UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WEST VIRGINIA

AT BECKLEY

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

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT, PLAN OF ALLOCATION, AND FINAL CLASS CERTIFICATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff the Commonwealth of Massachusetts Pension Reserves Investment Trust ("Lead Plaintiff" or "Massachusetts PRIT")[1] Fund and named plaintiff David Wagner (collectively, "Plaintiffs") on behalf of themselves and all members of the proposed Settlement Class,[2] respectfully submit this memorandum of law in support of their unopposed motion for final approval of the proposed Settlement of this class action, approval of the Plan of Allocation of the Net Settlement Fund, and final certification of the Settlement Class.

PRELIMINARY STATEMENT

As detailed below and in the accompanying Joint Declaration of Joel H. Bernstein and Jack Reise, dated April 30, 2014 ("Joint Declaration" or "Joint Decl."),[3] Lead Plaintiff has obtained a recovery of $265 million in cash for the Settlement Class. The Settlement is the ***second*** largest all-cash settlement in a securities class action within the Fourth Circuit and the ***largest*** within the District. It represents approximately ***47%*** of the most likely recoverable damages in this matter, as estimated by Lead Plaintiff's consulting damages expert, which is a truly outstanding result.

The Settlement was reached after three years of vigorously contested litigation in which

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[1] Capitalized terms not defined herein have the meanings set forth in the Stipulation and Agreement of Settlement, dated as of February 5, 2014 (ECF No. 181-1, the "Stipulation").

[2] The Court previously preliminarily certified the Settlement Class for settlement purposes only. *See* ECF No. 182 ¶¶2-4. Because nothing has occurred since then to cast doubt on the certification, the Court should finally certify the Settlement Class.

[3] The Joint Declaration is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted; the efforts of Co-Lead Counsel; the negotiations leading to the Settlement; and the value of the Settlement as compared to the risks and uncertainties of continued litigation. All exhibits referenced herein are annexed to the declaration. For clarity, citations to exhibits that themselves have attached exhibits will be referenced as "Ex. __-__." The first numerical reference is to the designation of the entire exhibit attached to the declaration and the second reference is to the internal exhibit designation.

the Settling Parties strongly advanced their positions. The Settling Parties participated in numerous settlement discussions and meetings, including a two-day mediation with Professor Eric D. Green, a well-respected and highly experienced mediator and professor of law.

Damages and loss causation were hotly contested throughout the litigation and would likely continue to be contested if the litigation proceeded. Principal among Defendants' arguments on these issues are that the market was generally aware of Defendants' poor safety practices and that the explosion at Massey's Upper Big Branch mine ("UBB"), the precipitating event that let to this Action, was caused by factors other than those practices.

Therefore, while Plaintiffs are confident in the merits of their claims, Defendants would likely mount vigorous defenses that add substantial risk to Plaintiffs' ability to recover. In contrast, Lead Plaintiff has secured a Settlement that represents a robust percentage of the potential recovery at trial and provides cash relief to the Settlement Class now. The Settlement is an exceptional recovery for the Settlement Class and merits this Court's approval.

ARGUMENT

I. THE STANDARDS FOR APPROVAL OF CLASS ACTION SETTLEMENTS

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action may be settled only with the approval of the Court, and only on a finding, after reasonable notice and a hearing, that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). *Muhammad v. Nat'l City Mortg. Inc.*, No. 2:07-0423, 2008 WL 5377783, at *3 (S.D. W. Va. Dec. 19, 2008) ("The court may [approve a settlement] only after a hearing and on finding that the proposed settlement is fair, reasonable, and adequate."); *In re MicroStrategy Inc. Sec. Litig.*, 150 F. Supp. 2d 896, 903-04 (E.D. Va. 2001) ("Simply put, the Court must assess whether the settlement here is both fair and adequate under the circumstances.") (citation omitted).

As a matter of public policy, courts favor the settlement of disputed claims, particularly in complex class actions. *See Lomascolo v. Parsons Brinckeroff, Inc.*, No. 1:08cv1310 (AJT/JFA), 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009) ("there is an overriding public interest in favor of settlement, particularly in class action suits") (citation omitted); *S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990) ("The voluntary resolution of litigation through settlement is strongly favored by the courts.").

The Fourth Circuit applies a two-part test to determine whether a proposed settlement meets the requirements of the Federal Rules by considering two elements: "fairness," which focuses on whether the proposed settlement was negotiated at arm's-length, and "adequacy," which focuses on whether the consideration provided to class members is sufficient. *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158-59 (4th Cir. 1991); *Muhammad*, 2008 WL 5377783, at *3 ("The Fourth Circuit Court of Appeals utilizes a bifurcated analyses for class action settlements, separating the inquiry into the fairness of the settlement from the inquiry into its adequacy.") (citing *Jiffy Lube*, 927 F.2d at 158-59). As set forth below, the Settlement represents an excellent result and satisfies each of the *Jiffy Lube* factors that form the framework by which courts within the Fourth Circuit determine whether that two-part test has been met.

