Appeal No. 20-0490

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SWN PRODUCTION COMPANY, LLC
Putative Intervenor Below/Petitioner,
v.
William K. Walden, et al.,
Plaintiffs and Defendants Below/Respondents,

Appeal from an Order of the Circuit Court of Brooke County, West Virginia Civil Action No. 18-C-4

OPENING BRIEF OF PETITIONER SWN PRODUCTION COMPANY, LLC

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I. Assignments of Error.

1. The circuit court erred in denying intervention as of right under W.Va. R. Civ. P. 24 because SWN Production Company, LLC ("SWN") has an ownership interest in the property whose title is in dispute in this action. SWN is thus a necessary and indispensable party to this case and entitled to intervene as of right.

2. The circuit court erred in concluding that SWN did not timely move to intervene. The circuit court failed to consider the status of the proceedings at the time SWN sought to intervene, the absence of prejudice to the existing parties, and the severe prejudice to SWN of denying intervention.

3. The circuit court erred by denying intervention on the grounds that SWN acquired its property interest after commencement of the lawsuit "with full knowledge that the Plaintiff did not have a 'quiet title[,]'" and that an entity cannot "buy in" to litigation. Nothing in Rule 24 prohibits a party from intervening in a civil action when the party's interest was acquired after commencement of the civil action. There is no evidence to support the trial court's finding that SWN had knowledge that the Plaintiffs, William and Andrea Walden, lacked "quiet title" to the property when SWN acquired its interest.

4. The trial court erred by ignoring the likelihood that resolution of the underlying quiet title action may impair SWN's ability to protect its interest in the subject property. A verdict finding that the title to the oil and gas underlying the Walden Property does not belong to the Waldens would purportedly destroy SWN's exclusive legal right to lease the oil and gas rights from the Waldens.

5. The trial court erred by finding that "SWN and the Plaintiffs have represented to the Court that their interests are in line with each other," that SWN's interest "is identical to that

of the Plaintiffs[,]" and that SWN's interest is protected by the Waldens. SWN's interests are markedly different from, and not identical to, the Waldens' interests. There is no evidence to support a finding that SWN's interests are adequately protected by the Waldens.

6. The trial court erred in denying permissive intervention, and in finding that the existing parties would be unduly prejudiced by allowing SWN to intervene.

II. Statement of the Case.

A. Introduction.

The underlying case is a quiet title action over competing ownership claims to certain oil and gas rights in a 138.75-acre tract in Brooke County, West Virginia identified in the assessment records as Tax Map B48, Parcel 27 ("Walden Property"). JA 000001-000011 (Complaint). Putative intervenor SWN entered into an option agreement with the Waldens effective September 14, 2018 that grants SWN the exclusive right to lease the oil and gas underlying their property during a two-year period on specified terms. JA 000130-000140 (Option Agreement).[1] SWN paid the Waldens $24,281.25 to obtain these valuable rights. JA 000130.

As discussed more fully below, SWN's option agreement creates legally enforceable rights in real property, and resolution of the underlying claims adverse to the Waldens would impair those rights. Notwithstanding SWN's ownership interest in the Walden Property, the lower court denied SWN's motion to intervene.

SWN also has oil and gas leases for other properties in Brooke County that have instruments in their chains of title similar to the operative instrument for the Walden Property

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[1] On July 23, 2020, SWN and the Waldens entered into an "Amendment and Ratification of Option to Acquire Oil and Gas Lease" ("Amended Option") that extended the duration of SWN's exclusive option rights to lease the oil and gas underlying the Walden Property through September 14, 2022. Defendants refused to include this document in the appeal record because it was not submitted to the circuit court. Contemporaneously with the filing of this brief, SWN has filed a motion to supplement the record to include the Amended Option.

between the Waldens' predecessors in title and Eli Rabb. JA 000148-000149 (Affidavit of Gary Nuckolls). A court's interpretation of the language set forth in operative instrument at issue will likely influence the interpretation of other similar instruments, and therefore may affect SWN's ownership interests in oil and gas underlying other properties with a similar instrument in the chain of title. The ability to reliably and consistently determine ownership of the oil and gas estate underlying specific parcels based on recorded instruments is key to SWN's operations. SWN's ability to determine ownership of mineral interests rests upon a well-settled body of law governing how courts should interpret conveyance and/or reservation language in deeds.

In denying SWN's motion to intervene, Judge Olejasz became the second judge in Brooke County within the span of 16 months to deny intervention to SWN in a quiet title action in which SWN has an ownership interest in the subject property. By order entered on February 22, 2019, Judge Cuomo denied SWN's motion to intervene in a case that involves the interpretation of a similar recorded instrument conveying certain mineral interests to Eli Rabb. SWN has a pending appeal before this Court challenging that order, which is set for oral argument on October 6, 2020. *SWN Production Company, LLC v. Conley, et al.*, Appeal No. 19-0267 ("*Conley*"). After Judge Cuomo declined to postpone a trial in *Conley* scheduled to start on August 26, 2019 until after resolution of SWN's appeal, this Court issued an order on July 17, 2019 doing so.[2]

This Court should reverse the circuit court's decision and allow SWN to intervene in the underlying case. It is black letter law that all persons who claim an interest in property must be parties to a quiet title action involving that property. *Bonafede v. Grafton Feed & Storage Co.*, 81

[2] This order is not in the appeal record for this case since it was not filed with the circuit court in the Walden action. This Court can, however, take judicial notice of its own order in another appeal.

W. Va. 313, 313, 94 S.E. 471, 471 (1917); *O'Daniels v. City of Charleston*, 200 W. Va. 711, 716, 490 S.E.2d 800, 805 (1997). SWN also satisfies the grounds for intervention set forth in Rule 24.

B. Nature of the claims in the underlying quiet title action.

The underlying civil action arises from a dispute over the ownership of certain oil and gas rights that stem from an instrument in the chain of title that is self-described as a deed dated January 22, 1962 between William Bailey Walden and Dorothy Fay Walden, as grantors, and Eli Rabb, as grantee ("Walden-Rabb Instrument"). JA 000142-000146. The language set forth in the Walden-Rabb Instrument is similar to language appearing in multiple other instruments recorded in Brooke County that purport to convey certain mineral interests to Eli Rabb ("Rabb Instruments"). JA 000148-000149 (Affidavit of Gary Nuckolls). This includes a June 5, 1959, instrument self-described as a deed from Maria H. Milliken, as grantor, to Eli Rabb, as grantee, recorded in the Brooke County, West Virginia, Clerk's Office in Deed Book 148, Page 144 ("Milliken Deed"). The Milliken Deed is at issue in *Conely*. JA 000151-000154. SWN has executed leases governing multiple properties with a Rabb Instrument in the chain of title. JA 000148-000149 (Affidavit of Gary Nuckolls).

