his words, “[b]y any objective measure . . . has created a culture of safety at Massey . . . .” Blankenship Motion, at p. 3.

personally and in his capacity as the President, Chief Executive Officer, and Chairman of Board of Directors of Massey Energy and A.T. Massey, directed the superintendent of the Alma Mine No. 1 (the “Alma Mine”), Mr. Lawrence Lester, to ignore work necessary to insure safe operation at the mine in favor of increasing coal production.

Whether the directive Mr. Blankenship gave Mr. Lester means what it says is clearly a matter of fact to be determined by a jury. Moreover, Massey Energy and A.T. Massey’s claims that the widows have failed to allege adequate facts to pierce the corporate veil are simply irrelevant. That is, the widows are contending that Mr. Blankenship is *independently liable* for his actions (and so, therefore, are the two companies on whose behalf he was acting directly) over and apart from the illegally dangerous conduct in which Mr. Bragg and Mr. Hatfield’s statutory employer, Aracoma, was engaged.

The widows contend that Mr. Blankenship cannot legally bypass the very corporate structure he helped to establish by personally directing a mine superintendent at a facility at least three corporate levels removed to ignore safety and “just run coal” without being held accountable for his actions when that same superintendent follows the directive. While it is unclear from the Motion of Massey Energy and A.T. Massey whether they are contending that they cannot be held accountable for Mr. Blankenship’s actions because he was acting beyond the scope of his corporate authority, Mr. Blankenship clearly understood that he was communicating directly to the mine superintendent and clearly believed he was doing so in his corporate capacity inasmuch as he “cc’d” both the Chief Operating Officer and the Senior Vice President - Group Operations of Massey Energy on his directive.

In essence, then, it appears that Mr. Blankenship and the two companies under his direct control are attempting to argue something akin to a reverse Nuremberg defense—I am not guilty because I was only giving the orders, not carrying them out. The outrageousness of such a position cannot be tolerated in modern society, and is, in fact, squarely contradicted by existing

law. Accordingly, this Honorable Court must necessarily deny the Motions of Mr. Blankenship, Massey Energy and A.T. Massey.

## II. LEGAL STANDARD

Mr. Blankenship and the Massey Defendants have filed Motions to Dismiss the widows' Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. "[T]he singular purpose of a Rule 12(b)(6) motion is to seek a determination whether the plaintiff is entitled to offer evidence to support the claims made in the complaint." *Dimon v. Mansy*, 198 W. Va. 40, 47, 479 S.E. 2d 339, 346 (1996). A motion to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. *John W. Lodge Distribution Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 606, 245 S.E. 2d 157, 159 (1978). "[A] motion to dismiss for failure to state a claim is viewed with disfavor, particularly in actions to recover for personal injuries." *Sesco v. Norfolk and Western Railway Co.*, 189 W. Va. 24, 26, 427 S.E. 2d 458, 460 (1993) (quoting *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E. 2d 207 (1977)).

The standard which a plaintiff must meet to overcome a 12(b)(6) motion to dismiss is a liberal standard, and few complaints fail to meet the burden. *McCormick v. Wal-Mart Stores*, 215 W. Va. 679, 682, 600 S.E. 2d 576, 579 (2004) (citing *Holbrook v. Holbrook*, 196 W. Va. 720, 474 S.E. 2d 900, 906 (1996)). "The trial court, in appraising the sufficiency of the complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *McCormick*, 600 S.E. 2d at 579 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). The allegations of a complaint, no matter how inartfully pleaded, will not be dismissed unless it is proved beyond doubt that the plaintiff can prove no set of facts entitling her to relief. *Norris v. Detrick*, 918 F. Supp. 977 ( N.D. W. Va. 1996); *see also Kirkhart v. PPG Industries, Inc.*, 2006 WL 3692643, \*7(N.D. W.Va. 2006); *McCormick*, 600 S.E. 2d at 576. For purposes of the Motion to Dismiss, the factual allegations of the

complaint are construed in the light most favorable to plaintiff, and its allegations are to be taken as true. *Lambert v. Gartin*, 211 W. Va. 496, 498, 566 S.E. 2d 633, 635 (2002).

While Mr. Blankenship has filed his Motion to Dismiss pursuant to Rule 12(b)(6), he has also raised extraneous factual material outside the scope of the pleadings. By doing so, he is essentially requesting that this Honorable Court treat his Motion as one for summary judgment: “if a circuit court considers matters outside the pleadings in connection with a motion to dismiss, [it] must treat the motion as one for summary judgment.” *Hively v. Merrifield*, 212 W. Va. 804, 807, 575 S.E. 2d 414, 417 (2002) (quoting *Harrison v. Davis*, 197 W.Va. 651, 478 S.E. 2d 104 (1996)). And inasmuch as the factual and legal allegations which give rise to Mr. Blankenship’s liability also give rise to the liability of the Massey Defendants, to the extent that Mr. Blankenship is not entitled to an award of summary judgment, then neither are they, and all pending Motions to dismiss/grant summary judgment should be denied. Although the Plaintiffs have served document requests upon Defendant Aracoma, to which they have yet to receive a response, given the pendency of the present Motions, no discovery had been served upon the remaining Defendants -- Don Blankenship, Massey Energy and A.T. Massey. *See Harrison*, 478 S.E. 2d 104 (where a plaintiff opposes a motion to dismiss under subsection (b)(6) of this rule and claims that discovery would enable him or her to oppose such a motion, the plaintiff may request a continuance for further discovery). However, as demonstrated below, there is more than adequate factual evidence, in the form of sworn witness statements and Defendants’ own public statements and admissions, to support the allegations of the widows’ Complaint.

### III. ARGUMENT

**A. As A Matter Of Law, Massey Energy And A.T. Massey Are Liable For The Harm To The Plaintiffs Because They Independently Participated In Wrongful Conduct Which Directly Contributed To The Plaintiffs' Harm.**

Massey Energy and A.T. Massey, through the affirmative acts of their Chairman, President, and Chief Executive Officer, Don Blankenship, were largely responsible for creating the deplorably hazardous conditions at the Aracoma Alma Mine No. 1, which caused the deaths of Elvis Hatfield and Don Bragg.<sup>3</sup> In their joint Motion to Dismiss, the Massey Defendants attempt to brush aside the wealth of documentation clearly showing their intimate involvement with the safety and production policies at the Alma Mine, and instead make the faulty technical argument that they cannot be held liable for the deaths of Don Bragg and Elvis Hatfield because they own only the rights to the coal seam at the Alma Mine, but do not own, operate, or possess the land or the mine itself. Massey Motion, pp. 3-4. The Massey Defendants also disclaim liability because they were not the statutory employers of Don Bragg and Elvis Hatfield. *Id.*, p. 4. As such, they conclude that any legal duties owed to Mr. Bragg and Mr. Hatfield were owed solely by Aracoma, and not by the Massey Defendants. *Id.* The law, however, is not so fixated on technicalities or so indifferent to justice as the Massey Defendants portray, and it soundly contradicts their position.

