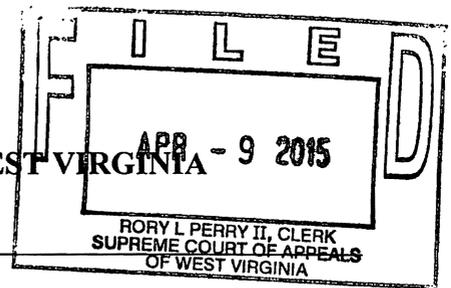


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 14-1210

GEOLOGICAL ASSESSMENT & LEASING AND WILLIAM CAPOUILLEZ

Petitioners

v.

MICHAEL C. O'HARA and DIERDRE J. O'HARA

Respondents.

**RESPONDENTS' BRIEF
AND CROSS-ASSIGNMENT OF ERROR**

On appeal from the Circuit Court of Ohio County, West Virginia
(Case No. 13-C-246)

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I. CROSS-ASSIGNMENT OF ERROR

By Order dated October 17, 2014, Judge Martin J. Gaughan held, *inter alia*, that Petitioners could enforce the arbitration clause in the subject oil and gas lease since they were a signatory to it. This was error.

II. STATEMENT OF THE CASE

Beginning in 2001, Petitioners solicited mineral rights owners in West Virginia, Ohio, Pennsylvania and Maryland to represent their interests in the procurement, negotiation, execution, and performance of oil and gas leases.

The Petitioners explained in marketing material sent to mineral rights owners:

“If you hire us, we will negotiate and solicit all the potential oil/gas developers in the area and draft far more protective lease provisions for you as well as bid your parcel out in order to try and get a better lease and value rate for your property.

...

“[Petitioners] will ask for a minimum of one dollar per acre as compensation regardless of the outcome, but only if you actually sign a lease that we have drafted the provisions for and have negotiated on your behalf to achieve better rents and royalty, etc.”

See Exhibit A, *Plaintiffs’ Response to Defendants’ Motion to Compel, Appendix*, pp. A81-A83.

In or about January 2006 the Respondents, desirous of leasing the mineral rights to their 44.94 acre parcel of land located in Ohio County, West Virginia, hired the Petitioners to represent their interests. Specifically, the Respondents and Petitioners entered into an oral or written *Landowner Representation Contract* wherein the Petitioners were to act as Respondents’ consultants and representatives in matters relative to the procurement, negotiation, execution, and performance of an oil and gas lease. See Exhibit B, *Plaintiffs’ Response to Defendants’ Motion to Compel, Appendix*, pp. A84-A86.

The *Landowner Representation Contract* states in relevant part that:

“[Petitioners] will advise and recommend draft lease provisions which will more adequately address the particular concerns and needs of the [landowner] during the course of lease negotiations and development.”

Id., at ¶1. It also states that, upon the request of the landowner, Petitioners will act as their “representative during...negotiations.” *Id.*, at ¶2. Further, in exchange for its “consulting” services Petitioners charged a fee based upon any monies received by them as follows:

- (i) 50% of all bonus payments greater than \$10.00 per acre;
- (ii) 50% of all delay rental payment greater than \$5.00 per acre; and
- (ii) 50% of all oil and/or gas royalty payments greater than 12.5% in perpetuity.

Id., at ¶3.

Importantly, there is no arbitration provision in the *Landowner Representation Contract*.

On June 6, 2006, the Respondents entered into an oil and gas lease (“Lease”) with Great Lakes Energy Partners, LLC, nka Range Resources-Appalachia, LLC, (Range Resources) leasing their oil and gas interests in and to the subject 44.94 acre parcel of land.¹ Petitioner William Capouillez signed the *Lease* as “Consultant” to Plaintiffs. Exhibit C, *Plaintiffs’ Response to Defendants’ Motion to Compel*, Appendix, pp. A87-A99.

The “consulting” activities performed by the Petitioners pursuant to the terms of the *Landowner Representation Contract* related to the *Lease* included the following:

- (i) instructed and advised the Respondents regarding their rights and obligations under the Lease;
- (ii) offered advice to the Respondents of their legal ownership interest and the

¹ Pursuant to an “Assignment of Oil & Gas Leases and Leasehold Interests,” Range assigned its rights under the Lease to Chesapeake Appalachia, LLC and Statoil Onshore Properties, Inc. (Chesapeake).

meaning of contract language;
(iii) prepared, drafted, and developed documents for the Respondents that required legal knowledge beyond the skill of an ordinary layman;
(iv) suggested and gave advice on various lease provisions, many of which were not contained in the form lease utilized by Range Resources;
(v) engaged in oil and gas lease negotiations on the Respondents behalf with Range Resources and other gas companies; and
(vi) gave recommendations and advice to the Respondents in matters connected with the law.

These activities constitute the practice of law as defined by order of this Court, which states in relevant part:

“DEFINITION OF THE PRACTICE OF LAW

...In general, one is deemed to be practicing law whenever he or its furnishes to another advice or service under circumstances which imply the possession or use of legal knowledge and skill.

