

14-0923

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

CECIL L. HICKMAN,
Plaintiff,

v.

CIVIL ACTION NO. 12-C-11
Judge David J. Sims

CHESAPEAKE APPALACHIA, L.L.C.,
GREAT LAKES ENERGY PARTNERS, L.L.C.,
now known as RANGE RESOURCES,
RED SKY-WEST VIRGINIA, L.L.C.,
TERRY L. MURPHY, JOHN MARK
HICKMAN, LAWRENCE GRANT HICKMAN,
CAROL SUE CRISWELL, GEOLOGICAL
ASSESSMENT & LEASING, and
WILLIAM A. CAPOUILLEZ.
Defendants.

ORDER

This matter comes before the Court on Defendants' various Motions for Summary Judgment and Motions to Compel Arbitration in this action. The Court, having considered the arguments of counsel, having reviewed the various pleadings, having reviewed the discovery submitted by the parties, and having reviewed the pertinent legal authority, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff owns a $\frac{1}{4}$ undivided interest in a 143.77 tract of land in Ohio County, West Virginia, along with his siblings, John Mark Hickman, Lawrence Grant Hickman and Carol Sue (*nee* Hickman) Criswell.

2. In 2001, Plaintiff and his siblings executed a lease (hereinafter referred to as "Canton lease") of this tract of land with Canton Oil and Gas Company (hereinafter referred to as "Canton") for oil and gas exploration for a term of five years.

CIRCUIT COURT
OF OHIO COUNTY
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3. The Hickman siblings were assisted through a consulting agreement with Defendants, William A. Capouillez (hereinafter referred to as "Capouillez") and Geological Assessment & Leasing (hereinafter referred to as "GAL").

4. The Canton lease was not executed in person by Plaintiff; rather, he received the said lease by mail and returned it to Canton. Plaintiff was a party to the Canton lease under the identical terms and dates as his siblings.

5. Prior to the expiration of the Canton lease, in December of 2005, Capouillez and GAL, acting under a subsequent consulting agreement with Plaintiff and his siblings, obtained an offer from Defendant, Great Lakes (now known as Range Resources), for a subsequent joint lease (hereinafter referred to as "Great Lakes lease").

6. Capouillez' consulting agreement permitted him to act as the agent for Plaintiff and his siblings in the negotiation process for the Great Lakes lease.

7. Plaintiff and his siblings intended to, and were, leasing the property together and reasonably expected that their lease terms and times frames would be identical.

8. Prior to December 21, 2005, the offer of lease made by Great Lakes was sent to Capouillez as a form contract with provisions for certain bonus payments and future royalties to be completed.

9. On December 21, 2005, Great Lakes tendered the lease to Plaintiff's siblings during a meeting at the Bethany (WV) Fire Department and Plaintiff's siblings executed the lease.

10. Plaintiff, a resident of Columbus, Ohio, was unable to attend this meeting but knew the terms and conditions of the Great Lakes lease and intended to sign along with his siblings as he had done with the Canton lease.

11. In December of 2005, at the time of the negotiation process and thereafter, Great Lakes knew through discussions with Capouillez and Plaintiff's siblings that there was to be a joint lease of the entire parcel with the same lease terms for each of the siblings.

12. Great Lakes had the authority to permit Plaintiff and his siblings to be included on one lease.

13. Capouillez, acting as an agent of Plaintiff and his siblings, was present during the December 21, 2005 meeting at the Bethany fire hall and should have been aware of the aforesaid discussions.

14. It was the understanding of Plaintiff and his siblings that Great Lakes would immediately forward to Plaintiff the Great Lakes lease for him to sign and return and that each of the siblings, including Plaintiff, would be on the same lease with the same lease terms.

15. Plaintiff contacted Capouillez in January 2006 because he had not received the lease or the bonus payment that his siblings had already received.

