

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

## I. (a) PLAINTIFFS

Davis, Carolyn Diana, as Administratrix of the Estate of Charles Timothy Davis

(b) County of Residence of First Listed Plaintiff Fayette  
*(EXCEPT IN U.S. PLAINTIFF CASES)*

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

Bruce Stanley, Alicia Schmitt, Stanley & Schmitt PC, 2424 Craftmont Avenue, Pittsburgh, PA 15205

## DEFENDANTS

United States

County of Residence of First Listed Defendant \_\_\_\_\_  
*(IN U.S. PLAINTIFF CASES ONLY)*

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

United States Department of Justice, Civil Division

## II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question *(U.S. Government Not a Party)*
- 4 Diversity *(Indicate Citizenship of Parties in Item III)*

## III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

## IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans <i>(Excludes Veterans)</i> <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input checked="" type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

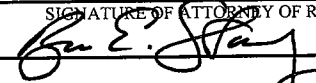
## V. ORIGIN *(Place an "X" in One Box Only)*

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District *(specify)*
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity):*  
 Federal Tort Claims Act -- 28 USC § 2671 et seq.  
 Brief description of cause:  
 Negligent Inspection of Coal Mine Property by Federal Mine Safety and Health Administration, Dept. of Labor

VII. REQUESTED IN COMPLAINT:  CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ \_\_\_\_\_ CHECK YES only if demanded in complaint: JURY DEMAND:  Yes  No

VIII. RELATED CASE(S) IF ANY *(See instructions):* JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE 4/5/2018 SIGNATURE OF ATTORNEY OF RECORD 

FOR OFFICE USE ONLY RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFF \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION**

<b>CAROLYN DIANA DAVIS,</b>	)	
<b>as the Administratrix for the ESTATE of</b>	)	<b>Civil Action No.</b> _____
<b>CHARLES TIMOTHY DAVIS,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>Judge</b> _____
	)	
<b>v.</b>	)	
	)	
<b>THE UNITED STATES,</b>	)	
	)	
<b>Defendant.</b>	)	

**COMPLAINT**

AND NOW comes the Plaintiff, Carolyn Diana Davis, as Administratrix of the Estate of Charles Timothy Davis, by and through undersigned counsel, and for her claim against Defendant The United States (“United States”), pursuant to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346(b), alleges and states as follows:

**INTRODUCTION**

1. On April 5, 2010, Plaintiff’s husband, Charles Timothy Davis, was killed in a massive explosion at the Upper Big Branch Mine—South (“UBB Mine”) then operated by Performance Coal Company, a sub-subsidiary of the Massey Energy Company and subject to safety inspections to be performed by employees of Defendant’s Mine Safety and Health Administration (“MSHA”).

2. Subsequently, Plaintiff, before the one-year anniversary of the explosion, and pursuant to the requirements of the Federal Tort Claims Act (“FTCA”), 28 USC § 2671 *et seq.*, filed an administrative claim on behalf of her husband’s estate with the Department of Labor (“DoL”).

3. More than six (6) years later, on October 19, 2017, the United States denied the claim. A copy of the letter denying the claim is attached hereto as Exhibit “A”.

4. With the passage of so much time, Plaintiff Davis misplaced her copy of the claim document she originally submitted to the DoL. In evaluating her case prior to bringing the present action, Plaintiff, through counsel, asked that DoL kindly provide her with a copy of her original claim document. Sadly, the DoL never responded to this simple request prior to the six-month statute that began running upon the DoL’s denial of the six-year-old claim. *See Exhibit A.*

#### **PARTIES**

5. Plaintiff, who resides at 221 Delung Lane, Scarbro, Fayette County, WV, is the duly appointed Administratrix of the estate of her late husband, Charles Timothy Davis.

6. Defendant, the United States, is a sovereign state. Liability for the acts described herein is based on actions of agents and employees of MSHA, an agency of the United States, for which sovereign immunity is waived under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*

#### **JURISDICTION AND VENUE**

7. This Court may properly exercise original jurisdiction over the parties and the subject matter of this action pursuant to 28 U.S.C. § 1346(b)(1), 28 U.S.C. § 1331, and 28 U.S.C. § 2674.