A. Application of the *Jiffy Lube* Factors Supports Approval of the Settlement

1. The Proposed Settlement Is Fair

In determining whether a proposed settlement is fair, district courts in the Fourth Circuit must consider four factors: "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of securities. . . ." *Jiffy Lube*, 927 F.2d at 158–59; *In re MicroStrategy Inc. Sec. Litig*, 148 F. Supp. 2d 654, 664 (E.D. Va. 2001); *In re The Mills Corp. Sec. Litig*, 265 F.R.D. 246, 255 (E.D. Va. 2009).

(a) The Posture of the Case and Extent of Discovery

The first *Jiffy Lube* fairness factor assesses "how far the case has come from its inception." *Mills*, 265 F.R.D. at 254 (citing *Muhammad*, 2008 WL 5377783, at *3). "Like the first factor, the second factor – evaluating the extent of discovery that has been conducted – enables the Court to ensure that the case is well-enough developed for Class Counsel and Lead Plaintiffs alike to appreciate the full landscape of their case when agreeing to enter into this Settlement." *Mills*, 265 F.R.D. at 254. "There is, however, no minimum or definitive amount of discovery that must be undertaken." *Muhammad*, 2008 WL 5377783, at *3 (quoting *Jiffy Lube*, 927 F.2d at 159). The record here provides ample reason to conclude that these two similar factors are satisfied in this case.

First, Plaintiffs filed an extensive Consolidated Class Action Complaint for Violations of the Federal Securities Laws (the "Complaint"). To develop the facts necessary to sustain the Complaint, Lead Counsel undertook to investigate the conduct at issue, including the review and analysis of: (i) documents filed publicly by Massey with the Securities and Exchange Commission (the "SEC"); (ii) press releases issued by or concerning Massey and the other Defendants; (iii) research reports issued by financial analysts concerning Massey's securities; (iv) news articles and media reports concerning Massey's operations; (v) information and data published by the U.S. Mine Safety and Health Administration ("MSHA"); (vi) Co-Lead Counsel's internal investigation, which involved the identification of more than 100 potential witnesses, contact of approximately 50 witnesses, and interviews with approximately two dozen former Massey employees and other persons with relevant knowledge; (vii) the applicable law governing the claims and potential defenses; and (viii) pleadings and materials, including a criminal indictment, filed in other pending actions that name Massey, other Defendants in the

Action, or certain other Massey employees as defendants or nominal defendants. Joint Decl. ¶¶ 11, 32.

Second, after Plaintiffs prevailed on Defendants' motions to dismiss and following extensive briefing on Plaintiffs' successful motion to partially lift the mandatory stay imposed by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Co-Lead Counsel reviewed thousands of pages of documents, more than 300 transcripts, videos, maps, and photographs that Massey produced pursuant to the Court's September 28, 2011 Order. *Id*. ¶¶11, 36-40, 44-50. This production included all documents concerning the safety of all Massey mines that Massey produced in other litigations and to government agencies, excluding documents produced to investigators or prosecutors involved in the United States government's criminal investigation related to the UBB explosion or the government's work product. *Id*. ¶39.

This discovery provided Co-Lead Counsel with a detailed assessment of the strengths and weaknesses of the case and more than sufficiently enabled Lead Plaintiff to conclude that the Settlement is fair, reasonable, and adequate under the circumstances. In *MicroStrategy*, the settlement with the company came prior to the completion of formal discovery. The Court concluded that "plaintiffs have conducted sufficient informal discovery and investigation to. . . evaluate [fairly] the merits of Defendants' positions during settlement negotiations." 148 F. Supp. 2d at 664-65. In short, the posture of the case and the nature of the discovery strongly support final approval of the Settlement.

(b) The Circumstances Surrounding Settlement Negotiations

The third *Jiffy Lube* fairness factor requires the Court to evaluate the conditions and circumstances surrounding the settlement negotiations between counsel. *See Mills*, 265 F.R.D. at 255. "The objective of this factor is to ensure that counsel entered into settlement negotiations on behalf of their clients after becoming fully informed of all pertinent factual and legal issues in

the case." *Id*. (quoting *Stone*, 749 F. Supp. at 1424); *see also The Kay Co. v. Equitable Prod. Co*., No. 2:06-CV-00612, 2010 WL 1734869, at *7 (S.D. W. Va. Apr. 28, 2010) (approving settlement and noting that it resulted from "arm's length [negotiations] over a period of months between counsel through the use of an experienced mediator and after extensive discovery"); *MicroStrategy*, 148 F. Supp. 2d at 665 ("Counsel for both sides of this lawsuit participated in numerous meetings and extensive and intensive discussions extending over a period of months, with plaintiffs' lead counsel pressing their belief in the strength of their case on the merits.").

