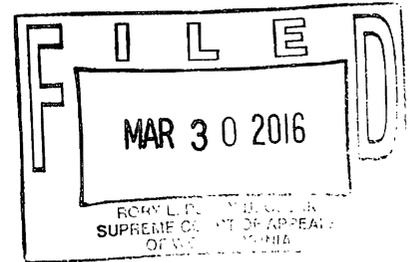


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET NO. 15-1040



CONSOL ENERGY INC.,

*Defendant Below, Petitioner,*

v.

MICHAEL HUMMEL, ET AL.,

*Plaintiff Below, Respondents.*

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**REPLY BRIEF OF PETITIONER**

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## I. INTRODUCTION

Under the guise of fairness and justice, Respondents ask the Court to re-write the documents at issue so that they may receive unvested restricted stock units (“RSUs”) that otherwise would not vest under the plain terms of the controlling agreement. Respondents do not hide their alteration of the language. In their brief, Respondents twice replace the actual wording of the relevant documents with language that they want the documents to say. This strained reading does not comport with the plain language set forth in the documents. Ultimately, this Court must decide whether it will affirm the judgment of the Circuit Court—a decision that altered the clear meaning and intent of the parties as expressed in an unambiguous written contract, or apply the plain language of the Plan documents and reverse the Circuit Court.

The Letter Regarding Restricted Stock Unit Award Under CONSOL Energy Inc. Equity Incentive Plan, which included a Terms and Conditions attachment (together, “the Award Agreement”), is clear that the definition of Change in Control for accelerated vesting of the RSU award is as defined in the CONSOL Energy Inc. Equity Incentive Plan (“the Plan”), and the Plan’s definition of Change in Control is with respect to the “Company,” which is defined in the Plan as “CONSOL Energy Inc.” The Award Agreement does not modify the definition of Change in Control set forth in the Plan. This is evidenced by the fact that, in contrast to the first three (3) accelerated vesting events set out in the Award Agreement (which specifically relate to a termination of employment with CONSOL and its subsidiaries for purposes of vesting and thus use the term “Company” as defined in the Award Agreement), the word “Company” is conspicuously and intentionally absent from the Change in Control vesting trigger (which does not relate to termination of employment but rather a fundamental transaction, as specified in the Plan and related to the parent company, CONSOL Energy Inc.). Further, the language of the

Award Agreement to this accelerated vesting event expressly refers to the definition of “Change in Control” **in the Plan** to eliminate any possible ambiguity as to the meaning of “Change in Control” for purposes of the Award Agreement (even though there was no other definition for this term in the Award Agreement).

Moreover, CONSOL’s Board of Directors had and used its full and binding authority to interpret the term “Company” under the Plan as including only CONSOL and not its subsidiaries. This alternative ground for reversal is set forth in the record and should be considered on appellate review. Based on the Board of Directors’ interpretation and pursuant to a plain reading of the applicable terms of the Award Agreement and the Plan, the 2013 sale did not entail the sale of all or substantially all of CONSOL’s assets and no Change in Control occurred. Thus, CONSOL did not commit a breach of contract by not fully vesting the Respondents’ RSU awards in connection with the 2013 sale.

## II. ARGUMENT

### A. Petitioner Complied with All Terms of the Plan and Did Not Breach Its Contracts with Respondents

In their brief, Respondents inappropriately seek to expand the meaning of terms in the Award Agreement.<sup>1</sup> Rather than look to the plain language of the Award Agreement, Respondents substitute the language they desire into the Award Agreement to reach their desired result. This is in contrast to the straightforward reading of the documents advocated by Petitioner. The straightforward reading is as follows. The Award Agreement provides for four