8. Venue is properly laid in the Southern District of West Virginia, Beckley Division, pursuant to 28 U.S.C. § 1402(b). The events and the acts complained of giving

rise to this action occurred within Raleigh County, in this District, and the Plaintiff resides in this District.

9. West Virginia law applies to this action.

10. As noted in Paragraph 2, Plaintiff has exhausted the administrative requirements set forth in 28 U.S.C. § 2675, by submitting Form SF-95, Claim for Damage, Injury, or Death to the United States Department of Labor, Council for Claims and Compensation, Office of the Solicitor of Labor, 200 Constitution Avenue NW, Suite S4325, Washington, DC 20210, by the statutory deadline for doing same, which claim the United States denied on or about October 19, 2017, as set forth in Exhibit A.

### **BACKGROUND**

11. At approximately 3:00 p.m. on April 5, 2010, as a shift change was taking place, a blast ignited at the tail of the UBB Mine longwall operation.

12. The blast resulted when the longwall's shearer, cutting into sandstone, sent sparks into a pocket of methane that had accumulated over the preceding Easter weekend.

13. The resulting fireball then travelled to the tailgate area of the longwall, setting off massive explosions of accumulated coal dust, an explosion that ripped through more than two miles of the mine workings.

14. A total of twenty-nine coalminers died in the explosion.

15. Charles Timothy Davis was one of four bodies later discovered by mine rescue team members in the headgate entry to the longwall.

## MSHA'S ROLE IN THE EXPLOSION

16. The Governor's Independent Investigation Panel ("GIIP") appointed by then-Governor Joe Manchin and led by former MSHA Assistant Secretary of Labor J. Davitt McAteer assigned four specific failures to MSHA's role in the explosion.

17. First, per the GIIP Report, "The Upper Big Branch Mine was a gassy mine ... subject to special spot inspections ... [and] had experienced at least three major methane-related events. ... All took place in the longwall mining sections." GIIP Report, at p. 78.

18. "MSHA's responsibility, as the watchdog, was to recognize [these methane-related events] as evidence of hazards unique to this mine ... that warrant special precautions. However, officials in MSHA's Mount Hope district office did not compel (or to our knowledge even ask) UBB management to implement those recommendations. Senior officials in the Mount Hope office couldn't explain why no action was taken, but agreed in retrospect that the methane outbursts ... were extraordinary events deserving special attention. \*\*\* If MSHA has knowledge, data or evidence that a mine operator does not take all necessary precautions to protect miners' safety, MSHA *must* step in." GIIP Report, at p. 78 (emphasis original).

19. Second, per the GIIP Report, "In the seven months leading up to the disaster ... UBB Management submitted to MSHA more than 40 revisions to the mine's ventilation plan. \*\*\* MSHA managers and ventilation specialists recognized the precarious nature of UBB's ventilation system, particularly after the longwall section started in September 2009." GIIP Report, at pp.78-79.

20. Stating that MSHA ignored numerous “red flags” regarding the UBB ventilation system, the GIIP Report concluded that “MSHA is charged with doing more than reviewing plans, inspecting mines and writing citations and investigation reports. MSHA inspectors, with the guidance of their supervisors and engineering experts, must use their independent eyes to integrate information and see the cumulative effect of all the safety lapses and to develop a comprehensive enforcement strategy that includes special attention to those operators who skirt the bounds of safe operations.” GIIP Report, at p. 82.

21. Clearly, MSHA failed to do so in the days and months and even years leading up to April 5, 2010.

22. Third, per the GIIP Report, “Nearly all U.S. coal mine operators, including Massey Energy, rely solely on MSHA to sample the rock dust in all of their mines and to determine whether they have a sufficient percentage of incombustible content.

23. “An MSHA inspector is expected to collect samples of deposited dust in an underground mine at least during each quarterly inspection and additionally ‘when any doubt exists concerning adequacy of rock dust applications in the active working sections.’”

