IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CONSOL ENERGY INC.

Defendant Below, Petitioner,

v.

MICHAEL HUMMEL, ET AL.,

Plaintiffs Below, Respondents.

DOCKET NO. 15-1040

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

I. QUESTIONS PRESENTED

1. Whether the Circuit Court properly granted Plaintiffs' Motion for Summary Judgment by finding that the sale of Consolidation Coal Company and its subsidiaries to Murray Energy constituted a "completion of a Change in Control" under the plain and unambiguous language of the Award Agreement thereby triggering the accelerated vesting provision.

2. Whether this Court should consider Defendant's new arguments and evidence which were not raised before the Circuit Court and are asserted here for the first time.

3. Whether the Equity Incentive Plan's "Discretionary Authority Clause" permits Defendant to ignore the express terms of the Award Agreement and arbitrarily construe the Award Agreement for its financial benefit.

II. STATEMENT OF THE CASE

A. Introduction

The coal industry in West Virginia is in decline. Mine closings, layoffs, and bankruptcies have swept across our State. This has caused dire conditions for our miners and their families. Plaintiffs are seventy-six West Virginia coal miners who for years have worked in this State as employees of Consolidation Coal Company (hereinafter "CCC") or one of its subsidiary mines, including McElroy, Shoemaker, Blacksville, Loveridge, and Robinson Run.[1] [App. 0899; 0920]. Despite the uncertain future of coal, Plaintiffs chose to work and remain within this industry and signed an Award Agreement with their employers in large part because of the financial benefits they were promised. Now these benefits are being wrongfully withheld.

[1] Subsequent to the Circuit Court's Order of July 27, 2015, Plaintiffs filed a "Second Amended Complaint" asserting class allegations under W.Va. R. Civ. P. 23.

On December 5, 2013, Defendant CONSOL Energy, Inc. (hereinafter "Consol" or "Defendant") abandoned its operations in West Virginia and sold its West Virginia mines (and in essence Plaintiffs) to Murray Energy.[2] Under the express terms of the Award Agreement entered into between Defendant and Plaintiffs, this transaction triggered the accelerated vesting of certain benefits which entitled Plaintiffs to awards of Restricted Stock Units. Despite its contractual obligations, Defendant has refused to pay Plaintiffs' benefits. Plaintiffs filed the underlying claim to hold Defendant accountable and ensure that Plaintiffs and all other similarly situated miners received the benefits which were promised to them under the clear and unambiguous terms of the Award Agreement.

B. The Equity Incentive Plan and the Award Agreement

During the course of their employment, Plaintiffs received and participated in Defendant's "Equity Incentive Plan" (hereinafter "the Plan"). [App. 0722-0748]. Defendant's stated purpose for the Plan was three-fold: (1) to attract and retain key employees of Consol and ***its affiliates***; (2) to motivate employees by performance-related incentives; and (3) to enable employees to participate in the long-term growth and financial success of the company. [App. 0722] (emphasis added). Under the terms of the Plan, for each year of service that certain productivity marks were met, Plaintiffs would earn an award in the form of Restricted Stock Units (hereinafter "RSUs"). [App. 0726-0727]. The payment of the RSU award would be spread out over a three-year period. [App. 0727]. For example, if an employee is given an award of 99 RSUs in 2010, then he/she would receive 33 units each year for the next three consecutive years (2011, 2012, 2013). *Id.* Full payment was contingent upon Plaintiffs' continued employment

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2 For the sake of clarity and simplicity, Petitioner/Defendant Below is referred to as "Defendant" and Respondents/Plaintiffs Below are referred to as "Plaintiffs" throughout the body of this brief.

with Defendant's subsidiaries. [App. 0743-0744]. If the recipient quit or was terminated for cause prior to the completion of the schedule, whatever had not yet been paid was forfeited. *Id.*

Under the Plan, an "Award Agreement" would accompany each award and would "specify the terms and conditions of the award and any rules applicable thereto." [App. 0733]. Upon the awarding of RSUs each year, each Plaintiff would receive an Award Agreement requiring their signature and agreement. [App. 0742].

The Award Agreement contained an accelerated vesting provision which provided:

> *Acceleration of Vesting Events*: All of the shares subject to your award **will** vest (i.e., **will not be subject to forfeiture**) upon the occurrence of any of the following events, and (except as otherwise specified below) such vested shares **will** be delivered to you on such date (or as soon as administratively practical thereafter but **in no event** later than 15th day of third month following such date):
>
> - your **Separation for 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).
>
> Notwithstanding the foregoing, in no event will any special vesting of your shares occur **should your employment with the Company be terminated** for Cause (as such term is defined in the Plan) or **should you leave the Company's employ for any reason other than in connection with one of the accelerated vesting events specified above.**

[App. 0743] (emphasis added).

This provision assured Plaintiffs that, regardless of where in the three-year time-frame an award existed, if one of the triggering events occurred, the total award would be paid and all but one accelerated (incapacity). *Id.* Moreover, this provision plainly directs that payment upon each triggering event is mandatory, with no discretion to modify or refuse to honor the acceleration. *Id.*

In regards to "a completion of a Change in Control," the Award Agreement and the Plan both incorporate Treasury Regulation §1.409A-3(i)(5) (which is a tax regulation pertaining to deferred compensation) and obligates Defendant to comply with the terms and provision of the Regulation. [App. 0747, 737-738]. Treasury Regulation §1.409A-3(i)(5) employs what is known as a "downstream analysis" in determining when a "change in control" of a corporation occurs. To illustrate this, under the heading "Identification of relevant corporation," the Regulation provides the following EXAMPLE of a change in control:

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

[App, 0798].

