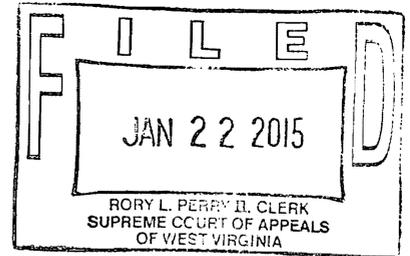


No. 14-0923



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

**GREAT LAKES ENERGY PARTNERS, LLC
N/K/A RANGE RESOURCES—APPALACHIA, LLC**

Petitioner,

v.

CECIL L. HICKMAN

Respondent.

From the Circuit Court of Ohio County, West Virginia
Civil Action No. 12-C-11

RESPONDENT'S BRIEF

Gregory A. Gellner, Esquire (WV Bar #4641)
GELLNER LAW OFFICES
1440 National Road
Wheeling, WV 26003
T: (304) 242-2900
F: (304) 242-0200
ggellner@gellnerlaw.com

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STATEMENT OF THE CASE

I. STATEMENT OF FACTS

In 2001, the Respondent and his siblings, joint tenants with $\frac{1}{4}$ equal shares in a 143.77 acre tract in Ohio County, West Virginia, executed a lease of this property with Canton Oil and Gas Company (hereinafter referred to as "Canton lease") for oil and gas exploration for a term of 5 years. *(See Order of Court, Findings of Fact, Paragraph 2, Appendix, page 1 and Canton Lease, Appendix, pages 137-152).*

Respondent and his siblings were assisted through a consulting agreement with the defendants below William Capouillez and Geological Assessment & Leasing (hereinafter referred to as "GAL") regarding this lease that was executed in person by Respondent's siblings but not executed in person by Respondent who received the lease by mail, executed it and returned it to Canton. *(Order of Court, Findings of Fact, Paragraphs 3-4, Appendix, page 2, deposition transcript of Cecil Hickman, pages 17-25, Appendix, pages 490-492).* Despite not signing the Canton lease at the same time as his siblings, Respondent was a party to this same lease under the identical terms and dates as his siblings and testified that all four signed the same document. *(See Order of Court, Findings of Fact, Paragraph 4, Appendix, page 2 and deposition transcript of Cecil Hickman, page 22, Appendix, page 492, and page 164, Appendix, page 527, Canton Lease, Appendix, pages 137-152).*

In December 2005, prior to the expiration of the Canton lease, Petitioner, acting through GAL, made an offer to Respondent and his siblings for a joint lease (hereinafter referred to as "Great Lakes lease"). *(Order of Court, Findings of Fact,*

Paragraph 5-6, Appendix, page 2 and Deposition Transcript of William A. Capouillez, page 15-16, Appendix, page 419). Respondent and his siblings intended to, and were, leasing the property together and reasonably expected that their lease terms and time frames would be identical. *(Order of Court, Findings of Fact, Paragraph 7, Appendix, page 2, deposition transcript of Cecil Hickman, page 62, Appendix, page 502 and affidavits of John Mark Hickman, Carol Sue Criswell and Lawrence Grant Hickman, Appendix, pages 536-544).* Respondent thought that the 2005 lease was merely a renewal of the 2001 lease. *(Deposition transcript of Cecil Hickman, page 99, Appendix, page 511).*

On December 21, 2005, Petitioner offered the Great Lakes lease to Respondent's siblings during a meeting at the Bethany (West Virginia) Fire Department at which time said siblings executed the lease. *(Order of Court, Findings of Fact, Paragraph 9, Appendix, page 2 and Deposition Transcript of William Capouillez, page 22-23, Appendix, page 421).*¹ Respondent did not attend this meeting as he was residing in Columbus, Ohio, at the time but knew generally the terms and conditions of the Great Lakes lease and intended to sign the lease jointly with his siblings as he had on the Canton lease. *(Order of Court, Findings of Fact, Paragraph 10, Appendix, page 2, and deposition transcript of Cecil Hickman, pages 32-35, Appendix, pages 494-495, page 62, Appendix, page 502).*

¹ The Petitioner as well as GAL and Chesapeake, defendants below, all failed and/or refused to provide a copy of the December 21, 2005, lease despite Respondent's formal discovery requests to procure the same. Interestingly, the Petitioner requested that the lower court compel arbitration on a lease that they have never produced to the parties or the court.

GAL through William Capouillez admitted that Great Lakes had the authority to permit Respondent and his siblings to be included on one lease. (*Order of Court, Findings of Fact, Paragraph 12, Appendix, page 3, and deposition transcript of William Capouillez, pages 62-63, Appendix, page 431*). Capouillez testified that if landowners wanted to have the terms to a lease coordinated, they would all sign the same lease dated the same versus signing individual leases. (*Deposition Transcript of William Capouillez, page 62, Appendix, page 431*).

