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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF BIRMINGHAM RETIREMENT AND RELIEF SYSTEM, ROBERT L. REESE, POLICE RETIREMENT SYSTEM OF ST. LOUIS, EDWARD TANSEY, AND ESTATE OF LEATRICE SEINFELD, Plaintiffs Below-Appellants, v. LYNN J. GOOD, ANN M. GRAY, G. ALEX BERNHARDT, SR., MICHAEL G. BROWNING, HARRIS E. DELOACH, JR., DANIEL R. DIMICCO, JOHN H. FORSGREN, JAMES H. HANCE, JR., JOHN T. HERRON, JAMES B. HYLER, JR., WILLIAM E. KENNARD, E. MARIE MCKEE, E. JAMES REINSCH, JAMES T. RHODES, CARLOS A. SALADRIGAS, B. KEITH TRENT, LLOYD M. YATES, JAMES E. ROGERS, WILLIAM BARNET III, PHILIP R. SHARP, Individual Defendants Below-Appellees, and DUKE ENERGY CORPORATION, Nominal Defendant Below-Appellee.	No. 16, 2017 On Appeal from The Court of Chancery, C.A. 9682-VCG PUBLIC VERSION - Filed: April 26, 2017

APPELLANTS' REPLY BRIEF

Martin S. Lessner (No. 3109)
Kathaleen St. J. McCormick (No. 4579)
Nicholas J. Rohrer (No. 5381)
Meryem Y. Dede (No. 6148)
YOUNG CONAWAY STARGATT & TAYLOR LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600

Delaware Counsel for Plaintiffs Below-Appellants

BARRACK, RODOS & BACINE
Robert A. Hoffman
Jeffrey W. Golan
Julie B. Palley
3300 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
(215) 963-0600

ROBBINS ARROYO LLP
Felipe J. Arroyo
Shane P. Sanders
Gina Stassi
600 B Street, Suite 1900
San Diego, CA 92101
(619) 525-3900

SCOTT+SCOTT,
ATTORNEYS AT LAW, LLP
Judith S. Scolnick
Donald A. Broggi
Thomas L. Laughlin
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
(212) 223-6444

Co-Lead Counsel for Plaintiffs Below-Appellants

ANDREWS & SPRINGER, LLC
Peter B. Andrews
Craig J. Springer
3801 Kennett Pike
Building C, Suite 305
Wilmington, DE 19807
(302) 504-4957

Counsel for Individual Plaintiffs Below-Appellants, Robert L. Reese and City of Birmingham Retirement and Relief System

LAW OFFICES OF ALFRED G. YATES, JR., P.C.
Alfred G. Yates, Jr.
519 Allegheny Building
429 Forbes Ave.
Pittsburgh, PA 15219

Counsel for Individual Plaintiff Below-Appellant, Robert L. Reese

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PRELIMINARY STATEMENT

This appeal requires the Court to determine whether the time-honored standards for adjudicating a motion to dismiss are as applicable to a derivative action as they would be to any other case. In order to have their claims upheld against Defendants' dismissal motion, the Plaintiffs here are required to plead particularized facts indicating that a majority of Duke's Board of Directors consciously disregarded their responsibility to comply with positive law. The Court is "bound to draw all inferences from those particularized facts in favor of the plaintiff, not the defendant, when dismissal of a derivative complaint is sought." *Sandys v. Pincus*, 152 A.3d 124, 128 (Del. 2016), (quoting *Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1022 (Del. 2015)). Plaintiffs need only "make a threshold showing, through the allegation of particularized facts, that [the] claims have some merit." *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993).

Applying these principles to derivative litigation requires a recognition that corporate board minutes and presentations are carefully vetted by lawyers and company insiders with an eye to avoiding liability and thus will only rarely, if ever, contain smoking gun admissions of board knowledge of corporate misconduct. This means giving effect to common sense inferences that can be drawn from the board materials when viewing them in the context in which they were created. Here, Plaintiffs claim that Defendants were aware Duke was violating

environmental laws by the unlawful operation of its coal ash ponds and condoned a strategy that was designed to perpetuate, rather than remediate, its non-compliance. Those claims are the product of reasonable inferences supported by particularized allegations.