Applying this Example to the transaction at issue here: Consol Energy, Inc. becomes "Corporation A," Consolidation Coal Company is "Corporation B," and all of the subsidiary corporations for whom Plaintiffs worked would be classified as "Corporation C."

Notably, the RSUs and incentive awards were not gratuitous payments under the Award Agreement nor was the consideration for them limited to Plaintiffs' past meritorious work and productivity. Rather, in exchange for these benefits, Plaintiffs were required to give ***new*** consideration. Specifically, "[a]s a further condition to [the] right and entitlement to receive the [RSUs]..." each Plaintiff had to enter into a two-year "Non-Competition Covenant" and a "Proprietary Agreement Covenant." [App. 0745-0747].

C. Plaintiffs' Employers Undergo a "Change in Control" Thereby Triggering the Accelerated Vesting Provision Under the Award Agreement

On December 5, 2013, Defendant sold CCC, a wholly-owned subsidiary, to Ohio Valley Resources, Inc. and its parent corporation, Murray Energy Corporation (collectively hereinafter "Murray Energy") through a stock purchase agreement. [App. 0843; 0850; 0854]. The purchase price was $3.5 Billion. *Id.* At this time, Plaintiffs were not employees of Defendant but were rather employees of CCC and/or its subsidiary mines.

Under the plain language of the Award Agreement, this transaction constituted "a completion of a Change in Control" which triggered the accelerated vesting of Plaintiffs' RSUs. The Award Agreement incorporates the Plan's definition of "Change in Control." [App. 0743]. The Plan defines a "change in control" as "a sale of all or substantially all of the Company's assets." [App. 0737-0738; 0743]. Significantly, the Award Agreement defines "Company" as "CONSOL Energy, Inc. (***including its subsidiaries***)." [App. 0742] (emphasis added). Nowhere in the Award Agreement is the definition of "Company" limited to only CONSOL Energy, Inc. (excluding its subsidiaries). *Id.* Thus, Plaintiffs' RSUs awards accelerated and vested upon the sale of CCC and its subsidiaries to Murray Energy per the express terms of the Award Agreement.

In December of 2013, as one of its last acts in West Virginia, Defendant announced that it would not pay the full amount of the earned RSUs to the miners and that the payments would not be accelerated. [App. 0022, at Para. 63; 0202]. As a result, all of the units which should have been paid to Plaintiffs were pocketed by Defendant. As purported justification for its conduct, Defendant claimed that a "Change in Control" did not occur because the accelerated vesting provision in the Award Agreement only applies to Consol – as the parent corporation – and not its subsidiary companies for whom Plaintiffs were employed.[3] [App. 0057; 0817].

D. Procedural History

Plaintiffs instituted the underlying action in the Circuit Court of Marshall County asserting that Defendant breached the express terms of the Award Agreement. [App. 0003-0014]. After conducting initial discovery, both parties acknowledged that the terms of the Award Agreement were clear and unambiguous and filed competing motions for summary judgment. [App. 0856-0869; 0870-0875].

On April 24, 2015, Judge Robert Stone held oral arguments on the competing motions. [App. 0708-0855]. Notably, Defendant never referenced, briefed, nor argued before the Circuit Court either the "Unanimous Written Consent" document or anything relating to Section 2 of the Plan and the Board's so-called "plenary authority."[4] In fact, Defendant's two Circuit Court memoranda - its "Memorandum of Law in Support of Defendant Consol Energy Inc.'s Motion for Summary Judgment" and "Consol Energy Inc.'s Response to Plaintiff's (sic) Motion for

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[3] Notably, Defendant issued RSU awards in 2013, securing from Plaintiffs additional written covenants and putting them on the three-year payment path, even though Defendant admitted that as of Spring 2013 it was considering selling those properties which Murray Energy bought just a few months later. [App. 0057]. Given its intention to ignore the vesting, Defendant sought and got real consideration, while giving Plaintiffs nothing in return. This result is unfair and unjust.

[4] The "Unanimous Written Consent" document was not produced until after the Circuit Court's July 27th Order. This is true despite Plaintiffs serving requests for documents specifically seeking all documents of this type. [App. 0067-0068].

Summary Judgment" - are utterly devoid of any reference to these arguments or evidence. [App. 816-829, 0749-0815]. After oral arguments, both sides submitted their respective proposed findings of fact and conclusions of law. [App. 0856-0869; 0870-0876].

By Order dated July 27, 2015, Judge Stone denied Defendant's Motion for Summary Judgment and granted Plaintiffs' Motion for Summary Judgment. [App. 0877-0890]. In his Order, Judge Stone found that a "change in control" had occurred under the plain and unambiguous language of the Award Agreement which entitled Plaintiffs to accelerated vesting of the RSU awards. *Id.* Specifically, Judge Stone found that the Award Agreement's definition of "Company" controlled and therefore the entity that was required to undergo a "change in control" was "CONSOL Energy, Inc. (***including its subsidiaries***)." *Id.*

The parties subsequently entered into two formal stipulations which were filed on September 22, 2015. One succinctly and simply agreed to the filing of the "Second Amended Complaint" so as to add miners and assert a class allegations. [App. 0909-0910]. The second stipulation resolved any remaining issues which may have impeded the parties' mutual desire to have the Circuit Court's Order presented on appeal via Rule 54(b) of the West Virginia Rules of Civil Procedure, including stipulations rendering Plaintiffs' damages subject to easy, mechanical, and ministerial computation. [App. 0911-0916]. The latter stipulation also permitted Defendant to submit into the Court file for the first time the "Unanimous Written Consent of the Compensation Committee," which is dated November 29, 2013 (only six days before the sale closed). [App. 0915-0916]. Defendant subsequently appealed the Circuit Court's Order of July 27, 2015, alleging that the Circuit Court misapplied the clear and unambiguous language of the Award Agreement.

