15-1040

RPF/klc: 9/14/15

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

MICHAEL HUMMEL, et al., Plaintiffs, vs. **CONSOL ENERGY, INC.,** Defendant.	CIVIL ACTION NO. 14-C-57K Judge Cramer

ORDER

The parties hereto have jointly requested a W.Va. Rule of Civil Procedure 54(b) determination that the Summary Judgment Order finding breach of contract entered on July 27, 2015 is a Final Order and based upon the Stipulations of the parties, all damages are now rendered to be mechanical and ministerial computations.

The Court has reviewed the parties' joint request and believes the same to be proper.

Therefore, it is accordingly ORDERED that the Judgment Order of July 27, 2015 granting Summary Judgment to Plaintiffs be certified and be entered as a Final Judgment which may be appealed.

ENTERED this 22nd day of SEPTEMBER, 2015.

Jeffrey W. Cramer, Judge of the
Circuit Court of Marshall County, WV

{00153494-1}

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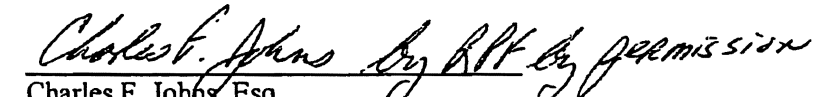

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RPF/kle 05/07/15

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

MICHAEL HUMMEL; JESSE AVERY; JOHN HORES; ROBBIE MUNDY; ANDREW SIMPSON; JOHN BUSHOVISKY; JOHN CALHOUN; DAVID POLINSKI; MIKE SIKORA; JOHN CAMPBELL; MICHAEL MOORE; CHARLES BRADLEY RACER; BART MICKEY; LANGSTON SHAFFER; CHAD SPANO; SHAWN BAUM; MIKE SIMPSON; PAUL CLEMENTS; JAMES BLAND; WILLIAM BALLOG; TIM FERGUSON; JOHN CARR; ED LEE; NICHOLAS VUCHENICH; THEODORE PERKINS; JAMES THOMAS; BRIAN NEEHOUSE; BRANDEN SAMPSON; JACK E. CLARK; BRIAN COOEY; ERIK HORNBECK; JOHN BESS, ANTHONEY CARPENTER; RICHARD MELLOTT; SCOTT MEADOWS; GARY DURBIN; MARK BISSETT; and THOMAS SCHAD,

Plaintiffs,

vs.

CONSOL ENERGY, INC.,

Defendant.

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CIVIL ACTION NO. 14-C-57K.

Judge Robert Stone
Judge

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On the 24th day of April, 2015, came the Plaintiffs by and through their attorneys, Robert P. Fitzsimmons and Clayton J. Fitzsimmons of the Fitzsimmons Law Firm PLLC and Anthony I. Werner and Joseph J. John of the John & Werner Law Offices, PLLC and, as well, came Defendant Consol Energy, Inc., by and through its attorney, Charles F. Johns of Steptoe & Johnson PLLC.

THEREUPON, the Court heard arguments on behalf of all parties on cross Motions for Summary Judgment. The Court has reviewed the Memorandums, Responses, and Replies of the parties in reference to each of their Motions for Summary Judgment as well as considered the pleadings and arguments of counsel and supplemental exhibits.

Based upon the pleadings and arguments, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiffs are 46 coal miners who worked for corporations that were wholly-owned by Consol Energy, Inc.

2. Murray Energy Corporation owned Ohio Valley Resources, Inc., which was a wholly-owned subsidiary of Murray Energy Corporation.

3. On December 5, 2013, Ohio Valley Resources, Inc. and its parent corporation, Murray Energy Corporation, purchased all of the issued and outstanding common stock of Consolidation Coal Company (hereinafter "CCC"), a wholly-owned subsidiary of Consol Energy, Inc. (hereinafter "Consol Energy"). By virtue of this purchase agreement, CCC and its assets, including various subsidiary corporations of CCC, became the exclusive assets of Ohio Valley Resources, Inc. and Murray Energy Corporation (hereinafter "Murray") *See* Supplemental Exhibits C, D, and E attached to Plaintiffs' Memorandum in Support of Motion for Summary Judgment.

4. At all times material herein, Plaintiffs were never employees of Consol Energy, but rather, were employees of CCC's subsidiary corporations, including by way of example, McElroy Coal Company, Inc., Shoemaker Coal Company, Inc., and three other mine companies

(hereinafter the subsidiary corporations).

