In the Intermediate Court of Appeals of West Virginia

Docket No. 23-69

KAPITUS SERVICING, INC. *formerly known as* **COLONIAL FUNDING NETWORK, INC.,** *as authorized servicing agent for First US Funding*,

Plaintiff* / *Petitioner,

v.

TUCKER COUNTY CIRCUIT COURT
BUSINESS DIVISION
CIVIL ACTION NO. 22-C-4
PRESIDING: JUDGE LORENSEN

TIMBERLINE FOUR SEASONS UTILITIES INC. AND CANAAN VALLEY PUBLIC SERVICE DISTRICT, individually, and in its capacity as RECEIVER OF TIMBERLINE FOUR SEASONS UTILITIES INC.,

Defendants* / *Respondents.

PETITIONER'S BRIEF

Ancil G. Ramey (W. Va. Bar No. 3013)
Sarah C. Ellis (W. Va. Bar No. 10434)
Benjamin McFarland (W. Va. Bar No. 9991)
Colton C. Parsons (W. Va. Bar No. 13243)
Steptoe & Johnson PLLC
707 Virginia Street East
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8000
ancil.ramey@steptoe-johnson.com
sarah.ellis@steptoe-johnson.com
benjamin.mcfarland@steptoe-johnson.com
colton.parsons@steptoe-johnson.com

I. ASSIGNMENT OF ERROR 1

II. STATEMENT OF THE CASE 1

III. SUMMARY OF THE ARGUMENT 6

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 7

V. ARGUMENT 7

A. Standards of Decision and Review. 7

B. The Circuit Court erred by failing to afford *res judicata* to the Bankruptcy Court's Orders. 8

1. The Circuit Court's refusal to afford preclusive effect to the Bankruptcy Court's Orders violated West Virginia law. 8

2. The instant civil action is precisely the problem that *res judicata* was created to prevent. 11

C. Even if the Bankruptcy Court's Orders were not entitled to claim preclusion, the Circuit Court erred by failing to afford issue preclusion to the factual findings and legal conclusions contained therein, issues fatal to Timberline Utilities' defense. 14

D. To the extent that it so held, the Circuit Court erred by holding that Timberline Utilities' strategic dismissal of its bankruptcy proceedings somehow invalidated the Bankruptcy Court's Orders or stripped them of their preclusive effect. 16

E. Although it would be wholly improper to even *ask* whose application of *Lockard* was better reasoned (just like it was improper for the Circuit Court to re-conduct the *Lockard* analysis at all), were this Court to do so, the Circuit Court's application was clearly erroneous. 18

F. Kapitus did not waive its right to argue that *res judicata* applied to the Bankruptcy Court's Order by electing not to participate in the PSC proceeding. 22

VI. CONCLUSION 23

CASES

Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.,
812 F.2d 898 (4th Cir. 1987) 20

Astoria Fed. Sav. & Loan Ass'n v. Solimino,
501 U.S. 104 (1991) 12

Bison Ints., LLC v. Antero Res. Corp.,
244 W. Va. 391, 854 S.E.2d 211 (2020) 10, 11

Blake v. Charleston Area Med. Ctr., Inc.,
201 W. Va. 469, 498 S.E.2d 41 (1997) 8

City of S. Charleston v. W. Va. Pub. Serv. Comm'n,
204 W. Va. 566, 514 S.E.2d 622 (1999) 20

Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.,
239 W. Va. 549, 803 S.E.2d 519 (2017) 9

Duvall v. Attorney Gen. of the United States,
436 F.3d 382 (3rd Cir. 2006) 12

EDP Med. Computer Sys., Inc. v. United States,
480 F.3d 621 (2d Cir. 2007) 9

Edwards v. Stark,
247 W. Va. 415, 880 S.E.2d 881 (2022) 8

Ewing v. Bd. of Educ.,
202 W. Va. 228, 503 S.E.2d 541 (1998) 7

In re BSL Operating Corp.,
57 B.R. 945 (Bankr. S.D.N.Y. 1986) 16

In re Eads,
417 B.R. 728 (Bankr. E.D. Tex. 2009) 9

In re National Med. Imaging, LLC,
439 B.R. 837 (Bankr. E.D. Pa. 2009) 12

In re Scarborough,
2015 WL 5672628 (D. Del. 2015) 16

John W. Lodge Distribution Co. v. Texaco,
161 W. Va. 603, 245 S.E.2d 157 (1978) 7

Lockard v. City of Salem,
127 W. Va. 237, 32 S.E.2d 568 (1944) ..... passim

Matter of Baudoin,
981 F.2d 736 (5th Cir. 1993) 9

Matter of Chappell,
984 F.2d 775 (7th Cir. 1993) 9

Murphy v. Smallridge,
196 W. Va. 35, 468 S.E.2d 167 (1996) 7

Poonja v. Alleghany Props.,
278 F.3d 890 (9th Cir. 2002) 9

Sampson v. Chase Home Fin.,
667 F. Supp. 2d 692 (S.D. W. Va. 2009) 9, 12, 18

Sartin v. Macik,
535 F.3d 284 (4th Cir. 2008) 12

Sayre's Adm'r v. Haprold,
33 W. Va. 553, 11 S.E. 16 (1890) 10

Siegel v. Fed. Home Loan Mortgage Corp.,
143 F.3d 525 (9th Cir. 1998) 9, 12

State ex rel. McGraw v. Scott Runyan Pontiac-Buick,
194 W. Va. 770, 461 S.E.2d 516 (1995) 8

State v. Miller,
194 W. Va. 3, 459 S.E.2d 114 (1995) 14, 15

United Fuel Gas Co. v. Pub. Serv. Comm'n of W. Va.,
154 W. Va. 221, 174 S.E. 2d 304 (1969) 20

United States v. Standard State Bank,
91 B.R. 874 (W.D. Mo. 1988),
aff'd 905 F.2d 185 (8th Cir. 1990) 17

United States v. Whyte,
918 F.3d 339 (4th Cir. 2019) 22

White v. SWCC,
164 W. Va. 284, 289, 262 S.E.2d 752, 756 (1980) 12

STATUTES

11 U.S.C. § 349(b) 17

11 U.S.C. § 522(i)(1) 17

11 U.S.C. § 542 17

11 U.S.C. § 550 17

11 U.S.C. § 553 17

W. VA. CODE § 24-2-12 ..... 19, 20, 22

RULES

W. VA. R. APP. P. 19 7

W. VA. R. APP. P. 21 7

W. VA. R. CIV. P. 8(c) 22

I. ASSIGNMENT OF ERROR

1. The Circuit Court erred by failing to afford *res judicata* to the Bankruptcy Court's Orders.

2. Even if the Bankruptcy Court's Orders were not entitled to claim preclusion, the Circuit Court erred by failing to afford issue preclusion to the factual findings and legal conclusions contained therein, issues fatal to Timberline Utilities' defense.

