IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MICHAEL AND PATRICIA SCHOENE,	CIVIL ACTION
Plaintiffs,	No. 5:13-cv-00095-JPB
vs.	JURY TRIAL DEMANDED
MCELROY COAL COMPANY AND CONSOL ENERGY INC.,	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND/OR TO SUPPLEMENT MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b)

NOW COME the Defendants, McElroy Coal Company ("McElroy") and CONSOL Energy Inc. ("CONSOL"), by and through their undersigned counsel, Dickie, McCamey & Chilcote, P.C., and file the within Memorandum of Law in Support of their Motion for Reconsideration and/or to Supplement Motion for Summary Judgment or in the Alternative for Certification Pursuant to 28 U.S.C. § 1292(b):

SUMMARY OF ARGUMENT

In their Motion for Summary Judgment (Doc. 37) and Memorandum in Support (Doc. 38), Defendants did not challenge the Plaintiffs' right to pursue relief as specified in the applicable federal and state statutes governing coal mine subsidence claims in West Virginia (Counts II and III). They did, however, challenge the Plaintiffs' ability to pursue common law remedies for surface support (Count I)—which include possible compensatory recovery over and above the applicable statutes—on the basis of a clear and unambiguous waiver of surface support. Plaintiffs did not challenge, and in fact agreed, that the law of West Virginia mandated a dismissal of their common law claims for support under Count I.

Defendants respectfully submit that this Court's January 29, 2016 Memorandum Order and Opinion Denying Defendants' Motion for Summary Judgment (Doc. No. 68)—which effectively constitutes a *sua sponte grant* of summary judgment in favor of Plaintiffs as to Defendants' complete affirmative defense[1] to Count I (Common Law Subjacent Support)—was a clear error of law and should be reconsidered. Plaintiffs, in their "Opposition" (Doc. 39), conceded that the common law claim set forth in Count I should be dismissed in light of the support waiver. Thus, Defendants were never afforded the opportunity to address any of the points raised for the first time in the Court's January 29, 2016 Opinion.

Support waivers identical to that at issue, as they relate to *common law claims* such as Count I here, have twice been upheld by this Court, including a decision affirmed by the Fourth Circuit Court of Appeal, *Giza v. Consolidation Coal Co.*, CV-85-0056-W(S) (N.D. W.Va. Dec. 12, 1991, Unpublished Slip Op.), *affirmed* (per curiam), 1992 U.S. App. LEXIS 18585 (copy attached to accompanying Motion as Exhibit "A"); *see also*, *Sendro v. Consolidation Coal Co*., 1991 U.S. Dist. LEXIS 21929 (N.D. W.V. March 27, 1991).[2] Both decisions squarely addressed and expressly rejected the concern raised by this Court in its January 29, 2016 decision—that longwall mining could not have been contemplated by the original parties to the severance deed, and that the waiver did not apply to longwall mining. Both decisions post-dated and distinguished the West Virginia Supreme Court's decision in *Cogar v. Summerville*, 379 S.E.2d 764, 769 (W. Va. 1989) on which this Court relied. Unlike this case (and unlike *Giza* and *Sendro*), *Cogar* involved the claimed waiver of *statutory* rights not existing at the time of the severance deed. Moreover, in *Rose v. Oneida*, 466 S.E. 2d 794 (W.Va. 1995)("*Rose II*"), which came six (6) years after *Cogar*, the Supreme Court of West Virginia once again held that a

[1] *See* Fifth Affirmative Defense in Answer and Affirmative Defenses (Doc. 25).
[2] Copies of the *Giza* and *Sendro* decisions were attached to Defendants' Motion for Summary Judgment (Doc. 37) as Exhibits "E" and "F."

waiver of support bars all common law claims,[3] but that the plaintiffs' claims under the WVSCMRA could proceed.

Further, the vacated intermediate appellate decision from Illinois relied upon in the Court's January 29, 2016 Opinion, *Phillips v. Old Ben Coal Co*., 1991 WL 4720 (January 18, 1991), predates *Sendro*, *Giza* and *Rose II*, and, in any event, does not reflect the law of Illinois (or West Virginia) as it relates to application of support waivers to *common law* claims for subsidence. A reported Illinois decision decided just six (6) months after *Phillips* reaffirmed Illinois law that waivers of surface owners' common law right to subjacent support have long been upheld and are not *per se* contrary to public policy. *See Rocking Ranch, Inc. v. Sahara Coal Co.*, 576 N.E.2d 1120 (Ill. App. Ct. July 3, 1991).

All of these cases post-dated and were, in fact, consistent with the *Cogar* decision—a clear and unambiguous waiver of support will bar common law claims but will not bar a claim under the federal SMCRA or WVSMCRA. That was the exact position taken by Defendants in this case and expressly admitted by Plaintiffs. Thus, Defendants respectfully submit that summary judgment in their favor was required.

Alternatively, Defendants respectfully request that this Court amend its January 29, 2016 Memorandum Order and Opinion Denying Defendants' Motion for Summary Judgment in accordance with 28 U.S.C. 1292(b).

[3] This was also the holding in "*Rose I*," *Rose v. Oneida Coal Company, Inc*., 375 S.E.2d 814 (W.Va. 1988). At the time, the plaintiffs had only pleaded a common law cause of action. The plaintiffs amended their claims to include the WVSMCRA, and the case again went before the West Virginia Supreme Court in *Rose II*.

FACTUAL BACKGROUND

This action was filed in the Circuit Court of Marshall County, West Virginia on or about June 26, 2013 against McElroy and CONSOL. Plaintiffs sought recovery of damages, under the common law only, for coal mine subsidence allegedly caused by McElroy. Defendants removed the matter to this Court on the basis of diversity.

Plaintiffs filed an Amended Complaint on January 16, 2014 (Doc. 24). In addition to the common law claim for subjacent support,[4] Plaintiffs added claims under the federal and state Surface Mining Control and Reclamation Act (Counts II and III). Defendants filed an Answer and Affirmative Defenses and raised the defense of a waiver of subjacent support by Plaintiffs' predecessors-in-interest.