The Walden-Rabb Instrument conveys to Eli Rabb "all the coal" underlying the Walden Property and reserves a one-half interest in the oil and gas, a one-half interest "in all oil and gas rentals" and the right to drill through a coal seam to produce gas. JA 000142-000143. The Walden-Rabb Instrument also purports to convey "rights to explore, operate and drill for Oil and Gas" together with the necessary surface rights to do so, along with an obligation to pay royalties on any produced oil and gas. JA 000143. This conveyance language is consistent with language used in oil and gas leases. The final paragraph of the Walden-Rabb Instrument states the grantors warrant title to the "said coal and mining rights," but does not mention any warranty for the oil

and gas rights. JA 000145. The Waldens are the successors in title to the grantors of the Walden-Rabb instrument (William Bailey Walden and Dorothy Fay Walden).

In June 2007, over 50 years after recording of the Walden-Rabb Instrument, Eli Rabb entered into a "Farmout Agreement" with defendant-below TriEnergy, Inc. JA 000005 (Complaint). Notwithstanding the complete absence of language in the Walden-Rabb Instrument conveying a fee interest in the oil and gas to Eli Rabb, the Farmout Agreement purports to authorize TriEnergy, Inc. to develop oil and gas underlying the Walden Property (and other properties in Brooke County). JA 000005 (Complaint). From 2007 through 2016, the putative rights created by the Farmout Agreement were subsequently divided and conveyed among multiple other parties. JA 000005-000007 (Complaint).

In the nearly 60 years since recording of the Walden-Rabb Instrument, the oil and gas underlying the Walden Property has not been developed, produced, or sold by anyone. JA 000007 (Complaint). The Walden Property has not been used for underground storage of oil or gas, and no royalties, rentals, or other monetary payments have been made to the Waldens in association with oil and gas development or storage. JA 000007 (Complaint).

C. Procedural history.

The Waldens filed their Complaint on January 23, 2018 naming a total of 11 defendants. JA 000001. The following four defendants made an appearance in the civil action: (1) TriEnergy, Inc.; (2) TriEnergy Holdings, LLC (both TriEnergy defendants will be collectively referenced as "TriEnergy"); (3) Lee Rabb, individually as trustee of the Eli Rabb Revocable Trust dated October 7, 2005 ("Rabb"); and (4) Trinity Health Systems Foundation ("Trinity Health") (these four defendants will be collectively referenced as "Defendants"). JA 000398-000399 (Docket Sheet). The Waldens filed a notice of voluntary dismissal for defendant Chevron, USA, Inc. on November

7, 2018. *Id.* The circuit court's docket does not reflect an appearance by the remaining six named defendants.[3] *Id.*

TriEnergy, Rabb, and Trinity each answered the Waldens' Complaint and asserted two counterclaims: (1) a declaration that they held legal title to the oil and gas underlying the Walden Property rather than the Waldens; and (2) a claim for adverse possession of the oil and gas. JA 000012-000060. On April 18, 2018, the Waldens moved to dismiss these counterclaims. JA 000061-000084. The circuit court's docket does not reflect a hearing or ruling on this motion. JA 000398-000399.

The only activity shown in the circuit court's docket from April 19, 2018 through December 2, 2018 reflects efforts to serve process on the other defendants and the dismissal of Chevron USA, Inc. noted above. JA 000398-000399. On December 3, 2018 and December 7, 2018, TriEnergy, Rabb, and Trinity filed certificates of service for responses to discovery requests served by the Waldens.[4] JA 000398-000399. This is the only reference in the circuit court docket to discovery activity. The docket does not reflect any deposition notices or other discovery activities. JA 000398-000399.

For the calendar year 2019, the circuit court's docket only reflects three entries. On April 9, 2019, the Court entered an order directing the parties to submit a stipulation containing information for use in preparing a scheduling order. JA 000092-000093. The parties did so on April 26, 2019. JA 000094-000095. The Court then entered a scheduling order on May 15, 2019 setting the case for trial on July 29, 2020 with a discovery completion deadline of May 20, 2020.

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[3] Those six defendants are: AB Resources, LLC; KRP Marcellus I, LLC; Rivercrest Royalties II, LLC; Diversified Rox Minerals, LLC; BRD Royalty Holdings, LLC; and Amon G. Carter Foundation. According to the Complaint, these entities appear in the chain of title for the rights that Rabb purportedly conveyed via the 2007 farmout agreement.

[4] The docket does not reflect when the Waldens served Defendants with the discovery requests.

JA 000096-000100. The scheduling order also established other deadlines, including the following:

- May 27, 2020: final witness list and exhibits exchanged.
- June 3, 2020: submission of dispositive motions.

The circuit court docket reflects no subsequent activity until SWN filed its motion to intervene on February 12, 2020. JA 000399. The circuit court set that motion for hearing on April 24, 2020, which was effectively canceled via the subsequent judicial emergency declaration arising from the Covid-19 pandemic. JA 000160. A hearing later took place on June 3, 2020. JA 000365-000397. During that hearing, counsel for the Waldens noted that counsel for the existing parties exchanged emails in January, 2020 recognizing the need to amend the scheduling order, which was before SWN moved to intervene. JA 000385-000386. The circuit court's docket does not reflect any exchange of any final witness or exhibit lists that was required by the scheduling order to take place by May 27, 2020. JA 000398-000399. No dispositive motions were filed on or before the June 3, 2020 deadline. JA 000398-000399.

Noting that the July 29, 2020 trial date was less than 60 days away and the minimal discovery that had taken place, Judge Olejasz invited the parties to submit a joint motion to amend the scheduling order. JA 000395.

The following day, June 4, 2020, Judge Olejasz entered an order denying SWN's motion to intervene. JA 000269-000271. The grounds stated in the order are very similar, but not identical, to those appearing in Judge Cuomo's order denying intervention to SWN in *Conley*. A week later, on June 10, 2020, the parties submitted a joint motion to vacate the scheduling order, which was granted by order entered on June 11, 2020. JA 000272-000274. The circuit court entered a new scheduling order on June 30, 2020 setting the case for trial on May 17, 2021. JA 000275-000279.

On July 2, 2020, SWN timely filed with this Court an appeal notice of Judge Olejasz's order denying intervention. SWN then filed on July 15, 2020 a motion with the circuit court to stay further proceedings until after resolution of SWN's appeal. JA 000280-000362. The circuit court granted SWN's motion by order entered on July 23, 2020. JA 000363-000364.