3. To the extent that it so held, the Circuit Court erred by holding that Timberline Utilities' strategic dismissal of its bankruptcy proceedings somehow invalidated the Bankruptcy Court's Orders or stripped them of their preclusive effect.

4. Although it would be wholly improper to even *ask* whose application of *Lockard* was better reasoned (just like it was improper for the Circuit Court to re-conduct the *Lockard* analysis at all), were this Court to do so, the Circuit Court's application was clearly erroneous.

5. Kapitus did not waive its right to argue that *res judicata* applied to the Bankruptcy Court's Order by electing not to participate in the PSC proceeding.

II. STATEMENT OF THE CASE

Kapitus Servicing, Inc. (formerly known as Colonial Funding Network, Inc.) ("Kapitus"), in its capacity as Authorized Servicing Agent for First US Funding, brought suit in the Circuit Court of Tucker County against Respondents, Timberline Four Seasons Utilities Inc. ("Timberline Utilities") and Canaan Valley Public Service District (individually, and in its capacity as receiver of Timberline Utilities) ("CVPSD"), based on contractual obligations under the Revenue Based Factoring ("RBF/ACH") Agreement and Security Agreement and Personal Guaranty ("Agreement") between Kapitus, Timberline Utilities, and Timberline Four Seasons Resort Management Company, Inc.[1]

---

[1] *See generally* Kapitus Servicing, Inc.'s Verified Compl., JA12–135 ("Ver. Compl.").

Timberline Utilities (among others) had voluntarily entered the Agreement with Kapitus on April 28, 2017, in order to induce Kapitus to advance $130,000 to Timberline Utilities and its affiliates.[2] In exchange, Timberline Utilities promised Kapitus Timberline Utilities' "future receipts, accounts, contract rights and other obligations arising from or relating to the payment of monies" from Timberline Utilities' "customers' and/or third-party payors"[3] (the "Purchased Receivables").

Timberline Utilities also made the following material representations and warranties—representations that Kapitus later learned were materially false:

1. That Timberline Utilities was in good financial condition and not insolvent.

2. That Timberline Utilities obtained all necessary governmental approvals to enter the Agreement.

3. That Timberline Utilities was authorized to enter the Agreement.

4. That Timberline Utilities would not enter into any other purchase or security agreement related to the Purchased Receivables.

5. That Timberline Utilities had good and marketable title to all Purchased Receivables, free and clear of all liabilities and liens.

Id. at ¶ 15, JA18–19.

On or about May 1, 2017, Kapitus fulfilled its obligations under the Agreement by advancing the purchase price to Timberline Utilities (less certain fees).[4] Initially, Timberline Utilities made payments under the Agreement. From on or about May 2 through June 28, 2017,

---

2 Ver. Compl. ¶¶ 12–13, JA17–18.

3 Ver. Compl. ¶ 13, JA18.

4 Ver. Compl. ¶ 18, JA20.

Timberline Utilities made total payments to Kapitus of $42,794.[5] However, Timberline Utilities ceased making payments at the end of June 2017, thereby breaching the Agreement.[6]

Due at least in part to fraudulent conduct and mismanagement, Timberline Utilities then filed for bankruptcy.[7] Kapitus filed a Proof of Claim (on June 11, 2021) and an Amended Proof of Claim (on August 2, 2021) (collectively the "Proof of Claim") in Timberline Utilities' bankruptcy case.[8] Timberline Utilities objected to Kapitus' Proof of Claim, and the parties engaged in significant and substantive briefing on the Proof of Claim's merits.[9]

The United States Bankruptcy Court for the Northern District of West Virginia ("Bankruptcy Court") ultimately ruled in Kapitus's favor, holding that the Proof of Claim was valid and secured.[10] Specifically, the Bankruptcy Court further ordered that the Agreement is enforceable and that Kapitus has a security interest in Timberline Utilities' accounts receivable.[11] Finally, the Bankruptcy Court made the following factual findings and conclusions of law:

1. Timberline Utilities may not gain the benefit of an Agreement while simultaneously voiding its obligations under that same Agreement.

2. The Agreement was in the public interest.

3. The Agreement was voidable at Kapitus's discretion and may be enforced.

4. Kapitus had a valid security interest in the accounts receivable of Timberline Utilities.

---

5 Ver. Compl. ¶ 19, JA20.

6 Ver. Compl. ¶¶ 19–21, JA20–21.

7 Ver. Compl. ¶ 42, JA27.

8 Ver. Compl. ¶ 43, JA27.

9 Ver. Compl. ¶ 43, JA27.

10 Ver. Compl. ¶ 52, JA30.

11 Ver. Compl. ¶ 49, JA28.

5. Voiding the Agreement would grant an inequitable financial windfall to Timberline Utilities (and now, CVPSD).

See id. at ¶¶ 49–50, JA28–29.