16. On June 2, 2006, Great Lakes, recorded a Memorandum of Lease for the Great Lakes lease executed by Plaintiff's siblings, which is recorded in the Office of the Clerk of the County Commission for Ohio County in Deed book 768, at page 790.

17. The said Memorandum of Lease included Plaintiff as a lessor of the tract of land.

18. Great Lakes finally sent a separate, undated lease to Plaintiff in July of 2006, after Plaintiff made several inquiries as to why he had not received his bonus payment.

19. Capouillez and GAL, as agents for Plaintiff and his siblings, failed to ensure that the Great Lakes lease was the same for Plaintiff and his siblings.

20. Capouillez had never meet or spoken to Plaintiff until after this litigation was commenced.

21. After receiving the separate, undated lease in July 2006, Plaintiff executed the lease, did not date it, and returned it to Great Lakes.

22. After the lease was returned to Great Lakes, it was dated by a representative of Great Lakes with an effective date of July 19, 2006.

23. Plaintiff believed that by signing the lease sent to him in July of 2006, he was agreeing to the same lease terms that his siblings had agreed to and that the effective date would be the same as the Great Lakes lease executed on December 21, 2005.

24. At no time was the lease of July 19, 2006, subject to negotiation or bargaining of any kind by and between Plaintiff and Great Lakes after December 21, 2005.

25. On or about October 19, 2010, Great Lakes (now known as Range Resources) assigned the Great Lakes lease and the July 19, 2006 lease to Defendant, Chesapeake Appalachia, L.L.C. (hereinafter referred to as "Chesapeake").

26. The said assignment of October 19, 2010, was backdated to July 1, 2010.

27. The Great Lakes lease expired on December 21, 2010, without oil or gas production taking place on the tract of land.

28. At the time Chesapeake took the assignment of the lease, it was on notice that the Great Lakes lease expired on December 21, 2010.

29. In late 2010, Plaintiff and his siblings were part of a group of landowners being solicited by Chesapeake, through its agents, Defendants, Terry L. Murphy (hereinafter referred to as "Murphy") and Red Sky-West Virginia, L.L.C. (hereinafter referred to as "Red Sky").

30. Chesapeake made a lease offer to Plaintiff and his siblings after the expiration of the Great Lakes lease.

31. A new lease (hereinafter referred to as "Chesapeake lease") was signed by and between Plaintiff and his siblings, as lessors, and Chesapeake, as lessee, on January 5, 2011, at the Spring Hill Suites in Wheeling.

32. The Chesapeake lease has a 5-year term.

33. As part of the consideration for the execution of the Chesapeake lease, Plaintiff and his siblings each received the sum of Ten Dollars (\$10.00) from Chesapeake at the time they executed the lease.

34. In accordance with the terms of the Chesapeake lease, Plaintiff was given an "Order of Payment" for the sum of \$179,710.00 for his ¼ share of the up-front lease bonus payment.

35. The sum of \$179,710.00 was not paid to Plaintiff.

36. Subsequent to executing the Chesapeake lease, Murphy, acting as an agent of Red Sky and Chesapeake, contacted Plaintiff and his siblings and advised that Chesapeake was requesting that each of them to sign an "amended" lease excluding Plaintiff as a party to the Chesapeake lease.

37. Murphy informed Plaintiff and his siblings that the amount of the "Order of Payment" (\$179,710.00) would not be paid to Plaintiff's siblings until Plaintiff was removed as a party to the Chesapeake lease. Plaintiff and his siblings were also told that Chesapeake would move forward with production even if they declined to execute the "amended" lease.

38. Plaintiff experienced significant duress during this time due to his belief that he would cost his siblings their share of the bonus payment (\$179,710.00 each) as well as future royalty payments on the Chesapeake lease if he failed to execute an "amended" lease.

39. As a result of this significant duress, Plaintiff felt that he had no choice but to acquiesce to the demands of Chesapeake, Red Sky and Murphy and execute a new top lease (hereinafter referred to as "top lease") on February 15, 2011.

