IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0761

MASON LOUIS COTTRELL,

Petitioner,

v.

On Appeal from the
Circuit Court of Ohio County
(Case No. 19-C-159)

LOUIS COTTRELL, JR., CHESAPEAKE APPALACHIA, LLC, SWN PRODUCTION COMPANY, LLC, JAMESTOWN RESOURCES, LLC, APPALACHIA MIDSTREAM SERVICES, LLC, and STATOIL USA ONSHORE PROPERTIES, INC.,

Respondents.

REPLY BRIEF OF PETITIONER

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I. INTRODUCTION

Pursuant to Rule 10(g) of the Rules of Appellate Procedure and because the briefs of Respondents, SWN, Appalachia Midstream Services, and Chesapeake Appalachia, LLC, mostly repeat the same arguments or more bluntly just purport to join in the arguments of each other, the Petitioner hereby submits a single reply brief addressing it all. Inasmuch as the initial *Brief of Petitioner* sufficiently sets forth the arguments which merit appellate relief, brevity can be maintained.

II. REPLY ARGUMENTS

1. Under the particular and unique set of facts in this case, the Petitioner sufficiently challenged the arbitration provision.

The September 1, 2020, *Order* upon which this appeal is based granted the Respondents' motions to compel arbitration. (J.A. 243-250). In so doing, the Trial Court failed to appreciate the wholly nullifying effect of failing to secure court approval for the contracts, including that housing the arbitration provisions. It instead rested its decision upon the misguided view that our law, despite our unique circumstances, required Petitioner to surgically focus solely on the arbitration provision of the implicated contract to the exclusion of the other provisions of the contract or the contract as a whole. "In the present case, Plaintiff is generally challenging the contract as a whole and is not explicitly challenging the enforceability of an arbitration clause within the contract." (J.A. 249). True, Petitioner does challenge the contract as a whole, contending that it simply does not legally exist, but carried with his argument is that the court approval process would have evaluated and ruled upon each of the contract's provisions, one by one, especially the arbitration provision, standing alone. Such is what occurs in minor contract proceedings, and as such, focus upon the arbitration itself was sufficiently made.

The Respondents contend that the Petitioner's arguments are "almost identical" to the arguments presented in *Bayles v. Evans,* 243 W. Va. 31, 842 S.E.2d 235 (2020). The facts of this case are far different than those presented in *Bayles v. Evans* and the Petitioner's arguments are far different as well.

In *Bayles*, the plaintiff argued that she was misled or defrauded by Evans, and if she was not misled or defrauded she would not have entered into the contract. That is a far cry from the Chesapeake lease being *void ab initio*, as a matter of law, for not obtaining the necessary Court approval pursuant to W.Va. Code §37-1-2.

In *Bayles*, this Court found:

> In the instant case, the plaintiff did not argue to the circuit court that the arbitration agreement was procured by fraud. Instead, she asserted that the entire contractual relationship between her deceased husband, on the one hand, and Ameriprise and Evans on the other, was induced by fraud. **The plaintiff argued that if she had not been misled or defrauded by Evans, no contractual relationship would have been formed with Ameriprise – and therefore, there would be no arbitration agreement.**
>
> **Because the plaintiff's claims of fraud go to the overall existence of a contract, we are required – because of the doctrine of severability – to presume that a valid arbitration agreement was formed by the parties.** Accordingly, the question of fraud posed by the plaintiff must be weighed by the arbitrator. Therefore, we find no error by the circuit court on this point.

Id. at 247-48; 43-44 (emphasis added).

In *Bayles*, this Court held that it was required, because of the doctrine of severability, to presume that a valid arbitration agreement was formed. Here, unlike in *Bayles*, any presumption that a valid arbitration agreement was formed was overcome, defeated and/or rebutted as a matter of law because, without court approval, the contract never existed and the arbitration clause never existed in the eyes of the law. There never was a presumably valid arbitration agreement in this case as a matter of law because there was no court approval as required by W. Va. Code §37-1-2.

This Court has previously held that if a statutory scheme involving the sale or encumbrance of real estate is not followed the transaction is *void ab initio*. See, *State ex rel. Ware v. Henning*, 212 W. Va. 189, 569 S.E.2d 436 (W. Va. 2002). In *State ex rel. Ware v. Henning*, this Court held that a transfer of land which did not comply with the constitutional and statutory provisions of W.Va. Code §35-1-6 was *void ab initio*. Consistent with this holding and reasoning, a transfer, sale or encumbrance in violation of W. Va. Code §37-1-2 is *void ab initio* and, thus the Chesapeake lease never legally existed.

