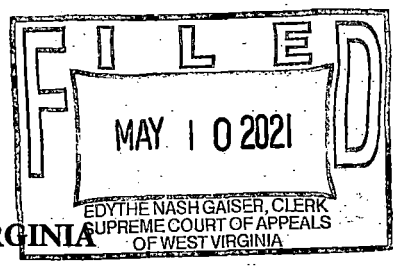

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0965

ANTERO RESOURCES CORPORATION,

Defendant Below, Petitioner,

v.

DIRECTIONAL ONE SERVICES INC. USA,

Plaintiff Below, Respondent.

PETITIONER'S REPLY BRIEF

Counsel for Petitioner

Ancil G. Ramey, WVSB #3013
Steptoe & Johnson PLLC
825 Third Avenue, Ste. 400
Huntington, WV 25701
(304) 522-8290
ancil.ramey@steptoe-johnson.com

W. Henry Lawrence, WVSB #2156
John D. Pizzo, WVSB #12680
Steptoe & Johnson PLLC
400 White Oaks Blvd.
Bridgeport, WV 26330
(304) 933-8000
hank.lawrence@steptoe-johnson.com
john.pizzo@steptoe-johnson.com

Counsel for Respondent

Sean P. McGinley, WVSB #5836
DiTrapano Barrett DiPiero
McGinley & Simmons, PLLC
P.O. Box 1631
Charleston, WV 25326-1631
(304) 342-0133
sean.mcginley@dbdlawfirm.com

Christopher Kamper
(admitted *pro hac vice*)
Carver Schwarz McNab
Kamper & Forbes, LLC
1888 Sherman Street, Suite 400
Denver, CO 80203
(303) 893-1825
ckamper@csmkf.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER

I. INTRODUCTION

In an effort to salvage its judgment, Directional One's Brief mischaracterizes the express language of the Master Services Agreement or MSA,[1] the lower court's orders, and testimony of Antero's employees. On its face, the MSA expressly prohibits its modification absent Antero's approval. Here, it was undisputed that Antero never approved any modification shifting any Lost in Hole or LIH costs to Antero. Furthermore, the express language of the MSA required Directional One to evaluate and incorporate the risk of its LIH equipment into the pricing for its services, to indemnify Antero for any LIH equipment, and to procure and maintain first-party property insurance to cover against such loss. Directional One's contention that its Pricing Proposal did not modify the MSA is wrong. Not only did the Pricing Proposal modify the MSA by charging Antero for LIH equipment but the Pricing Proposal eliminated Directional One's risk of loss for LIH equipment.

II. DISCUSSION

A. DIRECTIONAL ONE'S BRIEF MAKES MULTIPLE MISCHARACTERIZATIONS AND ERRONEOUS ASSERTIONS.

1. Directional One's Pricing Proposal or "Rate Sheet" is never referenced by the MSA and their relationship is not obvious.

Directional One incessantly refers to its Pricing Proposal[2] as a "Rate Sheet." However, the documents that Directional One drafted and refers to are titled "Pricing Proposal." Thus, Directional One's references in its Brief and attempts to deflect attention to the "Rate Sheets" are

[1] Because they are identical in all relevant respects, any reference to "MSA" is a reference to both the 2014 and 2015 MSAs unless otherwise specified.

[2] Because they are identical in all relevant respects, any reference to "Pricing Proposal" is a reference to all of Directional One's Pricing Proposals unless otherwise specified.

misleading. Directional One's Brief repeatedly relies on this clear error to support its position.[3] To the contrary, Section 5 of the MSA makes no mention whatsoever about another document of any kind, let alone a specific reference to a "Rate Sheet."[4] Sections 10.1 and 10.2 of the MSA again make no reference to a "Rate Sheet."[5] Instead, they use the words "published *schedule* of rates and/or prices."[6] Similarly, Section 19 never mentions a "Rate Sheet" but instead uses the words "published rate schedule."[7] Instead, the MSA anticipates *only* a schedule of prices for Directional One's services— not an entirely separate contract containing numerous terms and conditions — many of which modify and directly conflict with the MSA, including the provisions in Directional One's Pricing Proposal obligating Antero to pay for equipment LIH. This is highly significant because the lower court erred when it concluded that "the MSA refers specifically to Rate Sheets in multiple places, for example §§ 10.1, 10.2, and 19"[8] and that faulty conclusion forms the basis for the lower court's application of the relevant law.[9]

2. Antero never stipulated that the Pricing Proposal was part of the Parties' contract.

Directional One's Brief also falsely asserts that Antero "stipulated in open court" that "the

---

[3] For example, Directional One claims that the "MSAs anticipated the Rate Sheets [sic] . . . by specific references in, for example, §§ 5, 10.1, 10.2, and 19." Resp. Brf. at 28.