More specifically but without purporting to formulate a precise and completely comprehensive definition of the practice of law or to prescribe limits to the scope of that activity, one is deemed to be practicing law whenever (1) one undertakes, with or without compensation and whether or not in connection with another activity, to advise another in any matter involving the application of legal principles to facts, purposes or desires; (2) one undertakes, with or without compensation and whether or not in connection with another activity, to prepare for another legal instruments of any character; or (3) one undertakes, with or without compensation and whether or not in connection with another activity, to represent the interest of another before any judicial tribunal or officer, to represent the interest of another before any executive or administrative tribunal, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from legal conclusions in respect to such facts and figures....”

Michie’s West Virginia Code Annotated, State Court Rules (2014).

However, Petitioner William Capouillez has never been licensed to practice law in the State of West Virginia or any other state at any time. Moreover, no officer, director or stockholder of Geological Assessment has ever been licensed to practice law in the State of West Virginia or any other state at any time.

On July 30, 2013, Respondents filed a *Complaint* against Petitioners in the Circuit Court of Ohio County alleging that the character of the services provided by the Respondents under the oral or written terms of the *Landowner Representation Contract* constituted the unauthorized practice of law.

The *Complaint* seeks a declaration of the following issues and matters:

(a) that the advice and services provided by the Petitioners pursuant to the terms of the *Landowner Representation Contract* constituted the unauthorized practice of law in the State of West Virginia;

(b) that the *Landowner Representation Contract* entered into by and between the parties for “consulting services” is unenforceable since it is aimed at accomplishing fraudulent or illegal purposes;

(c) that the fees charged by the Respondents for their “consulting” work are unfair and unreasonable when viewed in the context of the entire representation of Respondents;²

² See, for example, *Schrader Byrd & Companion, P.L.L.C. v. Marks*, 220 W. Va. 502, 648 S.E.2d 8 (2007). The Petitioners’ consulting services have been quite lucrative. In West Virginia alone, the Petitioners have acted as “consultants” on about 9,000 acres of land. *William Capouillez and Geological Assessment & Leasing’s Fourth Supplemental Responses to Plaintiffs’ Interrogatories and Requests for Production of Documents*, p. 4. West Virginia clients paid the Petitioners the sum of \$377,000 in 2013 in compensation per the terms of the *Landowner Representation Contracts*. Exhibit E, *Plaintiffs’ Response to Defendants’ Motion to Compel*, Appendix, pp. A104-A110 consists of 1099 forms issued by Chesapeake to Petitioners. These 1099 amounts do not include the additional approximate sum of \$100,000 which was paid to the Petitioners in 2013 by Statoil Onshore Properties, Inc., partner or joint venturer of Chesapeake.

Petitioner William Capouillez estimated “within a reasonable degree of geological certainty and oil and gas industry estimates” the value of his fees or compensation of royalty payments of one and one-half percent (1.5%) on Marcellus Shale well properties have a resell value, if transferred or sold to a third party, of Five Thousand Dollars (\$5,000.00) per acre. Affidavit of William Capouillez attached to *Defendants’ Response in Opposition to Plaintiffs’ Motion to Remand or in the Alternative Motion for Discovery and Memorandum of law in Support Thereof*. ¶10 (Exhibit F, *Plaintiffs’ Response to Defendants’ Motion to Compel*, Appendix, pp. A111-A115.). Using Mr. Capouillez’s figures for the Marcellus Shale formation only, the value of his fee agreements for West Virginia mineral rights owners is 45 million dollars (9,000 acres X \$5,000 per acre).

(d) that the payment of a portion of any bonus rental payment, delay rental payments and/or royalty payments to Petitioners for their “consulting” services under the *Landowner Representation Contract* are void as against public policy or otherwise, and are of no force and effect;

(e) that any fees or monies paid or to be paid to Respondents as a result of their illegal activities be disgorged in order to deter similar conduct in the future and ultimately to protect to public.³

Plaintiffs’ Complaint, ¶19, Appendix pp. A6-A7.

On August 29, 2013, Petitioners removed the case to the United States District Court for the Northern District of West Virginia on the basis of diversity of citizenship pursuant to 28 U.S.C., §§1332, 1441 and 1446. While the case was pending in federal court, Petitioners moved to compel arbitration.

By order entered April 14, 2014, the case was remanded to the Circuit Court of Ohio County, West Virginia.

On or about April 17, 2014, the Petitioners filed a *Motion to Stay and to Compel*

As noted by Mr. Capouillez, “[t]he figure of Five Thousand Dollars (\$5,000.00) per acre, is based solely on projected royalty values for one formation, that being the Marcellus Shale formation and does not include other known gas producing formations, such as the Trenton/Black River, Oriskany, Utica, and Onondaga formations, to name a few, all of which the lease includes rights for development and production of.” *Id.*, ¶8. Once one factors in the interest Petitioners have in the development and production of the Trenton/Black River, Oriskany, Utica, and Onondaga formations, the value of the Petitioners’ fee agreements in the State of West Virginia is about 90 million dollars.

