IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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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.

BRIEF OF PETITIONER

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I. ASSIGNMENT OF ERROR

The Circuit Court erred in finding breach of contract by the Petitioner, CONSOL Energy Inc. ("CONSOL"), based on the meaning of the term "Company" under its equity incentive plan. The plain meaning of the contract language and CONSOL's full and binding express contractual authority to determine the meaning of its terms provided CONSOL with the basis to determine that "Company" means CONSOL only, and not its subsidiaries, with respect to what constitutes a "Change in Control."

II. STATEMENT OF CASE

All Respondents in this case were employed by subsidiaries of CONSOL, and all were participants in CONSOL's equity incentive plan entitled the CONSOL Energy Inc. Equity Incentive Plan ("the Plan"). Appendix Record ("A.R.") 0073. Under the Plan, they received restricted stock unit ("RSU") awards; with each RSU representing the potential right to receive one share of CONSOL's common stock. Specifically, the RSU awards represented *un*vested rights to receive shares of CONSOL's common stock in the future (assuming employment with CONSOL and its subsidiaries on the applicable vesting date), and there was no entitlement to such shares unless and until the RSU awards vested.

Vesting of the RSU awards was a gradual process; it did not occur immediately upon receipt of the RSU award. Conditioned on a Respondent's continued employment, the awarded shares vested in three successive equal annual installments from the grant date, Upon each annual vesting date one-third of the award would vest with the related shares being issued.[1]

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[1] For example, if CONSOL granted an RSU award in 2011, a third of the awarded shares would vest on each of the award date anniversaries in 2012, 2013 and 2014 (if the employee was employed with CONSOL and its subsidiaries on that date). Thus, the employee's award would not fully vest until 2014.

Employees participating in the Plan, such as the Respondents, were presented with a Letter Regarding Restricted Stock Unit Award Under CONSOL Energy Inc. Equity Incentive Plan, which included a Terms and Conditions attachment (together, "the Award Agreement"). A.R. 0151. An employee's Award Agreement set forth the specific number of RSUs awarded to that employee.

The Award Agreement provides for accelerated vesting of an employee's RSU award upon the occurrence of certain limited events: 1) the employee's "Separation from Service with the Company" at age 62; 2) the employee's "Separation from Service with the Company" through early retirement, if eligible, at age 55; 3) the employee's "Separation from Service with the Company" through death or a reduction in the workforce; or 4) "completion of a Change in Control (as such term is defined in the Plan)." A.R. 0152. Of those limited events triggering accelerated vesting, the only one at issue in this case is the "completion of a Change in Control (as such term is defined in the Plan)."

The Plan offers three alternative events that constitute a "Change in Control." A.R. 0105. Only the third ("the sale of all or substantially all of the Company's assets") is at issue here. The Plan defines "Company" as "CONSOL Energy Inc." only. A.R. 0106. Unlike the Award Agreement which includes CONSOL and its subsidiaries whenever the term "Company" is used within that document, the Plan does not include CONSOL's subsidiaries under its definition of "Company." To the contrary, subsidiaries are described under the Plan's separately-defined term "Affiliate."[2]

As discussed in the next two paragraphs, the Plan grants CONSOL's Board of Directors full and binding authority to decide all matters relating to the interpretation and administration of

[2] "'Affiliate' shall mean (i) any entity that, directly or indirectly, is controlled by the Company, (ii) any entity in which the Company has a significant equity interest . . ." A.R. 0088.

the Plan, which includes the authority to interpret the meaning of the Plan's terms, including the term "Company." As is also set forth, the Respondents, by accepting their RSU awards, agreed to all provisions of the Plan including the full and binding authority of CONSOL's Board of Directors concerning interpretation and administration of the Plan's terms.

The Plan recognizes the plenary and binding discretion of CONSOL's Board of Directors. In Section 2(a) on page one, the Plan states that the Board "shall have full power and discretionary authority to decide ***all matters relating to the*** administration and ***interpretation*** of the Plan." A.R. 0073 (emphasis added). This full discretion of the Board specifically includes "the authority to (vii) ***interpret*** and administer the Plan and any instrument or agreement relating to" it and "(x) ... reconcile any inconsistency in the Plan or in any Award Agreement in the manner and to the extent it shall deem expedient to carry the Plan into effect." Id. (emphasis added). The Board's decisions and determinations "***shall be final, conclusive and binding***." Id. (emphasis added).

