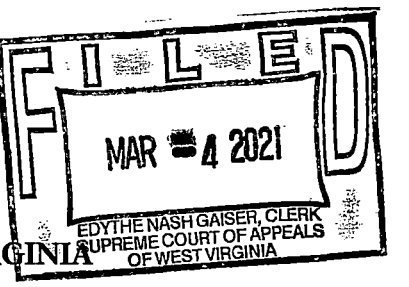

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0965

ANTERO RESOURCES CORPORATION,

Defendant Below, Petitioner,

v.

DIRECTIONAL ONE SERVICES INC. USA,

Plaintiff Below, Respondent.

PETITIONER'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in concluding that the parties' Master Services Agreement was modified by incorporating the "Lost in Hole" terms and conditions contained in Respondent's Pricing Proposal because the parties' Master Services Agreement explicitly and expressly prohibits such modification, and there were no authorized, written modifications of such Agreement as required.

2. The Circuit Court erred in concluding that Respondent did not bear the risk and costs for the "Lost in Hole" equipment under the unambiguous terms of the parties' Master Services Agreement.

3. The Circuit Court erred in concluding that the "Lost in Hole" terms and conditions contained in Respondent's Pricing Proposal must be construed with and incorporated into the parties' Master Services Agreement.

4. The Circuit Court erred in concluding that the "Lost in Hole" terms and conditions contained in Respondent's Pricing Proposal were not in conflict with multiple provisions of the parties' Master Services Agreement.

5. The Circuit Court erred in concluding that Respondent was a provider of tools and equipment when it was clear that it was a provider of a service.

6. The Circuit Court erred in concluding that Respondent's charges for "Lost in Hole" insurance were proper.

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.

On April 6, 2018, Respondent, Directional One Services Inc. USA ("Directional One" or

"Respondent"), filed a civil action in the Circuit Court of Tyler County.[1] On April 19, 2018, Directional One filed its First Amended Complaint,[2] asserting claims for breach of contract, lien foreclosure, estoppel, mutual mistake/equitable reformation, and negligent misrepresentation. Directional One sought payment of two disputed invoices and lost future profits.

Petitioner, Antero Resources Corporation ("Antero" or "Petitioner"), filed its motion to dismiss on June 15, 2018,[3] which the Circuit Court denied on July 18, 2018.[4] Antero served its Answer and Counterclaim on August 1, 2018, asserting four counts of breach of contract against Directional One.[5] Antero sought reimbursement for payment of improper invoices and charges submitted by Directional One.[6] On December 27, 2018, Directional One moved to refer the case to the West Virginia Business Court, which this Court granted on February 19, 2019.[7]

On May 9, 2019, Directional One filed its Motion for Partial Summary Judgment seeking judgment in its favor as to all of its claims, except for its claim for lost future profits, as well as judgment in its favor as to all Antero's counterclaims.[8] That same day, Antero filed its Motion for Summary Judgment as to all its counterclaims, as well as judgment in its favor as to all of Directional One's claims.[9]

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[1] *See* App. 1.

[2] App. 30-40. The First Amended Complaint is the operative complaint in this action. Any reference hereinafter to the "Complaint" is a reference to the First Amended Complaint.

[3] App. 41-82.

[4] App. 83-87.

[5] App. 88-107.

[6] *Id.*

[7] App. 120.

[8] App. 345-666.

[9] App. 123-344.

On August 19, 2019, the Circuit Court entered its Order Granting in Part and Denying in Part Directional One's Motion for Partial Summary Judgment[10] and its Order Granting in Part and Denying in Part Antero's Motion for Summary Judgment.[11]

The Circuit Court granted judgment in favor of Directional One regarding its claim for breach of contract in the amount of $1,481,510.30, plus interest, and denied as moot its equitable claims asserted in the alternative.[12] The Circuit Court's Orders made no ruling or findings regarding Directional One's claim for lien enforcement. The Circuit Court also granted judgment in favor of Directional One as to three of Antero's counterclaims, leaving for trial only Antero's fourth claim for breach of contract related to improper standby and day rate charges.[13] Finally, the Circuit Court granted judgment in Antero's favor regarding Directional One's claim for lost future profits.[14]

On August 26, 2020, trial was conducted on the only remaining claim, Antero's counterclaim for breach of contract for improper standby and day rate charges. At the conclusion of trial, the jury returned a verdict in favor of Directional One.[15]

On November 4, 2020, the Circuit Court entered its final Judgment Order from which Antero is prosecuting an appeal.[16]

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[10] App. 992-1007.

[11] App. 1008-20.

[12] App. 1006-07.

[13] App. 1000-03; 10019-20.

[14] App. 1014-19.

[15] App. 1021-22.

[16] App. 1023-27.

B. FACTUAL BACKGROUND.

Antero produces natural gas and related products in the Appalachian Basin. Antero hired Directional One to provide directional drilling services. Specifically, on August 25, 2014, Directional One submitted its "Directional Drilling Proposal" to Antero,[17] which, in addition to including the daily rates for its directional drilling services, also included multiple pages of additional terms and conditions.[18] The parties entered a Master Services Agreement dated August 29, 2014, and later executed a new Master Services Agreement ("MSA") dated September 30, 2015.[19]

While drilling on Antero's Jameson Unit 1H well on December 29, 2017, Directional One's directional drilling equipment became lodged in the wellbore (commonly referred to as "lost in hole" or "LIH" equipment) and could not be freed or recovered.[20] Directional One submitted an invoice for this LIH equipment dated January 3, 2018, for $762,425.30.[21]

Antero disputed the invoice and requested certain documents related to the LIH equipment pursuant to its audit rights under the MSA.[22] Directional One initially refused to

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[17] App. 373-86.

[18] The Directional Drilling Proposal was replaced with updated Proposals multiple times over the parties' relationship. The various Proposals provided by Directional One over the course of the parties' relationship were either titled "Directional Drilling Proposal" or "Pricing Proposal." The various Proposals, all of which were unsigned except for the first one, were in all respects relevant hereto, substantively identical. The only substantive changes across the various Proposals that are relevant here were to the prices for the services Directional One offered. For these reasons, this brief will refer the various Proposals universally as the "Pricing Proposal."

[19] The 2014 MSA and the 2015 MSA are identical in all relevant respects. The 2014 MSA was executed by Directional One on September 19, 2014. App. 447-64.

[20] App. 131; 358.

[21] App. 190-91.

[22] App. 131; 155.

provide the requested records, but Antero nevertheless continued to utilize Directional One to provide directional drilling services while the invoice dispute continued.