³ Since the unauthorized practice of law is a crime, benefits resulting from such activities are unenforceable as against public policy. Indeed, the West Virginia legislature found and declared “that it is a violation of public policy of this state to permit a person who commits a crime to thereafter gain a monetary profit from the commission of that crime.” *West Virginia Code*, §14-2B-2.

Arbitration, arguing that the arbitration clause contained in ¶29.1 of the Lease requires it. Appendix pp. A9-A60. On May 15, 2014, Respondents filed their Response to said *Motion to Stay and Compel Arbitration*. Appendix at pp. A61-A144.

On October 17, 2014, Judge Gaughan entered an order denying Petitioners' *Motion to Stay and to Compel Arbitration*. In his split ruling, Judge Gaughan held that Petitioners could enforce the arbitration clause as a signatory to the *Lease*, but that the unauthorized practice of law claim asserted by Respondents required the judiciary to have exclusive jurisdiction in the State of West Virginia over the case. Appendix pp. A228-A234.

As will be discussed below, the subject dispute revolves around the “consulting” activities related to the *Landowner Representation Contract*. As such, the arbitration clause in the *Lease* does not apply to this case since the terms and provisions of said *Lease* are not in dispute. Further, assuming, *arguendo*, that the subject action arises from or is related to the *Lease*, the arbitration provisions in it are only applicable to the signatories to it (Respondents and Chesapeake). These matters are discussed in the cross-appeal.

Finally, the Ohio County Circuit Court was correct in holding that the arbitration provisions in the *Lease* are null and void as contrary to public policy for claims related to the unlawful practice of law.

This appeal followed.

III. SUMMARY OF ARGUMENT

The Ohio County Circuit Court committed error when it ruled: (1) that the Petitioners could enforce the arbitration clause in the *Lease* since said clause is not relevant to the

dispute involving the *Landowner Representation Contract* which does not contain an arbitration clause and is an agreement separate and apart from the *Lease*; and (2) that Petitioners could enforce the arbitration clause contained therein since they are non-parties to the *Lease*, assuming *arguendo* that the subject claims arise from the *Lease*.

The Ohio County Circuit Court did, however, correctly ruled that it had exclusive jurisdiction over this case rather than transferring the matter to arbitration since it is within the purview of the Courts to define, regulate, supervise and control the practice of law. Accordingly, the lower court did not err in failing to grant the Petitioners' *Motion to Stay and to Compel Arbitration*.

IV. STANDARD OF REVIEW

The standard for a motion to compel arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. §4, is the summary judgment standard set forth under Rule 56(c) of the West Virginia Rules of Civil Procedure. *Brown v. Dorsey & Whitney, Llp.*, 267 F.Supp.2d 61, 66-67 (D.D.C., 2003)(cites omitted)("...[T]he Court concludes that the proper approach to employ in reviewing the defendant's motion to dismiss and compel arbitration is to apply the same standard of review that governs Rule 56 motions").⁴ In order to compel arbitration, Respondents must present evidence sufficient to demonstrate an enforceable agreement to arbitrate. *Oppenheimer & Co. v. Neidhardt*, 56 F.3d 352 (2d Cir.1995); *Phox v. Atriums Mgmt. Co., Inc.*, 230 F.Supp.2d 1279

⁴ See also, *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir.2003)(applying a summary-judgment-like standard in ruling on a motion to compel arbitration); *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 735 (7th Cir.2002)(same); *Doctor's Assoc., Inc. v. Distajo*, 944 F.Supp. 1010, 1014 (D.Conn.1996)(same), *aff'd*, 107 F.3d 126 (2d Cir.), *cert. denied*, 522 U.S. 948, 118 S.Ct. 365, 139 L.Ed.2d 284 (1997); *InterDigital Commc'ns Corp. v. Fed. Ins. Co.*, 392 F.Supp.2d 707 (E.D.Pa.2005)(same); *Klocek v. Gateway, Inc.*, 104 F.Supp.2d 1332 (D.Kan.2000)(same).

(D.Kan.2002).

Of course, summary judgment is appropriate where the moving party establishes that “there is no genuine issues as to any material fact and that [it is] entitled to judgment as a matter of law.” Rule 56 of the West Virginia Rules of Civil Procedure. In considering a motion to compel arbitration, the Circuit Court must consider all of the non-moving party's evidence and construe all reasonable inferences in the light most favorable to the non-moving party.⁵

Here, the Petitioners have failed to meet their burden to compel arbitration under Rule 56 of the West Virginia Rules of Civil Procedure.

V. STATEMENT REGARDING ARGUMENT AND DECISION

Oral argument is necessary pursuant to the criteria set forth in West Virginia Rules of Appellate Procedure Rule 18(a). Respondents respectfully submit that this matter presents a unique procedural issue, one that is a matter of first impression for this Court, and therefore oral argument is warranted. Accordingly, the Respondents request that the case be set for oral argument.