Here, as detailed in the Joint Declaration, the Settlement is the product of vigorous and informed arm's-length negotiations. For a period of approximately two years beginning in December 2011, counsel representing the Settling Parties engaged in various efforts to settle the Action, through direct negotiations, including an in-person meeting involving counsel and the parties' consulting damages experts and, ultimately, two mediation sessions, over three days. Joint Decl. ¶¶52-58.

The initial meeting in June 2012 involving the parties' consulting damages experts allowed the parties and their experts to engage with each other and exchange information, analyses, and assumptions. These efforts, however, proved unsuccessful as the parties maintained widely differing opinions on a number of issues, including damages that could be established at trial, the appropriate price range at which the case should settle, and the structure of settlement consideration. *Id*. ¶¶52-53.

In the summer of 2013, Lead Plaintiff and representatives of Defendant procured the services of Professor Eric D. Green, a well-respected mediator with extensive and successful experience in the area of securities litigation, in an effort to resume settlement discussions. Lead Plaintiff, representatives of Defendants, and counsel participated in an intensive formal

mediation session on October 7 and 8, 2013 before Professor Green in order to attempt to reach a settlement. The mediation was preceded by comprehensive mediation statements on legal and factual issues, together with reports from the parties' respective experts on both damages and the causes of the UBB explosion. During the mediation, the parties made detailed presentations that focused on their positions regarding damages as well as the merits of the case. With the substantial assistance of Professor Green, after this two-day mediation session, the parties reached a general understanding of the value of a settlement of the Action for $265 million but left for further negotiation material terms, including the form of consideration. *Id*. ¶¶54-57. After discussions between the parties as to certain proposals, on December 4, 2013, representatives of the Defendants and Lead Plaintiff, as well as certain of their experts, met with Professor Green to resolve the form of consideration. As a result of this second round of mediated negotiations, the parties reached an agreement in principle to settle the claims for $265 million in cash. *Id*. ¶58.

These arm's-length formal and informal settlement discussions and the involvement of Professor Green strongly support a finding of fairness. *See In re Am. Inv. Life Ins. Co. Annuity Mktg. and Sales Practices Litig*., 263 F.R.D. 226, 238 (E.D. Pa. 2009) (finding presumption of fairness of settlement mediated by Professor Green and describing Professor Green as "extremely experienced in mediating large, complex cases"); *see also Loudermilk Servs. Inc. v. Marathon Petroleum Co*., No. 3:04-0966, 2009 WL 728518, at *3 (S.D. W. Va. Mar. 18, 2009) (finding fairness after, among other things, noting that the parties engaged in three full days of mediation with an experienced mediator).

(c) The Experience of Co-Lead Counsel

"The final *Jiffy Lube* 'fairness' factor looks to the experience of Class Counsel in this particular field of law." *Mills*, 265 F.R.D. at 255. Labaton Sucharow and Robbins Geller are

among the nation's leading law firms in this area of practice and have served as lead or co-lead counsel on behalf of major institutional investors in hundreds of class litigations since the enactment of the PSLRA. Joint Decl. ¶¶118-19; Exs. 7 - A; 8 - A.

The Settlement represents a highly favorable result for the Settlement Class in the face of difficult legal and factual circumstances and can be attributed to the diligence, determination, and hard work of Co-Lead Counsel. *See Mills*, 265 F.R.D. at 255 (finding the fourth *Jiffy Lube* fairness factor met where lead counsel for the class "are highly experienced in the field of securities class action litigation" and where such counsel's decision to settle the action is the "product of through exploration and deliberation").

The quality of opposing counsel is also important in evaluating the quality of Co-Lead Counsel's work. *See MicroStrategy*, 148 F. Supp. 2d at 665 (noting "counsel for *both* sides are nationally recognized members of the securities litigation bar" when considering the fairness of the settlement). The skill, tenacity, experience, and resources of Defendants' Counsel are well known. Joint Decl. ¶121. These highly skilled practitioners zealously fought Plaintiffs' claims at every turn. Notwithstanding this experienced and formidable opposition, Co-Lead Counsel were able to develop Plaintiffs' case so as to resolve the litigation on terms highly favorable to the Settlement Class. This factor strongly supports the fairness of the Settlement.

2. The Proposed Settlement Is an Outstanding Result

In determining adequacy, courts within the Fourth Circuit consider the following factors: "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *Jiffy Lube*, 927 F.2d at 159.

(a) The Result Is a Significant Percentage of Provable Damages

According to Lead Plaintiff's consulting damages expert, the most likely aggregate damages the proposed Settlement Class could have obtained at trial are estimated to be approximately $560 million, assuming that liability and certain corrective disclosure dates were proven and based on various assumptions and modeling.[4] As such, the Settlement amounts to roughly ***47%*** of Lead Plaintiff's damages expert's calculation of the most likely provable damages. Joint Decl. ¶8.