40. No consideration was paid to Plaintiff at the time he executed the top lease.

41. All of the aforesaid leases contain arbitration clauses.

42. Plaintiff had no idea what arbitration was and was not familiar with the term arbitration until he pursued this action.

43. Plaintiff asserts that arbitration is, in general, unfair, and that he would not have signed any of the leases had he understood arbitration.

44. Capouillez and GAL were not parties to any of the leases mentioned herein; but did sign as consultants on the Great Lakes lease.

45. Murphy and Red Sky did not sign the Chesapeake lease and are not parties thereto.

46. The Chesapeake lease and the top lease each contain the following arbitration clause:

ARBITRATION. In the event of a disagreement between the Lessor and Lessee concerning this Lease or the associated Order of Payment, performance thereunder, or damages caused by Lessee's operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. Arbitration shall be the exclusive remedy and cover all disputes, including but not limited to, the formation, execution, validity, and performance of the Lease and Order of Payment. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee.

47. The Chesapeake lease contains an addendum entitled "Venue and Choice of Law" which reads as follows:

The venue for all actions and proceedings arising from this Lease shall be in the county in which the real property is located. The law of the state in which the real property is located shall apply.

48. Murphy was unable to answer any of Plaintiff's questions during discovery regarding any arbitration clause.

49. Chesapeake admits that the expenses of arbitration to Plaintiff could be unlimited.

50. Discovery was had regarding the formation of the leases as well as the arbitration clauses in question.

CONCLUSIONS OF LAW

1. "Only matters contained in the pleadings can be considered on a motion to dismiss under Rule 12(b) R.C.P., and if matters outside the pleading are presented to the court and are not excluded by it, the motion should be treated as one for summary judgment and disposed of under Rule 56 R.C.P., if there is no genuine issue of material fact in connection therewith." *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W.Va. 91, 736 S.E.2d 91 (2012), fn 4, (citing Syllabus Pt. 4, *United States Fidelity & Guaranty Co. v. Eades* 150 W.Va. 238, 144 S.E.2d 703 (1965)).

2. A motion for summary judgment should be granted only when it is clear that there is no genuine issue of material fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W.Va. 91 at 97-98.

3. On a hearing of motion of one party for summary judgment, after due notice, when it is found there is no genuine issue as to any material fact and that adverse party is entitled to judgment as a matter of law, failure of adverse party to file motion for summary judgment does not preclude entry of such judgment in his favor. *Employer's Liability Assurance Corp. v. Hartford Accident and Indemnity Co.*, 151 W.Va. 1062, 158 S.E.2d 212 (1967).

4. "As the purpose of the summary judgment proceeding is to expedite the disposition of the case, a summary judgment may be rendered against the party moving for judgment in favor

of the opposing party even though such party has made no motion for judgment.” *National Union Fire Ins. Co. of Pittsburgh v. Miller*, 228 W.Va. 739, 724 S.E.2d 343 (W.Va. 2012)(citing, Syl. Pt. 4, *Employer’s Liability Assurance Corp. v. Hartford Accident & Indemnity Co.*, 151 W.Va. 1062, 158 S.E.2d 212 (1967) and Syl. Pt. 2, *Arnold v. Palmer*, 224 W.Va. 495, 686 S.E.2d 725 (2009)).

5. Great Lakes, Capouillez, GAL, Chesapeake, Murphy and Red Sky filed various Motions to Dismiss, or in the alternative, Compel Arbitration herein with respect to Plaintiff’s claims on the various oil and gas leases in question.

6. Thereafter, on June 7, 2012, the parties appeared before the Court and argued the aforesaid motions after which the Court entered an Agreed Order allowing the parties time to engage in discovery regarding the factual issues related to arbitration with a deadline of November 7, 2012, which was thereafter extended to February 7, 2013.