VI. ARGUMENT

A. Argument in Support of Cross-Assignment of Error

1. The arbitration provision in the lease is not relevant in a dispute relating to the *Landowner Representation Contract*

Under West Virginia law, parties must submit their claims to arbitration if: (1) the parties entered into a valid arbitration agreement; and (2) the dispute falls within the scope of the

⁵ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Versage v. Twp. of Clinton N.J.*, 984 F.2d 1359, 1361 (3d Cir.1993); *Spaulding v. United Transp. Union*, 279 F.3d 901, 904 (10th Cir.2002)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

agreement. *State ex rel. TD Ameritrade, Inc. vs. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010). In this case, the Petitioners have failed to prove the parties entered into a valid arbitration agreement or that the dispute falls within the scope of it.

Although there is no arbitration provision in the *Landowner Representation Contract*, the Petitioners contend they should receive the benefit of the arbitration provision in the *Lease* since the "claims arise from the lease as well." *Defendants' Memorandum of Law in Support of Motion To Stay and To Compel Arbitration*, Appendix p. A16. The Ohio County Circuit Court agreed, holding that "the circumstances surrounding the question of the unauthorized practice to royalty payments are so intermingled between the Landowner Representation Contract and the...Lease that arbitration is justified as the Plaintiffs' claim falls within the substantive scope of the arbitration clause." See *Appendix* pp. A233. This was error.

In order for the Petitioners to assert their rights under the arbitration provision in the *Lease*, the Respondents' claims have to derive from the *Lease* itself. See, e.g., *Lawson vs. Life of the S. Ins. Co.*, 648 F.3d 1166 (11th Cir. 2011)(fact that claim referred to the contract as a factual predicate was insufficient when consumer's claim for return of credit disability insurance premium was independent of original loan contract).

Significantly, the claims asserted in the subject case relate *solely* to the *Landowner Representation Contract* (which contains no arbitration provisions) wherein the Petitioners were to act as the Respondents' consultant in matters "relative to the procurement, negotiation, execution, and performance of an oil and gas lease." *Plaintiffs' Complaint*, ¶8, *Appendix*, pp. A2-A3. The subject complaint does not assert any cause of action that arises from or relates to a breach of the

Lease entered into between the signatories to it (Respondents and Range Resources or its successor in interest, Chesapeake). This fact is not in dispute as Judge Frederick Stamp has previously held that “[t]he plaintiffs at no time in their complaint or motion briefing indicate that they are seeking to void the underlying lease...Accordingly, the royalty agreement is the object of the litigation, not the lease.” See *Plaintiffs’ Response to Defendants’ Motion to Compel*, Appendix p. A69.

Simply put, the Respondents’ claims are independent from the terms and conditions of the *Lease* and stand separate and apart from it. The *Lease* itself specifically refers to the *Landowner Representation Contract* between the Respondents and Petitioners as a separate and distinct document when it recited the following:

WHEREAS, Lessor has contracted with Geological Assessment & Leasing, with its principal place of business located at 7630 Ferguson Valley Road, McVeytown, PA 17051 to act as Lessor’s consultant and representative in the negotiation, execution, and performance of this Agreement, hereinafter designated “Consultant”

WHEREAS, Lessor’s contract with Consultant allows for a certain portion of Lessor’s bonus payment, delay rental payments and/or royalty payments to be paid directly to Consultant.”

Lease, 3rd and 4th WHEREAS clauses.

Since the Respondents’ claims do not depend on, and can stand independently of, the *Lease*, the Petitioners cannot enforce an arbitration provision in it. *Brantley v. Republic Mortgage Ins. Co.*, 424 F.3d 392, 395-396 (4th 2005)(mortgage insurer could not rely on equitable estoppel to compel consumer to arbitrate Fair Credit Reporting Act claims on the basis of an arbitration contract between the consumer and a mortgage lender when the plaintiff’s claims against the insurer were unconnected to the contract); *Lawson vs. Life of the S. Ins. Co.*, 648 F.3rd 1166 (11th Cir. 2011)(fact

that claim referred to the contract as a factual predicate was insufficient when consumer's claim for return of credit disability insurance premium was independent of original loan contract).

Finally, the fact that the *Lease* merely reflects some of the terms of the *Landowner Representation Contract* or because the subject claims touch upon matters referenced in the *Lease* are not enough for the Petitioners to enforce an arbitration provision in said *Lease*. Petitioners cannot avail themselves of the arbitration provision in the *Lease* simply because of a factual connection between the claims asserted by Respondents and the *Lease*, or because the claim touches matters covered by the *Lease*. *Goldman v. KPMG, L.L.P.*, 92 Cal Rptr. 3d 534 (Ct. App. 2009)(estoppel did not apply when claims were not based on the contract containing the arbitration clause).