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<sup>1</sup> Pursuant to the West Virginia Rules of Appellate Procedure, “briefs are due within the time frame set forth in the scheduling order.” W. Va. R. App. P. 10(b). The Court’s scheduling order in this case provided that the Respondents’ Brief was due on or before March 10, 2016. Although Respondents mailed their brief prior to the scheduling order deadline, the Respondents’ Brief was not filed until March 11, 2016. Briefs “are deemed filed when the requisite number of documents are received in the Clerk’s office, not when mailed.” *Id.* Failure to comply with the scheduling order can result in sanctions or dismissal of the appeal. Because Respondents failed to comply with the scheduling order, Petitioner requests that Respondents’ brief be struck from the Record. W. Va. R. App. P. 5(e).

events which result in accelerated vesting of the RSU awards. At issue here is the fourth event, “completion of a Change in Control (as such term is defined in the Plan).” A “Change in Control” for purposes of the Plan occurs upon the sale of all or substantially all of the Company’s assets. A.R. 0089. The Plan defines “Company” as “CONSOL Energy Inc.” Id. Accordingly, the plain language of the Plan requires the sale of all or substantially all of CONSOL Energy Inc.’s assets for a Change in Control to occur.

In order to advance their argument, Respondents suggest that this Court look not to the plain language of the Award Agreement, but instead to the language they substitute. While the Respondents correctly set out the four (4) Acceleration of Vesting Events on page three (3) of their brief they go on to inaccurately summarize those triggering events on page ten (10). When they summarize the triggering events, they quote sections of the Award Agreement in items 1, 2 and 3 that include the word “Company” and put that word in bold type. In their description of the fourth acceleration event however they add additional language **that is not in the Award Agreement** so that they can include the word **Company** in bold type even though the Award Agreement does not include that language. In the original document, the fourth acceleration event **does not** include the language “or a sale of all or substantially all of the **Company’s** assets” as set forth on page ten (10) of Respondents Brief. That language was added by Respondents. Using their altered language, the Respondents go on to state that “[a]ll four events relate to an occurrence involving the term ‘Company’ despite the fact that the fourth accelerating event does not use that language or the word “Company.”

On page 17, Respondents’ alteration/misinterpretation of the document language is even more apparent. They again list the four (4) accelerating events but now have completely removed any language contained in the Award Agreement from their description of the fourth accelerating

event. The fourth accelerating event, as set forth in the Award Agreement, is a “completion of a Change in Control (as such term is defined in the Plan).” Respondents leave out all of this language and instead describe the fourth accelerated vesting event as “a sale of all or substantially all of the *Company*’s assets.” This suggests that the Award Agreement uses the word “Company” and its definition of that term should apply rather than the definition set forth in the Plan. Respondents’ proposed reading of the Award Agreement is inconsistent with, and contrary to, the plain language used.

The Award Agreement is clear that its definition of Company applies only to the first three accelerated vesting triggers. The first three events all expressly use the term “Company,” whereas the fourth event does not, but rather specifically references the Plan. Of course, Petitioner could have drafted the Award Agreement to include the term “Company” in the fourth accelerated vesting event. It did not. If Petitioner had intended for the change of control of one of its subsidiaries to trigger the fourth accelerated vesting event, it could have easily incorporated the language Respondents substitute. The plain language, however, directs the reader of the Award Agreement to the Plan.

Respondents also assert that if the fourth event applies to a change of control of Petitioner, the first three vesting events could never happen. This is not true. As explained in Petitioner’s brief, the term “Company,” as defined in the Award Agreement, is used in connection with the first three events. Unvested RSUs vest early when the employee of CONSOL Energy Inc. or one of its subsidiaries, (1) retires at age 62; (2) retires at age 55, if eligible, or (3) dies or is part of a reduction in the workforce. Respondents contend it is illogical, unfair, and unreasonable for unvested RSUs to vest early as a result of a change in control of CONSOL Energy Inc., but not as a result of a change in control of one of its subsidiaries.

Neither the Award Agreement nor the Plan provides Respondents a right to make such a demand. Nothing about the plain language of the Award Agreement is illogical. Rather, Plaintiffs are not happy with the contract and now desire to rewrite the language. The Court cannot affirm such an action.