7. The Court has considered facts outside the pleadings and therefore the Motions to Dismiss are converted to Motions for Summary Judgment and it is the Court’s duty to determine whether or not there exist any genuine issues of material facts.

8. The Court may grant summary judgment to Plaintiff, the adverse party to said motions for summary judgment, where there exists no genuine of material fact on an issue in his favor despite the fact that he has not filed any motion for summary judgment.

9. “The purpose of the Federal Arbitration Act, 9 U.S.C. §2, is for courts to treat arbitration agreements like any other contract but does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that private agreements to arbitrate are enforced according to their terms.” *State ex rel Ocwen Loan Servicing, LLC v. Webster*, 232 W.Va. 341, 752 S.E.2d 372 (2013)(citing Syl. Pt. 7, *Brown v.*

Genesis Healthcare Corp., 228 W.Va. 646, 724 S.E.2d 250 (2011), overruled on other grounds by *Marmet Health Care Center, Inc. v. Brown*, ___ U.S. ___, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012)(*per curiam*)).

10. “Under the Federal Arbitration Act, 9 U.S.C. §2, a written provision to settle by arbitration a controversy arising out of contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.” *State ex rel Ocwen Loan Servicing, LLC v. Webster*, 232 W.Va. 341, 752 S.E.2d 372 (2013)(citing Syl. Pt. 7, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011), overruled on other grounds by *Marmet Health Care Center, Inc. v. Brown*, ___ U.S. ___, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012)(*per curiam*)).

11. Under the Federal Arbitration Act and the doctrine of severability, only if a party to a contract explicitly challenges the enforceability of an arbitration clause within the contract, as opposed to generally challenging the contract as a whole, is a trial court permitted to consider the challenge to the arbitration clause; however, the trial court may rely on general principles of state contract law in determining the enforceability of the arbitration clause, and, if necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract or consider any extrinsic evidence detailing the formation and use of the contract. *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W.Va. 91 at 99, 736 S.E.2d at 99. Plaintiff has challenged the various arbitration provisions.

12. “When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006), the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the

parties; and (2) whether the claims averred by Plaintiff fall within the substantive scope of that arbitration agreement.” *Kirby v. Lion Enterprises, Inc.*, 233 W.Va. 159, 756 S.E.2d 493 (2014) (citing Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010)).

13. The arbitration clauses contained in the leases in question must be analyzed first according to basic contract law in order for the court to determine whether, in fact, a valid contract exists at the outset. If no contract exists, then the entire agreement will be voided as a matter of law, including its arbitration provision.

14. It is the province of the Court and not of the jury to interpret a written contract because the determination of what constitutes a contract is a question of law. *In re Joseph G.*, 214 W.Va. 365, 589 S.E.2d 507 (2003).

15. One who enters into a contract or performs some act while laboring under a mistake of material fact is entitled to have the transaction or fact set aside in a court of equity. *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996) (citing *Webb v. Webb*, Syl. Pt. 1, in part, 171 W.Va. 614, 301 S.E.2d 570 (1983)).

16. “A meeting of the minds of the parties is the *sine qua non* of all contracts.” Syl. Pt. 2, *Triad Energy Corp. v. Renner, et al.*, 600 S.E. 2d 285 (W.Va. 2004). Without a meeting of the minds as to a material and crucial term such as the date of the contract, there can be no contract.

17. In *Kirby*, supra, the court recognized that “the elements of a contract are an offer and an acceptance supported by consideration.” *Dan Ryan Builders, Inc. v. Nelson*, 230 W.Va. 281 at 287, 737 S.E.2d 550, at 556 (2012)(citing *First Nat’l Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W.Va. 636, 153 S.E.2d 172 (1967); see *New v. Gamestop, Inc.*, ___ W.Va. ___, 752 S.E.2d 62, 71 (2013)(“West Virginia contract law requires mutual assent to form a valid contract . . . ‘In

order for this mutuality to exist, it is necessary that there be a proposal or offer on the part of one party and an acceptance of the part of the other. Both the offer and acceptance may be by word, act or conduct that evince the intention of the parties to contract. That their minds have met may be shown by direct evidence of an actual agreement . . .”)(citations and footnotes omitted). *Kirby*, supra, at page 10.