Defendants took written discovery from Plaintiffs. Defendants also deposed Plaintiffs and their expert witness.

Plaintiffs took no discovery from Defendants.

On December 1, 2015, Defendants filed their Motion for Summary Judgment (Doc. 37) and Memorandum of Law in Support (Doc. 38). Citing the waiver of support within the 1902 coal severance deed in the Plaintiffs' chain of title to their property, Defendants sought an order dismissing Count I. The relevant language of the severance deed granted the coal owner the right to mine all of the coal "***without leaving any support for the overlying stratas and without liability for any injury which may result to the surface***."

Defendants also sought an Order capping Plaintiffs' claimed damages in Counts II and II related to alleged damage to their home at the diminution in value of the home from the alleged

[4] Count I was titled "Support of the Surface Estate." Plaintiffs alleged that Defendants "have removed coal underlying the Plaintiffs' surface estate so as to cause a loss of the support of the Plaintiffs' surface estate . . . . [and] [t]he loss of the support of the Plaintiffs' surface estate has resulted in substantial damage to the Plaintiffs' real and personal property . . . . [and] [t]he Defendants are responsible for any and all damage caused by the loss of the support of the Plaintiffs' surface estate." First Amended Complaint, Paragraphs 13-15.

damage, dismissing any claim for monetary compensation for real property damage under the statutory claims in Counts II and III, dismissing all claims related to water damage, dismissing all claims for "emotional damages," dismissing any claims for punitive damages and dismissing all claims against Defendant CONSOL. In other words, Defendants sought an order limiting Plaintiffs' claims for relief as delineated in the federal and West Virginia SMCRA.

On December 23, 2015, Plaintiffs filed their "Response to Defendants' Motion for Summary Judgment" (Doc. 39). With regard to the dismissal of Count I, the Plaintiffs offered no case law or record evidence in opposition. In fact, Plaintiffs unequivocally admitted that Count I should be dismissed.

> The Plaintiffs agree, after additional discovery, research and consideration, that the matters for resolution in this case are much more limited than those originally pled in their Complaint and Amended Complaint. The Plaintiffs now agree, and do not dispute, that there is a waiver of subjacent support included within the chain of title to their property. **The Plaintiffs, therefore, acknowledge and agree that they cannot pursue traditional common law property damage claims related to the mining operations conducted under their property. The Plaintiffs therefore agree that Count I of their complaint would not be [a] viable claim for trial purposes of this matter.**

See Plaintiffs' Response (Doc. 39), p. 2 (emphasis added).[5]

Defendants filed their Reply Memorandum of Law in Support of Motion for Summary Judgment (Doc. 40) on December 30, 2015.

On January 29, 2016, this Court entered a Memorandum Order and Opinion Denying Defendants' Motion for Summary Judgment (Doc. 68), citing numerous matters outside the record in this case, including law review articles, West Virginia University College of Engineering Bulletins, Geological Surveys, and information gleaned from Defendant CONSOL's

[5] With regard to their claims under the federal and state SMCRA, Plaintiffs agreed that their remedies were limited to repair of affected real property and compensation for the diminution in value of their residence. *Id*., pp. 2-3.

website, as well as points of law to which Defendants were never afforded the opportunity to address.

For the reasons set forth more fully herein, Defendants respectfully request that this Honorable Court reconsider and withdraw its ruling and grant summary judgment in favor of Defendants as to Count I. In the alternative, Defendants request that this Court certify the issue of the waiver support and the denial of summary judgment as to Count I for appeal to the United States Court of Appeals for the Fourth Circuit.

ARGUMENT AND AUTHORITY

I. Legal Standard

"Pretrial rulings remain subject to reconsideration by the trial court 'and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities' as Federal Rule of Civil Procedure 54(b) expressly recognizes [a district] court's authority and discretion to reconsider a previous interlocutory order at any time prior to final judgment." *Monster Daddy, LLC v. Monster Cable Products, Inc.*, 2013 WL 3337828, at *2 (D.S.C. July 2, 2013) (citing *Am. Canoe Ass'n. v. Murphy Farms, Inc.*, 326 F.3d 505, 514-15 (4th Cir. 2003)). "[T]he following are appropriate reasons for granting a Rule 54(b) motion: ... to correct a clear error of law or prevent manifest injustice." *Id.* (citing *Hutchison v. Stanton*, 994 F.2d 1076, 1081 (4th Cir. 1993)). A "motion to reconsider would [also] be appropriate where ... the Court has made a decision outside the adversarial issues presented to the Court by the parties ... ." *Mt. Hawley Ins. Co. v. Felman Prod.*, Inc., 2010 WL 1404107, at *3 (S.D. W. Va. 2010) (quotations omitted). "[A]n order denying summary judgment is interlocutory, and leaves the trial court free to reconsider and reverse its decision for any reasons it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law."

Monster Daddy, 2013 WL 3337828, at *2 (quoting *Zarrow v. City of Wichita Falls*, 614 F.3d 161, 171 (5th Cir. 2010)).

Plaintiffs did not move for summary judgment on any issue. Defendants moved for summary judgment, *inter alia*, on their defense of waiver relative to Count I. The effect of the Court's January 29, 2016 Memorandum Order and Opinion is the grant of summary judgment in favor of Plaintiffs as to the waiver. The Court has ruled—as a matter of law—that the waiver of subjacent support by Plaintiffs' predecessor-in-interest is not enforceable.