Specifically, the Board materials and media reports cited by Plaintiffs show that when Duke was confronted by environmental groups with notices of intent to sue under the Clean Water Act ("CWA"), the Company rushed to enlist its captive regulator, the North Carolina Department of Environmental Quality ("DEQ"), to bring its own enforcement actions. Duke undertook this strategy so that the proposed citizen suits would be preempted, which, in turn, would allow the Company to negotiate a sweetheart deal with DEQ. Indeed, this is exactly what came to pass. Within months of when the notices of intent to sue were issued, Duke and DEQ signed a proposed Consent Decree that would have required the Company to pay a mere $99,000 fine and which did not require any environmental remediation of the unlawful (and often deliberately engineered) "seeps" of toxic coal ash wastewater that had been ongoing for years at the Company's ash pond sites. The occurrence of the disastrous Dan River spill put a monkey wrench into this strategy. Under harsh criticism for its failure to enforce environmental laws, DEQ realized that the proposed Consent Decree was impossible to justify and backed out of the deal.

The strategy to perpetuate the Company's violations of environmental law is plainly described in Board presentations. For example, [redacted]

[redacted]

[1] Unless stated otherwise, all emphasis is added and internal citations are omitted.

A more than reasonable inference from these presentations is that the Board was aware that the proposed Consent Decree was a sham agreement that would allow Duke's continued violation of the law. The $99,000 fine was, of course, a trivial amount for a Company then earning in excess of $2.5 billion per year. [redacted] That inference is amply supported not only by the miniscule size of the proposed fine, but even more importantly, by the fact that the proposed Consent Decree did not require Duke to undertake any remedial activities.

Tellingly, Defendants now claim that the "***most reasonable***" inference to be drawn from the quotation marks is the one drawn by the Court of Chancery: they denote simply a term of art. Appellees' Brief ("AB") at 46. The weighing of which inference constitutes the most reasonable inference is, however, precisely the sort of exercise that is impermissible on a motion to dismiss. At this stage, the Court "must credit" the inferences in favor of plaintiffs even if it believes the inference in favor of defendants is more likely. *La. Mun. Police Emps.' Ret. Sys. v. Pyott ("Pyott")*, 46 A.3d 313, 356 (Del. Ch. 2012), *rev'd sub nom on other grounds, Pyott v. La. Mun. Police Emps.' Ret. Sys.*, 74 A.3d 612 (Del. 2013).

The Court of Chancery appears to have simply accepted Defendants' narrative that Duke engaged in wholly legitimate conduct by working with the regulator to minimize its liability while bringing the Company into compliance with the law. Plaintiffs respectfully submit that this view of what transpired is belied by the utter toothlessness of the proposed Consent Decree that was agreed to by Duke and DEQ. Thus, when the Dan River spill occurred and there was no agreement in place for remediation of the ash ponds, the federal government indicted Duke, not just for the spill, but for the illegal and deliberately engineered seeps that for years had allowed contaminated wastewater to pollute North Carolina's rivers. Because the Defendants were complicit in this illegal conduct, they should now be held to account for it.

ARGUMENT

I. THE COMPLAINT ADEQUATELY PLEADS THAT DEFENDANTS ACTED IN BAD FAITH

In seeking to uphold the dismissal of the Complaint, Defendants' principal contentions are that the Complaint fails to plead reasonable inferences that: (i) the "directors knew that the seepage issues ... violated any environmental law" and (ii) DEQ was a "rogue" or "corrupt" regulator with whom the Defendants knowingly colluded. AB at 3-4. These arguments both ignore and misstate Plaintiffs' actual allegations and should be rejected.

