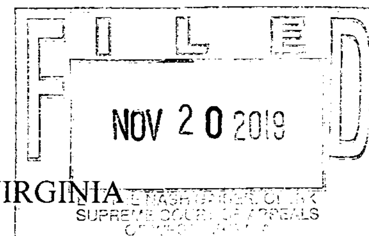
FILE COPY



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 19-0527

DO NOT REMOVE
FROM FILE

Bison Interests, LLC,
Defendant Below, Petitioner,

vs.

Appeal from a final order of the
Circuit Court of Harrison County
(Case No. 18-C-271-2)

Antero Resources Corporation,
Plaintiff Below, Respondent,

and

CGAS Properties, L.P.,
Plaintiff Below, Respondent.

REPLY BRIEF OF PETITIONER BISON INTERESTS, L.L.C.

Frank E. Simmerman, Jr. (WVSB # 3403)
Chad L. Taylor (WVSB # 10564)
Frank E. Simmerman, III (WVSB # 11589)
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Facsimile: (304) 623-4906
fes@simmermanlaw.com
clt@simmermanlaw.com
trey@simmermanlaw.com
Counsel for Petitioner Bison Interests, LLC

TABLE OF CONTENTS

page(s)

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 2

A. The Litigation of Ownership of the Ash/Clark Leasehold Estates, and Entitlement to the Ash/Clark Overriding Royalty Interests, in Civil Action No. 15-C-124-1 – The 2015 Royalty Case 2

B. Trial of the 2015 Royalty Case – AR Again Affirms Bison's Unrestricted and Unlimited Ownership of the Ash/Clark Mineral Interests – And Overriding Royalty Entitlement.... 5

C. The Substantive Issue – The Ash/Clark Lease Language, the Governing Turnkey Drilling Agreement Language – and the Absence of a Depth Limitation/Grant of the Entire Working Interest to Bison's Predecessor in Title 8

III. ARGUMENT 10

A. AR's Res Judicata and Collateral Estoppel Arguments Fail as the Only Conclusion, Based on AR's Own Admissions and Concessions, is that Bison has Satisfied the Third Element of the Res Judicata Test, and the Elements of Collateral Estoppel 10

B. As the Only Conclusion is that Bison Satisfied the Four Factor Judicial Estoppel Test, the 2018 Royalty Case is Barred by the Doctrine of Judicial Estoppel 13

C. AR's Harmonizing of the "Not Less Than"/Minimum Conveyance Language in the Turnkey Drilling Agreements is not Supported by Logic or Foreign Oil & Gas Case Law, and is Further Defeated by the Plain Language of the Turnkey Drilling Agreements, the Doctrine of Merger, and Sound Principles of Oil & Gas Instrument Construction........ 15

IV. CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Banbury Holdings, LLC v. May, No. 18-0550, pg. 11 (Nov. 8, 2019)..................................13

Carnegie Natural, 56 W. Va. 402, 49 S.E. 548 (1904)..16

Henderson Dev.Co. v. United Fuel Gas Co., 121 W. Va. 284, 3 S.E.2d 217 (1939)...................16

Ryan v. Nuce, 67 W.Va. 485, 68 S.E. 110 (1910)...18

State ex rel. Med. Assurance v. Recht, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003) 11

State ex rel. Universal Underwriters Inc. Co. v. Wilson, 825 S.E.2d 95, 2019 W.Va. LEXIS 66 (2019)..13

W.Va. DOH v. Robertson, 217 W.Va. 497 (2005)..13

Foreign Case Law

Range Res. Corp. v. Bradshaw, 2008 Tex. App. LEXIS 3426, (May 8, 2008)..................15, 16

Tex. Indep. Exploration, Ltd. v. Peoples Energy Production-Texas L.P., 2009 Tex. App. LEXIS 6941, (August 31, 2009)...17, 18

Secondary Sources

Black's Law Dictionary 1100 (7th ed. 1999)...11

12B Michie's Jurisprudence, Merger, § 2..18

I. INTRODUCTION

AR admitted and conceded in the context of prior, fully adjudicated litigation, not once, not twice, but on at least five (5) separate occasions, that Bison owned the royalty interests presently at issue, without restriction or limitation. Indeed, such admissions and concessions were not off-hand comments, AR went so far as to expressly state such admissions and concessions in writing to the Circuit Court of Harrison County, West Virginia. Additionally, AR's own post-verdict summation concedes that no limitation or restriction is present, and that the jury, after a five (5) day trial, confirmed this reality in the 2015 Royalty Case:

> Simply put, BILLC **represented and the Court in the State Court Action** [the 2015 Royalty Case] **accepted that BILLC has an overriding royalty interest in Antero's production on the Subject Leases** [which include Ash/Clark], which allowed BILLC to recover damages from Antero based on a breach of contract claim under the Assignment, Bill of Sale and Conveyance.

(emphasis added) (Appx. 320). AR's Response, which simply ignores AR's representations, admissions and concessions in the 2015 Royalty Case, presents an incomplete picture for this Court. Upon viewing the full picture, this Court should reach the conclusion that AR's present action is barred by the doctrines of *res judicata*, collateral estoppel and judicial estoppel – as this is the logical, and fairest, conclusion – a conclusion which upholds the integrity of the judicial system.