At the time of the negotiation process and thereafter, Petitioner knew through discussions with GAL and Respondent's siblings that there was to be a joint lease of the entire parcel with the same lease terms for each of the siblings. (*Order of Court, Findings of Fact, Paragraph 11, Appendix, page 3, and affidavits of John Mark Hickman, Carol Sue Criswell and Lawrence Grant Hickman, Appendix pages 536-544*).

It was the understanding of the Respondent and his siblings that Great Lakes would immediately forward to Respondent the Great Lakes lease for him to sign and return and that each of the Hickman siblings, including the Respondent, would be on the same lease with the same terms. (*Order of Court, Findings of Fact, Paragraph 14, Appendix, page 3, deposition transcript of Cecil Hickman, page 32, Appendix, page 494 and affidavits of John Mark Hickman, Carol Sue Criswell and Lawrence Grant Hickman, Appendix pages 536-544*).

After having not received payments in line with those received by his siblings, the Respondent contacted GAL, specifically Capouillez, in January 2006, to tell him that he had not received the lease or bonus payment that his siblings had already been provided, but did not speak to Capouillez nor did Capouillez return his

call. (*Order of Court, Findings of Fact, Paragraph 15, Appendix, page 3, and deposition transcript of Cecil Hickman, page 47, Appendix, page 499*). The Respondent made inquiries regarding the lease but it was not until July 2006 that he received a lease from Petitioner to sign. (*Order of Court, Findings of Fact, Paragraph 18, Appendix, page 3 and deposition transcript of Cecil Hickman, pages 42-43, Appendix, page 497*).

Prior to that time, on June 2, 2006, Petitioner recorded a Memorandum of Lease in the Office of the Clerk of the County Commission for Ohio County in Deed book 768, at page 790, giving notice that the Respondent and his siblings were bound by the terms of a joint oil and gas lease executed in favor of the defendant, Great Lakes, dated December 21, 2005, and extending for a period of five (5) years. (*Memorandum of Lease, Appendix, pages 33-35 and Order of Court, Findings of Fact, Paragraphs 16-17, Appendix, page 3*).

Thereafter, in July 2006, Petitioner sent to the Respondent a separate, undated lease, after Respondent made several inquiries as to why he had not received his bonus payment. (*Order of Court, Findings of Fact, Paragraph 18, Appendix page 3 and deposition transcript of Cecil Hickman, pages 42-45, Appendix, page 497, pages 46-47, Appendix page 499*). After receiving the separate, undated lease, Respondent executed the lease, did not date it, and returned it to Petitioner. (*Order of Court, Findings of Fact, Paragraph 21, Appendix, page 4 and deposition transcript of Cecil Hickman, page 43-44 appendix page 497*). Upon receipt of the lease executed by the Respondent, Petitioner, through its representative, unbeknownst to Respondent, altered the lease by affixing the date of July 19, 2006. Petitioner presented no evidence contrary to this fact. (*Order of Court, Findings of Fact,*

Paragraph 22, Appendix page 4, Great Lakes lease executed by Cecil Hickman, Appendix, pages 65-76).

At no time was the lease of July 19, 2006, subject to negotiation or bargaining of any kind between the Petitioner and Respondent after December 21, 2005.

(Order of Court, Findings of Fact, Paragraph 24, Appendix, page 4 and deposition transcript of Cecil Hickman, pages 41-42, Appendix, pages 496-497).

Respondent believed that by executing the lease 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. *(Order of Court, Findings of Fact, Paragraph 23, Appendix, page 4 and Complaint, Appendix, pages 19-32).* Further, the Hickman siblings advised the Respondent that Petitioner had agreed to a joint lease and had agreed to forward him the lease following the meeting of December 21, 2005. *(Affidavits of John Mark Hickman, Carol Sue Criswell and Lawrence Grant Hickman, Appendix, pages 536-544).* The Respondent's understanding comports with the manner in which the prior joint lease was executed in 2001. *(Canton Lease, Appendix, pages 137-152).*

Respondent's understanding is also consistent with Petitioner's actions in recording the Memorandum of Lease in Ohio County giving notice that Respondent was under the December 21, 2005 lease along with his siblings. The Petitioner presented no contrary evidence.

Thereafter, Petitioner assigned both the December 21, 2005, and July 19, 2006, leases to Chesapeake Appalachia, L.L.C.² (*Assignment, Appendix, pages 77-90*). The assignment was made on October 19, 2010, but was backdated to July 1, 2010. (*Order of Court, Findings of Fact, paragraph 26, Appendix, page 4 and Assignment, Appendix, pages 77-90*). According to the assignment, Petitioner as assignor agreed to the following:

3. Assignor hereby retains all revenues, losses, claims, liabilities, demands, costs and expenses in connection with the Properties with respect to any period or portion thereof prior to the Effective Time and further retains the Retained Liabilities under this Agreement.