[4] App. 153-54.

[5] App. 155.

[6] *Id.* (emphasis added).

[7] App. 163.

[8] App. 998.

[9] In addition, West Virginia law is clear that "[t]o achieve incorporation of a referenced document, a writing must make a 'clear reference to the document' and 'describe[ ] it in such terms that its identity may be ascertained beyond doubt[.]'" *State ex rel. U-Haul Co. of West Virginia v. Zakaib*, 232 W. Va. 432, 441, 752 S.E.2d 586, 595 (2013). Because the Pricing Proposal makes no reference whatsoever to the MSA, let alone describes in such terms as it could be ascertained beyond doubt, the Pricing Proposal cannot be incorporated into the MSA.

MSAs and Rate Sheets were interrelated documents that must, as a matter of law, be construed together."[10] Directional One bases these assertions on one line in the lower court's jury charge: "The parties have stipulated there is a binding contract; however, the terms are in dispute."[11] Directional One's assertion is erroneous. Antero simply stipulated that there was a binding contract — the MSA — and clearly disputed any terms purportedly added to the MSA by the Pricing Proposal.[12] Antero never agreed that the Pricing Proposal was interrelated with the MSA.

Directional One also contends that Antero used the Pricing Proposal in support of its own claims at trial.[13] This again is a distortion. The only issue at trial was Count Four in Antero's Counterclaims, which sought recovery of payments for services not performed by Directional One or for which Directional One double-billed.[14] Antero never disputed that it agreed to pay Directional One for its *services* (Operational Days, Standby Days, and Mobilization/Demobilization) based on the prices set forth in its Pricing Proposal. That is, of course, the only thing ever contemplated by Antero or the MSA — a schedule of rates for Directional One's *services*, all of which is contained in two pages of Directional One's Pricing Proposal.[15] Antero certainly did not rely on any of the additional, unauthorized terms and conditions in the Pricing Proposal, particularly anything purporting to shift the risk of LIH equipment to Antero in direct contravention of the MSA.[16]

---

[10] Resp. Br. at 35; *see also* Resp. Br. at 27.

[11] App. 1028.

[12] *Id.*

[13] *See, e.g.,* Resp. Br. at 18.

[14] *See* App 105.

[15] App. 377-78.

[16] To the extent that Directional One claims that Antero relied on the 2% early pay discount from the Pricing Proposal, this was on the same page as the pricing for the services, and, more importantly, was

3. The law cited by Directional One for its proposition that specific provisions modify general provisions is not applicable in this case.

Directional One contends that "[n]arrow and specific provisions are generally regarded as exceptions or qualifications to more general provisions."[17] However, every case cited by Directional One deals with specific provisions and general provisions in *the same document* drafted by *the same party.* Directional One also contends that the case cited by Antero, *Pertee v. Goodyear Tire & Rubber Co.*,[18] supports its position as the two agreements at issue in that case were to be "read together."[19] Although Directional One's Brief purports to quote *Pertee* when using the phrase "read together," that phrase appears nowhere in the *Pertee* decision. Rather, the *Pertee* court explicitly said it "construed" the two agreements together.[20] Analyzing and explaining two agreements together is far different from incorporating additional *conflicting terms* from one into the other. In fact, after construing the two agreements in *Pertee*, the court did not read them together or incorporate one into the other. Instead, because the two documents conflicted, the court resolved the issue by concluding that the second document was a counteroffer thereby rejecting and nullifying the first agreement.[21]

Directional One fails to cite a single case that explicitly supports the proposition that a general provision in a contract drafted by one party must yield, i.e., be qualified or modified, by a

---

already listed on Directional One's invoices, so no reference to the Pricing Proposal was needed. *See, e.g.*, App. 436.

[17] Resp. Br. at 22.

[18] 67 F.3d 296 (unpublished) (4th Cir. 1995), 1995 WL 578057.

[19] Resp. Br. at 23.

[20] *Pertee*, 67 F.3d 296, 1995 WL 578057 at *3. Black's Law Dictionary defines "construe" as "[t]o analyze and explain the meaning of (a sentence or passage)."

[21] *Pertee*, 67 F.3d 296, 1995 WL 578057 at *4.

separate document drafted by another party. In the only case discussed by either party that dealt with different agreements drafted by different parties, the court accepted one agreement in favor of the other and refused to read them together.[22] Likewise, in this case, the lower court should have applied the MSA as written and rejected the argument that the Pricing Proposal modified it.