Further, AR's Response also ignores the plain, actual language contained in the Ash/Clark mineral interest Assignments and the Turnkey Drilling Agreements. The Assignments and Turnkey Drilling Agreements, when viewed in their entirety, as they must be, are simple: Bison's predecessor was entitled to all mineral depths without restriction or limitation – as all mineral depths were obtained from the Clark and Ash families. This was the parties' bargain set forth in the plain language contained within the Assignments and Turnkey Drilling Agreements – language

which this Court should review, and harmonize, in its entirety. For this additional reason, among others, this Court should reverse the grant of summary judgment entered by the Circuit Court and confirm and declare that Bison is entitled (as it historically has been) to be paid a 6.25% overriding royalty interest from all mineral production by AR, or its successors/assigns, on the Ash/Clark mineral acreage

II. STATEMENT OF THE CASE

A. The Litigation of Ownership of the Ash/Clark Leasehold Estates, and Entitlement to the Ash/Clark Overriding Royalty Interests, in Civil Action No. 15-C-124-1 – The 2015 Royalty Case.

March 18, 2015, Bison Interests, LLC, ("Bison"), filed a Complaint, ("the 2015 Royalty Case"), in Circuit Court seeking a declaration of Bison and Antero Resources Corporation's, ("AR"), rights and obligations with respect to the Clark and Ash Leases/overriding royalty interests. (Appx. 47-54).

In 2012, Bison conveyed certain mineral assets to AR and AR was to pay Bison substantial up-front money, ("bonus money"), and a percentage overriding royalty, 6.25% gross, from its Marcellus shale operations on the conveyed assets, such as the Ash/Clark interests. (Id.). After AR **confirmed Bison's title and ownership of**, among others, the Ash/Clark leases, to Marcellus shale depths, Bison was paid, in 2012, two-thousand dollars ($2,000.00) per acre for these assets – a total payment of eighty-five thousand dollars ($85,000.00) for the Ash/Clark assets. (Appx. 56-62, 728).

In the 2015 Royalty Case Bison initially sought: (1) payment of its overriding royalty; and (2) "a declaration of the parties' respective rights and obligations, historically and prospectively, with respect to the foregoing [the parties contractual relationship and the leases – including the Clark and Ash leases]." (Appx. 53-54). To expand, Bison discovered in late 2014 that AR had drilled certain mineral acreage in early 2012, that AR had failed to disclose this drilling and

production activity to Bison, and that AR was holding substantial sums of money from production, the 6.25% gross overriding royalty interest owed to Bison. (Appx. 48-49, 208, 209).

May 15, 2015, AR filed its Answer and Counterclaim in the 2015 Royalty Case, pleading: that AR "**has no interest in the ownership of the overriding royalty interest**"; and requesting that the Court "declare the rightful owner of the overriding royalty interest so that Antero can pay future royalties, if any, to said party . . . ." (emphasis added) (Appx. 67-78). Consistent with its judicial representations, AR invited a third party, CGAS Properties, L.P., into the 2015 Royalty Case. (Appx. 80-83). As made clear by AR, CGAS Properties, L.P. was invited into the 2015 Royalty Case because "Antero believes that there is a possibility of a competing overriding royalty interest on one of the leases – being the lease executed by Okey and Clara Clark [the Clark Lease]." (Id.). By its own declarations, AR was fully aware, and in fact desired to, and did, resolve all title issues in the 2015 Royalty Case – an action in which CGAS Properties, L.P. was an active participant. (Id.).

After substantial discovery and litigation, by Agreed Orders entered August 22, 2016 and May 1, 2017 in the 2015 Royalty Case, respectively, the parties declared and confirmed that "CGAS Properties, L.P. "**has no rights in and to overriding royalty interest payments from deep mineral right production by Antero Resources Corporation on and under the 900-foot radius of [the Clark and Ash leases]**." (emphasis added) (Appx. 185-193).

In the 2015 Royalty Case, AR repeatedly filed various pleadings and made continual admissions and concessions that ownership of the Clark/Ash overriding royalty issues was fully and finally adjudicated and resolved. On August 15, 2017, AR, in objecting to Bison's Motion to Compel wherein Bison sought to discover certain documents related to the Ash lease title opinion, argued as follows to Judge McCarthy's Court:

> Plaintiff's Motion should be denied because it seeks disclosure of privileged and protected title opinions. **Further, the subject matter of Plaintiff's Motion is moot where the documents requested by Bison involve issues already resolved in this litigation** by entry of the Agreed Order Granting Bison Interests, L.L.C.'s Motion for Partial Summary Judgment as to Certain Relief Sought via Bison Interests, L.L.C.'s Counterclaim regarding the Ash Lease, entered by the Court on May 1, 2017.
>
> Bison's request for all communications between Antero and its counsel regarding the Ash Lease title opinions **is irrelevant to the remaining claims in this litigation**.
>
> The Ash Lease title opinions **go to the point of ownership of the Ash Lease acreage, which was already settled by Agreed Order Granting Bison Interests, L.L.C.'s Motion for Partial Summary Judgment** as to Certain Relief Sought via Bison Interests, L.L.C.'s Counterclaim regarding the Ash Lease, entered by the Court on May 1, 2017.