District courts should not grant summary judgment on grounds not raised by a party without providing notice and a reasonable time to respond. Fed. R. Civ. P. 56(f) ("After giving notice and a reasonable time to respond, the court may: . . grant the motion on grounds not raised by a party ... "). Although "[d]istrict courts are not strictly bound to specific grounds urged in motions for summary judgment[]" and that "they may consider others sua sponte,... they should do so only after insuring that the nonmovant has had a fair opportunity to contest the grant on that ground." *Brock v. Carroll*, 107 F.3d 241, 247 (4th Cir. 1997). Before a district court grants summary judgment *sua sponte* the notice it provides "must allow the party a reasonable opportunity to present all material pertinent to the claims under consideration." *United States Dev. Corp. v. Peoples Federal Say. & Loan Assoc*., 873 F.2d 731, 735 (4th Cir. 1989). *See also id*. at 736 ("[A] district court may not *sua sponte* enter summary judgment against [a claim] until the claim's proponent has been given notice and a reasonable opportunity to be heard"); *Hughes v. Bedsole*, 48 F.3d 1376, 1379 (4th Cir. 1995) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence") (quotations omitted).

Under 28 U.S.C. § 1292(b) a district court can certify an interlocutory appeal if the order in question is "not otherwise appealable under this section [and the district judge is] of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation... ."

II. Argument

A. The Cogar v. Sommerville "Waiver of Statutory Rights" Decision Does Not Apply to Waivers of Common Law Claims and the Reasoning of the Surface Mining Cases Do Not Apply to Waivers of Support for Longwall Mining.

The Supreme Court of Appeals of West Virginia[6] has long-held that an unambiguous written contract must be applied as written, *without resort to parole evidence as to the intent of the parties*:

> [W]here the writing is plain, definite, and unambiguous it cannot be varied by parole evidence showing facts which might have the effect of changing the plain intent expressed by the writing; nor will practical construction by the parties change the clear intent expressed by the writing. The writing is the repository of what the parties meant, and cannot be varied by extraneous evidence.

Syl. by the Court *Watson v. Buckhannon River Coal Co*., 120 S.E. 390 (W. Va. 1923). Deeds affecting real property are subject to the principles of interpretation and construction that govern contracts generally. *Arnold v. Palmer*, 686 S.E.2d 725, 733 (W.Va. 2009).

Here, despite the Plaintiffs' judicial admission that the waiver of support precluded any common law recovery, the Court identified and relied on factual materials outside the record in this case, including law review articles, West Virginia University College of Engineering Bulletins, Geological Surveys, and information gleaned from Defendant CONSOL's website (none of which were raised by Plaintiffs at any point in this litigation), to distinguish longwall

[6] As jurisdiction in this matter is based on diversity of citizenship, the Court is to apply the substantive law of West Virginia. *Stonehocker v. General Motors Corp*., 587 F.2d 151, 154 (4th Cir.1978).

mining and room and pillar mining, and to conclude that the parties to the original severance deed could not have anticipated this change in mining technology. Defendants submit that the Court's consideration of these materials was improper. These materials were outside of the factual record before the Court. Fed. R. Civ. P. 56 delineates what the Court may consider in ruling on a motion for summary judgment, and at a most basic level, the Court is to consider "the record." Thus, not only were the materials referenced above not raised by Plaintiffs in their Opposition, they could not have been raised by Plaintiffs even if they had tried. Moreover, the Court's analysis as to the extent of damages with room and pillar mining versus longwall mining amounts to an analysis which would otherwise be required to be provided by an expert. To the extent such expert analysis is necessary to the issue, Defendants were clearly prejudiced in not having an opportunity to address the issue with their own expert.[7]

In this regard, the Court relied heavily on *Cogar v. Sommerville*, 379 S.E.2d 764 (W. Va. 1989) (hereinafter "*Cogar*"), *Brown v. Crozer Coal & Land Co.*, 107 S.E.2d 777 (W.Va. 1959) (hereinafter "*Crozer*") and *West Virginia-Pittsburgh Coal Co. v. Strong*, 42 S.E.2d 46 (W.Va. 1947) (hereinafter "*Strong*"). Defendants respectfully submit that these cases do not support the proposition that a clear and unambiguous waiver of support is ineffective as to a common law claim for damages allegedly arising from longwall mining.

[7] The extra-record materials relied upon the Court do not meet the requirements of Fed. R. Evid. 201 as "judicial notice," *i.e.*, facts generally known within the trial court's territorial jurisdiction or which can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Articles published in journals and law reviews, *see J/H Real Estate Inc. v. Abramson*, 901 F. Supp. 952, 955 (E.D. Pa. 1995), and company web sites, *see Moore U.S.A. Inc. v. The Standard Register Co*., 139 F. Supp. 2d 348, 363 (W.D.N.Y. 2001), are not "matters of public record," and since they are used to challenge Defendant McElroy's right to conduct longwall mining operations without liability for common law damages, they are "subject to reasonable dispute" and are therefore inappropriate for judicial notice. *See Benak v. Alliance Cap. Mgmt. L.P*., 435 F.3d 396, 401 n.15 (3d Cir. 2006). Even if these extra-record materials qualified under Rule 201, a party "is still entitled to be heard" when a court takes judicial notice before notifying a party. *See* Rule201(e). Underlying this rule is the notion that "[b]asic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed." Fed. R. Evid. 201(e) advisory committee's note; *see also, Pickett v. Sheridan Health Care Center*, 664 F.3d 632, 648-51 (7th Cir. 2011) (district court erred by relying on independent internet research on attorney fees without giving parties opportunity to address information).

Simply stated, the *Cogar* case had nothing to do with the waiver of common law damages for support. Instead, the issue was whether a broad form waiver executed in 1914 could be used as a *statutory* waiver of the *statutory* prohibition (created in 1977) against conducting *surface mining* operations within 300 feet of an occupied building.[8]

In *Cogar*, the landowners held the surface rights to the land subject to broad form waivers contained in two severance deeds.[9] The coal company argued, and the trial court determined, that the waivers were sufficient and constituted a waiver of the landowners' statutory right not to have surface mining operations conducted within 300 feet of an occupied dwelling. The trial court granted a preliminary injunction against the landowners and they filed their petition for a writ of prohibition.