In its Memorandum in Support of its Motion to Compel Arbitration, the Petitioner claims that while it assigned its “right, title and interest in and to all oil, gas and mineral leases, operating rights, working interests and net revenue interests” in the assignment of leases to Chesapeake, it expressly retained “all revenues, losses, claims, liabilities, demands, costs and expenses in connection with the properties with respect to any period or portion thereof prior to [July 1, 2010].” (*Memorandum in Support of Renewed Motion to Dismiss, or in the Alternative, Motion to Compel Arbitration of Defendant Great Lakes Energy, LLC, Now Known as Range Resources—Appalachia, LLC, page 14, Appendix, page 257*). Petitioner averred that it “has a direct interest in the arbitration provision to the extent a claim made relating

² Issues related to this assignment and subsequent Chesapeake leases are the subject of another appeal to this court, specifically *Chesapeake Appalachia, L.L.C., et al v. Hickman*, Appeal No. 14-0921.

to any event in connection with the 2006 Great Lakes Lease occurring prior to July 1, 2010." [Emphasis added]. *Id.*

The Great Lakes lease expired on December 21, 2010, without oil or gas production taking place on the tract of land. (*Order of Court, Findings of Fact, paragraph 27, Appendix, page 4*).

The circumstances surrounding and issues related to these Great Lakes' leases culminated in the filing of Respondent's complaint. (*Complaint, Appendix, pages 19-32*). Specifically, with respect to the Petitioner, the Respondent has alleged in his complaint that said Petitioner: (1) fraudulently altered the lease by adding a date that was not agreed to by Respondent; (2) sold and/or assigned the lease to Chesapeake when it did not have the right to do so; (3) is estopped from asserting any effective date on the lease other than the December 21, 2005, date as is evidenced by its own filing of a Memorandum of Lease with that same date; (4) economically harmed the Respondent; (5) negatively affected the title to Respondent's property; (6) slandered the title of the Respondent; and (7) sought a declaration that the memorandum of lease filed in Ohio County was binding and that the January 2011 lease was valid or alternatively, if not valid then there was no current lease on the property. *Id.*

In January 2011, the Respondent and his siblings executed a lease with Chesapeake Appalachia, L.L.C. but Respondent soon thereafter was forced, under duress, to execute a different lease dated February 2011 (a top lease) based upon Chesapeake's assertion that the July 2006 remained in effect. (*Complaint, Paragraph 32 and Exhibit 3, Appendix, pages 24, 38-43*). Respondent's siblings were likewise

forced to sign an addendum removing Respondent from the January 5, 2011 lease. *(Affidavits of John Mark Hickman, Carol Sue Criswell and Lawrence Grant Hickman, Appendix, pages 536-544).*

The manner in which the Petitioner handled the original lease culminated in circumstances that greatly harmed the Respondent in his $\frac{1}{4}$ ownership in the tract in question specifically relative to his mineral rights. For a more complete rendition of the timeline of events following the assignment of the leases to Chesapeake Appalachia, L.L.C., the Respondent refers this Court to the Order from which Petitioner's appeal is being taken. *(See Order, Findings of Fact, Paragraphs 25-40, Appendix, pages 4-6).*

Both Great Lakes' leases contained purported arbitration provisions as did the subsequent Chesapeake leases. All of the defendants below, including the Petitioner, filed motions to compel arbitration along with motions to dismiss (converted to motions for summary judgment) seeking to have the lower court order the case to arbitration.

II. PROCEDURAL HISTORY

The Respondent takes issue with the Petitioner's assertion that none of his claims against Petitioner relate to the January 2011 or February 2011 lease. In actuality, the negligent and/or fraudulent manner the Petitioner handled the December 21, 2005 lease and subsequent July 2006 lease, deemed to be invalid by the lower court, caused and/or contributed to the fiasco brought about by

Chesapeake's insistence that the Respondent execute the February 2011 lease and abandon the January 2011 one.

The Respondent also takes issue with the Petitioner's allegation in its Procedural History that it had "no involvement in" the procurement of the January 2011 Chesapeake lease. In fact, but for the actions of the Petitioner, Respondent would have remained a party to the January 2011 lease and the ensuing litigation and damages suffered by the Respondent would not have occurred.

Petitioner states that the lower court's order limited any future arbitration proceedings to claims regarding the January 2011 lease to which the Respondent disagrees. Petitioner itself cites to the Court's Conclusions of Law, paragraph 59, Appendix, page 18, wherein the court directed that "... all remaining claims involving all parties herein shall be arbitrated."

As to the remainder of the facts contained within Petitioner's section of the brief entitled "The Circuit Court's Final Order", the Respondent takes no issue.

SUMMARY OF ARGUMENT

Simply stated, it is incredible that the Petitioner now seeks to be released from participation in court-ordered arbitration. All prior pleadings filed with the lower court by Petitioner, including Proposed Findings of Fact and Conclusions of law submitted after the motions for arbitration were heard, zealously advocated and sought adjudication of Respondent's claims by arbitration. Now, based upon the lower court's ruling against the Petitioner on preliminary matters, Petitioner has engaged in the wholesale abandonment of its years' long position in seeking

arbitration. They now argue that the claims against them are somehow dismissed in total despite the complete lack of basis for such an assertion. The trial court ruled otherwise.