This percentage of damages compares extremely favorably to other securities class action settlements. In *MicroStrategy*, for example, plaintiffs estimated damages at $711 million. There, the initial settlement was comprised of stock and options with no cash component, and by the time plaintiffs filed their motion for final approval, the value of the settlement was estimated at approximately $100 million, representing 14% of the aggregate damages. *See* 148 F. Supp. 2d at 667, n.22. In approving the settlement, the Court noted that the partial settlement compared "favorably to amounts recovered in similar cases." *Id*. (collecting cases).

Indeed, as a percentage of provable damages, the Settlement is ***greater*** than recoveries approved in other large PSLRA settlements. *See, e.g.*, *In re Cendant Corp. Litig.*, 264 F. 3d 201, 242 (3d Cir. 2001) (approving $3.2 billion settlement representing 36-37% of estimated damages and observing that approved settlement recoveries in securities class actions typically range from 1.6% to 14% of claimed damages); *In re Initial Pub. Offering Sec. Litig*., 671 F. Supp. 2d 467, 483 (S.D.N.Y. 2009) (approving $586 million settlement "represent[ing] two percent of the aggregate expected recovery"); *In re Merrill Lynch & Co. Research Reports Sec. Litig*., 246 F.R.D. 156, 167 (S.D.N.Y. 2007) (approving $125 million settlement that was "between

[4] Defendants strongly contest this estimation and believe damages to be significantly lower, assuming that liability was established.

approximately 3% and 7% of estimated damages [and] within the range of reasonableness for recovery in the settlement of large securities class actions"); *In re Interpublic Sec. Litig.*, No. 02 Civ. 6527 (DLC), 03 Civ. 1195 (DLC), 2004 WL 2397190, at *8 (S.D.N.Y. Oct. 26, 2004) ($96 million settlement fund reflecting "ten to twenty percent" of estimated damages "sits comfortably within the range of reasonableness"); *see also In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) ("The Settlement Fund is approximately $40.3 million. The settlement thus represents a recovery of approximately 6.25% of estimated damages. This is at the ***higher end of the range*** of reasonableness of recovery in class actions securities litigations.") (emphasis added).[5]

Here, the Settlement was reached after hotly contested litigation by highly experienced and skilled counsel. Although Co-Lead Counsel were confident in the strength of Plaintiffs' claims, the $265 million cash recovery alleviated the substantial risks that the Settlement Class faced, including class certification, summary judgment, and jury and trial-related risks, all of which carried the tangible potential for zero recovery.

In view of the percentage of recovery obtained, the appreciable risk of having no recovery at all, and the very large cash payment—the second largest within the Fourth Circuit—it is respectfully submitted that the Settlement represents an excellent result for the Settlement Class and should be readily approved by the Court.

(b) The Strength of Plaintiffs' Case

The "first and second *Jiffy Lube* factors … compel the Court to examine how much the

[5] The agreement between Alpha and the United States Attorney's Office for the Southern District of West Virginia and the United States Department of Justice reached in December 2011, concerning the criminal investigation of events surrounding the UBB explosion, led to payments and safety investments totaling $209 million, the largest-ever resolution in a criminal investigation of a mine disaster.

class sacrifices in settling a potentially strong case in light of how much the class gains in avoiding the uncertainty of a potentially difficult case." *Mills*, 265 F.R.D. at 256. Securities cases, like the present one, are "notably difficult and notoriously uncertain." *Id*. at 255 (citing *Stone*, 749 F. Supp. at 1426). While Plaintiffs are confident in the merits of their claims, the Settlement Class would still have to overcome numerous defenses asserted by Defendants in order to survive summary judgment or recover at trial.

(i) Risks Concerning Loss Causation and Damages

Loss causation requires proof of a "causal connection between the material misrepresentation and the [economic] loss" investors suffered. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005). Once causation is established, damages estimation remains "a complicated and uncertain process, typically involving conflicting expert opinion about the difference between the purchase price and [share]s 'true' value absent the alleged fraud." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004).

Plaintiffs faced considerable risk with respect to proving loss causation and damages at summary judgment and trial. If a jury were to have found that any of the alleged corrective disclosures identified in the Complaint were not actionable, as Defendants contend as to all of them, the potential recovery would have been significantly diminished—if not zero. As set forth in detail in the Joint Declaration, Defendants would undoubtedly argue that none of the alleged corrective disclosures cured any material misrepresentations because the market was already aware of Massey's poor safety reputation. *See, e.g.*, *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 473 (4th Cir. 2011) ("[c]orrective disclosures must present facts to the market that are new. . . .[and] relate back to the misrepresentation and not to some other negative information about the company") (internal quotation omitted). Defendants would also likely argue that: (i) the stock price decreases after the mine explosion were not the materialization of any undisclosed safety

problems at Massey, based upon the results of a very well-financed and extensive investigation and analysis that Massey had commissioned; (ii) certain of the alleged disclosures did not result in statistically significant price declines; and (iii) portions of the alleged stock price decreases after the explosion were not attributable to the alleged fraud. Joint Decl. ¶¶61-68.

