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.

RESPONDENT'S BRIEF

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Assignments of Error

Directional One responds to each of Petitioner's six assignments of error in Section III of the Argument section of this brief, below.

Statement of the Case

Petitioner's Statement of the Case omits several relevant aspects of the three-day jury trial that began August 26, 2020, regarding Count IV of the Counterclaims of Petitioner. Petitioner alleged that Directional One had provided insufficient staff to support Petitioner's operations and had improperly moved workers from one well to another on the same calendar day, allegedly in violation of the Rate Sheets. APP-01033. Though Petitioner now asks this Court to disregard the Rate Sheets, and in particular the terms and conditions stated therein, Petitioner's counterclaim expressly relied upon those terms and conditions.

The jury instructions, read in open court, stated that "***the parties have stipulated there is a binding contract***; however ***the terms*** are in dispute." APP 01028 lines 11-12 (emphasis added). The Court also instructed the jury that "[p]arties can form contracts that consist of more than one document.... [which] 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." *Id.* lines 13-17. The Court then instructed the jury that the parties' agreement included both the Rate Sheets and the Master Services Agreements ("MSAs"). APP 01030, line 4 (Rate Sheets) and line 16 (MSAs).

Petitioner did not object to any of the foregoing instructions. Petitioner's claim then was submitted to the jury, which after deliberations of approximately 90 minutes returned a verdict in favor of Directional One and against Petitioner. Petitioner does not appeal from or assign error to the instructions or jury verdict.

On November 19, 2020, Directional One filed a motion for attorneys' fees, costs, and expenses in the Business Court based upon the Rate Sheets. That motion has not yet been briefed and is pending before the Business Court.

Statement regarding Oral Argument and Decision

Because the Business Court correctly applied black-letter contract law to undisputed facts and unambiguous contract terms, oral argument is not necessary. For the same reasons, this case is suitable for summary affirmance in a memorandum decision.

Summary of the Argument

"The MSA and the Rate Sheets are part of the same transaction whereby Plaintiff supplied equipment and services to Defendant." Order, APP 00998 ¶ 23. This concise formulation summarizes and is supported by three full paragraphs of undisputed facts in the Order of the Business Court (*id.* ¶¶ 21-23) and brings together two undisputed factual findings that support its entry of summary judgment in favor of Directional One. These core findings are: (1) the MSAs and Rate Sheets are interrelated parts of "the same transaction"; and (2) Directional One "supplied equipment ***and*** services" to Petitioner (emphasis added).

Directional One's entitlement to summary judgment flows by ineluctable logic from these two undisputed findings. First, because the Rate Sheets and MSAs are interrelated, their combined effect, not what either one says in isolation, is what matters. Here, that combined effect was to require Petitioner to pay for LIH tools. This is in fact exactly how the parties' agreement would operate for any of the tools or services Directional One provided, not just tools lost in the wellbore. It is also exactly how the parties performed their obligations to each other for more than three years and more than $23 Million of business concluded.

Second, because the term "Work" in the MSAs unambiguously includes services and equipment "provided" to Petitioner, and because Directional One did exactly that as a matter of

undisputed fact, Directional One's function embraced both tools ***and*** services. In fact, tools and services were invoiced on every single bill submitted to and paid by Petitioner – not just invoices for LIH tools. Petitioner cannot simply cherry-pick the services aspect of the relationship.

In its Opening Brief, Petitioner fails to identify even a shred of evidence that raises an issue as to these facts. Petitioner also neglects to mention its own stipulation in open court that the Rate Sheets were part of a "binding contract." Instead, Petitioner argues that the MSAs stood on their own and goes so far as to suggest that the Rate Sheets were not even part of the agreement. As to the MSAs, Petitioner appears of the belief that the Business Court consistently misread them while making a series of errors in basic contract law. Rather than facts or evidence, Petitioner relies upon strained analogies for its arguments, for example that Directional One was akin to an "electrician, plumber or carpenter." Opening Brief ("Pet. Brf.") at 11.

Petitioner's analogy, like much of its brief, is a mischaracterization of facts that are undisputed. Directional drilling, as is undisputed, bears no resemblance to mere household repairs. Rather, it is a complex operation involving powerful equipment in addition to directional tools, conducted by teams of skilled workers. It begins with Directional One turning over its tools and equipment to Petitioner or its agent. That party or yet another contractor then attaches the tools to a drilling rig that it, and not Directional One, controls, sending the tools thousands of feet deep into the earth. Petitioner or another of its agents operates the rig while Directional One reads the data and provides advice as to which way to steer. The witnesses who testified to these facts are or were, at the relevant times, the senior managers and executives ***of Petitioner*** and their testimony is undisputed.

No witness testified, and there is no evidence, and it is untrue, that Directional One ever operated or could operate its directional drilling tools, let alone the drilling rig that drove them,

by itself. Though Petitioner attempts to blame Directional One for the loss of the tools (Pet. Brf. at 4-5), these intimations are directly contrary to undisputed facts in the record. It is undisputed that Directional One "provided" tools as well as services in the form of advice but did not control the drilling operation.

It is similarly undisputed that the parties' two MSAs are silent as to what Directional One had been hired to do for Petitioner – whether it was to drill wells, drive trucks, or dig pipeline trenches – or what price it would charge, or in fact any of the details, or even the basics, of the parties' relationship. The MSAs expressly refer these matters to the Rate Sheets. Thus, the MSAs do not stand alone. Moreover, it is also undisputed that for three years, Petitioner paid every single invoice based upon the Rate Sheets, including four separate occasions where it paid LIH charges.

This Court created the Business Court specifically to establish a division of the Circuit Courts with specific expertise in commercial contracts and relationships. See, W.Va. Tr. Ct. Rule 29. The Business Court performed this function admirably, rendering a thoughtful decision that correctly applied clear law to undisputed fact. Petitioner is left to its strained arguments because it has no alternative. The Business Court correctly entered summary judgment for Directional One and that judgment should be affirmed.

Argument

In the following sections, Directional One explains why (1) the facts underlying the Business Court's judgment are undisputed; (2) the Business Court properly applied black-letter contract law to these undisputed facts; and (3) Petitioner's assignments of error must each be rejected.

I. The facts underlying the Business Court's judgment are undisputed.

A. The standard of review.

"Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party." *Williams v. Precision Coil*, 194 W. Va. 52, 59-60, 459 S.E.2d 329, 336-37 (1995) (citations omitted). Petitioner's burden as the responding party is to offer "concrete evidence from which a reasonable finder of fact could return a verdict in its favor." *Id.* (quotation cleaned up).

Even though review of summary judgment is *de novo*, "this Court will not address an issue raised for the first time on appeal and not decided by the circuit court." *Diane Horton v. Prof'l Bureau of Collections of Md., Inc.*, 238 W. Va. 310, 312-13, 794 S.E.2d 395, 397-98 (2016) (upholding grant of summary judgment);) *State v. Miller*, 197 W. Va. 588, 597, 476 S.E.2d 535, 544 (1996) ("We have invoked this principle with a near religious fervor.")

B. Directional One and Petitioner established their contract in September 2014.

At Petitioner's request, on August 25, 2014 Directional One submitted an initial drilling proposal to Jon Black, Petitioner's Director of Drilling – Operations. APP-00373. This initial proposal contained Directional One's rate sheets for daily operational rates, for LIH tools, and other charges. APP-00376-379 (the "Rate Sheet").

Directional One's LIH pricing consisted of a single sheet with a specific price for each separately listed and specifically identified piece of equipment. Petitioner understood Directional One's LIH tool pricing was a single flat rate charged for each specific type of tool. *Kilstrom Deposition*, APP-00547 (transcript page 45:8-23); *Eddy Deposition*, APP-00500 (transcript page 70:16 to 72:18).