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<sup>3</sup> It goes almost without saying that a corporation is liable for the acts of its officers, carried out on the corporation's behalf. *See, e.g., United States v. Bestfoods*, 524 U.S. 51, 65 (1998), (A "corporation is itself responsible for the wrongs committed by its agents in the course of its business.") Again, it is apparent that Mr. Blankenship, in the promulgation of his October 19, 2005 memorandum, among other relevant actions, understood himself to be acting in his official capacities with the Massey Defendants. The Massey Defendants appear to accept this position, since they have not attempted to raise any defense by disclaiming the acts of Mr. Blankenship as rogue and unauthorized.

“There are circumstances and conditions under which a person, not actually the master or employer, may be held liable, as if he were such.” *Ward v. Liverpool Salt & Coal Co.*, 79 W. Va. 371, 376-377, 92 S.E. 92, 94 (1916); *see also* 1 M.J., MASTER AND SERVANT, § 13, *citing Ward*. This was the case in *Ward*, where the corporate defendant which had controlled and influenced activities at a coal mine was held liable for injuries to the plaintiff mine employee, even though the “defendant insist[ed] that it is not liable, unless it was actually operating the mine at the time plaintiff was injured, and was his employer; that the evidence conclusively proves it did not employ him and was not the owner or operator of the mine at the time of his injury.” *Id.* 79 W. Va. at 376, 92 S.E. at 94. Although the Supreme Court of Appeals of West Virginia accepted the defendant’s factual claims that it was not the owner, operator, or employer, the court nevertheless held the defendant corporation liable because its president had been actively involved in directing the affairs of the mine. *Id.* 79 W. Va. at 378, 92 S.E. at 95. The court held that the corporation had therefore “[held itself] out as the master in such manner as thereby to induce the injured employee to believe he was [its] servant,” and the employees had a right to regard the defendant corporation as their employer. *Id.* at 377, 378.

Since the early decision in *Ward*, this same principle has been reaffirmed and further developed nationwide. The Supreme Court of the United States, in *United States v. Bestfoods*, held that a parent corporation may be held directly liable for wrongful acts at a subsidiary’s facility if it “actually exercised control over, or was otherwise intimately involved in the operations of, the subsidiary corporation immediately responsible for the operation of the facility.” 524 U.S. 51, 67 (1998). The Court emphasized that this *direct* liability is not the same as piercing the corporate veil, holding the parent *indirectly* liable for the acts of the subsidiary:

[D]erivative liability cases are to be distinguished from those in which the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management and the parent is directly a participant in the wrong complained of. In such instances, the parent is directly liable for its own actions. Apart from corporation law principles, a shareholder, whether a natural person or

a corporation, may be liable on the ground that such shareholder's activity resulted in the liability. The fact that a corporate subsidiary happens to own a polluting facility operated by its parent does nothing, then, to displace the rule that the parent corporation is itself responsible for the wrongs committed by its agents in the course of its business.

*Id.* at 64-65 (internal citations omitted). In their Motion, the Massey Defendants misconstrue the widows' claims, avoiding discussion of their direct liability, and arguing only that there is no basis in this case to pierce the corporate veil. Massey Motion, pp. 4-5. The Massey Defendants, in fact, cite *U.S. v. Bestfoods* for the irrelevant proposition that a parent corporation is not generally liable for the acts of its subsidiaries, completely ignoring the Supreme Court's extensive discussion and ultimate finding of potential *direct* liability for the parent corporation in that case.

The theory of direct liability does not require that the parent or its agents personally, physically carry out the wrongful actions. There is no requirement for the Court to find, for instance, that Mr. Blankenship himself physically knocked out the stopping walls that allowed suffocating smoke to fill the victims' escapeways, or that he personally failed to install a federally-mandated CO monitor in the victims' work area that would have provided them with early warning of the fire and saved their lives. Rather, the theory holds that "a parent corporation may be held liable for the wrongdoing of a subsidiary where the parent directly participated in the subsidiary's unlawful actions." *Esmark, Inc. v. NLRB*, 887 F.2d 739, 756 (7th Cir. 1989); *see also Papa v. Katy Indus.*, 166 F.3d 937, 940-942 (7th Cir. 1999); *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929); *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 486-487 (3d Cir. 2001). In these cases, "[t]here was no allegation that the parent did anything directly to the third party. Instead the parent only acted against the third party's interests through the agency of the subsidiary. The owner's liability was based on its control of its subsidiaries' actions from 'behind the scenes.'" *Esmark* at 756. This principle is based upon courts' recognition that "[a] parent corporation may disregard the subsidiary's independence at its whim," and "specifically direct[] the

actions of its subsidiary, using its ownership interest to command rather than merely cajole.” *Id.* at 757. In such situations, where the parent acted not “in its capacity as owner of the subsidiary; rather, it has forced the subsidiary to take the complained-of action, in disregard of the subsidiary’s distinct legal personality,” the parent will be held liable. *Pearson*, 247 F.3d at 487 (3d Cir. 2001).

This statement of the law is both logical and just, preempting the “reverse Nuremberg defense” that the defendants attempt to employ here. A parent corporation should not be allowed to escape liability on the theory that it only gave the commands, but did not personally carry them out. The prime example of the Massey Defendants’ wrongful acts is Blankenship’s October 19, 2005 memorandum, which specifically commanded the mine superintendent at the Alma Mine, in a threatening and forceful tone, to “ignore” any instructions he had “to do anything other than run coal,” including any safety projects such as “build[ing] overcasts, do[ing] construction jobs, or whatever.” Blankenship Motion, Exhibit A. This memorandum, as powerful as it is, appears to be only the tip of the iceberg, giving a mere glimpse of the extent to which the Massey Defendants interfered with the daily concerns of its member mines, constantly demanding high production at any and all costs, including the safety of its miners. This profound and continual “disregard for [Aracoma’s] distinct legal personality” will be described in great detail below, in relation to Mr. Blankenship’s personal involvement in the operation of the Alma Mine. The Massey Defendants’ arguments that they cannot be held liable because they were not the owners, operators, or employers at the Alma Mine, and that there has been no attempt to pierce the corporate veil, are irrelevant at best, and deceptive at worst, ignoring the law and facts which serve to hold them *directly* liable for their own actions in directing the deadly events at the Alma Mine.