(emphasis added) (Appx. 195-204).

The benefit associated with such representation is readily apparent, AR was able to shield documents from production in the 2015 Royalty Case, as the Court accepted AR's position that this issue was resolved.

AR also made it clear in oral argument on August 17, 2017, that all issues associated with the ownership of the Ash lease, and entitlement to the Ash overriding royalty, were resolved in the 2015 Royalty Case:

> Mr. Lawrence [counsel for AR, stated as follows]:
>
> If we go back to the filing of the complaint then, in March 2015, Cabot intervened -- when I spoke to Mr. Miller, he indicated he thought that with Cabot relinquishing any claims that it had, or CGAS, that Cabot, CGAS were no longer parties. That's why they're not here. **He believes their claims had been resolved through these agreed orders. But back in March 2015, there was a question as to who had priority in interest as to the Marcellus rights that Bison now claims**.
>
> And it's not disputed by the parties, at least with respect to Ash. There was an agreed order submitted to the Court and entered by the Court, on May 1, 2017, where **CGAS acknowledged that Bison did in fact own the Marcellus rights at the bottom of their drill boreholes. So that issue was clarified**. And that was the

> second order. There was an earlier order [as to Clark] entered with respect to one of the other leases. **Payments were released upon entry of that order**.
>
> **And I liken the first issue that was presented in Bison's complaint, the original complaint, not the amended complaint, but the original complaint, in March 2015, was quiet title declare that Bison has superior right and interest in the Marcellus at the bottom of this borehole**.
>
> So I liken it to a block of Swiss cheese. The cheese not the hole, the cheese was Doran's. That's now Cabot's. So Cabot has an interest in the Marcellus in that block of cheese. **The issue that was presented originally to the Judge, to you, to the Court, was the hole, that what we refer to as a borehole assignment, who owns the Marcellus at the bottom of the borehole**? Does that borehole go all the way through the cheese, through the Marcellus? Such that Bison has an interest in that mineral, or is it depth limited?
>
> **The parties now agree that Bison owns the entire hole in the block of cheese**.
>
> **This case started out as a dispute as to who owns the Marcellus in that hole. That dispute's been resolved. And we assert in the response that the title issues surrounding Ash are moot. I'm not sure how the titles or any of those issues are even relevant to the instant dispute, because that -- that title is no longer at issue**.

(emphasis added) (Appx. 224-229).

Consistent with AR's unlimited and unrestricted judicial admissions and the resolution of the Ash/Clark title dispute, on or about August 29, 2017, AR issued a check to Bison in the amount of $206,221.37 for undisputed funds from production for marcellus shale hydrocarbons, in part, as to the Ash/Clark assets. (Appx. 227, 279).

B. Trial of the 2015 Royalty Case – AR Again Affirms Bison's Unrestricted and Unlimited Ownership of the Ash/Clark Mineral Interests – And Overriding Royalty Entitlement.

March 26, 2018, the 2015 Royalty Case came on for trial before the jury and the Honorable Christopher J. McCarthy. (Appx. 294). As noted in AR's Pre-Trial Memorandum, the issues tried were: [1] whether AR breached its contract with Bison by paying Bison overriding royalty payments based on amounts received from production, rather than amounts realized from Antero's financial hedging strategies; [2] whether AR breached its contract with Bison by inadvertently

omitting Bison from its weekly drilling report circulation; [3] whether AR breached any fiduciary duties owed to Bison; [4] whether AR's representation constituted constructive fraud; and [5] damages, if any. (Appx. 290).

During the opening statement AR, through counsel and after an initial objection from Bison, admitted and conceded, yet again, to the Court that AR "completely agree[d]" that:

> (1) the court had ruled on this issue [the issue of ownership of the Ash/Clark deep mineral interests]; and (2) **that it was improper to suggest to the jury in Civil Action No. 15-C-124-1 that there's a question as to who owns the Ash/Clark deep mineral interests**. (emphasis added).

(Appx. 843-844). Indeed, the court even noted in the 2015 Royalty Case, at trial, that the question as to ownership of the deep mineral rights had been resolved. (Appx. 844).

Nonetheless, during the 2015 Royalty Case trial AR repeatedly, over objection from Bison, attempted to inject the Ash/Clark ownership issues to confuse the jury. (Appx. 584-588).

At the conclusion of a five-day trial, which involved the admission of over one hundred (100) exhibits and multiple witnesses presented by both sides, the jury found that AR breached its contract with Bison – and the jury concluded that Bison was entitled to payment for the Ash and Clark overriding royalty/interests – otherwise the jury would have returned a defense verdict. (Id.).

Indeed, in AR's own federal judicial filings describing the verdict in the 2015 Royalty Case, AR admitted and conceded that:

> Simply put, BILLC **represented and the Court in the State Court Action** [the 2015 Royalty Case] **accepted that BILLC has an overriding royalty interest in Antero's production on the Subject Leases** [which include Ash/Clark], which allowed BILLC to recover damages from Antero based on a breach of contract claim under the Assignment, Bill of Sale and Conveyance.

