

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

MONONGAHELA POWER COMPANY,
ALLEGHENY POWER,
ALLEGHENY ENERGY SERVICE
CORPORATION,

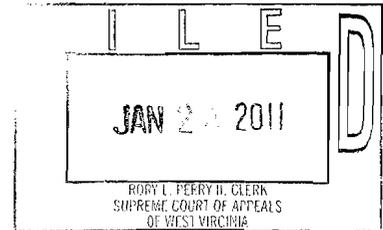
Petitioners,

v.

No. 11-0015

THE HONORABLE FRED L. FOX, II,
Judge of the Circuit Court of Marion County, and
Shell Equipment Company, Inc., a West Virginia corporation,
and Shell Energy Company, Inc., a West Virginia corporation,

Respondents.



**RESPONDENTS SHELL EQUIPMENT COMPANY, INC.'S AND SHELL ENERGY
COMPANY, INC.'S RESPONSE TO PETITION FOR WRIT OF PROHIBITION,
OR IN THE ALTERNATIVE, WRIT OF MANDAMUS**

(In the Circuit Court of Marion County, West Virginia
Consolidated at Civil Action No. 09-C-3)

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ENERGY COMPANY, INC.,**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 5

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 6

ARGUMENT 6

 I. The Court should deny the Petitioners’ Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus because (1) the Petition is untimely filed; (2) a contract for the sale of coal in place is governed by the UCC only if the seller is to sever the coal; (3) the Coal Sales Agreement is not a contract for the sale of goods because a party other than the seller has the duty to sever the coal; (4) Shell Equipment acted as a broker under the Coal Sales Agreement and was only responsible for selling the coal and ensuring delivery, not for the actual severance of the coal; (5) the circuit court’s decision is grounded in the provisions of the UCC and the Petitioners have not provided any case law or statutory law to the contrary; (6) the denial of said writ will not cause any negative policy implications as coal sales agreements will still be enforceable and, because this is a case of first impression, the uniform interpretation of the UCC will be carried out; and even if the UCC arguably applies, the Court should apply the longer statute of limitations. 6

 STANDARD OF REVIEW 8

 A. The Court should deny the Petitioners’ requested relief because they untimely filed their writ of prohibition and/or writ of mandamus. 9

 B. A contract for the sale of minerals in place must satisfy two conditions to qualify as a contract for the sale of goods under the UCC: (1) the contract must require that the minerals are to be severed from the realty and (2) the contract must require that the selling party bears the duty of such severance. 11

 C. The Coal Sales Agreement is not a contract for the sale of goods under the UCC because it does not satisfy the conditions set forth in West Virginia Code § 46-2-107. 15

D.	Shell Equipment Co., Inc. acted as a broker in that it sold and arranged for the sale of coal to the Petitioners from Shell Sales Co., Inc.’s Baldwin Mine.	19
E.	The UCC provides the legal basis for the circuit court’s conclusion and the Petitioners have provided no alternative case or statutory law supporting their argument	20
	a. The UCC itself provides the legal basis for the determination that the UCC does not govern the Coal Sales Agreement.	21
	b. <u>Reece v. Yeager Ford Sales, Inc.</u> provides analysis regarding “Sellers” under the UCC and insight as to how to analyze whether a contract is governed by the UCC.	21
	c. The case law cited by the Petitioners is not applicable to the instant matter because such cases do not deal with the application of UCC § 2-107 and do not involve contracts with similarly situated parties to the Coal Sales Agreement.	23
F.	The Coal Sales Agreement is not an agreement for the sale of goods and therefore, the predominate purpose test does not apply.	28
G.	The Court can rule in favor of the Respondents without concern of creating anomalies in the UCC or bankrupting the coal industry because this is a case of first impression and is a limited issue unlikely to affect a great number of contracts.	30
H.	Even if the Coal Sales Agreement may be subject to the UCC’s statute of limitations, the agreement may also be subject to the general contract statute of limitations, and in such case, the general contract statute of limitations should apply.	32
I.	The Court should deny the Writ of Prohibition and the Writ of Mandamus as both are inappropriate in this action.	33
	CONCLUSION	34

TABLE OF AUTHORITIES

CASES

<u>Adani Exports Ltd. v. AMCI Export Corporation,</u> No. 05-304, 2007 WL 4298525 (W.D. Pa., Dec. 4, 2007)	23, 24
<u>Cochran v. Appalachian Power Co.,</u> 162 W. Va. 86, 246 S.E.2d 624 (1978)	33
<u>Diversified Energy, Inc. v. Tennessee Valley Authority,</u> 339 F.3d 437 (6th Cir. 2003)	26
<u>Frederick Mgmt. Co., L.L.C. v. City Nat'l Bank,</u> No. 35438, 2010 W. Va. LEXIS (November 23, 2010)	18, 19
<u>In re: Pilgrim's Pride Corp.,</u> 421 B.R. 231 (Bankr. N.D. Tx. 2009)	27
<u>Peabody Natural Resources Company v. Commissioner of Internal Revenue,</u> 126 T.C. 261 (U.S. Tax Court 2006)	24, 25
<u>Phillips v. Larry's Drive-In Pharm., Inc.,</u> 220 W. Va. 484, 647 S.E.2d 920 (2007)	12, 13
<u>Reece v. Yeager Ford Sales, Inc.,</u> 155 W. Va. 461, 184 S.E.2d 729 (1971)	20-22
<u>Savage v. Booth,</u> 196 W.Va. 65, 468 S.E.2d 318 (1996)	9
<u>State ex rel Burdette v. Zakaib, Jr.,</u> 224 W. Va. 325, 685 S.E.2d 903 (2009)	8, 9, 34
<u>State ex rel. Greenbrier County Airport Authority v. Hanna,</u> 151 W.Va. 479, 153 S.E.2d 284 (1967)	9
<u>State ex rel. Hoover v. Berger,</u> 199 W.Va. 12, 483 S.E.2d 12 (1996)	33
<u>State ex rel. W. Va. Dept. of Health & Human Resources v. Yoder,</u> No. 35693, 2010 W. Va. LEXIS 120, *15 (November 1, 2010)	8
<u>State ex rel. West Virginia Housing Development Fund v. Copenhaver,</u> 153 W.Va. 636, 171 S.E.2d 545 (1969)	8

<u>State ex. rel. W. Va. National Auto Insurance Co., Inc. v. Bedell,</u> 223 W. Va. 222, 672 S.E.2d 358 (2008)	10, 11
<u>W. Va. Dept. of Energy v. Hobet Min. and Const. Co.,</u> 178 W. Va. 262, 358 S.E.2d 823 (1987)	10

STATUTES

11 United States Code § 503(b)(9)	27
West Virginia Code § 40-19-9	32
West Virginia Code § 46-2-725	4, 33
West Virginia Code § 46-2-105	13, 23, 28, 29
West Virginia Code § 46-2-107	passim
West Virginia Code § 46-2-107(1)	4, 12
West Virginia Code § 55-2-6	32

OTHER AUTHORITIES

Uniform Commercial Code § 2-107	23, 25-27
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COMES NOW, Respondents Shell Equipment Company, Inc. (“Shell Equipment”), and Shell Energy Company, Inc. (“Shell Energy”) (collectively, the “Respondents”), by and through their counsel of record, James A. Varner, Sr., along with Samuel H. Harrold, III, and the law firm of McNeer, Highland, McMunn & Varner, LC and hereby respond to the Petition for Writ of Prohibition, or, in the alternative, Writ of Mandamus. The Respondents state the following in support of their response:

QUESTION PRESENTED

The question presented by the Petitioners is not specific to the instant case. To that extent, the Respondents argue that the question presented should be:

Whether a multi-party contract to sell coal that is attached to the realty is governed by the Uniform Commercial Code wherein a party to the contract other than the buyer or the seller is charged with the duty of severing such coal?

This formulation of the question presented more accurately describes the issue presented to the Court and should be adopted by the Court. To the extent that the Court utilizes the Petitioners' question presented or formulates its own question, the Respondents' argument herein responds to such question presented.

STATEMENT OF THE CASE

Shell Equipment has been involved in the acquisition of purchase orders for coal sales and the filling thereof within and about the State of West Virginia for many years, both preceding the acts complained of in the complaint and thereafter. App. 126. Petitioner, Allegheny Power served as a buyer of coal for Petitioner, Monongahela Power Company and procured orders of coal for its needs in its local power plant facilities. App. 22.