As to Defendants' first contention, if they were to successfully convince a jury that the UBB explosion was related to unforeseen or unpreventable causes, not the result of the alleged safety lapses and practices that Plaintiffs allege were not disclosed to the market, any possible damages that could be awarded would be significantly reduced, possibly to zero. *Id*; *see also Katyle*, 637 F.3d at 473.

The risks associated with loss causation and damages as to the other issues Defendants raise are reflected in the sharply divergent opinions and methodologies of Lead Plaintiff's and Defendants' consulting experts. Thus, Defendants would likely have argued that the alleged stock price drops on certain dates were not statistically significant as a matter of law because they purportedly did not meet the 95% confidence level. Lead Plaintiff's expert would present evidence to rebut this assertion as to several of these dates, as well as the very requirement of a 95% level of confidence. Joint Decl. ¶67. As to the latter point, the law on this issue is split[6] and it is uncertain what the Court would have required here.[7]

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[6] *Compare Kaminske v. J.P. Morgan Chase Bank N.A.*, No. 09-cv-00918, 2010 WL 5782997, at *1 (C.D. Cal. Oct. 20, 2010) ("Generally, a showing that . . . conclusions have a 95% confidence level with a [±] 5% [] margin of error is significant, and where the proper foundation is laid, such conclusions are likely admissible evidence."), *with Stone v. Advance Am.*, 278 F.R.D. 562 (S.D. Cal. 2011) (finding that a statistical analysis concluding that Spanish is spoken in 23% of payday loan transactions and including an 18% margin of error was deemed admissible; the large margin of error "goes to the weight [and not the admissibility] of the evidence.").

[7] Additionally, Defendants' experts would likely argue that even if Defendants had made full disclosures during the Class Period, Massey's stock price would have fallen after the explosion nonetheless and, therefore, Plaintiffs cannot claim the entirety of that decline. If credited by a jury, Co-Lead Counsel's understanding is that this defense could eliminate

The Settling Parties' competing opinion testimony would inevitably reduce the trial of these issues to a risky "battle of the experts." *See MicroStrategy*, 148 F. Supp. 2d at 667 ("the damages issues would have become a battle of experts at trial, with no guarantee of the outcome in the eyes of the jury"). Juries, particularly those tasked with weighing complex financial or scientific evidence, are unpredictable. A jury could reject or minimize the opinions of Lead Plaintiff's experts and credit those of Defendants. The loss of certain of the alleged corrective disclosures could have reduced estimated damages from $560 million to approximately $230 million—less than the Settlement being proposed—or less. Joint Decl. ¶¶64-66, 68. These complex issues support the adequacy of the Settlement.

(ii) Risks Concerning Liability

To prevail on the Section 10(b) claim, Plaintiffs would have to prove "that the [D]efendants were responsible for the material misstatements or omissions of fact; that these defendants knowingly or recklessly misstated or omitted the alleged material facts; that the class justifiably relied upon the misrepresentations; and that the class suffered damages as a result of the misconduct." *MicroStrategy*, 148 F. Supp. 2d at 665-66. Proving the elements of a section 10(b) claim "is a heavy burden, for it is always true that plaintiffs' risks of establishing liability are significant where fraud is alleged . . . . Elements such as scienter, materiality of

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approximately $135 - $150 million in aggregate damages. Plaintiffs would respond that the explosion was a classic manifestation of a concealed risk causing damages to investors for which they should be fully compensated. *See In Re Vivendi Univ., S.A. Sec. Litig.*, No. 02 Civ. 05571 (S.D.N.Y. Apr. 6, 2009) at 25-26 (ECF No. 767) ("Establishing the [causal] connection does not, as defendants appear to believe, require plaintiffs to establish a one-to-one correspondence between concealed facts and the materialization of the risk. In other words, if a company misrepresents fact A [we have safe mines], which conceals risk X [the mines are not safe], the risk can still materialize by revelation of fact B [explosion of the mine], an indication of risk X [the mines are not safe]"). However, Defendants would have relied on other case law on this issue and it is far from clear what the jury would have found. *See Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 170 (2d Cir. 1980) ("One could not reasonably estimate how the public would have reacted to the news that the Titanic was near an iceberg from how it reacted to news that the ship had struck an iceberg and sunk.").

misrepresentation and reliance by the class members often present significant barriers to recovery in securities fraud litigation." *Id.* at 666. Indeed, although "although plaintiffs successfully defeated a threshold dismissal motion . . . success at trial is another matter entirely" and "[v]ictory at the threshold does not necessarily forecast victory on the merits." *Id.*

Defendants would be expected to argue at summary judgment and at trial that Plaintiffs could not prove the element of materiality of any statements or omissions, because (i) investors focused on data other than safety-related disclosures in making trading decisions with regard to Massey stock; and (ii) the market already knew about Massey's safety record and run-ins with regulatory authorities and that Massey specifically warned investors about the risks and hazards in Massey's mining business.[8] Joint Decl. ¶¶70-79.