**B. Don Blankenship Should Be Held Personally Liable For The Harm To The Plaintiffs Because He Personally Directed, Sanctioned, And/Or Participated In Tortious Acts Against The Plaintiffs And Their Deceased Husbands.**

In his Motion to Dismiss, Mr. Blankenship presents the legal defenses that he cannot be held liable for the torts of the corporation solely because of his position as a corporate officer, or because of any non-feasance of duty on his part. Additionally, although Mr. Blankenship recognizes that corporate officers may be held directly liable for their personal involvement in corporate wrongdoing, he makes the counterfactual protestation that he had no personal involvement in any wrongdoing, and in fact created a culture of safety at Massey and its subsidiary entities. Mr. Blankenship's legal arguments will be addressed first below. Second, in response to Mr. Blankenship's introduction of wildly misleading factual claims and evidence outside of the pleadings, the widows will present a sampling of the evidence already uncovered which clearly shows Mr. Blankenship's personal involvement in the wrongdoing which led to their husbands' tragic, unnecessary deaths in the Alma Mine.

**1. As a Matter of Law, the Plaintiffs Have Stated Valid Claims Upon Which Relief May Be Given, Sufficient to Hold Don Blankenship Personally Liable for Their Husbands' Deaths.**

As is perfectly evident from their Complaint, the widows do not seek to hold Mr. Blankenship personally liable for their husbands' deaths "simply because of his status as an officer," or because of any mere "non-feasance of duty" on his part. Blankenship Motion at pp. 7, 9. Rather, the widows rightly allege that Mr. Blankenship must be held liable because he personally directed the management at the Aracoma Alma Mine No. 1 to prioritize coal production over all else, to the exclusion of state and federal mine safety laws, among other acts and policies by Mr. Blankenship which created the hostile attitude towards safety and the resulting deadly conditions in the Alma Mine on January 19, 2006.

As Mr. Blankenship well knows, according to many of the cases cited in his own Motion, "where a corporate director has in some way participated in or directed the tortious act,

personal liability will attach.” *Steinke v. Beach Bungee*, 105 F.3d 192, 195, 196-197 (4th Cir. 1997); *see also Bowling v. Ansted Chrysler-Plymouth-Dodge*, 188 W. Va. 468, 474, 425 S.E. 2d 144, 149 (1992) (“an officer of a corporation may be personally liable for the tortious acts of the corporation . . . , if the officer participated in, approved of, sanctioned, or ratified such acts.”); *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141, 1144 (4th Cir. 1975) (“Proof that the director voluntarily and intentionally caused the corporation to act is sufficient to make him personally accountable.”).<sup>4</sup> Under this standard, Mr. Blankenship’s October memorandum, in which he directed the superintendent of the Alma Mine to ignore any safety projects such as “build[ing] overcasts, do[ing] construction jobs, or whatever” and just “run coal”, *clearly* falls within the scope of “participating in,” “directing,” “approving of,” or “sanctioning” the practice at the Alma Mine of ignoring necessary safety projects in favor of maximizing production.<sup>5</sup>

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<sup>4</sup> This principle is widely followed. *See, e.g., White v. Wal-Mart Stores, Inc.*, 918 So.2d 357, 358 (Fla. 1st DCA 2005) (“The law is clear to the effect that officers or agents of corporations may be individually liable in tort if they commit or participate in a tort, even if their acts are within the course and scope of their employment.”); *Mill Run Assocs. v. Locke Prop. Co.*, 282 F. Supp. 2d 278, 287-288 (E.D. Pa. 2003) (A corporate officer is “personally liable to third persons for such a tort [by the corporation], [or for the acts of other agents, officers or employees of the corporation in committing it, [if] he specifically directed the particular act to be done or participated, or cooperated therein”); *St. James Constr. Co. v. Morlock*, 89 Md. App. 217, 227-225, 597 A. 2d 1042, 1045 (Md. Ct. Spec. App. 1991) (“The general rule is that corporate officers or agents are personally liable for those torts which they personally commit, or which they inspire or participate in, even though performed in the name of an artificial body.”); *Hunt v. Rabon*, 275 S.C. 475, 476-478, 272 S.E. 2d 643, 644 (1980) (“A director, officer, or agent is not liable for torts of the corporation or of other officers or agents merely because of his office. He is liable for torts in which he has participated or which he has authorized or directed.”); *Crigler v. Salac*, 438 So.2d 1375, 1380 (Ala. 1983) (“a director of a corporation may not participate in a tort perpetrated through the agency of a corporation, or in a fraudulent injury to another, without being civilly responsible.”).

<sup>5</sup> As was described in regard to the Massey Defendants’ liability, “[t]his rule does not depend on the same grounds as ‘piercing the corporate veil,’ that is, inadequate capitalization, use of the corporate form for fraudulent purposes, or failure to comply with the formalities of corporation organization.” *Bowling*, 188 W. Va. at 427, n4, 425 S.E.2d at 149, n. 4. Although Mr. Blankenship does not explicitly raise the widows’ decision not to attempt to pierce the corporate veil as a defense, much of the authority cited in the Blankenship Motion relates to that theory of liability, and is therefore irrelevant and potentially misleading in the analysis of this case.

Mr. Blankenship's memorandum rises far above and beyond the scope of mere non-feasance of duty, but was rather an affirmative violation of the duties to the miners to maintain a safe work environment in accordance with state and federal laws. As a corporate officer, Mr. Blankenship is held to the same standard of care as the corporation itself, and when he commandeered the affairs of the Aracoma Alma Mine No. 1 in his official roles with the Massey Defendants, he assumed the same duties to the miners as though he were the mine operator and employer. *See, e.g., St. James Constr. Co. v. Morlock*, 89 Md. App. 217, 224 (Md. Ct. Spec. App. 1991); *United States v. Bestfoods*, 524 U.S. 51 (1998). As already described in relation to the Massey Defendants' liability, it is not necessary for the corporate officer to have "personally created any of the alleged unsafe working conditions," as Mr. Blankenship feebly suggests. Blankenship Motion, p. 8.

In *Bowling v. Ansted Chrysler-Plymouth-Dodge*, for instance, the officer of the defendant car dealership was held liable for seventeen instances of defrauding plaintiff customers by misleading them about the histories of the used cars for sale, despite the fact that "in fifteen of the seventeen cases there is no evidence that he directly [misled] the customers . . . or that he told his salesmen to misrepresent the car's history." 188 W. Va. at 473, 425 S.E. 2d at 149 (1992). In this case, the court found that the officer had "sanctioned" the fraud where he had "conceived of" the wrongful scheme and "knew or should have known" of the fraud being carried out under that policy, even where he was not directly involved. *Id.* Not only does the officer not need to directly *carry out* the act—the court also held that, in sanctioning a wrongful act, "the officer need not have actual knowledge because constructive knowledge may suffice." *Id.*, 188 W. Va. at 473, 425 S.E. 2d at 149. Further, "[t]his knowledge does not have to be shown by direct evidence and usually can only be proved by circumstantial evidence. The circumstantial evidence may include evidence of similar transactions in the course of a systematic way of doing

business.”<sup>6</sup> *Id.* The court adopted the rule in 3A Fletcher’s Cyclopaedia of Corporations § 1135 at 267 (Perm. ed. 1986), which states:

[C]orporate officers, charged in law with affirmative official responsibility in the management and control of the corporate business, cannot avoid personal liability for wrongs committed by claiming that they did not authorize and direct that which was done in the regular course of that business, with their knowledge and with their consent or approval, or such acquiescence on their part as warrants inferring such consent or approval.

