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

MASON LOUIS COTTERLL,

Plaintiff Below/Petitioner,

v.

LOUIS COTTRELL, JR.,
CHESAPEAKE APPALACHIA, LLC,
SWN PRODUCTION COMPANY, LLC,
JAMESTOWN RESOURCES, LLC,
APPALACHIA MIDSTREAM SERVICES, LLC,
And STATOIL USA ONSHORE PROPERTIES, INC.,
n/k/a Equinor USA Onshore Properties, Inc.,

Defendants below/Respondents.

(On Appeal from Civil Action No. 19-C-159 Circuit Court of Kanawha County, West Virginia)

BRIEF OF RESPONDENTS SWN PRODUCTION COMPANY, LLC AND STATOIL USA ONSHORE PROPERTIES, INC. N/KA EQUINOR USA ONSHORE PROPERTIES, INC.

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I. STATEMENT OF THE CASE

Both this Court and the United States Supreme Court of Appeals have definitively addressed the threshold issue presented in this matter -- whether a purportedly void contract containing an arbitration agreement can be compelled to arbitration. Both have held that whether a contract is void under state law is a matter for an arbitrator to determine. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006) (specifically rejecting the argument that 9 U.S.C. § 2 does not apply to arbitration provisions in purportedly void contracts); Syl. Pt. 1, *Bayles v. Evans*, 243 W. Va. 31, 42-44; 842 S.E.2d 235, 246-48 (2020)(under doctrine of severability, challenges that go to the overall existence of a contract go to an arbitrator). Nevertheless, Petitioner contends that W. Va. Code § 37-1-2, a state law that applies to certain defined real property transactions, trumps long established precedent and renders the contract containing the arbitration agreement void and thus voids the arbitration provision contained within the contract. However, W. Va. Code § 37-1-2 does not, by its own terms, apply to arbitration agreements standing alone and so, under well-settled legal principles of the severability doctrine and arbitration, the Trial Court did not err in compelling arbitration in this case.

Petitioner Mason Louis Cottrell incorrectly asserts that this case arises from a real property deed given by a mother to her infant son. In fact, the deed at issue transferred real property to Louis Cottrell, Jr. as Trustee. J. A. 12. The deed states "Trustee may grant, convey or incur debt on said land for the benefit of Mason Louis Cottrell." *Id.* The fact that the property was conveyed to a trust does not appear to be disputed, but the Petitioner discounts its legal significance and continually refers to the trust property as a "minor's property." ***Although this trust had a minor beneficiary, Petitioner, this case does not involve any contract signed by a minor or property***

owned by a minor. It involves the property of a trust. Further, there is no conflict between the West Virginia Uniform Trust Code, W. Va. Code §§44D-1-101 *et seq.* ("UTC"), or the preceding traditional legal principles for trustees and beneficiaries of trusts, and W. Va. Code § 37-1-2 with regard to arbitration agreements signed by a trustee.

There appears to be no dispute that the deed at issue created a trust through its language, and the instrument explicitly states: "Trustee may grant, convey or incur debt on said land for the benefit of Mason Louis Cottell." J.A. 12. Based on this, the Trustee then entered into various contracts involving the trust property, including the Lease and other, later, contracts. The Lease includes an arbitration agreement with a delegation clause. J.A. 7 at ¶ 8. There is no allegation in the Amended Complaint that SWN Production Company, LLC ("SWN") and Statoil USA Onshore Properties Inc. n/k/a Equinor USA Onshore Properties Inc. ("Equinor") (collectively "Respondents") or their predecessors in interest failed to comply with the terms of those contracts and, in fact, it is affirmatively alleged that Respondents made the requisite payments to the Trustee. J.A. 7 at ¶ 9; J.A. 9 at ¶¶ 23- 24.

It is true that, on June 27, 2019, Petitioner filed suit. But that lawsuit was not against these Respondents, it was against the Trustee alleging, *inter alia,* that he "failed to well and truly and faithfully perform all of his duties as Trustee;" "breached his duties as Trustee and improperly spent and wasted the plaintiff's assets…". J.A. 8 at ¶¶ 21-25. In other words, the Petitioner sought the benefit, or "plaintiff's money," J.A. 9 at ¶¶ 23, 25, and 27, from the Trustee based on the very contracts he later claims are void in his Amended Complaint. *See generally* J.A. 8-10. Trustee failed to respond and default judgment was entered on August 7, 2019. J.A. 20. The Trial Court then heard Petitioner and Trustee regarding the claim for specific performance and requesting a

deed transfer from Louis Cottrell, Jr., Trustee for Mason Louis Cottrell, to Mason Louis Cottrell. J.A. 21-22. On or about August 19, 2019, it granted the same and held that Petitioner's claims for other relief and damages remained pending. J.A. 23. In this August 19, 2019 Order, it was again confirmed that there was a trust and that the Trustee entered into the contracts at issue. J.A. 22 at ¶¶ 5-6.

On or about January 9, 2020, Petitioner moved to amend his Complaint to include claims against additional defendants, including Respondents. J.A. 25-29. The Motion acknowledges that default was entered against the Trustee "and all allegations set forth in plaintiff's Complaint are to be taken as true and admitted." J.A. 26 (internal citations omitted). The Petitioner's Motion expressly averred that "the proposed amended complaint shall not assert new or additional claims" against the Trustee. J.A. 27 (emphasis in original). On that same day, the motion was granted. J.A.30-31. The *Amended Complaint* was filed on or about February 4, 2020, J.A. 32- 52, and sought to void the very contracts whose proceeds Petitioner sought from the Trustee in the *Complaint,* based on an allegation that no court approved under W. Va. Code § 37-1-2 and that the failure to do so rendered the Lease, and other contracts at issue, void. Signficantly, W. Va. Code § 37-1-2, if it were found to apply, would require the ***Trustee***, not the Respondents, to seek court approval. Thus, the Amended Complaint implicitly does assert new claims against Trustee. The Amended Complaint does not assert a claim that the Lease or any contract at issue was inherently unfair or unconscionable with regard to the terms.

On or about May 14, 2020, Respondents timely filed their *Motion to Dismiss and Compel Arbitration*. J.A. 70-126. Respondents specifically sought arbitration under the "Paid-Up Oil & Gas Lease" between Trustee and Chesapeake Appalachia, LLC ("Lease") based on partial

assignments of the same to Respondents. J.A. 72-75. The Lease contains both an arbitration and a delegation clause:

> ARBITRATION. In the event of a disagreement between 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.

See J.A. 80 (March 10, 2011 Lease, Deed Book 820, Page 256) (emphasis added).

In addition to moving to compel arbitration on the Lease claims, Appellee SWN separately moved for the Trial Court to dismiss Count VI of the Amended Complaint under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. J.A. 75-76. This is an unrelated argument to the Motion to Compel Arbitration claims arising under the Lease and is based on a "Term Pipeline Option and Right of Way Agreement" dated October 20, 2017 ("SWN Contract"). J.A. 71; J.A. 75-76. SWN argued that Petitioner failed to prove his claim related to the SWN Contract as a matter of law under the UTC, arguing that the UTC, and not W. Va. Code §37-1-2, applied to the SWN Contract. *See* J.A. 75-76 at ¶ 14; J.A. 115-24; J.A. 202-218; *See also* J.A. 43-46 (Amended Complaint, Count VI). The SWN Contract does not contain an arbitration clause and instead SWN moved to dismiss those claims under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. J.A. 115-20. Other defendants in the underlying matter likewise responded to the *Amended Complaint* with various motions based on their positions. Although a hearing on these motions was noticed for July 2020, J.A. 314, it was canceled, and the matter was determined based on the briefing. On September 1, 2020, the Circuit Court of Ohio County, West Virginia granted

Respondents' Motion to Compel Arbitration under the Lease and stayed the matter pending arbitration ("Order"). J.A. 243-250. That Order acknowledged in footnote 1 that Chesapeake Appalachia, LLC ("Chesapeake") had filed for Chapter 11 bankruptcy protection. *Id.* at 243. *See also* J.A. 315. The Order made a specific finding that funds under the contracts were received by Trustee from Defendants and that Trustee breached his fiduciary duties to Plaintiff. J.A. at 244 ("Mr. Cottrell ultimately converted most, if not all, of the funds he received from Defendant to his own personal use and breached his fiduciary duties to Plaintiff.").