The Plan reiterates and specifies in detail the binding nature of the Board's discretion in Section 2(b):

> Board Discretion Binding. Unless otherwise expressly provided in the Plan, ***all designations, determinations, interpretations,*** and other decisions under or with respect to the Plan or any Award ***shall be within the sole discretion of the Board, may be made at any time and shall be final, conclusive, and binding*** upon all Persons, including the Company, any Affiliate, any Participant, any holder or beneficiary of any Award, any shareholder and any Employee. ***All Awards shall be made conditional upon the Participant's acknowledgement, in writing or by acceptance of the Award, that all decisions and determinations of the Board shall be final and binding*** on the Participant, his or her beneficiaries and any other person having or claiming an interest under such Award.

A.R. 0074 (emphasis added).

On December 5, 2013, CONSOL sold the stock of its subsidiary, Consolidation Coal Company, to Murray Energy Corporation and Ohio Valley Resources, Inc., a Murray Energy Corporation subsidiary (collectively, "Murray") ("the 2013 sale"). Consolidation Coal Company's assets included five underground coal mines in northern West Virginia. Each Respondent worked for Consolidation Coal Company or one of Consolidation Coal Company's subsidiaries sold to Murray in the 2013 sale. A.R. 0878.

The 2013 sale did not entail "all or substantially all" of the Company's (CONSOL's) assets. CONSOL submitted to the Circuit Court documentation it had filed with the United States Securities and Exchange Commission demonstrating that the assets it transferred to Murray, on a GAAP basis, constituted less than twenty percent (20%) of CONSOL's assets. A.R. 0810. Thus, a Change in Control of CONSOL that would trigger accelerated vesting of the Respondents' RSU awards did not occur.

At the time of the 2013 sale, the Respondents' RSU awards were not fully vested, and CONSOL rightfully exercised its fully binding discretion to decline to recognize accelerated vesting of and, hence, decline issuance of certain of those shares. Moreover, CONSOL correctly applied the definition of Change in Control in the Plan in determining that the unvested portions of the Respondents' RSU awards would not vest in connection with the 2013 sale. Importantly, CONSOL, through a binding resolution or "consent" of its Board of Directors effective November 29, 2013 ("the Board Consent"), did take special action to vest some, but not all, of the Respondents' shares that would otherwise have been cancelled or forfeited due to the 2013 sale. The Board's consent states in pertinent part:

> Subject to closing the [2013 sale] Transaction, the Committee approves (i) for each RSU award held by a Departing Employee who is not otherwise "early retirement" eligible under the terms of the applicable RSU award agreement or age 62 or older at the

> [2013 sale] Effective Time, *such employees' RSU awards granted under the Plan will be deemed vested as to the number of shares relating to such RSU award that would have vested on the regularly scheduled vesting date of such awards closest to the Effective Time,* and any remaining, unvested portion of such RSU awards will be cancelled and forfeited at the Effective Time . . . .

See Unanimous Written Consent of the Compensation Committee. A.R. 0915.

The Board determined this special action was necessary in order to affect the partial vesting because CONSOL's sale of its subsidiary, Consolidation Coal Company, to Murray did not constitute a "Change in Control (as such term is defined in the Plan)." 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.

The Respondents brought this action in which they incorrectly allege they were entitled to accelerated vesting of the unvested portion of their RSU awards based on a Change in Control not of CONSOL, but rather of the individual subsidiaries which employed them.

CONSOL and the Respondents filed cross motions for summary judgment. Ignoring the express language of the Plan documents and the plenary authority of CONSOL's Board of Directors to decide and resolve any interpretation and administration issues thereunder, the Circuit Court granted summary judgment to the Respondents on their claim for breach of contract by CONSOL, and in so doing signed unchanged the proposed Findings of Fact, Conclusions of Law and Order submitted by Respondents. Specifically, the Circuit Court concluded CONSOL breached its contractual obligation to fully vest the Respondents' RSU awards in connection with the 2013 sale. A.R. 0889.