5. For years prior to the sale at issue, Plaintiffs received and participated in an "Equity Incentive Plan" of Consol Energy. *See* Exhibit A attached to Plaintiffs' Memorandum in Support of Motion for Summary Judgment. During this time, and all material times, Plaintiffs were employees of the subsidiary corporations and never employees of Consol Energy.

6. The Plan, as written, indicated it was a Consol Energy plan and in its definition section, states that the word "Company" shall mean Consol Energy. *See* Exhibit A, p. 17. Nowhere in the agreement is there any limitation upon or additional definitions of the word "Company." Further, nothing in the agreement indicates or suggests that the definition of Consol Energy was not intended to encompass all subsidiary corporations which employed Plaintiffs.

7. A clear reading of the Plan, which was applied by Plaintiffs' employers (the subsidiary corporations) for years prior to the purchase date, requires the inclusion of Consol's subsidiary corporation within the definitions of "Company" and/or "Consol Energy, Inc." If Consol's subsidiaries are not included within those definitions, then none of these Plaintiffs, nor any other employees of the subsidiary corporations of Consol Energy would have ever received an incentive bonus. Such an interpretation is unreasonable, illogical and nonsensical as well as inconsistent with the entire history of the Plan.

8. The purpose of the Plan was three-fold: (1) *namely,* to attract and retain key employees of the company and <u>ITS AFFILIATES</u>; (2) motivate employees by performance-related incentives and; (3) to enable employees to participate in long-term growth and financial success of the company. *See* Plan, Exhibit A, p. 1.

9. Each year an award would be made to the employees including all Plaintiffs in

terms of Restricted Stock Units ("RSUs").

10. The payment of an RSU award would be spread out over a three-year period. By example, if an employee is given an award of 99 RSUs in 2010, then he/she would receive 33 units each year for the next three consecutive years (2011, 2012, 2013). According to the Plan, an "Award Agreement" would accompany the award and would "specify the terms and conditions of the award and any rules applicable thereto." Employees/Plaintiffs were required to sign the Award Agreement and agree to all of the terms and conditions. *See* Section 14 of the Plan.

11. The Plan specifically provided that the awards were to be subject to the provisions of Section 409A of the Treasury Regulations. *See* Plan, Section 14 General Provisions.

12. Additionally, the Plan provided for a definition of "Change in Control" which was defined, in part, . . . "as a change in the ownership or EFFECTIVE CONTROL OF A CORPORATION, or a change in the ownership of a substantial portion of the assets OF A CORPORATION. . . within the meaning of Treasury Regulation §1.409A-3(i)(5), and SHALL BE INTERPRETED AND CONSTRUED TO EFFECTUATE SUCH INTENT." *See* Plan Section 16, definition of "Change in Control." [Emphasis added]. *See* Exhibit A, p. 17.

13. Upon the awarding of RSUs each year, the employees/Plaintiffs would receive a letter requiring the employee's signature and agreement. *See* Exhibit B attached to Plaintiffs' Memorandum in Support of Motion for Summary Judgment.

14. The letter award identifies Consol Energy, Inc. (INCLUDING ITS SUBSIDIARIES THE "COMPANY") [Emphasis Supplied]. *See* p. 1 of letter award, Exhibit B. The letter award then requires that the employee agree to the terms and conditions attached to the

Letter Award in order to receive their RSUs over the next three year period.

15. A section within the terms and conditions of the Letter Award provides that the employee will obtain his/her full award even if he/she is no longer employed by the company before the full award has been paid. This section is titled "ACCELERATION OF VESTING EVENTS". It indicates that employees may exercise their right to retire as well as 2 other conditions beyond the employees control, namely a reduction in work force or a "CHANGE OF CONTROL" which will not affect their right to receive their full award. These acts do not disqualify the employee from receiving their full award including any portion that had not been paid when the described act occurred.

16. Setting aside "Change of Control" for the moment, the other two acts all directly involve the subsidiary corporation – the subsidiary where each Plaintiff worked and would either retire from or be laid off due to a reduction in work force. The additional event that preserves payment of the full award is a "Change of Control." Because "change of control" is within the same provision as the other two preserving events, it should be interpreted no differently. This provision alone demonstrates that the focus of each act within this section must be applied to the employing company which in this case are the subsidiary corporations. No other interpretation is reasonable.