In addition to the position taken by the Petitioner, the facts also support the circuit court's ruling on this issue. There were purported arbitration clauses contained within both the December 21, 2005, and July 19, 2006, Great Lakes leases. Although not provided in discovery, the lease executed by the Respondent in July 2006 should have mirrored the one signed by his siblings in December 2005. The court held that the December lease was valid, though expired. The trial court did not, however, state that the arbitration clause contained therein was unconscionable. The court then determined that the entire lease of July 2006 lacked mutual assent, therefore, there could be no valid arbitration clause contained therein.

Further, it is undisputed that Petitioner filed a Memorandum of Lease in June 2006, giving notice to the public and subsequent assignee by defendant-below, Chesapeake, stating that the Respondent was bound by the terms of the December 2005 lease. This led to Chesapeake's offer of the January 2011 lease to the Respondent. And, as a corollary to that, the mishandling of the July 2006 lease sent to Respondent led to the unfortunate events in Chesapeake's wrongful insistence that Respondent surrender his rights under the January 2011 lease in favor of a February 2011 top lease, subsequently found to be void by the lower court.

Interestingly, Petitioner cited to its Assignment to Chesapeake and stated that it has a "direct interest in the arbitration provision to the extent a claim made

relating to any event in connection with the 2006 Great Lakes Lease occurring prior to July 1, 2010,” meaning that any claim made by the Respondent as to the 2006 lease was its responsibility. Presumably, based upon the pleadings filed herein, Petitioner always wanted to have these claims decided through arbitration. They now switch positions in hopes of avoiding their liability solely because arbitration was ordered under a different lease than they promoted.

Petitioner attempts to invoke its right not to arbitrate based upon its status as a non-signatory to the January 2011 Chesapeake lease, but this is to no avail based upon the facts on the record applied to relevant case law. The principles of contract law and agency support Petitioner’s participation in the arbitration, if one is deemed appropriate.

Specifically, the theory of assumption states that a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate. Case law supports this theory when there is a clear intention to arbitrate or an agreement to arbitrate, both of which the Petitioner has displayed. Additionally, the theory of estoppel applies to this matter. Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders the assertion of those rights contrary to equity. Petitioner argues since it was not a signatory to the Chesapeake lease, it cannot be compelled to arbitrate Respondent’s claims.³

In this case, it is Respondent’s position that alternative estoppel applies,

³ It appears that Petitioner would have this court believe that there exists no other claims against it, but the lower court did not rule on the merits and Respondent’s claims remain viable and subject to adjudication.

requiring arbitration between a signatory and non-signatory when there exists a close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract and the claims were intimately founded in and intertwined with the underlying contract obligations.

The Petitioner through its actions in mishandling the July 2006 lease, then filing the June Memorandum of Lease and assigning its leases to Chesapeake in July 2010, operated to make it intertwined with the claims involving the January 2011 lease, upon which the court refers the case to arbitration.

In the alternative, should this Court find that Petitioner need not submit to arbitration, the claims of Respondent will remain with the circuit court who has not dismissed any of such claims on the merits.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is warranted pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure. The Respondent, Cecil Hickman, respectfully submits that the decisional process would be significantly aided by oral argument in that this appeal involves significant and complex issues affecting the manner in which oil and gas companies deal with landowners in West Virginia at a time when the industry is experiencing tremendous growth in our state.

Further, under Rule 18(c), the Respondent has filed a separate motion asking that this argument be consolidated with the appeals of Great Lakes Energy Partners, LLC, N/K/A Range Resources-Appalchia, LLC v. Hickman, Appeal No. 14-0923 and

Chesapeake Appalachia, LLC, et al v. Hickman, Appeal No. 14-0921, due to the fact that these cases involve the same or related assignments of error and/or questions of law.

Finally, the Respondent requests that oral argument be set under Rule 19 of the West Virginia Rules of Appellate Procedure.

ARGUMENT

1. Standard and Scope of Review

The lower court's Order reflects rulings on motions to dismiss that were converted to motions for summary judgment inasmuch as "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 pleadings 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)(citing *Syl. Pt. 4, United States Fidelity & Guaranty Co. v. Eades*, 150 W.Va. 238, 144 S.E.2d 703 (1965)).

On a hearing of a motion of one party for summary judgment, after due notice, when it is found that 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 a motion for summary judgment does not preclude entry of 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).

This appeal deals with the lower court's determination as to whether arbitration should be compelled. As stated in *Grayiel, supra*, "this Court will preclude enforcement of a circuit court's order compelling arbitration only after a *de novo* review of the circuit court's legal determinations leads to the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that a

matter be arbitrated or that the circuit court's order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate." *Grayiel*, Syl. Pt. 1 (citing Syl. Pt. 4, *McGraw v. American Tobacco Company*, 224 W.Va. 211, 681 S.E.2d 96 (2009)).