The parties then agreed to ask the Circuit Court to certify its summary judgment ruling for appellate review pursuant to West Virginia Rule of Civil Procedure 54(b). A.R. 0917. Upon

the Circuit Court's Rule 54(b) certification of its breach of contract ruling as a final order, and pursuant to the agreement between the parties, all other claims of any nature against CONSOL in this action were dismissed.

III. SUMMARY OF ARGUMENT

The Award Agreement is clear that the definition of Change in Control for accelerated vesting of the RSU award is as defined in 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 of the Plan which is further evidenced by the fact that, in contrast to all other accelerated vesting events set forth in the Award Agreement, the word "Company" is notably absent from the Change in Control vesting trigger (which expressly refers to the definition of Change in Control in the Plan and relates to CONSOL only). The use of the term "Company" in the Award Agreement was only meant to apply to the three (3) employment-termination vesting triggers, and not the Change in Control vesting trigger for which the term "Company" is notably absent.

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. Based on that 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.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is suitable and should be set for oral argument under West Virginia Rule of Appellate Procedure 19 because it involves an assignment of error in the application of settled law and involves narrow issues of law. Further, because this Court should reverse the Circuit Court's ruling, a memorandum decision without oral argument may not be appropriate. W. Va. R. App. P. Rules 19 (a) and 21(d).

V. ARGUMENT

Because the Circuit Court granted the Respondents summary judgment, this Court's standard of review is *de novo*. Syl. Pt. 2, Ayersman v. W. Va. Div. of Envtl. Prot., 208 W. Va. 544, 542 S.E.2d 58 (2000). Because both the Plan and the Award Agreement expressly provide that Delaware law governs their validity, construction and effect, Delaware law is controlling on the substantive issues. A.R. 0085, 0156. Under that controlling law and in line with the Plan documents, CONSOL properly applied the Award Agreement and the Plan, and thus no breach of contract resulted. Moreover, the Board had full and binding authority pursuant to the contracts to interpret their application and correctly did so. Petitioner addresses each of these arguments in turn.

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

Petitioner complied with all terms of the Plan and therefore did not breach its contracts with Respondents. The documents set forth in a straightforward manner the definition of the term "Company."

Pursuant to the documents, Respondents are entitled to accelerated vesting of the RSUs if a Change in Control occurred. In arguing that a Change in Control occurred as a result of the

sale of the mines, Respondents ignore the plain language of the Award Agreement and 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.

The Award Agreement provides for four events which result in accelerated vesting of the RSU awards:

- your Separation from Service with the Company on or after your attainment of age sixty-two (62);

- your Separation from Service with the Company (i) on or after your completion of at least one year of continuous service with the Company from the Award Date and your attainment of age fifty-five (55) under circumstances which also satisfy the criteria for Early Retirement under the Company's Employment Retirement Plan, as in effect at that time (the "ERP"), or (ii) due to Incapacity Retirement as defined under the ERP, (provided that in each such event, the delivery of your vested shares will continue to be paid on the date on which those shares would normally have vested);

- the Separation of Service with the Company by reason of your death or as part of a reduction in force as specified and implemented by the Company; or

- completion of a Change in Control (as such term is defined in the Plan).

The first three events specifically deal with termination of employment within the CONSOL family. All three provisions specifically use the term "Company" and, as such term is defined in the Award Agreement, includes subsidiaries of CONSOL Energy Inc. In contrast to those provisions, the fourth acceleration trigger does not use the word "Company" and thus is not controlled by the definition in the Award Agreement. This fourth provision states that vesting of the RSU awards will be accelerated in the event of a "completion of a Change in Control **(as such term is defined in the Plan)**" (emphasis added). Change in Control is defined in the Plan as the sale of all or substantially all of the Company's assets. "Company," as defined in the Plan,

is "CONSOL Energy Inc." The fourth vesting trigger in the Award Agreement does not use the term "Company" to modify the meaning of the Plan definition of that term. The Award Agreement does not provide for any alternative definition of Change in Control, but rather expressly incorporates the definition of Change in Control from the Plan and thus logically means a Change in Control of CONSOL only.