(emphasis added) (Appx. 320). Again, on May 11, 2018, AR accurately summarized the verdict in the 2015 Royalty Case, as follows:

Stated another way, the jury [in the 2015 Royalty Case] **accepted BILLC's . . . position that it is entitled to an overriding royalty interest by virtue of the Assignment, Bill of Sale and Conveyance of Marcellus rights to Antero as part of its disposition of the breach of contract claim as well**.

(emphasis added) (Appx. 335).

Post-trial of the 2015 Royalty Case, specifically on May 15, 2018, AR filed a Combined Motion for Declaratory Judgment – seeking to contradict AR's prior admissions and the jury's finding in the 2015 Royalty Case. Findings which AR had conceded and admitted just four (4) days earlier were resolved by the jury in the 2015 Royalty Case. (Appx. 452).

To be clear, dissatisfied with the jury's affirmation of Bison's entitlement to proceeds of the Ash/Clark production and the outcome of the 2015 Royalty Case AR sought to undo its prior admissions, and the jury's finding of breach of contract/affirmation of Bison's entitlement to an overriding royalty interest from the Ash/Clark mineral acreage, by requesting that the Court define the parties' rights in relation to the Ash and Clark overriding royalties. (Id.).

By Order entered July 20, 2018, Judge McCarthy issued a ten (10) page Memorandum Opinion and Order thoroughly addressing the proper (and plead/tried) post-trial issues which were before the Court. (Appx. 452-461). Contained within the Order, as dicta, is Footnote 2, which is a summary denial of AR's improper attempt to relitigate an issue previously adjudicated in the 2015 Royalty Case – an issue which the Court acknowledged was resolved prior to trial during opening statements in the 2015 Royalty Case. Footnote 2 of the Opinion and Order (notably not provided in full in the Response) - is the lone provision which addresses this issue:

> Antero also urges this Court to interpret the terms of the agreements between Bison and CGAS Properties, L.P., and their respective predecessors in interest, to determine Bison's entitlement to royalties on Marcellus Shale production by Antero from the Ash and Clark Leases. Third parties to a contract between two private citizens generally cannot sue to obtain a declaration as to validity of such a contract or to raise questions as to its construction. See 55-13-2, but see Shobe v. Latimer, 1979, 253 S.E.2d 54, 162 W.Va. 779. Further, in the instant case, one of the parties,

> CGAS Properties, L.P., whose entitlement under the agreement would be directly affected, is no longer a party to this case and, thus, would not have the opportunity to be heard on this issue. The Court, therefore, declines to address this issue in the instant action.

(Appx. 456, 843-844).

C. The Substantive Issue – The Ash/Clark Lease Language, the Governing Turnkey Drilling Agreement Language – and the Absence of a Depth Limitation/Grant of the Entire Working Interest to Bison's Predecessor in Title.

On or about October 25, 1978, Okey Clark, Clara B. Clark (his wife) and Ruby V. Sadler leased their interest in approximately one-hundred (100) acres of oil and gas to Doran & Associates, Inc. (Appx. 692-700). Similarly, on or about December 21, 1978, Hazel D. Ash and Opal Ash (his wife) leased approximately twenty-six (26) acres of oil and gas to Doran & Associates, Inc. (Appx. 692-700). **The underlying Clark and Ash Leases do not contain depth limitations or restrictions – and this issue not disputed by AR in its Response**. (emphasis added) (Appx. 634-637).

Bison's predecessor was assigned the mineral leasehold estates for the Ash and Clark assets by Warranty Deeds of Assignment. (Appx. 680-683, 702-705). The Warranty Deeds of Assignment for the Ash/Clark leasehold conveyances to Bison's predecessor do not contain: (1) a depth limitation; or (2) a depth restriction. (Id.). **This fact is not disputed by AR in its Response**.

Returning to Turnkey Drilling Agreements, as to both the Ash and Clark interests, the Operator (Doran & Associates, Inc.), was to procure "drilling sites" for the benefit of Bison's predecessor in title, LaMaur Development Corporation. (Appx. 639, 660). Per the Turnkey Drilling Agreements, the terms "drilling site" or "drilling location" are defined terms that "shall include the right to the oil and gas in place, reserves in ground, as well as the right to all oil and gas production from such drilling site or location, together with location of well site to be drilled and to develop this well site for and on behalf of developer . . . ." (Appx. 639, 660).

As made clear above, as part of this working relationship Bison's predecessor was assigned the "entire interest in such well site or well location and the surrounding protective acreage." (Appx. 640, 661).