Significantly, the Trial Court found that the Petitioner was "generally challenging the contract as a whole and is not explicitly challenging the enforceability of an arbitration clause within the contract." J.A. 249. The Trial Court stated:

> Because Plaintiff's Claims go to the overall existence of a contract, the doctrine of severability requires this Court to presume that a valid arbitration agreement was formed by the parties. Accordingly, the question of the lack of court approval of the contract raised by Plaintiff must be weighed by the arbitrator.

J.A. 249. The Court then properly granted the Motion to Compel Arbitration and stayed the matter pending arbitration. J.A. 250. This ruling applied to the entirety of the remaining claims, including the SWN Contract and the contract with Appalachia Midstream Services LLC. *Id.*

While Plaintiff moved to alter and amend the Order pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure with regard to Appalachia Midstream Services, LLC claims, he did not move to alter and amend with regard to the SWN Contract. J.A. 251-253. The Trial Court granted that Motion to Amend. J.A. at 260. [1]

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[1] Petitioner did not make the same motion regarding the separate SWN Contract, the 2017 "Term Pipeline Option and Right of Way Agreement," and so accepted and agreed with the Trial Court's ruling to stay that

II. SUMMARY OF ARGUMENT

Petitioner asserts that the Trial Court erred by granting the motion to compel arbitration in three ways: 1) by determining that the Petitioner did not sufficiently challenge the arbitration provision and instead challenged the Lease as a whole as void; 2) by not determining that the contracts at issue were void *ab initio* for lack of court approval under W. Va. Code § 37-1-2; and 3) by not finding that the Petitioner voided the contracts through disaffirmation after reaching the age of majority. Each of Petitioner's arguments fail both factually and legally, under well-settled legal principles. Petitioner also alleges plain error regarding the entry of the Order during Respondent Chesapeake's bankruptcy stay; however, the circumstances of this case do not meet the requirements for application of the plain error doctrine.

Although Petitioner claims the Trial Court "mis-analyzed" the case under prevailing arbitration standards, in fact it simply applied well-settled, black letter law that requires challenges to a contract as a whole, even a challenge that the contract is void under state law, to be decided in arbitration not in courts. *See Buckeye Check, supra,* at (2006) (specifically rejecting the argument that 9 U.S.C. § 2 does not apply to arbitration provisions in purportedly void contracts); Syl. Pt. 5, *Bayles v. Evans*, 243 W. Va. 31, 42-44; 842 S.E.2d 235, 246-48 (2020)(under doctrine of severability, challenges that go to the overall existence of a contract go to an arbitrator). There

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claim and send this contract dispute to arbitration along with the Lease claim. No error has been alleged regarding this aspect of the Order and it was within the Trial Court's discretion to do so. *See e.g. U.S. ex rel, TBI Investments, Inc. v. BrooAlexa, Inc.*, 119 F. Supp. 3d 512, 541 (S.D. W. Va. 2015)(memorandum opinion) (staying proceedings pending arbitration is within the discretion of the district court); *Blevins v. Flagstar Bank*, F.S.B., 2013 U.S. Dist. LEXIS 93724, *47-49 (N.D. W. Va. 2013)(in "extraordinary circumstances a district court may send nonsignatory defendants to arbitration" if those claims are interdependent and intertwined with claims subject to arbitration sent to arbitration). Any argument to the contrary has been waived by Petitioner's failure to raise the same.

is no allegation of error or argument below, with regard to the fact that a trust was created and that Louis Cottrell, Jr. was designated as the Trustee of the trust. J.A. 32-55 (Amended Complaint); J.A. (Petitioner's Response). *See generally* Petitioner's Brief. There is no claim that the Trustee did not sign or agree to the arbitration agreement on behalf of the trust. J.A. 134-60. There is no assignment of error or argument related to whether the Trustee assented to the arbitration agreement on behalf of the trust. All arguments to There is no assignment of error or argument that the terms of the arbitration agreement are unconscionable or unfair.

Instead, the Petitioner challenged the Lease as a whole, claiming it is void based on a statute that would only apply, if at all, to the Lease as a whole and not directly to the arbitration provision or delegation clause. W. Va. Code § 37-1-2 does not, by its terms, apply to arbitration agreements. Further, it is significant in this case, based on the arguments set forth in Petitioner's brief, that there is no allegation that Petitioner signed the Lease at issue as a minor or that the Lease is a contract between a minor and Respondents (or their predecessors in interest). Rather, this case involves a Lease for real property held in a trust by a Trustee. Petitioner's Brief at p. 2; J.A. at 6-7 (¶¶ 5-7); J.A. 11. Petitioner is bound to arbitration as a nonsignatory. As such, *Bayles, supra,* and not *Fitness Fun & Freedom, Inc. v. Perdue*, 2021 W. Va. LEXIS 67 (2021) (memorandum decision) controls the issue of arbitration.

As a nonsignatory to the Lease, the Petitioner is bound to the arbitration agreement and delegation provision undisputedly agreed to by the Trustee under estoppel, third-party beneficiary, principal-agent and trust principles. *See e.g. Bayles, supra*; Syl. Pt. 10, *Chesapeake Appalachia, L.L.C. v. Hickman,* 236 W.Va. 421, 781 S.E.2d 198 (2015)(holding that a nonsignatory can be bound to arbitrate under five traditional theories of contract and agency law: "(1) incorporation by

reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel"). A trustee can enter into an arbitration agreement on behalf of a trust. *See* W. Va. Code § 44-5A-3(w) ("[t]o compromise, adjust, arbitrate, sue on or defend, abandon or otherwise deal with and settle claims in favor of or against the estate or trust as the fiduciary considers advisable, and the fiduciary's decision is conclusive between the fiduciary and the beneficiaries of the estate or trust and the person against or for whom the claim is asserted, in the absence of fraud by those persons..."); 19 M.J. Trusts and Trustees § 91, fn. 1007 (trustees have the authority to agree to arbitration, citing *Leslie v. Brown,* 1 Pat. & H 216 (Va. 1855)). In addition, the Petitioner filed his initial Complaint against only the Trustee ***to obtain the benefits*** of the Lease and contracts at issue, "plaintiff's money,"[2] and his claims must be determined by reference to the Lease and other contracts. *See e.g.* J.A. 9 at ¶ 23. Petitioner does not contest this[3] and instead focuses on arguments that the Lease is void in its entirety. Petitioner Brief at p. 3.

Ignoring the doctrine of severability that has repeatedly been confirmed by this Court, the Petitioner mistakenly contends that a Trial Court, not an arbitrator, should determine whether W. Va. Code § 37-1-2 applies to all claims arising under the Lease. The Petitioner continues to focus on the container contract as a whole and no direct challenge to the arbitration agreement or delegation provision or their terms are made in this appeal. This Court has consistently held that

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[2] While Respondents aver that this is sufficient evidence to determine estoppel under *Bayles, infra*, should the Court find the Complaint, Motion for Default and resultant Orders insufficient to establish this issue, Respondents respectfully assert that, since entry of the Order, additional evidence of receipt of benefits and affirmance of the contracts at issue has come to light in that Petitioner is now affirmatively cashing royalty checks and, should the Court reach this issue, seek a remand to develop this evidence further.