A. There Is No Dispute That Defendants Were Aware of the Seeps That Gave Rise to Duke's Indictment and Liability

Defendants cannot and do not assert that the Board was unaware that seeps of toxic wastewater were occurring from Duke's unlined ash ponds. In fact, [redacted] (A268). This is part of the very misconduct for which Duke was indicted and to which the Company pled guilty.[2]

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[2] Defendants acknowledge that coal ash wastewater is a "pollutant" under the CWA and that the CWA prohibits the discharge of any pollutant into the waters of the United States, except those in compliance with an NPDES permit. AB at 7. And while Defendants assert that "*[i]n general terms*" NPDES permits allow wastewater to be discharged from a treatment system, AB at 8, they do not claim

Defendants nevertheless claim they cannot be held liable because the Complaint does not plead facts showing that the Board *knew* that the deliberately engineered seeps were illegal. In making this argument, Defendants are insisting on precisely the sort of smoking gun admission that will almost never be found in board materials given the realities described above. That does not mean, however, that common sense inferences cannot be made. As Vice Chancellor Laster held in *Pyott*, a case arising out of Allergan's alleged illegal promotion of BOTOX for off-label uses:

> ... a plaintiff does not have to point to actual confessions of illegality by defendant directors to survive a Rule 23.1 motion in a *Caremark* case. Particularly at the pleadings stage, a court can draw the inference of wrongful conduct when supported by particularized allegations of fact. Given that off-label marketing is illegal, ***it would be astonishing if the ... board presentation[s] actually used that term. If in-house counsel hoped to keep their jobs, those words only could make it into a board presentation in the context of a statement against the practice. But sadly, sophisticated corporate actors at***

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that Duke's NPDES permits allowed coal ash seeps from the bottom of an ash pond (where the concentration of toxic chemicals was the highest) to be deliberately channeled into nearby rivers.

The NPDES permit for Duke's Riverbend facility, for example, allowed the discharge of wastewater from only three "permitted outfalls," subject to effluent limitations and monitoring requirements for, among other things, the toxic heavy metals that are present in coal ash. (A196 ¶ 152). By contrast, Duke admitted as part of its plea agreement with the U.S. Government that an "engineered drain" that allowed wastewater containing "elevated levels of arsenic, chromium, cobalt, boron, barium, nickel, strontium, sulfate, iron, manganese, and zinc" to flow into a river were "unpermitted discharges." (A196-97 ¶¶ 153-54).

times engage in illegal behavior and attempt to hide their misconduct with the appearance of legal compliance.

46 A.3d at 357.

Similarly here, there is no express reference in the Board materials reviewed by Plaintiffs stating the Board was informed that the seeps were illegal.[3] But Defendants themselves acknowledge that the Board was advised that [redacted] AB at 28. There is nothing in the presentation from which Defendants could have concluded the environmental lawsuits were meritless, or that there was any basis to defend them. Furthermore, if the legality of the seeps or their environmental impact were clearly lawful, then why did the issue even rise to the level of the Board? That the seeps were patently illegal is beyond question. As the U.S. Government stated during Duke's sentencing hearing, "***[T]here is clearly no dispute that you are not supposed to channel seeps directly into a river without a permit.***" Appellants' Opening Br. ("OB") at 10.

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[3] The legal ramifications of the seeps are likely matters on which the Board received advice from counsel. By insisting that Plaintiffs offer direct evidence of the Board's awareness that the seeps were illegal, Defendants would effectively require Plaintiffs to have knowledge of such advice, a matter that they certainly regard as privileged.