The West Virginia Supreme Court granted the writ of prohibition. The meaning of "waiver" as used in W. Va. Code § 22A-3-22(d)(4) was determined by the Court, after reference to federal regulations on the same subject, to require specific, written reference to the ***statutory***

[8] "The dispositive issue here is whether the broad form waivers contained in the two severance deeds . . . constitute a waiver of the petitioners' statutory right not to have mining operations conducted within three hundred feet of an occupied dwelling." *Cogar*, 379 S.E.2d at 767.

[9] There were two deeds at issue, the "Short" deed and the "Howard" deed. The Short deed, dated April 20, 1914, provided:

> Excepting, the parties of the first part reserves [sic] for themselves, their heirs, executors and administrators all coal deposits underlying the surface of the aforesaid described tract of land, together with the free uninterrupted right of way into, upon and under said land, at such points and in such manner as may be proper and necessary for the purpose of digging, draining and ventilating, and carrying away said coal, hereby waiving all surface damages of any sort arising therefrom, or from the removal of said coal.

The Howard deed, dated June 10, 1907, provided:

> The party of the first part doth however reserve all the coal in and under the above described lands together with the free and uninterrupted right of way into, upon and under said lands for the purpose of digging mining, draining, ventilating, coaking and carrying away said coal hereby waiving all damages arising therefrom or from the removal of all said coal together with the privilege of removing through said discribed [sic] lands other coal . . . . belonging to said party of first part their heirs or assigns or which may hereafter be acquired by them[.]

Cogar, 379 S.E.2d at 765.

right being waived, and a specific agreement on the distance from the dwelling where the mining operation was allowed. The general waivers in the deeds did not conform. One of the main purposes of the West Virginia Surface Coal Mining and Reclamation Act, W. Va. Code § 22A-3-1 et seq. (1985), was protection of the rights of the surface landowners. Specifically, the Court held as follows:

> Upon examination of the federal law and pertinent regulations, it is apparent that the waiver contemplated is one which is knowingly made by the owner and which specifies the distance from the occupied dwelling where mining operations may take place. **Here, the old severance deeds waived only surface damages and did not authorize mining operations within three hundred feet of an occupied dwelling**. We believe that permitting a waiver of the three-hundred-foot requirement in these circumstances would be contrary to one of the purposes of Congress in enacting the federal surface mining law -- the protection of property owners.
>
> This is consistent with our mining cases holding that a severance deed is to be construed in light of the conditions and reasonable expectations of the parties at the time it is made. As a consequence, mining methods not contemplated at the time of the severance deed may not be utilized. *See Brown v. Crozer Coal & Land Co*., 144 W. Va. 296, 107 S.E.2d 777 (1959) (auger mining); *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W. Va. 832, 42 S.E.2d 46 (1947) (strip mining). **It would be impossible to conceive that the parties to old severance deeds would have any contemplation of waiving <u>future</u> <u>statutory</u> <u>rights</u>**.

Cogar, 379 S.E.2d at 769 (emphasis added).

In this case, consistent with *Cogar* and other precedent, Defendants have never argued that the support waiver precluded any right of recovery under the applicable statutes. The issue, however, is whether a clear and unambiguous waiver of support precludes recovery under the common law. As previously argued in Defendants' summary judgment filings and as set forth herein (and as admitted by Plaintiffs), it does.

In its January 29, 2016 Memorandum Order and Opinion, the Court distinguishes the West Virginia Supreme Court's decision in *Rose I* on the basis that the decision "neglected to consider or mention the 'reasonable expectations of the parties' at the time of the conveyance,

likely because this case was decided several months before *Cogar*." Doc. 68, p. 16. However, six (6) years later, the West Virginia Supreme Court once again revisited the support waiver issue in *Rose II*. *See Rose v. Oneida*, 466 S.E. 2d 794 (W.Va. 1995). In that decision, which only arose because the plaintiffs were permitted to amend their Complaint to include *statutory* claims under SMCRA, the Court was most certainly aware of its holding in *Cogar*[10] and refused to revisit its decision in *Rose I* that the common law claims were precluded by the support waiver. Indeed, the Court re-affirmed its holding from *Rose I* that the common law claims were barred in light of the waiver. *Id*.

Finally, as is apparent from the block quote from the *Cogar* decision above, the *Crozer* and *Strong* cases did not involve underground mining or even subsidence. Rather, both cases involved **surface mining** (*Crozer* involved auger mining and *Strong* involved strip mining, *i.e.*, coal was removed by going through and destroying the surface) and whether broad form coal severance deeds granted the operators the right to conduct surface mining.

The issue in *Strong* was whether the right "to remove all said coal" *implied* a right to destroy the surface via strip mining. In ruling that said right could not be implied, the Court reasoned as follows:

> Certainly, if the owner of the surface has a proprietary right to subjacent support (36 Am. Jur. 405), he has at least an equal right to hold intact the thing to be supported, i. e., the surface, in the absence of a clearly expressed intention to the contrary. Of course there can be no right, proprietary or otherwise, to the preservation of something that another person has a superior right to destroy. Furthermore, we believe, in this instance, that the purpose of the landowner to retain the surface undisturbed is further borne out by the deed's requirement to the effect that the owner of the coal shall pay the landowner for the surface occupied above the Pittsburgh No. 8 vein at the rate of $ 100.00 per acre. That provision we believe plainly shows that it was not within the contemplation of the parties that the owner of the coal by virtue of the mining rights granted should be entitled to remove any part of the surface, except for the mouths of ordinary shafts or drifts, in connection with the removal of the coal. If removal of that nature had

[10] *See Rose II*, 466 S.E.2d at 798 (citing *Cogar*).

> otherwise been included in the mining rights granted, that interpretation is certainly dispelled by the provision to pay $ 100.00 for the surface "occupied or used" above the Pittsburgh No. 8, since the words "occupied or used" certainly do not contemplate destruction. Furthermore, what we believe to be an option to buy the surface presupposes its existence.