24. “This practice of rock-dusting is particularly troubling because for more than 20 years, government researchers ... and MSHA have studied and subsequently developed ... [the] coal dust explosibility meter (CDEM).” GIIP Report, at p. 82.

25. However, “no form of [the CDEM] is being used in U.S. coal mines.” GIIP Report, 82.

26. Per the GIIP Report, responsibility for that sad fact rests squarely with MSHA: “The Mine Act places ... a duty[] on MSHA to ‘develop, promulgate and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal mines ....” GIIP Report, at p. 83.

27. Despite the fact that “The Mine Act is considered a ‘technology forcing’ statute, meaning that MSHA has the authority to use regulatory action to spur technological change’ [and that] ... [t]he CDEM is fully developed, field-tested and has proved completely capable of doing the job for which it was designed[,] ... no action – regulatory or non-regulatory – has been taken to compel the industry to adopt the devices.” GIIP Report, at p. 83.

28. Finally, per the GIIP Report, “The ultimate failure of MSHA at UBB ... was the agency’s inability to see the entire picture, the inability to connect the dots of the many potentially catastrophic failure taking place at the mine – especially the mine operator’s failure to properly ventilate the mine, to control methane, to apply sufficient amounts of rock dust.” GIIP Report, at p. 83.

29. In addition, the United States’ own Independent Panel Assessment of An Internal Review of MSHA Enforcement Actions at the Upper Big Branch Mine South (the “IPA”) found fault with the agency’s inspection efforts—or lack thereof—prior to the explosion.

30. The IPA specifically considered whether: “If MSHA’s UBB enforcement performance had consistently and timely enforced the Mine Act and its applicable regulations, could it have prevented or minimized the explosion?” In answering that question, the Independent Panel Assessment found that “there were three concurrent,

critical events that directly led to the explosion” and that there were, correspondingly, “three opportunities to prevent or minimize the explosion.” IPA, at p. 7.

31. The IPA concluded that MSHA failed to adequately perform its duties at UBB, and that this failure had a causal relationship to the explosion. Sections 2 (“Preventing a Fuel Source for the Initial Gas Explosion”), 3 (“Preventing the Dust Explosion”) and 4 (“Conclusion”) are particularly relevant.

32. By way of example, with respect to preventing a fuel source for the initial gas explosion, the IPA states: “if MSHA enforcement personnel had completed their **required** enforcement actions during at least one of the four inspections, it is less likely that a roof fall would have occurred. The airflow would not have been reduced as a consequence. With the proper quantity of air, there would not have been an accumulation of methane, thereby eliminating the fuel source for the gas explosion.” IPA, at p. 8 (emphasis supplied).

33. Additionally, with respect to preventing the dust explosion, the IPA “concludes that if MSHA enforcement personnel had taken appropriate enforcement actions during the inspections in the months prior to the explosion, either dangerous accumulations of explosive coal dust would have been rendered inert, or the mine would have been idled. In short, even if there had been a gas explosion, it would have lacked sufficient fuel to trigger a massive dust explosion.” IPA, at p. 9.

34. Furthermore, commenting upon the interviews with MSHA inspection personnel, the Independent Assessment Panel concluded that “there were numerous instances in which MSHA’s enforcement personnel exhibited a lack of understanding of MSHA’s policies and procedures” and that “some interviews of MSHA supervisory



personnel suggested that at the time of the explosion, they were unaware of the inadequate quality of MSHA's enforcement performance at UBB." IPA, at p. 4.

### **COUNT I – NEGLIGENCE AND WRONGFUL DEATH**

35. Paragraphs 1 through 34 are incorporated by reference as if set forth fully herein.

36. Per the Supreme Court of Appeals of West Virginia, "The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82, Syl. Pt. 3 (1988).