While Timberline Utilities' bankruptcy case was pending, the West Virginia Public Service Commission ("PSC") nominally—but orchestrated by counsel for Timberline Utilities[12]—moved the Bankruptcy Court to lift the stay so that the PSC could "investigate" the Agreement.[13] The Bankruptcy Court granted the PSC's motion,[14] but during the December 15, 2021 hearing on the PSC's motion, the Bankruptcy Court held that Kapitus's claim against Timberline Utilities is valid and enforceable *regardless of the PSC's investigation into the validity of the Agreement* and that the Bankruptcy Court's Orders were final and enforceable.[15] There is, therefore, *no question* that the Bankruptcy Court intended Kapitus's claim against Timberline Utilities to be valid, its Orders final, and both enforceable.[16]

In an effort to disappear the Bankruptcy Court's holdings, Timberline Utilities repeatedly moved the Bankruptcy Court to reconsider its decision.[17] But those attempts were unsuccessful.[18]

---

[12] Martin Sheehan, counsel for Timberline Utilities, also represented the Receiver, Canaan Valley Public Service District ("CVPSD"), which stood to personally gain from rendering the Agreement void. *See infra* note 18.

[13] Ver. Compl. ¶ 51, JA29.

[14] Ver. Compl. ¶ 52, JA30.

[15] Ver. Compl. ¶¶ 52–53, JA30. ECF No. 114, Case No. 2:21-bk-00125; Bankruptcy Court's December 15, 2021, Audio Tr., at 40:25—41:18. All references to the United States Courts' Case Management/Electronic Case Files numbers herein ("ECF No.") are to Case No. 2:21-bk-00125.

[16] In fact, as noted below, Respondents concede that the Bankruptcy Court's Orders were a final adjudication in previous briefing. (*See infra* at 9 n.33.)

[17] Ver. Compl. ¶ 54, JA30.

[18] CVPSD, the Receiver, also stood to reap a windfall upon the denial of Kapitus's claim since it would take the business free and clear of the Agreement without any consideration. With this in mind,

With the Bankruptcy Court's denials, Timberline Utilities dismissed its bankruptcy case, believing that the dismissal would "undo" the Bankruptcy Court's Orders.[19] As demonstrated below, however, the dismissal failed to effect the Bankruptcy Court's Orders.

On March 7, 2022, with a valid Proof of Claim and the Bankruptcy Court's favorable Orders enforcing the Agreement, Kapitus filed suit in the Circuit Court of Tucker County seeking damages of $325,784.16.[20]

After Kapitus filed the instant case, the PSC concluded its investigation of the Agreement and, on April 10, 2022, entered its order discussing its investigation and purportedly voiding Kapitus's Agreement with Timberline Utilities (the "PSC order").[21] As noted, however, the Bankruptcy Court had already stated unequivocally that the Agreement is in the public interest and enforceable, *regardless of the PSC's investigation*.[22]

Believing itself to be armed with the (legally impotent) PSC order, Timberline Utilities filed a motion to dismiss Kapitus's Verified Complaint, arguing that the Agreement is not enforceable pursuant to the PSC order—*i.e.*, exactly what the Bankruptcy Court had already rejected and decided against.[23] On December 20, 2022, despite Kapitus's opposition and the clear applicability of *res judicata* to the Bankruptcy Court's Orders, the Circuit Court

---

Timberline Utilities and CVPSD orchestrated the PSC investigation in an effort to dispose of Kapitus's valid and enforceable claim.

19 *Id.*

20 *See generally* Kapitus Servicing, Inc.'s Verified Compl., JA12–135.

21 *See* Defs.' Mot. to Dismiss & Mem. of Law in Supp., JA140–141 (discussing and attaching Recommended Decision of the Public Service Commission as Ex. 1, JA151–162).

22 ECF No. 114; Bankruptcy Court's December 15, 2021, Audio Tr., at 40:25—41:18.

23 *See generally id.*, JA136–194.

erroneously granted Timberline Utilities' Motion to Dismiss as to Count I of the Verified Complaint, Kapitus's breach of contract claim against Timberline Utilities.[24]

By dismissing Kapitus's breach of contract claim, the Circuit Court erred as a matter of law and committed reversible error. Kapitus timely filed its Notice of Appeal seeking reversal of the erroneous December 20, 2022, order.[25]

III. SUMMARY OF THE ARGUMENT

The Tucker County Circuit Court erred as a matter of law by granting in part Timberline Utilities' Motion to Dismiss, practically ignoring the Bankruptcy Court's clear and unequivocal prior holding that the Agreement between Kapitus and Timberline Utilities is valid and enforceable—regardless of the outcome of the PSC's "investigation." Both Kapitus and Timberline Utilities thoroughly briefed and argued before the Bankruptcy Court the precise issue of whether their Agreement was valid and enforceable. After reviewing the briefings and conducting a hearing, the Bankruptcy Court explicitly held that the Agreement is valid and enforceable, irrespective of any PSC findings. And that holding was incorporated in the Bankruptcy Court's final Order. The Tucker County Circuit Court erroneously failed to apply the Bankruptcy Court's clear directive and improperly provided Timberline Utilities with an illicit opportunity to relitigate a final decision on the merits of the action. Kapitus therefore seeks reversal of the Circuit Court's decision and requests this Court to hold that the Bankruptcy Court's Orders are entitled to *res judicata* and remand the case for conformity with such holding.

---

[24] *See* Entered Order Granting in Part, and Denying in Part, Defs.' Mot. to Dismiss, JA1–10 ("Cir. Ct. Order").

[25] *See* Notice of Appeal, JA473–498.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal presents an issue proper for oral argument under W. VA. R. APP. P. 19. The Circuit Court committed reversible error by failing to apply the Bankruptcy Court's Orders. Instead, the Circuit Court impermissibly relitigated the issue of whether the Agreement is valid and enforceable, leading it to dismiss Count I of Kapitus's Verified Complaint. A Memorandum Decision is also appropriate for resolution of this appeal.[26] While Kapitus requests reversal of the lower court's partial dismissal, the judicial doctrine of *res judicata* is straightforward, and its application in the instant action is clear. The reasons for reversal, are thus, explainable with a "concise statement."[27]

V. ARGUMENT

A. Standards of Decision and Review.

Kapitus appeals the Circuit Court's dismissal of Count I of its Verified Complaint. In a lower court's analysis of a motion to dismiss, "the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true."[28] A motion to dismiss should only be granted where it is clear that "no relief could be granted under any set of facts that could be proved consistent with the allegations."[29] "For this reason, motions to dismiss are viewed with disfavor," and this Court has "counsel[ed] lower courts to rarely grant such motions."[30]

---

26 W. VA. R. APP. P. 21.

27 *Id.*

28 *John W. Lodge Distribution Co. v. Texaco*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978).