Directional One's most recent pricing for LIH tools is as follows:

directional ONE SERVICES INC. USA

Replacement / Lost in Hole Prices

Mud Motors	
4 ¾" – Motors	$127,000
6 ¼" – 6 ¾" Motors	$156,250
8" – Motors	$189,250
9 ½" and 9 5/8" – Motors	$234,000
Monel Collars	
4 ¾", 5" – Non Magnetic Slick Drill Collar	$32,900
4 ¾", 5" – Pony Non Magnetic Drill Collar	$21,400
6 ¼" – Non Magnetic Slick Drill Collar	$35,500
6 ¼" – Pony Non Magnetic Drill Collar	$23,400
8" – Non Magnetic Slick Drill Collar	$43,750
8" – Pony Non Magnetic Drill Collar	$25,400
Shock Subs	
4 ¾" – Shock Subs	$37,250
6 ¼" – 6 ¾" Shock Subs	$57,250
8" – Shock Subs	$73,750
9 ½" and 9 5/8" – Shock Subs	$93,750
Subs	
4 ¾" EMWD Gap Sub (EM tool)	$59,000
6 ¼" EMWD Gap Sub (EM tool)	$73,400
8" EMWD Gap Sub (EM tool)	$89,700
Inclination & Gamma at Bit Sub (6 ½" tool)	$197,500
Inclination & Gamma at Bit Sub (4 ¾" tool)	$179,500
Pickup Subs (not returned)	$1,575
Crossover Subs (not returned)	Cost plus 15%
Bell Subs (not returned)	Cost plus 15%
Float Subs (not returned)	Cost plus 15%
Stabilizers (not returned)	Cost plus 15%
EM - MWD tool (one string, down-hole components only) No Gamma on tool string Direction & Inclination only	$339,900
EM - MWD tool (one string, down-hole components only) Direction, Inclination & Gamma tool	$389,000

APP-00409.

Other provisions of the Rate Sheets provided further explanation. They each contained detailed provisions regarding "fishing operations," (APP-00397 ¶ 9), and a "Liability Reduction" or LIH insurance option (APP-00400 ¶ 25). The Liability Reduction was simply an increase in the daily rates charged, in exchange for which Directional One would reduce the LIH prices for tools lost in the wellbore if Petitioner specifically requested and paid for this pricing option. *Id.*

After the initial proposal, subsequent Rate Sheets retained this same structure, though the prices fluctuated over time. By their terms, Rate Sheets could be updated on 30 days' notice.

APP-00398 ¶ 14. Over the course of the parties' relationship, Directional One submitted several Rate Sheets to Petitioner, and each took effect 30 days after submittal. Petitioner had the opportunity during this 30-day period to reject the Rate Sheet, but ***never*** did so.

After extensive discussions with Directional One's principal, Kevin Onishenko, Petitioner executed the initial Rate Sheet on September 19, 2014. APP-00386. Mr. Black reviewed the LIH rates and found them reasonable and typical for the industry as well as Petitioner's other drilling contractors. *Black Deposition*, APP-00423 (Tr. at 45:19 – 46:22).

Later in September 2014, Directional One and Petitioner executed a Master Services Agreement (the "2014 MSA," APP-00462). The parties later entered a subsequent MSA (the "2015 MSA") that was materially identical to the 2014 MSA. The MSAs are boilerplate forms that neither party negotiated.

The two MSAs each state that "the Parties are entering into this Agreement because the Company may, from time to time, request Work to be performed by the Contractor. The Company does not guarantee that any Work will be requested, and the Contractor does not guarantee that it will perform any Work for Company upon request." APP-00449 § 2 (2014 MSA). The MSAs do not even state what "Work" would be performed – rather the definition lists several possibilities by general category such as "services, labor, experience … equipment … [and] tools." *Id.* § 1.19. Thus, they covered all the bases but did not identify a specific task.

Once Work was requested and performed, the MSAs required Petitioner to pay for the "Work," including all "tools" and "equipment" that were "provided by" Directional One. 2014 MSA, APP-00449 § 1.19. Payment by Petitioner was to be "in accordance with" Directional One's "published schedule of rates and/or prices," in other words, the Rate Sheets. APP-00453 § 10.1. The MSAs nowhere required a signature on a Rate Sheet, just that they be "published." *Id.*

There is no dispute each Rate Sheet was "published" to Petitioner with the required 30-day notice. The MSAs also expressly permitted Directional One to charge for "materials or supplies" as long as such charges were "specified in the scheduled rates." *Id.* § 10.2.

The term "LIH," or any of its cognates or synonyms, do not appear in either of the parties' two MSAs, which contain no specific provisions regarding LIH tools or LIH insurance. Petitioner through its Rule 30(b)(7) deponent has admitted that nothing in the MSAs prevented Petitioner from (1) "agreeing to pay for lost in hole charges if it chooses to do so"; or from (2) "purchasing lost in hole insurance." *Schopp Deposition*, APP-00472 (Tr. page 46:22 to 47:11).

The MSAs required Directional One to factor into its "compensation" the inherent risks and hazards of the well and the well site. APP-00451 at § 5. Directional One's LIH pricing and LIH insurance option stated in the Rate Sheets satisfied this requirement. APP-01000 ¶¶ 30-31.

The MSAs required Directional One to insure its tools and equipment including "equipment ... used in the Work" (APP-00463 ¶ G), and to indemnify Petitioner against loss (APP-00456 § 13.3). Accordingly, Directional One procured insurance policies that Petitioner approved ***as a pre-condition to Directional One's beginning any work***. *Onishenko Aff't*, APP-00487-88, at ¶¶ 4 – 6. Petitioner monitored and approved Directional One's insurance coverage, but never requested evidence of insurance for downhole tools. APP-00537, *Interrogatory Response* (admission that "lost in hole insurance is not a form of insurance" that Petitioner monitored); *Black Deposition*, APP-00424 (Tr. page 57:2 – 16 ("Q: [W]as it your belief that Antero ... required Directional One to obtain insurance specific to the bottom hole assembly? A: No.") Third-party LIH insurance is generally of zero or limited availability, but Directional One secured such coverage when it was reasonably available from a tool supplier. APP-00488 ¶ 7.

Petitioner identified no evidence, either below or in its Opening Brief, that such insurance was available for the LIH tools in this case.

Section 22 of the MSAs empowered certain of Petitioner's employees to "bind [Petitioner] to risk allocation provisions." APP-00461 § 22. These include any of Petitioner's employees other than "project managers, field personnel, or consultants." *Id.* Jon Black (Director of Drilling – Operations), Jon McEvers (Director), James Harvey and Joe Honeycutt (Drilling Superintendents for Ohio and West Virginia, respectively), Tim Clawson, (Director of Drilling – Operations), and Kevin Kilstrom (Senior Vice President of Production), and others, all meet these criteria because none of them is a project manager, field personnel, or consultant. APP-00693-95 (Tr. at 74:15-19; 85:3-18; and 102:5 to 107:23). Instead, these senior managers and executives of Petitioner approved each of Directional One's invoices and/or Rate Sheets.

C. Directional One "provided" both goods and services to Petitioner.

With the initial Rate Sheet and the 2014 MSA in place, and its insurance approved, Directional One then began working on oil and gas wells in Ohio. The key improvement provided by Directional One was to efficiently and reliably drill wells "on air" rather than using traditional methods involving the use of liquid lubricants, reducing both drilling time and rig downtime. APP-00426 (Tr. at 86:21 – 87:3). Drilling on air is faster than the conventional approach and can yield substantial cost savings due to the fact that the total daily cost of a drilling operation runs to $100,000 to $200,000 per day. *Eddy Deposition*, APP-00497 (Tr. at 32:8 to 33:14). Thus, every hour saved is a cost reduction. *Harvey Deposition*, APP-00505 (Tr. 41:17) ("reducing days on well saves cost").

In these operations, as described by Petitioner's senior managers and executives, Directional One's role was "the provision of tooling" and "skilled labor" to help operate the

tools, along with a well plan.[1] *Black*, APP-00420 (Tr. 22:23-25); *Eddy*, APP-00495 (Tr. 22:3 – 20 ("directional drillers also provide tools, which are referred to as the 'bottom hole assembly'"); *Harvey*, APP-00504 (Tr. 22:22 to 23:5) ("the directional drilling contractor decides what they think would be the best BHA to achieve the goal that we at Antero would want ... the directional driller owns the BHA and provides it to Antero Resources."); *Kilstrom*, APP-00550-51 (Tr. 96:24 to 97:6) ("Q: Did you understand Directional One was providing tools to you and that's what this invoice was about? [Objection] A: ... they provided overall service; people, tools, equipment, cars, vehicles, I mean a variety of things, so not restricted to tools."); *Schopp*, APP-00474 (Tr. 57:11-15) ("Q: So the rate of $7,995 includes both the tools and the personnel. Correct? A: Just for this proposal, that would appear to be correct.")