In addition to the Board discussions, there is circumstantial evidence indicating that Defendants knew that the seeps were illegal. As noted in an August 28, 2014 letter from DEQ to Duke, problems with the Company's coal ash ponds "ranging from ***unauthorized discharges*** to groundwater contamination, ***have been well known and well documented for decades.***" OB at 10-11. The letter thus makes clear that it was general knowledge that "unauthorized discharges," *i.e.*, seeps, had been occurring over a long period of time. The Defendants on the RPOC were charged with monitoring the risks associated with coal ash. It was their business to know that the unpermitted discharge of coal ash wastewater into rivers through engineered channels was illegal. At this stage of the proceedings, given Defendants' acknowledgement that they were aware in 2013 of the seeps that gave rise to Duke's 2015 criminal prosecution, Plaintiffs have pled sufficient facts from which to infer Board knowledge that the Company was in violation of environmental laws.[4]

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[4] Defendants seek to draw a negative inference from the fact that the nine-count indictment of Duke did not charge anyone with knowing misconduct. *See* AB at 12. No such inference can be drawn. Defendants' breaches of their fiduciary duties arise from the fact that they knowingly allowed Duke to engage in illegal activity, regardless of whether the crime was negligence-based or not.

B. The Complaint Amply Pleads that the Proposed Consent Decree Was a Sham, and that the Board Was Complicit in Approving It

Defendants misleadingly assert that Plaintiffs' theory of the case requires allegations from which an inference can be drawn that DEQ was a corrupt regulator. The term "corrupt" in relation to DEQ does not appear anywhere in the Complaint; rather, it was introduced by the Court of Chancery at oral argument. As Plaintiffs noted in their opening brief, Plaintiffs are not asserting that DEQ officials were corrupt in the sense that they were taking bribes from the Company. Rather, Plaintiffs have alleged that DEQ was a captive regulator of Duke due, in part, to a long-standing web of political connections, including Governor McCrory's 28-year tenure as a Duke employee and the more than $1 million in campaign contributions he received from the Company and its employees.[5] As a captive regulator, DEQ effectively abandoned its role of enforcing environmental

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[5] The Court of Chancery found that Plaintiffs' theory of liability was somehow undermined by the fact that DEQ's lax enforcement of environmental laws arguably predated the McCrory administration. (A503-04; AB at 38-39). But this fact is of no consequence because Plaintiffs do not contend that DEQ officials under the McCrory administration were bribed by Duke. While DEQ became particularly friendly to industry following McCrory's election (with regulated entities being treated as "customers" and DEQ employees fearful for their jobs if they enforced the law (OB at 14-15)), the fact that the agency was lenient in previous administrations actually reinforces Plaintiffs' claim that DEQ was long a captive of its regulated industries and that Defendants would have been well aware of it.

laws against polluters and generally acceded to industries' requests to be regulated in a manner prescribed by the regulated entities themselves.

DEQ's conduct of its enforcement litigation against Duke, even in the aftermath of the Dan River spill, confirms the agency's status as a captive regulator. In the *Yadkin Riverkeeper* case cited in Plaintiffs' Opening Brief, a federal district court allowed a citizen suit to proceed against Duke because it was "unable to find that [DEQ] was trying diligently or that its state enforcement action was calculated, in good faith, to require compliance with the Act." OB at 35-36. Defendants assert that *Yadkin* has no relevance because the court did not find that DEQ was acting corruptly or that it colluded with Duke. AB at 40. The absence of such findings does not undermine Plaintiffs' case because DEQ's corruption is a straw-man argument. Plaintiffs' assertion simply is that, in DEQ, Duke had a willing partner that would serve the Company's interest by preempting the citizen suits and allowing Duke to continue the operation of its ash ponds in violation of the law, by dint of a toothless Consent Decree. With its finding that DEQ's enforcement action was, indeed, not "calculated, in good faith, to require compliance with the [law]," the *Yadkin* decision stands as powerful evidence in support of Plaintiffs' assertion, and the Court of Chancery erred in discounting it.