III. Summary of argument.

A. Assignment of Error No. 1 (SWN's ownership interest in the property).

This Court need not look far to reverse the circuit court's denial of intervention. SWN has an ownership right to the oil and gas interests at issue in this title dispute. The circuit court is deciding whether the Waldens and SWN own the mineral rights, or whether one or more of the Defendants does. West Virginia law is crystal clear that all persons who claim an interest in property must be parties to a quiet title action involving that property, and any judgment without those persons as parties is void. SWN is thus a necessary and indispensable party to this suit for quiet title, and entitled to intervene.

B. Assignment of Error No. 2 (timeliness of intervention motion).

The circuit court abused its discretion in finding that SWN did not timely move to intervene. The circuit court failed to consider the status of the case as a whole, the severe prejudice to SWN that would result from being excluded from the case, and the absence of any unfair prejudice to the existing parties by allowing SWN to intervene. In January, 2020, before SWN moved to intervene, the existing parties recognized the need to amend the scheduling order to provide more time for discovery beyond the existing May 20, 2020 deadline. Minimal written discovery had taken place and no depositions had been scheduled, much less conducted. Both the circuit court and the parties recognized the need to amend the scheduling order during the June 3, 2020 hearing on SWN's motion regardless of whether SWN was granted intervention. No party

could have suffered any unfair prejudice as a result of the timing of SWN's motion or allowing SWN into the case.

C. Assignment of Error No. 3 (timing of SWN's property interest acquisition).

The circuit court erred as a matter of law by denying intervention on the grounds that SWN acquired its property interest after suit was filed. Nothing in Rule 24 allows the circuit court to deny intervention based on an after-acquired property right. The circuit court's interpretation of Rule 24 unfairly precludes intervention by persons who acquire an interest in property either with or without knowledge of pending litigation. Such an interpretation is contrary to the text and purpose of Rule 24 – to provide all persons having a cognizable interest in the subject of litigation with a proverbial "seat at the table" to protect their interests.

The circuit court also erred by concluding that SWN cannot "buy in" to the litigation because it purportedly had "full knowledge" that the Waldens lacked quiet title to the property, and therefore "assumed the risk" that its option agreement has no value. There is no evidence in the record to demonstrate that SWN was aware of the pending litigation when SWN entered into an option agreement with the Waldens. Regardless of any knowledge, the existence of litigation over title to property does not destroy the value of the subject property. Oil and gas rights have obvious value for development as shown by the considerable resources devoted by the existing parties and SWN in this case. The circuit court's order – not the pending litigation – has the effect of diminishing the value of property rights. The ability to "tie up" future conveyances of property rights through litigation (regardless of the merits) has the perverse effect of encouraging quite title actions by those who may benefit from depressing the market value of real property interests.

D. Assignment of Error No. 4 (likelihood of impairment).

The circuit court's order ignores the likelihood that resolution of the competing title claims could impair SWN's rights to lease the oil and gas underlying the Walden Property. A declaratory judgment quieting title in favor of TriEnergy, Rabb, and/or Trinity would purport to destroy SWN's exclusive rights to lease the Walden's oil and gas interests in the Walden Property, which would be the ultimate impairment of a property interest. By denying intervention, the circuit court precluded SWN's ability to protect its property interests in this case.

E. Assignment of Error No. 5 (adequate protection of interest).

The circuit court erred in finding that SWN's interests are identical to the Waldens' interests, and that the Waldens will adequately protect SWN's interests. The circuit court made no findings of fact concerning SWN's interests or how the Waldens would adequately protect those interests. Nor could it. SWN's interests are not fully aligned with the Waldens, and in some ways are antagonistic to the Waldens. SWN's development of oil and gas poses considerable risks not shared by mineral owners – namely the potential loss of substantial investment of time and capital associated with efforts to produce oil and gas. SWN also has leases for other properties that have a Rabb Instrument in their chain of title. A decision interpreting the Walden-Rabb instrument will likely influence the interpretation of other Rabb Instruments. There is no evidence that the Waldens' have any motivation to protect those interests. The Waldens also likely lack the same level of financial resources as SWN that can be applied to vigorously protect their property rights.

F. Assignment of Error No. 6 (permissive intervention).

The circuit court erred in denying permissive intervention on the grounds that the Waldens adequately protect SWN's interests, and the existing parties would be prejudiced by the timing of SWN's intervention. The June 4, 2020 order denying intervention notes that the July 29, 2020

trial was scheduled to commence in less than two months. The circuit court shortly thereafter vacated the scheduling order upon receipt of the joint motion anticipated during the June 3, 2020 hearing, and later entered a new scheduling order. Postponement of the trial date had nothing to do with the timing of SWN's motion. Moreover, the circuit court made no findings as to whether SWN satisfied the elements to support permissive intervention.

IV. Statement regarding oral argument and decision.

SWN requests Rule 19 oral argument. This Court is scheduled to hear Rule 19 oral argument in *Conley* on October 6, 2020. Although the factual circumstances giving rise to this appeal are different than *Conley*, many of the legal issues at issue in this appeal are also presented in *Conley*. In light of this Court's determination that the issues presented in *Conley* merit Rule 19 oral argument, and the similarity of the issues presented in this appeal, SWN believes Rule 19 oral argument would be sufficient.

V. Argument.

A. Grounds for intervention in a pending civil action.

Rule 24 of the West Virginia Rules of Civil Procedure governs intervention. Its purpose is to "achieve judicial economies of scale by resolving related issues in a single lawsuit" while also preventing "intervention by nonparties who have no real interest whatsoever in an action." *Palmer*, et al., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE, 5th ed. at 698.

Rule 24 should be liberally construed in favor of the prospective intervenor. *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 403, 540 S.E.2d 917 (1999); *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000). "Courts should allow intervention where no one would be hurt and greater justice could be attained." *Palmer*, et al., LITIGATION HANDBOOK ON WEST VIRGINIA

RULES OF CIVIL PROCEDURE, 5th ed. at 698. "Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993).

Rule 24 recognizes two grounds for intervention: mandatory and permissive. Rule 24(a) creates a mandatory right to intervene when four criteria are met:

> (1) the application must be timely;
>
> (2) the applicant must claim an interest relating to the property or transaction which is the subject of the action;
>
> (3) disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and
>
> (4) the applicant must show that the interest will not be adequately represented by existing parties.

Syl. Pt. 2, *Ball*, 208 W. Va. 393.