The quality of the tooling provided by Directional One was equally important to Petitioner as the service quality. As Mr. Black testified, Directional One's "service quality and the [quality of] tooling provided was extremely high." APP-00426 (Tr. 86:13-20) (noting only "one directly attributable incident of ... non-production time over a period of approximately two and a half to three years"). Directional One's record was "[v]ery good performance." *Harvey Deposition*, APP-00505 (Tr. 41:18-23); *Honeycutt Deposition*, APP-00516 (Tr. 64:22-25).

As Mr. Schopp testified, the Rate Sheets all contain a single "Operational Day Rate" both for the tools provided and the personnel to operate them. Here is an example of that pricing:

Operational Day Rate

7 7/8", 8 ½", 8 ¾" & 12 ¼" Hole size, directional tools below table: $7295 per day

Directional Supervision (2 Supervisors)	Included
Non-Magnetic Slick Drill Collars (2 as required)	Included

[1] Under the MSAs, Directional One was an independent contractor and not an employee of Petitioner. MSA, Appx. at Ex. 15 § 6. It is undisputed that Directional One's role was not to run or direct Petitioner's drilling operations. Rather, it was to support them in the manner Mr. Black described.

EMWD System with backup	Included
Subsistence for 2 DD	Included
Measurement Tool Supervision	Included
Subsistence for Measurement Tool Supervisor	Included
Infield Mileage for 2 DD and 1 MWD Supervisors	Included
Gamma Service (if required)	$535 per day
Gamma Supervisor (if required)	$615 per day
Subsistence for Gamma Supervisor (if additional is required)	$90 per day

APP-00406.

As can be seen from the above, this pricing is for "directional tools below table" and lists the personnel (the service providers) in most cases as "included" in the tool price. Thus, the pricing encompasses both tools and services. The Court recognized this critical fact in its Order. APP-00998 ¶ 22.

As these witnesses testified, the tooling Directional One provided is known as a "bottom hole assembly" or "BHA," which makes it possible to steer the drill bit. APP-00420 (Tr. 22:5-11). The BHA is one part of the "drill string," which is the complete mechanism used by Petitioner to drill the well. The drill string in turn is connected to the drilling rig, also controlled by Petitioner or another contractor acting as Petitioner's agent. APP-00488 ¶ 9.

Petitioner had overall control of the drilling operation. APP-00421 (Tr. 26:4 – 9); APP-00470 (Tr. 35:15-21).[2] To do this, as per industry practice, Petitioner controlled the three main "drilling parameters" of drilling and had overall authority over the drilling operation. *Eddy*, APP-00495-96 (Tr. 22:3 to 26:19). Petitioner also exercised sole power over "fishing operations" that result when tools are stuck downhole and described the transaction as a "purchase" of the stuck tools. *Eddy*, APP-00496 (Tr. 26:20 – 28:21); *Honeycutt*, APP-00514 (Tr. 45:18 to 48:7); *Schopp*, APP-00470-71 (Tr. 36:21 to 37:24). When Petitioner attempted to

[2] Petitioner attempts to blame Directional One for the loss of tools. Pet. Brf. at 4-5. However, not only did Petitioner control the drilling operation, its agent ran the rig and controlled all the primary drilling parameters. *Eddy Deposition*, APP-00496 (Tr. 26:5-14).

fish the LIH tools at issue in this case, and when it ended up setting a cement plug instead, it necessarily relied upon these Rate Sheet provisions because the MSAs contain no provisions authorizing such operations. *Schopp*, APP-00471 (Tr. 37:22-24).

In sum, Directional One provided a BHA to Petitioner for use by it or its contractors, to be attached to a drilling rig operated by those contractors or by Petitioner, while Directional One would assist with advice. *Black Deposition*, APP-00420-21 (Tr. 23:2 to 26:9). Petitioner directed the drilling operation and had overall supervision of the activities of each member of the team, including Directional One. *Id.* In the specific context of tools stuck in the wellbore, Petitioner made all the key decisions, as authorized by the Rate Sheets alone.

D. Petitioner approved and accepted the Rate Sheets.

Directional One's Rate Sheets were reviewed and approved by Petitioner's operations and procurement group. APP-00508 (Tr. 61:14 to 62:12). The Rate Sheets then became the basis of payment. Petitioner admitted in discovery that is "unaware of any circumstance in which it paid an invoice ... on any basis other than the Rate Sheet." APP-00557 (Supplemental Answer to ROG #11, verified by Mr. Schopp). This is true not only for LIH tools, but for all other charges, amounting to thousands of invoices in a three-year period. Over that period of time, the parties conducted over $23 Million in business. APP-00766.

In Directional One's early communications with Petitioner, Petitioner expressly confirmed that Mr. Black, who executed the first Rate Sheet on behalf of Petitioner, was "the correct member of our staff" for Directional One to work with as to pricing. APP-00565. Petitioner's Senior Vice President Mr. Kilstrom said, "[i]f you are working with Jon Black on this, that is satisfactory to me." APP-00564.

E. Petitioner requests Directional One's "LIH insurance."

During the initial months of drilling in Ohio, Petitioner was "challenging existing conventions and drilling methods" by using air drilling. APP-00426 (Tr. 86:21 – 87:3). Accordingly, Petitioner exercised the option to purchase LIH insurance. APP-00433 (Tr. 182:15-22); APP-00517 (Tr. 66:5 – 67:2). Petitioner specifically requested LIH insurance for each well by filling out a form. APP-00517 (Tr. 65:5 – 67:5). Invoices for that well would reflect the insurance charge and would go through several layers of review and approval by Petitioner prior to payment. APP-00518 (Tr. 72:5 – 74:4).

As Diana Hoff, Vice President of Operations for Petitioner, stated in an email to her team: "Antero chooses whether it wants LIH insurance or not on each well (not the vendor) .... The LIH insurance typically reduces the amount owed for a LIH assembly by 50%." APP-00991. Petitioner realized and accepted the benefits Ms. Hoff described. For example, when tools were lost downhole on the Seckman well, Directional One accordingly reduced the LIH charges. APP-00602 ("With Ins." denotes the covered tools).

F. Petitioner invariably paid for tools that it lost during its drilling operations.

In September 2015, Directional One signed the 2015 MSA. Both before and after the execution of the document, Petitioner lost the BHA (or parts of it) downhole on four separate wells and approved and paid the resulting charges in accord with the published Rate Sheets. APP-00586-92 (internal tracking); APP-00594-603 (paid LIH invoices).

Three of these wells incurred LIH charges ***before*** the parties entered the 2015 MSA. One of them, the Seckman well, incurred an LIH charge (reduced by insurance) soon thereafter.

The two smallest LIH invoices were approved by Mr. Black and were paid by Petitioner, without any dispute or negotiation of the amount charged. The three largest invoices were approved by Petitioner's senior executives Clawson and Kilstrom (Mr. Black's bosses) and

likewise were paid promptly and without dispute. APP-00586-92. Thus, both parties relied upon the LIH pricing of the Rate Sheets as the expression of their intent and had done so even before they executed the 2015 MSA. ***Neither party*** requested any material change to the 2015 MSA from the form of the 2014 MSA, knowing that these LIH charges had been paid.

G. Petitioner abruptly refuses to pay "legitimate" LIH charges.

In January 2016, Directional One began drilling wells in the Marcellus formation in West Virginia, as well as continuing to drill in the Utica formation in Ohio. In late 2017, Petitioner decided to stop purchasing LIH insurance from any of its drilling contractors as "a pure economic decision" based on "the performance demonstrated" after "nearly three years of development of a new drilling technique." *Black*, APP-00429 (Tr. at 121:17-24). Petitioner, in other words, decided to make a considered bet it would not lose any more tools in the wellbore.

Black thought this was a bad bet. *Id.* He was not alone. "Just because ... you haven't wrecked your car, doesn't mean you drop your car insurance." *Harvey*, APP-00507 (Tr. 58:7-9). Without informing Directional One, Mr. Eddy planned to negotiate LIH invoices downward if he lost that bet, to mitigate the effects of his own decision to drop LIH insurance. APP-00499 (Tr. 53:4-10 and 53:25 to 55:14). Thus, Petitioner could have its cake and eat it, too.

In December 2017, the BHA on the Jameson 1H well became stuck in the wellbore. "The actual mechanical failure [on the Jameson 1H] was due to an on-site company [Antero] representative not following specific directives from [Antero Drilling Superintendent] Joe Honeycutt." *Black*, APP-00430-31 (Tr. 148:24 – 149:1). Soon thereafter, in February 2018, tools became stuck in hole on the Jack 2H well, when the "gap sub" failed. It recently had been inspected by Petitioner's agent on the rig prior to use. APP-00612 (inspection report).