By letter dated February 20, 2018, Directional One notified Antero that it was unilaterally terminating the parties' MSA effective thirty days therefrom.[23] Three days later, on February 23, 2018, while drilling at Antero's Jack Unit 2H well, Directional One again lost its equipment in the wellbore.[24] Directional One submitted an invoice for this second set of LIH equipment dated March 20, 2018, for $719,085.00, which Antero also disputed.[25]

As part of its review of Directional One's invoices for the LIH equipment on the Jameson 1H and Jack 2H wells, Antero's engineering department reviewed the parties' MSA. Their review informed them that the MSA clearly provided that Directional One was required to analyze and incorporate the risks and costs of its equipment becoming lost in hole into the pricing for its services, which are billed by the day.[26] Further, the MSA provided that Directional One was required to provide first-party property insurance to cover itself, and Antero by naming it as an additional insured for any potential loss related to its equipment and tools.[27] Directional One was also required to indemnify Antero for any such losses.[28] Moreover, a review of Directional One's earlier invoices showed that Directional One had improperly submitted multiple invoices for LIH

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[23] App. 195.

[24] App. 132; 358.

[25] App. 196-97.

[26] App. 133-35.

[27] App. 137-38; 160-61; 166.

[28] App. 137-38; 157-58.

equipment, as well as multiple charges to Antero for LIH insurance,[29] all which Antero had mistakenly paid.

Simply put, Directional One, a drilling services provider, has attempted to shift its loss of equipment for which it was responsible and for which it had contractually assumed the risk and obligated itself to insure such risk for Antero's benefit onto Antero.

III. SUMMARY OF ARGUMENT

The Circuit Court erred by concluding that the parties' agreement required Antero to bear the risk and costs for Directional One's LIH equipment. As a result, the Circuit Court's orders on the parties' cross-motions for summary judgment contain several errors.

First, the Circuit Court erred in concluding that the parties' MSA was modified by incorporating the "LIH" terms and conditions contained in Respondent's Pricing Proposal because the parties' MSA explicitly and expressly prohibits such modification, and there were no authorized, written modifications of such MSA as required.

Second, the Circuit Court erred when it concluded that Directional One did not bear the risks and costs for the LIH equipment under the terms of the parties' MSA. The MSA requires Directional One to evaluate the risk of its equipment becoming lost in hole, the costs of such losses, and incorporate those risks and costs into the compensation for its directional drilling services. The MSA further requires Directional One to indemnify Antero for losses associated with LIH

[29] App. 137-38. Directional One provided an option for LIH insurance, which was not truly insurance. Rather, it was a daily charge that Antero could elect to take for each day the equipment was used on a well site, which, if equipment became LIH, would reduce Directional One's charges for certain pieces of the equipment by a fixed percentage, usually 50%.

equipment and procure first-party property insurance to cover such losses.

Third, the Circuit Court incorrectly ruled that the terms and conditions in Directional One's Pricing Proposal must be incorporated into and construed with the terms and conditions of the parties' unambiguous MSA. The MSA clearly and specifically provides that in the event of any conflict between the MSA and any other document, the MSA shall control and that any inconsistency between the MSA and any other document is explicitly rejected.

Fourth, the Circuit Court erred when it concluded that the LIH terms and conditions in Directional One's Pricing Proposal did not conflict with the MSA terms. The forced incorporation of the Pricing Proposal's terms for LIH equipment not only produces direct conflicts with the MSA but renders multiple provisions of the MSA without meaning or effect.

Fifth, the Circuit Court erred in concluding that Directional One was a provider of equipment. Directional One was never a provider of equipment as contemplated under the MSA. Instead, Directional One was purely a service provider that used its tools and equipment to perform its services. In any event, such a designation is irrelevant as it does not affect the fact that the parties' MSA clearly requires Directional One to account for, insure, and accept the risk and costs for LIH equipment.

Finally, the Circuit Court's error in concluding that Directional One was not responsible for the risks and costs associated with its equipment becoming lost in hole led to the additional error that Directional One's charges to Antero for LIH insurance were proper. On the contrary, because Directional One bore the risk of LIH equipment, and the MSA required Directional One to cover such losses with first-party property insurance.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because this case involves assignments of error in the application of settled law, Petitioner respectfully submits that this case is suitable for oral argument under R. App. P. 19. Because reversal is warranted, t this case is not appropriate for a memorandum decision.

V. ARGUMENT

A. STANDARD OF REVIEW.

"Appellate review of summary judgment is *de novo.*"[30] The *de novo* standard applies regardless of whether the grant of summary judgment is complete or partial.[31] Further, review of the "grant of summary judgment based upon contract interpretation is subject to *de novo* review because interpretation of contract language is a question of law."[32]

B. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE PARTIES' MASTER SERVICES AGREEMENT WAS MODIFIED BY INCORPORATING THE "LOST IN HOLE" TERMS AND CONDITIONS CONTAINED IN RESPONDENT'S PRICING PROPOSAL BECAUSE THE PARTIES' MASTER SERVICES AGREEMENT EXPLICITLY AND EXPRESSLY PROHIBITS SUCH MODIFICATION AND THERE WERE NO AUTHORIZED, WRITTEN MODIFICATIONS OF SUCH AGREEMENT AS REQUIRED.

The MSA and the Pricing Proposal were drafted independently by two different parties without input from the other party or contemplation of the other document. Nowhere does Directional One's Pricing Proposal mention the MSA or any other agreement with Antero.[33]

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[30] *Conkey v. Sleepy Creek Forest Owners Ass'n, Inc.*, 240 W. Va. 459, 463, 813 S.E.2d 112, 116 (2018) (citing Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo.*")).

[31] *See id.*; *Gastar Expl., Inc. v. Contraguerro*, 239 W. Va. 305, 312, 800 S.E.2d 891, 898 (2017) ("If partial summary judgment is granted, the standard of review on appeal to this Court is *de novo.*"); *W. Virginia State Police v. Hughes*, 238 W. Va. 406, 796 S.E.2d 193 (2017) ("This Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.").

[32] *Wood v. Acordia of W. Virginia, Inc.*, 217 W. Va. 406, 411, 618 S.E.2d 415, 420 (2005).

[33] App. 373-386

Nowhere does the MSA refer to the Pricing Proposal or any other document intended to contain additional terms and conditions.[34] In fact, only the very first Pricing Proposal produced by Directional One was signed by an Antero employee, Jon Black.[35]

Not one of the subsequent Pricing Proposals was signed by an Antero employee, and not a single Pricing Proposal was signed by Directional One.[36] The MSA on the other hand, was signed by Directional One's owner, Kevin Onishenko, and Antero's Chief Administrative Officer and Regional Senior Vice President, Alvyn Schopp.[37] When read together, as required under West Virginia law, MSA Sections 22 and 23 require Mr. Schopp to be the person to modify the contract:

> **22. MODIFICATION OF CONTRACT.** No change, modification, extension, renewal, ratification, rescission, discharge, abandonment, or waiver of this Agreement or any of the provisions of this Agreement or any representation, promise, or condition relating to this Agreement shall be binding upon Parties unless made in writing, signed by the Parties, and specifically referencing this Agreement. Company's project managers, field personnel, or consultants are not authorized to modify this Agreement or to bind Company to risk allocation provisions.
>
> **23. NOTICES.** Any notices or other communications required or permitted hereunder shall be in writing and shall be deemed given only when received by the Party to whom the same is directed as follows:
>
> Company:
>
> **Antero Resources Corporation**
> 1615 Wynkoop Street
> Denver, CO 80202
> Attn: Al Schopp
> Phone: (303) 357-7325
> Fax: (303) 357-7315
>
> Contractor:
>
> Directional ONE Services Inc USA
> Attn: KEVIN ONISHENKO
> Address: Directional ONE Services Inc. USA 21624-1 State Route 821 CWD Complex 2, Bldg G Marietta, OH 45750

[34] App. 149-166.