17. Despite Plaintiffs all working for subsidiary corporations of Consol Energy, the terms and conditions all specifically utilized the word "Company." Thus, the only reasonable interpretation of Consol Energy must include the employers/subsidiary corporations. For example, the terms and conditions listed within "Acceleration of Vesting Events" indicate that the RSUs shall be paid to the employee, even though he does not remain with the company if he

separates from service at age 62, takes early retirement at age 55, dies or is laid off because of a reduction in force. This section would never apply to any of the RSU award recipients if Consol's interpretation that "company" means only the parent corporation - Consol Energy, Inc. To make any sense of the Plan and terms and conditions of the award letter, the words "company" and "Consol Energy, Inc." must include each subsidiary and employing company. If Consol intended otherwise they could have easily said so, *e.g.* "Consol Energy Inc. means only Consol Energy, Inc. and none of its subsidiary companies."

18. The letter award also requires new consideration to be paid by each employee, including an agreement that the employee not compete for a period of two years after termination of employment. Additionally, the employee must sign and agree to protect and hold secret proprietary information. *See* Exhibit B, pgs. 5, 6. These obligations were personally signed by Plaintiffs and would be binding agreements after the sale/change of control.

19. As written and utilized in the Letter Award and its terms and conditions, the word "Company" can only fairly be read as meaning Consol Energy, Inc. and its subsidiaries, namely the employing company of each of these Plaintiffs. This is also consistent with the Plan in its use of the word "affiliates" and the Letter Award's clear acknowledgment that Consol Energy, Inc. "includes its subsidiaries."

20. To the extent there is any ambiguity or conflict, the letter award/agreement specifically indicates that the applicable terms and provisions of the agreement will govern and prevail. *See* Exhibit B, p. 6.

21. Consol Energy, Inc. was the author of both the Plan and the Letter Award (Exhibits A and B), and there is no fact indicating that Plaintiffs in any way participated in

drafting the Plan and/or the Letter Award or its terms and conditions.

22. Treasury Regulation §1.409A-3(i)(5) is referenced by Consol in the Plan and Award Letter and its provisions must be complied with as indicated throughout the Plan and Letter Award. As can be seen by the examples in the Treasury Regulations, the focus in determining change of control for a company (downstream analysis) is upon the employer of the person affected. One of the specific examples in the Treasury Regulations was described as follows:

> "Corporation A is a majority shareholder of Corporation B, which is a majority shareholder of Corporation C. A change in ownership of Corporation B constitutes a change in control event to service providers performing services for Corporation B or Corporation C, and to service providers for which Corporation B or Corporation C is solely liable for payments under the plan (for example, former employees), but is not a change in control event as to Corporation A or any other corporation of which Corporation A is a majority shareholder unless the sale constitutes a change in the ownership of a substantial portion of Corporation A's assets (see paragraph (i)(5)(vii) of this section)."

23. Applying the Purchase Agreement at issue to the Internal Revenue Regulation 409A and its example, Consol Energy, Inc. is "Corporation A." Consolidation Coal Company ("CCC") is "Corporation B" and all of the corporations that Plaintiffs worked for would be classified as "Corporation C," including the employing subsidiary corporations.

24. Analyzing the facts of this case under the IRS example, it is clear that a change in control affected each of the Plaintiffs' employing companies, thereby entitling them to the full (one, two or three-year) benefits of each of the RSUs that had been awarded to them and which they had earned.

25. Defendant's argument that the word "Company" can only and exclusively mean Consol Energy, Inc., and excludes the employing/subsidiary corporations, is not reasonable

based upon a fair reading of the Plan and the Letter Award. If one applies Defendant's interpretation of the word "Company," there would never be an instance when these Plaintiffs or other subsidiary corporation employees would have received RSUs in the past, which is completely contrary to the history in this case and the manner in which the incentive plan operated for years and was intended to be applied

26. Each of the employing/subsidiary companies received new and substantial considerations, including covenants not to compete and non-disclosure of proprietary information from each of their employees, in exchange for the RSUs. Each of the employees are obligated to comply with those new covenants even after the purchase agreement.

27. Both the Plan and the Letter Award agreement should, in fairness, be read in their entirety to apply not only to employees of Consol Energy, but to all employees of all subsidiary corporations, when determining "change of control." It is clear that such "change of control" should be measured by the employing company of each Plaintiff and RSU recipient and not the parent company.