4. Directional One's references to other MSAs with other directional drillers is unsupportive and its references to Antero's mistaken payments are irrelevant.

Directional One repeatedly claims that Antero paid all its other directional drillers for LIH equipment, even going so far as to claim that "[t]his is so because, in addition to Directional One, [Antero] structured all of its contracts with all of its drilling contractors in precisely this fashion."[23] This is an odd assertion since the next paragraph of the Brief quotes from a third-party MSA provision explicitly shifting the risk of LIH equipment to Antero in the MSA — something that Directional One never requested in its MSA. Moreover, such a provision is absent from the MSA between Directional One and Antero.[24] Directional One claims that inclusion of this provision shifting the risk of LIH equipment in third-party MSAs to Antero is evidence that it is not in conflict with the indemnity provision. But, this LIH equipment risk-shifting provision is in the *same document* as the general indemnity provision, which was drafted by one party — Antero. This is the same situation with every other MSA with other drillers that Directional One references, but not with Directional One's MSA.[25] Consequently, reliance on explicitly different MSAs with other

---

[22] *Id.*

[23] Resp. Br. at 24.

[24] *Id.* at 24-25.

[25] *See* App 136, 198-334. In addition, all but one of the other drillers' MSAs do not have the requirement for first-party property insurance, *see* App. 221-22; 257-58; 290-91; 313-14; and 333-34. However, Section 13.12 of Directional One's MSA requires this insurance explicitly to support its promise to indemnify Antero for such LIH equipment, *see* App. 160, which supports the conclusion that, unlike the

drillers is not only unsupportive of Directional One, but they support Antero's position.[26]

Finally, Directional One's continued references to Antero's mistaken payment of LIH invoices is not waiver where Antero explicitly reserved the right to recoup mistakenly paid invoices in MSA Section 10.7.[27] More importantly, West Virginia law is clear that course of performance is considered only when a contract is ambiguous.[28] Thus, this extrinsic information is irrelevant.

B. NOTHING IN DIRECTIONAL ONE'S BRIEF ALTERS THE LOWER COURT'S ERRORS AND THIS COURT SHOULD REVERSE AND REMAND.

Directional One's Brief addresses each of Antero's assignments of error in turn. However, Directional One's Brief fails to justify the lower court's errors or establish that the reasoning and legal analysis in Antero's Opening Brief does not warrant reversal and remand of this matter. Antero addresses its assignments of error, and Directional One's responses thereto, in turn.[29]

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.

Directional One effectively disregards Antero's first assignment of error, contending that the lower court did not explicitly state that the MSA was "modified" by the terms and conditions

---

other drillers, this MSA intended for the risk of LIH equipment to be borne by Directional One. *See* App. 160.

[26] Moreover, reference to any industry standards or customs should not be considered when there is a clear and unambiguous contract. *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 496, 128 S.E.2d 626, 635 (1962).

[27] App. 156.

[28] *See Watson v. Buckhannon River Coal Co.*, 95 W. Va. 164, 164, 120 S.E. 390, 393 (1923) (when a writing is "clear and unambiguous, the intent must be gleaned from the contract alone, and extraneous matter, although potent and persuasive of a different intent, will not be considered.").

[29] Recognizing that it is derivative of the other Assignments of Error, Antero does not reply to Directional One's response related to Antero's sixth Assignment of Error and will instead rest on its Opening Brief as to its sixth Assignment of Error.

in the Pricing Proposal and therefore Directional One need not bother addressing the issue. Notwithstanding Directional One's semantic sidestep, its argument fails for two reasons. *First*, Antero and Directional One raised the issue of contract modification below.[30] The fact that the lower court declined to agree with Antero's argument regarding modification of the contract is error in itself, and this Court's review is *de novo*. *Second*, the fact that the lower court did not expressly use the word "modify" or "modification" has no bearing on the indisputable fact that its rulings undeniably operate as, and indeed are, a *de facto* modification of the MSA. Black's Law Dictionary defines "modify" as "To make more moderate or less sweeping; to reduce in degree or extent; to limit, qualify, or moderate."

Regardless of whether the lower court phrased them as "interrelated," when it "construed [the MSA and Pricing Proposal] together," the lower court modified the MSA by definition and in effect. Indeed, the heart of Directional One's argument confirms that reading the Pricing Proposal with the MSA modifies the MSA. Directional One repeatedly relies on the proposition that specific provisions in contracts *modify* more general provisions.[31]

The MSA required Directional One to bear the risk of LIH equipment, and any incorporation of the Pricing Proposal that shifts that risk to Antero *is* a modification of the MSA.