More specifically, Clause 1.3 of the Turnkey Drilling Agreements sets a minimum interest that was required to be conveyed by the Operator (Doran & Associates, Inc.) to Bison's predecessor in interest as to the Ash/Clark mineral assets:

> Operator [Doran & Associates, Inc.] agrees that any well site or location, drilling and producing right, farm-out agreement or lease acquired for or on behalf of Developer [LaMaur Development Corporation] for the purpose of this Agreement shall provide that Developer shall be entitled to be assigned and **shall be assigned not less than 81.25% of all oil and gas reserves in place**, **to a depth through the Benson Sands Horizon**, on the subject acreage and produced by any well drilled on such location or site.
>
> Operator agrees that any well site or location, drilling and producing right, farm-out agreement or lease acquired for or on behalf of Developer for the purpose of this Agreement shall provide that Developer shall be entitled to be assigned and **shall be assigned not less than 81.25% of all oil and gas reserves in place**, to a depth through the Bradford Kane sand, **but not to exceed 4,000 feet with regard to the Pennsylvania wells**, and **through the Benson Sand Horizons with regard to West Virginia wells**, on the subject acreage and produced by any well drilled on such location or site.

(emphasis added) (Appx. 641, 662).

Speaking further, Clause 2.1 of the Turnkey Drilling Agreements provides that "Operator [Doran & Associates, Inc.] agrees to assign and transfer by general warranty deed to Developer [LaMaur Development Corporation] **all right, title and interest it has to any and all oil and gas reserves and production as to any locations upon which a well is to be drilled . . . .**" (emphasis added) (Appx. 642, 663).

Again, to be clear, at this time Doran & Associates, Inc., by virtue of the Ash/Clark leases, was vested with the entire working/leasehold interest in the Ash Lease – without depth restriction or limitation – and this is not disputed. Perhaps most telling, Article IV, Section 4.2 of the Turnkey

Drilling Agreement is titled "**Assignment**" and provides that "Operator [Doran & Associates, Inc.] agrees that it shall assign and transfer to Developer [LaMaur Development Corporation – Bison's predecessor] by written instrument of reconveyance **all right, title and interest to the drilling site under an agreement of general warranty**." (emphasis added) (Appx. 650-651, 671).

Consistent with the foregoing, by Warranty Deeds of Assignment dated June 21, 1979, and October 25, 1978, respectively, Doran & Associates, Inc. assigned unto LaMaur Development Corporation the "entire working interest, to the oil and gas reserves in, and production from, that portion of the oil and gas lease to be used for the well site, and within a radius of 900 feet of the borehole, together with such protective acreage as is described in the Turnkey Drilling Agreement" as to the Ash/Clark Leases. (Appx. 680-683, 702-705). Bison's predecessor farmed out the shallow portions of the Ash and Clark mineral leasehold estate(s) which were being developed in 1979, after Bison's predecessor in title was vested with the entire mineral leasehold estate to the center of the earth by Doran & Associates, Inc. unlimited leasehold assignment, through depth limited assignments to the drilling partnerships – Drilling Prospect 1979 – No. 2 & No. 3. (Appx. 264-271).

III. ARGUMENT

A. AR's Res Judicata and Collateral Estoppel Arguments Fail as the Only Conclusion, Based on AR's Own Admissions and Concessions, is that Bison has Satisfied the Third Element of the Res Judicata Test, and the Elements of Collateral Estoppel.

AR's Response concedes that Bison has satisfied the first and second elements of the *res judicata* test, and that Bison satisfied the second through fourth elements of collateral estoppel. Further, important to the present issues, AR concedes that "AR raised the same claim in the Prior Litigation [the 2015 Royalty Case] Litigation", but asserts that one footnote in a post-verdict

Order, after years of discovery, litigation, and a five (5) day jury trial, preserves the integrity of AR's present claim. Response, pgs. 11-13.

Initially, this Court has acknowledged that it is axiomatic that "language in a footnote generally should be considered obiter dicta which, by definition, is language 'unnecessary to the decision in the case and therefore not precedential.' Black's Law Dictionary 1100 (7th ed. 1999)." State ex rel. Med. Assurance v. Recht, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003). Ironically, AR acknowledges this limitation in its own briefing on appeal – as AR requests that this Court not give Judge Bedell's footnote, contained in the present Order on appeal, any weight. See AR Response, pg. 30 (stating that "It is clear – both from the context of the Circuit Court's Harison discussion and from its placement of that discussion in a footnote – that the Court considered this information to be extraneous of the relevant contract language."). (emphasis added). Thus, Bison similarly submits that Judge McCarthy's footnote, relied upon by AR in support of its *res judicata*/collateral estoppel arguments, simply cannot serve as the basis for resurrection of claims fully and finally litigated – and resolved – in the 2015 Royalty Case.

In that vein, this Court need look no further than AR's own admissions and concessions, pre-trial, during trial, and post-trial in the 2015 Royalty Case; admissions and concessions which prove that the issues now before this Court, which arise from a 2018 AR Complaint were fully litigated in the 2015 Royalty Case:

Pre-trial, AR admitted and conceded that the issue now before this Court was resolved:

> But back in March 2015, there was a question as to who had priority in interest as to the Marcellus rights that Bison now claims.
>
> So I liken it to a block of Swiss cheese. The cheese not the hole, the cheese was Doran's. That's now Cabot's. So Cabot has an interest in the Marcellus in that block of cheese. The issue that was presented originally to the Judge, to you, to the Court, was the hole, that what we refer to as a borehole assignment, who owns the Marcellus at the bottom of the borehole? **Does that borehole go all the way**

> **through the cheese, through the Marcellus? Such that Bison has an interest in that mineral, or is it depth limited**? **The parties now agree that Bison owns the entire hole in the block of cheese**.
>
> **This case started out as a dispute as to who owns the Marcellus in that hole. That dispute's been resolved. And we assert in the response that the title issues surrounding Ash are moot. I'm not sure how the titles or any of those issues are even relevant to the instant dispute, because that -- that title is no longer at issue**.