If Petitioner is correct, then there simply is no valid arbitration provision, nor any other valid contract provision, that Respondents can rely upon.

> An illegal contract is as a rule void—not merely voidable—and can be the basis of no judicial proceeding. No action can be maintained upon it, either at law or in equity. This impossibility of enforcement exists whether the grant is illegal in its inception, or whether, being valid when made, the illegality has been created by subsequent statute. . . . "If a contract is tainted with the vice of illegality, it is held to create no obligation, not from any consideration of the individual rights of the parties, who may be equally in fault, but from regard for the public." Generally, the illegality of a contract is a perfect defense to its enforcement, because the law will not require one to do, or punish him for not doing, that which it forbids him to do.

W. Va. Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co., 820 S.E.2d 416, 423, 241 W. Va. 148, 155, 2018 W. Va. LEXIS 465, *19, 2018 WL 2769058 (internal citations omitted).

Accordingly, if the Chesapeake lease never legally existed as a matter of law, then the arbitration provision never existed as a matter of law and there was no valid or presumed arbitration provision to challenge. That distinction is what makes this case far different than the cases cited by Respondents as this case involves a contract that was *void ab initio* as a matter of law.

In *Bayles*, this Court used the term "presume" pertaining to the validity of an arbitration provision when not specifically challenged. This is not an irrebuttable presumption. This Court would not use the word "presume" if the presumption could not be defeated or overcome as a matter of law.

Thus, even if this Court determines that the Petitioner's challenge to the arbitration provision was not specific enough, there is only the presumption that the arbitration provision was valid. Again, that presumption was overcome and defeated in this case because the Chesapeake lease was *void ab initio* for failure to seek and obtain Court approval.

Under the particular and unique set of facts in this case, the Petitioner sufficiently challenged the arbitration provision and/or the presumption of a valid arbitration agreement was overcome. Importantly, the West Virginia courts, not foreign arbitrators, should decide this most important legal issue as the oil and gas industry has greatly expanded in West Virginia and properties of minors are certainly involved in these oil and gas transactions.

2. <u>Respondents miss the mark on disaffirmation.</u>

At section "D" of its brief, SWN disputes Petitioner's contentions of disaffirmation, and then curiously disconnects and wanders into a misguided discussion of the *Uniform Trust Act*. Appalachian Midstream basically regurgitates the same argument, and Chesapeake piggybacks on them both.

Concerning disaffirmation, we know this: Petitioner was under the disability of minority when the lease housing the arbitration provision was signed on his behalf, by his father, purportedly as his trustee. Promptly upon having his disability removed, i.e., when he turned 18, Petitioner turned to the court system to have his father's trustee capacity dissolved, which was accomplished by the Trial Court's *Order* of August 19, 2019. (J.A. 021-024). At that juncture Respondents were depleting Petitioner's land under supposed contracts with no one sitting in the "Lessor" or "Grantor" capacity. Then Petitioner promptly took what was logically and legally the next step. Within a matter of just a few months he brought the Respondents into the existing court action, not on breach of contract contentions, but in formally disaffirmation of each contract, seeking a judgment declaring them void, and seeking the recovery of tort damages caused by each

Respondent's misconduct. While the Trial Court did not ratify the disaffirmation and the Respondents continue to use and deplete Petitioner's land of its resources, the disaffirmation is a formal and clear matter record.

Respondents seek to evade the effects of the disaffirmation through two arguments. First, they contend that Petitioner cannot disaffirm a contract that he personally did not execute while a minor, and second, they contend, based on nothing in the record, that Petitioner ratified the contracts by accepting royalties since becoming an adult.