The circuit court's entry of summary judgment is reviewed *de novo*. Syl. Pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In doing so, "a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." *West Virginia Dept. of Health and Human Resources v. Payne*, 231 W.Va. 563, 746 S.E.2d 554 (2013)(citing Syllabus Pt. 3, *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997)). See also, Syllabus Pt. 3, *Keesecker v. Bird*, 200 W.Va. 667, 490 S.E.2d 754 (1997).

2. The Circuit Court Did Not Err In Ordering Petitioner to Participate In Any Future Arbitration Proceedings

A. There were Arbitration Clauses contained within the December 21, 2005, and July 2006 Leases and the Court, in its Order, Granted Petitioner's Motion to Compel Arbitration

It appears that the Petitioner is taking a position that is in stark contrast to its positions taken in the lower court. There, the Petitioner sought arbitration of the claims made by the Respondent against it that arose out of the mishandling of the execution of the December 21, 2005, joint lease. Specifically, the Petitioner, in its "Memorandum of Law in Support of Renewed Motion to Dismiss, or in the Alternative, to Compel Arbitration of Defendant Great Lakes Energy Partners, L.L.C.,

Now Known as Range Resources—Appalachia L.L.C.” moved to have the court refer the matter to arbitration under the July 2006 lease that contained an arbitration provision. (*Memorandum, supra, Appendix, pages 239-261*). Although the Petitioner has failed to provide the signed December 21, 2005, lease to Respondent, the record fails to reflect anything other than the form used for that lease was the same as was executed by the Respondent in July 2006. (*Order of Court, Findings of Fact, Paragraphs, 6, 8, Appendix, page 2, and deposition transcript of William Capouillez, page 16, Appendix, page 419*). It is undisputed that the arbitration clause was part of the form and not an item to be completed at a later date.

It is curious as to why the Petitioner now states that there was no arbitration provision between the parties. Although the Respondent did seek to have said motion to compel arbitration denied in the lower court, he, at no time, took a position that either lease lacked an arbitration clause altogether. The Petitioner is attempting to have this Court believe that it is against arbitration of Respondent’s claims when, throughout the litigation, it has vehemently sought the lower court’s referral to arbitration.⁴ Respondent believes that Petitioner would have this Court believe that the lower court made findings that effectively dismissed Respondent’s claims against Range. This did not occur.

In reality, the lower court’s order did not grant Petitioner’s Motion to Dismiss nor was summary judgment granted in favor of the Petitioner. However, the Court did grant the Petitioner’s Motion to Compel Arbitration. In fact, the court below

⁴ The Petitioner and the other defendants below filed motions to dismiss and motions to compel arbitration prior to filing any answer herein. There have been no answers filed on behalf of any of the defendants below, including Petitioner.

ruled that: (1) the July 2006 lease was invalid (to which the Petitioner obviously agrees inasmuch as it has not taken issue with that particular ruling); (2) the December 21, 2005, lease is the controlling lease between the parties, although currently expired (again an issue not contested by Petitioner); (3) any remaining issues related to the Chesapeake lease should be arbitrated and defendants' various motions to compel arbitration is granted; (4) given the relationship of the parties herein and the intertwined nature of the claims, all remaining claims involving all parties shall be arbitrated. *(Order, Conclusions of Law, paragraphs 58-59, Appendix, pages 1-18).*

Moreover, there is nothing in the order to indicate that the court below decided that only the claims against Chesapeake were still viable. Paragraph 58 states:

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.

(Order, Conclusions of Law, paragraph 58, Appendix, page 17).

This is not the exclusive ruling of the court regarding Respondent's claims as paragraph 59 goes further and states that:

59. All parties herein, including non-signatory Defendants shall participate in the arbitration proceeding based upon common law principles of contract and agency. [citations omitted]. . . Given the relationship of the parties herein and the intertwined nature of the claims, all remaining claims involving all parties herein shall be arbitrated. [Emphasis added].

(Order, Conclusions of Law, paragraph 59, Appendix, page 18).

The Petitioner's argument that no agreement exists between the parties fails as well as its argument that the Final Order resolved all issues in the case as to all of the oil and gas leases except the January 2011 lease. The Court did not order that only "future claims" concerning the January 2011 lease be arbitrated. Based upon the above, it is clear that the court determined at all the Motions to Compel arbitration should be granted and that any claims that remained after the order be arbitrated.

As to the claims against the Petitioner, the court invalidated the July 2006 lease, and left the December 21, 2005, lease as controlling between the parties. That lease expired by its own terms on December 21, 2010. The unfortunate circumstances giving rise to the July 2006 lease and the aftermath, particularly with regard to the Chesapeake lease problems, can be attributed to the actions of the Petitioner, negligent and otherwise. Therefore, those claims set forth in Respondent's complaint remain and have not been resolved. The court appropriately decided only the arbitration issues, and to do so had to decide which contracts were assented to and valid.