18. The question of whether a party was fraudulently induced into a contract may go to the formation of the contract. A party that is misled as to the essential terms of a contract does not technically agree to the contract, as no assent to its terms has been formulated due to the misrepresentation. In this situation, it is irrelevant whether the misrepresentation was made by the other party to the contract or a third person. Restatement (Second) Contracts, ch. 7, §§163 (1981).

19. A court can assume that a party to a contract has read and assented to its terms, absent fraud, misrepresentation, duress, or the like, the court can assume that the parties intended to enforce the contract as drafted. *New v. GameStop, Inc.*, 232 W.Va. 564, 753 S.E.2d 62 (2013) (citing *Adkins v. Labor Ready, Inc.*, 185 F.Supp.2d 628, 638 (S.D.W.Va. 2001)).

20. It is well established under contract law in West Virginia that no legal contract exists if the minds of the parties are not in agreement with the essential elements or contract “fundamentals . . . [which include] competent parties, legal subject matter, valuable consideration and mutual assent. *State ex rel. Saylor v. Wilkes*, 216 W.Va. 766, 613 S.E.2d 914 (2005) (citing Syl. Pt. 5, in part, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253 (1926)); *Dan Ryan Builders, Inc. v. Nelson*, 230 W.Va. 281, 737 S.E.2d 550 (2012) (citing Syl. Pt. 5, *Virginia Export Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253 (1926)).

21. The Court concludes that the Great Lakes lease was the controlling contract between Plaintiff and his siblings, as lessors, and Great Lakes, as lessee.

22. It is clear that it was the intention of Plaintiff and his siblings that the Great Lakes lease was to have identical terms for all of the lessors, including the date of execution.

23. Defendants have offered no evidence to suggest that the Great Lakes lease was not to include all the owners of the property in question, that being Plaintiff and his siblings.

24. It was Plaintiff's intention of being included on the same lease as his siblings, consistent with the Canton lease.

25. Great Lakes, Capouillez and GAL, knew or should have known that Plaintiff and his siblings desired to be included on one lease.

26. Plaintiff understood that he would receive the same rights and obligations under the Great Lakes lease as would his siblings. This is evidenced by the fact that the Canton lease was executed by mail by Plaintiff and its terms were identical to his siblings.

27. Great Lakes had the same understanding as is evidenced the fact that it recorded the Memorandum of Lease before Plaintiff executed the July 2006 lease.

28. It is clear that the July 2006 lease executed by Plaintiff was procured due to a mistake on the part of Plaintiff and Great Lakes, who neglected to timely forward the lease to Plaintiff for his signature.

29. It is clear that the delay was a mistake on the part of Great Lakes and the July 2006 lease is void as a matter of law for having been mistakenly procured and the Great Lakes lease is the controlling lease for Plaintiff and his siblings.

30. Further, there was no meeting of the minds between Plaintiff and Great Lakes as to the terms of the July 2006 lease, as is evidenced by the fact that the lease was sent undated and

) there were no negotiations between Plaintiff and Great Lakes as to the terms of the July 2006 lease. Clearly, this lease lacked mutual assent to material terms, i.e., the parties thereto and the effective date.

31. Due to the fact that the July 19, 2006 lease is void as a matter of law, the arbitration clause therein is, likewise, void and unenforceable.

32. Therefore, the Court grants summary judgment for Plaintiff in finding the July 19, 2006 lease void, and as a result, the arbitration clause therein is unenforceable.

33. The Great Lakes lease assigned to Chesapeake expired on December 21, 2010 and is of no further force or effect.

34. Chesapeake knew or should have known, that Plaintiff was listed as a party on the Great Lakes lease and the Memorandum of Lease recorded June 2, 2006.