As to the first argument, they contend that This Court's analysis in *Fitness, Fun, & Freedom, Inc. v. Perdue*[1] is useless because there the infant himself actually signed the contract, albeit solely in his mother's name, whereas here it was Petitioner's trustee father who signed the arbitration agreement contract which all Respondents contend to fully bind Petitioner and his lands. Respondents miss the point. The plaintiff in *Fitness, Fun* signed his mother's name. While this constitutes fraud, it places the mother, not the minor, in the role of contracting party. The Court may well have negated the arbitration provision on fraud grounds, or sent it to an arbitrator to address, but instead, as SWN noted[2], it considered it to be a contract with a minor, voidable once the disability of minority ended. (The Court also recognized the challenge to the arbitration provision itself, which appeared very similar to the manner of Petitioner's challenge against Respondents' arbitration provision, to be sufficient to satisfy applicable federal, and therefore our own, standards.) The point is that once the disability ended the now-adult had an opportunity to disaffirm a contract which purportedly bound him. True, it was not Petitioner that signed the contract that allowed his property to be depleted of its value, but once he had the shackles of

[1] 2021 W. Va. LEXIS 67, 2021 WL 653240 (memorandum decision).

[2] ...at Page 27 of its brief.

minority removed, he had the trustee removed and then promptly acted to have the contracts declared void. Everything about this case is in straight accord with the principles and rationale underlying *Fitness, Fun.* No doubt, had Petitioner not brought a formal action expressing disaffirmation, Respondents would be claiming that to be a fatal failure in his quest to get back his land and the value of what was taken from him.

Worried that This Court will agree with all this, Respondents resort to a shameful and wholly illegitimate tactic of alleging and relying upon facts outside the record---the contention that Petitioner has ratified the contracts by accepting royalty payments. They insinuate the falsity of the following representation to the Trial Court in Petitioner's July 1, 2020, *Surreply* (J.A. 237-38), which was recounted in the procedural history to This Court in the *Petition* at Pages 3-4:

> [P]laintiff's conduct exemplifies propriety, for by promptly repudiating all of the contracts upon turning 18 through the Amended Complaint, which plainly states as against each corporate defendant its contract is "void", by not ever getting any benefits under any of the contracts, and by bringing all of the corporate defendants into the action prior to having any damages determined, plaintiff has not misled nor gained any unfair advantage over anyone.

Suffice to say, Petitioner made no misrepresentation, and as to Respondents' substantive allegation that royalty payments have been ever sent by any respondent to Petitioner after the Trial Court's order granting the motions to dismiss, Petitioner will welcome having that issue fully developed and argued once the case is returned to the Trial Court, right along with all the other issues. At this juncture, it is nothing other than a foul allegation which violates the fundamentals of appellate procedure which only demonstrates the willingness of the Respondents to exceed the boundaries of propriety in order to prevail.

The remainder of SWN's Section D arguments are scattershot contentions respecting the *Uniform Trust Code*. It commences with an oddly incorrect observation that the *Petition* does not dispute the application of the *UTC*, seemingly ignoring the fact that Section E of the *Petition*

devotes five pages of discussion on the topic. SWN then spends three pages itself trying to counter points that Petitioner somehow, somewhere made. While elsewhere herein and in the *Petition* all of what SWN maintains have been addressed, a few points merit emphasis now.

First, and as set forth in the *Petition*, it was before the effective date of the *UTC*'s enactment that Petitioner's cause of action arose, and similarly, it was before the *UTC* that approval under §37-1-2 needed to be secured for these particular contracts, regardless of how a court might later observe the *UTC* and §37-1-2 to now relatively co-exist. Consequently, the fight should be confined to what obligations are carried with §37-1-2 alone.

Second, all of the *UTC* "protections" which SWN highlights are limited to obligations and after-the-damage liabilities of the trustee, with no extension whatsoever to third parties such as Respondents. This is utterly worthless in a scenario such as ours where a rogue trustee does not care what the law requires of him. This is precisely why §37-1-2 is so vital, for just like in an infant settlement setting, a trial court ensures the transaction, by each and every of its provisional components (such as a proposed arbitration provision), would serve the child's interests, and this is before the deal goes through. This judicial power is spread to all who are involved in the deal, for if they want it to go through they must obey the strictures the court imposes. As Respondents want it, they are long gone with the fruits of their deal and beyond judicial accountability by the time any complaint is registered over a horrible, if not illegal, deal harming a minor, incompetent or incarcerated person. That is not the law.

Third, to say that §37-1-2 does not apply to arbitration provisions because back in the mid-1800s when the statute was enacted the Legislature did not include a clause stating "and this applies to arbitration provisions affecting a minor's lands" is absurd. Again using our minor settlement law for analogy, nowhere therein is there any reference to arbitration, but it is a sure bet that any

judge and guardian ad litem scrutinizing a settlement contract with a minor would quickly focus on a provision that would purport to force a minor to Philadelphia (or somewhere else typically seen) to have three arbitrators address any contention that the settlement agreement had been breached. The statutory charge is to approve of the deal, and this is obviously by the deal's independent provisional components, whatever they may be. That's the point.