*Id.*

**2. As a Matter of Fact, Existing Evidence Shows That Don Blankenship’s Personal Actions on Behalf of the Massey Defendants Are Sufficient to Hold Each of Them Liable.**

In the face of this overwhelming legal authority in the widows’ favor, which requires simply that Mr. Blankenship authorized, directed, sanctioned, or otherwise approved of the wrongful acts of the corporation, and does not require that he was personally present and directly participating in such acts, but finds liability where he authorized and directed wrongs

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6 It is interesting to note that, in *Bowling*, one element of circumstantial evidence the court found to be informative was the officer’s “letter to the editor defending his sales practices and assuring the local readership that he was ‘totally responsible for all my service and sales staff.’” Additionally, the officer “testified at trial that his dealership was the smallest in Fayette County, and he boasted that he knew everything that happened in the business.” *Id.* 188 W. Va. at 474, 425 S.E. 2d at 150. The officer’s bold assertions in that case are paralleled by the past statements of Mr. Blankenship, including one instance where he gave the following testimony:

“Q. And as a wholly-owned subsidiary of Massey, did Massey have a financial interest or other interest in the performance and results of Wellmore?

A. Yes. My responsibility to the board, of course, is to look after Massey Energy’s bottom line and interest and all the things that Massey Energy does, and essentially, Massey Energy is the addition or accumulation of all its subsidiaries. So there’s no escaping my responsibility for whatever the subsidiaries do.”

Sworn testimony of D. Blankenship under direct examination, p. 57, lines 9-19, *Caperton v. A.T. Massey Coal Co.*, Civil Action No. 98-C-192 (July 18, 2002) (Ex. 1).

committed by subordinates in the regular course of business, Mr. Blankenship's defense desperately turns to twisting the facts. In an apparent effort to have his Motion to Dismiss treated as a motion for summary judgment, Mr. Blankenship introduces new evidence and incredibly attempts to convince this Court that he has "created a culture of safety" at the Massey subsidiary mines, and that his October memorandum does not mean what it says.<sup>7</sup> Blankenship Motion, p. 3. The overwhelming absurdity of this position is exposed below, using the significant amount of evidence already collected in this case.

**a. Blankenship's October Memorandum directed the managers at Aracoma to place production over safety.**

First, Mr. Blankenship attacks the widows' Complaint by asserting that it falsely characterizes the testimony of Mr. Donald Hagy concerning the meaning of the October 19, 2005 memorandum sent directly by Mr. Blankenship to all mine superintendents at A.T. Massey's various subsidiaries, sub-subsidiaries and even sub-sub-subsidiaries. However, the Motion to Dismiss filed on Mr. Blankenship's behalf in itself fails to give the full portion of the relevant text of Mr. Hagy's sworn statement, which he voluntarily offered in the joint investigation conducted by the federal Mine Safety and Health Administration ("MSHA") and the state Office of Miners' Health, Safety and Training.

Specifically, omitted from that portion of the transcript recited in Mr. Blankenship's Motion is the full exchange between Mr. Hagy, a construction crew foreman, and the MSHA accident investigator:

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<sup>7</sup> In acknowledging that he is responsible for creating the culture at Massey, and that his October memorandum was intended to direct the actions and decisions of management at Massey's sub-subsidiaries, Mr. Blankenship essentially acknowledges what the Massey Defendants attempt to deny—that they are directly responsible for many of the relevant acts and policies carried out at the Alma Mine.

- Q. If you was that mild mannered section boss up on Two section trying to run coal and a memo like that come across your desk, how would you take it?
- A. I really don't know how to answer that. I mean, the way I look at things and the way somebody else looks at things, they might let things bother them more. Probably wouldn't like it.
- Q. Do you feel threatened if you was a section boss by that last statement, this memo is necessary only because we seem not to understand that coal pays the bills?
- A. Could you repeat that again?
- Q. To look at it as a section boss, you was up there running coal, maybe you're having downtime, maybe you're having problems, do you think -- I know it would me, I've been in your position and I know. I've been there, I've done that. This memo is necessary only because we seem not to understand that coal pays the bills. Doesn't that seem to be inclusive that we need to run coal regardless of whatever? If you was that section boss, how would you feel if that memo was laid across to you and you read it for the very first time?
- A. **You would feel that you wasn't running enough coal from the way it sounds, you know, for what reason.**
- Q. A couple quick questions and I'll turn it over to Bill. Do they sometimes use people from the sections to help you guys on construction projects?
- A. Yeah, they pull people off section to help -- to actually build overcasts or build stoppings.
- Q. Okay. Has it been that way since you been back, since you come back in November that they have had to rob people to help you?
- A. They don't really -- per se, help us, but they'll do outby jobs. You know, they'll pull people off to go back down and build plaster stoppings or if there's an overcast that has to be built, they'll send the -- I'm sorry, the miner section crew to build overcasts before they start running. They have shut the miner section down to shovel belt.

Statement of Donald Hagy, p. 124, line 9-p. 126, line 16 (emphasis added) (Ex. 2).

The significance of a lack of stoppings has become all too clear in the present case. By way of example, the federal Mine Safety and Health Administration's "Aracoma Mine Fire Investigation Report" ("MSHA Aracoma Report") notes that the removal of a critical stopping to accommodate another project and the subsequent failure to replace it contributed

directly to the deaths of Mr. Bragg and Mr. Hatfield. Significantly, that stopping was *removed concurrently with the receipt of Mr. Blankenship's memos at Aracoma:*

“Physical evidence and interview statements revealed a stopping had been constructed in the No. 7 Belt entry between SS 3266 and the intersection with the next inby crosscut. However, there was no stopping in that location on January 19. This stopping was removed by a construction crew to facilitate installation of a dual switch house (“splitter box”) during the last week of October 2005.”

MSHA Aracoma Report, p. 38 (Ex. 3).

Certainly the widows are not alone in their interpretation of Mr. Hagy's statement. J. Davitt McAteer, the former assistant secretary of the United States Department of Labor, in his independent preliminary report to Governor Joe Manchin III, “The Fire at Aracoma Alma Mine #1,” noted the following regarding Mr. Hagy's statement: “[w]hat did that [the October 19, 2005 Blankenship memo] mean to him, Hagy was asked. ‘Well, it sounds as if they don't want you to shut production down to go build an overcast or do construction jobs,’ he said. And how would he feel if, as a section boss, that memo were laid in front of him? ‘You would feel that you wasn't running enough coal from the way it sounds,’ he said.” McAteer Report, at p. 54 (Ex. 4).