Defendants also misleadingly deride as speculation Plaintiffs' allegation that Duke asked DEQ to preempt the citizen suits. AB at 42. That allegation was not

made up out of whole cloth, but was based on a report by the *New York Times* and a review of emails it obtained. As the Complaint alleges, shortly after the first notice of intent to sue was issued in January 2013, "Duke contacted DEQ seeking to reach an agreement whereby DEQ would preempt SELC's [Southern Environmental Law Center] complaints" and that "DEQ and Duke lawyers subsequently consulted on how to best exclude SELC from negotiations between DEQ and Duke, with ..., DEQ's senior lawyer, seeking advice from Duke lawyers." (A097). Thus, the allegation that Duke solicited DEQ to intervene in the planned citizen suits on the Company's behalf is pled in a particularized, non-conclusory manner. *See Sandys*, 152 A.3d at 129 n.23 (quoting *Rales*, 634 A.2d at 935 n.10 ("[T]here is a variety of public sources from which the details of a corporate act may be discovered, including the ***media***...") (emphasis added)).

Defendants' fallback position is that even if such a request occurred, "it is not improper for a company to seek a negotiated resolution with its regulator, and Plaintiffs plead no particularized factual basis to infer that there was any impropriety, much less one of which the Director Defendants were aware." AB at 42. This is just plain wrong. Plaintiffs do not contend that whenever a company seeks a negotiated resolution with a regulator, it is acting improperly. Rather, Plaintiffs contend that when a company uses a captive regulator ***to avoid compliance with the law***, it has crossed the line and engaged in conduct that is

impermissible. *In re Massey Energy Co.*, 2011 WL 2176479, at *20 (Del. Ch. May 31, 2011) (fiduciary cannot be loyal "by knowingly causing it to seek profit by violating the law"). More than sufficient facts have been pled at this stage to require the Court to draw a reasonable inference that this is precisely what occurred and that Defendants were aware of it.

[redacted] The inference is plausible not just from the face of what was presented to the Board, but also in light of the fact that this is exactly what occurred. Defendants argue, incongruously, [redacted]

[redacted] AB at 44. But by asking the Court to weigh inferences, Defendants essentially concede that their motion to dismiss must be denied.[6]

The best evidence about the nature of the proposed Consent Decree and Defendants' knowledge of it comes from the [redacted] Thus, the proposed Consent Decree did not require Duke to undertake *any* action to bring its facilities into compliance.

[redacted]

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6 [redacted] As discussed in Plaintiffs' Opening Brief, OB at 16, 38, [redacted] While Defendants' "term of art" explanation should not be considered on a motion to dismiss, it is not even the most plausible explanation, given the trivial nature of the $99,000 fine that was ultimately agreed to by the parties.

[redacted]

On what basis, then, should the Board have concluded that the Consent Decree was a legitimate effort to seek a negotiated resolution with a regulator? It essentially required nothing of the Company and certainly did not require remediation of the seeps which Defendants knew existed. As such, Plaintiffs have pled particularized allegations showing that the proposed Consent Decree was a sham and that Defendants knew that it would allow the Company's continued violation of the law.[7] Defendants cite with approval the observation of Vice Chancellor Glasscock at oral argument that "it is hard to imagine even the most environmentally zealous corporate board saying, '[n]o. We prefer to be sued by the environmentalists rather than regulated[.]'" AB at 45. Respectfully, that is not the choice the Board knew of and exercised. Instead, the Board condoned a strategy that allowed Duke to be neither sued *nor* regulated. By making that

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[7] If the proposed Consent Decree had been anything but toothless, would DEQ have felt the need to walk away from it after the Dan River spill publicly revealed the unsafe and unlawful condition of Duke's ash ponds? Again, the reasonable inference here is that the Consent Decree was nothing more than a sham.

choice and allowing Duke to continue to violate the law, Defendants acted in bad faith and breached their duty of loyalty to the Company. *Massey Energy Co.*, 2011 WL 2176479, at *20; *Metro Commc'n. Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121,131 (Del. Ch. 2004).

The reasonable inferences here show that the Board (a) knew about the Company's violation of environmental laws, (b) did not take any actions to remediate them, and (c) *in fact* approved a strategy that would allow such violations to continue. No more is required at this stage of the proceedings.