Rule 24(b) empowers a trial court to grant intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." W. Va. Civ. R. 24(b); *see also, Fauble v. Nationwide Mut. Fire Ins. Co.*, 222 W.Va. 365, 664 S.E.2d 706 (2008). Permissive intervention is also warranted when there are questions of law and fact in common between the parties. *Stern v. Chemtall Inc.*, 217 W.Va. 329, 617 S.E.2d 876 (2005).

Failure to allow permissive intervention when such common questions exist constitutes an abuse of discretion. "It is obvious to us that intervention should have been permitted due to the questions of law and fact in common between the parties." *Stern v. Chemtall Inc.*, 217 W. Va. 329, 337, 617 S.E.2d 876, 884 (2005).

B. Standard of review.

On appeal, a trial court's denial of intervention as of right under Rule 24(a) is reviewed *de novo* except for the timeliness element, which is reviewed for abuse of discretion. Syl. Pt. 3, *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 540 S.E.2d 917 (1999); *Brumfield v. Dodd*, 749 F.3d 339, 342 (5th Cir. 2014) ("We review a denial of a right to intervene de novo."); *Medical Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 485 F.3d 1006, 1008 (8th Cir. 2007) ("We review a district court's denial of mandatory intervention *de novo*."); *Freedom From Religion Found., Inc. v. Geithner*, 644 F.3d 836, 840 (9th Cir. 2011) ("We review a denial of a motion to intervene as of right *de novo*."). This Court owes no deference to any of the circuit court's findings concerning the elements of mandatory intervention other than the timeliness of SWN's intervention motion.

Permissive intervention is reviewed under an abuse of discretion standard. *Stern v. Chemtall Inc.*, 217 W. Va. 329, 337, 617 S.E.2d 876, 884 (2005).

C. Assignment of Error No. 1: As an owner of an interest in the Walden Property, SWN has an absolute right to intervene in the quiet title action and any judgment without it is void.

The circuit court erred in denying intervention for numerous reasons. Like Judge Cuomo's order in *Conley*, Judge Olejasz's order fails to follow black letter law on who should be made a party in a suit to quiet title to real property.

SWN's option agreement with the Waldens creates an ownership right to the oil and gas interests. An option to acquire property interests is a recognizable property right protectable by law. *See Kaiser Dev. Co. v. Honolulu*, 649 F. Supp. 926, 936 (D. Haw. 1986) (option holder "has the power to force conveyance of the land, has immunity from revocation or repudiation by the optionor, and may enforce these rights in court."). An option agreement creates a property right that gives rise to a mandatory right to intervene in litigation involving the subject property. *Brown*

v. Brown, 136 A.D.3d 852, 853 (N.Y. App. Div. 2016); *Renewable Land, LLC v. Rising Tree Wind Farm, LLC*, 2013 U.S. Dist. LEXIS 34908, at*8 (E.D. Cal. 2013).

This Court has consistently held that a party who claims an interest in real property that is the subject of a quiet title action is a necessary and indispensable party that must be permitted to participate. "In a suit to cancel a cloud upon the title to real estate, all parties who have or claim any interest, right, or title under the instrument, or instruments, of writing sought to be cancelled, should be made parties defendant." *Bonafede*, 81 W. Va. at 313. "It is axiomatic that when a court proceeding directly affects an interest in real property, any persons who claim an interest in the real property at issue are necessary parties to the proceeding. Therefore, any decree issued in the absence of those parties is void." *O'Daniels*, 200 W. Va. at 716.

SWN's option to lease oil and gas rights from the Waldens qualifies as a "direct and substantial" legal interest in the Walden Property that gives rise to a mandatory right to intervene in a dispute over who owns the title to the oil and gas. SWN has an absolute, unconditional right to intervene, and any judgment in this case without it is void.

This point is dispositive, and the circuit court's decision should be reversed on this ground.

D. Assignment of Error No. 2: SWN timely moved to intervene.

The circuit court also erred in concluding that SWN's intervention was not timely. Judge Olejasz committed the same legal error as Judge Cuomo did in *Conley* by focusing on how long the case had been pending rather than examining the status of the case and whether prejudice would result from granting or denying intervention.

"The requirement of timeliness must be considered within the factual context of each case, including the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the possibility of prejudice to the existing parties." 6

MOORE'S FEDERAL PRACTICE - CIVIL § 24.21 (2019) (citing various federal cases). "In order to properly determine whether a motion to intervene in a civil action is sufficiently timely, a trial court in this Circuit is obliged to assess three factors: first, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion." *Alt v. United States EPA*, 758 F.3d 588, 591 (4th Cir. 2014).

"The mere passage of time, in itself, does not render a motion untimely; rather, the important question concerns actual proceedings of substance on the merits." 6 MOORE'S FEDERAL PRACTICE - CIVIL § 24.21 (2019). "The timeliness requirement prevents disruptive, late-stage intervention that could have been avoided by the exercise of reasonable diligence." *Id.*

1. The circuit court failed to consider the circumstances and status of proceedings in denying intervention.

The circuit court's June 4, 2020 order states that SWN's request for intervention under Rule 24(a) was untimely because "SWN did not file an application until two (2) years after the initial Complaint was filed." JA 000269-000271. The order reflects no consideration of the overall case status rather than the mere passage of time. The case had not progressed very far. As reflected on the docket sheet, the existing discovery activity was limited to Defendants' responses to a set of written discovery served by the Waldens. JA 000398-000399. No depositions had taken place. No dispositive motions had been filed. The parties did not serve the final lists of witnesses or exhibits by the May 27, 2020 deadline, or file dispositive motions by the June 3, 2020 deadline. JA 000398-000399.

The order notes that the "current trial is scheduled to begin on July 29, 2020, less than two (2) months from this date." However, the order does not acknowledge the discussion during the June 3, 2020 hearing that the existing parties all recognized as early as January 2020 – well before

SWN sought intervention – that an amendment of the scheduling order would be necessary to afford additional time for all parties to engage in discovery and prepare for trial:

> [Counsel for the Waldens, Mr. Cipriani] Now, finally, Your Honor, going back to the scheduling, which is frankly my biggest concern right now because the trial is scheduled July 29th and a couple of deadlines have passed, the – which it was – I think an exhibit list was supposed to be filed. Nobody did that. And the reason we didn't do that, I know the reason I didn't do that, I assume the reason the defendants didn't, counsel didn't do it, is because back in January, we started talking about vacating the scheduling order. I wrote an e-mail both to Joe and Rich. They actually approached me about amending the scheduling order.
>
> I said that I'm sorry it's taken so long to get back to you. I agree that we should modify the existing schedule. I just don't know how you want to handle it. So let me know your ideas.
>
> I received an e-mail back from Mr. Beaver saying, "Joe and I spoke about the scheduling order issue. We think that a joint motion to vacate the scheduling order is the way to go. I will draft a motion and circulate it next week."
>
> Well, Your Honor, you practiced law for a long time. These things come and first thing you know, you go, where is that motion? So I thought he was going to draft a motion and next thing you know, there's a motion to intervene and the next thing you know, there's the Coronavirus and the Supreme Court's issued an administrative order, so we don't know what ends up.
>
> So, frankly, Your Honor, I think we need to address that maybe when we're done with this other thing. So that's – that's where we are with that.