As for the follow-up memo sent out later by Mr. Blankenship, that document is certainly subject to an interpretation that supports the widows' contention that Mr. Blankenship, and through him, the Massey Defendants, emphasized production at the expense of safety. For example, Mr. Blankenship states that “I would question the membership of anyone who thought that I consider safety to be a secondary responsibility.” To put that statement into the appropriate perspective, it is important to understand that Massey Energy refers to the coal mine employees of its subsidiaries as “members.” With that understanding, it is evident that Mr. Blankenship is actually stating that anyone who wants to keep his or her job at a Massey mine had better not question his motives. In fact, he acknowledges that a reasonable interpretation of the first memo would be that he personally was emphasizing productivity over

safety: “Some of you may have interpreted that memo to imply that safety and S-1 are secondary.”

**b. Those involved with the Alma Mine believed that the corporate culture placed production over safety concerns.**

Numerous witnesses giving statements to the investigation team certainly believed that Massey emphasized production over safety. For example, Larry E. Browning, a headgate operator on the Alma longwall, offered the following:

A. And outside, you know, they want you to run coal, you know.

\* \* \*

Q. As a miner, and I know you don't have a lot of experience in the mines, but do you have any suggestions or maybe thoughts on why they don't have air there on that longwall?

A. Yeah, in a hurry to run coal. Just basically, they want you to hurry up and run it.

Q. So, it's more production oriented, you think?

A. Yeah. It's like a fast-food restaurant to me, you know, hurry up and get it up, hurry up and get it up.

Q. Do you feel in jeopardy in any way that if you were to complain to your boss that you didn't have adequate ventilation, that you would stand to --

A. Oh, yeah.

Q. -- be reprimanded or something?

A. Nobody -- the whole mine I think is like that, you know. Nobody says hardly anything. I mean, I ain't saying they would just up and fire you, but they wouldn't -- my opinion, they wouldn't listen to you. And if you did really push the issue, you'd probably head out the door, I'd say.

Statement of Larry E. Browning, p. 31, lines 17-19; p. 40, line 1-p. 41, line 13 (Ex. 5).

The widows respectfully submit that Mr. Browning's understanding is certainly consistent with Mr. Blankenship's "corrected" memo "questioning the membership" of anyone who would dare accuse him of placing production ahead of safety.

Mr. Browning certainly was not the only “member” to offer up the notion that production was emphasized over safety. For example, Brandon Conley described in his statement a fire on December 23, just a few weeks before the fatal January 19 fire, when he said that fire fighting equipment did not work—there was no water in the lines but that likely would have made little difference inasmuch as the fire hose coupling did not fit the fire tap—a situation that had not been corrected by January 19. Mr. Conley quit his “membership” after the fire that killed Mr. Bragg and Mr. Hatfield:

Q. And if I might ask, why did you leave your job at Aracoma?

A. Just don't feel safe there anymore.

\* \* \*

Q. In your opinion, what do you think could have been done to prevent this?

A. Well, I reported what happened to me [on the 23<sup>rd</sup>] on the 26<sup>th</sup> when I went back to work on dayshift and my supervisor, he never asked me no questions about it and I never seen him write anything down, you know, about what—you know, I told him what happened and to me—the way I feel, it was just blown off.

Q. And who was your supervisor?

A. Jeff Perry.

Q. Okay.

A. That's just the way I feel.

Q. Go ahead.

A. That's just the way I feel. That's the way I took it, you know, like who cares, you know. When 20 minutes of welding or putting a bolt in or something could have, you know, prevented this.

Statement of Brandon Conley, p. 20, line 24 -p. 21, line 2; p. 68, line 14-p. 69, line 1 (Ex. 6).

Apparently, Mr. Perry had a penchant for learning about fires inside the mine but not doing anything about them. According to belt examiner Carl White, Mr. White was involved in putting out a fire in another part of the mine on December 29. He states that he reported the fact of the fire to Mr. Perry, but Mr. Perry did nothing with the information, even though one employee

apparently suffered from smoke inhalation. Statement of Carl R. White, p. 169, line 15-p. 170, line 22 (Ex. 7); Statement of Wyatt Robinson, Jr., generally, pp. 187-190 (Ex. 8) (“I was feeling pretty bad from this incident and I had called them and told Jeff Perry, which is my boss, that I was feeling pretty bad and my lungs were hurting me real bad and I was going to—actually, it was the 31<sup>st</sup>, and I was going to let him know that I wasn’t going to come into work. And he said I had to work because Karl had called in.” P. 188, line 22-p. 189, line 7) (Ex. 8).

Another former “member” who left after the deadly fire, Edward R. Ellis, the assistant longwall coordinator and swing shift section foreman, bemoaned the lack of manpower to do what needed to be done:

- Q. Did you feel that there was sufficient coordination to oversee the different areas of the mine and coordinate it safely and efficiently?
- A. There was enough people—I mean enough management. I don’t think that you had enough men to do what needed to be done there.

Statement of Edward R. Ellis, p. 79, lines 7-15 (Ex. 9).

Commenting directly on the “just run coal” Blankenship October 19 memo, Aracoma employee Kevin Scott Ferguson offered the following:

- Q. Okay, what is your opinion about what this says?
- A. It’s about the truth of it.
- Q. About the truth of it. So you think this was similar to the attitude at the mine in your opinion; is that what you’re saying?
- A. Yeah.
- Q. And Exhibit C references, you know, this is a memo by—it’s from Don Blakenship [sic] to supervisors of yours and anyone else, you know, talking about everything necessary to run the coal. I guess would you explain -- you said that’s about the truth of it. What do you mean by that? Would you explain that, what that was?
- A. It’s just always—I guess by no means—by any means necessary. If you—if it’s time to run coal, run coal. If you’re doing something that needs to be done, I mean it’s constant rush, rush, rush. And if you had something

else to do, you might as well forget it and get done what you needed to get done and let them start running it.

Q. So the attitude was—in your opinion, you’re saying was run coal instead of taking care of a condition or something like that?

A. Yeah, it was. That was—that’s the first priority.

\* \* \*

Q. Do you think the failure to correct the flawed conditions and the things that you knew were wrong on the take-up and you had reported doing wrong on the take-up, do you think that could have helped lead to the cause of the fire in this situation?