The charges for the Jameson 1H "were legitimate and they're normally paid." APP-00624 (Tr. 44:13). The charges for the Jack Unit 2H as a "normal occurrence would have been

paid" because "lost-in-hole charges are generally paid." *Id.* (Tr. 45:3-12). James Harvey, Petitioner's Drilling Superintendent for the State of Ohio, stated that if presented with an LIH invoice from Directional One, "I figured we would just pay for it." APP-00507 (Tr. 59:3 – 10).

H. Petitioner's "Factual Background" is irrelevant, false, and misleading.

Petitioner provides a "Factual Backround" describing its response to the LIH charges at issue in this case, purporting to show that the entire 3-year course of performance of the parties had been "mistaken." Pet. Brf. at 5-6. Petitioner's description is implausible on its face and also at odds with the summary judgment record, which contains several examples of how Petitioner's employees and executives actually responded to those charges. *Id.* at 6.

For example, Petitioner's senior managers and engineers including Jon Black, James Harvey, and Jonah Fryman each testified in their depositions that Petitioner should have paid Directional One's LIH charges at issue in this case.[3] Petitioner's Senior Vice President of Production, Kevin Kilstrom, approved a prior invoice for LIH tools, which on its face reflected a discount due to LIH insurance. He testified that "I did not believe it was improper at the time" and that he did not know if the MSA would change that conclusion. APP-00552 (Tr. 127:17-18).

Hoff also investigated allegations made by Mr. Eddy that Directional One's daily rate and standby charges were improper but found no evidence to support the claim. APP-00607 (Tr. 21:12-21). She also looked into LIH insurance and concluded "there is nothing to look for in those charges." APP-00991. Hoff also in a separate email passed on Mr. Schopp's directive that

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[3] Hoff said the same thing in an email to Mr. Eddy that was not made a part of the summary judgment record.

the dollar amounts were not worth the trouble of litigation "unless we want to make an example out of someone."[4]

Through March 2018, Directional One patiently awaited payment, but Petitioner refused to respond even after Directional One offered a 30% discount. Seeing no other choice, Directional One terminated the parties' agreement and brought this litigation. Petitioner counterclaimed, including the two counterclaims that Hoff had found to be without merit. Primarily as a result of Petitioner's delay tactics, but also affected by the Covid-19 virus, Petitioner has succeeded in delaying payment of Directional One's legitimate invoices for more than three years, effectively killing Directional One, which is no longer a viable business.

I. The Business Court correctly found the foregoing facts undisputed.

Based on the foregoing undisputed facts, the Business Court reached two critical findings of fact. First, the Business Court found that Directional One provided tools as well as services to Petitioner. APP-00997-98 at ¶¶ 21 and 22. Second, the Business Court found that the MSA was silent as to pricing (APP-00999 ¶ 24) and, in contrast to the Rate Sheets, contained nothing specifically applicable to LIH tools (APP-00998 ¶ 22). Thus, the only comprehensible agreement between the parties consisted of the Rate Sheets read in concert with the MSAs. The court found no conflict between the MSAs and the specific pricing of the Rate Sheets, referencing several provisions of the MSA that anticipated and referred to further elaboration in the Rate Sheets. APP-01001 ¶¶ 31-32. Regarding LIH insurance, the Business Court found that Petitioner had specifically requested the insurance and had benefitted from it. APP-01002-03 at ¶¶ 36 and 37.

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[4] This email was made an exhibit and accepted into evidence at trial over Petitioner's objection (Directional One Trial Exhibit No. 127), a ruling to which Petitioner assigns no error and takes no appeal.

In response, Petitioner failed below and fails again to carry its light burden to identify so much as a single issue of disputed fact. Petitioner argues the Business Court committed reversible error when Petitioner does not and cannot identify even a scrap of evidence that raises an issue as to any part of the foregoing. Directional One carried its burden of proof, and the Business Court's Order must be affirmed.

II. The Business Court correctly applied black-letter contract law to undisputed facts, and therefore its judgment should be affirmed.

The Business Court's entry of summary judgment was supported by the correct application of black-letter contract law to the foregoing undisputed facts and should therefore be affirmed. The parties' contract requires Petitioner to pay for all "Work" delivered by Directional One, and to do so "in accordance with" Directional One's "published schedule of rates." APP-00453 at § 10.1. "Work" is a defined term that includes "equipment" and "tools ... provided by Contractor to Company." APP-00449 § 1.19. The downhole tools at issue in this case are "equipment" or "tools" Directional One "provided" to Petitioner and are specifically and separately identified in the Rate Sheets by individual tool type, in contrast to the general description in the MSAs. Therefore, the parties' contract requires payment for these tools. The Business Court correctly entered summary judgment for Directional One.

A. As a matter of law, the MSAs and the Rate Sheets must be read together.

As a matter of law, the MSAs and the Rate Sheets should be construed together because "[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." *Ashland Oil v. Donahue*, 159 W.Va. 463, 469, 223 S.E.2d 433, 437 (1976). This is particularly

true where, as here, "[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." *Id.*[5]

Though Petitioner now disputes the application of this law to this case, Petitioner stipulated to that effect at trial, and raised no objection to the jury instructions that expressed the identical principle, *verbatim*, when Petitioner was pursuing its own affirmative claims. This is not mere pleading in the alternative. Petitioner stands before this Court intending to pursue one theory on appeal (the Rate Sheets are superfluous at best and the MSA "stands on its own," Pet. Brf. at 29), after conducting a three-day jury trial having ***stipulated*** to the opposite (the Rate Sheets and MSAs must be read together to form a "binding contract"). "Stipulations or agreements made in open court by the parties in the trial of a case and acted upon are binding." Syllabus Point 1, *Butler v. Transfer Corp.* 147 W. Va. 402, 128 S.E.2d 32 (1962); see also, *Matter of Starcher*, 202 W. Va. 55, 61, 501 S.E.2d 772, 778 (1998).

1. The relationship between the Rate Sheets and MSAs is obvious.

Under *Ashland*, "the relationship between the documents" must be "clearly apparent," and their relationship in the instant case is obvious. Without the Rate Sheets, the parties' "agreement" would not even state that Directional One would be involved in directional drilling. The services and tools it would provide, how it would do so, at what prices, for what times, and under what circumstances, would all be sheer guesswork because the MSA says nothing about those subjects. Moreover, as shown by the undisputed facts explained above, the MSAs

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[5] Petitioner attempts to argue that because the most recent MSA was entered in 2015, and the first Rate Sheet was entered in 2014, the two are not contemporaneous. Pet. Brf. at 24 n.88. The undisputed facts are that the initial MSA and initial Rate Sheet were both executed in September 2014, and that the replacement documents for each, issued from time to time, were identical in all material respects to the preceding version of that document. Below, Petitioner did not attempt to argue that the documents were not contemporaneous or that the 2015 MSA differed in any material respect from the 2014 MSA.

anticipated the Rate Sheets not only by their silence. Each also, in several places, expressly anticipated further detail in the Rate Sheets. Section 2 states the MSA is not even binding until there is a further, accepted request for Work. Section § 5 refers to "compensation" for risks and hazards of drilling, § 10.1 requires payment "in accordance with" the Rate Sheets, §10.2 permits charges for "materials and supplies" if they are "specifically stated in the scheduled rates", and § 19 addresses conflict between the MSAs and the Rate Sheets.

Petitioner attempts to blunt the force of these frequent references by arguing that the Rate Sheets permissibly could consist only of raw numbers, implying that it was free to disregard any phrase contained therein that was expressed in plain English. Pet. Brf. at 25. However, as is obvious from review of the Rate Sheets, Directional One's LIH pricing in fact consisted of exactly that – raw numbers. It is literally a single sheet with rates on it, therefore a rate sheet (see page 6 above). To be sure, the Rate Sheets also contain a few phrases written in ordinary English that explain when the LIH pricing applies, as is necessary for any document to make sense. A mere price is meaningless with no word of explanation as to what it is for.

Moreover, the Business Court found, and it is undisputed, that under the terms of the MSAs, the Rate Sheets may only be disregarded if they are in actual "conflict" with the MSA, in which case the latter documents prevail "to the extent of the conflict." APP-00461 § 19. The MSA itself therefore defined what was permissible in the Rate Sheets, and nowhere prohibits what Petitioner describes as "terms and conditions." In fact, Petitioner availed itself of several "terms and conditions" of the Rate Sheets, for example: fishing operations APP-00397; a 2% "early pay" discount (APP-00407); and a "volume discount" (*id.*) The "early pay" discount alone, on $23 Million in business concluded, represents $460,000 in benefits to Petitioner.