(emphasis added) (Appx. 224-229).

During trial, in the opening statements, AR again admitted and conceded that the present issue before this Court was resolved, as AR "completely agree[d]" that:

> (1) the court had ruled on this issue [the issue of ownership of the Ash/Clark deep mineral interests]; and (2) **that it was improper to suggest to the jury in Civil Action No. 15-C-124-1 that there's a question as to who owns the Ash/Clark deep mineral interests**. (emphasis added).

(Appx. 843-844).

Post-trial, AR yet again admitted and conceded that the issue now before this Court was resolved in the 2015 Royalty Case:

> Simply put, BILLC represented and **the Court in the State Court Action [the 2015 Royalty Case] accepted that BILLC has an overriding royalty interest in Antero's production on the Subject Leases** [which include the Ash/Clark lease – the subject of the 2018 Royalty Case], **which allowed BILLC to recover damages from Antero based on a breach of contract claim** under the Assignment, Bill of Sale and Conveyance.

(emphasis added) (Appx. 320).

As the only conclusion, based upon AR's representations and admissions, is that the Circuit Court committed error in its latest decision, this Court should reverse the Circuit Court's grant of summary judgment to AR, and find that the doctrines of both *res judicata* and collateral estoppel clearly bar AR's declaratory judgment claim in the 2018 Royalty Case.

B. As the Only Conclusion is that Bison Satisfied the Four Factor Judicial Estoppel Test, the 2018 Royalty Case is Barred by the Doctrine of Judicial Estoppel.

Under West Virginia law, "judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process." Syl. Pt. 4, State ex rel. Universal Underwriters Inc. Co. v. Wilson, 825 S.E.2d 95, 2019 W.Va. LEXIS 66 (2019); citing Syl Pt. 2, W.Va. DOH v. Robertson, 217 W.Va. 497 (2005). Further, as recently noted by this Court in Banbury Holdings, LLC v. May, No. 18-0550, pg. 11 (Nov. 8, 2019), judicial estoppel is appropriate when a party's, such as AR's, actions/omissions cannot be sanctioned by this Court, as such a sanction would "greatly undermine the integrity of the judicial process."

In the 2015 Royalty Case, AR strongly resisted Bison's attempt to discover AR's title information, arguing as follows:

> Plaintiff's Motion should be denied because it seeks disclosure of privileged and protected title opinions. **Further, the subject matter of Plaintiff's Motion is moot where the documents requested by Bison involve issues already resolved in this litigation by entry of the Agreed Order Granting Bison Interests, L.L.C.'s Motion for Partial Summary Judgment** as to Certain Relief Sought via Bison Interests, L.L.C.'s Counterclaim regarding the Ash Lease, entered by the Court on May 1, 2017. (emphasis added).
>
> Bison's request for all communications between Antero and **its counsel regarding the Ash Lease title opinions is irrelevant** to the remaining claims in this litigation.
>
> The Ash Lease title opinions **go to the point of ownership of the Ash Lease acreage, which was already settled by Agreed Order Granting Bison Interests, L.L.C.'s Motion for Partial Summary Judgment** as to Certain Relief Sought via

> Bison Interests, L.L.C.'s Counterclaim regarding the Ash Lease, entered by the Court on May 1, 2017. (emphasis added).

(emphasis added) (Appx. 224-229).

AR obviously received a benefit from this position – as AR was not forced to produce title information associated with the Ash/Clark acreage in the 2015 Royalty Case.

Further, AR admitted and conceded as follows to the Court in the 2015 Royalty Action:

> **This case started out as a dispute as to who owns the Marcellus in that hole. That dispute's been resolved.**
>
> **And we assert in the response that the title issues surrounding Ash are moot. I'm not sure how the titles or any of those issues are even relevant to the instant dispute, because that -- that title is no longer at issue**.

(emphasis added) (Appx. 224-229).

At present, AR has performed a 180° turn, taking a clearly inconsistent position in the 2018 litigation by arguing that Bison does not own the marcellus in that hole – that "block of cheese" described by AR's counsel above. Such shapeshifting satisfies the four-factor judicial estoppel test and substantially undermines the integrity of the judicial process. These realities are evidenced by AR's own post-verdict description of the 2015 Royalty Case, juxtaposed to AR's current position in this litigation:

> Simply put, BILLC represented **and the Court in the State Court Action [the 2015 Royalty Case] accepted that BILLC has an overriding royalty interest in Antero's production on the Subject Leases** [which include the Ash/Clark lease – the subject of the 2018 Royalty Case], which allowed BILLC to recover damages from Antero based on a breach of contract claim under the Assignment, Bill of Sale and Conveyance.

(emphasis added) (Appx. 320, 335).