3. **W. Va. Code §37-1-2 is mandatory, not permissive, and the Respondents should have required Defendant Cottrell to seek and obtain Court approval before entering into the contracts and tendering the consideration.**

As fully argued below to the Trial Court and herein, the issue of the arbitration provision's effectiveness is inextricably tied to whether that provision ever came to exist, and whether it ever came to exist is dependent upon whether court approval for the provision and the overall contract that houses it was necessary. In an age experiencing both an explosion of gas and mineral leases and a ubiquitous proliferation of arbitration provisions, this *de novo* opportunity ought to be taken to definitively confirm how a minor's interests must be safeguarded.

West Virginia Code §37-1-2 has been part of our law for well over a century and it focuses specifically upon our scenario whereby a minor's trustee and "interested" gas and mineral corporations wish to enter into contracts encumbering the minor's land. In its fullness, and in obliging the contracting parties to obtain court approval as a prerequisite to having an effective agreement, the statute reads:

> If the guardian of any minor, or the committee of any insane person or convict, think that the interest of the ward or insane person or convict will be promoted by a lease or by a mortgage or by a trust deed upon or by a sale of his estates, or of an estate in which he is interested with others, infants or adults; **or if the trustee of any estate, or any person interested in any estate in trust, whether he be interested with others or not, think the interest of those for whom the estate is held will be promoted by a lease of the same, mortgage or trust deed upon the same, or a sale thereof; such guardian, committee, trustee, or beneficiary, whether the estate of the minor or insane person or convict, or any of the persons interested, be absolute or limited, and whether there be or be not limited thereon any other estate, vested or contingent, and whether the**

> **guardian, committee or trustee, or the minor, insane person, convict, or any of the persons interested, reside in this State or not, may, for the purpose of obtaining such sale, lease, mortgage or trust deed, file a bill in equity in the circuit court of the county in which the estate proposed to be leased, sold or encumbered by mortgage or trust deed or some part thereof may be, stating plainly all of the estate, real and personal, belonging to such infant or insane person or convict, or so held in trust, and all of the facts calculated to show the propriety of the sale, lease, mortgage, or trust deed.** The bill shall be verified by the oath of the plaintiff; and the infant or insane person or convict, or the beneficiaries in such trust, when not plaintiffs, and all others interested, shall be made defendants. **The word "lease" as used in this article shall include any mining or timber lease or any lease of any profit in land,** and the word "sale" shall include the sale of any undivided interest, or any part of the corpus of land, or anything in or growing upon land. (bold added)

In calling for the full disclosure of a minor's estate implicated by the pending deal, in requiring the provision of "all of the facts calculated to show the propriety of the [contract]," by requiring the bill in equity, i.e., the petition, to be verified, and by compelling the Petitioner to make all interested parties defendants, this court approval process can hardly be characterized as a perfunctory rubber stamp. The Legislature made it a sincere and serious process, for obvious reasons.

All of the contracts underlying Petitioner's claims against all the corporate respondents fall squarely within the expressed reach of this statute. Latching on to the use of the word "may", what Respondents' deny is that the court approval set forth by the statute is mandatory. Moreover, they say, mandatory or not, the statute is superseded by, or is simply trumped by, provisions of the West Virginia Code Chapter 44D, namely, the *West Virginia Uniform Trust Code*. They are clearly wrong across the board.

Considering West Virginia Code §37-1-2 with rules of statutory construction, it is easy to discern the court approval process the statute prescribes to be mandatory. The purpose is easy to divine; it is to protect minors, the insane and convicts—all of whom are compromised and vulnerable—from being unfairly taken advantage of in business dealings over their estates. When the things that must be done to proceed for court approval are so comprehensive and formal,

including laying out each and every proposed provision to determine its propriety, it is manifest that the Legislature did not intend to let those contracting away the rights of minors, insane and incarcerated people to simply opt to skip it all. Add to this *pari materia* consideration of all the associated statutes which apply to this same §37-1-2 court approval: §37-1-3, requiring the appointment of a guardian ad litem to minors; §37-1-5, a resultant decree approving of the contract must, among other things, require "ample security" to be given respecting a sale of estate on credit; §37-1-7, mandating that the proceeds from the deal "shall be invested under the direction of the court, for the use and benefit of the persons entitled to the estate,..."; §37-1-14, requiring guardians and committees to "enter into bond, with approved security, conditioned for the faithful application of the proceeds of sale or lease;" ...etcetera. Clearly, by structuring such an extensive system of court approval, our Legislature did not intend to allow contracting parties to simply ignore it all, enter into a contract with any provisions they choose to chuck within it, such as arbitration, and unfairly exploit the minor (or insane person or convict). The Legislature intended for it all to be employed, faithfully.