Significantly, the Petitioner took the position in the trial court that it "has a direct interest in the arbitration provision to the extent a claim made relating to any event in connection with the 2006 Great Lakes Lease occurring prior to July 1, 2010. (*Memorandum in Support of Renewed Motion to Dismiss, or in the Alternative, Motion to Compel Arbitration of Defendant Great Lakes Energy, LLC, Now Known as Range Resources—Appalachia, LLC, page 14, Appendix, page 257*). The lower court, in its order merely adopted the Petitioner's argument that any event in connection with

the 2006 Great Lakes lease occurring prior to July 1, 2010, should be arbitrated. The Respondent's claims rose to the level of "any event" pertaining to the July 2006 that the court found to be invalid due to the actions of the Petitioner. And, the allegations made by the Respondent against the Petitioner dealt with a time frame prior to July 1, 2010.

The Petitioner cites to State ex rel City Holding Co. v. Kaufman, 216 W.Va. 594, 609 S.E.2d 855 (2004) in support of its position that "a party must assent to arbitration before it can be forced into arbitration and denied access to the courts." Id., 216 at 594, 609 at 859. Obviously, the Petitioner assented to arbitration because it advocated for arbitration in this matter filing not one but two motions to compel arbitration before the lower court. More importantly, though, the Petitioner cited to the State ex rel City Holding Co. in the lower court to bolster its argument and argued that "in determining whether the language of an agreement to arbitrate covers a particular controversy [under the FAA], the federal policy favoring arbitration of disputes reasonably contemplated by the language and to resolve doubts in favor of arbitration." Id., at 598, 859.

Clearly, it was within the lower court's purview to give the Petitioner what it had repeatedly asked for – arbitration. To now argue against arbitration is in apposite to every position taken by the Petitioner up to this point. Because the court ordered arbitration under a different lease than the one promoted by Petitioner, they want to be dismissed from any further involvement. Such position is without merit and contrary to every position the Petitioner took at the trial court level.

B. The Court's Use of the Non-signatory Exception In Ordering Petitioner to Participate in Arbitration Was appropriate under the Circumstances and Did not constitute Error

The lower court did not err in referring Respondent's claims against the Petitioner to arbitration when the Petitioner not only assented to arbitration but moved the court for an order compelling arbitration. The circuit court was justified in its assertion that the non-signatory exception applied to all non-parties to the January 2011 Chesapeake lease based upon the facts and circumstances surrounding all of the transactions as well as the proceedings below taken in light of the applicable law.⁵

As set forth in more detail below, it is apparent that the court found that the actions of the Petitioner in its handling of the July 2006 lease, its filing of the Memorandum of Lease regarding the December 21, 2005, lease and its assigning of the leases to Chesapeake in addition to seeking arbitration in its own right justifies the referral of all of the Respondent's claims against Petitioner to arbitration even if the triggering clause was the January 2011 Chesapeake lease.

i. Common law principles of contract law and agency Support the application of the Non-Signatory Exception against Petitioner as well as GAL

The court correctly relied upon the cases of *State ex rel United Asphalt Suppliers, Inc. v. Sanders*, 204 W.Va. 23, 511 S.E.2d 134 (1998), *State ex rel Richmond*

⁵ Respondent challenged GAL and alleged that it was a non-signatory to any of the leases but never took the position that Petitioner qualified as a non-signatory.

Homes v. Saunders, 228 W.Va. 125, 717 S.E.2d 909 (2011), and Caperton v. A.T. Massey Coal Co., Inc., 225 W.Va. 128, 690 S.E.2d 322 (2009) to support its ruling that the Petitioner as a non-signatory to the January 2011 Chesapeake lease can be compelled to arbitrate the Respondent's claims made against it.

In State ex rel United Asphalt Suppliers, Inc. v. Sanders, 204 W.Va. 23, 511 S.E.2d 134 (1998), this court stated that "a court may not direct a nonsignatory to an agreement containing any arbitration clause to participate in an arbitration proceeding absent evidence that would justify consideration of whether the nonsignatory exception to the rule requiring express assent should be invoked." *Id.*, Syl. Pt. 3. In keeping with that ruling, in the instant case, there exists ample evidence to justify consideration of the exception requiring express assent in that the Petitioner, by its actions and motions in the lower court, desired arbitration, moved to compel arbitration and held the position that the allegations made by the Respondent should be determined by an arbitration proceeding.

The court in State ex rel Richmond Homes v. Saunders, 228 W.Va. 125, 717 S.E.2d 909 (2011) reiterated the ruling in the United Asphalt case and cited to the parameters set forth in Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773 (2nd Cir.1995) discussed in more detail below.

Further, it appears that the lower court relied upon the ruling in Caperton v. A.T. Massey Coal Co., Inc., 225 W.Va. 128, 690 S.E.2d 322 (2009), as persuasive authority, wherein this court, when dealing with whether non-signatories can be compelled to a forum-selection clause, held that "a range of transaction participants, signatories and non-signatories, may benefit from and be subject to a forum

selection clause. In order for a non-signatory to benefit from and be subject to a forum selection clause, the non-signatory must be closely related to the dispute such that it becomes foreseeable that the non-signatory may benefit from or be subject to the forum selection clause.” *Id.*, 225 W.Va. at 154, 690 S.E.2d at 348. Following the reasoning of the *Caperton* case, the Petitioner, from the time the Great Lakes’ leases were executed in 2005 and 2006 up through the filing of its motions in the lower court, foresaw that it would be litigating the issues raised by the Respondent in an arbitration proceeding.