A. I think it—they encourages being like that, I think that had to do with this—something to do with it.

Q. Do you think that—do you think that management knew about these conditions?

A. Yeah, they had to know about them.

\* \* \*

Q. Okay. In your opinion, was safety a priority of management at this mine?

A. No.

Statement of Kevin S. Ferguson, p. 240, line 10-p. 241, line 19; p. 258, line 24-p. 259, line 15; p. 262, lines 6-9 (Ex. 10).

So much for S-1.

**c. Blankenship’s claims to have created a “culture of safety” at Massey are ill-founded and misleading.**

Against the backdrop of this reality of what *actually* goes on inside a Massey Energy controlled mine that Mr. Blankenship has directed to “just run coal,” Mr. Blankenship offers as evidence of his commitment to safety the receipt of the “highly coveted Golden Pyramid Award.”

The “Golden Pyramid Award” is not an honor bestowed upon safe operating coal mines by some objective third party seeking to identify industry leaders in the field of coal mine

safety. Rather, the Golden Pyramid Award is presented by the Promotional Products Association International, an organization representing purveyors of refrigerator magnets, key chains and similar trinkets bearing company logos. The organization is by no means considered an expert in the area of coal mine safety or coal mine regulatory compliance. Indeed, the widows would submit that, because the Golden Pyramid Award-winning program instituted by a Massey vendor, Artistic Promotions, of Dunbar, W. Va., was an “incentive program” which rewarded employees “for working the month without a lost-time accident or a disqualifying absence,” it actually encouraged workers and the supervisors to not report actual injuries. After all, what worker wants to be responsible for his buddies not being able to order something from the prize catalog at the end of the month?

As one author, admittedly a labor advocate, noted regarding such “behavioral modification” safety programs, “[i]nstead of having a focus on identifying hazards and eliminating or reducing them, the emphasis of the safety program is on getting workers to work more carefully around hazards that shouldn’t be there in the first place. Workers are supposed to duck, dodge, jump out of the way, lift safely, wear personal protective equipment, avoid the line of fire, and keep their eyes on the task. When a worker is injured, it is viewed as his or her fault for not working carefully enough. Discipline can then become management’s preferred response to worker injury.” Nancy Lessin, “Behavioural Safety Schemes: A Union Viewpoint,” *Hazards Magazine*, p. 5 of 11 (Ex. 11). In any event, Mr. Blankenship does not contend in his filing that the Alma Mine was a participant in this particular program, so any benefits that it might offer apparently were never experienced by the Aracoma miners.

In stark contrast to the glory of the Golden Pyramid Award, Massey subsidiaries have experienced 16 fatalities since the year 2000 -- Ronnie Wright (May 24, 2000), Ricky Dale Vance (October 30, 2000), Allen Harris, Jr., (February 2, 2001), Herbert J. Meadows (March 29, 2001), Gregory Barron (August 27, 2001); Paul Miller (September 14, 2001); Danny Adkins (January 2, 2002), Keith L. Casey (March 22, 2002); Rodney Alan Scurlock (July 19, 2003);

William P. Birchfield and Rodney W. Sheets (September 17, 2003); Kenneth Adrian McNeely (February 5, 2004); Christopher McGuire (March 29, 2005); Don Bragg and Elvis Hatfield (January 19, 2006); and Paul Moss (February 1, 2006). These fatalities stand as somber rebuttals to the supposed “achievements under Mr. Blankenship’s leadership.”<sup>8</sup> Blankenship Motion, at p. 3.

Indeed, with regard to our two victims, Mr. Bragg and Mr. Hatfield, Mr. Blankenship has reportedly described their deaths as “statistically insignificant:”

Blankenship said before the speech that he believes the Aracoma mine explosion was caused by fire in the belt, the mechanism that brings coal from the interior of the mines to the surface. He said he believes that type of explosion, and the Jan. 2 Sago Mine explosion in Upshur County that killed 12 workers, is rare and statistically insignificant.

Hagerstown Herald-Mail, February 19, 2006 (Ex. 12).

While in his current brief, Mr. Blankenship touts that “Massey’s NFDL (Non Fatal Days Lost) has been better than the industry average in 13 out of 15 years,” (Blankenship Motion, p. 2 n.1), in a report to then-Governor Bob Wise, J. Davitt McAteer had this to say about Massey’s purported low NFDL rate: “Massey Energy has for several years publicly proclaimed that their accident record is among the lowest in the nation, which when the contractor accident

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<sup>8</sup> Mr. Blankenship touts as one innovation “video cameras on large surface mining equipment that allow drivers to see smaller vehicles in blind spots.” Blankenship Memo, p. 2. Yet such capital investments are relatively meaningless unless accompanied by an actual commitment to safety training and maintenance rather than “S-1” lip service. Thus it was that two miners were tragically killed when their smaller vehicle was overrun by a large rock truck at Massey subsidiary Progress Coal’s Twilight MTR surface mine when the driver of the larger vehicle failed to switch the camera system out of “standby mode.” In addition, although it did not contribute to those fatalities, one of the cameras on the truck was inoperable because the lens cover would not open. MSHA Report of Investigation CAI-2003-25-26, p. 7 (Ex. 13). Indeed, one of the contributing violations cited by MSHA for the deaths of Mr. Bragg and Mr. Hatfield was an abysmal failure to adequately train a dispatcher regarding the monitoring and reporting of alarm conditions. MSHA Aracoma Report, pp. 22 – 23, 93 (Ex. 3)].

data is omitted is true; however, if contractor accident data were included it would be among the highest.” Davitt McAteer, Report to Governor Bob Wise on Mine Safety and Health in West Virginia, Fall 2001, p. 24 (Ex. 14). As recently reported in the MSHA Aracoma Report, the Aracoma Alma Mine No. 1’s NFDL and overall incident rates in particular were more than *twice* the national averages in 2005. MSHA Aracoma Report, pp. 3-4, Table 1 (Ex. 3).

**d. The culture of “production over safety” was created by Don Blankenship and other top management of the Massey Defendants.**

The evidence shows that Massey’s dismal safety practices can be traced directly to top management levels, and witnesses freely offered statements regarding the hypocrisy of Mr. Blankenship and Massey Energy’s professed belief in the notion of “safety first.” For example, MSHA Assistant District Manager Richard J. Kline, whose office had responsibility for federal regulatory oversight for Massey Energy’s southern West Virginia mines, offered the following:

Q. Do you think that there’s a disconnect between the upper mine – the upper Massey managers, such as [Massey Energy Vice President -- Group Operations] Drexel [Short] and [Massey Energy Chief Operating Officer] Chris [Adkins] and [Massey Energy Corporate Safety Coordinator] Frank [Foster], and the local mine management, such as the mine superintendent, mine foremen?

A. I don’t know. You want my opinion?

Q. Yes.

A. Okay. I think they know what’s going on and I think they’re after coal production. And these other things, they don’t have and they can’t keep their engineers, they can’t kept [sic] their people, they’re having the same problems we’re having. And they’re getting coal out and not keeping the mine system proper.