More fundamentally, Petitioner's own senior drilling Director, Jon Black, ***signed*** the initial Rate Sheet. APP-00386. His signature, as is the case with all contracts, committed Petitioner to the entire document, not just isolated parts of it. At trial, Petitioner itself relied upon the terms and conditions of the Rate Sheets for its affirmative claims and stipulated to formation of a "binding contract." APP-01028 lines 11-12. Yet, Petitioner now claims it can cherry-pick the parts of that Rate Sheet that suit its arguments and ignore others on the ground that it never anticipated that the Rate Sheets might be written in English.

Finally, there is no dispute that for over three years, and in payment of innumerable invoices, both parties lived by the Rate Sheets and not solely the MSAs. Petitioner admitted in discovery that it was "unaware of any circumstance in which it paid an invoice ... on any basis other than the Rate Sheet." APP-00557. See, *Watson v. Buckhannon River Coal Co.*, 95 W.Va. 164, 175, 120 S.E. 390, 394 (1923) ("Tell me what the parties have done under a contract and I will tell you what that contract means.") This undisputed course of performance establishes that Petitioner accepted each and every Rate Sheet and relied upon the Rate Sheets as part of the agreement.

2. The Rate Sheets do not conflict with the MSAs.

Even if potentially in conflict, separate provisions of an agreement "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." *Gabbert v. William Seymour Edwards Oil Co.*, 76 W.Va. 718, 721, 86 S.E. 671, 672 (1915). See also, *McCaskey v. California State Automobile Assn.*, 118 Cal. Rptr. 3d 34, 52-53 (Cal. App. 2010) ("where two provisions conflict, the resulting repugnancy ... must be reconciled"); *Johnson Controls, Inc. v. City of Cedar Rapids*, 713 F.2d 370, 374 (8th Cir. 1983) (courts should find a "harmonious interpretation" to resolve potentially conflicting clauses).

In *Gabbert*, this Court construed an oil and gas lease that began its life as a printed form, to which the parties had added a typewritten additional term. 76 W.Va. at 720, 86 S.E. at 671. The typewritten additional term required the Lessee either to begin operation within 40 days or pay the Lessor $500.00. The pre-printed form, however, gave the Lessee the right to surrender the lease at any time. *Id.* On the 39th day, the Lessee attempted to surrender the lease, but the Lessor argued that surrender clause had been nullified by the typewritten term. *Id.*

Though this Court recognized a general rule that the typewritten clause would prevail over the pre-printed form to the extent of any "conflict" between them, it declined to find such a conflict, instead relying upon a presumption that "the contract contains no provisions or clauses not intended by the parties." *Id.* This Court held the two provisions could be read together to state that the Lessee could avoid the $500.00 payment by surrendering the lease prior to the 40th day. The pre-printed form, though subordinate to the typewritten addition, remained as an exception or limitation to the operation of the clause that would otherwise prevail by default rule. Thus, both clauses were given meaning and effect by this Court.

Here, §§ 13 and 14 of the MSAs require Directional One to provide an indemnity favoring Petitioner against loss of tools, and to insure tools, in the most specific description, "used in the Work." See, Exhibit A to MSAs, APP-00463 (2014) and 00584 (2015 MSA).

In contrast, the Rate Sheets:

(1) Identify specific individual tools that are subject to LIH pricing (APP-00409);

(2) State the specific dollar amount applicable to each separately listed tool (*id.*);

(3) State when the LIH pricing applies (APP-00396 ¶ 7); and

(4) Describe the specific procedures that the parties will use in the event that tools become stuck in the wellbore (APP-00397 ¶ 9).

It is therefore undisputed that the Rate Sheets provide specific detail as to LIH tools that is lacking in any applicable provision of the MSAs. Therefore, although § 19 of the MSAs provides a similar rule to that identified in *Gabbert* regarding any "conflict" with the Rate Sheets, this Court should not search for conflict. It should rather, as in *Gabbert*, treat these documents as two agreements that the parties intended to function together, as they in fact did for three years.

It is easy to see how they did so. As interpreted by the Business Court, the MSAs and Rate Sheets work together to articulate a single rule that Directional One was responsible for its tools and equipment up to the point where specific tools were placed in the wellbore, at which point Petitioner assumed responsibility for specific tools up to an agreed and definite price. This is how Directional One understood the contract to work, and for three years, this is also how Petitioner performed.

The parties, and the Business Court, were therefore both following black-letter contract principles. Narrow and specific provisions are generally regarded as exceptions or qualifications to more general provisions, and courts, as this Court did in *Gabbert*, try to find ways to give both provisions effect. See, *Earth Pipeline Servs. v. Columbia Gas Transmission*, 623 B.R. 100, 112 (Bankr. D. Del. 2020) (applying West Virginia law, specific lien waiver language in contract controlled over general waiver provision); *State ex rel. Hercules Tire & Rubber Supply Co. v. Gore*, 152 W.Va. 76, 84, 159 S.E.2d 801, 806 (W. Va. 1968) (specific language in a statute controls over general language); 5 *Corbin on Contracts* § 24.23 (2020) ("the more specific term should usually be held to prevail over the more general term"); *Restatement of Contracts* § 236(c) (1932) ("Where there is an inconsistency between general provisions and specific

provisions, the specific provisions ordinarily qualify the meaning of the general provisions.") Every jurisdiction in America, without exception, considers this to be black-letter contract law.[6]

Petitioner suggests that this Court could "resolve" the tension between the LIH pricing and the indemnity of the MSA by ruling its favor. Pet. Brf. at 29. Petitioner, below, failed to identify an accepted canon of construction that would support the resolution it suggests.[7] In contrast, "specific qualifies the general" is a well-established rule of law.

Petitioner relies upon *Pertee v. Goodyear Tire & Rubber Co.,* 1995 U.S. App. LEXIS 27704 (*slip op.* 4th Cir. October 2, 1995), an unpublished federal decision construing West Virginia law.[8] Pet. Brf. at 27. This reliance appears misplaced because *Pertee* held that the two contractual documents at issue in that case were to be "read together." Slip op. at 5. Indeed, *Pertee* cites the same authority Directional One relies upon for this proposition. *Id.* The

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[6] See, e.g., *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) ("Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."); *Brinderson-Newberg Joint Venture v. Pac. Erectors, Inc.*, 971 F.2d 272, 278 (9th Cir. 1992) ("It is well settled that where there is an inconsistency between general provisions and specific provisions [in a contract], the specific provisions ordinarily qualify the meaning of the general provisions."); *Mayer v. Pierce County Med. Bureau, Inc.*, 909 P.2d 1323 (Wash. 1995) (the specific provision ordinarily qualifies the meaning of the general provision under general rules of contract construction); *Kittleson v. Grynberg Petro. Co.*, 2016 ND 44, P14, 876 N.W.2d 443, 447 (N.D. 2016) ("if a conflict exists between a specific provision and a general provision in a contract, the specific provision qualifies the general provision"); *Musko v. Musko*, 697 A.2d 255, 256 (Pa. 1997) ("when specific or exact provisions seem to conflict with broader or more general terms, the specific provisions are more likely to reflect the intent of the parties than the general provisions").

[7] Petitioner suggests that this Court should resolve this issue using a "battle of forms" analysis. Pet. Brf. at 29. Petitioner did not raise this argument below. Also, Petitioner has overlooked the fact that if this case was a battle of forms, Directional One fired the last shot – its Rate Sheet that took effect December 1, 2017 would then become the controlling document. This document was the basis of every invoice and payment made until March 2018, when Directional One terminated the MSA.

[8] Because *Pertee* was issued prior to January 1, 2007, under Fourth Circuit Rule 32.1, Petitioner's citation "is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case." However, an exception may be made if there is "no published opinion that would serve as well." Petitioner's reliance on *Pertee* may therefore be taken as an admission that Petitioner could not find a single published decision to support its arguments.

difference between *Pertee* and the instant case is that in *Pertee*, the two agreements contained contrary indemnities. One document stated that the Seller would indemnify the Buyer against all third-party claims; the other document stated Buyer would indemnify Seller for those same claims. *Id.* It was not possible to give effect to both provisions at the same time.