[3] No assignment of error relates to the status of Petitioner as a nonsignatory. Petitioner Brief at p. 1. Accordingly, any argument of error regarding Petitioner not being subject to the arbitration agreement because he is a nonsignatory has been waived.

such challenges are decided by an arbitrator. *See Bayles, supra,* at 25-34 (evaluating the claim that plaintiff as a nonsignatory should not be bound by an arbitration agreement in an investment contract, finding she was bound under the estoppel theory because she sought to recover the assets from the contract and sought to enforce her understanding of the contract, and finding that the remaining claims were challenges to the contracts as a whole, or intrinsically intertwined with the contracts, and so under the delegation clause and the doctrine of severability, those claims were referred to arbitration as well); *Rent-A-Center, Inc. v. Ellis*, 241 W. Va. 660, 827 S.E.2d 605 (2019) (holding that whether a contract violated a West Virginia statute related to workers' compensation claims and was therefore void *pro tanto* was itself a matter subject to arbitration under the arbitration clause of the allegedly void contract); Syl. Pt. 2, *Schumacher Homes of Circleville, Inc. v. Spencer*, 787 S.E.2d 650 (2016)(doctrine of severability requires a challenge specific to the arbitration agreement not the contract as a whole). Likewise, the Supreme Court of the United States has held that challenges to a contract as a whole, including challenges asserting a contract is void, are for an arbitrator, not the Court, to decide. *See Buckeye Check, supra,* at 446 (2006) (specifically rejecting the argument that 9 U.S.C. § 2 does not apply to arbitration provisions in purportedly void contracts); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010) (only challenges specific to the validity of the arbitration provision are decided by the court, other challenges to the contract as a whole are decided by the arbitrator). Petitioner's circular argument challenging the arbitration contract and delegation provision by claiming the Lease was void at inception under W. Va. Code § 37-1-2 does not meet the requirements of this precedent and the Trial Court's decision should be affirmed.

With regard to Petitioner's second allegation of error, he incorrectly states that, should the

Lease be found to be subject to W. Va. Code § 37-1-2, and should that be appropriately before the Trial Court and not the arbitrator, which is denied, it is void *ab initio.* It is well settled that this distinction is immaterial in reviewing an arbitration agreement or delegation provision under *Buckeye Check Cashing, supra,* and *Bayles, supra.* The challenge to the Lease as a whole is one for the arbitrator. To the extent the Court determines it should go beyond this inquiry and consider Petitioner's additional assignments of error related to the Lease as a whole, Petitioner's additional arguments fail.

This Court has found that a failure to follow the procedures for court approval under the specific statute at issue renders a transaction merely voidable, not void. *See French v. Pocahontas Coal & Coke Co.*, 87 W. Va. 226, 104 S.E. 554 (1920) (any failures under W. Va. Code § 37-1-2 would render a contract voidable only, and the purchaser could show the circumstances at the time of the sale justified the sale and the Court could then ratify and validate any defective sale). In addition, contrary to the argument of Petitioner, there is no indication that, in applying W. Va. Code § 37-1-2, a court will examine and analyze each provision of the subject contract separately, standing alone, so as to indicate there would be a separate review of the arbitration agreement and delegation clause. Rather, it refers to a petition showing "all of the estate, real and personal.... And all of the facts calculated to show the propriety of the sale, lease, mortgage or trust deed." W. Va. Code § 37-1-2. The statute itself, if it applies, goes to the propriety of certain real property transactions *as a whole.* Finally, as discussed above, if the arbitration agreement and delegation clause are removed from the container Lease to be examined separately, as required by the severability doctrine, then W. Va. Code § 37-1-2 ***does not by its own terms apply*** to those separate agreements and they are evaluated under general contract principles. As set forth above, under

general principles of agency and contract law, a Trustee (at common law or under the UTC) would not have to get court approval to enter into an arbitration agreement or delegation clause on behalf of the trust. As such, Petitioner's arguments with regard to W. Va. Code § 37-1-2 as relate separately and explicitly to the ability of the Trustee to enter into an arbitration agreement and delegation clause, fail and there was no error by the Trial Court.

Petitioner's third assignment of error likewise fails. Petitioner contends that his claimed disaffirmance after reaching majority is relevant as to the existence of the arbitration agreement. It is not. First, the Lease is not a contract with a minor and so the arbitration agreement contained therein is not a contract with a minor. It is a contract by a Trustee regarding trust property with Appellee's predecessors in interest. Second, to the extent the Court considers whether Petitioner's actions are relevant in a different context, such as to determining if a voidable contract was affirmed[4], the Petitioner has not disaffirmed the Lease. Rather, he affirmed it by filing a Complaint against the Trustee to obtain its benefits, namely what he referred to in his Complaint as "plaintiff's money." J.A. 9 at ¶ 23. The Amended Complaint cannot revive a claim for disaffirmance after those contentions were made and an Order entered regarding the same and Petitioner should be estopped from arguing differently. Finally, should the Court believe that disaffirmance is an issue with regard to the arbitration agreement contained in the Lease, significant additional evidence of the Petitioner's affirmance of the Lease and acceptance of benefits under the lease through the cashing of his royalty checks after the age of majority should be developed below and considered if this issue is of significance to the Court's decision and the matter should be remanded to develop

[4] Respondents contend such analysis is firmly within the scope of the arbitration agreement and should be determined by an arbitrator. Respondents also note that the Trial Court did not rule on this issue. *See* J.A. at 243-250.

this evidence. However, Respondents contend that 1) disaffirmance is not relevant to the issue of the arbitration agreement contained in the Lease signed by the Trustee for the trust; and 2) if the Court finds affirmance or disaffirmance relevant, then the Petitioner affirmed the Lease through the filing of the Complaint, and it cannot later be disaffirmed through the filing of the Amended Complaint.

Petitioner has also referenced arguments that Respondents made with regard to SWN's Motion to Dismiss the claims related to the SWN Contract on the merits which he erroneously conflates with the arbitration agreement discussion regarding the Lease. J.A. 115-124; 202-217. The arbitration issues under the Lease are separate and distinct from the SWN Contract. SWN moved to dismiss the claims against it for failure to state a claim upon which relief could be granted and, through that motion, there was a discussion of whether W. Va. Code § 37-1-2 applied and, if it did, whether it was permissive or mandatory or whether the UTC applies. Respondents contend that this analysis is not relevant to any decision regarding the arbitration agreement and the delegation clause under the standard set forth in *Buckeye Check Cashing, supra*, and *Bayles, supra*. All of these issues go to the merits of Petitioner's claims and the validity of the Lease as a whole. As such, they are to be decided by an arbitrator and not a court under the arbitration agreement. The Trial Court appropriately recognized this and found that the challenge to the Lease as a whole went to the arbitrator. J.A. 243-250.

Finally, Petitioner attempts to argue that it is plain error to proceed because the Order is void due to Chesapeake's bankruptcy stay. It undisputed that no one raised this issue below and so it is subject to the plain error doctrine. There was no plain error with regard to these Respondents because it is well settled that a case can proceed against a debtor's co-defendants

during a bankruptcy stay absent unique circumstances. Further, even if there were error, it did not impact substantial rights and did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings with regard to these Respondents. Therefore, even if there were error, the Court should exercise its discretion because there has been no fundamental miscarriage of justice.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents do not believe oral argument is necessary under West Virginia Rule of Appellate Procedure 18(a). The dispositive issues in this case have been authoritatively decided under state and federal arbitration standards. Respondents do not believe that oral argument will significantly aid the decisional process. Should the Court grant oral argument under West Virginia Rule of Appellate Procedure Rule 19 as requested by Petitioner, Respondents believe this case is appropriate for a memorandum decision on the issue of arbitration.

IV. ARGUMENT

A. Standard of Review

Respondents understand that the Court has determined that the Order in this case constitutes a final order and that this matter is ripe for appeal based on its refusal of Respondents' Motion to Dismiss the Appeal as stated in the entered Scheduling Order. As such, the standard of review is stated in *McGraw v. Am. Tobacco Co.*, 224 W. Va. 211; 681 S.E.2d 96 (2009). In Syllabus Pt. 4 of *McGraw*, the Court stated:

> 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.