---

[30] *See, e.g.*, App. 674-75, 849-50.

[31] *See, e.g.,* Resp. Br. at 24 (noting that general indemnity provisions in Antero's other directional drillers' contracts were "qualified and modified" by more specific indemnity provisions (emphasis added));*see also* Resp. Br. at 22 ("Narrow and specific provisions are generally regarded as *exceptions* or *qualifications* to more general provisions . . ." (emphasis added)); *id.* at 23 ("In contrast, 'specific qualifies the general' is a well-established rule of law." (emphasis added)); *id.* at 25 ("All contained a general indemnity; all contained provisions *modifying* the general indemnity and separately addressing LIH tools." (emphasis added)); *id.* at 30 ("[T]he Rate Sheets are more specific than the MSAs and therefore *qualify* their meaning." (emphasis added)). Merriam Webster defines "qualify" as "to reduce from a general to a particular or restricted form: MODIFY." (capitalization in original). QUALIFY, Merriam-Webster.com, *available at* https://www.merriam-webster.com/dictionary/qualify, last visited 2 May 2021. Thus, Directional One's consistent use of "qualify" or "qualifies" is the same as "modify" or "modifies."

Regardless of whether it is described as modifying, limiting, qualifying, or excepting, the tangible result is that the MSA, and its intent, have been changed, amended, altered, and/or qualified — the very definition of modification,[32] and Directional One cannot escape that fact.

It is of course understandable that Directional One wishes to ignore this issue as it cannot wordsmith its way out of the clear and unequivocal modification provisions of the MSA. The MSA *placed the risk of LIH equipment on Directional One*, whether through Section 5's requirement that such risks be factored by Directional One into the compensation for its services, or through the indemnity and insurance provisions of Sections 13 and 14, respectively.[33] Thus, any purported shifting of that risk by incorporating new terms is, by definition, a modification and subject to Section 22 of the MSA, which is crystal clear:

> **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.[34]

Not one Pricing Proposal *ever* references the MSA despite Section 22's clear requirement.

---

[32] Black's Law Dictionary defines "modification" as: "A change to something; an alteration or amendment or [a] qualification or limitation of something."

[33] Indeed, Directional One concedes that Sections 13 and 14 operate to place the risk of LIH equipment on Directional One:

> Section 13, APP-00455 (2014 MSA) and 00575 (2015 MSA), requires Directional One to indemnify Petitioner against loss of tools, and, in similar fashion, Section 14 of the MSAs require Directional One to obtain insurance for tools "used in the Work," APP-00463 (2014 MSA) and 00584 (2015 MSA).

Resp. Br. at 30.

[34] App. 164.

Nor did any representative of Directional One *ever* sign even one Pricing Proposal, again in violation of Section 22. Other than the very first pricing proposal in August 2014, not a single Pricing Proposal was signed by any Antero representative, and the solitary Pricing Proposal signed by an Antero employee was signed by Jon Black, who is an employee in the field[35] and therefore not authorized to modify the MSA in any way, let alone to bind Antero to a new set of risk allocation provisions such as shifting the risk of LIH equipment from Directional One to Antero. Directional One asks this Court to disregard the clear language of Section 22 and ignore Directional One's repeated failures to comply with Section 22.

In addition to the clear requirements of Section 22 that Antero approve any modification to the MSA, Section 23[36] of the MSA provides:

> **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: 2335 State Route 821
> Building 14
> Marietta, OH 45750

[35] *See* App. 185-86 (testimony by Jon Black recognizing that he was a field employee with responsibilities limited to well drilling operations in Ohio and West Virginia).

[36] App. 164.

Because Section 22 required any modification to be in writing, the obligations of Section 23 are triggered, and Section 23 mandates that any such written modification is not effective until received by Al Schopp at Antero's corporate offices in Denver, Colorado. Section 23's requirements are critical because they assure that, when coupled with Section 22, any modification of the MSA must be "received" by the representative of Antero that personally signed and agreed to the terms of the MSA —Mr. Schopp.[37] As Directional One argues in its Brief, these requirements are written in clear, unequivocal English, yet Directional One wants this Court to ignore these terms and what they agreed to under the MSA.

2. The Circuit Court erred in concluding that Directional One did not bear the risk for LIH equipment.

Directional One's Brief posits five arguments against Antero's second assigned error.