The Respondent agrees with the Petitioner that the most instructive case on the issue is *Thomson-CSF, S.A. v. American Arbitration Ass’n*, 64 F.3d 773 (2nd Cir.1995). However, the Petitioner’s application of the *Thomson-CSF* case falls short in its analysis to the facts presented by its appeal.

In *Thomson-CSF*, the Second Circuit Court of Appeals recognized that while arbitration agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract “it does not follow, however, that under the [Federal Arbitration] Act an obligation to arbitrate only to one who has personally signed the written arbitration provision.” *Id.* at 776 (citing *Fisser v. International Bank*, 282 F.2d 231, 233 (2^d Cir.1960)).

The court went further and held that “a non-signatory party may be bound to an arbitration agreement if so dictated by the ‘ordinary principles of contract and agency.’” *Id.* (citing *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2^d Cir.1980)) and stated there are “a number of theories under which non-signatories may be bound to the arbitration agreements of others.” *Id.* Accordingly, the court

recognized five theories for binding non-signatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. *Id.*

As for these theories, the Respondent agrees that the principles of (1) incorporation by reference, (3) agency and (4) veil-piercing/alter ego do not apply to the instant case. But Respondent disagrees with the Petitioner on the remaining theories.

First, under an assumption theory, a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate. *Id.* at 777 (citing *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1005 (2d Cir.)(Flight attendants manifested a clear intention to arbitrate by sending a representative to act on their behalf in arbitration process), cert. denied, 502 U.S. 910, 112 S.Ct. 305, 116 L.Ed.2d 248 (1991) and *In Re Transrol Navegacao S.A.*, 732 F.Supp. 848 (S.D.N.Y.1991)(where the district court found that respondent had agreed to arbitrate - - despite never having signed the contract containing the arbitration clause - because it previously had agreed to arbitrate in France and only later refused to arbitrate in New York.)).

In this case, Petitioner has moved to compel arbitration on two occasions before the lower court. It is difficult to understand how Petitioner now seeks to become a stranger to the court-ordered arbitration. This is especially true when it stated in prior pleadings that it specifically reserved “claims and liabilities” such as “any event” dealing with the July 2006 unto itself in the assignment agreement. Based on the theory of assumption set forth in the *Thomson-CSF* case, upon which

the Petitioner has cited and relies, it is clear that its non-signatory status does not prevent arbitration.

Second, the theory of estoppel likewise provides a non-signatory exception in this case. Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders the assertion of those rights contrary to equity. International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 C.A.4 (W.Va. 2000). The Thomson-CSF case, upon which the Petitioner relies, explained that estoppel can be applied when one directly benefits from the agreement although not a signatory thereto. Thomson-CSF at 778. In addition, however, there also exists estoppel, called alternative estoppel, requiring arbitration between a signatory and non-signatory when there exists “a close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory’s obligations and duties in the contract . . . and [the fact that] the claims were ‘intimately founded in and intertwined with the underlying contract obligations.’” Id. (citing Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757-758 (11th Cir.1993), cert. denied, 513 U.S. 869, 115 S.Ct. 190, 130 L.Ed.2d 123 (1994)).

The Respondent’s claims against the Petitioner fall within the alternative estoppel theory in that there exists a close relationship between the entities involved, i.e. lessor/lessee, assignor/assignee, as well as the relationship of the alleged wrongs which is supported by the allegations in the Complaint.

Based upon the above and as set forth in more detail below in response to section B (ii) of the Petitioner’s Argument, it is easy to see how the intertwined

nature of the claims justifies the use of the estoppel principle in addition to the assumption theory as aforesaid.

ii. The “Relationship of the Parties” and the Intertwined Nature of the Claims” Support The Nonsignatory Exception’s Application Against the Petitioner

The court’s Order herein to which the Petitioner objects correctly applies the estoppel theory thus incorporating the non-signatory exception in favor of arbitration. As stated aforesaid, the circuit court relied upon Caperton v. A.T. Massey Coal Co., Inc., 225 W.Va. 128, 690 S.E.2d 322 (2009). That case explained how estoppel may be used to bind nonsignatories to a forum selection clause and cited to the case of Compana LLC v. Mondial Assistance SAS, No. 3:07-CV-1293-D, 2008 WL 190522 at 4 (N.D.Tex. Jan. 23, 2008) where the Fifth Circuit recognized two theories of estoppel that can bind a nonparty of a contract to the contract’s arbitration or forum selection clause, the first being an ‘intertwined claims theory’ of equitable estoppel and the second being a ‘direct benefits’ theory.