29 *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996) (internal quote marks and citations omitted).

30 *Ewing v. Bd. of Educ.*, 202 W. Va. 228, 235, 503 S.E.2d 541, 548 (1998).

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*."[31] The same standard governing lower court review governs appellate review: *i.e.*, an appellate court must consider all facts in the light most favorable to the plaintiff and "not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief."[32]

B. The Circuit Court erred by failing to afford *res judicata* to the Bankruptcy Court's Orders.

1. The Circuit Court's refusal to afford preclusive effect to the Bankruptcy Court's Orders violated West Virginia law.

Although the parties extensively briefed and argued the point, the Circuit Court's order granting in part Defendants' motion to dismiss does not even *mention res judicata*. *A fortiori*, it failed to apply *res judicata* to the Bankruptcy Court's Orders. But the Bankruptcy Court's Orders had the full force and effect of the law, so they barred any further litigation on the issue of the validity of Kapitus's Proof of Claim—including the validity of the contract underlying Kapitus's Proof of Claim (or any other issue that might have been raised at the same time).

Under West Virginia law, *res judicata* applies when three conditions are met:

> First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Syl. pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

---

[31] Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516 (1995).

[32] *Edwards v. Stark*, 247 W. Va. 415, 880 S.E.2d 881, 886 (2022) (internal quotations and footnote omitted).

In the instant civil action, the Bankruptcy Court's Orders easily satisfy all three conditions.

First, the Bankruptcy Court's Orders were final adjudications on the merits by a court of competent jurisdiction on the validity of Kapitus's contract-based Proof of Claim. In fact, Respondents concede that the Bankruptcy Court's Orders were a final adjudication in previous briefing.[33] In any event, regardless of Timberline Utilities' concession, courts have repeatedly and definitively held that a bankruptcy court order allowing a proof of claim is a "final judgment" deserving of *res judicata*.[34] "Unquestionably, a federal court's judgment is binding upon a West Virginia state court."[35] The Circuit Court's decision, however, failed to give full faith and credit to the Bankruptcy Court's Orders.

Second, the instant civil action and the Bankruptcy Court proceedings involve the same parties.

Third, Kapitus's claim in the Bankruptcy Court requesting enforcement of the Agreement is *identical* to the cause of action in the instant case. The validity and enforceability of the Agreement are the central issues in Kapitus's breach of contract claim and the reasons that the

---

[33] *See* Timberline Utilities' Motion to Dismiss, ECF No. 139 at 5 (noting that "the Order of October 25, 2021, undoubtedly became [a] final order [at the December 15, 2021, hearing].").

[34] *See, e.g., Sampson*, 667 F. Supp. 2d at 695 (citing *EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 625 (2d Cir. 2007); *Matter of Baudoin*, 981 F.2d 736, 742 (5th Cir. 1993); *Siegel v. Fed. Home Loan Mortgage Corp.*, 143 F.3d 525, 528–31 (9th Cir. 1998)); *Matter of Chappell*, 984 F.2d 775, 782 (7th Cir. 1993); *see also In re Eads*, 417 B.R. 728, 741 (Bankr. E.D. Tex. 2009) (stating explicitly that a "bankruptcy court's allowance or disallowance of a proof of claim is a final judgment") (citing *Poonja v. Alleghany Props.*, 278 F.3d 890, 894 (9th Cir. 2002)).

[35] *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 558, 803 S.E.2d 519, 528 (2017) ("The rule that state courts must give binding effect to federal court proceedings is uncontroversial.") (citing Susan Bandes, Thomas D. Rowe, Jr., 18 MOORE'S FEDERAL PRACTICE § 133.10 (3rd ed. 2017)); Ronan E. Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 744 (1976) (recognizing that there is a "clearly established rule that state courts must give full faith and credit to the proceedings of federal courts," the fact "[t]hat this is the rule is *beyond doubt*, and the state courts have generally accepted it") (emphasis added).

Circuit Court advanced for dismissing that claim. In ruling on Kapitus's Proof of Claim, the Bankruptcy Court already ruled on the validity of the Agreement, expressly holding that it valid and enforceable.[36]

Because all three conditions are satisfied, *res judicata* bars the prosecution of a lawsuit where the claims alleged therein have already been ruled upon by a court with jurisdiction to rule on those claims.[37] In this case, the Bankruptcy Court already ruled on whether the Agreement was valid and enforceable, so the issue should not have been relitigated in front of the Circuit Court.

But one searches the Circuit Court's order in vain for so much as a mention of *res judicata*. The reason is clear: the Circuit Court erroneously believed that it had the power to give Timberline Utilities a do-over, to view the Bankruptcy proceedings as nothing but a dress rehearsal, and to relitigate the entire issue of the validity of the Agreement. This ultimately allowed Timberline Utilities to misrepresent its ability to enter into the Agreement and CVPSD to keep Kapitus's substantial advance and walk away with both the cake and the ability to eat it, too—precisely what the Bankruptcy Court already ruled on. In fact, the only damaged party now is the only one that provided *substantial* value to Timberline Utilities—*i.e.*, Kapitus. Clearly the

---

[36] *See generally* Kapitus Servicing, Inc.'s Verified Compl., at ¶¶ 49–50, JA28–29.

[37] *See* syl. pt. 2, *Bison Ints., LLC v. Antero Res. Corp.*, 244 W. Va. 391, 398, 854 S.E.2d 211 (2020) ("An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being res judicata.") (quotations, internal quotations, and citations omitted) (quoting syl. it. 1, *Sayre's Adm'r v. Haprold*, 33 W. Va. 553, 11 S.E. 16 (1890)).