Although the Trial Court did not order dismissal in this case, the same *de novo* standard of review is utilized for appellate review of an order granting a motion to dismiss. Syl. Pt. 1, *Bayles v. Evans*, 243 W. Va. 31, 842 S.E.2d 235 (2020). Below, the trial court has a limited inquiry, focusing on "only two questions: does a valid arbitration agreement exist? And do the claims at issue in the case fall within the scope of the arbitration agreement?" *Id.* at pp. 38-39; 242-43 (internal citations omitted). This Court has similarly confined its *de novo* review to those two issues when reviewing a motion to dismiss and compel arbitration. *Id.* at 39; 243.

B. There was no error in the Trial Court's finding that Petitioner did not sufficiently challenge the arbitration provisions under applicable legal standards and no error in finding that the arbitrator should determine their validity.[5]

As this Court stated in Syl Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010):

> 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 the plaintiff fall within the substantive scope of that arbitration agreement.

See also Bayles, supra, at Syl. Pt. 2 (citing Syl. Pt. 2, *TD Ameritrade, Inc., supra*); *Golden Eagle Res., II, L. L. C. v. Willow Run Energy,* L.L. C., 242 w. Va. 372, 836 S.E.2d 23 (W. Va. 2019) (same). In this case, the Trial Court did not err by applying the doctrine of severability that has repeatedly been confirmed by this Court and the United States Supreme Court and finding that, under the delegation provision of the arbitration agreement at issue here, any claim that the Lease

[5] Respondents note that they follow the Assignments of Error of Petitioner in the order listed in that section of the Brief. Petitioner's brief utilizes a different order and slightly different terminology in its headings within his Brief.

was void must be decided by an arbitrator. *See Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 446 (2006) (specifically rejecting the argument that 9 U.S.C. § 2 does not apply to arbitration provisions in purportedly void contracts); *Rent-A-Center, W., Inc. v. Jackson,* 561 U.S. 63 (2010) (only challenges specific to the validity of the arbitration provision are decided by the court; other challenges to the contract as a whole are decided by the arbitrator); *Bayles, supra,* at 25-34 (evaluating the claim that plaintiff as a nonsignatory should not be bound by an arbitration agreement in an investment contract, finding she was bound by estoppel theory because she sought to recover the assets from the contract and enforce her understanding of the contract, and finding that the remaining claims were challenges to the contracts as a whole, or intrinsically intertwined with the contracts, and so under the delegation clause and the doctrine of severability, those claims were referred to arbitration as well); *Rent-A-Center, Inc. v. Ellis*, 241 W. Va. 660, 827 S.E.2d 605 (2019) (holding that whether a contract violated a West Virginia statute related to workers' compensation claims and was therefore void *pro tanto* was itself a matter subject to arbitration under the arbitration clause of the allegedly void contract).

Respondents agree with Petitioner that *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 787 S.E.2d 650 (2016) is the seminal case on arbitration agreements generally, and further aver that *Bayles v. Evans*, 243 W. Va. 31; 842 S.E. 2d 235 (2020) squarely addresses the precise issues presented in this case regarding nonsignatories such as Petitioner and is determinative of the issues raised by Petitioner. *Schumacher Homes* acknowledges that a delegation clause within an arbitration agreement gives the power to decide the validity, revocability or enforceability of the arbitration agreement to the arbitrator. *See* Syl. Pt. 4, *Schumacher Homes.* It also acknowledges that, under 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." *Id.* at Syl. Pt. 2, in part. Likewise, a challenge to a delegation clause, or an arbitration agreement, must be explicit challenges to the enforceability of those clauses, as opposed to general challenges to the contract as a whole. *Id.* at Syl. Pts. 2 and 5. If an arbitration agreement or delegation clause is not separately challenged, it is presumed to be valid. *See Bayles, supra* at pp. 43-44; 247-48.

When there are express challenges to the arbitration clause or delegation provision, the trial court considers the same under general principles of state contract law. *Schumacher, supra,* at Syl. Pt. 2, in part (challenges to arbitration provisions); *Id.* at 5 (challenges to delegation clauses). The trial court considers any challenge directed at the validity revocability or enforceability of the delegation provision itself. *Id.* at Syl. Pts. 5-7. However, as the Trial Court found, in this case no such explicit challenges to the arbitration agreement or delegation clause are raised by Petitioner and so they are presumed valid. An arbitrator must determine both the validity of the arbitration agreement and the Lease.

The arbitration agreement and delegation clause at issue in this case is as follows:

> ARBITRATION. In the event of a disagreement between 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.

J.A. 80 (March 10, 2011 Lease, Deed Book 820, Page 256) (emphasis added). There has been no

challenge to the terms of this clause by Petitioner. Further, similar language in arbitration clauses have been upheld by West Virginia courts when direct challenges have been made to the same. *See Chevron U.S.A., Inc. v. Bonar*, 2018 W. Va. LEXIS 101; 2018 WL 87156, 2-3 (W. Va. Feb. 14, 2018) (memorandum decision) (compelling arbitration pursuant to the following lease arbitration clause: "[a]ny question concerning this lease or performance thereunder shall be ascertained and determined by three disinterested arbitrators.... The cost of such arbitration will be borne equally by the parties."); *SWN Prod. Co., LLC v. Long*, 240 W. Va. 1, 4, 807 S.E.2d 249, 254 (2017) (compelling arbitration pursuant to the following arbitration clause: "[i]n the event of a disagreement between Lessor and Lessee concerning this Lease, 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. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee.").

As discussed above, there is no inconsistent allegation, argument or assertion of error in any of Petitioner's filings with regard to the following facts: Trustee signed the Lease as Trustee and the Lease contains an arbitration agreement and a delegation provision. The Trustee assented to the arbitration agreement. There are no allegations of fraud, unconscionability or similar matters related to the signature of the arbitration provision, the delegation clause or the scope of the agreement. As a nonsignatory to the Lease and the beneficiary of the trust, the Petitioner is bound to the arbitration agreement and delegation provision (undisputedly agreed to by the Trustee) under estoppel, third-party beneficiary and principal-agent principles. *See e.g. Bayles v. Evans*, 243 W. Va. 31, 842 S.E.2d 235 (2020) (discussing the five traditional theories under which a signatory to an arbitration agreement can bind a nonsignatory and finding that estoppel applied to the

nonsignatory based on her seeking the benefit of the contract containing the arbitration agreement); Syl. Pt. 10, *Chesapeake Appalachia, L.L.C. v. Hickman,* 236 W.Va. 421, 781 S.E.2d 198 (2015) (holding that a nonsignatory can be bound to arbitrate under five traditional theories of contract and agency law: "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel"); *Harvey ex rel. Gladden v. Cumberland Trust & Inv. Co.*, 532 S.W. 3d 243, 274 (Tenn. 2017) (applying third-party beneficiary principles to an arbitration agreement signed by a Trustee). Petitioner filed his initial Complaint against Trustee seeking "plaintiff's money" paid under contracts entered into by Trustee for real property held in trust and that must be determined by reference to the Lease, and obtained default judgment on these claims. J.A. 112-13. He is also seeking to recover the real property interest leased by the Trustee that was the subject of the Lease, the rest of the Lease. J.A. 112.