In particular, Defendants would likely argue that Massey was an attractive investment because of its advantages with regard to productivity, low cost structure, and valuable coal reserves – not because of what it said or did not say about its safety practices and regulatory compliance, which Defendants will likely characterize as "mere puffery." In support of this argument, Defendants would likely point to, among other things, over 300 analyst reports that detailed a variety of factors in their consideration of the value of Massey stock, all solely related to Massey's financial performance, with little or no reference to Massey's statements concerning its compliance with safety standards. Joint Decl. ¶71; *In re IMAX Sec. Litig.*, 272 F.R.D. 138, 150 (S.D.N.Y. 2010) (looking to analyst reports to determine how the market interpreted a disclosure and noting, in dismissing an argument put forth by the plaintiffs concerning a

[8] The market's knowledge also goes to the ability of Plaintiffs to establish the element of reliance and the fraud-on-the-market presumption of reliance under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), necessary for class certification.

corrective disclosure, that plaintiff "does not cite to one analyst report" that interpreted the statement in that way").

Defendants would also likely argue that news of Massey's perceived poor safety performance and questionable safety culture were widely available in various media outlets and would be prepared to present to a jury those various mediums that pointed to Massey's history of safety violations and its adversarial relationship with MSHA. Defendants would also likely present evidence that Massey's safety record and MSHA violations history were publicly available on MSHA's website. Joint Decl. ¶¶73-74. Although Plaintiffs are confident that they could rebut each of these arguments, *id.* ¶¶75-77, and that Defendants could not satisfy the standards for establishing the "truth on the market" defense, a jury's reaction to the large volume of information presented by Defendants is impossible to predict, particularly a jury sitting in this District that would have been exposed to mining news as well as news related to Massey. *Id.* ¶78; *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579 (S.D.N.Y. 2008) (risks on truth-on-the market defense supported settlement).

With regard to scienter, the Individual Defendants would likely argue that they believed in Massey's safety protocols and the overall safety of Massey mines and would blame various underlings for any proven violations of safety rules, which they will claim they did not order, direct, or approve and as to which they will claim no contemporaneous knowledge. The Individual Defendants will also point to the fact that, as of the date of this memorandum, none of them have been formally charged in any criminal proceeding. Joint Decl. ¶¶80-81.

While Plaintiffs would be prepared with substantial responses to Defendants' expected contentions, the uncertainty of how the Court or a jury would resolve such issues supports approval. *See MicroStrategy*, 148 F. Supp. 2d at 665-66 ("a fair assessment of plaintiff's burden

of establishing the elements of their fraud claim against the asserted defenses … on liability and damages grounds firmly supports the propriety of the partial settlement").

(c) The Duration and Expense of Additional Litigation

The third *Jiffy Lube* adequacy factor, the anticipated duration and expense of additional litigation, considers the substantial time and expense litigation of this type would entail absent settlement. *See Mills*, 265 F.R.D. at 256. "This factor is based on a sound policy of conserving the resources of the Court and the certainty that unnecessary and unwarranted expenditures of resources and time benefit[s] all parties." *Id*.

Here, despite the significant effort that went into defeating Defendants' motions to dismiss, the review of tens of thousands of pages of documents concerning the various investigations of the UBB explosion, as well as working with various experts to analyze the claims and defenses, formal merits and expert discovery had not yet begun and would involve tremendous costs and a significant amount of time. Indeed, expert discovery alone would have involved significant resources given the multiple number of different types of experts it is possible both sets of parties would likely designate, including, experts in mine safety, the causes of mine explosions, loss causation and damages, among others. It is also uncertain when formal discovery would have been allowed to commence. Joint Decl. ¶89.

Therefore, the expense and duration of continued litigation through merits and expert discovery, class certification, summary judgment, trial, including the trial itself, and post trial motions would have been significant. Moreover, even if Plaintiffs had succeeded at trial, Defendants almost certainly would have appealed. *See MicroStrategy*, 150 F. Supp. 3d at 904 ("Also likely is that post-trial motions and appeals would have extended the litigation and delayed any relief for plaintiffs significantly."). Defendants are represented by experienced counsel who would have continued to mount a zealous and thorough defense to Plaintiffs' claims

for relief. Joint Decl. ¶121. As one court aptly noted, "no contested lawsuit is ever a 'sure thing.'" *Clark v. Lomas & Nettleton Fin. Corp*., 79 F.R.D. 641, 651 (N.D. Tex. 1978). *See also MicroStrategy*, 150 F. Supp. 2d at 904 ("there is every reason to believe that continued litigation of plaintiffs' claims against PwC would have been as protracted and costly…").