[35] App. 386.

[36] App. 388-400, 402-416.

[37] App. 165.

These types of contractual provisions are specifically included to prevent what occurred in the instant case, i.e., permitting the modification of a contract – the MSA – in a manner other than "in writing, signed by the Parties, and specifically referencing this Agreement," not by the "Company's project managers, field personnel, or consultants," but by the person "authorized to modify or bind Company to risk allocation provisions," which was Mr. Schopp.[38]

The Circuit Court plainly erred in concluding that the MSA was modified by Directional One's Pricing Proposal because the parties' MSA explicitly and expressly prohibits such modification, and there were no authorized, written modifications regarding the allocation of the risk of loss of LIH equipment as expressly required under the MSA. This alone warrants reversal of the Circuit Court's judgment.

C. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE PARTIES' MSA DID NOT REQUIRE DIRECTIONAL ONE TO BEAR THE RISK AND COSTS FOR ITS LIH EQUIPMENT.

One of the Circuit Court's primary errors was concluding that the MSA was silent about which party assumed the risks of equipment becoming LIH and its associated costs.[39] On the contrary, multiple provisions in the MSA clearly mandate that Directional One assumed that risk and was to incorporate those risks into the pricing for its directional drilling services. When applying and construing the terms of an unambiguous contract, a court must interpret the contract as a whole.[40] When reviewing the MSA as a whole, it is clear and unambiguous that LIH equipment's risks and costs were to be borne by Directional One.

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[38] Clearly, the shifting of the risk of loss for LIH equipment is modifying the risk allocation under the MSA and could not be approved by anyone other than Mr. Shopp, and certainly not by field personnel, like Mr. Black.

[39] App. 1001.

[40] *See* Syl. pt. 3, *Moore v. Johnson Serv. Co.*, 158 W. Va. 808, 219 S.E.2d 315 (1975).

1. Directional One was required to incorporate all of the risks for its LIH equipment into its service price.

Section 5 of the MSA provides that "[Directional One's] acceptance of and/or agreement to perform Work means that [Directional One] has, and warrants that it has, fully investigated and incorporated into the compensation . . . the complications, hazards, and risks incident to the Site and/or performing the Work[.]"[41] Directional One recognized that LIH equipment is a risk incident to performing directional drilling services and admitted as much in its complaint when it stated that LIH equipment is something that "often happens."[42] Requiring Directional One to evaluate the risks involved in its services and compute its daily rate for directional drilling services to cover and include those risks promotes stability and predictability in Antero's costs.

To allow Directional One to charge separately for LIH equipment makes no more sense in allowing an electrician, plumber, or carpenter to charge separately for their equipment lost or damaged in providing professional services, would render Section 5 meaningless, and contravenes West Virginia law: "in the construction of contracts, words or clauses are not to be treated as meaningless or discarded if any reasonable meaning consistent with the other parts of the contract can be given them."[43] The only reasonable interpretation of MSA Section 5 is that Directional One was responsible for ensuring that its daily rate would adequately compensate it for all risks involved with performing its directional drillings services, including LIH equipment. By signing the MSA, Directional One explicitly warranted that it did just that and cannot now ignore that obligation.

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[41] App. 153-54.

[42] App. 33.

[43] *Moore v. Johnson Serv. Co.*, *supra* at 817, 219 S.E.2d at 321.

2. Directional One was required to procure and maintain first-party property insurance to cover LIH equipment and to protect Antero by naming Antero as an additional insured.

A review of the MSA's insurance provisions makes clear that Directional One was financially responsible for its equipment. Under Section 14.1 of the MSA, Directional One was required to procure and maintain insurance:

> [Directional One] (and its contractors and subcontractors of every type and tier) shall at its own cost and expense (including deductibles) carry insurance (with carriers acceptable to Company) in the minimum amounts and in accordance with the specifications and requirements set forth in this Article 14 and Exhibit "A" of this Agreement. All such insurance shall be effective prior to the commencement of any Work and shall be maintained in full force and effect at all times Work is performed and/or this Agreement is in effect.[44]

Section 14.5.1 further required that Directional One name Antero as an additional insured on the relevant insurance policies.[45] Exhibit "A" to the MSA listed the various forms of insurance that Directional One was required and agreed to carry. Critically, Section 14 and Exhibit "A" required Directional One to carry "[f]irst Party/Property Insurance covering (for its full value) the property, equipment, tool, and equipment of [Directional One] that is **used** in the Work."[46]

Moreover, the MSA unequivocally provides that the daily directional drilling rates "agreed to be paid to [Directional One] by [Antero] **shall** be inclusive of (i) insurance premiums paid by [Directional One] in acquiring and maintaining the insurance required by this Agreement[.]"[47] This contractual requirement is exact. The only logical conclusion drawn from reading the insurance requirements is that Directional One bore responsibility for any loss of its equipment.

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[44] App. 160.

[45] App. 161.

[46] App. 160; 166 (emphasis added).

[47] App. 155 (emphasis added).

There would be no reason for Directional One to carry first-party property insurance that covered its equipment and tools if the parties intended for Antero to pay Directional One for LIH equipment.

Here, it is undisputed that Directional One failed to satisfy its obligation to purchase the required insurance, and Antero did not waive this obligation by previously paying improper invoices for LIH equipment.

First, the MSA explicitly addresses waiver: "[i]n no event shall commencement of Work, payment for Work, or failure to object by [Antero], constitute a waiver of any of [Antero's] rights or [Directional One's] obligations under this Article 14, Exhibit 'A,' or any other provision of this Agreement."[48]

Second, Directional One's failure to obtain insurance does not relieve its duty to indemnify Antero for LIH equipment: "failure to secure the insurance coverage, the failure to comply fully with any of the insurance provisions . . . shall in no way relieve [Directional One] from any of the obligations of this Agreement[.]"[49] Nor would any choice by Directional One to self-insure affect the protections that Directional One agreed, and was required, to provide to Antero.[50] MSA § 14.10 mandates that:

> [Directional One's] decision to self-insure shall in no way work any prejudice on or against [Antero]. All self-insurance coverage or retentions shall be treated as

[48] App. 161.

[49] *Id.*

[50] App. 162. MSA § 14.10 mandates that, "[Directional One's] decision to self-insure shall in no way work any prejudice on or against [Antero]. All self-insurance coverage or retentions shall be treated as coverage under an insurance policy, and [Antero] will have the same benefits and protection in relation thereto as though Directional One had secured an insurance from a separate insurer." *Id.* Section 14.10 was one of the few sections changed in the 2015 MSA. The 2015 MSA, including this provision, is the operative contract applicable to all of the disputed LIH charges.