28. Here, there was clearly a "change of control" in Consolidation Coal Company and, as indicated in the example of the Treasury Regulation, all downstream subsidiary corporations, including each of the corporations for which each Plaintiff was employed.[1]

29. A clear reading of the Plan, Award Letter and terms and conditions, indicates that the announced purposes of the incentive plan would be totally frustrated if the "change of control" analysis was limited to the parent corporation, Consol Energy. The only reasonable reading is that the definitions of "company" and "Consol Energy, Inc." include all of the

[1] Defense counsel indicated that one of the Plaintiffs has received his RSUs in total. Plaintiffs and Defendant can

subsidiary corporations and every Plaintiff who was employed by any subsidiary of CCC experienced a "change in control", thereby entitling him/her to "Acceleration of Vesting Events" (all of the shares subject to your award will vest *(i.e.*, will not be subject to forfeiture))". Exhibit B, p. 2.

CONCLUSIONS OF LAW

1. Summary judgment is designed to effect prompt disposition of controversies on their merits without resort to lengthy trial, if there essentially is no real dispute as to salient facts or if it only involves questions of law. Larew v. Monongahela Power Co., 199 W.Va. 690, 487 S.E.2d 348 (1997).

2. A Motion for Summary Judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Grayiel v. Appalachian Energy Partners, 230 W.Va. 91, 736 S.E.2d 91 (2001).

3. The parties agree there is no genuine issue of material fact and the issue presented is a question of law.

4. Subject to any underlying factual determinations which may arise, it is the province of the Circuit Court, and not of a jury, to interpret a written contract. Wood v. Accordia of West Virginia, Inc., 217 W.Va. 406, 618 S.E.2d 415 (2005); Also see Toppings v. Rainbow Homes, Inc., 200 W.Va. 728, 490 S.E.2d 817 (1997).

5. Defendant Consol Energy prepared the "Incentive Plan" (Plaintiffs' Exhibit A) and the "Award Letter" which includes terms and conditions (Plaintiffs' Exhibit B).

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agree upon this, or if there is a dispute, it can be submitted to the Court for resolution as to whether that individual Plaintiff had received full benefits of the RSUs.

6. Any ambiguities or uncertainties in a written contract should be resolved against the party who prepared it. Syl. Pt. 1 Charleston v. Chevrolet Motor Co., 115 W.Va. 25, 174 S.E. 570 (1934).

7. A clear reading of the Incentive Plan and Letter Award indicates that the terms "Company" and "Consol Energy Inc." include all subsidiary companies, including Consolidation Coal Company and its subsidiaries such as McElroy Coal Co., Inc., Shoemaker Coal Co., Inc., etc.

8. This interpretation is corroborated by the actual history of the Plan, and its use of the term "Affiliates" in the introductory paragraph of the Plan together with its specific declaration in the introductory paragraph of the Letter Award which identifies "Consol Energy, Inc. (including its subsidiaries, the "Company".)" See Exhibit B.

9. To the extent terms and conditions differ, the terms indicate that the Letter Agreement controls (Plaintiffs' Exhibit B, p. 6, last three lines). However, the Letter Agreement also says the Plan would govern (Plaintiffs' Exhibit B, p. 1). This resolution clause is in and of itself renders the terms ambiguous and, therefore, to the extent any ambiguity exists, it must be interpreted most favorably to Plaintiffs.

10. Treasury Regulation 1.409A-3(i)(5)(ii) identifies and defines "relevant corporation" and clearly supports Plaintiffs' position and contention in this case. The Treasury Regulation states, in pertinent part, as follows,

> (ii) *Identification of relevant corporation* - (A) In general. To constitute a change in control event with respect to the service provider, the change in control event must relate to -
>
> > (1) The corporation for whom the service provider is performing services at the time of the change in control

event;

11. Both the Plan and Letter Agreement discuss, refer to, and apply Internal Revenue Regulation 1.409A-3(i)(5) which provides examples for "change of control" of corporations. Applying the IRS example here clearly demonstrates that each Plaintiff experienced a change of control when Murray purchased Consol Energy Inc.'s CCC (which owned multiple subsidiary companies which were the employing companies of each Plaintiff).

12. Each Plaintiff earned and was promised RSUs that had not been paid at the time of Murray's purchase of CCC on December 5, 2013.

13. The Incentive Plan provides that each employee would be paid their RSUs if the company experienced a "change of control."

14. A fair reading of the Plan and Letter Award indicates employees should receive their unpaid awarded RSU's if the employers experienced a change of control, including all subsidiary companies of Consol Energy, Inc. which would include all of Plaintiffs' employers, namely the subsidiaries of Consolidation Coal Company. Such is a fair and reasonable reading of the Plan and Letter Award.