Strong, 42 S.E.2d at 50.

The same issue of an *implied* right to destroy the surface from the grant of general mining rights was addressed in *Crozer*, decided 12 years after *Strong*. Critically, the Court noted in *Crozer* that "[t]here is no language in this record which indicates that the owners of the surface intended any waiver of damages to same or relinquished to the owners of the mineral rights any subjacent support. It may be well to note that the same type of bond required by statute for strip mining is required for auger mining in this state." *Crozer*, 107 S.E.2d at 787. Syllabus point 8 of the *Crozer* decision makes clear that its holding is limited.

> Deeds, one made in 1904 granting mineral rights in "all minerals" with "all rights-of-way, of ingress and egress over, across and through [said land] for the purpose of removing the minerals &c. therefrom"; one made in 1905 granting "all the coal and other minerals and mineral substances * * * together with the right to mine and remove said minerals in the most approved method"; and one made in 1907 reserving "all minerals * * * together with all necessary and useful rights for the proper mining, pumping, transporting of said minerals" do not give owners of such mineral rights the right to engage in improper mining such as would damage the surface owned by others by auger mining, a method of mining which at the time of the creation of the mineral rights was not an usual method of mining known and accepted as common practice in Wyoming County where the lands in question are located.

Id. Thus, the issue, again, was whether broad mining rights in a severance deed granted the coal owner the implied right to employ techniques which would destroy the surface.

Defendants submit that granting the implied right to destroy the surface by surface mining techniques not in use at the time of the execution of a deed is far different than enforcing a clear and unambiguous waiver of subjacent support which unequivocally demonstrates that the parties contemplated the loss of support (and possible surface damage) from *underground* coal

mining. The proper inquiry is not whether the parties contemplated the actual technology used—it is whether the parties contemplated a *loss of support* and whether the grantor was waiving that common law right to support. Simply stated, if the language in the deed constitutes a waiver of subjacent support, the surface owner cannot recover damages resulting from the loss of support. *See Stamp v. Windsor Power House Coal Co.*, 177 S.E.2d 146, 148 (W.Va. 1970).

As cautioned by one commentator on longwall mining[11]:

> It may be tempting to conclude from the surface mining cases that a new principle emerged whereby use of new methodology, indeed even new technology, is measured by the contemplation of the parties at the time of contracting or executing severance deeds. Indeed, great emphasis can be placed upon language in cases such as *West Virginia-Pittsburgh Coal Co. v. Strong*, where the court held, among other points, that because surface mining was not a known mining method in Brooke County, West Virginia, in 1904, it was not within the contemplation of the parties when they drafted the severance deed in question.
>
> Stopping the analysis at this point, and concluding that the right to surface mine or exercise any other mining right does not exist because not contemplated, misses the real reason and justification for these decisions. The underlying basis for the Strong case, and others like it, starts with the fact that the mining right in question (surface mining) was not expressly created, and the issue was whether it would be deemed implied with mineral ownership. The real basis for the decision that it is not an implied right is that the exercise of this right substantially injures the surface.
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> In one of the most recent cases on this subject, the Kentucky court in *Ward v. Harding* considered a 1988 constitutional amendment on this topic, and held with respect to surface mining under Kentucky broad form deeds that
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> > properly framed, the question here is not what the parties actually intended, but what they would have intended if significant surface destruction had been contemplated. In circumstances where there is no actual intent, a court should presume a reasonable intent.
>
> The court properly held that the inquiry was not the mining technology and whether the parties could have contemplated surface mining, but rather, whether the parties contemplated a substantial destruction of the surface.

[11] The Court relied on this same commentator and his law review article at page 11 of its January 29, 2016 Memorandum Order and Opinion.

See J. Thomas Lane, *Fire in the Hole to Longwall Shears: Old Law Applied to New Technology and other Longwall Mining Issues*, 96 W.Va. L. Rev. 577, 594 (1994) (citation omitted).[12]

As set forth below, this is the approached historically taken in the Northern District of West Virginia as to whether waivers of surface support result in a waiver of common law claims for damages arising from longwall mining.

B. The Court's Decision Directly Conflicts With Decisions of this District Addressing Identical Facts and Issues as Well as West Virginia Supreme Court Precedent.

In their Motion for Summary Judgment and Memorandum of Law in Support, Defendants cited several decisions of the West Virginia Supreme Court, as well as decisions of this Court, supporting enforcement of the support waiver as to common law claims for subsidence damage. In its January 29, 2016 Memorandum Order and Opinion, this Court distinguished those cases on several bases, including that they were decided before *Cogar*, that the plaintiffs in those cases did not raise similar concepts raised *sua sponte* by this Court, or that it was not clear whether longwall mining was at issue.

Defendants also provided copies of two (2) decisions issued by Judge Stamp of this Court (*Sendro* and *Giza*, *supra*) which specifically addressed the enforcement of support waivers (executed in 1901 and 1902) as applied to longwall mining operations. Those decisions were not addressed by this Court.

In the March 27, 1991 decision of *Sendro v. Consolidation Coal Company*, the **identical** support waiver language at issue in this case—"*without leaving any support for the overlying stratas and without liability for any injury which may result to the surface*"—was examined at length by Judge Stamp.

[12] Other commentators point out that there is actually *less* damage to the surface with longwall mining than with room and pillar mining. *See* The Continuing Viability of Subjacent Support and Subsidence Waivers: Fact or Myth? 14 EASTERN MINERAL LAW INSTITUTE, (CH. 10), n. 20 (1993).