2. Assuming the subject claims arise from the *Lease*, Petitioners cannot enforce the arbitration provision in it since they are non-parties to said *Lease*

The subject parties never agreed in the *Landowner Representation Contract* or *Lease* to submit their disputes to arbitration and since the Respondents' claims are independent from the terms and conditions of the *Lease* (where there are arbitration provisions) and are not based upon or dependent on it, the Petitioners cannot compel arbitration.

Of course, since arbitration is a matter of contract, it should only be compelled when the parties have agreed to it. *Arthur Andersen LLP vs. Carlisle*, 129 S.Ct. 1896, 1903, 173 L.Ed.2d 832 (2009)(“a litigant who was not a party to the relevant arbitration agreement may avoid §3 [of the Federal Arbitration Act] if the relevant state contract law allow him to enforce the agreement”); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 377 (4th Cir.1998); *Arrants v. Buck*, 130 F.3d 636, 640 (4th

Cir.1997). Here, the parties did not agree to submit their claims to arbitration and the Ohio County Circuit Court erred in so ruling.

First, the parties to the *Lease* are set forth in the first paragraph of it, namely, the “Lessor” (Michael C. O’Hara and Dierdre J. O’Hara) and the “Lessee” (Great Lakes Energy Partners, LLC). And, although Petitioner William Capouillez signed the *Lease* as a “consultant,” this does not make him a party to it. The language in the *Lease* clearly indicates that Mr. Capouillez signed as “consultant” solely to ensure that he would receive any monies owing him directly from the gas company, similar to what is done in workers’ compensation or social security cases.

Since parties generally intend that the contract they sign apply only to the parties enumerated in the agreement,⁶ Petitioners, non-parties to the *Lease*, do not have a right to enforce the arbitration agreement.⁷

Second, the arbitration clause in the *Lease* states that a dispute would be ascertained and settled by three (3) arbitrators, “one thereof to be appointed by the Lessor (Respondents), one

⁶ See, e.g., *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 687 (7th Cir. 2005); *E.I. DuPont de Nemours & Co. v. Rhone Pulenc*, 269 F.3d 187, 195-197 (3d Cir. 2001); *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995); *Alliance Title Co. v. Bucher*, 25 Cal. Rptr. 3d 440, 444 (Ct. App. 2005); *Mohamed v. Auto Nation USA Corp.*, 2002 WL 31429859, at *4 (Tex. App. Oct. 31, 2001) (“[A]n entity that was not a party to the arbitration agreement may not enforce the agreement’s provisions unless that non-signatory entity falls into an exception, recognized under general equitable or contract law, that would allow such enforcement.”).

⁷ *Jenkins v. Atelier Homes, Inc.*, 62 So.3d 504, 510-511 (Ala. 2010)(explaining that when the contract is narrowly drawn or explicitly refers to the parties, it will not allow non-signatories to invoke doctrines like equitable estoppel to enforce an arbitration provision); *Equal Employment Opportunity Comm’n v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002); see also, *Bridas S.A.P.I.C. v. Gov’t of Turkmenistan*, 345 F.3d 347, 353 (5th Cir. 2003)(“In order to be subject to arbitral jurisdiction, a party must generally be a signatory to a contract containing an arbitration clause.”); *Lafayette Texaco, Inc. v. Smith*, 2010 WL 653494, at *4 (M.D. Ala. Feb. 19, 2010)(while judicial economy would favor sending all claims to arbitration, parties to the dispute who had not signed arbitration agreements would not be bound to arbitrate alongside parties who did sign arbitration agreements); *Midwest Fin. Holdings, L.L.C. v. P & C Ins. Sys., Inc.*, 2007 WL 4302436, at *3 (C.D. Ill. Dec. 7, 2007)(generally non-signatories are not bound by arbitration clauses signed by other parties); *Universal Underwriters Life Ins. Co. v. Dutton*, 736 So. 2d 553 (Ala. 1999); *Flores v. Evergreen at San Diego, Inc.*, 55 Cal. Rptr. 3d 823 (Ct. App. 2007) (“Generally, a person who is not a party to an arbitration agreement is not bound by it”).

by the Lessee (Chesapeake), and the third by the two (2) so appointed aforesaid..." Clearly, then, the arbitration clause in the *Lease* is only meant to apply to disputes between the Lessor and Lessee since it refers only to the "Lessor" and "Lessee" and makes no mention of the "consultant." It makes no sense that the Lessee (Chesapeake) would be able to select an arbitrator in a dispute between the Respondents and Petitioners, but, according to the Petitioners, the arbitration clause in the *Lease* gives it that right.

It makes even less sense that Chesapeake would be responsible for one-half (½) of the costs of the arbitration in the subject dispute which does not involve them, but the arbitration clause in the *Lease* requires such allocation of expenses ("the cost of such arbitration will be borne equally by the parties").

Nevertheless, the Ohio County Circuit Court ignored this unintended result when it ruled that the Petitioners could enforce the arbitration clause. This was in error since a fair reading of the *Lease* clearly indicates that the arbitration clause was to only apply to disputes between the Lessor and Lessee.