Circuit Court believed that the Bankruptcy Court "got it wrong," but it had no legal authority to tear up the Bankruptcy Court's orders at all.

The Circuit Court expressly stated that it believed it was deciding which of two "competing holdings"—*i.e.*, "the PSC Order and the federal Bankruptcy Court order"—was more convincing.[38] Misapplying this Court's jurisprudence, the Circuit Court felt compelled to "give deference to the PSC order"[39] and dismissed Kapitus's contract claim. But more importantly than any such "deference," West Virginia law also enforces final orders from previously litigated issues and applies the judicial doctrine of *res judicata*—a doctrine that is not a mere tie-breaking preference, but dispositive substantive law.[40] ***Regardless of the merits of the Circuit Court's underlying decision to pick the PSC order over the Bankruptcy Court's Orders***, as demonstrated herein, West Virginia law precluded the Circuit Court from going down that road in the first instance. Instead, in the instant civil action, the Bankruptcy Court's Orders were the law of the case, while the PSC order meant nothing.

2. The instant civil action is precisely the problem that *res judicata* was created to prevent.

If there were any doubt about the negative impact of the Circuit Court's decision to treat the Bankruptcy Court's Orders as little more than an editorial, one would only need to examine the purpose of *res judicata* to see the harm done. *Res judicata* promotes finality and judicial economy: "[T]he doctrine of *res judicata* is based on a recognized public policy to quiet litigation and on a desire that individuals should not be forced to litigate an issue more than

---

38 Cir. Ct. Order, JA8.

39 *Id.*

40 *See Bison Interests*, 244 W. Va. at 397–98, 854 S.E.2d at 217–18.

once."[41] The purpose of *res judicata* is to protect parties from the burden of relitigating the same issue with the same party, to promote judicial efficiency, and to promote reliance on judicial action by reducing the likelihood of inconsistent judgments.[42] To accomplish these purposes, *res judicata* bars relitigating claims that were, or could have been, raised in a prior proceeding between the same parties.[43]

But the principles and goals of *res judicata* have been ignored here. Kapitus has been forced to litigate and relitigate its claims before multiple fora with no finality in sight. Every time Kapitus thinks that this eternal litigation will end, it is forced to start over in a new tribunal, tirelessly relitigating the exact same issue, at least a half dozen times now including the instant appeal.[44] *Timberline Utilities could have appealed the Bankruptcy Court's Orders before they became final*, or even sought a certified question. Timberline Utilities, however, never did so, giving Kapitus the (cruelly false) belief that the case was over. This belief was not fantastical, but a reaction specifically contemplated and advanced by the legal system:

> [A] losing litigant *deserves no rematch after a defeat fairly suffered*, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, *impose unjustifiably upon those who have already shouldered their burdens*, and drain the resources of an adjudicatory system with disputes resisting resolution.

Duvall v. Attorney Gen. of the United States, 436 F.3d 382, 387 (3rd Cir. 2006) (emphasis added) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107–08 (1991)).

---

41 *White v. SWCC*, 164 W. Va. 284, 289, 262 S.E.2d 752, 756 (1980).

42 *See In re National Med. Imaging, LLC*, 439 B.R. 837, 845 (Bankr. E.D. Pa. 2009).

43 *See Sampson*, 667 F. Supp. 2d at 692 (citing *Sartin v. Macik*, 535 F.3d 284, 287 (4th Cir. 2008)); *see also Siegel*, *supra* (applying *res judicata* where bankruptcy court decision was final).

44 As noted, before the Circuit Court did so, both the Bankruptcy Court and (for whatever weight it has) the PSC had already addressed Timberline Utilities' and later CVPSD's arguments about the validity of the parties' agreements.

After enlisting the PSC as a monkey's paw to do its bidding, Timberline Utilities chose a new forum and sought an undeserved rematch. In clear violation of *res judicata* and important considerations of judicial economy, Timberline Utilities was allowed to relitigate the enforceability and validity of the Agreement. Winning by cheating, however, should not be rewarded. Legal rules exist for a reason, and Kapitus requests the Court to serve as the final referee, to apply the proper legal rules, and to correct the Circuit Court's error.

The impetus for this Court to reverse the Circuit Court and provide the desired finality is highlighted by the significant injuries sustained by Kapitus in this perpetual litigation. During Timberline Utilities' bankruptcy, due to Respondents' perpetual motions—overt or disguised—to reconsider, Kapitus briefed whether it had a secured claim against Timberline Utilities on six separate occasions.[45] After Kapitus prevailed and the Bankruptcy Court held that Kapitus had a valid and secured claim, Kapitus briefed the finality of the Bankruptcy Court's Order on two instances.[46] Next, because Respondents failed to properly appeal the Bankruptcy Court's Orders before they became final, Kapitus also briefed its breach of contract claim (based on the same facts and arguments as the briefing on its secured claim) before the Circuit Court after Respondents brought in the PSC to "investigate" the Agreement.[47] Timberline Utilities fails to appreciate the finality and competency of the Bankruptcy Court's Orders and tactically seeks new fora to relitigate issues in hopes of a different outcome. The legal system, however, is not designed to provide infinite opportunities for litigation of the same issues, a fact demonstrated by the existence of *res judicata*.

---

[45] *See* ECF Nos. 64, 74, 84, 91, 104, and 132.

[46] *See* ECF Nos. 110 and 146.

[47] Timberline Utilities' briefing in the Bankruptcy Court was by and through its Receiver, CVPSD, who was set to benefit from denial of Kapitus's Proof of Claim. *See supra* note 18.