Throughout 1999 and before, Shell Equipment had submitted bids for coal sales and secured purchase orders from the Petitioners, and each of them, or all of them in some combination, for the purchase and acquisition by the Petitioners of marketable and merchantable coal generally to be shipped to Monongahela Power Company's Harrison Power Station located in Haywood, Harrison County, West Virginia. App. 22-23.

In November 1999, Shell Equipment received and responded to a request of bid by the Petitioners. App. 23, 34. Thereafter, Shell Equipment was awarded a purchase order based on its bid establishing an agreement between the parties. App. 34, 36.

To finalize the agreement between the parties, Shell Equipment, Shell Sales Co., Inc., Allegheny Energy Supply Company, LLC, Monongahela Power Company, and The Potomac Edison Company entered into the Harrison Power Station Coal Sales Agreement (hereinafter "Coal Sales Agreement" and attached as Appendix 9) that is at issue in this case. App. 34. In that agreement, Shell Equipment was identified as the "Broker," Shell Sales Co., Inc., as the "Producer," and both

collectively as the “Seller.” App. 9. Under that agreement, Shell Equipment was obligated to supply the Petitioners with 8,000 tons of coal per month from Shell Sales Co., Inc.’s Baldwin Mine. App. 9. The Petitioners were obligated to pay Shell Equipment upon delivery of such coal.

During the term of the purchase order agreement and at all times, Shell Equipment utilized its efforts and contacts within the coal marketplace to assist the Petitioners in the fulfillment of orders as needed by the Petitioners and to be able to participate then and thereafter, in subsequent bids from the Petitioners, all with the expectation and anticipation of remaining in good standing so as to be awarded contracts in the future. App. 23.

Because of the lapse of time between verbal notification that Shell Equipment would ultimately get the bid and the time it actually got the purchase order, the supplying mine encountered a geologic problem known as a “squeeze.” App. 24. Regardless, to ensure it could fulfill its contractual obligations, Shell Equipment made arrangements to ship contract and compliance coal, all of which was the customary and usual practice both in the industry and with these Petitioners. App. 24. The compliance coal arrangement was rejected and the agreement was breached by the Petitioners. App. 24.

In their Complaint and in the action, the Respondents argue that the Petitioners wrongfully and illegally refused to honor the competitive and successful bid and, as a pretext, said it was because it would “upset” other producers. App. 24. This breach was arbitrary and capricious and done knowing full well it would proximately cause injury and damage to Respondents, which had expended significant sums to perform their obligations to the benefit of Petitioners. App. 24.

On January 5, 2009, the Respondents filed a complaint to institute the instant action. App. 21. In their complaint, the Respondents have relied on a breach of contract claim for the Petitioners' failure to accept delivery of coal from Shell Equipment and pay for the same. App. 22-25.

The Petitioners responded to the suit by filing a motion to dismiss, or, in the alternative, a motion for summary judgment, arguing that the suit was barred by the four-year statute of limitations provided by the Uniform Commercial Code ("UCC") in West Virginia Code § 46-2-725. App. 28. The Respondents filed a response arguing that the UCC did not apply to the enforcement or construction of the Coal Sales Agreement because it was not a contract for sale of goods. App. 116, 119. The thrust of the Respondents' argument was that a contract for the sale of coal that is in place, e.g., attached to the realty, is only a sale of goods if such coal is to be severed by the seller. App. 119-21. See W. Va. Code § 46-2-107(1). Under the Coal Sales Agreement, Shell Sales Co., Inc., not the seller, Shell Equipment, had the responsibility to sever the coal. App. 120. The Circuit Court of Marion County, in its November 9, 2009 Order, partially denied and partially granted the Petitioners' motion to dismiss, or, in the alternative, a motion for summary judgment. App. 1. The circuit court dismissed Count II of the Respondents' Complaint, but denied the dismissal of count I, the breach of contract claim. App. 6-7. The circuit court held, "because the plaintiffs were brokers, the aforementioned four-year limitation period does not apply and the defendants' motion must be denied in this respect." App. 6-7.

In response to the circuit court's denial of part of their motion, the Petitioners filed a Motion for Reconsideration and to Certify Question for Immediate Appeal on February 8, 2010. App. 128-88. The Respondents filed their Response and Incorporated Memorandum of Law to Defendants' Motion for Reconsideration and to Certify Question for Immediate Appeal on April 14,

2010. App. 189-214. The circuit court denied the Petitioners' motion by Order dated June 28, 2010. App. 215-216.

There are no deadlines or upcoming events that are relevant to the questions presented or the relief request.

SUMMARY OF THE ARGUMENT

The Court should deny the Petitioners' writ and affirm the decision of the circuit court because the UCC does not apply to the Coal Sales Agreement, as evidenced by the UCC itself. For the UCC to apply to the Coal Sales Agreement, such agreement has to be a contract for the sale of goods. Whether the Coal Sales Agreement is a contract for the sale of goods is determined by the provisions of the UCC itself.

The Coal Sales Agreement is a contract for the sale of coal that is currently in place, or attached to the realty. The agreement requires that Shell Equipment sell the coal to the Respondents, and that Shell Sales Co., Inc., a signatory to the agreement, sever the coal and remove such from its Baldwin mine. Therefore, Shell Sales Co., Inc. has the duty of severing the coal.

A contract for the sale of coal to be removed from the realty is only a contract for the sale of goods if the coal is to be severed by the buyer. W. Va. Code § 46-2-107. Because the broker/seller, Shell Equipment, is not charged with the duty of severing the coal, then the Coal Sales Agreement is not a contract for the sale of goods and would not be governed by the UCC.

The cases cited by the Petitioners in support of their argument are not applicable as such cases do not discuss similar mineral sales contracts and generally do not analyze whether the UCC applies. To that extent, the Court's best authority is the provisions of the UCC itself.

The contract involved herein is different from the vast majority of coal sales agreements because it is between multiple parties and divides the responsibilities of selling and severing between

two parties. Further, such contract (and other coal contracts) will still be enforceable if the Court rules in favor of the Respondents. Such contracts will then simply be governed by the common law, which clearly provides mechanisms for the enforcement of contracts.

The circuit court's decision was correct. A thorough examination of West Virginia Code § 46-2-107 and the Coal Sales Agreement will establish that, pursuant to the terms of the UCC, the Coal Sales Agreement is not a contract for the sale of goods and therefore not subject to the statute of limitations provided by the UCC.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18 of the Revised Rules of Appellate Procedure, the Respondents are of the belief that Rule 18(a)(4) is satisfied and are of the opinion that they have adequately presented their arguments within this Response for the Court to make a ruling. However, the Respondents ask for and of course would appreciate the opportunity to present oral argument to the Court on this matter. If the Court orders oral argument, the case should be set for a Rule 20 argument because it is a case involving first impressions.

ARGUMENT

- I. The Court should deny the Petitioners' Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus because (1) the Petition is untimely filed; (2) a contract for the sale of coal in place is governed by the UCC only if the seller is to sever the coal; (3) the Coal Sales Agreement is not a contract for the sale of goods because a party other than the seller has the duty to sever the coal; (4) Shell Equipment acted as a broker under the Coal Sales Agreement and was only responsible for selling the coal and ensuring delivery, not for the actual severance of the coal; (5) the circuit court's decision is grounded in the provisions of the UCC and the Petitioners have not provided any case law or statutory law to the contrary; (6) the denial of said writ will not cause any negative policy implications as coal sales agreements will still be enforceable and, because this is a case of first impression, the uniform interpretation of the UCC will be carried out; and even if the UCC arguably applies, the Court should apply the longer statute of limitations.**

The Court should deny the Petitioners' request for relief for a number of reasons.

First, the Petitioners untimely filed their Petition; having waited more than a year after the circuit court originally rejected their argument.

Second, an agreement to sell coal currently in place is only a contract for the sale of goods if such coal is to be severed by the seller. When the contract requires someone other than the seller to sever the coal, then the contract is governed by common law and the UCC has no application.

Third, the Coal Sales Agreement allocates the duty of severance to a party other than the seller, and therefore it is not subject to the UCC.

Fourth, Shell Equipment was only responsible for selling the coal and therefore was acting as a broker of the coal at issue in the Coal Sales Agreement. Shell Sales Co., Inc. was the party acting as producer and severer of the coal. Because the selling and severing duties are held by different parties to the Coal Sales Agreement, the Coal Sales Agreement does not fall within the jurisdiction of the UCC.