III. SUMMARY OF ARGUMENT

Distilled to its simplest form, the issue before the Court is which company must undergo a "Change in Control" to trigger the accelerated vesting provision in the Award Agreement.[5] The plain and unambiguous language of the Award Agreement makes clear that this company is "Consol Energy Inc. (***including its subsidiaries***)." [App. 0742] (emphasis added). This company is not Consol Energy Inc. (***excluding its subsidiaries***). Defendant's attempt to unduly restrict the definition of company to exclude Defendant's subsidiaries is improper as it ignores the plain and unambiguous language of the Award Agreement.

The Award Agreement "specif[ies] the terms and conditions of the [RSU] award[s] and any rules applicable thereto." [App. 0733]. Importantly, the first sentence of the Award Agreement defines the operative term "Company" as "CONSOL Energy, Inc. (***including its subsidiaries***)." [App. 0742] (emphasis added). The Award Agreement then proceeds to identify four separate events which will trigger the accelerated vesting of the RSU awards. One of those triggering events is a "completion of a Change in Control (as such ***term*** is defined in the Plan)." [App. 0743] (emphasis added). Notably, the use of "term" is in its singular form and only applies to "Change in Control." The Plan defines "Change in Control" in pertinent part as "unless otherwise defined in the applicable Award Agreement ... the sale of all or substantially all of the Company's assets." [App. 0737-0738]. "Company" is not defined within the "Change in Control" provision and the Plan's definition of "Company" is not incorporated into the Award Agreement. [App. 0152; 742-0743]. Significantly, Defendant incorporated several distinct definitions from the Plan into the Award Agreement but chose not to incorporate the definition of "Company." As such, the Award Agreement's definition of "Company" controls and identifies the "Company"

5 Defendant has never asserted – nor can it – that a "completion of a Change in Control" did not occur with respect to CCC or any of its subsidiaries for whom employees were employed.

which must undergo a "Change in Control" to trigger the acceleration provision. The Award Agreement defines "Company" as "CONSOL Energy, Inc. (***including its subsidiaries***). [App. 0742] (emphasis added). Thus, the sale of CCC and its subsidiaries on December 5, 2013, triggered the "Change in Control" accelerated vesting provision. This conclusion is required by express language of the Award Agreement.

Here, as it did before the Circuit Court below, Defendant attempts to pervert the plain and unambiguous language of the Award Agreement. Defendant asks this Court to read into the Award Agreement a definition from the Plan that was never incorporated and then give it precedence over those definitions contained in the Award Agreement. Defendant argues that the Plan's definition, which defines "Company" as "CONSOL Energy, Inc" ***excluding its subsidiaries***, controls and governs the terms of the Award Agreement. This interpretation of the Award Agreement distorts the plain and unambiguous language of the applicable agreements. The Circuit Court properly rejected this argument and upheld the plain language of the Award Agreement by finding that the term "Company" from the Award Agreement (as opposed to the Plan's definition) controlled.

Defendant's argument, at best, merely creates a conflict between the language in the Plan and the Award Agreement as both agreements contain a separate and distinct definition of "Company." To the extent there are conflicting terms, those contained in the Award Agreement control and govern. The Award Agreement contains a conflict resolution provision which states:

> *Award Subject to Plan*: This Award is subject to the Plan. The terms and provisions of the Plan as it may be amended from time to time are hereby incorporated herein by reference. **In the event of a conflict between any term or provision contained herein and a term or provision of the Plan, the applicable terms and provisions of the Agreement will govern and prevail.**

Id. (emphasis added).

Thus, even if Defendant's interpretation were plausible (which it is not), the Award Agreement's definition of "Company" would still control as the Award Agreement trumps the Plan.

Moreover, reading the Award Agreement in its entirety evidences that the term "Company" must be interpreted to include the subsidiary companies as the vesting events are uniformly tied into employment. The Award Agreement identifies four separate "Acceleration of Vesting 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) a completion of Change in Control (as such term is defined in the Plan) or a sale of all or substantially all of the ***Company***'s assets.

[App. 0742-0743.]

All four events relate to an occurrence involving a "Company." There is no directive that different definitions of the term "Company" are to be applied to the four contingencies and there is no reason the "change of control" event – which is within the same provision as the other three triggering events - should be interpreted differently. Here, Plaintiffs were all employees of CCC and/or its subsidiaries and were not in the employ or service of Defendant. Because of this, the term "Company" must be defined as "CONSOL Energy, Inc. (and its subsidiaries)" or else Plaintiffs would never be entitled to benefits. Thus, interpreting the term "Company" to exclude Defendant's subsidiaries would create an absurd and illogical result.

Treasury Regulation §1.409A lends further support to the Circuit Court's holding. Treasury Regulation §1.409A-3(i)(5) is incorporated in the Plan and Award Agreement and its provisions must be complied with as set forth in the agreements. As can be seen by the example contained in the Regulation, the focus in determining whether a change in control occurred for a company in a "downstream analysis" is upon the ***employer*** of the person affected. Such is evidenced by the example contained in the Regulation:

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

[App. 0798] (emphasis added).