None of these facts are specifically challenged by the Petitioner. Instead, the Petitioner's challenge is to the Lease as a whole. He claims that it is void because the real property transaction at issue was not approved by a Court under W. Va. § 37-1-2. Both below and in his brief, Petitioner argued that because he contends "the Chesapeake contract is invalid, all of it is invalid, including all of the arbitration verbiage." J.A. at 127. *See also* Petitioner Br. at pp. 14-15 ("[f]orgoing court approval amount to a legal hand grenade that destroyed all of the contracts in terms of legitimacy, but it certainly can be said to have destroyed the contracts by their individual, provisional, components too."). This is a challenge to the formation and validity of the Lease itself. The arbitration agreement explicitly includes "formation, execution, validity and performance of the Lease and Order of Payment," J.A. 80, and so Petitioner's claims fall squarely within the arbitration clause and delegation provision. Petitioner does not raise the scope of the arbitration clause or

delegation provision as an error in this case, instead he continues to aver that the Lease as a whole is void or disaffirmed.

This Court's recent case of *Bayles v. Evans* is squarely on point with the instant case. In *Bayles*, the Court determined that the nonsignatory plaintiff was bound by the arbitration agreement under the terms of estoppel because, *inter alia*, she sought a direct benefit of the agreement, their investment funds. *Id.* at p. 246, 42. The Court then examined her claim that the money could not have been moved into the account at issue without her consent, and that her consent was induced by misleading or fraudulent statements. *Id.* at p. 246, 42. Accordingly, she said, "any arbitration clause in that contract must be invalidated." *Id.* at p. 247, 43. The Court rejected this argument as violating "a basic rule of federal arbitration law: the doctrine of severability." *Id.* at p. 247, 43. The *Bayles* Court acknowledged, like the Trial Court in this case acknowledged, that this "doctrine requires a party resisting arbitration to exclusively challenge the enforceability of the arbitration clause, and not the overall contract...". *Id.* After discussing the holdings and in reliance on *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this Court held:

> 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 this case, Petitioner's arguments are almost identical to the arguments presented in *Bayles*. There, the plaintiff argued that absent alleged fraud, no contract would have been formed and so there would be no arbitration agreement. *Id.* Here, Petitioner argues that there is no contract because the Trustee did not seek court approval of the Lease of the trust property (a legal "hand grenade"), and so the contract was not formed and, without the contract, there is no arbitration agreement because the Lease was void. Like the claims at issue in the *Bayles* case, these are claims related to the Lease as a whole and fall within the scope of the arbitration agreement. As such, all such claims should be compelled to arbitration. *See Buckeye Check, supra* at 446 (2006) (holding that *Prima Paint* makes discussion of whether a contract is void or voidable under state law is irrelevant in determining enforceability of an arbitration agreement); *State ex rel. Williams v. Cramer*, 2021 W. Va. LEXIS 650 (Nov. 19, 2021) (memorandum decision) (a party challenging delegation provisions and arbitration agreements cannot challenge the entire contract, they must sever or separate the same and challenge the validity of each standing alone or the trial court is required to presume they are valid).

Petitioner's reliance on the case of *Parsons v. Halliburton Energy Servs.*, 237 W. Va. 138, 785 S. E. 2d 844 (2016) to the contrary is misplaced because in that case the challenge was to the arbitration agreement. In *Parsons*, the Court evaluated whether a party had *waived* a contractual right to arbitration by participating in litigation. *Id.* The Court expressly stated "[Parsons] does not challenge the enforceability of the arbitration agreement under West Virginia's general contract law." *Id.* at 849-50. Thus, *Parsons* did not consider whether courts or arbitrators determine the enforceability of an arbitration provision. More importantly, in *Parsons*, unlike in

this case, the challenge presented was specific to the arbitration provision only – whether the right to arbitrate had been waived. The plaintiff in *Parsons* did not argue that his employment contract at issue was invalid as a whole and the waiver argument was made specifically regarding arbitration. *Parsons* is inapplicable to this case as no direct challenge or allegation specific to the arbitration provision has been made. *Bayles*, not *Parsons*, controls. It is well settled that a challenge to the contract as a whole is insufficient to challenge the enforceability of an arbitration agreement or delegation provision within the contract itself. The arbitration agreement and delegation provision must be separately challenged and, in this case, they were not.

C. The trial Court did not err in failing to determine whether the implicated contracts were void *ab initio* for lack of court approval and any court approval would have been wholesale approval or rejection of each contract and not judicial consideration of the contract on a provision-by-provision basis, including the arbitration provision.

As discussed above, it is well settled that this distinction is immaterial in reviewing an arbitration agreement or delegation provision under *Buckeye Check Cashing, supra,* and *Bayles, supra*. *Buckeye Check Cashing* squarely and definitively addresses this issue in evaluating whether a court, rather than an arbitrator, should resolve a claim that a contract is "illegal and void *ab initio*." *Id.* at 443. The Court stated:

> It is true, as respondents assert, that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. ***Prima Paint* resolved this conundrum – and resolved it in favor of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.**

Id. at 448-49 (emphasis added). As discussed above, this Court has likewise routinely held that

challenges to a contract as a whole are not sufficient to defeat an arbitration agreement and delegation clause within the contract. The enforceability of the arbitration agreement and delegation clause must be separately challenged. They were not in this case. Each of the arguments and allegations of error related to the applicability of W. Va. Code § 37-1-2, whether it is void or voidable, and whether it is discretionary or mandatory go to the merits of the dispute and the Lease as a whole, not the arbitration agreement and delegation clause. Although briefed below, the same were briefed with regard to the SWN Contract by Respondents and are not relevant to the issue of the arbitration agreement and delegation clause or the Order issued by the Trial Court. J.A. 115-124; 202-217; 243-250. The Petitioner has conflated the arguments on the merits of the issues presented in the motion to dismiss the SWN Contract where the applicability of W. Va. Code § 37-1-2 was potentially relevant as it was the basis of the claim sought to be dismissed, but disputed, J.A. 202 at fn. 3, with the issues presented by the Motion to Compel Arbitration, which solely sought to compel arbitration. J.A. 111-114; 200-202. The analysis of the motion to compel arbitration begins and ends with the Petitioner's failure to challenge the enforceability of the arbitration clause and delegation provision separately from the Lease as a whole. The other alleged errors of Petitioner are red herrings with regard to this narrow and specific issue. Nevertheless, should the Court find these issues relevant, Respondents provide their response to the arguments of Petitioner.

Petitioner separately alleges that the Trial Court erred by failing to find that the Lease and other contracts were "void *ab initio* for lack of court approval" because, he asserts, the court approval process "would have not just involved a wholesale approval or rejection of each contract, but judicial consideration of the contract on a provision-by-provision basis, including respecting

the arbitration provisions." Petitioner Br. at p. 1. Contrary to the argument of Petitioner, there is no indication that, in applying W. Va. Code § 37-1-2, a court would examine and analyze each provision of the subject contract separately, standing alone, and reach a conclusion with regard to that provision. There is no indication that a separate analysis of arbitration terms and conditions or issues specific to arbitration and delegation would be considered apart from the container contract. Rather, W.Va. § 37-1-2 refers to a petition showing "all of the estate, real and personal.... And all of the facts calculated to show the propriety of the sale, lease, mortgage or trust deed." W. Va. Code § 37-1-2. The statute itself, if it applies, which is denied,[6] goes to the propriety of certain real property transactions *as a whole* and does not indicate a focus on the arbitration agreement and delegation clause as required under the severability doctrine.

Further, W. Va. Code § 37-1-2[7] is a statute related to certain real property transactions and does not address arbitration or delegation. W. Va. Code § 37-1-2 (discussing the lease, mortgage, trust deed or sale of any estate in trust, minor, committee of any insane person or convict); *see also Williams v. Skeen,* 184 W. Va. 509, 514; 401 S.E.2d 442, 447 (1990) (discussing when a committee for an incompetent must seek judicial approval for transactions and stating that the Court did "not

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[6] Petitioner states that Respondents do not seem to deny that all contracts at issue within the Amended Complaint fall squarely within the reach of W. Va. Code § 37-1-2, Petitioner Brief at p. 18. With regard to the issue of arbitration, Respondents aver that this is an issue for the arbitrator to decide and none of these issues were raised or briefed by Respondents with regard to the arbitration agreement. With regard to the claims not involving an arbitration agreement, each Defendant filed a motion to dismiss the same below based on a variety of arguments related to the merits of this claim and did not admit or concede that the statute would apply as a matter of law to the SWN Contract or the Lease. *See generally* J.A. 202-214; 207 at fn. 7; 212 at fn. 10.