Given the uncertain prospects of success, settlement at this time is highly beneficial to the Settlement Class. If the case had gone to trial and Defendants had obtained a favorable verdict, the Settlement Class would have been left with no recovery at all and only after lengthy additional proceedings. The Settlement, therefore, provides sizeable and immediate relief to the Settlement Class, without subjecting it to the risks, duration, and expense of continuing litigation. This factor weighs strongly in favor of the adequacy of the Settlement.

(d) The Likelihood of Recovery on a Litigated Judgment

The ability of Defendants to pay is another *Jiffy Lube* factor that the Court must consider. Had the litigation continued, there was a real possibility the class would have recovered less than the amount provided for in the Settlement or nothing at all due to the financial pressures facing ANR, the limited and wasting insurance available to the Defendants, and the financial resources of the Individual Defendants. *See e.g.*, *MicroStrategy*, 148 F. Supp. 2d at 667 (noting that "even were plaintiffs ultimately to recover damages of up to $711 million, it is highly unlikely that such a judgment would be collectible").

According to ANR's most recently filed financial statements with the SEC, ANR has sufficient cash and cash equivalents on hand at the present time to deal with the UBB explosion and fund a settlement. However, the liabilities stemming from the UBB explosion (estimated by ANR at more than $500 million when the Settlement is excluded) and the financial pressures facing ANR generally, along with the high costs associated with trial and the amount of potentially recoverable damages, creates some uncertainty with respect to the Settlement Class

Members' ability to recover the amount of potentially recoverable damages. For instance, ANR's share price went from $57.23 per share on January 28, 2011 – the last trading day before it announced that it had entered into a merger agreement with Massey – to roughly $6 per share as of the time Professor Green was retained. Joint Decl. ¶85.

Insurance coverage could not be relied upon to fully fund a judgment. According to ANR's 2013 Form 10-Q (filed Nov. 8, 2013), it disclosed that it had only $70 million remaining in insurance, a fraction of the amount of the settlement consideration, that could be used to resolve the claims of investors. Moreover, such insurance would also undoubtedly be used to pay for litigation expenses and attorneys' fees. As the parties continued to litigate, these insurance funds would quickly diminish. As discussed above, ongoing litigation would have been very costly. Accordingly, there was a real threat that at the point of a judgment, the Defendants would have no, or only limited, insurance to satisfy the judgment. Joint Decl. ¶87. Finally, although the Action involves claims against the Individual Defendants, research into their assets indicated that they would not be able to satisfy a judgment totaling hundreds of millions of dollars and enforcing judgments against them would take additional time-consuming litigation, with no guaranteed outcome. *Id*. ¶88.

(e) Reaction of the Settlement Class to Date Supports Approval

The reaction of class members to a proposed settlement "as expressed directly or by failure to object" is also "a proper consideration for the trial court." *Flinn v. F.M.C. Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975). A low number of objections or opt-outs in comparison to the size of the settlement class evidences the fairness of the proposed settlement. *See, e.g*., *Mills*, 265 F.R.D. at 257-58.

Pursuant to the Preliminary Approval Order, to date, a total of 217,446 copies of the Notice were mailed to potential members of the Settlement Class. Ex. 5 ¶10. The Notice set

forth the terms of the Settlement and informed Settlement Class Members of their right to object to the Settlement, their right to seek exclusion from the Settlement Class, and the procedures for doing so. *See generally* Ex. 5 - A.[9] The deadline for filing objections or seeking exclusion is May 14, 2014. To date, no objections to the Settlement have been received and three invalid requests for exclusion from the Settlement Class have been received. *See* Ex. 5 ¶15.[10] If any objections or additional requests for exclusion are received subsequent to filing this brief, Plaintiffs will respond in their reply papers due on May 28, 2014.

II. THE PROPOSED PLAN OF ALLOCATION SHOULD BE APPROVED

Approval of a plan of allocation of settlement proceeds is governed by the same standards of fairness and reasonableness applicable to the settlement as a whole. *See, e.g.*, *MicroStrategy*, 148 F. Supp. 2d at 668 ("To warrant approval, the plan of allocation also must meet the standards by which the partial settlement was scrutinized—namely, it must be fair and adequate."). "The proposed allocation need not meet standards of scientific precision, and given that qualified counsel endorses the proposed allocation, the allocation need only have a reasonable and rational basis." *Mills*, 265 F.R.D. at 258.

Here, the Plan of Allocation, which was developed in consultation with Lead Plaintiff's consulting damages expert, Global Economics, and is consistent with Plaintiffs' allegations, provides for distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata* basis based on a formula tied to liability and damages. In developing the Plan of Allocation,

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[9] The notice program of individual mailed notice and a summary notice met all of the requirements of Rule 23, which calls for the "best notice [that is] practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

[10] Specifically, none of the requests were submitted by Settlement Class Members. One person did not purchase Massey stock and two persons sold their purchases before the first alleged corrective disclosure. *See* Ex. 5 - D.