In their brief, Respondents incorrectly argue that the paragraph in the Award Agreement immediately following the “Change in Control” provision requires early vesting in the situation of a change in control occurring with respect to a subsidiary. That paragraph provides that in no event will any special vesting of shares occur if (1) the employee is terminated for cause; or (2) the employee leaves the Company for any reason other than in connection with one of the accelerated vesting events mentioned in the Award Agreement. Nothing in that paragraph guarantees early or special vesting if a CONSOL subsidiary experiences a change in control. In fact, this language expressly makes clear that, unless one of the specific, four accelerated vesting events has occurred, a person will not vest in his or her RSU award if he or she discontinues employment with CONSOL and its subsidiaries before the award has become fully vested.

Finally, Respondents continue to site an irrelevant example from Treasury Regulation § 1.409A-3(i)(5), yet ignore that Section 409A’s purpose is to address payment and tax treatment issues, *not* vesting issues. Vesting issues are covered by the Plan documents and are contractual issues, not Internal Revenue Service issues. In situations where there is no vesting, as in the Respondents’ case regarding the disputed shares, Section 409A is not relevant.

In conclusion, Respondents employ emotional rhetoric in order to mask the simplicity of the dispute. Petitioner is accused of many things, from breaking promises to acting unfairly, unjustly, and reprehensibly. These allegations are unfounded and false. Petitioner respectfully requests that the Court look beyond the emotional pleas and instead look to the substance of the

documents. At its core, this case is a matter of simple contract interpretation. To interpret the contract in any other way than that suggested by Petitioner will lead to an unfair and unjust result.

**B. The Court May Consider Whether Petitioner Rightfully Exercised Its Fully Binding Discretion Not to Accelerate the Vesting of Unvested RSUs**

Petitioner did not waive its ability to argue that it has discretion not to accelerate the vesting of unvested RSUs. To be clear, Petitioner does not claim that it utilized its discretion in order to prevent issuance of *vested* RSUs. Petitioner instead argues that the Board chose to respect and employ the express definitions set forth in the Plan, and, to the extent any of those terms differed under the Award Agreement, the Board was correct in utilizing the Plan's definitions. See A.R. 0151 (emphasis added) (to the extent the terms of the Award Agreement "differ in any way from the terms set forth in the Plan, *the terms of the Plan shall govern.*"). This is not a new argument. Indeed, Petitioner has asserted from the beginning that § 409A, as a tax regulation, does not regulate vesting issues but does acknowledge the fact that the employer has *discretion* to limit the definition of change in control. A.R. 0754, 0821.

Additionally, the West Virginia Supreme Court is "not wed . . . to the lower court's rationale, but may rule on any alternate ground manifest in the record." Conrad v. ARA Szabo, 198 W. Va. 362, 369, 480 S.E.2d 801, 808 (1996). This is true where the Circuit Court sets forth factual findings sufficient to permit meaningful appellate review. In this case, the Circuit Court's factual findings allow for meaningful appellate review of this issue. Specifically, the Circuit Court referenced the Plan's requirement that Petitioner **interpret** and **construe** whether a Change of Control occurred. A.R. 0880. The Circuit Court said that it was viewing the Plan and the Award Agreement in their entirety. A.R. 0884. This would necessarily include those portions of the Plan giving the Board of Directors full and binding authority over interpretations

under the Plan. It also specifically noted that “nowhere in the agreement is there any limitation upon or additional definitions of the word ‘Company.’” A.R. 0879. In addition, the Circuit Court said that it considered the “entire history of the Plan.” Id.

Furthermore, Petitioner is not asking this Court to review documents not made part of the record. When the parties stipulated to the Circuit Court that all matters not covered by the Circuit Court’s order were resolved, the parties explicitly agreed that the Court record would be supplemented with the Unanimous Written Consent of the Compensation Committee. A.R. 0913. Judge Cramer approved the stipulation and the Unanimous Written Consent of the Compensation Committee became part of the record. A.R. 915–16. Accordingly, it may be considered by the Court on appeal.