Recognizing the shortcomings of its arguments below, Defendant has resorted to new arguments raised for the first time to this Court on appeal. In its petition, Defendant introduced a document entitled "Unanimous Written Consent of the Compensation Committee" and argues that it should be afforded deference in interpreting the Award Agreement pursuant to the Plan's Discretionary Authority Clause. Because Defendant failed to raise these arguments to the Circuit Court below, it waived its right to assert them here on appeal. Accordingly, this Court should not consider any argument pertaining to the Discretionary Authority Clause, the "Unanimous Written Consent of the Compensation Committee," or that Defendant is afforded broad discretion to interpret its own contracts.

Nonetheless, even if the Court were to consider Defendant's new arguments, such must fail. The Discretionary Authority Clause does not give Defendant the right to interpret unambiguous contract terms against their plain meaning. Thus, it cannot alter the express contract provisions to achieve its desired end. In addition, the "Unanimous Written Consent of the Compensation Committee" is not evidence of a properly valid exercise of Board discretion toward contract interpretation. The Compensation Committee has no authority to interpret the Award Agreement. Defendant's attempt to equate the Compensation Committee's actions with those of the Board (which purportedly has interpretive authority) is improper. Finally, Defendant's argument that its decisions are protected by the Business Judgment Rule is misdirected. The Business Judgment Rule only applies to breach of fiduciary claims brought by shareholders. It is not applicable to breach of contract claims such as those brought by Plaintiffs below.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria in Rule 18(a)(4) of the Revised Rules of Appellate Procedure, Plaintiffs believe the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. Indeed, the matter is appropriate for a memorandum decision pursuant to W.Va. Rule of App. Proc. 21 because there are no substantial questions of law; the Circuit Court's decision was correct; there is no prejudicial error; and other just cause exists for summary affirmance.

V. ARGUMENT

A. Standard of Review

Review of a Circuit Court's grant of summary judgment is *de novo. See* Syl. Pt. 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994). It is axiomatic that summary judgment "should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co.,* 148 W.Va. 160, 133 S.E.2d 770 (1963). Moreover, the interpretation of contract, including the question of whether the contract is ambiguous, is a legal determination which, like the Circuit Court's grant of summary judgment, is reviewed *de novo* on appeal.

Payne v. Weston, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995); *see also*, *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 100, 468 S.E.2d 712, 715 (1996).

B. Principles of Delaware Contract Law

The Plan and Award Agreement are not qualified pensions or retirement plans under Section 401(a) of the United States Code and are exempt from substantially all of the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). [App. 00052]. Accordingly, the Plan and Award Agreement are construed under basic principles of contract law. Here, the Plan and Award Agreement contain a choice of law provision that Delaware law shall govern. Delaware contract law is well established.

Under Delaware law, the interpretation of a contract is a question of law. *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001). In interpreting a contract, the court's role is to "give words their plain meaning unless it appears that the parties intended a special meaning." *Norton v. K-Sea Transp. P'rs L.P.*, 67 A.3d 354, 360 (Del. 2013). When determining the plain or special meaning of a provision, the court "must construe the agreement as a whole, giving effect to all provisions therein." *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985). "[A] court interpreting any contractual provision . . . must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument." *Elliott Assocs., LP. v. Avatex Corp.*, 715 A.2d 843, 854 (Del. 1998).

Importantly, Delaware's treatment of contractual ambiguity is in unison with our own:

> It is a well-accepted principle that ambiguities in a contract should be construed against the drafter. Restatement (Second) of Contracts § 206 (1981); *see also, Arthur L. Corbin, et al.*, Corbin on Contracts § 559, supp. at 337 (1960 & Supp. 1996) ("imposed as a matter of public policy as a penalty for bad draftsmanship").

Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392, 398 (Del. 1996).

C. The Sale of CCC and its Subsidiaries to Murray Energy Constituted a "Completion of a Change in Control" Under the Plain and Unambiguous Language of the Award Agreement Thereby Triggering the Accelerated Vesting of Plaintiffs' RSU Awards.

The starting and ending point for the analysis here is the Award Agreement. The Award Agreement convey[s] all awards and "specif[ies] the terms and conditions of the award and any rules applicable thereto." [App. 0733]. In this case, there is no ambiguity in the language of the pertinent provisions of the Award Agreement. The Award Agreement makes clear that a "change in control" event occurred upon the sale of CCC and its subsidiaries to Murray Energy which triggered the accelerated vesting of Plaintiffs' RSU awards.

The very first sentence of the Award Agreement defines the term "Company" as "CONSOL Energy Inc. (***including its subsidiaries***)." [App. 0742] (emphasis added). The Award Agreement then sets forth four separate "Acceleration of Vesting Events." [App. 0743]. The fourth vesting event, which is at issue here, states that the employees are entitled to accelerated vesting of their RSUs upon a "completion of a Change in Control (as such ***term*** is defined in the Plan)." *Id.* (emphasis added). Thus, the Award Agreement incorporates the definition of "Change in Control" from the Plan and only that definition. The Award Agreement does ***not*** incorporate the Plan's definition of "Company." *Id.* The Plan has a specific definition of "Company" which could have been incorporated into the Award Agreement but was not.

As defined in pertinent part in the Plan, "Change in Control" means "unless otherwise defined in the applicable Award Agreement ... the sale of all or substantially all of the Company's assets." [App. 0737-0738]. Incorporating this definition into the Award Agreement, and substituting it for the phrase "the completion of a Change in Control," the fourth triggering event occurs when there has been a sale of all or substantially all of the Company's assets. In order to define "Company," one must look to the Award Agreement since "Company" is not defined within the "Change in Control" provision. [App. 0737-0738]. The Award Agreement expressly defines "Company" as "CONSOL Energy Inc. (***including its subsidiaries***)." [App. 0742]. Thus, a "completion of a Change in Control" occurs when there has been a sale of all or substantially all of the assets of CONSOL Energy, Inc. ***or its subsidiaries***. This interpretation is unescapable under the plain and unambiguous language of the Award Agreement.