C. Neither the *Qualcomm* Nor *General Motors* Cases Relied on by Defendants Supports Dismissal of the Complaint

Defendants' contention that *Melbourne Mun. Firefighters' Pension Trust Fund v. Jacobs*, 2016 WL 4076369 (Del. Ch. Aug. 1, 2016) ("*Qualcomm*"), *aff'd*, 2017 WL 836928 (Del. Mar. 3, 2017), is controlling precedent for dismissal of this case highlights the fundamental flaws of their argument. In *Qualcomm*, the company incurred several substantial fines from regulators in primarily foreign markets that determined Qualcomm had run afoul of fair competition laws. The Qualcomm board steadfastly maintained that these decisions were wrongly decided and that the company had been fully compliant with antitrust laws. The board's position was expressly articulated in numerous public filings of the company. Additionally, the company followed through on its stated proclamations of innocence by availing itself of every avenue of appeal from the adverse rulings in

every instance. 2016 WL 4076369, at *10. Qualcomm ***never*** admitted wrongdoing.

The plaintiffs in *Qualcomm* expressly disclaimed that the Qualcomm board knew that the company was engaging in illegal, anticompetitive conduct. Rather, they claimed that findings of anticompetitive conduct had been made (mostly in foreign jurisdictions), that these findings constituted "red flags" that the Qualcomm board failed to properly investigate, and that, as a result, the board acted in bad faith.[8] The Court of Chancery rejected plaintiffs' contention, noting that the board did in fact respond to the "red flags": it elected to adopt a strategic imperative of public relations and lobbying designed to avoid future fines, while appealing from all of the adverse actions taken by the overseas regulators. By adhering to its stated position that the company was conducting its affairs lawfully, appealing regulatory findings and penalties, and engaging in lawful lobbying and public relations efforts to change the viewpoint of the regulators, the Court of Chancery found (and this Court affirmed) that the board had acted lawfully and there was no basis for a finding of bad faith. 2016 WL 4076369, at *12. In short, the *Qualcomm* plaintiffs were challenging the ***wisdom*** of the board's response, and the

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[8] *See* Oral Argument, *Melbourne Mun. Firefighters' Pension Trust Fund v. Jacobs*, C.A. No. 444, 2016, at 5:00-5:35 (Del. Mar. 1, 2017) *available at* http://courts.delaware.gov/supreme/oralarguments/.

ruling in *Qualcomm* turned on the consistency with which the board acted on its belief that Qualcomm at all times adhered to the law.

The contrast with Duke could not be more dramatic. Here, Plaintiffs do allege that the Duke Board was aware that the Company was operating its ash ponds in violation of environmental laws. [redacted] Thus, unlike *Qualcomm*, where the extent of a company's market dominance under foreign law arguably involved legal "gray areas," here, as the U.S. Government noted at Duke's sentencing hearing, there was "clearly no dispute that you are not supposed to channel seeps directly into a river without a permit."

Moreover, unlike *Qualcomm*, rather than proclaiming its innocence and appealing adverse rulings, the Duke directors endorsed the Company's policy of asking the regulatory agency, DEQ, to sue the Company at all fourteen plants for the unlawful manner in which the coal ash ponds were being managed. The Defendants do not, and cannot, dispute that, if proven, it would be "egregious conduct" for the Board of Duke to request DEQ to sue the Company so that the Company could enter into a sham Consent Order releasing it from any obligation

to take corrective action to bring its coal ash ponds into environmental compliance, thereby blocking any chance of enforcement of the laws by way of citizen suits. Yet, a reasonable inference – indeed, the ***most*** reasonable inference – from all the particularized allegations put before the Court of Chancery is that this egregious conduct is exactly what the majority of the Board knowingly endorsed.