That is not the case here. In the instant case, the MSA § 13.3 contains a general indemnity, and § 14 contains general insurance requirements applicable to tools, in their most specific formulation, "used in the Work." The Rate Sheets do not sweep so broadly. Instead, they require payment in specific, pre-determined amounts for identified, separately listed tools. Payment is triggered by specific circumstances, i.e., while the tools are below the rotary table, and when they become stuck in the wellbore. At that point, the parties are to follow, and did follow, procedures stated only in the Rate Sheets – not the MSA. The pricing for LIH tools does not extend to all of Directional One's equipment or tools "used in the Work," but rather only to the tools identified and separately listed in the Rate Sheets. If the tools at issue in this case had been stolen from Directional One's tool-yard or fallen off a Directional One truck rather than being lost in the wellbore, or if the LIH tools in this case had not been listed on the LIH pricing sheet, this litigation would never have happened.

Directional One's LIH pricing was specific, was industry standard, and was also standard for all of Petitioner's drilling contractors. *Black Deposition*, APP-00423 (Tr. 46:14 – 48:24). This is so because, in addition to Directional One, Petitioner structured all of its contracts with all of its drilling contractors in precisely this fashion. They all contain a general indemnity in favor of Petitioner, qualified and modified by more specific provisions pertaining to LIH tools.

For example, another of Petitioner's drilling contracts provides as follow:

> § 8.2(A): "EXCEPT IN THE CIRCUMSTANCES SET OUT IN ARTICLE 8.2(C), CONTRACTOR SHALL BE RESPONSIBLE FOR AND AGREES TO

RELEASE ... INDEMNIFY AND HOLD HARMLESS COMPANY FROM AND AGAINST ANY AND ALL CLAIMS FOR DAMAGE TO OR LOSSS OR DESTRUCTION OF PROPERTY OF ANY MEMBER OF CONTRACTOR GROUP" (emphasis in original).

8.2(C): "COMPANY SHALL BE RESPONSIBLE FOR AND AGREES TO REIMBURSE CONTRACTOR GROUP FOR ALL LOSS OF, DAMAGE TO, ABNORMAL WEAR OR DESTRUCTION OF ANY CONTRACTOR GROUP PROPERTY OR EQUIPMENT ... WHILE IN THE WELL BORE, OR INSIDE THE CASING OR RISER BELOW THE ROTARY TABLE ..." (emphasis in original).

APP-00632.

Thus, the same contract contains (1) a general indemnity in favor of Petitioner; and (2) a specific exception for LIH tools in favor of the drilling contractor. But the two are not in conflict. In fact, one is expressly an exception to the other. Petitioner structured all of its drilling contracts in this fashion. All contained a general indemnity; all contained provisions modifying the general indemnity and separately addressing LIH tools. APP-00644 – 666.

The only difference is that Directional One's agreement is stated in two documents – the applicable Rate Sheet plus the current MSA – rather than a single document. This also explains why Directional One did not negotiate specific changes to the MSA. The parties had already agreed to standard LIH pricing terms in the Rate Sheet. *See*, Pet. Brf. at 18.[9] By the time the parties entered the 2015 MSA, Petitioner had already paid LIH charges based on the Rate Sheets ***on three separate occasions*** and did so one more time soon thereafter.

Moreover, the difference between using two documents rather than one to express the intent of the parties is immaterial. It is in fact typical in the oil and gas industry because "MSAs will not work for .... [c]ertain contracts, such as drilling contracts." William W. Pugh and

[9] Here, Petitioner points to Directional One's "sophistication" in an effort to show that Directional One should have attempted to negotiate the terms of the MSAs rather than simply relying upon the executed and binding Rate Sheets. Petitioner was a "sophisticated" party as well, one that knowingly executed and entered into the obligations stated in the Rate Sheets, and also paid LIH invoices four times.

Harold J. Flanagan, *Master Service Agreements and Risk Allocation: In Whose Good Hands Are You?* Chapter 14, 48 Rocky Mtn. Mineral Law Institute (2002) at § 14.02[3]). Although the "typical drilling contract will allocate certain risks on a reciprocal basis .... Other risks, such as ... downhole tools ... are often assumed by the operator." *Id.* at § 14.03[1][a].

Thus, there is no dispute that the Rate Sheets and MSAs were intended to be read together. The Business Court maturely considered all of the evidence and the law that applies in this commercial business context. Its entry of summary judgment is supported by undisputed facts and clear law. It should therefore be affirmed.

B. The contract term "provided" has a broad, but unambiguous meaning.

The key contractual term "provided," in plain English, means: "[t]o make, procure, or furnish for future use, prepare. To supply; to afford; to contribute." *Black's Law Dictionary*, 6th Ed., 1990. It has "a broad and inclusive" meaning. *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1239 (D.C. Cir. 2007) ("provide" is broad enough to include "the act of supplying a good or service as a component of a larger, integrated product"). See also, *King v. Independent Sch. Dist.*, 272 P. 507, 510 (Idaho 1928) ("provide" includes "almost any means" whereby something is "made available").[10]

As shown by the foregoing undisputed facts, Directional One "provided" both tools and personnel, contributing to a complex operation directed and controlled by Petitioner. Each and every witness to address this issue so testified, including ***each and every one of Petitioner's own***

[10] Petitioner's Brief attempts in several places to substitute outlandish rhetoric in place of legal analysis. Perhaps the most outlandish is its statement that Directional One "desperately clings" to the term "provided." Pet. Brf. at 19. That term is part of the plain language of the parties' agreement. Directional One certainly is happy to rely upon the plain language of the agreement and does not share Petitioner's apparent belief that such reliance is a matter of desperation. It is just what the contract says.

senior managers and executives. Those are the undisputed facts of the parties' actual, real-world relationship.

Petitioner argues that it never took title to the tools (Pet. Brf. at 19-20), but this red herring is both irrelevant and false. It is irrelevant because "provided" does not imply or require a transfer of title. An equipment lessor, for example, "provides" equipment to the lessee without transferring title. In fact, a daily leasing or rental arrangement appears to be more or less what is contemplated by the "Operational Day Rate" of the Rate Sheets. But Petitioner's assertion is also false because when tools became stuck in hole, a "purchase" transaction is precisely how Petitioner's drilling managers described the ensuing resolution. Only the Rate Sheets, not the MSAs, gave Petitioner permission to cement the tools into the wellbore and permanently deprive Directional One of any opportunity to attempt retrieval.

Petitioner also argues, again for the first time on appeal, that Directional One did not provide tools for Petitioner's "end use." Pet. Brf. at 20. Petitioner did not raise this argument below and does not clarify what it means by "end use." However, this statement is also, like much of Petitioner's brief, a raw assertion unsupported by a scintilla of evidence. It is also a ludicrous statement. Petitioner does not dispute that its wells were drilled – more than 250 of them. No witness, no document suggests these wells were drilled by any means other than the directional drilling tools provided by Directional One.

Therefore, based upon undisputed facts, the Rate Sheets and MSAs are interrelated parts of "a single transaction" and the Business Court was correct to construe them together even before Petitioner stipulated to that effect. Moreover, because Directional One "provided" both services and tools as "Work" to Petitioner, Petitioner was obligated to pay for both. The summary judgment in favor of Directional One should therefore be affirmed.

III. Petitioner's assignments of error must be rejected.

In the following, Directional One responds to Petitioner's assignments of error. The following sections rely upon, and incorporate by reference, the arguments stated above.

A. Petitioner's Assignment of Error #1 should be rejected because the Business Court did not rule that the parties' MSAs were modified or amended by the Rate Sheets.

For its first assignment of error, Petitioner asserts that the Business Court incorrectly ruled that the MSAs were "modified by" the Rate Sheets. Pet. Brf. at 1. However, the Business Court in fact made no such ruling. Therefore, Petitioner attempts to assign error to a ruling the Business Court never made.

As stated in the foregoing, the Business Court ruled that the MSAs and Rate Sheets were "interrelated" documents that must be read and construed "together" as part of "the same transaction." APP-00998 ¶ 23. The MSAs anticipated the Rate Sheets not only by their silence as to any specific pricing information or other detail, but also by specific references in, for example, §§ 5, 10.1, 10.2, and 19. However, ruling that the parties have expressed their agreement in more than one document is substantially different as a matter of law from ruling that one document was specifically intended to be an amendment or modification of an earlier document. The Business Court never made the latter ruling.