Fifth, the decision of the circuit court is grounded in the provisions of the UCC itself. No further statutory or case law is needed. Further, the Petitioners have not presented any law in contradiction of the circuit court's decision.

Sixth, the policy arguments of the Petitioners are misguided. The ruling of the circuit court is not against the uniform interpretation of the UCC. Further, the effect on coal contracts throughout the State will be minimal because of rare factual characteristics of the Coal Sales Agreement and the continued enforceability of the Coal Sales Agreement.

Seventh, even if the UCC arguably applies, the Court should apply the longer, ten year statute of limitations for the enforcement of contracts given the common law's preference for hearing cases on their merits.

STANDARD OF REVIEW

The Petitioners have requested that the Court issue a writ of prohibition against the Honorable Fred L. Fox, II to prevent him from allowing this action to continue and to dismiss the case. “A writ of prohibition will issue only in clear cases, where the inferior tribunal is proceeding without, or in excess of, jurisdiction.” State ex rel. W. Va. Dept. of Health & Human Resources v. Yoder, No. 35693, 2010 W. Va. LEXIS 120, *15 (November 1, 2010) (*quoting* State ex rel. Vineyard v. O'Brien, syllabus, 100 W.Va. 163, 130 S.E. 111 (1925)). Further, in analyzing whether to grant a writ of prohibition, the Court has stated:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Id. at *1, syl. pt. 1 (*quoting* State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12, syl. pt. 4 (1996)).

The Petitioners have further requested that, in the alternative, the Court issue a writ of mandamus. “Mandamus lies to require the discharge by a public officer of a nondiscretionary duty.” State ex rel Burdette v. Zakaib, Jr., 224 W. Va. 325, 685 S.E.2d 903, syl. pt. 1 (2009) (*citing* State ex rel. Williams v. Department of Mil. Aff., 212 W.Va. 407, 573 S.E.2d 1, syl. pt. 1 (2002); State ex rel. West Virginia Housing Development Fund v. Copenhaver, 153 W.Va. 636, 171 S.E.2d

545, syl. pt. 1 (1969); State ex rel. Greenbrier County Airport Authority v. Hanna, 151 W.Va. 479, 153 S.E.2d 284, syl. pt. 3 (1967)). Further, “[a] writ of mandamus will not issue unless three elements coexist - (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” Id. (citing State ex rel. Kucera v. City of Wheeling, 153 W.Va. 538, 170 S.E.2d 367, syl. pt. 2 (1969)). A review of the case in light of these standards will conclude that the Petitioners’ requests should be denied.

A The Court should deny the Petitioners’ requested relief because they untimely filed their writ of prohibition and/or writ of mandamus.

In response to the alleged clearly erroneous decision of the circuit court, the Petitioners did not promptly seek relief with the Court. Instead, they waited an extraordinarily long time before seeking such relief. The circuit court entered its Order denying the Petitioners’ Motion to Dismiss, Or, In the Alternative, Motion for Summary Judgment on November 9, 2009. The Petitioners did not file their writ until December 30, 2010, in excess of one year post the order complained of. After their initial motion to dismiss was denied, the Petitioners filed a Motion for Reconsideration and to Certify Question for Immediate Appeal with the circuit court on February 8, 2010. The circuit court subsequently denied that motion on June 28, 2010. Therefore, even after the circuit court denied their motion for the second time, the Petitioners waited six months to seek relief from the Court.¹

There is no specific deadline for filing a writ of prohibition, but the Court has made it clear that such writs must be filed within a reasonable time. Pursuant to Rule 3 of the West Virginia Rules

¹ In analyzing whether the writ was untimely, the Court should focus on the initial Order, not on the June 28, 2010 Order. The Court has consistently held, “we repeatedly have emphasized that the West Virginia Rules of Civil Procedure do not recognize a ‘motion for reconsideration’.” Savage v. Booth, 196 W.Va. 65, 468 S.E.2d 318 (1996). Instead, the Court reviews such motions as either motions to alter or amend pursuant to Rule 59(e) or, if filed more than ten days after the ruling, as Rule 60(b) motions. Instead of filing their motion for reconsideration, it would have been more appropriate for the Petitioners to file their writ.

of Appellate Procedure/Rule 5 of the Revised Rules of Appellate Procedure,² appeals must be filed/perfected within four months of entry of the final order. If such appeal is filed later, then it is untimely and the appeal is dismissed. W. Va. Dept. of Energy v. Hobet Min. and Const. Co., 178 W. Va. 262, 358 S.E.2d 823, 825 (1987). If this was a direct appeal (from either the first or the second Orders), then such appeal would clearly be untimely.

Of course, the Petitioners' writ is not a direct appeal, but that only makes the need for filing even more timely. The "[C]ourt has long recognized that prohibition may not be used as a substitute for an appeal . . . [further,] prohibition is a drastic, tightly circumscribed, remedy which should be invoked only in extraordinary situations." State ex. rel. W. Va. National Auto Insurance Co., Inc. v. Bedell, 223 W. Va. 222, 229, 672 S.E.2d 358, 365 (2008). The Court continued, "[W]hile there is no specific time frame for the filing of a writ of prohibition, extraordinary remedies are, by their very nature, to be considered upon a case-by-case basis." Id.

The Court criticized the petitioners' late filing in W. Va. National Auto Insurance Co., Inc. and the Petitioners' actions herein are even more egregious. In W. Va. National Auto Insurance Co., Inc., the petitioners waited approximately nine months after the entry of the initial order denying their Motion to Dismiss, Or, In the Alternative, Motion for Summary Judgment before filing their petition. Further, the petitioners waited an additional three months after their motion for reconsideration had been denied before filing the writ. Here, the Petitioners filed their writ approximately 13 months after the circuit court denied their initial motion to dismiss. Then, instead of filing a writ after that denial, they decided to file a Motion for Reconsideration And To Certify

² The Respondents assert that because the Order that is the subject of the Petitioners' writ was entered before December 1, 2010, the "old" Rules of Appellate Procedure apply. Nonetheless, the Court has indicated in its scheduling order that the Revised Rules of Appellate Procedure apply, and the Respondents have followed those rules in preparing their Response.

Question for Immediate Appeal. After the circuit court denied that motion, the Petitioners waited approximately six months to file the writ.

In light of the time frame involved in W. Va. National Auto Insurance Co., Inc. and the Court's conclusion therein, it must be concluded that the Petitioners' writ was clearly untimely filed. The Court should give significant weight to the Petitioners' failure to promptly (or even within a reasonable time) seek the extraordinary relief they request in their Petition.

Such extraordinary delay justifies the dismissal of the Petitioners' Petition for Writ of Prohibition, or In the Alternative, Writ of Mandamus, and the Court should order such dismissal.

B. A contract for the sale of minerals in place must satisfy two conditions to qualify as a contract for the sale of goods under the UCC: (1) the contract must require that the minerals are to be severed from the realty and (2) the contract must require that the selling party bears the duty of such severance.

In its analysis of whether the Coal Sales Agreement³ was a contract for the sale of goods, and therefore subject to the UCC, the circuit court reviewed the entirety of the controlling statute, West Virginia Code § 46-2-107. The Petitioners take issue with this, arguing that “[t]he ‘severed by the seller’ UCC language . . . has no place in that analysis.” (Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus, p. 10.) Instead, the Petitioners argue, the focus should be on whether the contract was “one for sale of services [or] one for the sale of coal.” Id. Such focus is wrong; the focus should be first on what contracts for the sale of coal fall under the UCC, and then whether the contract at issue is one of those UCC contracts.

³ Throughout their Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus, the Petitioners place emphasis on the fact that the Plaintiffs refer to the contract at issue as a coal sales agreement. (See Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus, p. 15). Such emphasis is misplaced. The contract at issue is clearly titled, “Harrison Power Station Coal Sales Agreement” and the Respondents clearly were utilizing “coal sales agreement” as a shortened version of the title of the document rather than repeating, “the contract at issue.” Although a title to a legal document should describe what the document is and what it does, such title is not controlling and the actual text of the document and its effect controls.