As a matter of fact, Petitioner William Capouillez does not even believe that the arbitration provisions in the oil and gas leases he and his company procured like the one in this case have any applicability with disputes between him and the landowners.

In *Cecil Hickman vs. Chesapeake Appalachia, et. al.*, (Ohio County Civil Action No.: 12-C-11), the Petitioners herein were sued for giving bad advice to Mr. Hickman relating to an oil and gas lease. At Mr. Capouillez's deposition on March 21, 2013, the following exchange occurred:

Q. (Greg Gellner, Plaintiff's attorney): Would you have had any written contract, consulting contract, representation contract, any kinds of contract with any of the

Hickmans?

A.(William A. Capouillez): It's possible.

Q. Okay

A. Normally, what I would do is if I was representing somebody early on, I had a contract that I would utilize. But in some instances, people would come in, after they had found out what the bid was by word of mouth, friends or neighbors, and they would just come in and want to sign a lease because they heard that that was the best deal, and I would not have a contract with them.

...

Q: And this contract that you may have had with the Hickman family, although if you did, it's been discarded, correct?

...

A. Yes.

Q. Do you know whether or not that contract had an arbitration clause in it?

A. I do know whether or not it had an arbitration – my contract does not have an arbitration clause.

Q. So your contract, if there was one with the Hickmans, would not have had that?

A. That's correct. It would be a representation contract. It does not have an arbitration clause.

Q. So you and the Hickmans have never agreed to arbitrate disputes amongst yourselves, correct?

A. I can tell you that anything that they may have signed with me would have been a representation contract and none of my representation contracts have an arbitration clause in it.

So with respect to your question, I would not have arbitrated anything with anyone.

Q. With the Hickmans?

A. Correct.

...

Q. No one has ever asserted a right – come to you and said, I have a dispute with you and we need to go to arbitration because of this contract or something, no one's ever –

A. Nobody's ever done that.

Q. Okay. And you've never asked someone else to be involved in an arbitration in a dispute you might have had with them; is that right?

...

A. And the question was have I ever –

Q. Requested someone arbitrate a dispute that you had with them?

A. Sir, I don't have any experience with arbitration.

Q. Okay. Do you believe that you and the Hickmans have signed any agreement that you two, you and the Hickmans, would arbitrate disputes?

A. I've not signed any agreements with Hickmans that has anything to do with arbitration, is that what you –

Exhibit H, *Plaintiffs' Response to Defendants' Motion to Compel*, Appendix pp. A140-A144.

Third, since the Petitioners have no duties or obligations imposed on them under the terms of said *Lease* (and thus are incapable of breaching it), they cannot avail themselves of its terms. Generally, while a third-party beneficiary may be entitled to certain benefits under a contract, a beneficiary who is not a promisor, who does not oblige itself to perform under the contract by virtue of its beneficiary status, and who is not responsible for a breach of the oil and gas lease, cannot use the contract to its advantage. *See, e.g. Flink v. Carlson*, 856 F.2d 44, 46 (8th Cir. 1988)(non-party could not be required to arbitrate under a third-party beneficiary theory because "mere status as a third-party beneficiary (or receipt of benefits) does not bind the beneficiary to perform duties imposed by the contract").

Fourth and finally, merely receiving contractual benefits from the *Lease* (which the Petitioners believe they do) is not itself sufficient to bring a third-party within the scope of an arbitration clause. *Wachovia Bank v. Schmidt*, 445 F.3d 762 (4th Cir. 2006)("The fact that a signatory receives benefits from a contract is therefore insufficient, in and of itself, to estop it from asserting that a non-signatory is not entitled to invoke the contract's arbitration clause."); *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.2d 347, 362 (5th Cir. 2003); *InterGen N.V. v. Grina*, 344 F.3d 134, 147 (1st Cir. 2003)("a benefitting third party is not necessarily a third party beneficiary"); *Scharf v. Kogan*, 285 S.W.2d 362, 370 (Mo. Ct. App. 2009)(receiving incidental benefits under contract is

insufficient to confer third-party beneficiary status).

In sum, any contention by the Petitioners that they are third-party beneficiaries of the *Lease* is without merit since they cannot show that the parties to said *Lease* specifically intended to confer the benefits of the agreement on them when they signed it as a "consultant." *Lawson v. Life of the S. Ins. Co., supra*, and *Brantley v. Republic Mortgage Ins. Co., supra*. Moreover, even if the Petitioners are intended beneficiaries of the *Lease*, they must be intended beneficiaries of the arbitration provision specifically in order to compel a signatory to arbitrate. *Foy v. Ambient Technologies, Inc.*, 2009 WL 1750033, at *2 (D. V.I. June 19, 2009)(third party could not enforce arbitration clause even though the contract identified it as a third-party beneficiary, because the arbitration provision made no mention of the beneficiary). Clearly, they are not.