Stated succinctly, the 2018 Royalty Case challenges the integrity of the judicial process. AR has deliberately reversed its position from the 2015 Royalty Case, thereby prejudicing Bison – acts which must not be sanctioned by this Court.

C. AR's Harmonizing of the "Not Less Than"/Minimum Conveyance Language in the Turnkey Drilling Agreements is not Supported by Logic or Foreign Oil & Gas Case Law, and is Further Defeated by the Plain Language of the Turnkey Drilling Agreements, the Doctrine of Merger, and Sound Principles of Oil & Gas Instrument Construction.

AR insists that the following language set forth in the Ash/Clark Turnkey Drilling Agreements creates an unrecorded, depth limitation which governs the current issues:

> Operator [Doran & Associates, Inc.] agrees that any well site or location, drilling and producing right, farm-out agreement or lease acquired for or on behalf of Developer [LaMaur Development Corporation] for the purpose of this Agreement shall provide that Developer shall be entitled to be assigned and shall be assigned **not less than[1] 81.25% of all oil and gas reserves in place, to a depth through the Benson Sands Horizon**, on the subject acreage and produced by any well drilled on such location or site.
>
> Operator agrees that any well site or location, drilling and producing right, farm-out agreement or lease acquired for or on behalf of Developer for the purpose of this Agreement shall provide that Developer shall be entitled to be assigned and shall be assigned **not less than 81.25% of all oil and gas reserves in place,** to a depth through the Bradford Kane sand, but not to exceed 4,000 feet with regard to the Pennsylvania wells, **and through the Benson Sand Horizons with regard to West Virginia wells**, on the subject acreage and produced by any well drilled on such location or site."

(emphasis added) (Appx. 641, 662).

AR's analysis is misplaced. First, in Range Res. Corp. v. Bradshaw, 2008 Tex. App. LEXIS 3426, (May 8, 2008), the Court of Appeals of Texas, Second District analyzed similar "not less than" language contained in an oil and gas royalty dispute. In analyzing "not less than" language, the Texas Appeals Court noted that such language contained in an oil and gas contract sets a minimum/floor for a conveyance or interest, not a restriction/ceiling as argued by AR in its Response:

[1] Bison submits that "not less than" is another way of saying "equal to or greater than" – not a fixed amount or assignment interest as suggested by AR. This is readily apparent from common sense. For example, when a construction contract states that a party shall acquire not less than 1,000,000.00 of operational insurance coverage or a party is required to give not less than ten (10) days' notice in a contract, such statements are floors for insurance/notice, not ceilings/fixed amounts – which is the core of AR's present, illogical argument.

> When paragraph three is read together with paragraphs one and two it is evident that the parties included the '**not less than' language to establish a floor from which Bradshaw's share of production could be calculated . . . . because the 'not less than' language indicates that the royalty calculation was not intended to be a fixed**, constant amount, we hold that the deeds provided for a 'fraction of royalty' . . . [t]his interpretation is consistent with the plain language of the deed and gives effect to all of the operative language in the deed so that all of the terms are in harmony.

(emphasis added) Range Res. Corp. v. Bradshaw, 2008 Tex. App. LEXIS 3426, pgs. 11-12. Bison submits that this Court should adopt the logic of Range Res. Corp. v. Bradshaw, as the words "not less than" are simply not words of limitation as argued by AR – but are rather terms of a minimum conveyance which must be read in the context of the entire, applicable Turnkey Drilling Agreements.

In that vein, AR's Response additionally ignores – and in no way, shape or form, harmonizes – the language contained in the Turnkey Drilling Agreements. When harmonizing contractual language, every word in a contract is presumed to have a unique meaning under West Virginia law. As stated in Carnegie Natural, 56 W. Va. 402, 49 S.E. 548 (1904), "[n]o word or clause in a contract is to be treated as a redundancy, if any meaning reasonable and consistent with other parts can be given to it." Id., Syl. Pt. 3. To the same effect is Henderson Development Co. v. United Fuel Gas Co., 121 W. Va. 284, 3 S.E.2d 217 (1939), wherein this Court explained that in construing a contract, "[f]orce and effect must be given to every word, phrase and clause employed, if possible."

Here, the Turnkey Drilling Agreements are clear – Bison's predecessor (thus ultimately Bison) was to be assigned the "entire interest" which the Operator, LaMaur Development Corporation, leased from the Ash/Clark families – and the Ash/Clark families undisputedly leased all minerals, without depth limitations or reservations:

- Operator agrees to assign unto Bison's predecessor "**Operator's entire interest in such well site or well location and the surrounding protective acreage**." (Appx. 642, 663).

- "Operator [Doran & Associates, Inc.] agrees to assign and transfer by general warranty deed to Developer [LaMaur Development Corporation – Bison's predecessor] **all right, title and interest it has to any and all oil and gas reserves and production as to any locations upon which a well is to be drilled** . . . ." (emphasis added) (Appx. 640, 661).