West Virginia Code § 46-2-107 is designed to bring some contracts for the sale of coal under the UCC's umbrella. The statute is not designed to draw a distinct line between sales of coal in place and sales of extracted coal; a clear reading of the statute indicates that the distinction has more nuance. The statute provides:

A contract for the sale of minerals or the like including oil and gas or a structure or its materials to be removed from realty is a contract for the sale of goods within this article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

W. Va. Code § 46-2-107(1). The statute is directed at contracts to sell minerals currently in place wherein a buyer and seller agree to buy/sell certain minerals and the seller is responsible for severance.

The Petitioners have argued for a very liberal interpretation of the statute, specifically one in which the phrase, "severed by the seller" is read out of the statute. In fact, the opposite is true: the Court should narrowly construe the statute and what contracts fall under it.

First, the statute is not open to construction because it is not ambiguous and there cannot be multiple meanings attributed to the language utilized therein. "A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." Phillips v. Larry's Drive-In Pharm., Inc., 220 W. Va. 484, 491, 647 S.E.2d 920, 927 (2007) (citing Sizemore v. State Farm Gen. Ins. Co., 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998) (quoting Hereford v. Meek, 132 W. Va. 373, 386, 52 S.E.2d 740, 747 (1949))). Therefore, construction is not appropriate in this situation.

Second, the Court cannot arbitrarily modify the statute and remove the language specified by the legislature. Id. The Petitioners' requested interpretation is clearly a modification of the

statute. Further, the rules of construction require “effect to be given to all the terms used in a statute” *Id.* (citing *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885, syl. pt. 9 (1953)).

Obviously if all of the terms contained in West Virginia Code § 46-2-107 are going to be given effect, the phrase, “severed by the seller,” has to have some effect and utilization in the interpretation of the Coal Sales Agreement.

Finally, the UCC modifies the common law. In this case in particular, the modification is particularly harsh: a six-year reduction in the applicable statute of limitations. Regarding statutes that modify the common law, the Court has stated that such statutes should be strictly interpreted:

Statutes which impose duties or burdens or establish rights or provide benefits which were not recognized by the common law have frequently been held subject to strict, or restrictive, interpretation. Where there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in the common law.

Id. at 492, 647 S.E.2d at 928 (citing Norman J. Singer, 3 Sutherland Statutory Construction § 61:1 at 217 (6th Ed. 2001)). If West Virginia Code § 46-2-107 is strictly interpreted, then it would require the seller in the contract to sever the coal, not merely require someone other than the buyer to make severance. A strict interpretation would clearly conclude that when the mineral agreement involved multiple parties and the duty to sever and the duty to sell were held by different parties, the UCC does not apply. With these rules of construction set forth, the interpretation of the statute is straight forward.

The statute answers the question of when contracts for the sale of minerals in place are considered contracts for the sale of goods.⁴ Therefore, for the sale of a mineral in place to be a

⁴ Minerals that have already been extracted do not invoke this statute as they are already “goods” and thus subject to the UCC. *See* W. Va. Code § 46-2-105 (Goods are all things that are “movable at the time of identification to the contract for sale”). Coal in place is not a good unless West Virginia Code § 46-2-107 is satisfied.

contract for the sale of goods, the following must occur: (1) the parties must intend that the mineral be removed from the realty and (2) the removal must be done by the seller. Both of those conditions are limiting clauses. If both conditions are not fulfilled, then the contract is not a contract for the sale of goods.

The mineral contracts that fall under West Virginia Code § 46-2-107 are generally between two parties (the buyer and the seller/owner) when the contract is for the sale of particular coal, e.g., from a particular mine. In that instance, if the seller is obligated to deliver the coal to the buyer, then impliedly, the coal has to be severed. It is likely true, as the Petitioners contend, that in this situation, the seller does not physically sever the coal, but hires a third party to mine the coal. Such hiring is a separate and unrelated contract, not affecting the contract between the buyer and the seller/owner. Under their contract, the seller/owner impliedly has the duty to sever the coal, and therefore would be the party severing the coal as between the parties to the coal sales agreement. That duty is not altered even if the seller/owner hires a third party, by separate contract, to mine and remove the coal. The Petitioners ignore the fact that, in the Coal Sales Agreement, the mining company is actually a party to the contract. This separates the duties to sell and to sever, allocating the duty to sell to Shell Equipment and the duty to sever to Shell Sales Co., Inc. This creates a situation in which the explicit conditions of West Virginia Code § 46-2-107 are not fulfilled.

One of the problems that the Petitioners have in their analysis is that they begin with the idea that the UCC applies, rather than the proper starting point: that the UCC does not apply. They discuss how the Respondents are “removing the entire contract from its original governance by the W. Va. UCC,” but ignore the fact that the UCC is a limited body of law. (See Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus, p. 12.) For the UCC to govern a contract, said contract has to fall within the parameters of the UCC. The only way an agreement to sell minerals

currently attached to the realty is governed by the UCC is if such agreement satisfies the conditions contained in West Virginia Code § 46-2-107.

As explained more fully infra in Section 2, the Coal Sales Agreement does not fall under West Virginia Code § 46-2-107's umbrella. This is because the seller under the contract, Shell Equipment, identified as the “broker,” is not the party to sever the coal. The party to sever the coal is another entity, Shell Sales Co., Inc., identified in the Coal Sales Agreement as the “producer.” Therefore, the Coal Sales Agreement does not satisfy the conditions contained in West Virginia Code § 46-2-107.

C. The Coal Sales Agreement is not a contract for the sale of goods under the UCC because it does not satisfy the conditions set forth in West Virginia Code § 46-2-107.

The focus of the Court’s analysis should be on whether the Coal Sales Agreement fulfills the definitions related to the sale of goods contained within the UCC, not general categorizations of the UCC, such as whether the contract is for the sale of goods or for services.⁵ If that focus is made, then it becomes apparent that the Coal Sales Agreement does not fall under the jurisdiction of the UCC.

The Coal Sales Agreement involves five parties: Shell Equipment, identified as the Broker; Shell Sales Co., Inc., identified as the Producer; Allegheny Energy Supply Company, LLC; Monongahela Power Company; and The Potomac Edison Company. App. 9. Shell Equipment and Shell Sales Co., Inc. are collectively referred to as the Seller; the remaining parties are collectively referred to as the Buyer. App. 9. The Coal Sales Agreement obligates the Seller to supply the Buyer with coal from Shell Sales Co., Inc.’s (the Producer’s) Baldwin Mine. App. 9.

⁵ By that the Respondents mean that, at a macro level, UCC Article 2 could be described as governing contracts for the sale of goods, but does not govern the provision of services. However, when looking at an actual contract, such contract has to be read in light of the actual provisions of the UCC and not the general proclamations regarding its reach. The Coal Sales Agreement is the perfect example as, given between the sale of goods and sale of services, it would appear to be a sale of goods. However, when considered in light of the definition of goods, the Coal Sales Agreement does not involve goods.

Shell Equipment is not involved in any coal mining operations and does not itself sever coal. See App. 126. Shell Equipment sells coal; that is what the company does. App. 125-26. The company has a close relationship with Shell Sales Co., Inc. in that Joe Staud is the president and chief shareholder of each company. However, contrary to the Petitioners' contentions, this does not make the companies one and the same, and the Petitioners object to such characterization.⁶ Shell Sales Co., Inc. owns a coal mine, the Baldwin Mine. Shell Equipment Co., Inc. regularly acted as broker or seller of the coal from the Baldwin Mine, purchasing said coal from Shell Sales Co., Inc. It was Shell Sales Co., Inc.'s responsibility for severing and processing the coal; Shell Equipment's responsibility was to get the severed, processed coal from the mines to the buyer and collect the proceeds. That is the agreement that was in place with the Petitioners.

The Coal Sales Agreement contemplated that relationship between Shell Equipment and Shell Sales Co., Inc. By separating the two into "broker" and "producer," the parties' duties were clearly delineated. The Buyer's primary duties were obvious; they were to take delivery of the coal and pay for the same. As Producer, Shell Sales Co., Inc. was to sever the coal and prepare it for shipment. As Seller, Shell Equipment was to receive payment for the coal.⁷

These clear allocations of duties allow the Coal Sales Agreement to be interpreted in light of West Virginia Code § 46-2-107. That statute's concern is focused on who had the duty to sell the coal and who had the duty to sever the coal. If those two duties are not held by the same party, then the UCC does not apply to a contract for the sale of minerals to be severed from realty. Here, the two duties are not held by the same party: Shell Sales Co., Inc. has the duty to sever and Shell

⁶ The Respondents note that the Petitioners share the same mailing address and are related companies. Nonetheless, the Respondents presume that the Petitioners would object if their corporate structures were disregarded and they were considered one company.