> coverage under an insurance policy, and [Antero] will have the same benefits and protection in relation thereto as though [Directional One] had secured an insurance policy from a separate insurer.

In other words, even if Directional One chose to self-insure, Antero would be entitled to the same benefits as if Directional One had procured insurance and named them as an additional insured, i.e, Antero would be protected against any claim for LIH equipment.

In summary, the only logical conclusion from these requirements is that the MSA intended for Directional One to be responsible for its LIH equipment.

The MSA's plain and unambiguous language requires that Directional One "shall" obtain and pay for insurance to cover its equipment, to name Antero as additional insured, and to incorporate the cost of such insurance into its daily rate charges. The MSA's plain language also clarifies that Directional One's failure to fulfill the insurance obligations and any lack of objection by Antero does not waive or shift Directional One's responsibility. By signing the MSA, Directional One agreed to carry such insurance for the benefit of both parties, and it cannot merely ignore this contractual requirement after it has sustained a loss that it agreed to insure against and somehow seek to shift the risk of that loss to Antero.

3. Directional One was contractually required to indemnify Antero for any losses related to the damage to or loss of its tools and equipment.

The Circuit Court also erred by concluding that Antero cannot indemnify itself against Directional One's claims related to its LIH equipment.[51]

In its order, the Circuit Court concluded that "[Antero] cannot seek indemnity against its contractual obligation to pay for work provided by [Directional One]."[52] Of course, paying for

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[51] App. 1003.

[52] *Id.*

Directional One's work — its directional drilling services — is not what Antero's seeks to indemnify itself against.

Section 13.1 entitled "Indemnity Obligations" provides broad indemnification and strictly limits those causes for which indemnification will not apply:

> **EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, ALL RELEASE, PROTECTION, DEFENSE, INDEMNITY, AND HOLD HARMLESS OBLIGATIONS AND/OR LIABILITIES . . . SHALL BE REGARDLESS OF CAUSE EVEN IF CAUSED BY . . . RUIN OF . . . EQUIPMENT, . . . BREACH OF DUTY (LEGAL, STATUTORY, CONTRACTUAL, EQUITABLE, OR OTHERWISE), ANY THEORY OF TORT, BREACH OF CONTRACT, THE NEGLIGENCE OF ANY DEGREE OR CHARACTER (WHETHER SOLE, JOINT, OR CONCURRENT; ACTIVE, OR PASSIVE) OF ANY PARTY OR PARTIES, INCLUDING THE INDEMNIFIED PARTY AND/OR ITS PARTY GROUP.**[53]

Furthermore, in Section 13.3, Directional One explicitly and expressly agreed to "release, protect, defend, indemnify, and hold harmless [Antero] from and against any and all Claims arising out of or related to: . . . (ii) the damage to or loss of property of [Directional One], . . . **REGARDLESS OF CAUSE (AS PROVIDED IN SECTION 13.1)**.[54] The MSA defines "Claims" as used in Section 13.3 as "any loss, cost, liability, damage, claim, security interest, lien, or expense of any kind or character whether constitutional, statutory, contractual, tortious, or equitable . . . ."[55] The indemnity provisions that Directional One explicitly agreed to in the MSA cannot be any clearer.

To summarize the language, Directional One agreed to release, indemnify, and hold Antero harmless for *any* Claims arising out of or related to the damage to or loss of its equipment,

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[53] App. 157-58 (emphasis in original).

[54] App. 158 (emphasis in original).

[55] App. 149.

regardless of cause, and regardless of whether such claim is based in tort, breach of contract, or negligence.

Consequently, Directional One's claims for recovery of the cost of its LIH equipment based on breach of contract directly conflict with the indemnification provisions Directional One explicitly agreed to in the MSA. And, contrary to the Circuit Court's conclusion that no party would have entered into such an agreement,[56] any party who complied with their obligations under the MSA by factoring the risk of such losses into its compensation and insuring itself against such losses should be at ease in entering into such an agreement. Directional One failed to protect itself against such losses as required under the MSA and instead asked the Circuit Court to disregard the MSA's indemnification provisions.

Furthermore, Directional One admitted that it bore the risk for its tools and equipment while they were aboveground,[57] and Directional One would therefore be required to indemnify Antero for any loss of its equipment above the rotary table. However, Directional One contends that the responsibility shifted to Antero when the tools went below the rotary table.[58] But Directional One cites no law or MSA provision to support its claim that liability would shift from Directional One to Antero once the tools were below the rotary table.

Notably, while Section 13 defines the parties' liabilities in specific scenarios (e.g., damages related to pollution or contamination), Section 13 contains no provisions that shift the risk of loss for LIH equipment from Directional One to Antero. The absence of such a provision is significant.

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[56] App. 1001.

[57] App. 179.

[58] *Id.*

Had the parties intended for Antero to be responsible for LIH equipment, the MSA would have included an LIH provision.

This is precisely the case in Antero's agreements with all its other directional drilling contractors.[59] Antero entered into similar master services agreements with six other companies. Directional One's MSA is the only agreement that does not explicitly require Antero to pay for LIH equipment; the agreements with the six other companies contain separate LIH provisions that expressly shift the obligation to pay for those six companies' LIH equipment to Antero, subject to depreciation discounts. For example, Section 13.1.1 of Antero's Master Services Agreement with Panther Drilling Systems LLC states:

> Notwithstanding the foregoing in Section 13.3(ii), if [Panther's] equipment is lost or damaged while in the hole below the rotary table, [Antero] shall, at [Antero's] sole cost and expense, repair such equipment or, if such repair is not feasible, as reasonably determined by [Panther], pay [Panther] the replacement value of such equipment (less depreciation), except if such loss or damage arises from a defect in the lost or damaged equipment or the gross negligence or willful misconduct of Contractor Group.[60]

Each of these other companies' agreements contains similar but unique provisions because each company independently requested and negotiated the LIH provision with Antero. The fact that these six other directional drilling contractors requested an explicit provision shifting the cost of LIH equipment from the directional driller to Antero strongly suggests that they understood which party bore the risk of equipment LIH absent such an explicit risk-shifting provision. Contrary to Directional One's claim that the MSA is a "take it or leave it" contract, Antero frequently negotiates terms with its drilling contractors, as evidenced by these unique LIH

[59] App. 213; 237; 253; 280-81; 307; 326-27.

[60] App. 237.

provisions.[61]

Directional One's President and Owner, Kevin Onishenko, has years of experience and could have negotiated a LIH provision, but he admitted that he did not request any changes to the MSA.[62] In the absence of an express LIH provision shifting the risk for Directional One's equipment, Directional One retained the risk under the language of Section 13 and indemnified Antero against any claims for its LIH equipment. The Circuit Court should have rejected Directional One's *ex post facto* request to alter the parties' agreement by disregarding this clear provision.