First, it attempts to sidestep the requirement of MSA Section 5 that it "incorporate" into its compensation the risk and cost of LIH equipment.[38] As discussed, *infra*, it is doubtless that Directional One Services Inc. USA Inc. is a *service* provider. As such, it was required to *incorporate* the risk of LIH equipment into its compensation, i.e., the rates for its *services*. Separate individualized pricing for LIH equipment not only defeats Directional One's responsibility and obligation to incorporate it into its service rates, it is by definition not incorporated.[39] As to Directional One's argument that its LIH charges were just some other form of compensation, this

[37] Notably, Section 23 provides the same protection for Directional One by mandating that modifications or other notices must be received by Kevin Onishenko, Directional One's owner and President and, as with Mr. Schopp, the actual representative of Directional One that signed and agreed to the terms of the MSA.

[38] App. 153-54.

[39] Black's Law Dictionary defines "incorporate" as "[t]o *combine* with something else." (emphasis added).

argument simply ignores that fact that Directional One was *required* under the MSA to maintain insurance to cover its LIH equipment — not Antero.

Directional One also makes the non-sensical argument that the parties agree that its LIH equipment also qualifies as "materials or supplies furnished by" under Section 10.2 of the MSA.[40] This is a wholly false claim as Antero has never agreed to such an absurd conclusion. LIH equipment is just that —equipment — and it cannot reasonably be considered materials or supplies. Directional One goes on to argue that the Pricing Proposal is more specific than the MSA and therefore modifies the insurance and indemnification provisions of MSA Sections 13 and 14.[41] The lower court never suggested in any way that its rulings nullified the insurance requirements and there is no legal support for such a claim. Directional One also proclaims that "the parties intended for all the documents they signed to part of a single agreement," and they must therefore be read together.[42] This is yet another falsehood as Antero never agreed for the Pricing Proposal to modify the MSA but instead provided for Directional One to tender a schedule of rates for its directional drilling services.

Second, Directional One contends that the indemnity provisions in Section 14 of the MSA are an anticipatory release that "cover only such matters as may fairly be said to have been within the contemplation of the parties at the time of its execution."[43] However, the case Directional One quotes for this proposition, *Murphy v. N. Am. River Runners* [44]is inapposite. *Murphy* dealt

---

[40] Resp. Br. at 30.

[41] *Id.*

[42] Resp. Br. at 30-31.

[43] *Id.* at 31.

[44] 186 W. Va. 310, 316-317, 412 S.E.2d 504, 510-511 (1991).

specifically and exclusively with an assumption of risk and release agreement, not an indemnification agreement.[45] As release and indemnity are distinct legal concepts,[46] the entirety of Directional One's argument on this point is irrelevant and inapplicable.

Third, Directional One argues that it "cannot reasonably be held to have entered an agreement with the understanding that Petitioner would assert an indemnity against its own contract to pay for specified tools and equipment."[47] It is of course entirely reasonable that Directional One would indemnify Antero against any claim for LIH equipment if Directional One had incorporated that risk into the price for its services and insured itself against that risk as it was required, and explicitly agreed to do, under the MSA.[48] If a carpenter repairing your home loses a hammer, the carpenter cannot charge you for the hammer when your contract states that the potential loss of the carpenter's tools is priced into your quote, and the same principle applies here.

Fourth, Directional One proclaims that "there is no evidence in this case that third-party LIH insurance was even available for the tools at issue herein."[49] This is a confusing statement because Directional One continues, in the very next sentence, to admit that "[i]t is undisputed"

---

[45] *Id.* at 314-17, 412 S.E.2d at 508-11

[46] *See, e.g.*, 42 C.J.S. *Indemnity* § 3 ("Release and indemnity are related, but nevertheless distinct, legal concepts. Release and indemnity are distinguishable in that a release extinguishes a claim or cause of action, whereas an indemnity arises from a promise by the indemnitor to safeguard or hold harmless a party against an existing or future loss, liability, or both.").

[47] Resp. Br. at 32.

[48] Directional One also makes the false statement that the parties "negotiate[d] the prices in great detail" which is wholly unsupported. Indeed, the MSA itself was agreed to and unilaterally submitted by Directional One to Antero without negotiation. *See* App. 794 ("Q. . . . did you at any point . . . ask for any revisions to the MSA? A. No, I did not.")

[49] *Id.*

that such insurance is available, albeit on a limited basis.[50] This statement is also irrelevant as Antero was not obligated to procure this insurance —Directional One was. To the extent such insurance was unavailable or available only on a limited basis, Directional One could have renegotiated its MSA with Antero or it could have declined to assent to the MSA knowingly and willingly and its clear terms. It consciously chose neither of those options.