⁷ There is some question as to which party was responsible for delivery, but that is irrelevant. The focus is on who was to sever the coal and prepare it for delivery; Shell Sales Co., Inc. had that duty.

Equipment has the duty to sell. Therefore, the conditions of West Virginia Code § 46-2-107 are not met and the UCC does not apply.

The Petitioners' focus on a brokerage contract versus a sale of goods contract is a red herring. The focus should be on the contract, who has what duties under the contract, and how those duties match up with West Virginia Code § 46-2-107. Shell Equipment committed itself to sell in place coal that was to be severed by another party; that is why it is characterized as a broker. Shell Equipment is classified as a broker because it was providing for the sale of a product that someone else was going to produce.

The Respondents' assertion of a breach of the Coal Sales Agreement is appropriate insofar as it alleges that the Petitioners breached an agreement to purchase coal. To support a contract action, the complaining party must allege a breach of the contract. The Buyer in the Coal Sales Agreement had the duty to purchase coal from Shell Equipment. See App. 9. The Buyer did not do that, and therefore breached the contract. Those duties to buy/sell were the focus of the Respondents' Complaint. Given that Shell Equipment was selling and arranging for the delivery of coal that it did not own, the Respondents assert that is a brokerage service and such assertion is consistent with the Coal Sales Agreement's characterization of Shell Equipment as a broker.

The Petitioners argue that the Court must look at both Shell Sales Co., Inc. and Shell Equipment in its analysis. (See Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus, p. 14.) The Respondents do not disagree with this and have consistently focused their own analysis of the duties and responsibilities of all the parties to the Coal Sales Agreement. However, the Petitioners want the Court to conclude that the UCC covers contracts in which one seller-party severs the coal and such request is unfounded. See id. West Virginia Code § 46-2-107 is very specific; it requires the seller of the mineral to also sever the mineral. It does not encompass

situations in which another party to the contract severs the mineral. Here, the Petitioners would have the Court essentially combine Shell Sales Co., Inc. and Shell Equipment and conclude that because they collectively are the suppliers of the coal and one of them severs the coal, then the UCC applies. Such argument ignores the distinction in the contract and in West Virginia Code § 46-2-107. Such an interpretation would essentially rewrite West Virginia Code § 46-2-107 to indicate that so long as the buyer is not severing the mineral, then it falls under the UCC. Such rewriting is inappropriate given the clear wording of the statute.

Under the terms of the Coal Sales Agreement, Shell Equipment does not have a duty to sever the coal; it only has a duty to sell such severed coal to the Buyer. This limited duty of the seller does not invoke West Virginia Code § 46-2-107. The Coal Sales Agreement deals with a contract for the sale of coal attached to realty, and therefore, only falls under the UCC if said coal is severed by the seller. Shell Sales Co., Inc., the producer under the Coal Sales Agreement, but not the seller, is the severing party, and therefore the UCC does not apply. Neither party is looked at in isolation; they are looked at in light of the Coal Sales Agreement and their duties thereunder.

The Petitioners' argument also ignores the fact that the Coal Sales Agreement separately identified Shell Equipment and Shell Sales Co., Inc. To lump the two together ignores the language of the contract. There was some reason for identifying those companies as Broker and Producer, respectively. Such reasons are not apparent on the face of the document, and therefore, it is appropriate to consider parol evidence. Generally, parol evidence is inadmissible to explain a written document. See Frederick Mgmt. Co., L.L.C. v. City Nat'l Bank, No. 35438, 2010 W. Va. LEXIS (November 23, 2010). However, where the meaning is uncertain and ambiguous, parol evidence is admissible to show the situation of the parties, the surrounding circumstances when the writing was

made, and the practical construction given to the contract by the parties themselves either contemporaneously or subsequently. *Id.* (citations omitted.)

Considering parol evidence, in an affidavit, *see* App. 125, Frank J. Staud specified that reasoning, specifically referring to the businesses in which each company engaged. If the two companies are viewed interchangeably, then the drafters' intent is nullified. Given the ambiguity, the Respondents should be allowed to engage in discovery and bring forward additional evidence regarding the meaning of the Coal Sales Agreement.

D. Shell Equipment Co., Inc. acted as a broker in that it sold and arranged for the sale of coal to the Petitioners from Shell Sales Co., Inc.'s Baldwin Mine.

In the Coal Sales Agreement, Shell Equipment Co., Inc. was identified as a "Broker." App. 9. This clearly had some meaning and when Frank J. Staud's interpretation of the Coal Sales Agreement is considered, it makes perfect sense. Shell Equipment is a broker of coal in the sense that it does not mine coal; it merely sells coal that has been mined by other parties. In this instance, Shell Sales Co., Inc., the producer under the Coal Sales Agreement, was to mine coal from its Baldwin mine and Shell Equipment would sell such coal. App. 9.

The fact that Shell Equipment was a "broker" does not in and of itself remove the Coal Sales Agreement from the jurisdiction of the UCC. Rather, it is the duties of the parties under that agreement that determine whether the UCC controls. The simple fact that Shell Equipment was selling coal does not cause the Coal Sales Agreement to fall under the UCC; rather, the proper conditions must be fulfilled.

The provisions of the Respondents' Complaint that the Petitioners cite are largely consistent with the Respondents' arguments herein. (Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus, pp. 18-19.) The Buyer under the Coal Sales Agreement breached the agreement

by not allowing Shell Equipment to deliver coal to it, coal produced by Shell Sales. Insofar as Shell Equipment's allegations are that it was unable to ship the coal, such language is consistent with delivery in that the severed coal had to be transported from the Baldwin mine, and such delivery was a responsibility of either Shell Equipment or Shell Sales Co., Inc. Regardless of how the two allocated that responsibility, that did not change the earlier process of severing the coal. Further, Shell Equipment was the final source of the coal for the Buyer; such coal would be delivered by Shell Equipment and funds would be paid to it for such transfer of ownership. Simply because Shell Equipment promised to deliver coal that was currently attached to realty does not mean that such promise falls under the UCC, especially wherein another party to the contract was to sever the coal.

E. The UCC provides the legal basis for the circuit court's conclusion and the Petitioners have provided no alternative case or statutory law supporting their argument.

The only legal basis needed to support the circuit court's holding is West Virginia Code § 46-2-107. A clear reading of that section leads to the conclusion that the Coal Sales Agreement is not governed by the UCC. Second, the circuit court cited Reece v. Yeager Ford Sales, Inc., 155 W. Va. 461, 184 S.E.2d 729 (1971), in support of its holding. Reece deals with the definition of "seller" under the UCC and also provides insight as to how to analyze whether a contract is within the umbrella of the UCC. Third, the Petitioners have not provided any case law in support of their position. The cases they cite do not specifically deal with the statute at issue or deal with completely dissimilar factual scenarios, creating little assistance for the Court. (See Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus, p. 14, n. 18, 21-22.) All of the cases are distinguishable and inapplicable to the instant action.

a. The UCC itself provides the legal basis for the determination that the UCC does not govern the Coal Sales Agreement.

The circuit court's legal basis for finding in favor of the Respondents was the UCC itself, specifically West Virginia Code § 46-2-107 and the interpretation of that statute's clear language. At the same time, the Petitioners have not provided citation to any case law or statutory law interpreting that section of the UCC in the context of a multi-party contract.

In arguing that there is no basis for the UCC not applying, the Petitioners lose track of the important question: what is the basis for the UCC applying? The only basis for the UCC governing the Coal Sales Agreement is contained in West Virginia Code § 46-2-107. As previously stated, if the conditions explicit in West Virginia Code § 46-2-107 are not fulfilled, then it does not apply. In turn, the UCC would not apply.

More specifically, as the Petitioners state, the UCC applies to the sale of goods. West Virginia Code § 46-2-107 determines if the sale of coal in place is a contract for the sale of goods. If it is not, then obviously the coal is not a good and not subject to the UCC. No further case law or legal basis is needed; everything necessary is contained in the statute.

b. Reece v. Yeager Ford Sales, Inc. provides analysis regarding "Sellers" under the UCC and insight as to how to analyze whether a contract is governed by the UCC.