4. Directional One provided a service and was not a provider of tools and equipment as contemplated by the MSA.

As noted above, the Circuit Court erroneously concluded that "[Antero] cannot seek indemnity against its contractual obligation to pay for work provided by [Directional One]."[63] The Circuit Court also made the following conclusion:

> Further, it is nonsensical to assert that a party can demand indemnity against its own contractual obligations. [Antero] can no more claim to be indemnified against this payment obligation than against any other obligation to pay for services or material [Directional One] provided pursuant to the parties' agreement. [Directional One], like any other rational party, never would have entered into such an agreement to ***not*** be paid for its Work.[64]

However, this conclusion is wrong on at least two counts.

First, Antero did not indemnify itself from having to pay charges for Directional One's "Work," i.e., its directional drilling services, which charges were contractually required to include

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[61] App. 213; 237; 253; 280-81; 307; 326-27.

[62] App. 169; 178.

[63] App. 1003.

[64] App. 1001.

both the risk and cost of Directional One's equipment becoming LIH and the cost for first-party property insurance to cover such losses. On the contrary, Antero merely indemnified itself against such claims that might arise by virtue of Directional One's failure to account for and protect itself against such potential losses by complying with multiple other terms of the MSA.

Second, the Circuit Court's conclusion distorts the "Work" that Antero contracted Directional One to provide and for which Antero agreed to pay. The only way that Directional One can avoid the clear and unambiguous indemnification language is to attempt to convert itself from a pure service provider into some form of equipment vendor.

In its effort to change the nature of its work from service provider to equipment vendor, Directional One erroneously rests its breach of contract claim on Section 10 of the MSA,[65] which states:

> [Antero] will pay [Directional One] for Work that is satisfactorily rendered and in accordance with this Agreement (i) at such rates and/or prices as are agreed to by Contractor and Company in the applicable Order or (ii) in accordance with Contractor's published schedule of rates and/or prices[.]

The MSA defines "Work" as "all services, labor, experience, expertise, vehicles, equipment, supplies, tools, manufactured articles, materials, facilities, and/or goods (in whole and/or in part) to be provided by Contractor to Company pursuant to this Agreement and/or any Order."[66] Absent from the definition of "Work" is LIH equipment, so Directional One desperately clings to the mention of equipment and tools "provided" to Antero.[67]

However, the MSA is a standardized contract that Antero provides to its contractors,

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[65] App. 33.

[66] App. 151.

[67] App. 33.

subcontractors, and vendors.[68] The MSA is intended for contractors and subcontractors that sell or "provide" their services to Antero, such as Directional One, as well as for vendors that sell or "provide" — for Antero's end use and ownership — equipment, supplies, tools, manufactured articles, materials, facilities, and/or goods. Directional One was not a vendor. It never sold or provided tools or equipment for Antero's end-use or for Antero to own; Directional One maintained ownership of its equipment at all times.[69]

Instead, the "Work" that Directional One provided was directional drilling **services**. Section 10.2 further supports this argument as it plainly states that "[t]he rates to be paid to [Directional One] by [Antero] for the Work shall be in lieu of any other charges for materials or supplies furnished by [Directional One] for use in the Work."[70]

When Sections 1.19, 5, 10.1, and 10.2 are read in conjunction, it is clear Directional One was to build into its daily rates the costs and risks associated with use, and potential loss, of its equipment. The logical conclusion that Directional One was a service provider and not an equipment vendor is further supported by the indemnification and insurance provisions discussed *supra*.

In summary, the risks and costs for equipment LIH was borne by Directional One. The clear language of the MSA required Directional One to (1) assess and incorporate the risk of its

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[68] App. 336-37.

[69] To the extent that Directional One may argue that once the equipment became stuck in hole its ownership transferred to Antero, this assertion is baseless. There is no legal or contractual support for claiming that the equipment's ownership transferred by virtue of it becoming LIH. Moreover, this does not alter the nature of Directional One's "Work", i.e., providing directional drilling *services*. This is particularly true in light of the MSA's requirement that Directional One incorporate the costs of any of its equipment becoming LIH into its daily service rates and carry first-party insurance to insure against loss of its equipment.

[70] App. 155.

tools becoming LIH into its daily rates, which it warranted that it had done, (2) to carry and maintain first-party property insurance to cover the risk of its equipment becoming LIH and to name Antero as additional insured on that policy, and (3) to indemnify Antero for any claim for LIH equipment. Directional One failed to comply with any of these contractual provisions.

D. THE CIRCUIT COURT ERRED IN CONSTRUING AND INCORPORATING THE ADDITIONAL LIH TERMS AND CONDITIONS FROM DIRECTIONAL ONE'S PRICING PROPOSAL INTO THE PARTIES' MASTER SERVICES AGREEMENT.

The Circuit Court erred by concluding that the additional terms and conditions in Directional One's Pricing Proposal had to be incorporated into and construed with the MSA.

First, the Circuit Court erred by finding that the MSA explicitly referred to Directional One's Pricing Proposal, let alone anticipated that its terms and conditions would be incorporated into the MSA.

Second, contrary to the Circuit Court's conclusion, the MSA is entirely capable of standing on its own without any terms and conditions of Directional One's Pricing Proposal other than the daily pricing for its directional drilling services.

Finally, the Circuit Court incorrectly found that the terms and conditions of Directional One's Pricing Proposal did not conflict with and render meaningless provisions of the MSA.

1. The Circuit Court erred in concluding that the MSA refers to and anticipates Directional One's Pricing Proposal and, therefore, that the Pricing Proposal's additional terms and conditions must be incorporated into and construed with the MSA.

The Circuit Court erroneously found "that the even though the MSA and Rate Sheets are separate writings, they must be construed together."[71]

[71] App. 998.

At the outset, it bears noting that the Circuit Court repeatedly refers to Directional One's Pricing Proposal as the "Rate Sheet."[72] However, there is a critical distinction between the Pricing Proposal and any form of "rate sheet" referenced in and contemplated by the parties' MSA, which is more fully discussed below.

The Circuit Court relies primarily, if not exclusively, on the holdings in *Oliver Typewriter Co. v. Huffman*[73] and *Ashland Oil, Inc. v. Donahue*[74] for its conclusion that the MSA and Pricing Proposal must be construed together.[75] This reliance is misplaced.

In *Oliver*, the plaintiff's agent provided the defendant with two separate documents.[76] The first was an order for two Oliver brand typewriters, and the second was an agency agreement allowing the plaintiff an exclusive sales territory for the Oliver typewriters.[77] Both documents were prepared by the plaintiff's agent and presented to the defendant at the same time. The agency agreement contained various sales terms and other provisions. It required the defendant to pay in advance for typewriters ordered. In contrast, the order for the two typewriters indicated that the typewriters were to be paid for when shipped and only shipped upon the defendant's express request for such.[78] The dispute arose when the plaintiff shipped two typewriters before the defendant requesting or needing them and then demanding payment, claiming that the order

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[72] *See, e.g., id.*

[73] 65 W. Va. 51, 63 S.E. 1086 (1909).