Additionally, when Duke was charged with nine counts of environmental crimes arising from its violations of the CWA at several of its coal ash ponds, it pled guilty in 2015, accepted the largest criminal fine ever imposed by a North Carolina federal court, and issued a written apology to all the citizens of North Carolina. Unlike in *Qualcomm,* Duke does not maintain that it was innocent of environmental violations; rather, the Company readily admitted them. And since the factual underpinnings of three of the criminal counts – allowing engineered seeps of coal ash wastewater at three of its facilities – were based on information that was known to the Board in 2013, there is substantial reason to believe that the Duke Board acted in bad faith by endorsing Duke's business plan of managing their coal ash ponds in a manner that violated federal environmental laws. Under the reasoning of *Qualcomm*, the Complaint here should be sustained.

Defendants' reliance on *In re General Motors Co. Deriv. Litig.*, 2015 WL 3958724 (Del. Ch. June 26, 2015), *aff'd,* 133 A.3d 971 (Del. 2016) is equally misplaced. The gravamen of the complaint in *General Motors* is that the board

violated its duty to monitor the company by being entirely in the dark about the safety defects in the ignition switches in GM automobiles, thereby allowing tragic accidents to occur. There was no dispute about the board's ignorance of the safety issue. While there was much room for improvement of the GM board's reporting system, the board did have a functioning, albeit imperfect, reporting system. *Id.* at *5-7. The Court of Chancery held, consistently with Delaware law, that there is a distinction between a board that may be negligent, even grossly negligent, and a board whose majority members "*consciously* act[] in a manner" that violates the law. *Id.* at *17.

Here, neither party maintains that the Duke's Board was unaware of the underlying facts that gave rise to Duke's violations of the law and guilty plea. [redacted] AB at 9. And Plaintiffs' claim is not that Defendants failed to ***monitor*** the coal ash ponds environmental violations. Rather, it is that Defendants ***knowingly disregarded the Company's noncompliance with environmental laws*** by: (a) failing to remediate them, and (b) soliciting DEQ to sue the Company for its violations and entering into a sham Consent Decree that required no remediation and blocked all other avenues of enforcement. This is the essence of "bad faith." Since there is a wealth of particularized allegations that

substantiate that claim, especially when reasonable inferences are accorded to Plaintiffs, as they must be at this stage, *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004), the Complaint must be allowed to proceed.

While Defendants' citation to *Qualcomm* and *General Motors* fails to support dismissal of this action, their attempt to distinguish the cases that support Plaintiffs' claims are also unavailing. The allegations here are at least as strong as those in *Pyott*, where the Court of Chancery upheld the complaint based on the pleading of facts that supported a reasonable inference "that directors *in fact* approved a business plan that contemplated off-label marketing [of BOTOX]." 46 A.3d at 358 (emphasis in original). Defendants imply that in *Pyott* the Allergan board was informed by its General Counsel that widespread off-label marketing was being conducted by the company and that the Allergan board knowingly approved of strategic plans to market BOTOX for off-label uses. *See* AB at 32. But the conduct that Allergan's General Counsel brought to the attention of the Board involved only a single doctor at a single Allergan-sponsored presentation, where the doctor used his own slides showing off-label uses of BOTOX, rather than the company's slides that only described strictly approved uses. 46 A.3d at 320. Moreover, there is no suggestion that in approving marketing plans for BOTOX the board was specifically advised that the plan included illegal marketing

for off-label indications. Nevertheless, the Court of Chancery held that no such "confessions of illegality" were necessary to survive the motion to dismiss. *Id.* at 357.[9]

II. DEFENDANTS DO NOT MEANINGFULLY CONTEST PLAINTIFFS' ALLEGATIONS OF PROXIMATE CAUSE

Defendants' contention that Plaintiffs have failed to show a causal connection between the corporate trauma sustained by Duke and Defendants' alleged misconduct rests on their contention that the Complaint fails to adequately plead any misconduct in the first instance. AB at 47. Defendants' observation that the rupture of the pipe at Dan River may have been "accidental", AB at 1, is unavailing. As demonstrated above and in Plaintiffs' Opening Brief, the Complaint pleads more than sufficient facts to raise an inference that Defendants acted in bad faith and breached their duty of loyalty to the Company. Dan River was only one of 14 plants at issue in the criminal plea and civil liabilities incurred by Duke.