35. Chesapeake entered into a valid and enforceable lease with Plaintiff and his siblings on January 5, 2011.

36. The Chesapeake lease is the controlling contract by and between Plaintiff and his siblings, as lessors, and Chesapeake, as lessee.

37. It is clear that it was the intention of all of the parties to the Chesapeake lease that it was to be a joint lease with Plaintiff and his siblings for said tract in question, and that there existed a meeting of the minds in this regard.

38. The February 15, 2011 top lease was procured due to a mistake in fact and misrepresentation on the part of Chesapeake, Red Sky and Murphy and is therefore, void and unenforceable as a matter of law.

39. Chesapeake, Red Sky and Murphy knew or should have known that the Great Lakes lease was the controlling lease between Plaintiff and his siblings as lessors and Great Lakes as

lessee and that said lease expired on December 21, 2010, due, in part, to the fact that there was a recorded Memorandum of Lease showing that Plaintiff was a party to the Great Lakes lease.

40. There is no evidence that the Memorandum of Lease was not valid or not properly recorded.

41. Chesapeake, Red Sky and Murphy misrepresented certain facts to Plaintiff and his siblings as an inducement for Plaintiff to execute the February 15, 2011 top lease. This misrepresentation is evidenced by the fact that Murphy and Red Sky advised Plaintiff and his siblings that it was necessary for an "amended" lease to be executed in order that each of Plaintiff's siblings receive the bonus payment of \$179,710.00 and their future royalty payments.

42. The Court concludes that Plaintiff executed the top lease under significant duress.

43. As a result, the top lease is void as a matter of law and the arbitration clause contained therein is, likewise, void and unenforceable.

44. Therefore, the court grants summary judgment for Plaintiff in finding the top lease void and the arbitration clause therein unenforceable.

45. The Chesapeake lease is the valid, enforceable and controlling lease with respect to the rights and obligations between Plaintiff and his siblings, as lessors, and Chesapeake, as lessee.

46. Having determined that the Chesapeake lease is controlling, the Court must determine whether, in fact, the arbitration clause contained therein is enforceable.

47. Where there is an arbitration agreement or provision, and a party moves to compel that a dispute be sent to arbitration, the trial court is limited to two tasks: (1) determining if an enforceable arbitration agreement exists between the parties; and (2) determining if the dispute falls within the scope of the arbitration agreement. See, *Rent-A-Center v. Jackson*, 561 U.S.

___, 130 S. Ct. 2772 (2010); Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010).

48. Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court. *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W.Va. 91, 736 S.E.2d 91 (2012)(citing Syl. Pt. 1, *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986)).

49. If a court, as a matter of law, finds a contract or any clause of a contract to be unconscionable, the court may refuse to enforce the contract . . .” *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W.Va. 91, 736 S.E.2d 91 (2012)(citing *Brown v. ex rel Genesis Healthcare Corp.*, 229 W.Va. 646, 724 S.E.2d 250 (2011)(overruled in part on other grounds sub nom. *Marmet Health Care Ctr. Inc. v. Brown*, ___ U.S. ___, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012))). If there is no valid contract there can be no valid arbitration clause in that contract.

50. The doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case.” *Kirby v. Lion Enterprises, Inc.*, 233 W.Va. 159, 756 S.E.2d 493 (2014)(citing Syl. Pt. 12, *Brown ex rel Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011), overruled in part on other grounds sub nom. *Marmet Health Care Ctr. Inc. v. Brown*, ___ U.S. ___, 132 S.Ct.1201, 182 L.Ed.2d 42 (2012)).

51. The standard for determining unconscionability is a discretion standard. Syl. Pt. 9, *Dan Ryan Builders v. Nelson*, 230 W.Va. 281, 737 S.E.2d 550 (2012).