[74] 159 W. Va. 463, 223 S.E.2d 433 (1976).

[75] App. 996; 999.

[76] *See* 65 W. Va. at 51, 63 S.E. at 1087.

[77] *Id.*

[78] *Id.*

triggered the requirement for advance payment, regardless of when they were shipped.[79] The Court concluded that the two documents were clearly interrelated such that they should be read in conjunction with one another.[80] The Court held for the defendant, finding that although the agency agreement required payment when the typewriters were ordered, the order for the two initial typewriters was not an unconditional one as plaintiff had claimed, rather it was an order conditioned on the specific request of the defendant that the typewriters be shipped. In concluding that the writings were interrelated, the Court explicitly relied on the fact that the order contained language indicating that the price for the typewriters was "less agent's discount," stating that such language would be meaningless "unless an agency was created by the contemporaneous papers."[81]

In *Ashland*, the plaintiff provided the defendant with a lease agreement for a gas station and a gasoline dealer contract, which the defendant agreed to and signed.[82] Under the lease, the defendant would pay rent, which was based on the amount of gas sold.[83] The dealer contract provided terms and conditions related to gasoline purchases, including the defendant's yearly obligations to purchase and accept gasoline in minimum and maximum amounts.[84] However, the two agreements contained varying termination clauses. After the parties' relationship soured, Ashland sought to terminate the lease and the dealer contract, and the parties disputed which termination provision would control.

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[79] *Id.*

[80] *Id.* at 51, 63 S.E. at 1088.

[81] *Id.*

[82] 159 W. Va. at 465, 223 S.E.2d at 438.

[83] *Id.*

[84] *Id.* at 470-71, 223 S.E.2d at 438-39.

The Court began its analysis by noting that "[i]t is a well-recognized principle of law that, even though writings may be separate, they will be construed together and considered to constitute one transaction when the parties are the same, the subject matter is the same and the relationship between the documents is clearly apparent."[85] Noting that the gas station lease and the dealer contract were "clearly agreements between the same parties" and "the relationship between the documents is apparent," the Court concluded that "[a] fair reading of the documents discloses that they are so interrelated on their face that either, standing alone, would be meaningless without the other and that neither Ashland nor Donahue would have entered into either the lease agreement or the dealer contract separately."[86] After construing the two documents together, the Court determined the two termination clauses could not be reconciled and decided the case by disregarding one of the termination clauses, which grossly favored Ashland, finding that it was unconscionable.[87]

Here, unlike in *Ashland* and *Oliver*, the separate writings, the MSA and the Pricing Proposal, were not contemporaneous writings.[88] Further, unlike the separate agreements in *Ashland* and *Oliver,* the MSA and the Pricing Proposal were drafted independently by two different parties without input from the other party or contemplation of the other document.[89] Nowhere does Directional One's Pricing Proposal mention the MSA or any other agreement with Antero. Nowhere does the MSA refer to the Pricing Proposal or any other document intended to contain

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[85] *Id.* at 469, 223 S.E.2d at 437 (citing *Oliver*).

[86] *Id.*

[87] *Id.* at 474, 223 S.E.2d at 440.

[88] App. 149; 373; 768. The operative 2015 MSA was effective September 30, 2015. There are no Pricing Proposals dated on or around September 30, 2015, let alone one signed by any Antero representative.

[89] App. 175; 373; 807.

additional terms and conditions.

The Circuit Court erroneously relied on the fact that the MSA uses the term "Rate Sheet" to conclude that "the MSA, standing on its own, would be ambiguous, incomplete, and meaningless if read without the Rate Sheets" and that "the parties clearly intended for the Rate Sheets and the MSA to function together."[90] Further, the Circuit Court found that "the MSA is incomplete without the information contained in the Rate Sheet."[91] These conclusions are incorrect.

The Circuit Court notes, "[t]he MSA refers specifically to Rate Sheets in multiple places, for example §§ 10.1, 10.2, and 19."[92] This is an oversimplification and provides no analysis of the words used or the clear intent. MSA Section 10.1 provides that:

> [Antero] will pay [Directional One] for Work that is satisfactorily rendered and in accordance with this Agreement (i) **at such rates and/or prices** as are agreed to by [Directional One] and [Antero] in the applicable Order or (ii) in accordance with [Directional One's] published **schedule of rates and/or prices, as such rates and/or prices** are in effect on the date of the Order after application of published or agreed discounts and/or credits.

(emphasis added). This language clearly indicates that Directional One will provide Antero only with a list or "schedule" of rates and/or prices — nothing more.[93] There is no reference to any Pricing Proposal or other extrinsic agreement containing additional terms and conditions. Similarly, MSA Section 10.2 provides that:

> The **rates** to be paid to [Directional One] by [Antero] for the Work shall be in lieu of any other charges for materials or supplies furnished by [Directional One] for use

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[90] App. 998-99.

[91] App. 999.

[92] App. 998.

[93] "Schedule" as "a written or printed list, catalog, or inventory." *See* Schedule, Merriam-Webster.com, *available at https://www.merriam-webster.com/dictionary/schedule.*

in the Work or any separate charges for any type of transportation to and from any Site, unless otherwise specified in the **scheduled rates**.[94]

Again, the MSA clearly indicates the provision of only a list or schedule of prices and does not refer to any document intended to include additional terms and conditions. The last section relied on by the Circuit Court, MSA Section 19, describes a "published rate schedule." This language clearly indicates that the MSA, and Antero, contemplated and intended only that Directional One would provide a schedule, or list, of prices for its directional drilling services.[95] Nothing in the language of these Sections of the MSA references or implicates an entirely separate agreement with additional terms and conditions. At bottom, Antero intended, and the clear language of the MSA anticipates, only that Directional One would provide a schedule or list of daily rates/prices for its directional drilling services — nothing more, nothing less — and certainly not a new agreement with additional terms and conditions that ran counter to the MSA.

In *Ashland*, the separate agreements were complementary and necessary to complete the agreement as to the parties' relationship; a gas dealership contract accompanying a lease for a gas station. Here, however, the two separate writings are, in effect, competing agreements. As noted, the MSA typically, if not exclusively, stands without any additional agreement to accompany it, depending only on the other party to submit a list of prices. Directional One admits that its Pricing Proposal has sufficed as the exclusive agreement for its services, without any additional document

[94] App. 155 (emphasis added).