Global Economics considered the amount of artificial inflation allegedly present in Massey's common stock throughout the Class Period that was purportedly caused by the alleged fraud. Joint Decl. ¶¶97-98.

Calculation of the recovery for each Recognized Claim will depend upon several factors, including the timing of the Authorized Claimant's purchases of Massey stock during the Class Period and sales during the Class Period, if any. *Id.*, Ex. 5 - A at 7-9. As recognized in the Plan of Allocation, beginning April 6, 2008, alleged inflation in the prices of Massey common stock was reduced sequentially, as corrective disclosures were allegedly made on, or after the close of the prior trading day to, April 6, 2010, April 7, 2010, April 15, 2010, April 22, 2010, April 30, 2010, May 17, 2010, and July 27, 2010. Joint Decl. ¶¶99-100; Ex. 5 - A at 8-9. The proposed Plan of Allocation should be approved as it was designed to fairly and rationally allocate the Net Settlement Fund among Authorized Claimants. Notably, no Settlement Class Member has objected to the Plan of Allocation.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant final approval to the proposed Settlement, approve the Plan of Allocation of the Net Settlement Fund, grant final class certification for settlement purposes, and enter the proposed Final Judgment and Order of Dismissal and proposed Order Approving Plan of Allocation of Net Settlement Fund. Proposed orders will be submitted with Plaintiffs' reply papers, after the deadlines for objecting and seeking exclusion have passed.

Dated: April 30, 2014

By: */s/ Joel H. Bernstein*
Joel H. Bernstein
Christopher J. Keller
Ira A. Schochet
Irina Vasilchenko
LABATON SUCHAROW LLP

140 Broadway
New York, NY 10005
(212) 907-0700
(212) 818-0477 (facsimile)

Counsel for Lead Plaintiff Commonwealth of Massachusetts Pension Reserves Investment Trust and Co-Lead Counsel for the Settlement Class

Paul J. Geller
Jack Reise
Dennis J. Herman
ROBBINS GELLER RUDMAN & DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
(561) 750-3000
(561) 750-3364 (facsimile)

Counsel for Plaintiff David Wagner and Co-Lead Counsel for the Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

- **Jonathan L. Anderson**
  jlanderson@jacksonkelly.com,ecooper@jacksonkelly.com
- **Eric J. Belfi**
  ebelfi@labaton.com
- **Joel H. Bernstein**
  jbernstein@labaton.com,rviczian@labaton.com,cboria@labaton.com,nzeiss@labaton.com,electroniccasefiling@labaton.com,ewierzbowski@labaton.com,fmann@labaton.com,sauer@labaton.com
- **Stephen L. Brodsky**
  sbrodsky@zsz.com
- **Ricklin Brown**
  rbrown@baileyglasser.com,missyddennis@gmail.com,jmarks@baileyglasser.com,mdennis@baileyglasser.com,mchapman@baileyglasser.com
- **John F. Dascoli**
  johnfdascoli@hotmail.com,Pamdc519@aol.com
- **Eric R. Delinsky**
  edelinsky@zuckerman.com
- **Alan I. Ellman**
  aellman@labaton.com
- **AL Emch**
  aemch@jacksonkelly.com,adsmith@jacksonkelly.com,jcrawford@jacksonkelly.com
- **Thomas V. Flaherty**
  tflaherty@fsblaw.com,cmontague@fsblaw.com
- **Paul Jeffrey Geller**
  pgeller@rgrdlaw.com,e_file_fl@rgrdlaw.com

- **Brian A. Glasser**
  bglasser@baileyglasser.com,missyddennis@gmail.com,mchapman@baileyglasser.com, pwilson@baileyglasser.com,mhatcher@baileyglasser.com,mdennis@baileyglasser.com, lsadler@baileyglasser.com,ttanner@baileyglasser.com

- **Stuart W. Gold**
  sgold@cravath.com

- **David J. Goldsmith**
  dgoldsmith@labaton.com,electroniccasefiling@labaton.com

- **Tammy R. Harvey**
  tharvey@fsblaw.com,cmontague@fsblaw.com

- **Dennis J. Herman**
  DennisH@rgrdlaw.com

- **Steven N. Herman**
  sherman@zuckerman.com

- **Victor L. Hou**
  vhou@cgsh.com

- **Christopher J. Keller**
  ckeller@labaton.com

- **Laurie L. Largent**
  LLargent@rgrdlaw.com, triciam@rgrdlaw.com

Manual Notice List
The following is the list of attorneys who are not on the list to receive e-mail notices for this case.

Nicole Zeiss
Labaton Sucharow
140 Broadway
New York, NY 10005

By: /s/ Joel H. Bernstein
Joel H. Bernstein