Q. The local or the corporate?

A. Both. I think it’s both.

\* \* \*

Q. Do you think it's typical of Massey management to feel that production is of the utmost importance?

A. In most cases.

Statement of Richard J. Kline, p. 110, line 19-p. 111, line 14; p. 112, lines 4-8 (Ex. 15).

Carl White, a belt examiner whose certification the state is seeking to withdraw as a result of his part in this unnecessary tragedy, spoke openly about his fear of upsetting the production apple cart in favor of safety:

Q. Do you think the company's philosophy of safety before production is true?

A. My personal opinion, they push production. You know, we want to run the belts. We want to run the coal. As a matter of fact, you live in a state of fear, you know, like hey, man, what will happen if I turn this belt? Will I get fired? Will I get a three-day suspension? And you live under this consumption [sic], you know, that you got to keep these belts going.

Statement of Carl White, p. 107, line 18-p. 108, line 6 (Ex. 7).

While Massey Energy mouths a policy of S-1, that safety is its top priority, the truth is borne out in its corporate compensation policies. Thus in its February 23, 2007 Form 8-K filing with the federal Securities and Exchange Commission, Massey Energy described the incentive-based compensation schedule for executives Baxter F. Phillips, Jr., J. Christopher Adkins, and Drexel H. Short. Mr. Phillips has a targeted *bonus* compensation award for 2007 of \$250,000. Mr. Adkins is also targeted at \$250,000, and Mr. Short, \$185,000 in possible *bonus cash compensation*. The measures for awarding this bonus compensation are described as follows:

Mr. Phillips has two specific performance goals, earnings per share and net coal sales, each constituting 50% of that portion of his cash target award attributed to specific performance. Mr. Adkins has four specific performance goals, safety performance, reduction of cash costs per ton, productivity of continuous miners (in terms of feet per shift), and productivity of longwalls (in terms of feet of retreat per longwall per day), each constituting 25% of that portion of his cash target award attributed to specific performance. Mr. Short has two specific performance goals, safety performance, constituting 25% of that portion of his cash target award attributed to specific performance, and tons shipped,

constituting 75% of that portion of his cash target award attributed to specific performance.

(Ex. 16) In other words, Mr. Phillips' entire cash bonus target is tied to production; 75% of Mr. Adkins cash bonus target is tied to production, and 75% of Mr. Short's cash bonus target is tied to production. So much for S-1.

e. **Blankenship's actions on behalf of the Massey defendants led directly to the deadly conditions inside the Alma Mine.**

Amazingly, the foregoing represents only a fraction of the evidence already uncovered regarding the outrageous disregard for worker safety at the Alma Mine. So what does that have to do with Mr. Blankenship, Massey Energy, and A.T. Massey? Everything.

For example, the general manager at the Alma Mine was Mr. Gary Goff, who undoubtedly had the opportunity to read Mr. Blankenship's October 19 missive. Mr. Goff was transferred to Aracoma from another Massey subsidiary in Eastern Kentucky -- Rockhouse Energy. While acting as the mine superintendent at Rockhouse Energy Mining Company Mine No. 1, Mr. Goff experienced two fatalities: Keith L. Casey, a mine section foreman, was killed on March 22, 2002; and Christopher McGuire, a utility man/scoop operator, was killed on March 29, 2005. Significantly, Mr. McGuire was killed when the tractor he was operating ran over a 14 foot long piece of metal channel lying in the travelway, causing it to flip up, enter the operator's compartment and strike Mr. McGuire. Rockhouse was cited because the doors had been removed from the equipment and no examination had identified the road hazard. (Ex. 17)

The widows expect to learn during the course of discovery how Mr. Goff came to be transferred to Aracoma.

The approach of the Alma Mine's management to workplace hazards bears the hallmark of upper corporate management's dedication to production over safety. Indeed, on the

day before the fatal fire, January 18, the Alma Mine managers had to make a decision about compliance with the law versus production. West Virginia state inspector Richard Boggess shut down the longwall operation for approximately an hour that day because air movement at the face of the longwall was dangerously below that which was required under the mine's ventilation plan. How did Aracoma managers address the problem? According to the statement of Aracoma employee Larry Browning, fellow employees Eddie Ellis and Brian Caserta knocked a hole in a stopping to gain additional air. Statement of Larry Browning, p. 34, line 11-25; p. 37, line 6-p. 39, line 9 (Ex. 5) In other words, two employees, presumably at their supervisor's direction but without the inspector's knowledge, actually knocked out a required ventilation control in order to get enough air to the face of the longwall unit to satisfy the state inspector and resume production.

There is significant, affirmative evidence of record that Aracoma's management on the day of the fatal fire actively engaged in bypassing safety mechanisms in order to keep up production. For example, dayshift mine foreman "Dusty" Dotson, who has apparently asserted his Fifth Amendment right against self-incrimination in proceedings brought against him by the West Virginia Office of Miners' Health, Safety and Training, is identified as having physically "bridged" or bypassed a safety circuit breaker controlling the take-up winch on the longwall conveyor belt tailpiece to keep the belt line running. This winch is in the general area where the fatal fire occurred. According to Larry Browning, on the day of the fatal fire, he overheard belt examiner Carl White saying "Dusty is fixing it, he's doing something that he shouldn't be doing." Statement of Larry Browning, p. 24, lines 11-13 (Ex. 5). White had been sent to the area to determine why the longwall belt kept shutting down, but was unable to identify the problem. Shortly afterwards, Dotson arrived, worked his "magic," and the problem went away. Within a few, short hours, Mr. Bragg and Mr. Hatfield were dead.

Witnesses even stated that the order to evacuate the section at the time of the deadly fire was apparently delayed because of the potential impact on production:

- Q. Do you know how long that time was between when the fire started and they were evacuated?
- A. No, I don't.
- Q. Either the longwall or the Number Two Section.
- A. I don't know how long it was in between. I know -- I can also say though when we pulled up there and the fire was going on if they would have called for the evac right then, they could have gotten everybody out of there. But you know, I know how things work in the coal mines and basically you evac somebody like that, you're shutting down a section. No section run, no production. No production, they ain't getting nothing. And that's what it all boils down to.

\* \* \*

- A. . . . You know, there's quite a few different things that should be done, but you know, it's whether it gets done or not. I mean, you look at the higher powers of like Massey and that, you would think that all the practice and preaching they do about safety first should be about safety. You know, they should take the time out to say this or go check that or bring a crew in, do ventilation, bring a crew in to do stoppings. You know, but it's not like that. It's just a number to them is all we are. It's just a number.

Statement of Jonah F. Rose, p. 180, lines 5-24; p. 207, lines 4-19 (Ex. 18).