B. Argument in Opposition to Petitioners/Appellants Assignment of Error

1. Assuming the subject claims arise from the *Lease*, the arbitration clause in it is void since a contract to engage in the unlawful practice of law promotes a violation of a criminal statute is therefore unenforceable and further it is contrary to public policy since the judiciary department in West Virginia has exclusive jurisdiction over the practice of law

As noted above, in their complaint Respondents asked the Ohio County Circuit Court, *inter alia*, to adjudge, declare and decree that the "consulting" services engaged in by the Petitioners constitute the unauthorized practice of law in the State of West Virginia.⁸

Petitioners filed a motion to compel arbitration, maintaining that the decision as to whether they engaged in the unlawful practice of law should be determined by three (3) arbitrators. Apparently, the Petitioners seek to allow a person or company to enter into a legal services

⁸ It is important to note that on April 5, 2013, the Court of Common Pleas of Lycoming County, Pennsylvania in a similar case held that the Petitioners herein engaged in the unlawful practice of law in the Commonwealth of Pennsylvania. Exhibit G, *Plaintiffs' Response to Defendants' Motion to Compel*, Appendix, pp. A116-A139. On April 4, 2014, this decision was upheld by the Superior Court of Pennsylvania.

agreement with a client, engage in the unlawful practice of law (a criminal activity)⁹ and then, when questioned about it, argue that the matter must be arbitrated.

Assuming, *arguendo*, that the arbitration clause in the *Lease* is within the scope of the subject dispute,¹⁰ it and the *Landowner Representation Contract* are unenforceable contracts. Otherwise, the well-established law that the courts have the exclusive jurisdiction to define, supervise, regulate and control the practice of law in the State of West Virginia, and to punish those who have engaged in the unlawful practice of it is eviscerated.

Further, the public policy of this State does not permit a person to benefit when he or she has performed a service of value but the service was performed in contravention of a code or the work was performed without proper licensure.¹¹ That is, this Court should not enforce a contract when a party performs an obligation but fails to comply appropriately with statutory or regulatory licensing requirements nor should this Court enforce a contract when it promotes the violation of a criminal statute.¹²

The preemptive powers of the Federal Arbitration Act (FAA) are found in Section

⁹ West Virginia Code, §30-2-4 (“It shall be unlawful for any natural person....to render legal services...”).

¹⁰ See discussion at pp. 8-16 above.

¹¹ Section 181 of the *Restatement (Second) of Contracts* (“Effect of Failure to Comply with Licensing or Similar Requirement”) purports to address these circumstances. This section provides:

“If a party is prohibited from doing an act because of his failure to comply with a licensing, registration or similar requirement, a promise in consideration of his doing that act or of his promise to do it is unenforceable on grounds of public policy if
(a) the requirement has a regulatory purpose, and
(b) the interest in the enforcement of the promise is clearly outweighed by the public policy behind the requirement.

¹² As noted above, see p. 4, the Respondents have asked the Ohio County Circuit to hold that the *Landowner Representation Contract* entered into by and between the parties for “consulting services” is unenforceable since it is aimed at accomplishing fraudulent or illegal purposes.

2, the “primary substantive provision of the Act.” *Moses H. Cone Memorial Hospital vs. Mercury Constru. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 327, 74 L.Ed.2d 765 (1983). The provision contains two parts: the first part holds that written arbitration agreements affecting interstate commerce are “valid, irrevocable, and enforceable,” but the second part is a “savings clause” that allows courts to invalidate those arbitration agreements using general contract principles. The relevant portion of Section 2 states:

"A written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, **save upon such grounds as exist at law or in equity for the revocation of any contract."**

9 U.S.C. §2 (emphasis mine).

The United States Supreme Court has “described this provision as reflecting both a ‘liberal federal policy favoring arbitration,’ and the ‘fundamental principle that arbitration is a matter of contract.’ ” *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011)(citations omitted). Accordingly, “courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.” *Id.* (citations omitted). The savings clause, however, permits arbitration agreements to be declared unenforceable based on “‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Id.* at 1746.

Thus, the FAA recognizes that certain agreements which would otherwise be subject to arbitration may not be enforceable “at law or in equity for the revocation” of the contract. Here,

such a case exists.

First, as noted above, an agreement calling for a party to perform an obligation but who fails to comply appropriately with statutory or regulatory licensing requirements is unenforceable. Similarly, a contract promoting the violation of a criminal statute is unenforceable.

Second, one of the more established doctrines in the State of West Virginia is that the judiciary has the inherent power to regulate the practice of law¹³ and any attempt to restrict or impair this power is unenforceable and/or contrary to public policy.

In *West Virginia State Bar vs. Earley*, 144 W.Va. 504, 109 S.E.2d 420 (1959), this Court explained the role of courts relative to the practice of law as follows:

"The judicial department of the government has the inherent power, independent of any statute, to inquire into the conduct of a natural person, a lay agency, or a corporation to determine whether he or it is usurping the function of an officer of a court and illegally engaging in the practice of law and to put an end to such unauthorized practice wherever it is found to exist.