JA 000385-000386. The order likewise does not reference the circuit court's invitation to the parties to submit a motion to amend the existing scheduling order:

> [Judge Olejasz] If the parties want to readdress the scheduling order, especially in light of some of the factual issues as to grantor versus draftor and the facts that could be determined or the expert testimony that would be needed, Mr. Cipriani, I'd be happy to look at a motion to continue or if the parties are still of the mind to put to the Court a joint motion to continue, I'd consider that as well. But now we're sitting here in early June with a trial date looming in late July, let alone some other dates in the scheduling order that are bearing down on us or entirely passed. So whatever we do, I'd appreciate it if we could do it as soon as possible.

JA 000395. The circuit court was well aware of the need to amend the scheduling order and the parties' intention to file a written motion to that effect in short order.

In short, the circuit court did not give any consideration to the status of the proceedings aside from the age of the case in making a determination of SWN's timeliness. This constitutes an abuse of discretion. "The mere passage of time, in itself, does not render a motion untimely; rather, the important question concerns actual proceedings of substance on the merits." 6 MOORE'S FEDERAL PRACTICE - CIVIL § 24.21 (2019).

2. The circuit court failed to consider the severe unfair prejudice to SWN of being denied intervention, and conversely the absence of unfair prejudice to the exiting parties.

The order contains no recognition of the severe prejudice that SWN would suffer by being excluded from a proceeding to determine ownership of the oil and gas that SWN has an exclusive option to lease from the Waldens. "The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." *7C Wright & Miller*, FEDERAL PRACTICE AND PROCEDURE § 1916 (3d ed.). "Conversely, the absence of prejudice supports finding the motion to be timely." *Id.*

"[I]n situations in which intervention is of right the would-be intervenor may be seriously harmed if he is not permitted to intervene, courts should be reluctant to dismiss a request for intervention as untimely . . . ." *Mt. Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d Cir. 1995) (quoting *7C Wright & Miller*, FEDERAL PRACTICE AND PROCEDURE, § 1916 at 424).

In *Mt. Top Condo.*, the Third Circuit affirmed a district court's decision to permit intervention in a case that had been pending for four years when the motion was made. The Third Circuit observed that "the critical inquiry is: what proceedings of substance on the merits have occurred?" *Id.* In that case, some discovery had taken place, but no depositions had been taken or decrees entered. *Id.* The court also recognized that the intervening party would be severely prejudiced if it were excluded from the case. *Id.*

The same holds true in this case. Little activity had taken place before the circuit court, and the existing parties recognized the need to seek an amendment of the scheduling order. SWN would be severely prejudiced by being excluded from the proceedings since a potential result could be a judgment declaring that the Waldens lack title to the oil and gas underlying their property, and would thus purportedly lack the ability to lease those rights to SWN.

With respect to prejudice to the existing parties, the order notes that "the interests of the original parties will be adversely affected if this litigation is extended via the additional of SWN" and that "the original parties would be unduly prejudiced by SWN's joining this litigation over two (2) years after it was initiated." JA 000269 and 000271. The order does not, however, provide any factual basis for these conclusions. More importantly, these statements are contrary to the comments quoted above by the existing parties and the circuit court during the June 3, 2020 hearing that an amendment of the scheduling order would be made soon, which had nothing to do with the timing of SWN's motion.

In other words, the scheduling order was going to be amended, and the litigation thus extended, regardless of whether SWN had moved to intervene. Moreover, the relevant inquiry is not how long the case had been pending. Rather, the relevant inquiry is what had taken place so far and whether the existing parties would be prejudiced by allowing a party to intervene. As noted above, barely any discovery had taken place. Deadlines for pretrial submissions had passed without action. The parties and the court all recognized the need to amend the scheduling order. Granting intervention to SWN would therefore not have unfairly prejudiced any of the parties.

The circuit court abused its discretion in failing to acknowledge any of these facts in its order denying intervention.

E. Assignment of Error No. 3: The timing of SWN's option agreement is irrelevant to whether SWN satisfies the requirements for mandatory intervention.

1. A direct and substantial property interest creates a mandatory right to intervene regardless of when the interest is acquired.

To satisfy the "interest" element for mandatory intervention, the claimed interest must be "direct and substantial." As stated in *State ex rel. Ball v. Cummings*:

> To justify intervention of right under West Virginia Rule of Civil Procedure 24(a)(2), the interest claimed by the proposed intervenor must be direct and substantial. A direct interest is one of such immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment to be rendered between the original parties. A substantial interest is one that is capable of definition, protectable under some law, and specific to the intervenor. In determining the adequacy of the interest in a motion to intervene of right, courts should also give due regard to the efficient conduct of the litigation.

Syl. Pt. 4, 208 W. Va. 393, 396, 540 S.E.2d 917, 920 (1999).

Here, SWN plainly has a direct and substantial interest in the suit.

a. SWN has an ownership interest in the Walden Property, whose title is in dispute in the underlying civil action.

The circuit court's order does not address whether SWN's option to lease the oil and gas rights from the Waldens created a "direct and substantial" interest in the Walden Property. Defendants' response filed with the circuit court in opposition to SWN's intervention motion does not argue that the nature of SWN's interest is insufficient to give rise to a right to intervene (aside from the timing of SWN's acquisition of that interest).

Several courts have recognized that an option agreement creates enforceable property rights and is sufficient to support intervention. *Brown v. Brown*, 136 A.D.3d 852, 853 (N.Y. App. Div. 2016) (recognizing that an option agreement creates a property right that gives rise to a mandatory right to intervene in litigation involving the subject property). *Renewable Land, LLC v. Rising Tree Wind Farm, LLC*, 2013 U.S. Dist. LEXIS 34908, *8 (E.D. Cal. 2013) (same); *Kaiser*

Dev. Co. v. Honolulu, 649 F. Supp. 926, 936 (D. Haw. 1986) (option holder "has the power to force conveyance of the land, has immunity from revocation or repudiation by the optionor, and may enforce these rights in court.").