Furthermore, and as a long-standing principle observed by this Court in its 1983 decision, *Hodge v. Ginsberg*, "**when the word may is in a statute made for the benefit of persons it is not permissive, but mandatory or compulsory**." 172 W. Va. 17, 22, 303 S.E.2d 245, 250, 1983 W. Va. LEXIS 515, *15. In support of this principle, *Hodge* cites to *Trail v. Trail*. 56 W. Va. 594, 600, 49 S.E. 431, 434, 1904 W. Va. LEXIS 161. It is noteworthy that *Trail* is itself a 1904 decision, and being of similar vintage to §37-1-2, its observations of legislative intent in that era regarding what is and is not mandatory carry particular weight. Involving issues of creditors' claims upon an estate, what is important is this Supreme Court observation respecting the use of the word "may" in statutes designed to benefit persons:

> It is suggested that a difference exists between the two statutes from the fact that as to a dead man's estate the Code says the court "may" decree a distribution upon the report of debts whereas the other statute says "shall" decree. **Now this**

> **statute was made for the benefit of creditors, and the law is that when this word "may" is in a statute made for the benefit of persons it is not comply permissive, but mandatory or compulsory.** 20 Am. & Eng. Encyc. L. (2d Ed.) 237.

56 W. Va. 594, 600, 49 S.E. 431, 434, 1904 W. Va. LEXIS 161, *13 (bold added).

Moreover, this Court has indicated that West Virginia Code §37-1-2 is mandatory. In *Williams v. Skeens*, Justice Workman explained that not all transactions involving incompetents require court approval, just those such as involving real estate where a statutory mandate exists for approval, specifically citing to §37-1-2 for the ruling.

> Finally, we do not imply through this opinion that a committee must seek judicial approval of every transaction which it seeks to enact on behalf of an incompetent, only those transactions which require or suggest approval by statute such as a real estate sale or where the need for court approval is required by the principle of *stare decisis* as in all subsequent situations when a committee for an incompetent seeks to effect a will renunciation on behalf of its ward. **See W. Va. Code §§ 37-1-2, -11**, and 56-10-4.

401 S.E.2d 442, 447, 184 W. Va. 509, 514, 1990 W. Va. LEXIS 270, *18 (bold added.)

Because the Court ruled that a business transaction involving an incompetent's real estate requires court approval because, per §37-1-2, court approval is mandated for transactions over a minor's real estate, it can be said that our issue is already resolved. Section 37-1-2 is undeniably mandatory and the consequence of Respondents' decisions to forgo court approval is the total voidance of the contract. As succinctly set forth in *Conrad v. Crouch*, where minors' lands were sold without the necessary court approval, "it necessarily follows that the sale to [the buyers] is not merely voidable, but absolutely void." 69 S.E. 888, 891, 68 W. Va. 378, 385, 1910 W. Va. LEXIS 134, *13-14.

4. **The West Virginia Uniform Trust Code does not supersede W.Va. Code §37-1-2 et seq.**

The *UTC* and §37-1-2, just as the *UTC* and §44-10-14, harmoniously co-exist. The notion of any conflict whatsoever between these court approval statutes and the *UTC* is merely a

fabrication Respondents deem necessary to support their arguments. Heavily they rely on §44D-8-815, which states that a trustee "without authorization by the court having jurisdiction" may exercise powers conferred by the terms of the trust instrument. However, by this statute's very title, "**General** powers of trustee", one can discern that §44D-8-815 must be read in conjunction with any other laws that apply to a **specific** scenario, and while here we are concerned with §37-1-2 involving minors, it could be any other law that specifically applies to a trust.

While §37-1-2 quite narrowly homes in on property leases for minors, the insane and convicts, in its great breadth the *UTC* obviously does too relate to this same subject matter. Given this, the following interpretive principles apply.