52. An analysis of whether the contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole. *Kirby v. Lion Enterprises, Inc.*, 233 W.Va. 159, 756 S.E.2d 493 (2014)(citing Syl. Pt. 3, *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986); Syl. Pt. 13, *Brown v. ex rel Genesis Healthcare Corp.*, 229 W.Va. 646, 724 S.E.2d 250 (2011), overruled in part on other grounds sub nom. *Marmet Health Care Ctr. Inc. v. Brown*, ___ U.S. ___, 132 S.Ct.1201, 182 L.Ed.2d 42 (2012)).

53. “A contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a ‘sliding scale’ in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.” *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W.Va. 91, 736 S.E.2d 91 (2012)(citing, Syl. Pt. 19, *Brown v. ex rel Genesis Healthcare Corp.*, 229 W.Va. 646, 724 S.E.2d 250 (2011)(overruled in part on other grounds sub nom. *Marmet Health Care Ctr. Inc. v. Brown*, ___ U.S. ___, 132 S.Ct.1201, 182 L.Ed.2d 42 (2012))).

54. “Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds, considering all the circumstances surrounding the transaction. The inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230

W.Va. 91, 736 S.E.2d 91 (2012)(citing, Syl. Pt. 19, *Brown v. ex rel Genesis Healthcare Corp.*, 229 W.Va. 646, 724 S.E.2d 250 (2011)(overruled in part on other grounds sub nom. *Marmet Health Care Ctr. Inc. v. Brown*, ___ U.S. ___, 132 S.Ct.1201, 182 L.Ed.2d 42 (2012))).

55. “Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and the public policy concerns.” *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 230 W.Va. 91, 736 S.E.2d 91 (2012)(citing, Syl. Pt. 19, *Brown v. ex rel Genesis Healthcare Corp.*, 229 W.Va. 646, 724 S.E.2d 250 (2011)(overruled in part on other grounds sub nom. *Marmet Health Care Ctr. Inc. v. Brown*, ___ U.S. ___, 132 S.Ct.1201, 182 L.Ed.2d 42 (2012))).

56. The Court finds and concludes that the arbitration clause contained in the Chesapeake lease is neither procedurally nor substantively unconscionable and is, therefore, valid and enforceable.

57. Further, the Court concludes that the arbitration provision in the Chesapeake lease provides that all fees and costs associated with the arbitration shall be borne equally, on a pro rata basis, by the parties, there is no restriction on remedies, there is no unfairness in the contract itself, the contract is not one-sided, will not have any overly harsh effect on Plaintiff, and the terms of the contract are not unreasonably unfair to Plaintiff or Defendants.

58. Therefore, after the entry of this Order, if any issues remain with regard to the Chesapeake lease, the Court grants Defendants’ various Motions to Compel Arbitration of the remaining issues and accordingly orders this matter stayed pending arbitration.

59. All parties herein, including non-signatory Defendants, shall participate in the arbitration proceeding based upon common law principles of contract and agency. See, Syl. Pt. 3, *State ex rel United Asphalt Suppliers, Inc. v. Sanders*, 204 W.Va. 23, 511 S.E.2d 134 (1998); *State ex rel Richmond Homes v. Saunders*, 228 W.Va. 125, 717 S.E.2d 909 (2011). See also, *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W.Va. 128, 690 S.E. 2d 322 (2009), finding the enforcement of a forum selection clause foreseeable to non-signatories. Given the relationship of the parties herein and the intertwined nature of the claims, all remaining claims involving all parties herein shall be arbitrated.

60. Based upon the Court's findings and conclusions in this matter, Chesapeake shall immediately pay all bonus payments and royalty payments due to Plaintiff under the terms of the Chesapeake lease, together with interest at the legal rate from the date said payments were due until paid.

61. The Clerk is directed to send certified copies of this Order to all counsel of record.

It is so **ORDERED**.

To which rulings the respective objections of the parties are hereby noted.

ENTER this 6th day of August, 2014.



Judge David J. Sims

A copy, Teste:



Circuit Clerk