The underlying suit involves competing claims between the Waldens and the Defendants as to ownership of the oil and gas rights for the Walden Property. A judgment that Defendants own the oil and gas rights would purportedly invalidate SWN's ability to exclusively lease those rights from the Waldens even though SWN would not be a party to the case. This makes SWN an indispensable party, and any judgment without it will be void. *Bonafede*, 81 W. Va. at 313; *O'Daniels*, 200 W. Va. at 716.

b. The circuit court's holding that a party cannot intervene if its property right is obtained after suit is filed should be rejected.

The circuit court's order addresses the timing of SWN's acquisition of its property interest as follows:

> SWN did not have any interest in the property when the lawsuit was filed and only subsequently pursued an interest through an option agreement with the Plaintiffs. Thus, SWN purchased the option agreement with full knowledge that the Plaintiff did not have a "quiet title" and therefore assumed the risk that it may have no value. This Court will not allow an entity to "buy in" to litigation.

JA 000270. The circuit court's conclusions are both factually and legally erroneous for a multitude of reasons.

First, there is no evidence in the record to support a finding that "SWN purchased the option agreement with full knowledge that the Plaintiff[s] did not have 'quiet title' and therefore assumed the risk that it may have no value." JA 000270. There is no evidence to establish that SWN was aware of the pending litigation when entering into the option agreement.

Second, even assuming *arguendo* that SWN was aware of the pending litigation, such knowledge does not mean that SWN "therefore assumed the risk that [the option agreement] may

have no value." The circuit court cited to no provision of Rule 24 or other law for the proposition that one "assumes the risk" that interests acquired in property involved in pending litigation have no value. In addition to lacking any basis in law, such a conclusion does not make practical sense. Simply because title to property is involved in litigation does not destroy the value of the subject property. The oil and gas rights to the Walden Property have obvious value for development. SWN paid over $24,000 to the Waldens simply to acquire an exclusive option to lease those rights during a two-year period. JA 000130. The Waldens and the Defendants certainly believe the oil and gas rights are valuable enough to expend considerable resources to fund litigation seeking a declaratory judgment in their favor. The mere existence of quiet title litigation does not destroy the value of any property. That is the practical effect, however, of the circuit court's ruling. Under that ruling, property owners who find themselves mired in litigation over title – whether meritorious or not – would be unable to transfer title to another party with assurances that the new owner could defend its newly acquired property rights in the pending litigation. This scenario would unfairly prejudice property owners by diminishing, if not destroying, the value of the property involved in a title dispute until resolution of the litigation. The ability to "tie up" future conveyances of property rights has the perverse effect of encouraging litigation by those who may benefit by depressing the market value of real property interests.

Third, the timing of SWN's acquisition of the option is irrelevant. The critical fact is that SWN has an ownership interest in the title of the property at issue – giving it an unconditional right to intervene and making the circuit court's judgment void if it is not a party. When SWN acquired the option is immaterial.

Fourth, nothing in Rule 24 prevents a party from seeking intervention in these circumstances based on an after-acquired property right. The circuit court is effectively re-writing

the rule to impose such a requirement, which is the same error committed by Judge Cuomo in *Conley*. *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (courts should not interpret the Rules of Civil Procedure to impose greater obligations than stated in the text). Such an interpretation would not make sense, in addition to being an incorrect construction of Rule 24. It would also unfairly restrict the ability of persons who have an interest in the object of litigation to intervene. Persons may acquire or dispose of various property interests without any knowledge of pending litigation concerning the property. Depending on the type of property involved, such as personal property, a potential buyer or seller may have no reasonable means of discovering the existence of pending litigation concerning the subject property. Under the limitation adopted by the circuit court, one who acquires property after litigation has commenced involving the property would be prohibited from intervening under Rule 24 regardless of the person's knowledge concerning the litigation.

Fifth, the circuit court's conclusion is contrary to the liberal standards of Rule 24. As this Court has emphasized, "[a] liberal view toward allowing intervention should be followed." *Ball*, 208 W. Va. at 403; *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000). "Courts should allow intervention where no one would be hurt and greater justice could be attained." *Palmer, et al.*, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE, 5th ed. at 698. "Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993).

In short, SWN's option agreement to lease the oil and gas rights from the Waldens qualifies as a "direct and substantial interest" in the property at issue regardless of when SWN acquired it.

The circuit court plainly erred by effectively reading into Rule 24 an additional limitation that would prohibit intervention when a property interest was acquired after litigation commenced.

c. A judgment in the underlying suit may affect SWN's leases of other property with a Rabb Instrument in the chain of title.

SWN's interests are further affected by the underlying action because of the potential impact on other properties in which SWN has an ownership interest. SWN has oil and gas leases for other properties in Brooke County that have a Rabb Instrument in the chain of title. A declaratory judgment concerning ownership of the oil and gas rights to the Walden Property will require an interpretation of the Walden-Rabb Instrument. A judgment interpreting the Walden-Rabb Instrument to vest Rabb, TriEnergy, and/or Trinity with the oil and gas rights to the Walden Property will likely be used as evidence in actions addressing ownership of oil and gas rights for properties with a similar Rabb Instrument in the chain of title. This gives SWN a strong incentive to participate in the underlying action in support of an interpretation of the Walden-Rabb Instrument that results in a declaration that the Waldens own the oil and gas rights to their property.

F. Assignment of Error No. 4: resolution of the underlying claims threatens to impair SWN's ability to protect its property interest.

In determining whether disposition of an action may impair or impede an intervenor's ability to protect its interest, "courts must first determine whether the proposed intervenor may be practically disadvantaged by the disposition of the action." Syl. Pt. 5, *Ball*, 208 W. Va. at 396. If so, the court "then must weigh the degree of practical disadvantage against the interests of the plaintiff and defendant in conducting and concluding their action without undue complication and delay, and the general interest of the public in the efficient resolution of legal actions." *Id.*

The circuit court's order does not squarely address whether SWN satisfied the "impairment" element of Rule 24(a) mandatory intervention – a showing that disposition of the underlying claims "may as a practical matter impair or impede the applicant's ability to protect

that interest[.]" Instead, the order notes that "even if SWN's interests are somehow collaterally affected adversely via the underlying suit, SWN can simply take legal action after this litigation has ended." JA 000270. Like a similar finding by Judge Cuomo in *Conley*, this aspect of the circuit court's order is in error for multiple reasons.

First, the circuit court's conclusion is contrary to black-letter West Virginia law recognizing that any person who claims an ownership interest in real property is an indispensable party in a quiet title action. It is so well established that SWN's interests would be impaired that any judgment is void if it is not a party. *Bonafede*, 81 W. Va. at 313; *O'Daniels*, 200 W. Va. at 716.