> The parties do not dispute that West Virginia common law permits surface owners to waive the right to subjacent support. *See Cogar v. Sommerville*, 180 W. Va. 714, 379 S.E.2d 764, 769 (W. Va. 1989); *Rose v. Oneida Coal Co*., 180 W. Va. 182, 375 S.E.2d 814, 816 (W. Va. 1988); *Winnings v. Wilpen Coal Co*., 134 W. Va. 387, 59 S.E.2d 655, 658 (W. Va. 1950); *Continental Coal Co. v. Connellsville By-Product Coal Co*., 104 W. Va. 44, 138 S.E. 737 (W. Va. 1927). For the waiver to be valid, the language purporting to waive the right to subjacent support must "clearly show that [the owner of the land] intends to [waive the right]." *Winnings*, 59 S.E.2d at 659 *citing Simmers v. Star Coal & Coke Co*., 113 W. Va. 309, 167 S.E. 737; *Continental Coal*, 104 W. Va. 44, 138 S.E. 737, *Hall v. Harvey Coal & Coke Co*., 89 W. Va. 55, 108 S.E. 491.
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> **The 1902 deed severing the mineral rights from the surface owner of the land in question states that the mineral owners may mine the coal "without leaving any support for the overlying stratus and without liability for any injury which may result to the surface." This language could not be more clear: the plaintiffs' predecessors in title clearly intended to waive the right to subjacent support**. While the West Virginia Supreme Court of Appeals stated in *Cogar*, 379 S.E.2d at 769, that "waivers of this nature are strictly construed," the Court continued to recognize the validity of such waivers when they are unambiguous.
>
> **The 1902 deed is unambiguous**. The Sendros' predecessors in title validly waived the right to subjacent support.

Sendro, 1991 U.S. Dist. LEXIS 21929 at *10-11 (emphasis added).[13]

Critically, the **exact same** issue raised by the Court here—whether the original parties to the deed contemplated "changes in technology" such as longwall mining—was also addressed at length by Judge Stamp.

> **Plaintiffs also contend that changed circumstances have rendered the 1902 waiver of subjacent support void. Plaintiffs argue that the parties to the 1902 deed did not contemplate the changes in technology that resulted in longwall mining, therefore creating a jury question as to the parties[']intent in agreeing to the waiver**.
>
> **Plaintiffs point the Court to the West Virginia Supreme Court of Appeals statement in *Brown v. Crozer Coal & Land Co*.**, 144 W. Va. 296, 107 S.E.2d 777, 786 (W. Va. 1959), **that "the language of these deeds must be interpreted and construed as of the time they were made in the county in which the land lay**." ***See also Sommerville***, 379 S.E.2d at 769 (same). **However, the Court must**

[13] The *Sendro* plaintiffs pleaded three (3) common law causes of action, none of which involved either the federal or West Virginia SMCRA. *Id*. at *2.

> **also consider the Supreme Court of Appeals decisions** in *Pocahontas Land Corp. v. Evans*, 175 W. Va. 304, 332 S.E.2d 604, 609 (W. Va. 1985); *Sally-Mike Properties v. Yokum*, 175 W. Va. 296, 332 S.E.2d 597, 601 (W. Va. 1985); *Cotiga Development Co. v. United Fuel Gas Co*., 147 W. Va. 484, 128 S.E.2d 626 (W. Va. 1962); **in which the Supreme Court of Appeals held that "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation."** *Id*. Syl. pt. 1. **The Court believes that the language of the 1902 deed is so clear and unambiguous that the owner of the surface could only have intended to waive the right to subjacent support whatever method of coal removal was employed. The Court therefore rejects plaintiffs' contention that the 1902 waiver was invalidated by changed circumstances**.
>
> The 1902 waiver was valid. Plaintiffs had no right to subjacent support, even if the defendant was grossly negligent in its mining operations.

Sendro, 1991 U.S. Dist. LEXIS 21929 at *19-20 (emphasis added).

Nine (9) months later, Judge Stamp again enforced a waiver of support (executed in 1901, granting the coal owner the right to mine "without leaving any support for the overlying stratas and without liability for any injury which may result to the surface"). *Giza v. Consolidation Coal Co.*, CV-85-0056-W(S) (N.D. W.Va. Dec. 12, 1991, Unpublished Slip Op.), *affirmed* (per curiam), 1992 U.S. App. LEXIS 18585 (copy attached to accompanying Motion as Exhibit "A"). The *Giza* plaintiffs raised the **exact same** arguments and Judge Stamp granted summary judgment in favor of Consolidation as to the common law claims for damages,[14] quoting the *Sendro* opinion nearly verbatim. The *Giza* plaintiffs appealed, and the United States Court of Appeals for the Fourth Circuit affirmed, per curiam ("Chester A. and Yueh-Hua Giza appeal from the district court's order granting summary judgment to defendant Consolidation Coal Company. Our review of the record and the district court's opinion discloses that this

[14] The mining at issue in *Giza* was completed in 1983 and no statutory claims were raised, other than plaintiffs' contention in opposition to summary judgment that SMCRA pre-empted the common law and rendered the waiver void.

appeal is without merit. Accordingly, we affirm on the basis of the opinion of the district court."). *See* Ex. "A."[15]

Judge Stamp's decisions were rendered *after* and distinguished *Cogar*, *supra*. They expressly distinguished the "deed-must-be-interpreted-as-of-the-time-it-was-made" holding of *Brown v. Crozer Coal* and held that that reasoning cannot overcome the more basic rule of construction that a court should not rewrite a clear and unambiguous deed. They are entirely consistent with West Virginia law, as historically and currently expressed by the West Virginia Supreme Court.[16] And, they unequivocally stated that the exact language at issue here is so clear and unambiguous that the prior owner "intended to waive the right to subjacent support ***whatever method of coal removal was employed***."

While Defendants are mindful that "[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case,"[17] Judge Stamp's reasoning squarely addresses the issues raised not by Plaintiffs, but by the Court, including the concern of what prior parties waived (*i.e.*, support, irrespective of the method). Judge Stamp's decisions, which comport to West Virginia Supreme Court precedent, have been the law in this District for at least 25 years, thereby lending predictability to those whose actions must be governed accordingly. Going forward, however,

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[15] The *Giza* plaintiffs were represented by the same counsel who represent the Plaintiffs in this matter.