Timberline Utilities' improper litigation tactics benefit only CVPSD, who seeks to obtain a windfall of Timberline Utilities' assets *and* Kapitus's Purchased Receivables free of any liens. Without paying any value for Timberline Utilities' assets, CVPSD aims to obtain Timberline Utilities' assets and customers without paying any consideration. Kapitus not only has a security interest in, but in fact owns, the Purchased Receivables pursuant to the Agreement and, therefore, has a right to Timberline Utilities' revenue, which Respondents seek to usurp. Respondents wish to benefit from Kapitus's advance, without repayment, but seek to void the very Agreement that gave rise to that advance in the first place. In addition to being illogical, this desire leaves Respondents unjustly enriched to the detriment of Kapitus. Respondents' relitigating the Agreement's validity stands only to advance this improper agenda. Respondents' unjust legal tactics and the resulting legally incorrect Circuit Court decision have resulted in hundreds of thousands of dollars in attorneys' fees for Kapitus and hindered any resolution or finality. This scenario is clearly unjust, contrary to the Bankruptcy Court's legally enforceable Orders, and just the type of injury *res judicata* aims to prevent.

C. Even if the Bankruptcy Court's Orders were not entitled to claim preclusion, the Circuit Court erred by failing to afford issue preclusion to the factual findings and legal conclusions contained therein, issues fatal to Timberline Utilities' defense.

The difference between claim and issue preclusion is well-settled:

> *Res judicata* generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action. A claim is barred by *res judicata* when the prior action involves identical claims and the same parties or their privies. Collateral estoppel, however, does not always require that the parties be the same. Instead, collateral estoppel requires identical issues raised in successive proceedings and requires a determination of the issues by a valid judgment to which such determination was essential to the judgment….

State v. Miller, 194 W. Va. 3, 9, 459 S.E.2d 114, 120 (1995). The requirements are similar, though not identical:

> Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Id.

In addition to its ultimate conclusion deeming the Agreement valid and enforceable (entitled to *res judicata*, as demonstrated *supra*), the Bankruptcy Court also made several findings of fact and conclusions of law based on the August 5, 2021 evidentiary hearing, prior proceedings, and arguments by the parties. Among other things, the Orders held that:

1. Timberline Utilities may not gain the benefit of an Agreement while simultaneously voiding its obligations under that same Agreement.

2. The Agreement was in the public interest.

3. The Agreement was voidable at Kapitus's discretion and may be enforced.

4. Kapitus had a valid security interest in the accounts receivable of Timberline Utilities.

5. Voiding the Agreement would grant an inequitable financial windfall to Timberline Utilities.

These findings and conclusions are at the very least entitled to preclusive effect. The issues were already litigated before the Bankruptcy Court. There was a final adjudication on the merits of the issues. The parties estopped from relitigating the issues—here, Respondents—were a party or in privity with a party to the Bankruptcy Court proceedings. And Respondents had a full and fair opportunity to litigate—indeed, actually *did* litigate—these issues. Accordingly, and again *regardless of the merits of its analysis of them*, the Circuit Court erred by revisiting any of these issues.

Finally, giving the Bankruptcy Court's Orders on these issues the respect that they are entitled to means that the Circuit Court erred in dismissing Kapitus's contract claim against

Timberline Utilities based on its belief that the Agreement was void: *i.e.*, the Circuit Court never had the power to question whether the Agreement was in the public interest, whether the Agreement was void, whether Kapitus had a valid security interest, and what effects voiding the Agreement would have on Kapitus and Timberline Utilities. By even considering the PSC order, the Circuit Court impermissibly reconsidered issues already litigated and decided on by the Bankruptcy Court.

D. To the extent that it so held, the Circuit Court erred by holding that Timberline Utilities' strategic dismissal of its bankruptcy proceedings somehow invalidated the Bankruptcy Court's Orders or stripped them of their preclusive effect.

Timberline Utilities strategically dismissed its own bankruptcy, apparently believing that preventing the Bankruptcy Court's allowance of Kapitus's Proof of Claim to mature into a paid claim could somehow make the Bankruptcy Court's Orders go away. That belief was incorrect: Timberline Utilities' dismissal of its bankruptcy had no effect on the Bankruptcy Court's Orders.

The Circuit Court's order dismissing Count I of Kapitus's Complaint is ambiguous about whether the Circuit Court held that the Bankruptcy Court Orders survived dismissal of Timberline Utilities' bankruptcy.[48] To the extent that this Court construes the Circuit Court's order as holding that the Bankruptcy Court Orders did not survive that dismissal, the Circuit Court also erred as a matter of law and should be reversed.

Under federal law, with just a handful of specific exceptions, inapplicable here, bankruptcy court orders ***survive*** dismissal of the bankruptcy case:[49]

> Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

---

[48] *See generally*, Cir. Ct. Order, JA1–10.

[49] *In re Scarborough*, 2015 WL 5672628 (D. Del. 2015) (citing *In re BSL Operating Corp*., 57 B.R. 945 (Bankr. S.D.N.Y. 1986)).

> (1) reinstates—
>
> (A) any proceeding or custodianship superseded under section 543 of this title;
>
> (B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
>
> (C) any lien voided under section 506(d) of this title;
>
> (2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and
>
> (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. § 349(b).

In this case, the Bankruptcy Court Orders were not affected by any of the provisions in 11 U.S.C. § 349(b). Timberline Utilities is not seeking to reinstate any proceeding, transfer, or lien. The Orders were not entered pursuant to 11 U.S.C. §§ 522(i)(1), 542, 550, or 553. And Timberline Utilities is not seeking to revest any property of the estate. As such, 11 U.S.C. § 349(b) does not alter or nullify—or have any effect whatsoever on—the Bankruptcy Court's Orders. Thus, the Bankruptcy Orders at issue survived dismissal of Timberline Utilities' bankruptcy case and remain unaffected.

Except as provided, dismissal of a bankruptcy case does negate the bankruptcy court's prior order's powers of *res judicata* or collateral estoppel.[50] Courts have repeatedly held that the allowance or disallowance of a claim is a final judgment that bars relitigating issues that were or

---

[50] *United States v. Standard State Bank*, 91 B.R. 874 (W.D. Mo. 1988), *aff'd* 905 F.2d 185 (8th Cir. 1990).

could have been litigated therein.[51] In this case, the Bankruptcy Court's August 9, 2021 Order held that "[a]t a minimum, Kapitus holds an unsecured claim."[52] The Bankruptcy Court's October 25, 2021 final Order on the merits concluded that "Kapitus has a valid security interest in [Timberline Utilities] accounts receivable."[53] The Bankruptcy Court Orders, which remain intact as final judgments, unquestionably hold that the Agreement is valid and support Kapitus's claim against Timberline Utilities. Accordingly, as discussed below, the Orders remain binding and have preclusive, *res judicata*, effect. The Circuit Court, thus, erred as a matter of law in failing to apply *res judicata* to the Bankruptcy Court's Orders and dismissing Count I of Kapitus's Verified Complaint in contravention thereof.