Second, there is no serious question that disposition of the underlying case could impair or impede SWN's ability to protect its interest. A judgment in the underlying case will go one of two ways: either the Waldens and SWN own the oil and gas rights or Defendants do. A judgment finding that Defendants own the oil and gas underlying the Walden Property would purport to deprive SWN of its rights to obtain a valid lease from the Waldens.

Third, the circuit court did not follow *Ball's* directive to weigh SWN's interest against the interests of the existing parties to resolve the underlying case without undue complication and delay. Syl. Pt. 5, 208 W. Va. at 396. The June 4, 2020 order reflects no discussion of these competing interests.

Fourth, the circuit court's comment that, in the event SWN's rights are impacted, "SWN can simply take legal action after this litigation has ended" is not a basis on which to deny intervention. Rather, this statement effectively concedes that SWN's interests are at risk in the litigation, which gives rise to a right to intervene. The circuit court offers no explanation of what legal action SWN could pursue in the event of a judgment adverse to the Waldens that would put

SWN in the same position that it enjoys via the option agreement – i.e. possessing exclusive rights to lease the oil and gas underlying the Walden Property for development. A subsequent suit against the Waldens would be meaningless since, under that scenario, the Waldens would purportedly lack any rights to lease the oil and gas that could be awarded to SWN. Any suit against Defendants challenging their title to the oil and gas would likely be met with a *res judicata* defense.

For all these reasons, SWN clearly satisfied the "impairment" element to establish a right to intervene. Rule 24(a) only requires a proposed intervenor to be situated such that "disposition of the action *may* impair or impede" the ability to protect the intervenor's interest (emphasis added). The circuit court's rationale cannot override the fact that SWN has an ownership interest in the property, is a necessary and indispensable party, and that any judgment without it is void.

G. Assignment of Error No. 5: SWN's interests are not identical to the Waldens' interests, and the Waldens will not adequately represent SWN's interests.

The circuit court erred in determining that SWN's interests are identical to the Waldens' interests, and that the Waldens would adequately protect SWN's interests. Judge Cuomo committed a similar error in *Conley*. The burden of demonstrating inadequate representation is "minimal" and "a liberal view toward allowing intervention should be followed." *Ball*, 208 W. Va. at 403. "Doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it, because this serves the judicial system's interest in resolving all related controversies in a single action." *Id.* (quoting *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992)).

"[A] proposed intervenor need only show that his claimed interest may not be adequately represented; no showing of actual inadequacy is required." *Id.* "If the proposed intervenor's interest is not represented by the existing party, or the existing party's interests are adverse to those of the proposed intervenor, intervention should be granted." *Id.* "If the interests of the proposed

intervenor and the existing party are similar, 'a discriminating judgment is required on the circumstances of the particular case, but [the proposed intervenor] ordinarily should be allowed to intervene unless it is clear that the [existing] party will provide adequate representation for the absentee.'" *Id.* (quoting *7C Wright & Miller*, FEDERAL PRACTICE AND PROCEDURE § 1909, p. 319) (alteration in original).

The circuit court based its conclusion that the Waldens will adequately represented SWN's interests on the following: "SWN and the Plaintiffs have represented to the Court that their interests are in line with each other. Therefore, the interest acquired by SWN through its option agreement with Plaintiffs, is identical to that of the Plaintiffs." JA 000270. Contrary to the circuit court's order, SWN and the Waldens advised the circuit court that their interests were *not* aligned, and that the Waldens would not adequately represent SWN's interests.

During the June 3, 2020 hearing, counsel for the Waldens, Mr. Cipriani, advised the circuit court that his clients' interests were "antagonistic" to SWN's interests. JA 000387. Mr. Cipriani also notified the circuit court during the June 3, 2020 hearing that SWN would bring much needed financial resources to the litigation that the Waldens were unable to provide. JA 000382-000383.

In SWN's memorandum of law filed in support of its intervention motion, SWN detailed four reasons why the Waldens would not adequately represent SWN's interests. JA 000101-000158. First, no party to this matter occupies a position legally or factually similar to SWN. The Waldens and certain of the Defendants claim fee ownership of the oil and gas interests underlying only the subject property. SWN's interest in the property is that of an option holder with rights to enter into a lease to develop the underlying oil and gas – most likely through pooling the property with other nearby property as part of a development unit. The Waldens have no similar interest in pooling properties for development.

Second, this Court's interpretation of the Walden-Rabb Instrument may influence the interpretation of other similar Rabb Instruments appearing in the chain of title for other properties in Brooke County that SWN has under lease. Similarly, parties might try to use as evidence in other actions to quiet title to properties with a Rabb Instrument in the chain of title any findings made by the circuit court or a jury in this case.

Third, the Waldens' interests are not completely aligned with SWN's interests. SWN has far more at stake than the Waldens should SWN exercise its option. Development of oil and gas poses considerable risks not shared by property owners who grant leases – namely, the potential loss of a substantial investment of time and capital associated with efforts to produce minerals. The Waldens have no obligation to commit time and capital to develop the oil and gas, and likewise bear no risk of loss associated with SWN's development. In the event SWN exercises its option, the proposed lease (which is part of the option agreement) anticipates payment of a per-acre bonus that the Waldens will retain regardless of whether SWN proceeds with mineral production. JA 000130-000140. While the Waldens would benefit from mineral production through payment of royalties, if SWN does not extend the lease or undertake certain activities within the five-year primary lease term, the lease will expire. *Id.* The Waldens will then have received the bonus payment from SWN and have regained the ability to lease the minerals, which would likely include another per-acre bonus payment.

Fourth, the Waldens likely do not have the same financial resources and incentives as SWN. As noted above, counsel for the Waldens advised the circuit court that SWN would bring much needed financial resources to the case. This is particularly important because SWN has far more of a financial interest here than the Waldens.

Defendants presented nothing to the circuit court to refute these positions. Rather, Defendants simply argued that SWN was apparently comfortable with the Waldens representing SWN's interests since SWN chose to enter into the option agreement while the litigation was pending. JA 000247-000255. As noted above, nothing in the record supports a finding that SWN had actual knowledge of the pending litigation when it obtained its option rights from the Waldens. In any event, what SWN knew, if anything, about the pending litigation is irrelevant to whether the Waldens will adequately represent SWN's interests in the case. Execution of an option agreement that makes no reference to any pending litigation cannot support a finding that SWN believed the Waldens will adequately represent SWN's interests in litigation. The pertinent question is whether it is *clear* that the Waldens will adequately represent SWN's interest. As stated in *Ball*, a proposed intervenor "ordinarily should be allowed to intervene unless it is clear that the [existing] party will provide adequate representation for the absentee.'" *Ball*, 208 W. Va. at 403 (quoting *7C Wright & Miller*, FEDERAL PRACTICE AND PROCEDURE § 1909, p. 319) (alteration in original). "Doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it, because this serves the judicial system's interest in resolving all related controversies in a single action." *Id.* (quoting *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992)). "[A] proposed intervenor need only show that his claimed interest *may* not be adequately represented; no showing of actual inadequacy is required." *Id.* (emphasis added).