Directional One also contends that Section 19 of the MSA is evidence that Antero intended that the Pricing Proposal, and its many additional terms and conditions would become incorporated into the MSA.[51] Section 19 provides:

> **PRIMACY.** If there are any conflicts between the provisions of this Agreement and any Order, Contractor's work ticket, invoice, statement, published rate schedule, or any other type of document or memoranda, whether written or oral, between Company and Contractor: (i) the provisions of this Agreement shall control to the extent of the conflict, regardless of the relative dates of any documents, and (ii) this Article 19 shall serve as Company's rejection of any such inconsistent terms. This primacy shall apply regardless of the relative dates of any documents or any action/inaction by Company in response to such documents.[52]

Directional One contends that "[i]t is only because the parties intended for the Rate Sheets and MSAs to be read together, and only because the MSAs anticipated that the Rate Sheets might contain a word or two of plain English, that this provision is necessary."[53] Despite Directional One's observation that the Pricing Proposal may contain "a word or two of English,"[54] Directional One apparently does not recognize that the clear English of MSA Section 19 never mentions a

---

[50] APP-00488 ¶ 7. Directional One notes that such insurance is available on a "limited" basis but does not provide any explanation of such limits. Directional One cites only to App. 488 ¶ 7, which is nothing more that Directional One's own self-serving affidavit by its owner and President, Kevin Onishenko.

[51] Resp. Br. at 32.

[52] App. 163.

[53] Resp. Br. at 32.

[54] *Id.*

Pricing Proposal or Rate Sheet.[55] Instead, what Section 19 does do is protect against this very situation where a document submitted by a service provider or vendor might contain terms or conditions that Antero never agreed to and are in direct conflict with the MSA. Indeed, it is for this very situation that Section 19 explicitly and clearly provides that the MSA "controls" and that Antero "reject[s]" any such conflicting terms "regardless of any action/inaction in by [Antero] in response to such documents."[56]

Directional One then points to Section 22 of the MSA and acknowledges that only certain personnel may "bind [Antero] to risk allocation provisions" and that those personnel cannot be "project managers, field personnel, or consultants."[57] However, Directional One claims:

> it is undisputed that the personnel who so "bound" Petitioner to the risk allocation pertaining to LIH tools as stated in the Rate Sheets had authority to do so. As Petitioner's Senior Vice President Kevin Kilstrom testified, Black, Harvey, Honeycutt, McEvers, Clawson, and Kilstrom - all personnel who reviewed and approved the Rate Sheets and the invoices that were based upon them - met the criteria of § 22. See, APP-00586-92 (internal tracking of LIH invoices reflecting approval by those personnel).[58]

To begin, except for Jon Black, none of these employees ever signed a rate sheet. In addition, this statement is false as the citation to the record that Directional One provides[59] is to nothing more than printouts of invoice payment records with approvals at various levels by the employees listed. While these employees may have approved invoices for LIH equipment under the mistaken understanding[60] that Directional One did not bear the risk of LIH equipment, that is

---

[55] See App. 163.

[56] *Id.*

[57] *Id.* at 33.

[58] *Id.*

[59] App. 586-92.

[60] It is undisputed that none of the individuals listed by Directional One ever read the MSA.

far different from having the legal or contractual authority to bind Antero to risk provisions. Other than Kevin Kilstrom, all named by Directional One worked in the field.

Directional One also disagrees with Antero's contention that Sections 22 and 23 of the MSA effectively mean that only Antero's Regional Senior Vice President, and signatory to the MSA, Mr. Schopp, can modify the MSA and bind Antero to risk allocation provision. It goes on to proclaim that Section 23 "does not authorize Mr. Schopp to approve anything."[61] However, unlike Jon Black and the other field personnel mentioned by Directional One, Mr. Schopp is authorized by Antero to modify the MSA and bind Antero to risk allocation provisions by virtue of his executive position. In addition, when reading these two provisions of the MSA together as the Court should,[62] it is clear that any modification of the MSA would have to be in writing and received by Mr. Schopp to be of any effect. Thus, by operation of the terms of the MSA, Mr. Schopp would necessarily have to be made aware of, and thus approve of, any modification or additional risk allocation provision.

Directional One also contends that "[i]f Mr. Schopp were the only person authorized to approve risk allocations," Section 22 would not need to identify those "persons" not so authorized.[63] Yet, Section 22 does not identify specific "persons" who do not have such authority, rather it identifies categories of individuals who lack such authority based on characteristics of their position with Antero. It is true that this leaves the possibility of another high-ranking Antero executive or officer possibly modifying the MSA and binding Antero to a risk allocation provision

---

[61] *Id.*

[62] *See, e.g., TD Auto Fin. LLC v. Reynolds*, 243 W. Va. 230, 235, 842 S.E.2d 783, 788 (2020) (noting that "[t]o protect the sanctity of the parties' written contract, all the provisions in the writing can and should be harmonized and given effect").