E. Although it would be wholly improper to even *ask* whose application of *Lockard* was better reasoned (just like it was improper for the Circuit Court to re-conduct the *Lockard* analysis at all), were this Court to do so, the Circuit Court's application was clearly erroneous.

Absent from this brief so far is any discussion of *Lockard v. City of Salem*, 127 W. Va. 237, 32 S.E.2d 568 (1944), the case at the core of Bankruptcy Court's Orders and the Circuit Court's subsequent order treating the Bankruptcy Court's Orders as if they had never been entered. Kapitus is reluctant to wade too deeply into that debate—whether the Bankruptcy Court's distinguishing this case from *Lockard*, whether *Lockard*'s dissent has in fact aged into becoming the law, *etc.*—because it is precisely the debate that, because of the Bankruptcy Court's Orders, no court has the power to revisit. And Kapitus remains firmly adhered to that proposition.

---

51 *See Sampson v. Chase Home Fin.*, 667 F. Supp. 2d 692, 695 (S.D. W. Va. 2009).

52 *See* Ver. Compl. at ¶ 45, JA27.

53 *Id.* at ¶ 49, JA28.

Nonetheless, even if it were proper to pretend like the Bankruptcy Court never ruled on these issues, Kapitus points out that the Bankruptcy Court's application of *Lockard* was plainly the far better-reasoned analysis.

In discussing *Lockard*, the Bankruptcy Court provided the following analysis:

> The court finds the Debtor's reliance upon *Lockard* in an attempt to contravene this freedom to be misplaced. In *Lockard*, West Virginia's highest court held ***a lease of a city's municipal water system to a private individual for operation*** to be outright void under [W. VA. CODE] § 24-2-12 because it lacked PSC approval. The court's analysis focused on the fact that ***the transaction was in the form of a municipality's lease of a public utility to be operated by a private individual in ruling to invalidate the agreement. The case here, however, deals with a financing agreement in which the Debtor continued controlling and operating the utility, rather than leasing it to a private individual.*** In sum, Kapitus funded the Debtor in the short term and rather than taking ownership of the Debtor, was to be paid at a daily rate over time until the loan was recouped in whole. **For this reason, *Lockard* is easily distinguishable.**

In re Timberline Four Seasons Utilities, Inc., 2021 WL 4952613, at *7 (Bankr. N.D. W. Va. October 21, 2021) (citations and internal citations omitted) (emphasis added), JA179.

The Bankruptcy Court further noted that even if the instant case were not so easily distinguishable from *Lockard*, it considered *Lockard*'s "dissent's analysis of the voidability language to be more in line with prevailing state case law"[54]:

> Every assignment, transfer, lease, sale or other disposition of the whole or any part of the franchises, licenses, permits, plant, equipment, business or other property of any public utility, or any merger or consolidation thereof and every contract, purchase of stock, arrangement, transfer or acquisition of control or other transaction referred to in this section made otherwise than as hereinbefore provided shall be void *to the extent that the interests of the public in this state are adversely affected*, but this shall not be construed to relieve any utility from any duty required by this section.

W. VA. CODE § 24-2-12 (emphasis added).

---

[54] ECF No. 114; JA180.

The Bankruptcy Court reasoned that the dissent in *Lockard* enforced the legislative intent of the statute because the dissent specifically considered whether the contract adversely affected the public:

> I think the majority opinion extends the statute beyond its letter, as well as its spirit. In my view the limit to which the statute should be applied is plainly set forth by the provisions thereof following: "*** and every contract, *** made otherwise than as hereinbefore *provided shall be void to the extent that the interests of the public in this state are adversely affected*, ***."

32 S.E.2d at 573 (Lovins, J. dissenting).[55] Justice Lovins's view would bear the test of time. In decisions after *Lockard*, the Court has repeatedly held that contracts are only void to the extent the contract adversely affects the public interest.[56]

The Bankruptcy Court ultimately found that an explicit application of *Lockard* here would contradict clear and unambiguous legislative intent:

> Under the holding of the majority opinion, regardless of whether a contract of the kind here considered has any effect on the public interest, adverse or otherwise, it is wholly void in the absence of approval by the Public Service Commission. I do not think the Legislature intended any such result. It is reasonable to say that the converse of the rule laid down in the statute would be true: that *if the contract does not affect the public interest, or if the public interest is favorably affected, that the ban of the statute has no application and that such contract is valid and enforceable.*

Id.[57] (emphasis in original).

---

[55] *See also Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 812 F.2d 898 (4th Cir. 1987) (citing W. VA. CODE § 24-2-12 and noting that the function of the PSC is to prevent adverse effects on "the public in this state").

[56] *See, e.g.*, *City of S. Charleston v. W. Va. Pub. Serv. Comm'n*, 204 W. Va. 566, 514 S.E.2d 622 (1999); *United Fuel Gas Co. v. Pub. Serv. Comm'n of W. Va.*, 154 W. Va. 221, 174 S.E. 2d 304 (1969).

[57] As discussed *infra*, the Bankruptcy Court also highlighted that in *Lockard*, this Court allowed the plaintiff to recover expenses, stating that:

> [i]t would be decidedly inequitable for (the city) to accept the benefit of plaintiff's expenditures of money and services without any compensation therefor in view of the fact [the] defendant itself, through its own inaction and lack of diligence, was partly

Technically, it is difficult to call the Bankruptcy Court's Orders *better* reasoned than the Circuit Court's order, because the Circuit Court contains *no reasoning at all* about these two points. Nevertheless, even if this were properly ever a battle of reasoning, the Bankruptcy Court's Orders—distinguishing this case from *Lockard* and finding that *Lockard* does not survive close scrutiny given the plain language of the statute—is plainly the better reasoned.[58]

Finally, any doubt about what the *Lockard* Court would have thought about the instant civil action can be easily resolved by reading the Court's opinion:

> It would be decidedly inequitable for the defendant to accept the benefit of plaintiff's expenditures of money and services without any compensation therefor in view of the fact, as this record discloses, defendant itself, through its own inaction and lack of diligence, was partly responsible for plaintiff's failure to obtain the consent and approval of the Public Service Commission to the lease in question.