In reaching its decision, the circuit court relied upon the case of Reece v. Yeager Ford Sales, Inc., 155 W. Va. 461, 184 S.E.2d 729 (1971). The Petitioners insist that this case has no relevance to the current matter, see Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus, p. 20, but the Respondents assert that it creates a basis for the analysis conducted herein. Specifically, it provides guidance regarding how courts in West Virginia should deal with similar issues regarding the definition of "Seller" under the UCC.

Reece involved a situation in which a buyer purchased a Ford automobile from an automobile dealer. Id. at 462-63, 184 S.E.2d at 728. One issue that arose was whether Ford was a seller of the automobile, in relation to the buyer's contract. Id. at 466-68, 184 S.E.2d at 730-31. The Court found that Ford was not a seller under the UCC because it was not "a person who sells or contracts to sell goods." Id. at 468, 184 S.E.2d at 731. Ford was not a party to the contract between the buyer and the dealer, and, therefore, could not be considered a seller in the transaction. Id.

The Respondents assert that Reece is instructive because it illustrates how the UCC defines its own scope and how a contract is to be interpreted. In Reece, the Court looked at the parties to the contract to be rescinded. Id. at 466-68, 184 S.E.2d at 730-31. Because Ford was not a party to the contract, the Court looked further and attempted to determine if Ford was a seller under the contract. Id. at 467-68, 184 S.E.2d at 730-31. It was not, because the definition of seller did not include anyone other than the actual seller of the good. Id. at 468, 184 S.E.2d at 731. The case focuses on the contract at issue (in that case) and applying the UCC definitions.

Reece governed the analysis set forth in Section 2 herein. However, to summarize, the Coal Sales Agreement involves multiple parties and to fall under the UCC, the seller of the coal under that agreement has to sever the coal. See W. Va. Code § 46-2-107. "Seller" has a specific meaning under the UCC and if Shell Sales Co., Inc., as the severing party, does not fall under that definition, then, the seller is not severing the coal under the Coal Sales Agreement. This is part of Reece's holding: That Ford did not fall within the definition of seller, and, therefore, the contract could not be rescinded against it because the contract could only be rescinded against the seller. 155 W. Va. 461 at 468, 184 S.E.2d at 731. Reece is not definitive, but it is highly instructive on how to analyze this issue; it instructs us to look to the UCC and utilize it to determine its scope and apply the definitions as written to the factual situation.

- c. **The case law cited by the Petitioners is not applicable to the instant matter because such cases do not deal with the application of UCC § 2-107 and do not involve contracts with similarly situated parties to the Coal Sales Agreement.**

In providing case law in support of their position, the Petitioners rely on Adani Exports Ltd. v. AMCI Export Corporation, No. 05-304, 2007 WL 4298525 (W.D. Pa., Dec. 4, 2007). That case involved Adani Exports, Ltd., a company that “imports coal into India for the purpose of selling it to a variety of Indian customers,” Id. at *1⁸, and AMCI Export Corporation, “a global trader of coal,” id. at *2. The dispute revolved around a contract between the two companies in which AMCI Export Corporation was obligated to sell four shipments of 65,000 metric tons of coal each to Adani Exports Ltd. Id. at *4.

The court in Adani Exports Ltd. concluded that the contract involved a sale of coal because the parties were clearly engaged in the transaction for coal that had already been severed. Id. at *9. It was not a sale of coal in place or of certain coal to be severed. We know this because one of the disputes between the companies was the geographic source of the coal. Id. at *4. Because the coal supply contract in Adani Exports Ltd. does not involve severance, but instead deals with the purchase of coal that has already been severed, such coal was clearly a good because it is movable at the time of identification. See W. Va. Code § 46-2-105.

Under the agreement, AMCI Export Corporation could provide coal from either China or Australia. Id. The parties disputed whether that decision had to be made at the beginning of the contract or whether it could be decided on a shipment by shipment basis. Id. at *4-6. This disagreement indicates that at the time that the parties entered into the contract, no certain coal was envisioned. Instead, AMCI Export Corporation had an obligation to go find coal, either already

⁸ Adani Exports Ltd. actually has a subsidiary that actually purchases and imports the coal, but that is irrelevant for our limited discussion.

severed or in place, purchase it, and have it delivered to Adani Exports Ltd. If the contract was for the purchase of particular coal, then the parties would not be arguing over whether the coal was to come from China or Australia.

In the instant case, all parties knew where the coal was coming from. In fact, the Coal Sales Agreement stated that the coal would come from Shell Sales Co., Inc.'s Baldwin Mine. Because the coal was in place at the time of the contract and the contract called for delivery to the Petitioners, clearly the coal had to be severed. Under the contract, the party to sever the coal is not the seller, but rather, another party, the "Producer," Shell Sales Co., Inc., is to sever the coal. This clearly distinguishes the case from Adani Exports Ltd. where the seller could buy coal on the open market or buy coal in place and have it severed, so long as the seller delivered coal to the buyer. As the Plaintiffs have repeatedly argued, the Coal Sales Agreement is different from the typical coal sales agreement, and a case finding that the UCC applied to a coal sales contract in which one party, the seller, was obligated to provide coal, regardless of local origin, to the buyer, is not persuasive and largely inapplicable.

The other cases cited by the Petitioners also do not shed light on the issue in the instant action. The contracts at issue in Peabody Natural Resources Company v. Commissioner of Internal Revenue, 126 T.C. 261 (U.S. Tax Court 2006), do not contain parties that are similarly situated to the parties in the Coal Sales Agreement. Id. at 264. Peabody involved a dispute between Peabody Natural Resource Company ("Peabody") and the Internal Revenue Service. Peabody had entered into an agreement with Santa Fe Pacific Mining Corporation ("Santa Fe") to trade Peabody's gold mining business to Santa Fe in exchange for Santa Fe's coal mining business. Id. at 262-63. In the deal, Peabody received a coal mine and "assumed all obligations of Santa Fe under two long-term coal supply contracts . . . with Tucson Electric Power Co. (TEPCO) and Western Fuels (WEF)." Id.

The problems with the IRS arose when Peabody treated the exchange as a like-kind exchange under the tax code. Id. at 266. Specifically, the IRS admitted that trading a gold mine for a coal mine was a like-kind exchange, but disagreed with Peabody over “whether two coal supply contracts are real property and/or like-kind property within the meaning of [the IRS code.]” Id.

Under the contracts, Santa Fe was obligated to provide certain amounts of coal to TEPCO and WEF from the coal mine at issue. See id. at 263. It appears that in the TEPCO contract, the only parties to the contract were Santa Fe and TEPCO. See id. Under the WEF contract, Santa Fe was the seller and WEF was the buyer; however, a third party was a guarantor of the amount of coal that WEF would buy. Id. at 264.

The court’s first issue was to determine whether those coal supply contracts were real property under New Mexico law or if they were contracts for the sale of goods. The court stated:

Minerals in place (i.e., minerals lying unworked beneath or on the surface of the land) are considered part of that land, and an interest in minerals in place is real property for purposes of New Mexico law. Interests in minerals in place can be separately conveyed to and held by someone other than the owner of the surface estate. After the minerals are severed and removed from the land, they become personal property.

Id. at 268. The court also looked at UCC § 2-107 and without any further discussion, concluded that the “coal supply contracts are contracts for the sale of goods under New Mexico law.” Id.

The problem with applying the Peabody court’s conclusion to the instant case is that this case and this coal sales agreement present a different scenario. Specifically, they involve parties in addition to the seller and the buyer; the Coal Sales Agreement involves a separate party who is obligated to sever the coal. West Virginia Code § 46-2-107 must be applied accordingly and all parties and their obligations considered before concluding whether the coal to be sold under the Coal Sales Agreement is a good as defined under the UCC. Once the third party is taken into account, it

becomes clear that West Virginia Code § 46-2-107 does not provide that the coal is a good within the provisions of the UCC.

Diversified Energy, Inc. v. Tennessee Valley Authority, 339 F.3d 437 (6th Cir. 2003), is almost similar to the instant case, but not quite. It involved a situation in which Diversified Energy entered into a contract with Tennessee Valley Authority to supply coal from the Sigmon Coal Company. Id. at 439-40. It appears that the contract was a two-party contract with Diversified Energy having a second contract with Sigmon Coal Company. Id. Diversified Energy had an obligation to deliver to Tennessee Valley Authority 10,000 tons of coal per week for a number of years. Id. In its separate contract with Sigmon Coal Company, it would pay Sigmon Coal Company 100% of the price Diversified Energy received from the Tennessee Valley Authority, “less a commission of 98 cents per ton.” Id. at 440. The dispute arose around the contract between Diversified Energy and Tennessee Valley Authority.