Additionally, there can be no doubt regarding the fact that the very sacrifices Mr. Blankenship directed his mine superintendents to make in his October 19 memo were made at Aracoma. For example, Mr. Blankenship makes specific mention of overcasts, a necessary ventilation control within underground coal mines. Yet the evidence is clear that the mine maps that Aracoma submitted to MSHA indicated the existence of overcasts that were never actually constructed underground. Ronald Hixson, a member of the MSHA Mine Rescue Team who traveled underground as a part of the rescue and recovery effort, spoke in detail about how the Aracoma mine maps were inaccurate and not up to date, and specifically noted that overcasts shown on the map had never been constructed underground. Thus, even though Aracoma's maps showed an overcast at spad 3199, Hixson noted that "There was no overcast. There never was an overcast installed there." Statement of Ronald Hixson, p. 27 l. 25-p. 28 l. 2 (Ex. 19). Similarly; there were overcasts missing in the vicinity of spad 3236: "Neither one of those overcasts were installed." Statement of Ronald Hixson, p. 37, l. 2-3 (Ex. 19). Even a member of a Massey

Energy rescue team from a different mine commented on the pathetic state of the Aracoma mine maps, telling Drexel Short, Massey Energy Vice President -- Group Operations, "Buddy, . . . your map ain't worth the paper it's printed on." Statement of Luther Marrs, MSHA Assistant District Manager, at p. 50, lines 15-17 (Ex. 20).

Accordingly, the widows respectfully submit that grave questions of fact surround Mr. Blankenship's alleged commitment to safety. What cannot be questioned, however, is his commitment to production, even to the point of placing miners in harm's way.

**f. Blankenship and the Massey Defendants cannot credibly claim that they were unaware of the daily events at the Alma Mine.**

While Mr. Blankenship may not have been personally aware of the steps that individual miners were taking to meet his directive, he was certainly well-informed on a real-time basis regarding the level of production at the Alma Mine, receiving text message "Alpha Reports" from the mine's dispatcher *every two hours, every day*. "The required two-hour reports were more important than anything," stated former dispatcher James Shelton. Mr. Shelton recounted one instance which showed very clearly just how much Don Blankenship and upper management valued those Alpha production reports over any safety concerns at the Alma mine:

Q. Did you have to -- was everything pretty much production-related on those two-hour reports? Is that the purpose of it?

A. Yeah.

Q. Down time and --?

A. It's mainly to let I guess the company people know what's going on the last two hours, what they're having problems with, where they're standing at. Estimated time if they are down when the reports goes out to when they'll be back up and running.

Q. Do you know why they wanted the reports on a two-hour basis?

- A. So they could call and jump on somebody if they ain't getting what they want, I guess.
- Q. Was it a pretty high priority?
- A. Yes, it was a very high priority.
- Q. Did anybody ever ask you to send a report ---?
- A. Because I looked at one lady one day --. I had an accident up on Two section. It was minor, but, you know, we still called the ambulance and stuff.
- Q. Right.
- A. And I didn't know it at the time before they came out, but, you know, when you hear that, you don't know how bad a person is. And I'm sitting there and I'm trying to keep the roads clear and everything. And here Sheila's calling for the report. Sheila, I ain't got time for that report right now, I said, I'll get it out to you as soon as we're done. I said, I got an accident here. Well, it went through everybody in the company, you know. And everybody in the company knew that there was an accident. And the sad part of it is, is, you know, it's a shame that I've got to explain myself to her on why this report's not out over an accident like that, 'cause --. I don't know. But like she said one time, and I looked at her and was talking to her, she said, well, the reason I jump on you is because if I don't jump on you, I get jumped on, too, if I don't get it into --. You know, it's falling right down the line, but --.
- Q. Who does she report to?
- A. I guess -- we got Sheila and then we got Jennifer. I think Sheila reports to Don and Jennifer reports to Chris, I think, Chris Adkins.
- Q. Where do they work?
- A. Oh, I don't know which is where, but one's in the main office and one's in the Chattensville (phonetic) office.

Statement of James Shelton, Jr., p. 137, line 17-p. 140, line 8 (Ex. 21).

Mr. Shelton also recounted how, on his last day on the job, he had reported to work at the end of day shift only to realize that the new dispatcher he had relieved had failed to get out the 4:00 p.m. Alpha Report, and that the overall daily productivity report was incorrect. "And I knew that Don Blankenship's girl is going to be calling me and jumping on me for not having that report out." Statement of James Shelton, Jr., p. 130, line 17-line 20 (Ex. 21). Sure enough, according to Shelton, Mr. Blankenship's assistant called, chewing him out because the

reports had not been received. Unfamiliar with the day's production activity and facing a situation where the mine belts were down, Shelton forwarded the call to mine superintendent Mr. Lawrence "Pepe" Lester. The upshot was that the longwall boss, Rob Morrison, apparently because he ultimately had to take the heat over the incorrect and missing production information, started cursing Shelton, who had previously given his two week notice but decided to quit on the spot as a result of his own frustration and the abuse being heaped upon him. Before he could leave the property, though, he said that Morrison challenged him to a fight. Statement at James Shelton, generally, at pp. 127-134 (Ex. 21). Apparently tensions run high when Mr. Blankenship doesn't receive the Aracoma production information every two hours. In fact, at the time of the deadly fire, the dispatcher apparently sent out an Alpha Report indicating *not* that there was a fire, but rather that the belts were down. Apparently the dispatcher had been trained to avoid the use of "fire" in the Alpha Reports: "[I]t wouldn't go out on the two-hour report. If a fire happened, I was to contact Gary Goff, [Lawrence] Pepe Lester and Eddie Lester. Those were the three. And they took control from there." Statement of Gary M. Brown, p. 201, lines 12-17 (Ex. 22). Apparently, Mr. Blankenship would have heard initially only that production had stopped.

Given all of the foregoing, and given their late spouses untimely, unnecessary and unimaginably horrendous deaths, described as "statistically insignificant" by Massey's president, chairman and chief executive officer, the widows can hopefully be forgiven if they do not take seriously Mr. Blankenship's protestations that he "has created a culture of safety at Massey and, under his leadership, Massey has achieved successful results." Blankenship Motion, p. 3.

**IV. CONCLUSION**

For the foregoing reasons, the Plaintiffs respectfully request that Defendants' Motions be denied in their entirety; and that the Court grant such other, further relief as it deems proper.

Respectfully submitted,

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Dated: April 3, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of April, 2007, true and correct copies of the foregoing **PLAINTIFFS' MEMORANDUM OF LAW IN JOINT OPPOSITION TO THE MOTIONS OF DON L. BLANKENSHIP, MASSEY ENERGY COMPANY, AND A.T MASSEY COAL COMPANY, INC. TO DISMISS PLAINTIFFS' COMPLAINT** were served via overnight delivery upon the following:

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