[16] To be sure, with regard to the effects of underground coal mining and the "contemplation of the parties," the West Virginia Supreme Court held over 100 years ago that

> it is a matter of common information, known to all who have paid any attention to mining that in coal mines the coal will have to remain in place as a support, or the surface be permitted to subside . . . . So it is a question of leaving something like one-half the coal in the mine or removing all and permitting the overlying surface to adjust itself to a new bed. And this . . . should be left for the parties to determine by their contract. If the owner of the coal wishes to keep half of it as a support for the surface he has a perfect right to do so, and if he wishes to sell all and permit all to be removed he may also do that. When he has made his contract in accordance with his own will and reduced it to writing the courts may declare the legal effect of the writing but cannot change it.

Griffin v. Fairmont Coal Co., 53 S.E. 24, 29 (W.Va. 1905).

[17] *Camreta v. Greene*, 563 U.S. 692, 131 S. Ct. 2020, 2023 n.7, (2011).

litigants in subsidence claims in this District, particularly in cases involving prior support waivers, may expect completely different rulings on common law claims and damages depending on which District Judge is assigned to their case.

Accordingly, Defendants respectfully submit that the January 29, 2016 Memorandum Order and Opinion was in error, and request that the January 29, 2016 decision be withdrawn and summary judgment as to Count I be granted in their favor.

C. Illinois Expressly Recognizes Support Waivers With Respect to Common Law Claims.

In denying Defendants' Motion for Summary Judgment, this Court also relied on *Phillips v. Old Ben Coal Co*., 1991 WL 4720 (Ill. App. Ct. Jan. 19, 1991), an unreported intermediate appellate decision from Illinois which held that a support waiver in a 1912 deed did not result in a waiver of support and damages from longwall mining.

First, as noted by this Court, this decision was vacated and the appeal was dismissed. It is not precedent, even in Illinois.[18]

Second, a reported Illinois decision decided just six (6) months after the vacated decision in *Phillips* reaffirmed Illinois law that a waiver of a surface owner's common law right to subjacent support have long been upheld and are not *per se* contrary to public policy. *See Rocking Ranch, Inc. v. Sahara Coal Co*., 576 N.E.2d 1120 (Ill. App. Ct. July 3, 1991). In that case, just as in *Rose II* in West Virginia, the court recognized the historical enforcement of support waivers as to *common law* claims and noted that landowners, in light of federal and state SMCRA, are not without protection.

> Plaintiff's first argument on appeal is that public policy no longer permits mining technologies which result in subsidence of the surface.

[18] In Illinois, a withdrawn opinion may not be relied upon either as precedent or as expressing the final views of the court. *See Tallman v. Eastern I. & P.R. Co.*, 41 N.E.2d 537 (Ill. 1942).

Plaintiff's action was brought **pursuant to the common law duty to provide subjacent support** which is owed to the surface owner by the owner of the mineral estate. This right was first recognized by our supreme court in *Wilms v. Jess* (1880), 94 Ill. 464. The court in *Wilms* also noted that the surface owner could waive the right to subjacent support. Since that time, numerous legislative enactments have manifested a growing public concern with conservation and protection of the environment . . . .

Clearly, current public policy in Illinois recognizes a public interest in the protection and conservation of surface lands apart from the interest of the individual surface estate owner.

We must reject, however, plaintiff's contention that public policy now prohibits any mining activities which result in the subsidence of the surface . . . .The statute clearly demonstrates that the SCMLCRA contemplates and accepts the occurrence of subsidence, both planned and unplanned, something this court implicitly recognized in *Old Ben Coal Co. v. Illinois Department of Mines & Minerals* (1990), 204 Ill. App. 3d 1062, 1071, 562 N.E.2d 1202.

We address next plaintiff's argument that recognizing and upholding waivers of subjacent support by predecessors in title is contrary to public policy. In *Boyer v. Old Ben Coal Corp*. (1923), 229 Ill. App. 56, a clause giving Old Ben the right to remove coal "without liability for any damage to the surface" was found sufficient to waive the right to subjacent support. **The clause in the present case waived "all surface damages of any sort arising * * * from the removal of said coal[.]**" Under *Boyer* and other similar cases, the language in the coal deed would have been sufficient to waive any right to damages arising from subsidence, but this issue was last addressed in *Mason v. Peabody Coal Co*. (1943), 320 Ill. App. 350, 51 N.E.2d 285, over 45 years ago. Plaintiff's argument that such language should no longer be sufficient to waive subsidence damage is premised on the position that mining technologies resulting in subsidence are contrary to current public policy, a position which is not supported by the SCMLCRA. **We conclude that waivers of the surface owner's common law right to subjacent support are not *per se* contrary to public policy**. We would note, however, that because the duties imposed upon coal operators by the SCMLCRA are owed to the general public and are therefore unaffected by any waiver of subjacent support given by the surface owners, in most cases the coal operator would have a duty to repair and restore surface lands and structures notwithstanding of any waiver by the surface owner.

In the present case, **plaintiff's complaint alleged only a violation of the common law duty to provide subjacent support. As noted above, language very similar to that employed in the deed in the present case has been held sufficient to waive the common law right to recover for subsidence damage**. We find the waiver in this case to be clear and unequivocal, and that the trial court correctly granted summary judgment for the defendants.

Rocking Ranch, Inc., 576 N.E.2d at 1121-1123 (emphasis added and citations omitted).

West Virginia courts have long-recognized the validity of support waivers as to common law claims for damages allegedly arising from longwall mining. The Court's reliance on the vacated Illinois decision from January of 1991 is misplaced and improper. Again, no one questions the Plaintiffs' right to proceed under the federal and West Virginia SMCRA, but the common law claims (which may permit recovery over and above the statutes) were waived, and Defendants submit that summary judgment in their favor, as to Count I, should be entered.