Despite this clear and straightforward language, Defendant argues that the "Change in Control" provision only applies to CONSOL Energy, Inc. -- and not any of the subsidiary employers -- because the term "Company" as defined in ***the Plan*** is "CONSOL Energy, Inc." Defendant's attempt to alter and pervert the plain language of the Award Agreement is erroneous and its interpretation is in direct conflict with the express language of the Award Agreement. Defendant cannot selectively substitute the Plan's definition of "Company" into the Award Agreement because the Award Agreement only incorporated the definition of "Change in Control." The Agreement did ***not*** incorporate the Plan's definition of "Company." Thus, the term "Company" as used in the Award Agreement, and any term incorporated therein, must be interpreted in accordance with the express terms of the Award Agreement which defines "Company" as "CONSOL Energy, Inc. (***including its subsidiaries***"). [App. 0742] (emphasis added).

If Defendant had intended for the term "Company" to be limited solely to CONSOL Energy, Inc. in the application of the Award Agreement, or if it had intended to incorporate the Plan's specific definition of "Company" into the Award Agreement, it should have (and easily could have) used words to that effect. Notably, Defendant incorporated three distinct definitions from the Plan into the Award Agreement on several separate occasions. [*See* App. 0743 (incorporating the definition of "Change in Control"), App. 0743 (incorporating the definition of "Cause"), App. 0744 (incorporating the definition of "Cause"), and App. 0745 (incorporating the definition of "Affiliates")]. Thus, Defendant not only knew how to incorporate specific definitions from the Plan, but had a history of doing exactly that. But in this case, Defendant elected not to incorporate the Plan's definition of "Company." The legal implication of this is clear: the Award Agreement's definition of "Company" controls.

Assuming *arguendo*, that Defendant's interpretation of the term "Change in Control" was plausible (which it is not), that interpretation would simply create a conflict as it would result in a facial inconsistency regarding the term "Company." In the event of conflicting terms between the Plan and the Award Agreement, the Award Agreement controls. The Award Agreement contains a conflict resolution provision which provides:

> *Award Subject to Plan*: This Award is subject to the Plan. The terms and provisions of the Plan as it may be amended from time to time are hereby incorporated herein by reference. **In the event of a conflict between any term or provision contained herein and a term or provision of the Plan, the applicable terms and provisions of the Agreement will govern and prevail.**

[App. 0747] (emphasis added).[6]

Thus, the definition of "Company" as set forth in the Award Agreement, governs and prevails and is applied to the "change in control provision." Defendant is precluded from arguing otherwise by the express terms of the Award Agreement it authored.

Further, if Defendant's interpretation and use of the term "Company" were applied, this would create an illogical and absurd result. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one that no

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[6] Plaintiffs acknowledge that there appears to be a contradictory provision in the Award Agreement that indicates that the Plan governs in the event of a conflict. [App. 0742]. This conflict would seemingly create an ambiguity which, under Delaware law, must be resolved against Defendant since it drafted the language. *See Kaiser Aluminum,* 681 A.2d at 398.

reasonable person would have accepted when entering the contract."); *Nassau Gallery, Inc. v. Nationwide Mut. Fire Ins. Co.*, No. 00C-05-034, 2003 WL 21223843, at *3 (Del. Super. Apr. 17, 2003) (unpublished) ("Under Delaware law, a Court's interpretation of a Contract cannot create an "absurd" result."). As stated previously, the Award Agreement provides for accelerated vesting of an employee's RSUs upon the occurrence of one of four trigging events. These events are all uniformly tied to Plaintiffs' employment and all utilize the term "***Company***":

> 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) a sale of all or substantially all of the ***Company***'s assets.[7]

[App. 0742-0743] (emphasis added).

Importantly, there is no directive in the Award Agreement that the term "Company" shall be interpreted or applied differently among the four triggering provisions. Nor is there any provision alerting the employee that only the first three events are tied to that "Company" with whom Plaintiff is employed. In addition, immediately following the "Change in Control" provision, the Award Agreement states as follows:

> Notwithstanding the foregoing, in no event will any special vesting of your shares occur should your employment with the ***Company*** be terminated for Cause (as such term is defined in the Plan) or should you leave the ***Company's*** employ for any reason other than

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[7] Defendant's argument that the fourth triggering event does not use the word "Company" is misplaced. Pet. p. 8. The fourth triggering provision is "a completion of a Change in Control (as such term is defined in the Plan)." As defined by the Plan, the term "Change in Control" means "a sale of all or substantially all of the ***Company***'s assets." [App. 0737-0738]. Thus, when this definition is incorporated and inserted for "Change in Control," all four triggering provisions contain the term "Company."

> in connection with one of the accelerated vesting events specified above.

[App. 0743] (emphasis added).

Notably, this paragraph (which Defendant fails to cite in its brief) addresses ***all*** of the triggering events, including "Change in Control", and must relate to the "company" for whom Plaintiff is employed. Thus, when read in its entirety, it is evident that the Award Agreement, and the acceleration provisions contained therein, must relating to Plaintiffs' employing company.

Here, Plaintiffs were never in the employ or service of CONSOL Energy, Inc., but were rather employees of CCC and/or its subsidiaries. If Defendant's restrictive definition of the term "Company" applied, Plaintiffs could never be eligible for benefits under any of the first three triggering provisions. This result is unfair, unreasonable, and could have never been intended. It is also completely contrary to the history in this case and the manner in which the Agreement Awards operated for years. To make any logical sense, the term "Company" must be interpreted to mean CONSOL Energy, Inc. ***and*** its subsidiaries throughout the Award Agreement.