By Article VIII, Section 1 of the Constitution of this State, the judicial power of the State is vested in the Supreme Court of Appeals, in the Circuit Courts and their judges, in such inferior tribunals as are authorized by the Constitution, and in justices of the peace. Under this grant of power to the judiciary it has the power by necessary implication to define, supervise, regulate and control the practice of law.

Id., at pp. 437-438 (cites omitted).

As the Fourth Circuit Court of Appeals noted:

"The regulation of the practice of law is entrusted in West Virginia to the Supreme Court of Appeals and those judicial bodies under that court subject to its orders...**It is difficult to conceive a matter closer or more important to the State of West**

¹³ *State ex. rel. Frieson v. Isner*, 168 W.Va. 758, 764-765, 285 S.E.2d 641 (1981)("[t]his constitutional provision vests in this Court the indisputable and exclusive authority to define, regulate and control the practice of law in West Virginia"); W.Va. Const. art. 8, §3 ("the power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law").

Virginia, not to mention her people, than the question of who is to practice law in that State. The question is one particularly suited for decision by the West Virginia courts under the supervision of the Supreme Court of Appeals of that State."

Allstate Ins. Co. v. W. Virginia State Bar, 233 F.3d 813, 820-21 (4th Cir. 2000)(emphasis added).

See also, Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.E.d.2d 572, 588 (1975)("[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"

Thus, private parties may not usurp, restrict, or impair the power of the judiciary to regulate the practice of law. Accordingly, claims relating to the unlawful practice of law should not be required to be submitted to arbitration since it conflicts with the indisputable and exclusive authority and right of the judicial department to define, supervise, regulate and control the practice of law.

Petitioners reliance on *McMahon v. Advanced Title Services Co. of West Virginia*, 216 W.Va. 413, 607 S.E.2d 519 (2004)¹⁴ is misplaced. Of course, the *McMahon* Court held that private parties may bring a cause of action for damages based on the unauthorized practice of law. *Id.*, at 418. However, *McMahon* did not abdicate the judiciary's power in addressing such a claim. Indeed, the *McMahon* Court upheld long standing legal precedent and policy in the State of West Virginia when it held that "the judicial branch determines what is and is not the unauthorized practice of law." *Id.* at 418. The Ohio County Circuit Court did not, as Petitioners claim, carve out an exemption for the unauthorized practice of law.

¹⁴ Misidentified by Petitioners as "*McMullen v. Advance Title Service Company of West Virginia*". *Petitioners' Brief*, pg. 6.

Moreover, Petitioners attempt to argue that this Court has held that tort and public policy claims may be submitted to arbitration is without merit. *Petitioners' Brief*, p. 7. Contrary to Petitioners' contention, this Court in *State ex rel. Clites v. Clawges*, 685 S.E.2d 693 (W.Va. 2009), did not specifically hold that tort claims may be submitted to arbitration. *Petitioners' Brief* at p. 7. Rather, the *Clites* Court held that statutory claims as well as fraudulent inducement to enter into an arbitration agreement claims were subject to preemption by the FAA. *Id.*, at 305. Here, the basis of Respondents' complaint was not grounded upon a statutory cause of action nor was there a claim made that the Respondents were fraudulently induced into entering an arbitration agreement.

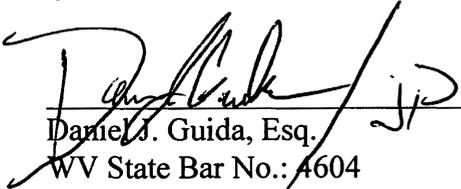
Further, Petitioners attempt to place the current case on the same footing as any other matter of public policy, relying on this Court's decision in *State ex rel. Wells v. Matish*, 215 W.Va. 686, 600 S.E.2d 583 (2004), is misguided. *Petitioners' Brief* at p. 7. While the Respondents recognize that the *Wells* Court held that the claims presented in that case were subject to arbitration, said claims dealt specifically and solely with employment law, not the unauthorized practice of law.

VII. CONCLUSION

The Ohio County Circuit Court erred in its Order of October 17, 2014, when it held that Petitioners could enforce the arbitration clause as a signatory to the *Lease*. However, the Ohio County Circuit Court correctly ruled that the unauthorized practice of law claim asserted by Respondents required the judiciary to have exclusive jurisdiction in the State of West Virginia over the case.

Respectfully submitted
on behalf of the Respondents,
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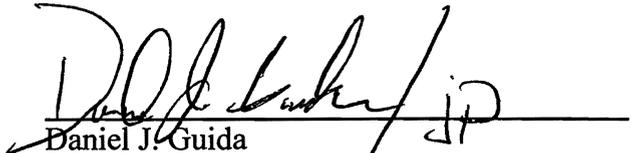

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CERTIFICATE OF SERVICE

Service of the foregoing **RESPONDENTS' BRIEF AND CROSS-ASSIGNMENT OF ERROR** was had upon Petitioners by mailing a true copy thereof, by regular U.S. first class mail, postage prepaid, to the following on this 8th day of April, 2015:

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