Thus, Directional One does not otherwise respond to this purported assignment of error because Petitioner appears to have misapprehended what the Business Court, in fact, ruled. Therefore, this assignment of error must be rejected, and the summary judgment in favor of Directional One affirmed.

B. Petitioner's Assignment of Error #2 should be rejected because the Business Court correctly construed the unambiguous provisions of the MSAs pertaining to allocation of risk, which by their plain terms anticipate further detail and elaboration in the Rate Sheets.

Petitioner next asserts that the MSAs contain several provisions pertaining to risk allocation, claiming they each would have "no effect" if construed as excluding LIH tools based upon the Rate Sheets. Pet. Brf. at 32. That this is a gross exaggeration is readily apparent from the fact that none of these provisions even mentions LIH tools. Moreover, Directional One has already described above how those provisions would operate in concert with the Rate Sheets. Directional One responds to Petitioner's purported construction of these provisions as follows.

Section 5, APP-00451 (2014 MSA) and 00571 (2015 MSA) requires Directional One to "warrant" that its "compensation" fully accounted for the "complications, hazards, and risks incident to the Site and/or performing the Work." Such "compensation" can only be stated in the Rate Sheets because the MSAs are silent as to any and all pricing information.

Petitioner attempts to argue that the word "compensation" here must be limited to "daily rates" or "service rates." Pet. Brf. at 20-21, 31. But there is nothing in this provision that suggests anything of the kind. "Compensation" is a plain ordinary word in English, not limited or equivalent to a "daily rate" or a "service rate." Instead, it is a broad term that encompasses both compensation for lost tools ("[t]hat which is necessary to restore an injured party to his former position") and services ("[r]emuneration for services rendered"). *Black's*, 6th Ed., 1990. Directional One's LIH pricing therefore is "compensation" stated in the Rate Sheets in recognition of the hazards of losing tools downhole. The LIH insurance option is another means of "compensation" that addresses this same risk. The Business Court correctly found it undisputed that the LIH pricing and insurance both met this standard.

Moreover, the LIH insurance offered by Directional One in fact functions in precisely the fashion Petitioner envisions. "LIH insurance" means nothing more than a higher daily rate charged in exchange for reduced LIH prices if tools are lost in the wellbore.

Section 10.1, APP-00453 (2014 MSA) and 00573 (2015 MSA) requires payment for all "Work" performed by Directional One "in accordance with" the Rate Sheets. The Business Court correctly concluded, and it is undisputed, that this obligation is fundamental to the parties' agreement – no provision was more important to Directional One than Petitioner's obligation to pay. As is apparent on their face, the Rate Sheets encompassed payment for LIH tools.

Similarly, Section 10.2, APP-00453 (2014 MSA) and 00573 (2015 MSA), though phrased as a prohibition, provides that Directional One could appropriately charge Petitioner for "materials or supplies furnished by" Directional One "for use in the Work" as long as it was "specified in the scheduled rates." There is no dispute between the parties that this provision encompasses the directional drilling tools at issue in this case within the meaning of "materials or supplies" furnished by Directional One. As is obvious from the Rate Sheets themselves and as the Business Court ruled, Directional One's LIH pricing "is specified in the scheduled rates because each Rate Sheet breaks out the lost-in-hole pricing." APP-00998 at ¶ 22.

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). In Section II.A.2 above, incorporated herein by reference, Directional One explains at length, and it is undisputed, that the Rate Sheets are more specific than the MSAs and therefore qualify their meaning. Because the parties intended for all the

documents they signed to be part of a single agreement, the documents can and must be read together, as the Business Court held.

There are four more reasons why Petitioner's arguments here fail.

First, reading the indemnity and insurance provisions as overriding the Rate Sheets would place them in direct conflict with the other sections of the MSAs that expressly permit or require Directional One to provide certain kinds of pricing in its Rate Sheets. Section 5 of the MSAs, for example, does not just permit but ***requires*** Directional One to factor "risks and hazards" of drilling into its "compensation." Section 10 refers to the Rate Sheets both for payment and specifically for rates applicable to "materials and supplies." These provisions "cannot be ignored wholesale in favor of the indemnity provisions." APP-01001 ¶ 32.

Second, the indemnity provisions of the MSAs are an anticipatory release, and such a release "covers only such matters as may fairly be said to have been within the contemplation of the parties at the time of its execution." *Murphy v. N. Am. River Runners*, 186 W.Va. 310, 316-317, 412 S.E.2d 504, 510-511 (1991) (gross negligence of whitewater rafting guide not within scope of release). Here, the indemnity Petitioner seeks could not have been within the contemplation of the parties when they executed the 2015 MSA because Petitioner always paid LIH charges at all times prior to January 2018, ***including three occasions that pre-dated the 2015 MSA***. Petitioner had also expressly and specifically requested lost-in-hole insurance, individually, for each and every well drilled to that point. In entering the 2015 MSA, ***neither Petitioner nor Directional One*** requested any material changes to the form of the 2014 MSA. Payment for LIH tools is also standard in the industry, and standard practice for Petitioner with all of its directional drilling providers.

Third, Directional One 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. In the Rate Sheets, Petitioner gave specific assurance that LIH tools would be compensated at the prices negotiated in those documents. Directional One could not have anticipated that Petitioner would negotiate these prices in great detail, and then fashion strained arguments that it was then free to ignore them. Every single service and all equipment Directional One provided was to be paid for by Petitioner in the same manner arising from the operation of the Rate Sheets and MSAs working ***together***.

Fourth, there is no evidence in this case that third-party LIH insurance was even available for the tools at issue herein. It is undisputed that such insurance is only available on a limited basis. APP-00488 ¶ 7.

Section 19, APP-00461 (2014 MSA) and 00581 (2015 MSA) specifically addresses the relationship between the Rate Sheets and the MSA. It does not state that the MSA stands alone, and in fact is inconsistent with that conclusion. Rather, it states that the MSA "shall control" only "[i]f there are any conflicts" between the two, and then only "to the extent of the conflict." If Petitioner were correct in its view that the MSA stands alone and the Rate Sheets are not part of the agreement, then this provision would be wholly unnecessary and meaningless. If Petitioner's argument were correct that the Rate Sheets may only contain raw pricing numbers, this provision would also be meaningless because raw numbers can never conflict with the MSAs, which contain no pricing information at all. It 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.

Section 22, APP-00461 (2014 MSA) and 00582 (2015 MSA) also specifically authorizes certain personnel to "bind [Petitioner] to risk allocation provisions." These personnel cannot be "project managers, field personnel, or consultants." Here, 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).

In dealing with this provision, Petitioner embarks on a strange argument purporting to show that Mr. Schopp was the only person who was authorized to approve risk allocations. Pet. Brf. at 9. Petitioner claims to arrive at this proposition by construing "together" the provisions of the MSAs that actually address risk allocation (§ 22) and the provisions that address the mailing of notices (§ 23). *Id.* Section 22 contains a detailed description of the parties who are not authorized to approve risk allocations – and thereby implies that others are so authorized. In contrast, § 23 states that Mr. Schopp must be the person named as the "attn." line on the envelop when notices are mailed to Petitioner. Notably, § 23 does not authorize Mr. Schopp to approve anything. It simply says that the mail must be addressed to Petitioner, to his attention. Yet, Petitioner argues this is not only a grant but an exclusive grant of authority to Schopp.

This odd argument strains credulity and does violence to the provisions of the MSA that it purports to reconcile. If Mr. Schopp were the only person authorized to approve risk allocations, there would be no need in § 22 to identify the persons who were ***not*** authorized to do so. The MSA would simply say the Mr. Schopp was the sole person so authorized. Petitioner's interpretation thus renders the detailed provisions in § 22 superfluous.

But that is not the only problem with Petitioner's argument. It is undisputed that the parties did business together for three years, drilled over 250 wells, and conducted over $23 Million in business. It is also undisputed that each and every payment Petitioner made to Directional One during the course of this relationship was based upon the Rate Sheets. Yet, Petitioner now appears to suggest that somehow the Rate Sheets were of no effect, and cannot be considered part of the agreement, because they were mailed to the "attention" of the wrong person.

To begin with, this argument ascribes far too much importance to a mere notice provision. As a typical case, *Univ. Emergency Med. Found. v. Rapier Invs., Ltd.*, 197 F.3d 18 (1st Cir. 1999) has held, 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." *Id.* at 22-23. It "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." 197 F. 3d at 23 (citing cases). Mailed notice is valid so long as it is *actually received* by the noticee. *Id.* There is no dispute in the instant case that Petitioner actually received each and every Rate Sheet and paid all invoices based upon them.