15. Although this Court believes a reasonable interpretation of the Plan and Letter Award requires the Plan to pay RSU's when there has been a change in control in Plaintiffs' employers who are subsidiaries of CCC, if any ambiguity exists in the use of the terms "Company" and/or "Consol Energy, Inc.," that ambiguity must be interpreted most favorably in favor of Plaintiffs. In such event, Plaintiffs would still be entitled to their RSUs because of a "change in control" of their employer and Consol's subsidiary.

16. In finding that a reasonable interpretation of the Plan and Letter Award requires

application of the change of control event to Plaintiffs' employer and Consol's subsidiaries, the Court considered the IRS example in Regulation 409A which is required to be followed by the applicable documents. This example clearly demonstrates that there was a change in control.

17. Additionally, Consol's requested interpretation of the word "Company" and literal reading of the definition "Consol Energy, Inc." is totally inconsistent with the history and purpose of the agreement. If one were to apply such a narrow and restricted meaning to the "Acceleration of Vesting Events" section in the Letter Award, then that entire section (which preserves payment of RSU's under certain situations (retirement, early retirement, reduction in force)) would never apply because all Plaintiffs worked for subsidiaries and not the parent company Consol Energy, Inc. This interpretation and result is illogical and patently unfair.

18. There is no reason that the document's definition of "Company" as "Consol Energy, Inc." is anything more or less - Consol Energy, Inc. is a corporation comprised of multiple subsidiaries including CCC, McElroy Coal Co., Inc., Shoemaker Coal Co., Inc., etc. If Consol wanted to limit the definition of "company" to only Consol Energy, Inc., excluding all subsidiaries, it could and should have done so. Instead, a fair interpretation of "Company" and "Consol", together with actual application of such definition throughout the Plan and Letter Award, clearly reveals that the focus for vesting events, including a "change of control," must focus on the employing company (the subsidiaries) for each participant (Plaintiffs).

19. Each of Plaintiffs' employers experienced a "change of control" on December 5, 2013 when Murray purchased Consolidation Coal Company and its subsidiaries.

20. The vesting (as that term is used in the Plan and Letter Award) of each Plaintiff's RSUs that had been awarded prior to December 5, 2013, accelerated as of December 5, 2013,

upon the purchase by Murray Energy.

21. Consol Energy, Inc. owes each Plaintiff all RSUs awarded to him/her prior to December 5, 2013.

22. Judgment interest shall accrue on such RSUs' value as of March 15, 2014 until paid in full. Plaintiffs may request a hearing to determine a date prior to March 15, 2014 when the RSUs would have been "administratively practical" for delivery. The parties may conduct discovery on this issue if the parties cannot agree to a date when the RSUs should have been delivered.

Based upon the Findings of Fact and Conclusions of Law, it is accordingly

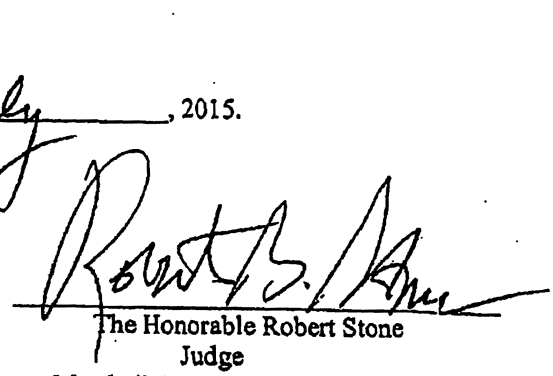
ORDERED that Plaintiffs' Motion for Summary Judgment is granted and Defendant's Motion for Summary Judgment is denied. It is further

ORDERED that all RSUs awarded to each Plaintiff and not otherwise paid shall be delivered to each Plaintiff by and through their attorneys. It is further

ORDERED that prejudgment interest shall accrue from at least March 15, 2014 on the value of the RSU's as of that date and the parties may request a hearing or otherwise agree to the date when it was administratively practical to deliver the RSUs prior to March 15, 2014 and after December 5, 2013. It is further,

ORDERED that discovery shall continue to determine or assess damages incurred by the plaintiffs on the contract claim and full discovery on the remaining causes of action shall likewise continue.

ENTERED this 27th day of July, 2015.



The Honorable Robert Stone
Judge
Marshall County Circuit Court
West Virginia