D. The Court's Ruling Resulted in a Sua Sponte Grant of Summary Judgment in Favor of Plaintiffs, Who Judicially Admitted that Count I Should be Dismissed, Without Affording Defendants an Opportunity to Address the Points Raised by the Court.

As noted above, Plaintiffs did not move for summary judgment on any claim or defense. On the contrary, they conceded that Defendants' defense of a support waiver precluded recovery under Count I. In ruling as a matter of law that the support waiver in this case is unenforceable as it pertains to longwall mining, the Court effectively granted summary judgment in favor of Plaintiffs as to the same.

Although "[d]istrict courts are not strictly bound to specific grounds urged in motions for summary judgment[]" and that "they may consider others *sua sponte*,... they should do so only after insuring that the nonmovant has had a fair opportunity to contest the grant on that ground." *Brock v. Carroll*, 107 F.3d 241, 247 (4th Cir. 1997). Before a district court grants summary judgment *sua sponte* the notice it provides "must allow the party a reasonable opportunity to present all material pertinent to the claims under consideration." *United States Dev. Corp. v. Peoples Federal Say. & Loan Assoc*., 873 F.2d 731, 735 (4th Cir. 1989).

Plaintiffs' admission in this case was unequivocal. ("The Plaintiffs . . . acknowledge and agree that they cannot pursue traditional common law property damage claims related to the

mining operations conducted under their property. The Plaintiffs therefore agree that Count I of their complaint would not be [a] viable claim for trial purposes of this matter.") (Doc. 39, p. 2).

While the Court expressed that "this Court does not believe that the parties can stipulate to legal principles which the Court believes to be erroneous" (Opinion, p. 7, n. 5), the Fourth Circuit has ruled that "'deliberate, clear [,] and unambiguous' statements by counsel may be considered judicial admissions that bind the conceding party to the representations made." *See Meyer v. Berkshire Life Ins. Co.,* 372 F.3d 261, 264-65 (4th Cir. 2004). Judicial admissions "go to matters of fact which, otherwise, would require evidentiary proof." *See New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 24 (4th Cir. 1963). In addition, judicial admissions "include intentional and unambiguous waivers that release the opposing party from its burden to prove the facts necessary to establish the waived conclusion of law." *See Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 347 (4th Cir. 2014).[19]

Here, Plaintiffs made a clear and unambiguous admission that Count I should be dismissed, and the Court's *denial* of summary judgment, in effect, a *grant* of summary judgment in favor of Plaintiffs, without affording Defendants the ability to respond, was improper.

E. In the Alternative, This Court Should Amend the Order to Conform to 28 U.S.C. § 1292(b) to Allow for Certification to the Fourth Circuit.

United States Code Chapter 28 Section 1292(b) authorizes this Court to certify an interlocutory appeal if the order in question is "[(1)] not otherwise appealable under this section [and the District Judge is] of the opinion that [(2)] such order involves a controlling question of law as to which [(3)] there is substantial ground for difference of opinion and [(4)] that an immediate appeal from the order may materially advance the ultimate termination of the

[19] In its decision, this Court devoted extensive discussion to the distinctions between longwall and room and pillar mining. To the extent those distinctions (*i.e.*, the mining methods and the type, likelihood, and extent of surface damage caused thereby) were important in the interpretation of the damage waiver in this case, Defendants were relieved of establishing facts through evidence of these matters by Plaintiffs' unequivocal admission.

litigation... ." Defendants respectfully submit that should this Court not reconsider the Order for the reasons expressed above, certification of an interlocutory appeal is appropriate under 28 U.S.C. § 1292(b).

First, the Order is not appealable under any other section of 28 U.S.C. §1292, none of which involve considerations relevant to this case. *See* 28 U.S.C. §§ 1292(a), (c) — (e). Second, the Order involves a controlling question of law because it decides that a waiver of surface support executed before longwall mining was used in West Virginia does not preclude common law claims for damages resulting from a loss of support following longwall mining. No one disputes that Plaintiffs can recover under the federal and West Virginia SMCRA, which both clearly define the parameters of recovery.[20] Allowing Count I to move forward completely changes the nature of the trial, in terms of evidence and in terms of damages. Specifically, Plaintiffs may not ask the jury to award them compensatory damages over and above that contemplated by SMCRA—*i.e.*, common law damages under West Virginia law.

Third, if this Court does not agree with the analysis of Judge Stamp in *Sendro* and *Giza*, *supra*, or that the West Virginia Supreme Court's decision in *Rose II*, *supra*—then that finding will, by definition, create a "substantial ground for difference of opinion," *within West Virginia and within this very Court*. 28 U.S.C. § 1292(b).

Finally, an immediate appeal from the Order will materially advance the ultimate termination of the litigation. As noted above, allowing Count I to move forward completely changes the nature of this litigation and most certainly will result in an appeal, and, most likely, a

[20] As to the residence, the statutes provide compensation in the form of a "diminution of value," and as to the real property, the statutes provide for an order to repair damages to the real property such that it is "restored…to a condition capable of maintaining [its] value and reasonable foreseeable uses which it was capable of supporting before subsidence."

second trial. Allowing this issue to be reviewed now most certainly avoids duplicative litigation and subsequent appeals and would create uniformity within this District.

For all these reasons, if this Court does not agree that the support waiver should be enforced to preclude the common law claims for damages in Count I, it should, in the alternative, amend the Order to allow for certification to the Fourth Circuit.

CONCLUSION

WHEREFORE, Defendants, McElroy Coal Company and CONSOL Energy Inc. respectfully request that this Honorable Court reconsider and withdraw its January 29, 2016 Memorandum Order and Opinion, and grant summary judgment in favor of Defendants as to Count I of the First Amended Complaint. Alternatively, Defendants request that this Court certify the issue relative to the waiver of support for appeal to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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