Moreover, *Pertee,* the case Petitioner cited, is instructive on this point. It held, and Petitioner presumably agrees having cited the decision as controlling authority, that "parties may infer acceptance" of a contract "by their acts or conduct." *Pertee*, slip op. at 6, citing *First National Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W. Va. 636, 153 S.E. 2d 172, 176 (1967); *Magruder v. Hagen-Ratcliff & Co.*, 131 W. Va. 679, 50 S.E. 2d 488, 495 (1948). In the instant

case, it is undisputed based upon three years of unbroken performance that Petitioner had accepted the Rate Sheets.[11]

Thus, the "risk allocation provisions" of the Rate Sheets were anticipated by the MSAs and accepted not only by Petitioner's execution of that document, but also by the undisputed conduct of Petitioner. The Business Court correctly construed these provisions and therefore this assignment of error must be rejected.

C. Petitioner's Assignment of Error #3 should be rejected because the Business Court correctly concluded no facts were in dispute and the MSAs and Rate Sheets were interrelated documents that should be construed together.

As shown by the above-stated undisputed facts and the analysis stated in Section I and II of this Argument, the MSAs and Rate Sheets were interrelated documents that must, as a matter of law, be construed together. Petitioner has indeed so stipulated in open court. Even setting the stipulation aside, Petitioner's repeated assertion that the MSA "stands on its own" (e.g., Pet. Brf. at 29) flies in the face of the undisputed contents of the MSAs themselves, which are not only silent as to certain issues but expressly refer to the Rate Sheets in several places. They nowhere limit the content of Rate Sheets to raw numbers. Which, in any case, is precisely what the Rate Sheets contain. This assignment of error must therefore be rejected and the summary judgment in favor of Directional One affirmed.

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[11] As held by *Gallipolis,* "an acceptance may be effected by silence accompanied by an act of the offeree which constitutes a performance of that requested by the offeror," as is "well established." 153 S.E. 2d at 176. As held by *Magruder*, "[w]here a private corporation accepts the benefits of a contract made on its behalf by an unauthorized agent it thereby ratifies the contract in its entirety and will be bound to perform the obligations provided by the contract to be performed on its part." 50 S.E. 2d at 495.

D. Petitioner's Assignment of Error #4 should be rejected because the Business Court correctly concluded based upon undisputed facts that the LIH terms and conditions of the Rate Sheets do not conflict with the provisions of the MSA.

Petitioner next asserts that the MSA and Rate Sheets are in conflict. Pet. Brf. at 30. It repeatedly claims that reconciling the documents in the manner easily accomplished by the Business Court would render certain provisions "without effect." *Id.* at 32. However, this is not true – Directional One has articulated above in Section II.A.2 how the MSA provisions work in concert with the Rate Sheets. It is well-settled law that a document does not conflict with another merely by qualifying it. "The Court finds the Rate Sheets contain detailed provisions and specific pricing regarding LIH tools, tool repairs, and LIH insurance.... on the face of the documents, there is no conflict between the MSA and the Rate Sheets." APP-01001 at ¶ 31. The boilerplate of the MSA does not conflict with the specific detail of the Rate Sheets, therefore this assignment of error must similarly be rejected.

E. Petitioner's Assignment of Error #5 should be rejected because the Business Court correctly concluded based upon undisputed testimony and the parties' unambiguous agreement that Directional One was a provider of both tools and equipment.

Throughout its brief, Petitioner repeatedly asserts that Directional One was a provider of services only and did not "provide" tools. See, Pet. Brf. at 1 (Assignment #5), 4, 6, 7 ("Directional One was purely a service provider that used its tools and equipment to perform its services."), 11 (likening Directional One to a "electrician, plumber, or carpenter"), 19, and 20.

These repeated assertions have two things in common. First, they are unadorned by so much as a single citation to evidence. To be sure, Petitioner drops the occasional reference to the MSAs, but these broadly written documents do not even purport to state what Directional One would actually do. Rather, they anticipated further elaboration of that point in a separate document. As to the question of whether Directional One ***in fact*** provided services, or tools, or

both, to Petitioner, Petitioner offers only raw and conclusory assertions, made in the face of the contrary undisputed testimony of its own most senior managers and executives as to how the parties' relationship, in the real world, actually worked.

Second, Petitioner's extra-record assertions display an unwillingness to contemplate the simple logical possibility that Directional One provided ***both*** tools ***and*** services – it does not have to be one or the other exclusively. Here, Directional One provided a set of tools to Petitioner for use in its drilling operations, and a team of skilled workers to advise Petitioner while the well was being drilled. This arrangement is not complicated. Petitioner fails to raise an issue of fact to support its claimed assignment of error, which must be rejected. The entry of summary judgment should therefore be affirmed.

F. Petitioner's Assignment of Error #6 should be rejected because the Business Court correctly concluded based upon undisputed facts that LIH insurance was proper.

As the Business Court found based upon undisputed testimony, Petitioner "specifically requested lost-in-hole insurance from [Directional One] for each well by completing a written form. Each such invoice then would go through several layers of review and approval by Petitioner prior to payment to Plaintiff." APP-01002 at ¶ 36. Petitioner admits the personnel who requested the insurance were acting "within their decision-making authority." APP-00991.

Petitioner suggests that the purchase of LIH insurance was contrary to the terms of the MSAs. Far from it: "[Petitioner's] purchase of this insurance option not only supports Plaintiff's invoicing [Petitioner] for the insurance, but also strongly evidences [Petitioner's] understanding that it was required to pay for lost-in-hole tools under the parties' agreement." AP-01003, end of ¶ 37. This "understanding" was stated by every single one of Petitioner's employees and executives who ever reviewed either the Rate Sheets of Directional One or approved and paid the invoices for Directional One's "Work." Mr. Schopp himself acknowledged that nothing in the

MSAs prevented Petitioner from purchasing LIH insurance from Directional One. *Schopp Deposition*, APP-00472 (Tr. page 46:22 to 47:11).

This assignment of error, like all of Petitioner's assignments of error, therefore must be rejected. Summary judgment in favor of Directional One and against Petitioner should be affirmed.

Conclusion

Before moving to this region of the country and agreeing to perform any work for Petitioner, Directional One obtained Petitioner's specific commitment that it would sign its initial Rate Sheet. Petitioner, through Mr. Black, gave that commitment and then, after Directional One had relocated, executed the initial Rate Sheet. The Rate Sheets are therefore of critical importance to Directional One, and in particular the LIH pricing. Refusal by the well operator to pay for LIH tools, as this case shows, is ruinous to an oilfield equipment provider.

Over three years ago, in January 2018, Petitioner abruptly refused to honor the Rate Sheets, after consistently and without dispute following them for more than three years and more than $23 Million of business concluded, including four occasions where it paid LIH invoices without dispute. It has spent the intervening years offering up one excuse after another intended to release it from a simple and clear obligation it knowingly and voluntarily assumed.

Again, it is undisputed that Petitioner ***signed*** the initial Rate Sheet. The blizzard of arguments stated in Petitioner's Opening Brief is all an attempt to distract this Court from that simple fact. Ordinarily, parties are bound by the agreements they sign. Though it involves the arcane area of drilling for oil and gas, this case is really no more complicated than that. Directional One has never denied it was bound by the MSA. In contrast, Petitioner's arguments all come down to some variety of claim that it should not have to honor a specific, plain and

simple document it knowingly and intentionally executed. A document, moreover, that Petitioner avidly embraced when it suited Petitioner's own (failed) arguments at trial.

Petitioner's conduct, and apparent success in delaying its payment obligations for three years in the face of its own written obligation, raises the question of whether a small business can ever hold a large business accountable for its written, specific promises in the face of that company's deployment of specious arguments combined with superior financial resources. It is within the purview of this Court, as the maker of judicial policy for this State, to address these concerns. This Court did so through the creation of the Business Court, which in the instant case efficiently rendered a well-reasoned and thorough decision. That decision should be affirmed.

Directional One specifically requests the following relief:

(1) Summary affirmance of the Order of the Business Court granting its motion for partial summary judgment;

(2) Its costs and attorneys' fees incurred in this appeal; and

(3) Such further relief as this Court shall deem proper.

Respectfully submitted April 19th, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2021, I served the foregoing RESPONDENT'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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