[7] Although Respondents do not believe it is critical to the arbitration agreement and delegation clause review, given the focus of Petitioner's brief, it must be noted up front that the real property was held by a trust, which again does not appear to be disputed. It is not the property of a minor that is involved in the Lease; rather, it is property of a trust.

imply through this opinion that a committee must seek judicial approval of every transaction which it seeks to enter on behalf of an incompetent...").[8] Thus, when the arbitration and delegation clauses are severed from the "container contract" Lease and examined separately, as required by *Schumacher Homes*, W. Va. Code § 37-1-2, does not by its own terms apply to those separate agreements and does not invalidate the arbitration agreement between the Trustee and Respondents. Petitioner has not advanced any argument or cited any statute or precedent indicating that a Trustee is prohibited from entering into an arbitration agreement or delegation clause on behalf of a trust; instead, he relies solely on the above-cited statute related to real property transactions. Under general principles of contract law, a Trustee (at common law or under the UTC) would not have to get court approval to enter into an arbitration agreement or delegation clause on behalf of a trust. *See* W. Va. Code § 44-5A-3(w) ("[t]o compromise, adjust, arbitrate, sue on or defend, abandon or otherwise deal with and settle claims in favor of or against the estate or trust as the fiduciary considers advisable, and the fiduciary's decision is conclusive between the fiduciary and the beneficiaries of the estate or trust and the person against or for whom the claim is asserted, in the absence of fraud by those persons..."); 19 M.J. Trusts and Trustees § 91, fn. 1007 (trustees have the authority to agree to arbitration, citing *Leslie v. Brown,* 1 Pat. & H 216 (Va. 1855)).

Petitioner further, and incorrectly, states that should the Lease be found to be subject to W. Va. Code § 37-1-2 and should that be appropriately before the Trial Court and not the arbitrator, which is denied, it is void *ab initio.* Again, under *Buckeye Check Cashing, supra,* and *Bayles,*

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[8] Although not relevant to the arbitration issue presented in this appeal, Respondents discussed *Williams* below with regard to the SWN Contract below and asserted it was inapplicable because it did not directly involve the statute Petitioner relies on in this case and because the property at issue is trust property. J.A. 212-214.

supra, such a distinction between void and voidable is irrelevant. However, to the extent the Court finds this relevant, it has held that a failure to follow the process of court approval under the statute at issue renders a transaction merely voidable, not void. *See French v. Pocahontas Coal & Coke Co.*, 87 W. Va. 226, 104 S.E. 554 (1920) (when no notice was given to an infant of a process to sell the infant's realty, the Court found that any failures under this act would render a contract voidable only, and the purchaser could show the circumstances at the time of the sale justified the sale and the Court could then ratify and validate any defective sale); *Frantz v. Lester*, 82 W. Va. 328, 95 S.E. 945 (1918) (if there is a procedural irregularity, a court can ratify and confirm a sale under this section). It is again important to note that Respondents contend that it is within the scope of the arbitration agreement whether W. Va. Code § 37-1-2 applies to the formation of the Lease and any claims related to the Lease and, as such, it was not argued with regard to the Lease. *See e.g.* J.A. 212 at fn. 10. Respondents have not conceded that the same applies to either the Lease or the SWN Contract. *Id. See also* J.A. 207 fn. 7. *See generally* J.A. 105-124; 199-218.

Throughout their argument of the Petitioner regarding this assignment of error, he repeatedly refers to the "minor's estate" and protection of minors. Petitioner Br. at pp. 18-25. As set forth *supra*, this is a mischaracterization of the property at issue. The real property at issue was expressly placed in a trust, with a Trustee. *See* J.A. 7 at ¶ 6 ("The aforesaid Deed did not convey the plaintiff's property to the defendant individually but as "Trustee" for the plaintiff..."; *id.* at ¶ 7 (As Trustee, the defendant Louis Cottrell Jr., was to act in a fiduciary capacity and was to act in the best interest of [plaintiff]..."); J.A. 11-13 (Deed). The property is not the property of a minor, it is the property of a trust. Petitioner is a beneficiary of that trust, not the owner of the property

at issue.[9] The contract at issue in the Order and the motion to compel arbitration is the arbitration agreement and delegation clause in the Lease, not the Lease itself. *See* J.A. 243-250. Thus, *Conrad v. Crouch*, 68 W. Va. 378, 386; 69 S.E. 888, 891(1910) and *Haskell v. Sutton*, 53 W. Va. 206, 212-13; 44 S.E. 533, 535-36 (1903) are not controlling. Further, as discussed below, beneficiaries of trusts have protections set forth in the UTC and had protections under common law. However, this is not relevant to the limited issue presented here of the arbitration agreement containing a delegation that was undisputedly agreed to between the Trustee and Respondents' predecessors in interest. Petitioner is a nonsignatory to that agreement and is bound as a beneficiary of a trust and on the other principles discussed *supra*.

It is true that, with regard to the motion to dismiss the claims related to the SWN Contract, SWN argued, *inter alia*, that W. Va. Code § 37-1-2 is permissive and not mandatory. W. Va. § 37-1-2 ("... trustee ... **may**, for the purpose of obtaining such sale, lease, mortgage or trust deed, file a bill in equity ...") (emphasis added); *Pioneer Pipe, Inc. v. Swain,* 237 W.Va. 722, 791 S.E.2d 168 at Syl. Pt. 1, (2016) (stating that generally speaking the word "may" generally implies discretion). J.A. 120-121; J.A.207-211. However, the Order does not address these underlying arguments that go to the Lease as a whole and found that they were for an arbitrator to decide under the arbitration agreement and delegation clause. J.A. 249-250. Based on this and the limited record given the stage of proceedings below, this Court should not consider Petitioner's assignments of error or arguments with regard to the same. *See* J.A. 243-250. *See also* Syl. Pt. 4, *G Corp., Inc. v. MackJo, Inc.*, 195 W. Va. 752; 466 S.E.2d 820 (1995) ("This Court will not pass

[9] Respondents note that the Trial Court did enter an August 19, 2020 Order requiring the trust terminate and the real property be deeded to Petitioner. However, at all times relevant to the arbitration agreement, the property was held in trust.

on a nonjurisdictional question which has not been decided by the trial court in the first instance"((quoting Syl. Pt. 2, *Sands v. Security Trust Co.,* 143 W. Va. 522; 102 S.E. 2d 733 (1958)).

With regard to the arbitration agreement and delegation provision, as severed from the Lease, however, the Court does not need to determine whether or not W. Va. Code § 37-1-2 is mandatory because, by its own terms, it does not apply to arbitration agreements or delegation provisions. W. Va. Code § 37-1-2, in pertinent part, states:

> . . . [I]f the trustee of any estate, or any person interested in any estate in trust, think the interest of those for whom the estate is held will be promoted by a lease . . . such . . . trustee . . . may, for the purpose of obtaining such . . . lease . . ., file a bill in equity in the circuit court of the county in which the estate proposed to be leased . . . may be, stating plainly all of the estate, real and personal, belonging to such infant . . . or so held in trust, and all of the facts calculated to show the propriety of the . . . lease . . . .

Mandatory for certain transactions or not, no part of W. Va. Code § 37-1-2 references or applies to arbitration agreements or delegation provisions and, therefore, it is not mandatory for the same when severed from the container contract Lease.

D. The Trial Court did not err in failing to determine that the Petitioner voided the implicated contracts through disaffirmance upon reaching the age of majority.