> Generally, "[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. Pt. 3, *Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975). Even "where two statutes are in apparent conflict, the Court must, if reasonably possible, construe such statutes so as to give effect to each." Syl. Pt. 4, in part, *State ex rel. Graney v. Sims*, 144 W.Va 72, 105 S.E.2d 886 (1958).

Barber v. Camden Clark Mem. Hosp. Corp., 240 W. Va. 663, 670-671, 815 S.E.2d 474, 481-482, 2018 W. Va. LEXIS 453, *17-18, 2018 WL 2470652.

Like a glove, the purposes of the *UTC* fit with the unwavering and long-standing statutory commitments to court oversight of business dealings involving minors. The Legislature is essentially stating: "Trustee, you have these powers generally, but when a minor is involved you must have court approval for such things as compromising claims and entering into leases for real property." The court approval statutes can in no way be said to do harm to the legislative purposes underlying the *UTC*.

Respondents have misunderstood the import of W.Va. Code §44D-3-303(3) and (5). Found within the Code article "Representation", and specifically in the statute titled "Representation by fiduciaries and parents," these subsections and all the other subsections of §44D-3-303 do authorize "parents" and "trustees" and "conservators" and "guardians" and

"personal representatives" and even "agents" to represent and bind persons, but that certainly does not mean without any necessary court approval. All this statute does is create standing to act for someone. When court approval, say for a minor settlement, is granted, it is not the court that signs the settlement agreement and release, but rather it is the parent, or guardian, or trustee of the minor who does so, ultimately binding the child. Although there is no statutory conflict, even if there were, the *UTC* would have to yield to §37-1-2. As *Barber* continues to state:

> However, when it is not reasonably possible to give effect to both statutes, the more specific statute will prevail. As we held in syllabus point one of UMWA by *Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984), "[t]he general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." *See also Int'l Union of Operating Eng'rs v. L.A. Pipeline Constr. Co., Inc.*, 237 W.Va. 261, 267, 786 S.E.2d 620, 626 (2016) ("[W]here two statutes apply to the same subject matter, the more specific statute prevails over the general statute."); *Newark Ins. Co. v. Brown*, 218 W.Va. 346, 351, 624 S.E.2d 783, 788 (2005) ("When faced with a choice between two statutes, one of which is couched in general terms and the other of which specifically speaks to the matter at hand, preference is generally accorded to the specific statute."). *Id.*

While in the face of conflict it is §37-1-2 that overcomes the UTC, in truth there is no need to find any conflict for the two bodies of law can be applied harmoniously. In any event, the statutory obligation to secure court approval for the contracts remains in full force and effect.

5. <u>Respondents' bankruptcy argument defies the law and procedural history of this case.</u>

Respondents refuse to recognize what has legally transpired and where that leaves the parties, which is back in circuit court without a dismissal order.

First, we have an automatic stay that was imposed due to the bankruptcy petition filed by Chesapeake Appalachia, LLC. That brought the brakes to everything. While the few federal court cases SWN[3] cites to demonstrate scenarios where cases go forward as against non-bankrupt defendants, we are past that point legally speaking. No party sought to have the scope of the stay

[3] The other respondents cite to nothing, other than to SWN.

determined by any court, most notably the bankruptcy court, nor affirmatively ask the bankruptcy court to narrow the stay as respondents now wish. However, *sua sponte*, this Honorable Court plainly, expressly and finally recognized the stay to affect the whole of the proceedings.

> Due to notice of bankruptcy proceedings involving Chesapeake Appalachia, LLC, this matter was automatically stayed in accordance with 11 U.S.C. § 362. On July 30, 2021, Nicolle R. Snyder Bagnell, counsel for Chesapeake Appalachia, LLC, submitted a status report indicating that Chesapeake Appalachia, LLC, emerged from bankruptcy and that this appeal was ripe for the lifting of the stay. The stay is lifted, and this appeal may proceed in accordance with this order.

(*Scheduling Order*, Nov. 4, 20210)

It is this order that recognized the scope of the bankruptcy stay, and it was total, across the whole case. As stated in the *Petition*[4], this is the law of the case, and the fact that no respondent even attempts to counter this argument proves its validity. Moreover, the order reflects a rational and careful approach designed to avoid doing offense to federally-preemptive proceedings.