The court never determined whether the UCC actually applied and did not mention UCC § 2-107. Instead, it assumed that the UCC applied in determining what damages Diversified Energy was entitled to. Id. at 446-47. In finding damages, the court also relied on the common law related to contracts. Id. The court conducted little to no analysis regarding whether the UCC applied and simply held that the section of the UCC that Diversified Energy was relying on did not apply given the damages that Diversified Energy sustained. Id.

Diversified Energy, Inc. is not persuasive authority in the instant case as it does not analyze whether the contract at issue in the case fell within the scope of the UCC. Further, it is not persuasive because it involves different considerations, e.g., a seller who is purchasing coal from a named, but unsigned, third party, and then sells said coal to the buyer. Here, we have all of the parties together in one contract, which affects the analysis under West Virginia Code § 46-2-107.

The final case cited by the Defendants, In re: Pilgrim's Pride Corp., 421 B.R. 231 (Bankr. N.D. Tx. 2009), is also inapplicable to the instant case. In that case, the bankruptcy court had to deal with whether certain claims by creditors of the debtor could be given administrative priority treatment under 11 U.S.C. § 503(b)(9). Id. at 234-35. One of the requirements for the treatment is that the claim must be for goods. Id. at 235. One of the creditors was the debtor's natural gas supplier. Id. at 234. The gas supplier argued that it was entitled to an administrative priority claim for the gas it supplied to the debtor that the debtor, in turn, used to run its plant and production facilities. Id. at 240-41.⁹

The bankruptcy court first had to determine if natural gas was a good under 11 U.S.C. § 503(b)(9). It used the UCC for guidance in making this determination, as the bankruptcy code does not define "good." Id. at 235-36. The court cited to UCC § 2-107 and stated:

While this provision is directed to minerals that are to be severed from realty, in its light it seems to the court absurd to exclude from the definition of goods minerals long since separated from the ground. Minerals, generally, are goods unless they remain part of the real estate of their origin.

Id. at 240-41. The court was not considering a situation in which the gas was to be separated from the ground; rather it was considering a contract for the sale of gas to a commercial user.¹⁰ Instead, the bankruptcy court used an analogy to determine that once the gas has been severed and passed on to a gas supplier, the gas was clearly a good. Id. The same is true of coal. If the Defendants had

⁹ We presume that the contract between the gas supplier and the debtor was the same as any other contract to supply gas to a commercial user and did not involve the source of supply or any reference to production.

¹⁰ The Plaintiffs note that this type of contract is doing something substantially different from a coal supply contract. It appears that this was a normal gas supply contract wherein the gas supplier would provide gas to the debtor through its normal distribution system. Based on the inferences gathered from the opinion, this contract was similar to a contract to supply gas to a residential home or other business. Although commercial end-users may engage in more specific contracts than a home-user of gas due to the commercial user's need for additional gas, this does not appear to have happened here.

honored the contract, bought the coal from Shell Equipment, and then decided to resell it, then and only then would the coal have been a good under the UCC. See W. Va. Code § 46-2-105. That fact does not cause coal that is to be severed by a party to the contract other than the seller to be a good when the UCC specifically only classifies coal in place as a good when it is the subject of a contract to sell and the seller is the party to sever such coal. See W. Va. Code § 46-2-107.

The cases cited by the Petitioners are not factually similar because they only involve two parties and, in some instances, involve the sale of minerals that have already been severed. Therefore, those cases are of little persuasive value and the Court should continue to rely on the clear language of West Virginia Code § 46-2-107 to determine whether the coal at issue is a good and whether the coal sales agreement is a contract for the sale of goods.

F. The Coal Sales Agreement is not an agreement for the sale of goods and therefore, the predominate purpose test does not apply.

The Petitioners have argued that the Coal Sales Agreement is a “mixed” contract and therefore, the “predominant purpose” test should control whether such agreement is governed by common law or by the UCC. (See Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus, pp. 22-23.) In the Plaintiffs’ Response and Incorporated Memorandum of Law to Defendants’ Motion for Reconsideration and to Certify Question for Immediate Appeal, the Respondents argued that the Coal Sales Agreement does not involve the sale of goods. See App. 205. The Petitioners believe that such argument is irreconcilable with the relevant statutes, but the Respondents assert that their argument is the clear one. (See Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus, p. 22).

As discussed supra, the UCC only governs those transactions that fall within its jurisdiction. Its jurisdiction is determined by the various statutes comprising the UCC. To be governed by Article

2 of the UCC, the contract has to be for the sale of goods. Therefore, for coal to be a “good” and the Coal Sales Agreement to be a contract for the sale of goods, both of those things have to fit within the definitions contained within the UCC. West Virginia Code § 46-2-105 contains the primary definition of “goods”:

(1) "Goods" mean all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action."Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (section 2-107).

W. Va. Code § 46-2-105. Under the first part of the definition, coal in place is clearly not a good because it is not “movable at the time of identification to the contract for sale” Id. However, coal in place may fall under the last phrase of the definition: “other identified things attached to realty as described in the section on goods to be severed from realty.” Id. The Respondents assert that phrase is irrelevant beyond its cross-reference to West Virginia Code § 46-2-107 and that 46-2-107 controls. West Virginia Code § 46-2-107 states:

A contract for the sale of minerals or the like including oil and gas or a structure or its materials to be removed from realty is a contract for the sale of goods within this article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

W. Va. Code § 46-2-107. That code section sets forth the situation in which coal in place is a good: especially when such good is to be removed from the realty and such severance is to be done by the seller of the coal. As discussed supra, the Coal Sales Agreement does not satisfy the conditions in West Virginia Code § 46-2-107 because a party other than the seller, specifically the producer, Shell Sales Co., Inc., is going to sever the coal. Therefore, the coal at issue in the Coal Sales Agreement would not be a good, as such coal does not fall within the definition of “good” under the UCC.

To be a “mixed” contract, the contract has to include some provision for the sale of goods. Once the contract involves both the providing of services and the sale of goods, then it is a mixed contract and the predominant purpose test arises. The Coal Sales Agreement is not a contract for the sale of goods, therefore, the concepts of mixed contract and predominant purposes are not relevant. A clear reading of the applicable statutes evidences such.

Because the Coal Sales Agreement is not a contract for the sale of goods and therefore the UCC does not apply, the common law regarding contracts controls. The UCC and its statute of limitations have no application to the Coal Sales Agreement as that agreement does not fall within the boundaries established by the provisions of the UCC.

G. The Court can rule in favor of the Respondents without concern of creating anomalies in the UCC or bankrupting the coal industry because this is a case of first impression and is a limited issue unlikely to affect a great number of contracts.

The Petitioners have made two policy arguments against the circuit court’s ruling: the uniform application of the UCC and protecting the coal industry. (Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus, pp. 12-14.) First, as explained throughout this Response, the circuit court’s holding was correct and policy arguments should not force an improper decision in light of statutory law. Second, the policy arguments are overstated and this case will not have far reaching negative effects.

No doubt the UCC is important, as its goal is to create uniform law for certain types of commercial transactions. However, the UCC does not apply to every commercial transaction; it only applies to those commercial transactions that come within its scope and jurisdiction, as determined by its own statutes. UCC Article 2, which is at issue in this case, applies to contracts for the sale of goods. However, Article 2 does not apply to any transaction involving any material item that

arguably could be considered a good. It instead limits itself to transactions involving those material things that fall within its definition of goods.

The UCC specifically limits its scope and to artificially expand that scope just to include more transactions within its governance is just as bad as artificially contracting that scope. The Petitioners want to expand the scope of the UCC without any basis, which will undoubtedly cause more problems in the area of commercial jurisprudence than the Petitioners claim will happen if the Court's holding stands.

Contrary to the Petitioners' argument, the effect of the circuit court's holding is not far-reaching. Rather, such holding would only apply to those contracts that are nearly identical in nature of parties, form, and substance to the Coal Sales Agreement. For the circuit court's holding to apply, there would have to be a party who did not have an obligation to sever the minerals, yet was not the buyer or seller. Such a situation is rare.