[63] *Id.*

for some reason. However, that is the very purpose of Sections 22 and 23, which, operating together, establish that a condition precedent to effectuating such a modification is that it must be in writing and received by Al Schopp so that he can either agree with and allow the modification, or reject it.[64]

Directional One lastly contends that Antero "ascribes far too much importance" to Section 23's notice provision and cites *Univ. Emergency Med. Found. v. Rapier Invs., Ltd.*, for its contention that "*the mailing address* stated in a notice provision 'does not, in itself, confer any benefit upon either party. It is merely a collateral term intended to enhance the probability that mailed notice will arrive promptly in the proper hands.'"[65] Directional One's reliance on *Rapier* is misplaced as *Rapier* is inapposite to the circumstances presented here.

In *Rapier*, the court analyzed a termination provision allowing either party to terminate their agreement by "giving at least four (4) months written notice" to the other party.[66] The contract in *Rapier* also contained a notice provision requiring that notices, including the termination notice, were effective only when "mailed."[67] The ultimate issue in *Rapier* was whether the termination notice was effective when notice had been timely mailed but to the wrong address, only arriving several days after the four-month termination window, and a second notice was

[64] To the extent that Directional One would argue that a modification by a qualifying executive other than Mr. Schopp would bind Antero, once received pursuant to Sections 22 and 23, Mr. Schopp could seek to rescind such a modification by agreement or even terminate the MSA pursuant to Section 4.2 or terminate any then ongoing Work pursuant to Section 4.5. *See* App. 153.

[65] Resp. Br. at 34 (quoting *Rapier*, 197 F.3d 18, 22-23 (1st Cir. 1999)).

[66] *Id.* at 20.

[67] *Id.*

mailed to and received by Rapier's partner entity[68] within the four-month deadline. *Id.* The court, relying on the mailbox rule, concluded that the termination was effective because it had been timely mailed, despite the delay from having initially gone to the wrong address and because it had been actually received by the noticed party's subsidiary.[69] Directional One quotes the *Rapier* court for its proposition that an address in a notice provision "is not the type of term . . . intended to allow one party to extinguish the other's contractual rights based on a failure of strict compliance."[70]

However, the full quotation states, "[t]hus, by its very nature, the stipulation that notice be *sent to a particular address* is not the type of term ordinarily bargained-for, nor is it the type of term intended to allow one party to extinguish the other's contractual rights based on a failure of strict compliance."[71] Utilizing a particular address is not at issue here. More importantly, however, unlike Rapier's contractual right to terminate, Directional One did not have a *right* to modify the MSA — it could do so only by strictly complying with the MSA's requirements and with Antero's written agreement. On the contrary, if the Court were to accept Directional One's contentions as to Sections 22 and 23, it would be Antero's contractual right to require full compliance with the MSA's modification and notice provisions that would be extinguished.[72]

Directional One also contends that "mailed notice is valid so long as it is actually received

---

[68] Rapier Investments, Ltd.'s contract with University Emergency Medicine Foundation ("UEMF") required Rapier's subsidiary, Medical Business Systems, Inc., to perform certain services for UEMF. *Id.*

[69] *Id.* at 24.

[70] Resp. Br. at 34 (quoting *Rapier*, 197 F.3d at 22).

[71] *Rapier*, 197 F.3d at 22 (emphasis added).

[72] The *Rapier* court also noted that, unlike the MSA, the termination and notice provisions in the *Rapier* parties' agreement were five pages apart, indicating a reduced expectation that the termination provision needed to strictly comply with the notice provision. *Rapier*, 197 F.3d at 23.

by the noticee."[73] Of course, Section 23 of the MSA does not specifically require mailing, rather it must be "received" by the noticed party, Mr. Schopp, and Directional One has provided no evidence whatsoever — because there is none — that any Pricing Proposal modifying the MSA was ever actually received and signed by Mr. Schopp as required under Sections 22 and 23. This is a critical provision that the parties bargained for and agreed to as it was imperative that any modifications to the MSA go through Mr. Schopp because he was the Antero representative that signed and agreed to the MSA. Further, Directional One's statement that "[t]here is no dispute in the instant case that Petitioner actually received each and every Rate Sheet and paid all invoices based upon them"[74] is meaningless. Simply having field personnel receive a Pricing Proposal does not make it a valid modification unless it fully complies with the MSA.[75]

Finally, Directional One, citing *Pertee*, contends that Antero's conduct inferred acceptance of the terms and conditions in the Pricing Proposal. However, as discussed, *supra*, the conduct of the parties is not relevant when the language of the MSA is clear and unambiguous.