The sale of the mines to Murray Energy did not involve the sale of all or substantially all of CONSOL Energy Inc.'s assets. Treasury Regulation § 1.409A-3(i)(5) provides that a change in the ownership of a substantial portion of a corporation's assets occurs when a person acquires assets from the corporation that have a total gross fair market value equal to or more than forty percent of the total gross fair market value of all of the assets of the corporation. The assets Petitioner transferred to Murray Energy, on a GAAP basis, were less than twenty percent of CONSOL Energy Inc.'s assets. A.R. 0810.

Respondents assertion that the Plan incorporates Treasury Regulation § 1.409A-3(i)(5)'s more expansive definition of Change in Control is not consistent with the purpose of the tax regulation. The very language of that regulation allows a company to set forth its own definition of Change in Control. *See* Treasury Regulation § 1.409A-3(i)(5)(i) (a "plan may provide for a payment on **a particular type or types of change in control events, and need not provide for a payment on all such events**") (emphasis added). The reference to the tax regulation does not expand the Plan's definition of Change in Control. Rather, the Plan's reference to the regulation simply makes clear that the Plan's definition of Change in Control is intended to fall within the boundaries of a "change in control event" as defined under the Section 409A regulations.

Because none of the events constituting a "Change in Control" as defined under the Plan and Award Agreement occurred, Respondents' unvested RSUs were cancelled and forfeited

(except as provided in the Board Consent). The Plan and Award Agreement provided for this result. It clearly states that any unvested portion of RSUs could be cancelled and forfeited. Petitioner, therefore, did not breach the Plan or the Award Agreement. Accordingly, the Circuit Court ruling in favor of the Respondents should be reversed.

B. Petitioner Rightfully Exercised Its Fully Binding Discretion to Decline to Recognize Accelerated Vesting of, and to Decline Issuance of, Unvested RSUs

At the time of the 2013 sale to Murray, not all RSUs awarded to the Respondents had vested, and CONSOL rightfully exercised its fully binding discretion to decline to recognize accelerated vesting of and, hence, decline issuance of certain of those RSUs. Although CONSOL's Board did take special action via its consent to vest a portion of the Respondents' otherwise forfeited RSUs, it did not take special action to expand the Plan's definition of an accelerated-vesting "Change in Control" beyond that of a "sale of all or substantially all of the Company's (CONSOL's) assets." Nor did it take action to expand the definition of "Company" to encompass Consolidation Coal Company or any subsidiaries of Consolidation Coal Company.

Rather, 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.*").

Delaware law recognizes CONSOL's Board's authority to construe Plan documents. In Friedman v. Khosrowshahi, No. Civ. A. 9191-CB, 2014 WL 3519188, 59 Employee Benefits Cas. 1657 (Del. Ch. July 16, 2014), the plaintiff stockholder sued Expedia, Inc. and its board of directors based on the decision of the board's compensation committee to accelerate the vesting of restricted stock unit ("RSU") shares of Expedia's common stock. The RSU award at issue

had been made to Expedia's chief executive officer under "the Company's 2005 Stock and Annual Incentive Plan." Id. at *1.

The Delaware court dismissed the action based on the plaintiff's failure to make a pre-suit demand on the board of directors and, in doing so, found 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." Id.

Significantly, the court added ***"At most, plaintiff has identified a potential ambiguity in the RSU Award that the compensation committee was authorized to interpret under the terms of the Plan."*** Id. (emphasis added). See id. at *9 ("Under Section 2(a)(vii) [of Expedia's Plan], the Compensation Committee has the authority 'to ***interpret*** the terms and provisions of the Plan and any Award issued under the Plan (and any agreement relating thereto).' . . . Thus, assuming arguendo that Section 1(b) of the RSU Award was ambiguous concerning whether the OIBA Target originally was intended as a vesting condition . . . the Compensation Committee had the authority to interpret Section 1(b) to resolve that ambiguity.").

Here, CONSOL was vested with, and employed that same contractual authority to interpret the term "Company" under its Plan, although, in CONSOL's case, as noted above, there is no ambiguity regarding the meaning of the term Change in Control under the Plan and Award Agreement as applying solely to CONSOL (and not its individual subsidiaries). As the decision made by Expedia's board of directors, the decision of CONSOL's Board resulted from "a valid exercise of business judgment." See id. at *1 and *12.