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[9] Defendants' effort to discount Plaintiffs' citation of *Massey Energy* on the basis that the case was decided on a preliminary injunction motion also fails because the derivative claims pled in *Massey* "would [have] survive[d] a motion to dismiss even under the heightened pleading standard applicable to Rule 23.1." 2011 WL 2176479, at *21. Moreover, *Massey's* doctrine that "a fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law," *id.* at *20, cannot be reconciled with the decision below.

The Complaint also adequately pleads proximate cause because, among other reasons, several of the counts to which Duke pled guilty are based on illegal conduct of which the Board was aware and failed to remediate (*i.e.*, the engineered seeps). *See* OB at 41-43. Moreover, when the tragic Dan River spill occurred, the absence of a meaningful consent decree that required remedial actions left Duke exposed to liability for the seeps and not just the spill itself. As such, the Complaint satisfies any requirements for pleading proximate cause.

CONCLUSION

For all of the foregoing reasons, Appellants respectfully request reversal of the decision of the Court of Chancery.

Dated: April 11, 2017

YOUNG CONAWAY STARGATT & TAYLOR LLP

/s/ Nicholas J. Rohrer

Martin S. Lessner (No. 3109)
Kathaleen St. J. McCormick (No. 4579)
Nicholas J. Rohrer (No. 5381)
Meryem Y. Dede (No. 6148)
YOUNG CONAWAY STARGATT & TAYLOR LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600

Delaware Counsel for Plaintiffs Below-Appellants

BARRACK, RODOS & BACINE
Robert A. Hoffman
Jeffrey W. Golan
Julie B. Palley
3300 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
(215) 963-0600

ROBBINS ARROYO LLP
Felipe J. Arroyo
Shane P. Sanders
Gina Stassi
600 B Street, Suite 1900
San Diego, CA 92101
(619) 525-3900

SCOTT+SCOTT,
ATTORNEYS AT LAW, LLP
Judith S. Scolnick
Donald A. Broggi
Thomas L. Laughlin
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
(212) 223-6444

Co-Lead Counsel for Plaintiffs Below-Appellants

ANDREWS & SPRINGER, LLC
Peter B. Andrews
Craig J. Springer
3801 Kennett Pike
Building C, Suite 305
Wilmington, DE 19807
(302) 504-4957

Counsel for Individual Plaintiffs Below-Appellants, Robert L. Reese and City of Birmingham Retirement and Relief System

LAW OFFICES OF ALFRED G. YATES, JR., P.C.
Alfred G. Yates, Jr.
519 Allegheny Building
429 Forbes Ave.
Pittsburgh, PA 15219

Counsel for Individual Plaintiff Below-Appellant, Robert L. Reese

CERTIFICATE OF SERVICE

I, Nicholas J. Rohrer, Esquire, hereby certify that on April 26, 2017, I caused to be served a true and correct copy of the foregoing document upon the following counsel of record in the manner indicated below:

By File & ServeXpress

Kenneth J. Nachbar, Esquire
Susan Wood Waesco, Esquire
Alexandra M. Cumings, Esquire
MORRIS NICHOLS ARSHT & TUNNEL LLP
1201 North Market Street
16th Floor
Wilmington, DE 19801

Peter B. Andrews, Esquire
Craig J. Springer, Esquire
ANDREWS & SPRINGER, LLC
3801 Kennett Pike
Building C, Suite305
Wilmington, DE 19807

Seth D. Rigrodsky, Esquire
RIGRODSKY & LONG PA
2 Righter Parkway, Suite 120
Wilmington, DE 19803

/s/ Nicholas J. Rohrer
Nicholas J. Rohrer (No. 5381)