The record before the circuit court is devoid of any evidence to support a finding that the Waldens will adequately represent SWN's interests. The only information before the circuit court on this issue demonstrates the opposite – that the Waldens will not adequately represent SWN's interests.

H. Assignment of Error No. 6: The circuit court abused its discretion in denying permissive intervention under Rule 24(b).

In addition to denying mandatory intervention under Rule 24(a), the circuit court also denied permissive intervention under Rule 24(b), which empowers a trial court to grant intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." W. Va. Civ. R. 24(b); see also, *Fauble v. Nationwide Mut. Fire Ins. Co.*, 222 W.Va. 365, 664 S.E.2d 706 (2008). Permissive intervention is also warranted when there are questions of law and fact in common between the parties. *Stern v. Chemtall Inc.*, 217 W.Va. 329, 617 S.E.2d 876 (2005).

Failure to allow intervention when common questions of fact and law exist among the parties constitutes an abuse of discretion. "It is obvious to us that intervention should have been permitted due to the questions of law and fact in common between the parties." *Stern v. Chemtall Inc.*, 217 W. Va. 329, 337, 617 S.E.2d 876, 884 (2005). Ignoring evidence also constitutes an abuse of discretion. "In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them." *State v. LaRock*, 196 W. Va. 294, 307, 470 S.E.2d 613, 626 (1996) (quoting *Gentry v. Mangum*, 195 W. Va. 512, 520 n.6, 466 S.E.2d 171, 179 (1995)).

The circuit court made two findings in support of its denial of permissive intervention: (1) "SWN's interests are protected by the existing Plaintiffs;" and (2) "the original parties would be unduly prejudiced by SWN's joining this litigation over two (2) years after it was initiated" in light of the trial scheduled to begin on July 29, 2020. JA 000269-000271. Neither of these findings warrant denial of permissive intervention.

First, whether an existing party will adequately represent the interests of a putative intervenor is not a relevant factor for permissive intervention. In any event, SWN explained in the preceding section why the Waldens will not adequately protect SWN's interests in the case.

Second, the circuit court's finding of ostensible prejudice to the existing parties by allowing intervention is based on a July 29, 2020 trial date in a scheduling order that all the parties and the circuit court acknowledged during the June 3, 2020 hearing would need to be amended regardless of whether SWN was allowed to intervene. JA 000395. The circuit court promptly vacated that scheduling order upon receipt of the joint motion that the circuit court invited the parties to file at the conclusion of the June 3, 2020 hearing. JA 000274. As explained in previous sections of this brief, the parties recognized the need to amend the scheduling order in January, 2020 – before SWN moved to intervene. JA 000385-000386. The parties would therefore not be prejudiced by the timing of SWN's intervention since the scheduling order needed to be amended regardless of whether SWN became a party.

The circuit court made no findings concerning the relevant factors identified in Rule 24(b) for permissive intervention – i.e. whether SWN's putative claims would share common questions of fact and law with the claims asserted by the existing parties. Judge Cuomo committed a similar error in *Conley*. SWN presented evidence to address those factors. SWN and the Waldens have a common interest in seeking a determination that the Waldens own the oil and gas rights to their property. The validity of SWN's lease option rights is derived from the same chain of title as the Walden's interests and depends on the Waldens having ownership of those rights. The questions of fact and law pertaining to the effect of the Walden-Rabb Instrument on the oil and gas interests are common between SWN, the Waldens, and Defendants. These potentially include: (1) who drafted the instrument; (2) what rights, if any, does the language of the instrument convey with

respect to the oil and gas; (3) if the instrument created a lease of the oil and gas, has that lease expired and if so when did it expire?

In light of these common questions of fact and law, the circuit court abused its discretion in denying permissive intervention.

VI. Conclusion.

In sum, SWN is an indispensable party to this case and will be severely prejudiced if not permitted to intervene. The underlying suit is over who owns title to the oil and gas underlying the Walden Property. SWN has an ownership interest in those oil and gas rights, which it paid substantial consideration to obtain. SWN's lease rights may be impaired in the event of a judgment in favor of Defendants. That alone warrants reversal of the circuit court's order.

SWN has satisfied all the elements for mandatory intervention under Rule 24(a). SWN's motion was timely in light of the overall status of the case. Rule 24 does not condition either mandatory or permissive intervention on when a property interest was acquired. SWN's rights may be impaired by a judgment adverse to the Waldens. SWN's interests are not aligned with, and not adequately represented by, the Waldens. SWN's claims share common questions of fact and law with the claims between the existing parties.

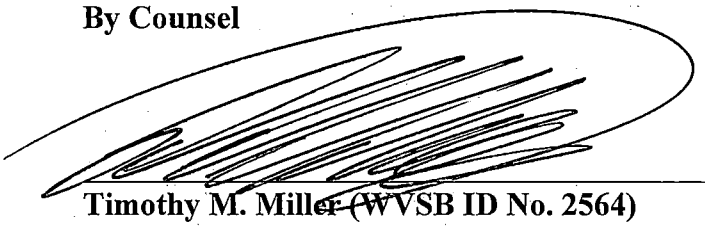
SWN asks this Court to issue an order reflecting the following:

1. A reversal of the circuit court's June 4, 2020 order denying SWN's intervention motion;
2. A directive to the circuit court to enter an order making SWN an intervening party and to enter a new scheduling order that permits a reasonable time for SWN to participate in discovery and filing of dispositive motions; and

3. All further relief this Court deems appropriate, equitable, and just.

PETITIONER SWN PRODUCTION COMPANY, LLC

By Counsel



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Appeal No. 20-0490

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SWN PRODUCTION COMPANY, LLC
Putative Intervenor Below/Petitioner,
v.
William K. Walden, et al.,
Plaintiffs and Defendants Below/Respondents,

Appeal from an Order of the Circuit Court of Brooke County, West Virginia Civil Action No. 18-C-4

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **OPENING BRIEF OF PETITIONER SWN PRODUCTION COMPANY, LLC** has been served this 5th day of October, 2020, by first-class U.S. mail, postage pre-paid, and via email to counsel of record listed below:

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