From the date counsel for Chesapeake Appalachia notified Ms. Nash Gaiser that it remains an interested party to the appeal, Petitioner patiently endured more than a year's delay in the overall appeal due to the bankruptcy stay. At a minimum, when months went by without This Court addressing SWN's November 6, 2020, *Motion To Dismiss Appeal*, SWN knew or should have known that this Court considered the stay to affect all the proceedings. However, SWN and the other Respondents did nothing to pursue their now-tardy argument that the stay did not impact them. If Respondents had any rights to argue the point, by this tactical inaction they waived them. Regardless of what benefits they thought to derive from their tactic, this is precisely the type of "raise or waive" conduct that this Court has admonished against throughout time. See, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613, 1996 W. Va. LEXIS 25.

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[4] ...at page 31.

For Petitioner's part, once it was appreciated that the stay was wholesale, and with just the briefest research resulting in the realization that all that is filed in derogation of a bankruptcy stay is void, knowing that the ramifications of the stay could only be addressed with this Court after it was lifted, he took the first opportunity to do so, with his *Petition*.

SWN's arguments also, quite illogically, contend that Petitioner's bankruptcy analysis is flawed due to his failure to go back to the trial court during the stay and seek some relief pursuant to W.V.R.C.P. 59(e). Not only could Petitioner not effectively do so, but there simply is no order from the trial court to move upon.

Moreover, with the effect of the bankruptcy stay being the divestment of the Trial Court's jurisdiction to act (*Id.*), there was no need for Petitioner to try (were there anything to try) to preserve his rights below. "It is well established that the issue of subject matter jurisdiction can be raised at any time, even *sua sponte* by this Court." *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 345, 801 S.E.2d 216, 223, 2017 W. Va. LEXIS 417, *15, 2017 WL 2415343. Further, "[t]his Court, on its own motion, will take notice of lack of jurisdiction at any time or at any stage of the litigation pending therein." Id, at Syl. Pt. 2.

> Furthermore, "[t]he urgency of addressing problems regarding subject-matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void." *State ex rel. TermNet Merch. Servs., Inc. v. Jordan*, 217 W.Va. 696, 700, 619 S.E.2d 209, 213 (2005); *see also* Franklin D. Cleckley, Robin Jean Davis, and Louis J. Palmer, Jr., *Litigation Handbook on W.Va. Rules of Civ. Pro.*, § 12(b)(1), at 325-26 (4th ed. 2012) ("Any judgment or decree rendered without such jurisdiction is utterly void.").

Id., at 239 W. Va. 338, 346, 801 S.E.2d 216, 224, 2017 W. Va. LEXIS 417, *15-16, 2017 WL 2415343

All of this is clear or should be. Just as clear is where things are left. SWN and the other Respondents would have this Court conclude that, with the stay now being lifted and with bankrupt Chesapeake purportedly beyond any potential liability to Petitioner, we should simply forget about

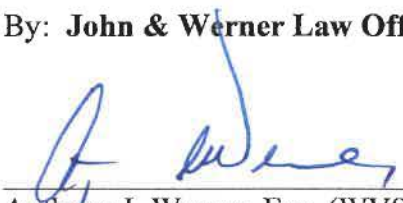
the bankruptcy proceedings and have an appellate resolution of the otherwise-appealed issues. While at first blush that might seem pragmatic, it simply cannot occur. This is not some mere technicality that an appellate court can dismiss. It is unequivocal federal law, as recognized by the United States Supreme Court, that finds the Trial Court's order a nullity. A valid appeal cannot have sprung from it. It does not exist. To act though it does, or to fabricate some basis to infuse it now with life, is to run afoul of the law. All that can be done is deem this appeal dismissed as being improperly based upon an ineffective order and have the parties return to the Trial Court as in the first instance.

III. CONCLUSION

For all the foregoing reasons and those previously set forth in *Petitioner's Brief*, Mason Cottrell respectfully requests that this Honorable Court reverse the Circuit Court of Ohio County's *Order Granting Defendants' Motions to Dismiss and Compel Arbitration.*

Respectfully submitted, Petitioner
Mason Cottrell

By: **John & Werner Law Offices, PLLC**



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CERTIFICATE OF SERVICE

Service of the foregoing **Reply Brief of Petitioner** was made upon the following by mailing a true copy thereof, by United States Mail, postage prepaid, on this 10th day of March, 2022:

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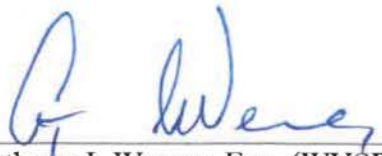

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