Petitioner's argument regarding disaffirmance of a contract and the application of *Fitness, Fun, & Freedom, Inc. v. Perdue*, 2021 W. Va. LEXIS 67 (2021) (memorandum decision) is based on the false premise that the Lease is a contract between a minor and Respondents' predecessors in interest. The critical fact in *Fitness, Fun, supra* was that the arbitration agreement and waiver were signed by a minor, B.P., who forged his parent's signature. *Id.* at *8. The Court considered this a contract signed by a minor and, under West Virginia law, ***contracts with minors*** are voidable, not void, and can be affirmed or disaffirmed after majority. *Id.* at *7 (internal citations omitted)

(emphasis added).

As discussed *supra*, the Lease is the only contract at issue with regard to the arbitration provision and delegation clause. The Lease, and so the arbitration provision and delegation clause, is a contract between the Trustee, who was not a minor and has not disaffirmed the Lease, and Respondents. Petitioner is bound to the same as a nonsignatory as discussed above but, as a nonsignatory, he cannot disaffirm the Lease or the arbitration agreement. Therefore, Petitioner's contentions that he disaffirmed the Lease, or any of the contracts at issue below, after reaching majority are inapplicable and irrelevant in addition to being inaccurate. As discussed above, Petitioner sought the benefit of the Lease, "plaintiff's money," in his original Complaint and so estoppel applies. In addition, to the extent that the Court considers affirmance or disaffirmance of a nonsignatory relevant to the Lease, Respondents respectfully request that the matter be remanded on that issue only as, since entry of the Order, there is additional evidence related to Petitioner's affirmance of the contracts through acceptance of benefits under the Lease. Finally, there is another critical difference between the instant case and *Fitness, Fun, supra*; namely the Court found that the minor specifically challenged the arbitration independently from the contract as a whole. *Id.* at *4-5. There is no such finding by the trial court in this case and the Trial Court expressly found that the Petitioner did not challenge the arbitration agreement or delegation clause separately. Even if such an argument were relevant in this case, however, Petitioner has not unequivocally and plainly disaffirmed the Lease or any contract at issue. *Fitness Fun, supra* does not apply to these circumstances.

Although not a designated assignment of error or a factor considered in the Order, Petitioner has alleged that the UTC does not apply to the Lease. Respondents contend that this is

a outside the scope of the assigned errors and should not be considered. This was not an issue addressed in the Order and it goes to a challenge of the Lease as whole. As such, it falls squarely within the arbitration agreement and delegation provision. *See* J.A. 80 (stating "[a]rbitration 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."). As such, whether the UTC applies to the Lease and disputes set forth in the Amended Complaint or not should be determined by the arbitrator.

Should the Court determine that an analysis of the UTC application to the arbitration agreement is necessary, Respondents aver it applies as it is undisputed that the Deed created a trust. While it is true that the UTC has an effective date of July 1, 2011, W. Va. Code § 44D-11-1105 states:

> (a) Except as otherwise provided in this chapter:
> (1) **This chapter applies to all trusts created before, on, or after July 1, 2011**;
> (2) **This chapter applies to all judicial proceedings concerning trusts commenced on or after July 1, 2011**;
> (3) This chapter applies to judicial proceedings concerning trusts commenced before July 1, 2011, unless the court finds that application of a particular provision of this chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this chapter does not apply and the superseded law applies;
> (4) **Any rule of construction or presumption provided in this chapter applies to trust instruments executed before July 1, 2011, unless there is a clear indication of a contrary intent in the terms of the trust instrument**; and
> (5) An act done before July 1, 2011 is not affected by this chapter.
> (b) If a right is acquired or vested before July 1, 2011, or if a right is extinguished or barred upon the expiration of a prescribed period that has commenced to run under any other statute before July 1, 2011, that right or statute continues to apply even if the statute has been repealed or superseded.

(emphasis added). Thus, the UTC applies to the Trust and so the arbitration agreement.[10]

Respondents agree that the Lease containing the arbitration agreement was executed on or about March 10, 2011; however, that does not affect the analysis of the arbitration agreement under the UTC. First, again, W. Va. Code § 37-1-2 does not apply to arbitration agreements. As such, even if W. Va. Code § 37-1-2 arguably applied and created some sort of accrued or vested rights with regard to real estate transactions (which is denied), it does not create an accrued right with regard to arbitration agreements. As the arbitration agreement must be evaluated separately from the container contract of the Lease, Petitioner's arguments with regard to accrued or vested rights are inapplicable with regard to the motion to compel arbitration. Further, far from leaving beneficiaries vulnerable and without judicial oversight as Petitioner states, the UTC provides significant protections to beneficiaries of trusts and imposes significant fiduciary duties on trustees. *See* W. Va. Code § 44D-8-802 (trustee has a duty of loyalty to the beneficiaries of a trust); W. Va. Code 44D-8-804 (trustee duty of prudent administration); W. Va. Code § 44D-8-810 (trustee duty to keep adequate records and keep trust property separate from trustee's property); W. Va. Code § 44D-8-813 (duty to inform and report to beneficiaries); W. Va. Code §§ 44D-10-1001 through 1003 (remedies and damages for trustee violations or breaches of trustee duties); *see also* J.A. 123-124 (discussing trustee liability under the UTC). Whether this comprehensive and specific statutory scheme controls under the circumstances of this case, however, is a matter for the arbitrator to determine.

Petitioner's arguments fail to acknowledge and separate the arbitration agreement from the

[10] Respondents join in the arguments of Appalachian Midstream Services, L.L.C. with regard to issues not involving arbitration and not addressed by the Order, including the application of the UTC to the contracts, should the Court reach those issues. SWN joins in those arguments with regard to the SWN Contract.

Lease in his arguments. He further fails to recognize these comprehensive and crucial protections that the Legislature put in place for trusts and instead focuses on the fact that the beneficiary of the trust was a minor. As noted above in the discussion of disaffirmance, this arbitration agreement is not between a minor and Respondents. It is between a trust (through a trustee) and Respondents (through their predecessors in interest) and trustees have the authority as a fiduciary to bind the trust to arbitration. The effective date of the UTC has nothing to do with this analysis as the principle was the same prior to the passage of the UTC. *See* W. Va. Code § 44-5A-3(w); 19 M.J. Trusts and Trustees § 91, fn. 1007 (trustees have the authority to agree to arbitration, citing *Leslie v. Brown,* 1 Pat. & H 216 (Va. 1855)). Further, Petitioner filed these judicial proceedings and they commenced after July 1, 2011. J.A. 6 (Complaint filed June 27, 2019); J.A. 32 (Amended Complaint filed February 4, 2020). Finally, under the UTC, a trustee has the authority to represent and bind a beneficiary and a parent has the authority to represent and bind a child. *See* W. Va. Code § 44D-3-303(3) and (5). As such, the UTC applies to the claims set forth in the Amended Complaint.

Petitioner's Brief makes a number of arguments related to the UTC and W. Va. Code § 37-1-2 that are simply inapplicable given the issues presented with regard to the motion to compel arbitration under *Buckeye Check Cashing, supra*, and *Bayles, supra*. Each of Petitioner's arguments hinges on his claim that a court must give approval for a real estate transaction involving a minor's property under W. Va. Code § 37-1-2 and that if no such approval is obtained the entire contract, including the arbitration agreement, is void. Each and every one of the points raised with regard to the UTC and W. Va. Code § 37-1-2 go to the Lease as a whole and not to the issue of the arbitration agreement and delegation clause. They are irrelevant to the issue of the arbitration agreement as

severed from the Lease and, as the Trial Court correctly found, these are issues are for the arbitrator to decide. There was no error, the motion to compel was appropriately granted and the Order should be affirmed.

E. The Trial Court's Order is not void or without legal effect with regard to Respondents because the automatic stay did not extend to Respondents and there was no plain error.