C. Petitioner Rightfully Exercised Its Fully Binding Discretion Not to Accelerate the Vesting of Unvested RSUs

As a matter of law, the contract language of the Plan expressly granted CONSOL’s Board of Directors full and binding authority regarding “*all designations, determinations [and] interpretations*” under the Plan and Award Agreement, including the Board’s acknowledgement of the plain meaning of the term “Company” and that the 2013 sale did not constitute a Change in Control under the Award Agreement and Plan. Respondents incorrectly assert that Petitioner altered the provisions of the agreement. Rather, as discussed above, the Board recognized and applied the plain meaning of the term “Company.”

Respondents additionally attack the binding resolution or “consent” of the Compensation Committee of the Board of Directors, in which the Board, through the Compensation Committee, affected the partial vesting of certain shares that would otherwise have been cancelled or forfeited because of the sale of the mines. The importance of this is clear. If the 2013 sale had constituted a Change in Control, the consent would have been unnecessary because the RSU

awards the Board resolved to vest via the consent would have automatically vested as a result of the sale alone.

Finally, Respondents wrongly argue that the cases cited by Petitioner are not applicable. Delaware law recognizes CONSOL's Board's authority to construe Plan documents. In support of that proposition, Petitioner cited two cases: Friedman v. Khosrowshahi, No. Civ. A. 9191-CB, 2014 WL 3519188, 59 Employee Benefits Cas. 1657 (Del. Ch. July 16, 2014) and Khanna v. McMinn, No. Civ. A. 20545-NC, 2006 WL 1388744 (Del. Ch. May 9, 2006). Respondents attempt to distinguish these cases on the basis that the business judgment rule is inapplicable in this case because it is not a shareholder derivative suit. But Petitioner has never raised the business judgment rule as grounds to reverse the Circuit Court's opinion. The importance of the Friedman is the fact that the court concluded that the defendants had "articulated a reasonable construction of the plain terms of the RSU Award" under which the compensation committee was entitled to waive a challenged vesting condition "in accordance with their authority under the Plan." Friedman, 2014 WL 3519188, at \*1. The Friedman court recognized the Compensation Committee's authority to interpret the terms and provisions of the Plan and any Award issued under the Plan. And in this case, Petitioner was vested with the same contractual authority as the company in Friedman. Similarly, the importance of Khanna is that the board of directors allowed a director's Restricted Stock Purchase Agreement shares to prematurely vest. The Delaware Court in that case noted the rational business purpose of such an action. Thus, Petitioner did not cite the above cases for the proposition that its directors should be shielded from individual liability, but for the proposition that a board of directors has the authority to construe Plan documents under Delaware law.

Likewise, Respondents' attempt to distinguish Burns v. J.C. Penney Company, Inc., 85 F. App'x 830, 32 Employee Benefits Cas. 1819 (3d Cir. 2004) also fails. In Burns, employees of a J.C. Penney subsidiary alleged they were due benefits based on a change of control under J.C. Penney's Separation Allowance Program. The Third Circuit determined there had been no benefits-triggering change of control to the parent J.C. Penney as would entitle the subsidiary employees to benefits. Like the documents in Burns, the Plan here indicates that there is a change of control event for the employees only when the parent company experiences a change in control.

### III. CONCLUSION

For the reasons set forth above, and set forth more fully in its opening brief, CONSOL Energy Inc. respectfully requests that this Court reverse the Circuit Court's judgment in favor of the Respondents and remand the proceeding with direction to the Circuit Court to enter judgment in CONSOL Energy Inc.'s favor.

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of March 2016, true and accurate copies of the foregoing "Reply Brief of Petitioner" were deposited in the U.S. mail contained in postage paid envelopes addressed to counsel of record as follows:

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