In this case, the lower court ruled that “given the relationship of the parties herein and the intertwined nature of the claims, all remaining claims involving all parties herein shall be arbitrated.” (*Order, Conclusions of Law, paragraph 59, Appendix, page 18*). Therefore, the court concluded that it was the first prong of the Compana exception that applies to this matter.

It is undisputed that Great Lakes entered into lease agreements in December 2005 and July 2006, regarding the property owned by the Respondent. Each of those leases contained arbitration clauses benefitting the Petitioner. While the July 2006 lease was deemed to be invalid because it clearly lacked mutual assent, the

December 2005 lease was valid, although undisputedly expired. The Petitioner filed a Memorandum of Lease regarding the December 2005 lease, listing Respondent as a party bound by the terms of that lease. Chesapeake, and the public at large, was entitled to rely upon that Memorandum of Lease as evidence that the Respondent's interest was encumbered by the Petitioner insofar as the mineral rights were concerned. This led directly to the January 2011 Chesapeake lease executed by the Respondent and then wrongfully nullified by the February 2011 top lease, later correctly deemed to be invalid by the lower court. The actions of the Petitioner directly led to the execution of the January 2011 lease, upon which the court refers the case to arbitration.

**iii. If the Petitioner's Argument is Accepted
then the Respondent's claims remaining
Against Range Must be Determined by
The Circuit Court**

The Order of the lower court did not resolve the merits of Respondent's claims against the Petitioner rather merely determined which leases, if any, were valid, and consequently, which arbitration clauses, if any, were valid. At no time did the lower court dismiss the claims of the Respondent as against the Petitioner. In fact, by determining that the July 2006 was invalid, the court's order justifies the further viability of Respondent's claims. These claims relate to the Petitioner's mishandling of the December 2005 lease, thus perpetrating the July 2006 and eventual execution of the January 2011 Chesapeake lease and the February 2011 Chesapeake top lease.

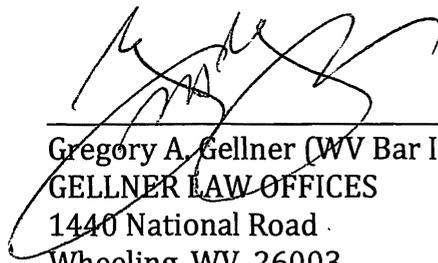
Should this Honorable Court determine that the Petitioner is not compelled to have the claims heard by arbitration, then those claims must be referred back to

the circuit court and the stay lifted as to Cecil Hickman's claims against Range. Petitioner Range cannot request arbitration at the trial court, get what they requested, only to thereafter try to avoid the same arbitration they sought. They must either face the allegations at the trial court or in arbitration. There has been no ruling on the merits, despite Respondent's position.

CONCLUSION

For the reasons stated above, the Respondent, Cecil Hickman, respectfully requests that this Honorable Court affirm the August 16, 2014, Order entered by the Circuit Court of Ohio County, West Virginia, to the extent that it requires Petitioner to participate in any arbitration. In the event Petitioner is deemed to be excluded from arbitration then the claims against them must be remanded to the Circuit Court for adjudication.

Respectfully submitted,



Gregory A. Gellner (WV Bar ID 4641)
GELLNER LAW OFFICES
1440 National Road
Wheeling, WV 26003
Phone: (304) 242-2900
Fax: (304) 242-0200
ggellner@gellnerlaw.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GREAT LAKES ENERGY PARTNERS, LLC
N/K/A RANGE RESOURCES –
APPALACHIA, LLC,

Petitioner,

v.

No. 14-0923

CECIL L. HICKMAN,

Respondent.

CERTIFICATE OF SERVICE

Service of the **RESPONDENT'S BRIEF** was had upon the following by sending true and correct copies thereof by regular U.S. Mail, postage prepaid, at their last known addresses this 22 day of January, 2015, as follows:

Robert C. James, Esq.
FLAHERTY SENSABAUGH BONASSO PLLC
1225 Market Street
P.O. Box 6564
Wheeling, WV 26003
*Counsel for Defendants Geological Assessment & Leasing
and William A. Capouillez*

Kenneth J. Witzel, Esq.
BARNES DULAC WATKINS
Two Gateway Center, 17 East
603 Stanwix Street
Pittsburgh, PA 15222
*Counsel for Defendant Great Lakes Energy Partners, LLC
N/K/A Range Resources –Appalachia, LLC*

Timothy M. Miller, Esq.
BABST CALLAND CLEMENTS & ZOMNIR, P.C.
500 Virginia Street East, Suite 590
Charleston, WV 25301
*Counsel for Defendant Chesapeake Appalachia, LLC, Red Sky Land, LLC, Red Sky-West
Virginia, LLC, and Terry L. Murphy*

Gregory A. Gellner (WV Bar ID 4641)
GELLNER LAW OFFICES
1440 National Road
Wheeling, WV 26003
Phone: (304) 242-2900
Fax: (304) 242-0200
ggellner@gellnerlaw.com



Counsel for Respondent