Significantly, Defendant admitted as follows:

> The first three events [of the Acceleration of Vesting Events provisions] 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.**

Pet., p. 8 (Emphasis added)

With its acknowledgment that the Award Agreement defines "Company" as Consol Energy and its subsidiaries, it is puzzling that Defendant continues to deny payment to Plaintiffs of their earned benefits. Regardless of what might be found in the Plan, it is the language of the Award

Agreement that 'will govern and prevail." [App. 0747]. Here, and as Defendant appears to concede, the focus is on CCC and its subsidiaries, and try as it might, it simply cannot legitimately eliminate "Change in Control" from the context of the Acceleration provision, where it chose to place it.

Interpreting "Company" to include Defendant's subsidiaries is also consistent with Treasury Regulation § 1.409A which was incorporated in full into the Plan Award Agreement and with which Defendant is obligated to comply. [App. 0747]. The entirety of Regulation §1.409A-3(i)(5)(ii), along with the concluding ***Example***, is set forth as follows:

> (5) *Change in the ownership or effective control of a corporation, or a change in the ownership of a substantial portion of the assets of a corporation*—
>
> (i) In general. Pursuant to section 409A(a)(2)(A)(v), a plan may permit a payment upon the occurrence of a change in the ownership of the corporation (as defined in paragraph (i)(5)(v) of this section), a change in effective control of the corporation (as defined in paragraph (i)(5)(vi) of this section), or a change in the ownership of a substantial portion of the assets of the corporation (as defined in paragraph (i)(5)(vii) of this section) (collectively referred to as a change in control event). To qualify as a change in control event, the occurrence of the event must be objectively determinable and any requirement that any other person or group, such as a plan administrator or compensation committee, certify the occurrence of a change in control event must be strictly ministerial and not involve any discretionary authority. The 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, provided that each event upon which a payment is provided qualifies as a change in control event. For rules regarding the ability of the service recipient to terminate the plan and pay amounts of deferred compensation upon a change in control event, see paragraph (j)(4)(ix)(B) of this section.
>
> (ii) Identification of relevant corporation –
>
> (A) In general. To constitute a change in control event with respect to the service provider, the change in control event must relate to—
>
> (1) The corporation for whom the service provider is performing services at the time of the change in control event;
>
> (2) The corporation that is liable for the payment of the deferred compensation (or all corporations liable for the payment if more than one corporation is liable) but

> only if either the deferred compensation is attributable to the performance of service by the service provider for such corporation (or corporations) or there is a bona fide business purpose for such corporation or corporations to be liable for such payment and, in either case, no significant purpose of making such corporation or corporations liable for such payment is the avoidance of Federal income tax; or
>
> (3) A corporation that is a majority shareholder of a corporation identified in paragraph (i)(5)(ii)(A)(1) or (2) of this section, or any corporation in a chain of corporations in which each corporation is a majority shareholder of another corporation in the chain, ending in a corporation identified in paragraph (i)(5)(ii)(A)(1) or (2) of this section.
>
> (B) Majority shareholder. For purposes of this paragraph (i)(5)(ii), a majority shareholder is a shareholder owning more than 50 percent of the total fair market value and total voting power of such corporation.
>
> (C) Example. The following example illustrates the rules of this paragraph (i)(5)(ii):
>
> Example. Corporation A is a majority shareholder of Corporation B, which is a majority shareholder of Corporation C. A change in ownership of Corporation B constitutes a change in control event to service providers performing services for Corporation B or Corporation C, and to service providers for which Corporation B or Corporation C is solely liable for payments under the plan (for example, former employees), but is not a change in control event as to Corporation A or any other corporation of which Corporation A is a majority shareholder unless the sale constitutes a change in the ownership of a substantial portion of Corporation A's assets (see paragraph (i)(5)(vii) of this section).

As evidenced by this Regulation, and in particular the "Identification of Relevant Corporation" section, the vesting provisions in the Award Agreement are meant to relate to that corporation for which each miner (or service provider) was employed. Regardless of the type of change in control event which occurred, if it related to the subsidiary, ***or*** to the company liable for the payment, ***or*** to the corporation which owned the subsidiary, then with respect to that miner, a change in control event occurred. That is precisely why the example was provided. If Defendant's argument was accurate, this example would be meaningless and completely antithetical. Thus, the Award Agreement relates to the subsidiary for which the miner directly worked. Such is necessary to be in compliance with the Treasury Regulation and the agreements' intrinsic and expressed pledge to remain in accord with the Regulation.

Defendant's contention that the Regulation gives it broad discretion to self-define "Change in Control" is misguided. The language cited by Defendant in support of its argument refers to different scenarios which may constitute a change in control ***for whichever corporation is at issue***, such as a change in the ownership of the corporation, or a change in the effective control of the corporation. *See*, Pet. 9 (quoting Treasury Regulation § 1.409A-3(i)(5)(1)) (a "plan may provide for a payment on a particular type or types of change in control events, and need not provide for payment on all such events"). However, as evidenced by the terms of this provision, which address the type or contours of a change in control event, this provision does not identify or somehow restrict which corporation must undergo a change in control event.[8] Thus, the interpretation of the Regulation proffered by Defendant to achieve its end is unpersuasive.

D. Defendant's Reliance on the Discretionary Authority Clause and the "Unanimous Written Consent of the Compensation Committee" is Misplaced and Without Merit.