37. Additionally, "A private inspector who inspects a work premises for the purpose of furthering the safety of employees who work on said premises owes a duty of care to those employees to conduct inspections with ordinary skill, care, and diligence commensurate with that rendered by members of his or her profession." *Bragg v. United States*, 230 W.Va. 532, 741 S.E. 2d 90, Syl. Pt. 4 (2013).

38. By analogy, the United States is liable here for negligently executing a duty it undertook, and for failing to exercise reasonable care to prevent harm to the Plaintiff caused by the United States' affirmative negligent conduct.

39. The United States voluntarily, specifically, physically, and actually undertook a duty to render services to the miners at the UBB Mine, including Mr. Davis.

40. The United States undertook the duty to administer the provisions of the Mine Act, which requires, *inter alia*, that MSHA perform thorough, detailed, and regular inspections of active underground mines such as the UBB Mine at prescribed intervals, in order to enforce compliance with mandatory safety and health standards.

41. The United States recognized or should have recognized that the careful rendering of those services were necessary for the protection of the miners, including Mr. Davis, and that performing those services in a negligent manner could lead to serious injury or death of the miners.

42. The Plaintiff reasonably relied upon the United States to undertake its inspections and enforcement actions in a competent and non-negligent manner, and that reliance ultimately contributed to the wrongful deaths of Mr. Davis.

43. The United States breached its duties to Mr. Davis by failing to notice and/or cite numerous blatant, fundamental, and grave violations of federal mine safety regulations, as described above, and as detailed in MSHA's own internal investigation of its actions preceding the fatal explosion at the UBB Mine. These acts and/or omissions were not only a breach of the United States' duties to the Plaintiff, but were violations of federal laws, regulations, and/or policies mandating the manner in which MSHA personnel were required to administer the provisions of the Mine Act.

44. The United States, by its acts and/or omissions, failed to exercise reasonable care in performing and rendering services to the Plaintiff, resulting in the death of Mr. Davis.

45. The United States' failure to exercise reasonable care in carrying out its inspection and enforcement activities increased the Plaintiff's risk of harm, and the United

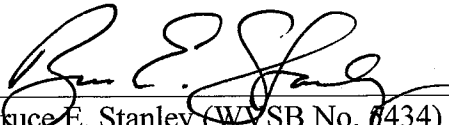
States thereafter failed to take reasonable steps to prevent harm to the Plaintiff resulting from its negligent affirmative acts.

46. The United States' acts and/or omissions were the proximate cause of and/or a substantial contributing factor in causing the Plaintiff's damages.

47. As a direct result of the United States' tortious acts and/or omissions in these matters, the Plaintiff's decedent suffered death, pain, impairment, and mental anguish, and the decedent's Estate suffered losses as set forth in West Virginia's Wrongful Death Act, West Virginia Code §§ 55-7-6(c)(1) and (2).

WHEREFORE, Plaintiff asks for a judgment against Defendant in an amount in excess of \$75,000, as well as prejudgment interest and any other relief to which she is entitled.

Respectfully submitted,



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*Attorneys for Plaintiff*

Dated: April 5, 2018

# EXHIBIT A

U.S. Department of Labor

Office of the Solicitor  
Washington, D.C. 20210



Suite S-4325  
200 Constitution Ave., NW  
Phone: (202) 693-5320  
Fax: (202) 693-5374

October 19, 2017

**CERTIFIED MAIL-RETURN RECEIPT REQUESTED**

Carolyn D. Davis, as Administratrix for  
the Estate of Charles Timothy Davis  
221 Delung Lane  
Scarbro, West Virginia 25917

Re: Tort Claim of Carolyn Davis, as Administratrix for the Estate of Charles Timothy Davis

Dear Mrs. Davis:

This letter responds to the administrative claim you filed with the United States Department of Labor (DOL) on behalf of the Estate of Charles Timothy Davis seeking 7.5 million dollars in damages for the death of your husband at the Upper Big Branch Mine on April 5, 2010. This office has carefully reviewed this administrative claim, filed pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.* and for the reasons stated below, this review discloses no liability on the part of the United States. Your claim, filed as Administratrix of the Estate of Charles Timothy Davis, is therefore denied.