- Article IV of the Drilling Prospect 1979 – No. 2 Turnkey Drilling Agreement is titled "Assignment" and provides that "Operator [Doran & Associates, Inc.] agrees that it shall, within the time provided in Paragraph 2.1, assign and transfer to Developer [LaMaur Development Corporation – Bison's predecessor] by written instrument of reconveyance **all right, title and interest to the drilling site under an agreement of general warranty**." (emphasis added) (Appx. 650-651, 671).

- Finally, per the Warranty Deeds of Assignment, Bison's predecessor was conveyed: [the] "**entire working interest, to the oil and gas reserves in, and production from, that portion of the oil and gas lease to be used for the well site, and within a radius of 900 feet of the borehole**, together with such protective acreage as is described in the Turnkey Drilling Agreement" as to the Ash/Clark Leases. (Appx. 680-683, 702-705).

AR provides no analysis, authority, or logical basis upon which this language can be properly ignored or nullified – and this plain language establishes Bison's unlimited interest.

Additionally, AR's position is contrary to Tex. Indep. Exploration, Ltd. v. Peoples Energy Production-Texas L.P., 2009 Tex. App. LEXIS 6941, (August 31, 2009). In Peoples Energy, an oil and gas operator argued that a farmout agreement contained a depth limitation in the context of an overriding royalty dispute, even when the face of a mineral interest assignment/deed contained no such depth limitation or restriction. In affirming that no depth limitation existed, the Texas Court of Appeals initially noted as follows:

> Because a deed passes the greatest estate possible unless there are clear and unequivocal exceptions or reservations, the Assignment would appear to convey to Sierra an interest in the Sun ORRI without any depth restriction. See Templeton v. Dreiss, 961 S.W.2d 645, 657 (Tex. App.--San Antonio 1998, pet. denied) (holding deed will be construed to confer upon grantee greatest estate that terms of instrument will permit). Peoples Energy, pg. 10.

The Texas Court of Appeals subsequently proceeded to analyze Texas Independent's argument that a farmout agreement was the source of a depth restriction in the context of an overriding royalty dispute. Id., pg. 22-23. In finding that no depth limitation existed, the Texas Court of Appeals stated as follows:

> Once the conveying instrument was executed, in this case the Assignment, all prior transactions between Texas Independent and Union Pacific and its successors-interest to the Sun ORRI were merged into the Assignment, and all of the parties' rights rested solely in the Assignment. See Alvarado v. Bolton, 749 S.W.2d 47, 48 (Tex. 1988) (holding that where deed is delivered and accepted as performance of contract to convey, contract merges into deed and deed alone determine parties' rights); GXG, Inc. v. Texacal Oil & Gas, 977 S.W.2d 403, 415 (Tex. App.--Corpus Christi 1998, pet. denied) (holding doctrine of 'merger by deed' operates to merge all prior transactions between parties into deed).
>
> To properly make a reservation or exception, it should be mentioned in the granting clause and fully set out thereafter. Derwen, 2009 Tex. App. LEXIS 3661, 2008 WL 6141597, at *6 (citing 55 TEX. JUR.3D Oil and Gas § 65 (2004)). Here, Texas Independent was clearly capable of limiting Union Pacific's interest in the Sun ORRI to the 6,600'-8,224' interval if that had been its intention. Depth restrictions are not novel in the oil and gas industry. Finally, to adopt Texas Independent's interpretation would be to allow Texas Independent's current, subjective intent to control over the intent as expressed in the Assignment, which is impermissible. See Frost Nat'l Bank, 165 S.W.3d at 311-12 (in construing a written contract courts must give effect to intent as expressed in four corners of document).

Similar to Peoples Energy, Bison alternatively submits that the Ash/Clark Assignments, which do not contain depth limitations or reservations, control the issue on appeal – as they are the final embodiment of the parties' bargain, and the Turnkey Drilling Agreements were ultimately eliminated by the doctrine of merger. See also 12B Michie's Jurisprudence, Merger, § 2, citing Ryan v. Nuce, 67 W.Va. 485, 68 S.E. 110 (1910), (stating that "the rule is universal, applicable to deeds as well as to all other contracts, that prior stipulations and understandings are merged in the final and formal contracts executed by the parties. When a deed has been delivered and accepted as performance of an antecedent contract to convey the contract is merged in the deed. Rights of the parties rest thereafter solely in the deed." – and cannot be contradicted by extrinsic evidence).

Stated succinctly, had the parties sought to impose depth limitations or restrictions they could have done so on the face of the Clark/Ash assignments – as these were the final, recorded governing documents. For these additional reasons, consistent with Peoples Energy, Bison submits that AR's Response is fundamentally flawed and replete with noteworthy omissions which render AR's argument unpersuasive.

IV. CONCLUSION

Bison respectfully requests that this Court reverse the grant of summary judgment entered by the Circuit Court of Harrison County and confirm and declare that Bison is entitled (as it historically has been) to be paid a 6.25% overriding royalty interest from all mineral production by AR, or its successors/assigns, on the Ash/Clark mineral acreage conveyed by Bison to AR in 2012; confirm and declare that the Turnkey Drilling Agreements and Warranty Deeds of Assignments for the Ash/Clark assets do not contain a depth limitation or restriction; and award Bison such further relief which the Court deems appropriate.

[signature page follows]