[95] The Circuit Court's and Directional One's reliance on Section 19 is notable in that Section 19 explicitly provides that "the provisions of this [MSA] shall control" to the extent of any conflict with a "published rate schedule." The LIH provisions in the Pricing Proposal conflict with multiple Sections of the MSA, as more fully discussed in Part V.C.3.i, *supra*, and, consequently, the MSA's terms control.

to complete it.[96] Thus, the writings here were not necessary to one another to complete the parties' relationship like the writings in *Ashland.*

Indeed, this case is more akin to *Pertee v. Goodyear Tire & Rubber Co.*,[97] where the Fourth Circuit Court of Appeals, interpreting West Virginia law, reviewed a case in which the plaintiff, an employee of Dover Elevator Company ("Dover"), sued Goodyear Tire & Rubber Company ("Goodyear") for injuries suffered while working on behalf of Dover at a Goodyear facility.[98] Goodyear filed a third-party complaint against Dover seeking contractual indemnification under the parties' agreement.[99]

Dover had issued Goodyear an "Agreement for Dover Master Maintenance Service," which contained specific indemnification provisions.[100] Roughly one month later, Goodyear issued two purchase orders to Dover for elevator repair work, which purchase orders contained different indemnification provisions than those in the Dover Agreement.[101] The dispute rested on whether Dover's Agreement would control, which did not indemnify Goodyear against the plaintiff's negligence claims, or whether Goodyear's Purchase Orders, which did provide indemnification, would control.[102]

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[96] Prior to owning Directional One, Kevin Onishenko was an owner of ARK Directional Drilling (ARK"). App. 170. ARK provided directional drilling services with Antero in Colorado prior to the formation of Directional One and its work in the Appalachian Basin. *Id.* 170-71. ARK did not have an MSA with Antero, relying instead on the pricing proposal alone. Directional One utilized the same pricing proposal form that ARK utilized.

[97] 67 F.3d 296 (4th Cir. 1995) (unpublished).

[98] 67 F.3d at 296.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

The Fourth Circuit agreed with the lower court that Dover's Agreement and Goodyear's Purchase Orders were interrelated such that the documents should be construed together and considered to constitute a single transaction, specifically relying on the fact that Goodyear's Purchase Orders expressly noted they "were issued 'per' Dover's elevator maintenance proposal."[103] However, after recognizing that the Agreement and Purchase Orders "clearly contained inconsistent provisions," the Fourth Circuit relied on West Virginia's general rule that:

> [w]here a new contract is made with reference to the subject-matter of a former contract, containing provisions clearly inconsistent with certain provisions of the original contract, the obligations of the earlier contract, in so far as they are inconsistent with a later one, will be abrogated and discharged, and the two contracts will be construed together, disregarding the provision of the original which are inconsistent with those of the latter.[104]

In applying West Virginia's general rule, the Fourth Circuit agreed with the lower court that since "Goodyear's purchase orders varied the terms in Dover's Master Maintenance Agreement, the purchase order represented a counteroffer for Goodyear's elevator maintenance."[105]

For the reasons already stated, the Pricing Proposal terms and conditions should not be construed with the MSA. However, even if it were to construe them together, this Court could also find for Antero on the same legal basis as the *Pertee* decision. Indeed, this case is very similar to *Pertee* in that Directional One issued its Pricing Proposal, which contained terms and conditions requiring Antero to pay for LIH equipment. Antero subsequently provided the MSA, which clearly contains multiple provisions inconsistent with the Pricing Proposal.[106] Thus, this Court can rule,

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[103] *Id.* (citing *Ashland*, 223 S.E.2d at 437).

[104] *Id.* (quoting *Consolidation Coal Company v. Mineral Coal Company,* 126 S.E.2d 194, 201 (W. Va. 1962) (internal quotation marks and citations omitted)).

[105] *Id.*

[106] App. 149-66. (*See, e.g.*, §§ 5, 10,13, 14, and Exhibit A).

as did the lower court and Fourth Circuit Court of Appeals in *Pertee*, that Antero's MSA dated August 29, 2014[107] was a counteroffer to Directional One's Pricing Proposal dated August 25, 2014,[108] and the inconsistent LIH provisions in the Pricing Proposal are therefore "abrogated and discharged," and the Pricing Proposal and MSA "will be construed together, disregarding the provision of the original [Pricing Proposal] which are inconsistent with those of the latter [MSA]."[109]

2. The Master Services Agreement stands on its own without any of the additional terms or conditions from Directional One's Pricing Proposal other than the prices.

The Circuit Court erred when it concluded that the MSA was not complete without the Pricing Proposal. While it is true that the MSA anticipated that Directional One would provide a schedule or list of prices for its services, that was *all* that was ever anticipated. Antero and the MSA never intended for or anticipated the incorporation of an entire separate agreement with new terms and conditions, some of which are in direct conflict with the MSA's intent and terms. Directional One's Pricing Proposal is, depending on the version, roughly fourteen pages long, but all that Antero and the MSA contemplated were the *prices* for Directional One's daily operational rate and its standby day rates, all of which was listed on one page of the Pricing Proposal.[110]

Indeed, the Circuit Court, in determining that the MSA's "terms referencing the Rate Sheets are meaningless and incomplete without the Rate Sheets," relies only on the fact that the

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[107] As well as Antero second MSA dated September 30, 2015. App. 149.

[108] App. 373.

[109] 67 F.3d at 296; *Consolidation Coal Company*, 126 S.E.2d at 201.

[110] App. 376; 391; 406.

MSA does not contain pricing information."[111] However, nowhere does the Circuit Court indicate a single other component of the Pricing Proposal that the MSA requires to be meaningful and complete — because there is none.[112]

3. The additional LIH terms and conditions from Directional One's Pricing Proposal are in direct conflict with and render meaningless multiple provisions of the parties' MSA.

i. The LIH provisions in Directional One's Pricing Proposal that require Antero to bear the risk and costs for LIH equipment are in direct conflict with Sections 5, 13, and 14 of the MSA.

The Circuit Court erroneously concluded that the Pricing Proposal was not in conflict with the MSA. Whether the documents conflict is a separate issue from whether the two documents should be incorporated and construed together. As discussed, *supra*, it is clear from the MSA's language that Directional One bore the risk of its equipment becoming LIH. It is evident that the MSA places the risk of LIH equipment on Directional One by requiring that Directional One include the risks and costs of LIH equipment into the price for its directional drilling services, that it indemnifies Antero against claims for loss of its equipment, and that it is obligated to carry first-party property insurance to cover such losses of its equipment.

On the other hand, Directional One's Pricing Proposal contains additional terms and conditions that would shift that risk of loss to Antero. It is hard to fathom how this is not a direct

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[111] App. 998; *see also* App. 999.

[112] Indeed, the Circuit Court later in its opinion again relies solely on the lack of pricing in the MSA: "As further support for its conclusion, the Court finds that the MSA is incomplete without the information contained in the Rate Sheet. The MSA contains no pricing whatsoever, and the Court concludes the terms referencing the Rate Sheets are meaningless without the Rate Sheets themselves." App. 999. Of course, this is not "further support," rather it is the same unavailing support.

conflict.

The Circuit Court held that "[e]ven if potentially in conflict, separate provisions 'will be construed together if possible . . . . The one will not be given control over the other if they can possibly be reconciled, it being presumed that the contract contains no provisions or clauses not intended by the parties.'"[113] There simply is no way to reconcile the LIH terms from the Pricing Proposal with the various terms of the MSA that place the risk of LIH equipment on Directional One.