A well-established principle of law is that the United State cannot be sued; this is commonly referred to as sovereign immunity. However, the United States can waive this immunity from suit by statute, as under the FTCA. This waiver of sovereign immunity under the FTCA is a limited waiver that is subject to numerous exceptions. In addition, liability of the United States under the FTCA is based on whether a private person in like circumstances would be liable under the applicable state law. 28 U.S.C. § 1346(b). "Sovereign immunity is jurisdictional in nature. Indeed, the 'terms of [the United States]' consent to be sued in any court define that court's jurisdiction to entertain the suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). See *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979); *United States v. Orleans*, 425 U.S. 807, 813 (1976).

As stated above, the basis for FTCA liability is *state* law. Violation of a *federal* law cannot be the basis for FTCA liability. *F.D.I.C. v. Myer*, 510 U.S. 471 (1994). The FTCA does not waive the sovereign immunity of the United States to allow tort claims based on alleged violations of federal statutes or regulations. See *Williams v. United States*, 242 F.3d 169, 173 (4th Cir. 2001); *United States v. Agronics, Inc.*, 164 F.3d 1343, 1346 (10th Cir. 1999); *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 536 (1st Cir. 1997); *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, (D.C. Cir. 1985). To the extent that your administrative claim is based on allegations that the Mine Safety and Health Administration (MSHA) failed to perform actions mandated by federal statutes, regulations or procedures, there is no liability under the FTCA, and thus, your claim is denied.

Your claim is also denied based upon the Discretionary Function exception to the FTCA. In passing the FTCA, "Congress was careful to except from the Act's broad waiver of immunity several important classes of tort claims," which would otherwise fall within section 1346(b)'s reach. *United States v. Varig Airlines*, 467 U.S. 797, 808 (1984). One of the exceptions to the FTCA's surrender of sovereign immunity is the Discretionary Function exception which bars "any claim...based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). If the Discretionary Function exception applies, the claim does not fall within the FTCA's waiver of sovereign immunity, and federal courts lack jurisdiction to entertain the claim. *Estate of Bernaldes v. United States*, 81 F. 3d 428 (4th Cir. 1996).

The government's actions in inspecting the Upper Big Branch Mine South, and in identifying, recording or correcting any hazards, met the required elements found in the Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801 *et seq.* Under the Mine Act, the Secretary is required to make inspections of each underground mine "in its entirety at least four times a year." 30 U.S.C. § 813(a). Although you assert negligent inspections, inspectors who were inexperienced, and inadequate training of MSHA employees, you have not specifically stated any mandatory duty regarding inspection, or training of MSHA inspectors, that has been violated. There is no dispute that MSHA conducted the requisite inspections. The manner of the inspection; choosing which inspectors to inspect the mine; the manner and sufficiency of those inspectors' training; and judgments made by the inspectors during the inspection fall within the FTCA's Discretionary Function exception, even if MSHA "clearly should have known" of the hazards as alleged in your claim. 28 U.S.C. § 2680(a). The federal government's actions in training its employees and in inspecting the UBB mine required it to exercise considerable discretion in order to balance a number of important and potentially conflicting policy considerations. Those actions involved human judgment in determining how best to train the inspectors to determine whether safety violations exist; the policy considerations of maintaining the health and safety of the workers at the UBB mine; and utilizing the limited governmental resources available to the agency and its inspectors in conducting the inspections. These types of governmental actions are the types of governmental functions that the Discretionary Function exception was designed to protect from suit. *See generally Estate of Bernaldes v. United States*, 81 F. 3d 428 (4th Cir. 1996). The Discretionary Function exception applies "whether or not the discretion involved be abused." 28 U.S.C. §2680(a); *Dalehite v. United States*, 346 U.S. 15, 33-34 (1953).