1. Defendant waived any argument relating to the Discretionary Authority Clause, the "Unanimous Written Consent of the Compensation Committee" or that it be afforded significant deference and autonomy to interpret the Award Agreement as it sees fit under Delaware law.

In its Appeal, Defendant raises for the first time that it is entitled to significant deference in construing the definition of "Change in Control" pursuant to the Discretionary Authority Clause contained in the Plan. Defendant also advances for the first time on appeal arguments relating to the "Unanimous Written Consent of the Compensation Committee" (hereinafter "the

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[8] This is in not unlike the difference between what, for purposes of coverage under an insurance policy, is an "occurrence" and what are the "insured premises" to which an occurrence would relate. The notions are separate and distinct, albeit they relate to each other for purposes of determining whether coverage is triggered.

> *Kronjaeger v. Buckeye Union Ins.* Co. , 200 W.Va. 570, 585, 490 S.E.2d 657, 672 (1997)("we frequently have held that issues which do not relate to jurisdictional matters and which have not been raised before the circuit court will not be considered for the first time on appeal to this Court."); *Koffler v. City of Huntington,* 196 W.Va. 202, 206 n. 6, 469 S.E.2d 645, 649, n.6 (1996)("Because plaintiff's arguments . . ., and the City's response thereto, were neither raised, argued nor considered by the circuit court on summary judgment, the subject of this appeal, they are not reviewable by this Court."); *State v. Miller,* 197 W.Va. 588, 597, 476 S.E.2d 535, 544 (1996)("Indeed, if any principle is settled in this jurisdiction, it is that, absent the most extraordinary circumstances, legal theories not raised properly in the lower court cannot be broached for the first time on appeal."); *Barney v. Auvil,* 195 W. Va. 733, 741, 466 S.E.2d 801, 809 (1995)("Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered."); *Whitlow v. Board of Educ. of Kanawha County,* 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993)("When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal.").

Id. at 9-10, 323-324.

Thus, this Court should not consider any argument by Defendant pertaining to the Discretionary Authority Clause, the Committee Consent, or that Delaware law affords it broad discretion to interpret the contract as such arguments were not raised before the Circuit Court.

2. <u>Even if the Court were to review Defendant's argument relating to the Plan's Discretionary Authority Clause, such argument must fail because the subject clause does not give Defendant the right to alter and amend the plain meaning of the Award Agreement.</u>

Section 2 of the Plan purports to provide the Board of Directors binding authority and "full power and discretionary authority to decide all matters relating to the administration and interpretation of the Plan." [App. 0073]. This same provision states such discretion is fettered by the terms of the agreement and applicable law. While a plan administrator may have discretion when interpreting the terms of the plan, any interpretation by that administrator may not controvert the plain language of the agreement. *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 520 (3d Cir. 1997). After all, the agreements are nothing more than contracts between Plaintiffs and Defendant. Delaware law is clear: "When the language of a ... contract is clear and unequivocal, a party will be bound by its plain meaning." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006). Thus, Defendant cannot use the Discretionary Authority Provision as a source of power for the Board to alter the terms of the Award Agreement itself. Interpreting the Award Agreement to administer it properly is one thing, substantively altering the provisions for Defendant's financial gain at the expense of Plaintiffs is quite another.

Here, the unambiguous and straightforward language of the Plan and Award Agreement entitle Plaintiffs to accelerated vesting of their RSUs awards upon a "change in control" of their employing company. The plain language of the Award Agreement further requires Defendant to give priority to the provisions contained in the Award Agreement to the extent they conflict with the Plan. [App. 0747]. As such, Defendant cannot arbitrarily construe the Award Agreement and apply the Plan's definition of "Company" as to do so would violate the express language of the Award Agreement and the conflict resolution provision.

3. Even if the Court were to consider the Committee Consent, such is not evidence that Defendant interpreted the Award Agreement in accordance with its plain and unambiguous language.

Under the express terms of the Plan, the Board of Directors may delegate only matters of ***administration*** to the Compensation Committee. [App. 0073-0074] (emphasis added). The Board may ***not*** delegate matters of ***interpretation***. *Id.* (emphasis added). To the extent Defendant offers the Committee Consent as evidence of interpretation, such must be rejected.

Recognizing the limited powers of the Compensation Committee, Defendant has decided that the facts will just have to change. In its Petition, Defendant states:

> 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.

Pet. at 4 (emphasis added).

This statement, together with Defendant's renaming of the document to the "Board Consent, is a mischaracterization of the facts and the import of the Committee Consent. As can be readily gleaned from the document itself, especially from its unequivocal title, the Committee Consent evidences ***Committee*** action. It does not evidence Board action as Defendant implies.[11] Thus, any attempt by Defendant to use the Committee Consent to argue some valid exercise of Board discretion toward contract interpretation must fail.

Further, the Committee Consent does not evidence some charitable or benevolent act on behalf of Defendant as Defendant would lead this Court to believe. Rather, what this document demonstrates is that Defendant hatched a divestment scheme at the 11th hour in order to enrich its corporate coffers by refusing to pay Plaintiffs the benefits they had earned. Such conduct is wrong and reprehensible.