Section 5 of the MSA requires Directional One to "warrant" that it has analyzed the "risks incident to . . . performing the Work," such as LIH equipment, and incorporated those risks and costs into the price for its directional drilling services.[114] But the LIH provisions of the Pricing Proposal would render Section 5 meaningless because it absolves Directional One of that obligation.

Section 13 of the MSA requires Directional One to indemnify Antero for "any and all claims arising out of or related to . . . the damage to or loss of property of [Directional One]."[115] Yet, the LIH provisions of the Pricing Proposal render this indemnification provision a nullity.

Lastly, Section 14 and Exhibit A of the MSA require Directional One to carry "[f]irst Party/Property Insurance covering (for its full value) the property, equipment, tool, and equipment of [Directional One] that is used in the Work."[116] Once again, the LIH provisions of the Pricing Proposal would gut the obligations required of Directional One in Section 14 and Exhibit A

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[113] App. 996 (quoting *Gabbert v. William Seymour Edwards Oil Co.*, 86 S.E. 671, 672 (W. Va. 1915).

[114] App. 153-54.

[115] App. 158.

[116] App. 160-62; 166.

of the MSA and the protections for both Directional One and Antero that such insurance is intended to provide under the MSA. Clearly, the LIH provisions of the Pricing Proposal conflict with these multiple provisions of the MSA.

It is clear here that the LIH provisions of the Pricing Proposal cannot be reconciled with the terms of the MSA, so one must yield to the other. Indeed, to provide the most "harmonious interpretation," the Court should disregard the LIH provisions in the Pricing Proposal in favor of the terms of the MSA.[117] Because it is "presumed that the contract contains no provisions or clauses not intended by the parties," certainly the LIH provisions of the Pricing Proposal should yield to the *multiple* Sections of the MSA that sought to expressly and explicitly prohibit charges for Directional One's LIH equipment.[118]

The Court is tasked with trying to harmonize the conflicting provisions. Disregarding multiple Sections of the MSA in favor of the LIH provisions in the Pricing Proposal is not harmonious; rather, it does violence to the MSA's intent by rendering multiple sections without force and effect. However, disregarding the Pricing Proposal's LIH provisions in favor of the MSA's provisions is the best, if not the only way to harmonize the two documents. That is because the MSA mandates that Directional One incorporate its risks and cost for LIH into its daily charges for its directional drilling services and to carry first-party property insurance to protect itself and Antero against these very types of losses.

Whether Directional One incorporated the risks into its charges cannot be known, although

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[117] App. 996 (quoting *Johnson Controls, Inc. v. City of Cedar Rapids*, 713 F.2d 370, 374 (8th Cir. 1983) (noting that "the preferred interpretation" is the one that gives a "harmonious interpretation" to potentially conflicting clauses)).

[118] *Id.* (quoting *Gabbert*, 86 S.E. at 672).

it explicitly warranted that it did, but Directional One has admitted that it failed to procure first-party property insurance. In any event, the question is which interpretation of the parties' agreement is the most harmonious. It is clearly an interpretation that disregards the Pricing Proposal's LIH provisions in favor of the MSA's terms. This is true because the MSA's provisions fully secure Directional One for losses due to LIH equipment in such a way that the Pricing Proposal's LIH provisions are superfluous and unnecessary. In fact, the MSA secures Directional One in two separate and distinct ways.

First, the MSA mandates that Directional One evaluate and "incorporate" costs associated with LIH equipment into its directional drilling charges. Thus, Directional One would be accruing monies to cover its LIH equipment with every daily drilling charge.

Second, the MSA requires Directional One to carry first-party property insurance to cover Directional One for its LIH equipment. Thus, if its equipment became LIH, its insurance carrier would reimburse it for its loss.

Thus, the parties' relationship vis-vis LIH equipment would be intact and harmonious based on the MSA alone, without the unnecessary incorporation of the LIH provisions in the Pricing Proposal. Directional One's failure to comply with the MSA does not change those facts.

ii. Incorporating the LIH terms and conditions of Directional One's Pricing Proposal renders meaningless the provisions strictly limiting modification of the parties' Master Services Agreement.

Section 22 of the MSA provides:

> No change, modification, extension, renewal, ratification, rescission, discharge, abandonment, or waiver of this Agreement or any of the provisions of this [MSA] or any representation, promise, or condition relating to this [MSA] shall be binding upon Parties unless made in writing, signed by the Parties, and specifically referencing this [MSA]. [Antero's] project managers, field personnel, or

> consultants are not authorized to modify this [MSA] or to bind [Antero] to risk allocation provisions.[119]

Incorporating the terms of the Pricing Proposal changes and modifies the MSA in a way that is prohibited under Section 22 of the MSA's clear and unambiguous language. For any change or modification to be binding on the parties, it must comply with Section 22.

To comply with Section 22, Directional One would have had to submit any change or modification to Antero in writing; such change or modification would have to be signed by the parties; *and* it would have to reference the MSA. Directional One's Pricing Proposal never references or mentions the MSA. Furthermore, the lone Pricing Proposal that was signed by anyone representing Antero was the very first one dated August 25, 2014.[120] Antero signed no subsequent Pricing Proposals. Consequently, changing and/or modifying the MSA by including the LIH provisions of the Pricing Proposal without complying with Section 22 is in direct conflict with the MSA and renders Section 22 meaningless.[121]

4. Directional One's charges to Antero for LIH insurance were improper.

As discussed above, Antero was not liable for Directional One's LIH equipment. Consequently, any charges submitted by Directional One to Antero for LIH insurance were improper. The MSA provides explicitly that Antero may seek reimbursement for improper invoices:

> Payment by [Antero] of any invoice (even if disputed) shall be without prejudice and shall not constitute a waiver of [Antero's] right subsequently to question or to

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[119] App. 164.

[120] App. 373-86.

[121] It bears noting that the two cases relied on to support incorporation of the Pricing Proposal and construing it with the MSA, *Ashland* and *Oliver*, did not involve modification limiting clauses or primacy clauses such as those contained in Section 22 and Section 19 of the MSA. The Court can and should take Section 22 and Section 19 into account when determining the applicability of *Ashland* and *Oliver* to this case.

> contest the amount or correctness of said invoice and to seek reimbursement. [Antero] shall have the right to deduct from any payment due to [Directional One] any damages caused in any way by [Directional One's] Default.[122]

VI. CONCLUSION

Petitioner, Antero Resources Corporation, respectfully requests that this Court reverse the judgment of the Circuit of Tyler County, Business Court Division, and remand this case for entry of judgment in its favor that Respondent is responsible for the risk and cost of its equipment lost in hole and, therefore, Respondent is not entitled to payment of its two disputed invoices and Antero is entitled to recoup all monies paid to Respondent for previous improper charges for LIH equipment and LIH insurance. Alternatively, Antero requests entry of an order reversing the orders of the Circuit Court of Tyler County, and remanding for further proceedings.

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[122] App. 156.

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2021, I served the foregoing "Petitioner's Brief" upon all counsel of record by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

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