Petitioner argues that the Order and all actions taken by the Trial Court after June 28, 2020 (the date Chesapeake Energy filed for bankruptcy) are null and void as violative of the automatic stay. Pet. Br. at p. 32. Even *if* there were an error with regard to entry of the Order as it pertains to Chesapeake Appalachia, LLC ("Chesapeake"), there is no error with regard to the entry of the Order as relates to the remaining Respondents as co-defendants. The bankruptcy stay applies to the claims arising against Chesapeake, ***not*** the remaining co-defendants absent unusual circumstances such as absolute indemnity by the debtor. *See Lone Wolfe Natural Res. Servs. v. Johnson,* 555 B. R. 537, 540-41 (S.D. W. Va. 2016)(memorandum opinion) (recognizing that the automatic stay only applies to the debtor, not co-defendants, unless a narrow exception in cases involving "unusual circumstances" such as "when there is such identity between the debtor and the third-party defendant that the debtor and the third-party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor") (internal citations omitted); *Doyle v. Fleetwood Homes of Va., Inc.*, 2009 U.S. Dist. LEXIS 37297, *3-5 (S.D. W. Va. 2009) (memorandum decision)(noting that "[a]s a general rule, the automatic stay imposed by § 362(a)(1) applies only to the debtor in bankruptcy, and not to the debtor's solvent co-defendants in a pending civil action" absent a "narrow exception" for "unusual circumstances" such as identify between the debtor and third-party defendant or absolute indemnity); *In re 3901*

Foods, LLC, 2009 Bankr. LEXIS 2872, *2-3 (E.D. N.C. 2009) ("[i]t is well established that the automatic stay does not extend to a debtor's non-bankrupt co-defendants 'even if they are in a similar legal or factual nexus with the debtor.'") (internal citations omitted). Here, although the Lease with the arbitration agreement and delegation clause originated between Chesapeake and Trustee, any claims against Respondents arising from the Lease would occur after the transfer of the Lease interest from Chesapeake to Respondents. The Trial Court acknowledged the suggestion of bankruptcy filed by Chesapeake in footnote 1 of the Order and, through that footnote, acknowledged that the claims were proceeding against the co-Defendants. J.A. 243. Petitioner recognized this in his notice of appeal and brief. Petitioner Br. at p. 5. As the automatic stay did ***not*** extend to Chesapeake's co-defendants, at a minimum, the Order was ***not*** null and void as to Respondents and there is no reason to remand this matter to the Trial Court to rule on the Motion to Dismiss and Compel Arbitration anew.

Even ***if*** the Trial Court's entry of the Order was in error, it must be noted that Petitioner did not seek to alter and amend the Order pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure based upon the automatic stay. As such, Petitioner's assignment of error based upon violation of the automatic is foreclosed from appellate review unless it rises to the level of plain error. This Court addressed the plain error doctrine in *Miller v. Fountainhead Homeowners Ass'n*, 2021 W. Va. LEXIS 552, *7 (2021) (memorandum decision) and noted that:

> [t]o trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Petitioners cannot meet this standard because they fail to demonstrate that the court's lone comment affected a substantial right or the fairness, integrity, or public reputation of the judicial proceeding....

As noted in *Rogers v. Ames*, 2020 W. Va. LEXIS 779 (2020) (memorandum decision), when evaluating the third *Miller* factor, it must be shown that there was an actual effect on the decisional process. *Id.* at 17-18. If the other three factors are found, evaluation of the fourth *Miller* is made on "a case-by-case exercise of discretion" and the inquiry is as follows:

> Once a defendant has established the first three requirements of *Miller*, we have the authority to correct the error, but we are not required to do so unless a fundamental miscarriage of justice has occurred. Otherwise, we will not reverse unless, in our discretion, we find the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Id. at 18 (internal citations omitted).

Assuming *arguendo* that the Order satisfies the first and second factors, it does not meet the third and fourth *Miller* factors. As discussed in *Rogers, supra,* the plain error must affect substantial rights and seriously affect the fairness, integrity, or public reputation of the judicial proceedings. As in *Rogers*, neither of these elements are met in this case. Petitioner cannot demonstrate that there was an actual effect on his rights as a result of entry of the Order after the automatic stay went into effect as to Chesapeake and only Chesapeake.

Further, Petitioner cannot satisfy the fourth *Miller* factor. Entry of the Order after the bankruptcy stay was in place did not, in this case, seriously affect the fairness, integrity, or public reputation of these judicial proceedings as any argument that the Trial Court's Order violated the automatic stay imposed by 11 U.S.C. §362 has effectively been mooted. On January 16, 2021, the Bankruptcy Court entered an order confirming Chesapeake's Chapter 11 Plan of Reorganization (In re: Chesapeake Corporation *et al.* Case No. 20-33233 (Bankr. S.D.Tx.)(Docket No. 2915). Upon confirmation of Chesapeake's Plan, the automatic stay under 11 U.S.C. §362 dissolved and was replaced by the injunction provisions in Article VIII(f) of the Plan. Thus not only is there no

present violation of the automatic stay, but Chesapeake is afforded all of the rights and protections created under the Confirmation Order and the Plan's injunction. Chesapeake is entitled to these protections regardless of whether the underlying claims presented in this matter are adjudicated in this civil action or in an arbitration proceeding. Pragmatically, Chesapeake should be dismissed from the civil action with the remaining parties bound to the Trial Court's Order to arbitrate. This Court could do so *sua sponte* based upon the Confirmation order and the Plan injunction. Otherwise, the expectation is that any remand on this issue would create the same result through dismissal of Chesapeake and issuance of the same Order without Chesapeake's presence or inclusion.

For these reasons, even ***if*** this Court finds that the first three *Miller* factors are present, it should find, as it did in *Rogers*, that there was no fundamental miscarriage of justice that seriously affected the fairness, integrity, or public reputation of judicial proceedings warranting remand to the Trial Court.

V. CONCLUSION

Petitioner contends that this case presents unique issues that would allow for a deviation from well settled arbitration principles of severability. It does not. This case is identical in all material respects to the recently decided case of *Bayles v. Evans*, where a nonsignatory was bound to an arbitration agreement with a delegation clause in a purportedly void contract. Petitioner's arguments related to contracts of a minor are inapposite as the contract at issue in this case was not signed by a minor. The arbitration agreement and delegation provision, contained in the Lease, was agreed to and signed by the Trustee acting on behalf of a trust. Respondents respectfully request that the Court affirm the Trial Court's Order compelling arbitration and for such further

relief as this Court deems proper and just.

SWN PRODUCTION COMPANY, LLC and STATOIL USA ONSHORE PROPERTIES INC. N/K/A EQUINOR USA ONSHORE PROPERTIES INC.

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

MASON LOUIS COTTERLL,

Plaintiff Below/Petitioner,

v.

LOUIS COTTRELL, JR.,
CHESAPEAKE APPALACHIA, LLC,
SWN PRODUCTION COMPANY, LLC,
JAMESTOWN RESOURCES, LLC,
APPALACHIA MIDSTREAM SERVICES, LLC,
And STATOIL USA ONSHORE PROPERTIES, INC.,
n/k/a Equinor USA Onshore Properties, Inc.,

(On Appeal from Civil Action No. 19-C-159 Circuit Court of Kanawha County, West Virginia)

Defendants below/Respondents.

CERTIFICATE OF SERVICE

I, Valerie H. Raupp, hereby affirm that on this date, February 17, 2022, I caused the foregoing **BRIEF OF RESPONDENTS SWN PRODUCTION COMPANY, LLC AND STATOIL USA ONSHORE PROPERTIES, INC. N/KA EQUINOR USA ONSHORE PROPERTIES, INC.** to be served on the following attorneys by depositing a true and accurate copy of the same in the regular United States Mail, first class, postage prepaid, as follows:

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