32 S.E.2d at 572. Here, the Bankruptcy Court, after an evidentiary hearing on this issue, held that the Agreement was in the public's interest:

> Ultimately, it appears the only shortcomings within the [A]greement were the result of misrepresentations by [Timberline Utilities], through its agents. Nothing in the record insinuates that these shortcomings are attributable to Kapitus's actions or that the public served by the utility suffered any detriment as a result of the [A]greement . *If anything, the detriment to the public as a result of alleged mismanagement was offset to some degree by the financing provided by Kapitus.* In sum, the [A]greement is valid *notwithstanding lack of PSC authority*.

ECF No. 114. The Bankruptcy Court then specifically found the Agreement to be valid and enforceable, concluding that, if anything, the Agreement's impact was beneficial. Any detriment

---

> responsible for plaintiff's failure to obtain the consent and approval of the [PSC] to the lease in question.

32 S.E.2d at 572. The Bankruptcy Court also noted that *Lockard* supports Kapitus's position that Timberline Utilities was the party responsible for obtaining PSC approval and any failure to do so, was the fault of Timberline Utilities. *Id*., JA179.

[58] *Lockard* said nothing about *res judicata*, as the Court there was not confronted with a valid prior order from a federal court already ruling on the very question presented. So any effort to second-guess the Bankruptcy Court's Orders here by resort to *Lockard* would be mere bootstrapping.

to the public occurred as a direct result of Timberline Utilities' misrepresentations, not any action attributable to Kapitus.

On the contrary, the Bankruptcy Court considered *Lockard* and specifically found the Agreement was in the public interest by providing emergency financing.[59] While the PSC found that the Agreement was void, its only legal basis for doing so was the failure to submit the contracts for prior approval under W. VA. CODE § 24-2-12.[60] Given the significant differences between the instant case and *Lockard*, *even if* the Circuit Court had the authority to engage in such an analysis in the first place, it erred by misapplying *Lockard* and dismissing Count I of Kapitus's Complaint.

F. Kapitus did not waive its right to argue that *res judicata* applied to the Bankruptcy Court's Order by electing not to participate in the PSC proceeding.[61]

The Rules of Civil Procedure require that a "party" who wishes to raise certain defenses, including *res judicata*, affirmatively state the defense in a pleading.[62] While Kapitus knew about the PSC proceedings, the mere opportunity to intervene in a proceeding does not make that entity a "party" within the meaning of W. VA. R. CIV. P. 8(c).[63] Kapitus was therefore not a "party" to the PSC proceedings and, consequently, it was not obligated to "raise" *res judicata* within those

---

59 ECF No. 114.

60 *See* Public Service Commission Recommended Decision, JA161.

61 Although waiver formed no part of the Circuit Court's decision, Timberline Utilities previously raised the issue. Believing that it will do so again, Kapitus preemptively demonstrates that it did not "waive" anything.

62 W. VA. R. CIV. P. 8(c).

63 *See United States v. Whyte*, 918 F.3d 339, 346-49 (4th Cir. 2019) (holding that, despite the government declining to intervene in a False Claims Act *qui tam* action, the government remained a "party in interest," but not a "party" to the litigation. Consequently, collateral estoppel did not prevent the government from pursuing criminal prosecution against the same individual).

proceedings. Furthermore, Kapitus is not using *res judicata* as a defense; it is *Respondents* who seek to ***avoid*** *res judicata* as a defense. Kapitus has not "waived" anything.

VI. CONCLUSION

If, instead of what happened here, a circuit court had dismissed Kapitus's claim against Timberline Utilities, that court would be quite surprised, and rightly offended, that a coordinate court in the federal system then came along later, relitigated the very same issues, and, simply disagreeing with the circuit court's reasoning, declared the Agreement valid and awarded Kapitus a money judgment. But the converse of that is precisely what happened here.

The Tucker County Circuit Court was wrong to ignore West Virginia law on preclusion and, consequently, the Bankruptcy Court's Orders. Accordingly, this Court should reverse the Circuit Court's dismissal of Count I of Kapitus's Complaint, hold that the Bankruptcy Court's Orders are entitled to *res judicata*, and remand this case to the Circuit Court for further proceedings in conformity with such holdings.

KAPITUS SERVICING, INC.

By Counsel:

Ancil G. Ramey (W. Va. Bar No. 3013)
Sarah C. Ellis (W. Va. Bar No. 10434)
Benjamin McFarland (W. Va. Bar No. 9991)
Colton C. Parsons (W. Va. Bar No. 13243)
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8000
ancil.ramey@steptoe-johnson.com
sarah.ellis@steptoe-johnson.com
benjamin.mcfarland@steptoe-johnson.com
colton.parsons@steptoe-johnson.com

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April 2023, I served the foregoing **"*Petitioner's Brief*"** upon all counsel of record by electronically filing the same through the West Virginia E-Filing System which will send notice and a copy to counsel of record:

Martin P. Sheehan, Esq.
Sheehan & Associates, PLLC
1 Community St., Suite 200
Wheeling, WV 26003
Counsel for Timberline Utilities

John W. Cooper, Esq.
Cooper & Preston, PLLC
P.O. Box 167
Davis, WV 26260

Jeffrey Zurbuck, Esq.
Busch, Zurbuch & Thompson, PLLC
P.O. Box 1819
Elkins, West Virginia 26241
jzurbuch@bztlaw.com
Counsel for CVPSD

Ancil G. Ramey (W. Va. Bar No. 3013)