4. Defendant's divestment scheme is not afforded protection by the Business Judgment Rule.

One of the fundamental principles of the Delaware General Corporation Law statute is that the business affairs of a corporation are managed by or under the direction of its board of directors. *Del. C.* § 141(a); *Smith v. Van Gorkom,* 488 A.2d 858, 872 (Del. 1985). The business

[11] The second page of the document expresses to the Board's Chairman, Chief Financial Officer, Chief Legal Officer and other Board officers that they should thereafter take all such further action and execute and deliver all such further instruments and documents in the name and on behalf of the Corporation, as in such person's judgment shall be necessary, proper or advisable in order to carry out the intent and purposes of the foregoing resolution ...[App. 0916] However, Defendant CONSOL has provided no evidence that the Board did so officially act. There is no document signed by the members of the Board, or otherwise from the Board itself adopting, effectuating, or responding in any way to the Committee's recommendation.

judgment rule is a corollary common law precept to this statutory provision. *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000). The business judgment rule, therefore, combines a judicial acknowledgment of the managerial prerogatives that are vested in the directors of a Delaware corporation by statute with a judicial recognition that the directors are acting as ***fiduciaries*** in discharging their statutory responsibilities to the ***corporation*** and its ***shareholders***. *Id.* (emphasis added). Thus, the business judgment rule is applicable in cases ***brought by shareholders*** against members of the Board alleging a breach of a ***fiduciary duty***.

Here, Plaintiffs have not asserted shareholder derivative claims alleging breach of a fiduciary duty. Rather, Plaintiffs have brought claims against Defendant for ***breach of contract***. The business judgment rule does not afford a corporation carte blanche authority to behave unlawfully, and therefore the rule is not a defense to a breach-of-contract claim. *Willmschen v. Trinity Lakes Improvement Ass'n*, 362 Ill. App. 3d 546, 840 N.E.2d 1275 (Ill. App. Ct. 2005). *See also*, *Dinicu v. Groff Studios Corp.*, 257 A.D.2d 218, 222–23, 690 N.Y.S.2d 220, 223 (N.Y. App. Div. 1999) ("[I]t may be good business judgment to walk away from a contract, [but] this is no defense to a breach of contract claim."). Thus, Defendant's assertion that its decision to deny Plaintiffs their earned benefits is protected by the "business judgment rule" is erroneous.

In support of its argument on this issue, Defendant cites two unpublished opinions from the Court of Chancery of Delaware - *Friedman v. Khosrowshahi*, No. 9161-CB, 2014 WL 3519188, at *1 (Del. Ch. July 16, 2014) *aff'd*, No. 442, 2014, 2015 WL 1001009 (Del. Mar. 6, 2015) and *Khanna v. McMinn*, No. 20545-NC, 2006 WL 1388744, at *1 (Del. Ch. May 9, 2006). Defendant's authorities are inapposite and unpersuasive. Neither of the cases involved an independent cause of action against the corporation under a breach of contract such as Plaintiffs' claims here.

In *Friedman, supra*, the plaintiffs brought a ***shareholder derivative*** suit against the individual members of the Expedia Board of Directors alleging ***breach of their fiduciary duty of loyalty*** for making an improper payment of compensation to an officer or director of the corporation in violation of the terms of a compensation plan. *Friedman*, 2014 WL 3519188, at *1, *5 (emphasis added). Applying the business judgment rule as set forth in *Aronson v. Lewis*, 473 A.2d 805, 809 (Del. 1984) *overruled by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000), the Court dismissed the plaintiffs' claim finding that the defendants had articulated a reasonable construction of the terms of the applicable plan. Similarly, in *Khanna*, *supra*, the plaintiff brought a claim against the individual members of the Board of Directors of the nominal corporate defendant seeking to impose liability for ***various breaches of fiduciary duties*** by the corporate directors. *Khanna*, 2006 WL 1388744, at *1. Applying the "business judgment rule" to the applicable portions of the plaintiff's claim, the *Khanna* Court dismissed the relevant claims finding that the plaintiff had failed to demonstrate that the Board's decision was beyond the business judgment rule. *Id.* at *23-26. Here, unlike the plaintiffs in *Friedman* and *Khanna*, Plaintiffs are not asserting a breach of fiduciary duty claim, but are rather alleging breach of contract. Thus, the business judgment rule is inapplicable and the holdings and reasoning from *Friedman* and *Khanna* are inapposite.

Burns v. JC Penney Company, Inc., 85 F. App'x 830 (3rd Cir. 2004), is non-controlling and equally unpersuasive. In *Burns*, J.C. Penney ("Penney") created an ERISA benefits plan called the Separation Allowance Program ("SAP"), which granted benefits to eligible employees who lost jobs, salary or status in the event of a "change of control" of Penney. *Burns,* 85 F. App'x at 830. The plaintiffs were employees of Penney's subsidiaries who were demoted and received a pay cut following the merger of two of Penney's subsidiaries. *Id.*, at 830-831. The plaintiffs filed a claim under the SAP arguing that the merger constituted a "change of control" under the agreement. *Id.* The Court dismissed the plaintiffs' claims finding that there had not been a change of control in Penney because Penney's stock was not converted in the manner described in the SAP. *Id.* at 832.

The facts in the present case are clearly distinguishable from *Burns*. First and foremost, the applicable agreement in *Burns* is not similar to the subject Plan and Award Agreement. Therefore, no analogous interpretations can be drawn among them. Additionally, and more importantly, the SAP in *Burns* set forth in clear terms that the "change in control" provision pertained to only the parent company (Penney). This is in stark contrast to the Award Agreement here which unmistakably states that the "change in control" provision applies to the parent company and its subsidiaries.

VI. CONCLUSION

For the foregoing reasons, the Circuit Court properly granted Plaintiffs' Motion for Summary Judgment and the instant appeal should be denied.

Respectfully submitted,

Michael Hummel, et al., ***Respondents***

By: ______________________

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CERTIFICATE OF SERVICE

Service of the foregoing **RESPONDENT'S BRIEF** was had upon the Defendant Consol Energy Inc., by mailing a true copy thereof by First Class United States Mail, postage prepaid, this 9th day of March, 2016, to the following:

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