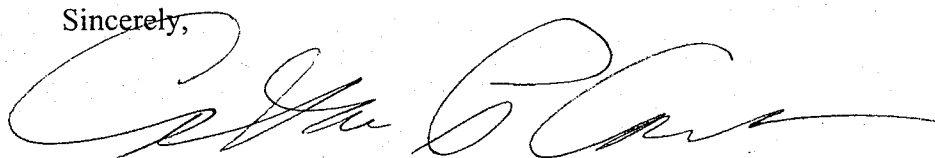
Finally, your claim is denied because the Government's alleged negligence has not created a cause of action under the state law of West Virginia. *See generally Bragg v. United States*, 230 W. Va. 532, 741 S.E. 2d 90 (2013). As previously stated, the basis for FTCA liability is *state* law. West Virginia has long held that for negligence to be actionable it "must be the proximate cause of the injury complained of and must be such as might have been reasonably expected to produce an injury." *McCoy v. Cohen*, 149 W. Va. 197, 140 S.E.2d 427 (1965); *Barbina v. Curry*, 221 W. Va. 41, 650 S.E.2d 140 (2007). Under West Virginia law, "the proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not have occurred. *Sergent v. City of Charleston*, 209 W. Va. 437, 549 S.E. 2d 311, 320 (2001); *Judy v. Grant County Health Dept*, 210 W. Va. 286, 557 S.E.2d 340 (2001). Although a "tortfeasor whose negligence is a substantial factor in bringing about injuries is not

relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct,” *Anderson v. Moulder*, 183 W.Va. 77 (1990), “[g]enerally a willful, malicious, or criminal act breaks the chain of causation.” *Yourtee v. Hubbard*, 196 W. Va. 683, 690 (1990); *Sergent* at 321. In this case, I find that criminal acts committed by Massey’s Don Blankenship break the chain of causation. On December 3, 2015, Don Blankenship was convicted of conspiracy to willfully violate MSHA standards. On January 19, 2017, the Fourth Circuit affirmed the District Court’s decision. *United States of America v. Blankenship*, 846 F. 3d. 663 (4th Cir. 2017) *cert denied* 583 U.S. \_\_\_. The Fourth Circuit noted that Blankenship’s conviction stemmed from his conspiring to violate, among other regulations, “(1) mine ventilation regulations, (2) mine-safety examination requirements, (3) regulations regarding support of roof and walls, and (4) regulations governing accumulation of explosive coal dust.” *Id.* at 668. The Court noted that despite MSHA issuing many citations to UBB in 2009 and 2010, “including some related to improper ventilation and accumulation of combustible materials – problems that were key contributing factors to the accident ... [Blankenship] told ... Massey employee in charge of the Upper Big Branch mine that ‘safety violations were the cost of doing business’ and that it was ‘cheaper to break the safety laws and pay the fines than to spend what would be necessary to follow the safety laws.’” *Id.* at 666-667.

The Mine Act places responsibility for compliance with health and safety regulations upon the mine operator. *See* 30 U.S.C. § 801(e). The Act provides that “the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe] conditions and practices in such mines.” *Id.* Even though MSHA regularly (as required by the statute) inspected the UBB mine for compliance with MSHA rules and to promote a safe working mine, Blankenship intentionally worked to thwart MSHA’s efforts. Blankenship was aware – due to MSHA inspections and many resultant citations - that unsafe conditions existed that were key contributing factors to the accident, but he chose to run his mine ignoring the Mine Act and its implementing regulations/procedures. Instead of working with MSHA, his instructions to Massey employees demonstrate intentional non-compliance to increase profits by ignoring MSHA rules. Consequently, to the extent that Massey’s actions at the UBB mine rose to the level of criminal conduct, as demonstrated by Blankenship’s conviction, any chain of causation due to MSHA’s alleged negligence in its inspections was broken. Under the FTCA (analyzing the applicable law of West Virginia), MSHA’s actions were not the proximate cause of Charles Timothy Davis’ death.

With respect to this denial under the FTCA, you are advised of your right to file suit in an appropriate United States District Court within six months of the date of the mailing of this letter if you are dissatisfied with the results of this determination.

Sincerely,



CATHERINE P. CARTER  
Counsel for Claims and Compensation