The other problem with the concern about a uniform interpretation of the UCC is that it appears that this issue is one of first impression. As explained in Section 3, there are no cases on point or factually similar to the instant case. Therefore, rather than swimming against the current and creating an anomaly in UCC jurisprudence, the Court's decision will simply be the first decision on the issue to be utilized as persuasive authority when another court considers the issue. Because this case is one of first impression, the concern about running afoul of the UCC's cautions regarding uniform interpretation is greatly lessened.

Further, arguments that the coal industry will be damaged and other coal sales agreements will become unenforceable as a result of the circuit court's holding are without support.¹¹ Under the circuit court's holding, the Coal Sales Agreement could arguably be treated as the sale of an interest in land. Such contracts are enforceable against the seller (or the buyer) whether or not such contracts are actually recorded. See W. Va. Code § 40-19-9. Further, there is no requirement that the Coal Sales Agreement has to be treated as a contract for the sale of interest in land; it could be treated similarly to a contract for services. In that case, it would still be enforceable against the parties and third parties. Nothing in the circuit court's holding makes the Coal Sales Agreement (or similar agreements) unenforceable.

H. Even if the Coal Sales Agreement may be subject to the UCC's statute of limitations, the agreement may also be subject to the general contract statute of limitations, and in such case, the general contract statute of limitations should apply.

Regardless of whether the Coal Sales Agreement could be a contract for the sale of goods, as the Respondents have proven in this Response, it is just as likely that the Coal Sales Agreement is a general contract and should fall under West Virginia common and statutory law related to enforcement of such contracts, including the applicable statute of limitation. W. Va. Code § 55-2-6. Because of this conflict, the Court should find that the contract is a general contract and not subject to the UCC.

The issue of conflicting statutes of limitation comes up at least periodically in regards to claims that may be a claim on contract or in tort. This creates a situation in which the plaintiff's case could be dismissed as untimely. Partially because of this harsh penalty and the idea that cases should

¹¹ The Petitioners further argue that this Coal Sales Agreement, given its multi-party dimensions, including separate broker and severing party, is materially different from the everyday coal sales agreement. The circuit court's holding is fact-specific enough to only apply to coal sales agreements factually similar to the Coal Sales Agreement, which would of course limit the scope of the circuit court's holding.

be heard on their merits, “courts frequently adopt the approach that the action should ordinarily be construed so as to avoid the bar of the statute of limitations whenever the action would be barred in one form but not the other.” Cochran v. Appalachian Power Co., 162 W. Va. 86, 93, 246 S.E.2d 624, 628 (1978). Regarding the choice between construing a claim as a contract claim or as a tort claim, “[A] complaint that could be construed as being either in tort or on contract will be presumed to be on contract whenever the action would be barred by the statute of limitations as being in tort.” Id. at 86, 246 S.E.2d 624, syl. pt. 1.

The Court is faced with a similar dilemma here. If it finds that the Coal Sales Agreement is for a sale of goods and is governed by the UCC, the Respondents’ claim may be time barred because of West Virginia Code § 46-2-725. If the Court finds that the agreement is not a contract for a sale of goods, then the Respondents’ claim is not time barred and can move forward on its merits. The better avenue, and the avenue that the Court has taken in the past and courts in other jurisdiction have taken as well in similar situations, is to find that the Coal Sales Agreement is not a contract for the sale of goods and allow the case to move forward on its merits. Further, the need for such a finding is strengthened by the use of “presumed” in the Cochran holding. Such presumption lends evidence and support to the argument that when there are two conflicting statutes of limitation that could apply, the statute granting the longer time period in which to make a claim should control.

I. The Court should deny the Writ of Prohibition and the Writ of Mandamus as both are inappropriate in this action.

In considering the State ex rel. Hoover v. Berger factors, only the first and fifth factors support hearing the Petitioners’ request for a writ in this instance. 199 W.Va. 12, 483 S.E.2d 12, syl. pt. 4 (1996). The remaining factors all support the denial of the relief requested. Specifically, the Respondents have demonstrated throughout this Response that the circuit court’s order was correct, and could not in anyway be considered clearly erroneous. Moreover, the circuit court’s order is

clearly not an often made mistake. The lack of clear error (and specifically, lack of error) should be given substantial weight. When the factors are considered, it becomes clear that the Court should deny the Petitioners' request without any further consideration.

Regarding the writ of mandamus, the Petitioners are clearly not entitled to a writ of mandamus because they do not have "a clear legal right in the petitioner to the relief sought" State ex rel Burdette v. Zakaib, Jr., 224 W. Va. 325, 685 S.E.2d 903, syl. pt. 1. This alone, without consideration of the remaining conditions, justifies the dismissal of the Petitioners' request.

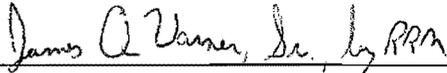
CONCLUSION

The Court should uphold Judge Fox's November 9, 2009 Order denying Defendants' Motion to Dismiss, or in the alternative, for Summary Judgment and deny the Petitioners' requested relief. The circuit court was correct it properly reviewed the Coal Sales Agreement in light of West Virginia Code § 46-2-107 and determined that the UCC did not apply as the Coal Sales Agreement was not a contract for the sale of goods because under that agreement, the seller, Shell Equipment, did not have the duty to sever the coal. Further, the circuit court considered the most relevant case law on the issue, both within and outside of the jurisdiction, and utilized said case law to guide its analysis. Such reliance on relevant statutory and common law makes it apparent that such decision was not clearly erroneous as a matter of law. Judge Fox did not abuse the circuit court's power and therefore, the Court should deny any request for a writ of prohibition or mandamus against him.

For the foregoing reasons, the Respondents request that this Court deny the Petitioners' requests for relief and remand this case to the circuit court for continued litigation to allow the parties to engage in discovery, additional motions, negotiation, and if necessary, trial.

Respectfully submitted this 21st day of January, 2011.

**Respondents, SHELL EQUIPMENT
COMPANY, INC. and SHELL ENERGY
COMPANY, INC., By Counsel:**



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Of Counsel

CERTIFICATE OF SERVICE

This is to certify that on this 21st day of January, 2011, the undersigned counsel served the foregoing “***RESPONDENTS SHELL EQUIPMENT COMPANY, INC.'S AND SHELL ENERGY COMPANY, INC.'S RESPONSE TO PETITION FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, WRIT OF MANDAMUS***” upon counsel of record by depositing a true copy in the United States Mail, postage prepaid, in an envelope addressed as follows:

Avrum Levicoff, Esquire
Denise R. Abbott, Esquire
Levicoff, Silko & Deemer, P.C.
Centre City Tower, Suite 1900
650 Smithfield Street
Pittsburgh, PA 15222-3911



Richard R. Marsh

(WV State Bar #10877)

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF HARRISON, TO-WIT:

I, Frank J. Staud, after making an oath or affirmation to tell the truth, say that the facts I have stated in the Respondent Shell Equipment Company, Inc.'s Response to Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus are true of my personal knowledge, and if I have set forth matters upon information given to me by others, I believe that information to be true.

Frank J. Staud Pres
Frank J. Staud, President, Shell Equipment Co., Inc.

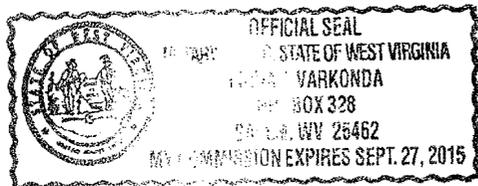
1/21/2011
Date

The foregoing instrument was acknowledged before me this 21st day of

January, 2011, by Frank J. Staud.

My commission expires: Sept 27, 2015

Shirley J. Varkonda
Notary Public



VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF HARRISON, TO-WIT:

I, Frank J. Staud, after making an oath or affirmation to tell the truth, say that the facts I have stated in the Respondent Shell Energy Company, Inc.'s Response to Petition for Writ of Prohibition, or in the Alternative, Writ of Mandamus are true of my personal knowledge, and if I have set forth matters upon information given to me by others, I believe that information to be true.

Frank J. Staud Pres
Frank J. Staud, President, Shell Energy Company, Inc.

1/21/2011
Date

The foregoing instrument was acknowledged before me this 21st day of

January, 2011, by Frank J. Staud.

My commission expires: Sept 27, 2015

Linda J. Varkonda
Notary Public