In Khanna v. McMinn, No. Civ. A. 20545-NC, 2006 WL 1388744 (Del. Ch. May 9, 2006), the plaintiffs sued Covad Communications Group, Inc. and its board of directors for

multiple alleged wrongs including allowing one director's Restricted Stock Purchase Agreement shares in Covad to prematurely vest. Id. at *1 and *18. In dismissing this claim and a majority of the other claims brought by the plaintiffs for various reasons, the court importantly noted that "this Court will not second-guess the judgment of a board of directors if it bases its decision on a rational business purpose." Id. at *23.

In Burns v. J.C. Penney Company, Inc., 85 F. App'x 830, 32 Employee Benefits Cas. 1819 (3d Cir. 2004), the Third Circuit affirmed the district court's grant of summary judgment to parent corporation J.C. Penney in a suit by employees of a J.C. Penney subsidiary who 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. A triangular merger that resulted in the plaintiffs' employer being acquired by another J.C. Penney subsidiary did not constitute a change of control in the parent, J.C. Penney. See also In re Digex Inc. S'holders Litig., 789 A.2d 1176 (Del. Ch. 2000) (distinguishing between a parent corporation and its subsidiary for change of control analysis and concluding the subsidiary's shareholders did not have reasonable likelihood of success where no change of control regarding subsidiary would ensue from merger of its parent corporation with another corporation).

Interpretation of contract language is a question of law. See Hudson v. State Farm Mut. Ins. Co., 569 A.2d 1168, 1170 (Del. 1990) (interpretation of a contract is a determination of law); Wood v. Acordia of W. Va., Inc., 217 W. Va. 406, 411, 618 S.E.2d 415, 420 (2005) ("it is the province of the circuit court, and not of a jury, to interpret a written contract").

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.

The Plan's reference to Treasury Regulation § 1.409A does not diminish the Board's binding authority on the above issues. Section 409A expressly authorizes a company to contractually limit its definition of change in control events instead of adopting all boilerplate examples set forth in the regulation. See Treasury Regulation § 1.409A-3(i)(5)(i) (a "plan may provide for a payment on a particular type or types of change in control events, and need not provide for a payment on all such events ..."). Thus, even in the context of the application of Section 409A, the Plan's definition of Change in Control only by reference to "CONSOL Energy Inc." is entirely permissible and consistent with the requirements of Section 409A.

Section 409A is a tax rule. See Rosen v. Smith Barney, Inc., 950 A.2d. 205, 207 (N.J. 2008) (providing that Section 409A governs "nonqualified deferred compensation plans" and "permits taxpayers to qualify for favorable tax treatment if the compensation is retained by the employer for a period of time and remains at a 'substantial risk of forfeiture' until payable to the employee") (citing 26 U.S.C. § 409A(a)(1)(A)(i)). Specifically, Section 409A restricts payment of "deferred compensation," and the specific portion of it referenced in the Board's consent is a "safe harbor" to pay participants *but only if* their stock is vested.

As a tax regulation, Section 409A's purpose is to address payment and tax treatment issues, *not* vesting issues. It does not address the rights of an employee on a substantive question such as entitlement to accelerated vesting. 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 does not become relevant.

Based on the express language of the Plan documents as interpreted under the full and binding discretion of CONSOL's Board of Directors, no accelerated vesting of the unvested portion of the RSU awards occurred, and CONSOL did not breach the Plan documents by declining to issue those shares to the Respondents. Accordingly, the Circuit Court ruling in favor of the Respondents should be reversed.

VI. CONCLUSION

CONSOL 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's favor.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January 2016, true and accurate copies of the foregoing "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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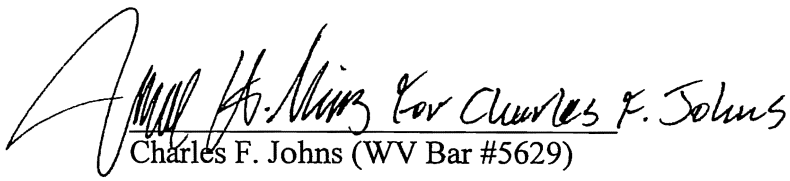

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