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' MSA.

Directional One contends that Antero's third assignment of error must be rejected because the MSA and Pricing Proposal must be read together, claiming that the MSA refers to the Pricing Proposal or "Rate Sheet" in "several places" and the MSA does not "limit" the Pricing Proposal to "raw numbers."[76] This is incorrect. As discussed, *supra*, the MSA never mentions the words

---

[73] Resp. Br. at 34.

[74] *Id.*

[75] Antero reserved the right to recoup mistakenly paid invoices in MSA Section 10.7. App. 156.

[76] Resp. Br. at 35.

Pricing Proposal or "Rate Sheet," rather it anticipates nothing more than a schedule or list of prices of Directional One's services. Those mere mentions of a schedule of rates or prices cannot be interpreted to somehow anticipate additional terms that eviscerate multiple provisions of the MSA. For the reasons stated herein, in addition to the reasons stated in Antero's Opening Brief, the lower court erred, and this Court should reverse and remand.

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.

Directional One's Brief continues with its dubious argument that the Pricing Proposal and MSA do not conflict. It claims the "MSA provisions work in concert with the Rate Sheets" and that Antero's argument that incorporating the Pricing Proposal into the MSA would render multiple MSA provisions "without effect" is untrue.[77] Directional One blindly ignores the impact of incorporating the Pricing Proposal's LIH equipment terms into the MSA: (1) Section 5 requires Directional One to incorporate the risk of LIH equipment into the pricing for its services; (2) Section 13 requires Directional One to indemnify Antero for LIH equipment; (3) Section 14 requires Directional One to maintain first-party property insurance specifically for its tools and equipment; (4) Section 19 provides that in the event of any conflict between the MSA and any schedule of rates, which Directional One appears to claim is the equivalent of its Pricing Proposal, the MSA controls and expressly rejects any conflicting terms; (5) Section 22 mandates that any modification must be in writing, signed by both parties, and specifically references the MSA, and prohibits modification by field personnel; and (6) Section 23 mandates that no modification would

[77] Resp. Br. at 36.

be effective unless received by Mr. Schopp. Of course, the lower court's incorporation of the Pricing Proposal's LIH terms into the MSA unquestionably renders no less than these six sections of the MSA, which the parties agreed to, without effect in whole or in part.

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

Directional One continues to cling to the idea that it is a provider of tools and equipment under the MSA. However, the MSA is intended to cover various types of contractors and vendors, including those that provide "services," such as Directional One, and other types such as those that provide "labor, experience, expertise, vehicles, equipment, supplies, tools, manufactured articles, materials, facilities, and/or goods."[78] Directional One considers itself a provider of *both* services and tools.[79] Directional One was solely a service provider that used *its* equipment to perform its service. It is undisputed that Directional One never provided Antero with equipment absent its use in Directional One's services or absent Directional One's employees to perform the service. The MSA never contemplated that Directional One was an equipment provider any more than it contemplated it was a vehicle provider simply because it drove its trucks to the well site. The Court should reject Directional One's mischaracterization of the MSA.

III. CONCLUSION

Petitioner, Antero Resources Corporation, respectfully requests that this Court reverse and remand this case for entry of judgment in its favor regarding the equipment lost in hole and and Antero is entitled to recoup all monies paid to Respondent for previous improper charges for LIH equipment and LIH insurance or remanding the case for further proceedings.

---

[78] App. 151.

[79] Resp. Br. at 37.

ANTERO RESOURCES CORPORATION

By Counsel:

Ancil G. Ramey, WVSB #3013
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington, WV 25722-2195
(304) 526-8133
ancil.ramey@steptoe-johnson.com

W. Henry Lawrence, WVSB #2156
John D. Pizzo, WVSB #12680
Steptoe & Johnson PLLC
400 White Oaks Blvd.
Bridgeport, WV 26330
(304) 933-8000
hank.lawrence@steptoe-johnson.com
john.pizzo@steptoe-johnson.com

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2021, I served the foregoing "Petitioner's Reply Brief" upon all counsel of record by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

Sean P. McGinley, Esquire
DiPiero Simmons McGinley & Bastress, PLLC
P.O. Box 1631
Charleston, WV 25326-1631

Christopher Kamper, Esquire
Carver Schwarz McNab Kamper & Forbes, LLC
1888 Sherman Street, Suite 400
Denver, CO 80203

Ancil G. Ramey (WV Bar #3013)