THE SUPREME COURT OF APPEALS OF WEST VIRGINA

No. 21-1004

STATE OF WEST VIRGINIA EX REL. TH EXPLORATION II, LLC

AND TUG HILL OPERATING, LLC,

vs.

VENABLE ROYALTY, LTD.; VI4, LP; VENRO, LTD.; V2, LP; and THE HONORABLE JUDGE JEFFREY CRAMER, Judge of the Circuit Court of Marshall County, West Virginia;

Respondents.

On appeal from the Order of the Circuit Court of Marshall County, West Virginia, on Cross-Motions for Summary Judgment, entered on November 10, 2021, in Consolidated Case Numbers 18-C-227 and 18-C-220

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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I. INTRODUCTION AND STATEMENT OF THE CASE.

Defendants sell gas products under several contracts that evolved from predecessor's contracts. Defendants do not mention these important contracts, whose specific language underpins the Circuit Court's findings and conclusions. Defendants do not even include these contracts in their Appendix. Thus, the Venable Plaintiffs must spend valuable briefing to provide a complete factual background with record. The resulting record exposes the key fallacy in Defendants' various arguments: that Defendants sell unprocessed gas to an affiliate of Williams OVM at meters named Corley and Birch Ridge. Defendants do not sell any gas – to any party – at Corley and Birch Ridge; rather, according to their own contracts they sell processed gas products farther downstream at the TETCO market and at plant tailgates in the Williams OVM system.

Defendants overtly request this Court to address this State's marketable product rule, warning that this case (involving a mere 15 Leases in Marshall County) will unleash chaos and widespread litigation for this State's oil and gas community. Defendants push for this legal principle: if a party buys gas, then *ipso facto* the gas must be marketable – regardless of the gas's condition – and the seller (the lessee) may pay royalties on prices received in the sale.[1] Defendants clearly want to make new law; but they are requesting this new law on facts that do not exist. Defendants have not sold gas in any condition, to any buyer, at Corley and Burch Ridge; they sell gas products far downstream of there. The Circuit Court's Order enforces royalty payments on actual prices for the gas products actually sold at TETCO (namely, "Residue Gas") and at plant tailgates (namely, "NGLs" and "Plant Condensate"), as evidenced by Defendants' own contracts.

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[1] Defendants' Petition at 29 (Defendants' appealing to Kansas case law and then pronouncing, "A buyer willing to pay money in exchange for a seller's gas determines whether it [*i.e.*, the gas] is marketable.").

If this Court wished to revisit the marketable product rule, it would do well to await an accurate record in which a seller (a lessee) sold oil or gas products to an arm's-length buyer at an actual market. Defendants' professed sales of unprocessed gas at Corley and Birch Ridge did not happen. Such fictional sales would not suffice for revisiting the marketable product rule.

Defendants improperly seek an interlocutory appeal of a partial summary judgment in a case only partially through discovery. Fortunately, this Court's standards for writs of prohibition strongly stand against what Defendants seek to do. "In ascertaining the necessity of issuing a writ of prohibition, [this Court is] mindful that '[a]s an extraordinary remedy, [it] reserves the granting of such relief to 'really extraordinary causes.''" *State ex rel. Southland Props., LLC v. Janes*, 240 W. Va. 323, 328, 811 S.E.2d 273, 278 (2018) (quoting, *State ex rel. AEP v. Nibert*, 237 W. Va. 14, 19, 784 S.E.2d 713, 718 (2016)). In addition, "[t]his Court is 'restrictive in its use of prohibition as a remedy.'" *State ex rel. Allstate Ins. Co. v. Gaughan*, 220 W. Va. 113, 118-19, 640 S.E.2d 176, 181-82 (2006) (quoting, *State ex rel. West Virginia Fire Cas. Co. v. Karl*, 199 W.Va. 678, 683, 487 S.E.2d 336, 341 (1997)). As former Justice Cleckley, the author of the current standard, explained, "the '"[l]iberal allowance"' of extraordinary writs '"degrades the prominence of the trial"' and it undermines our statutory provisions limiting appellate review to final judgments." *State ex rel. Allen v. Bedell*, 193 W. Va. 32, 36, 454 S.E.2d 77, 81 (1994) (Cleckley, J., concurring) (citations omitted).

For these reasons, a writ of prohibition "will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code 53-1-1." Syl. Pt. 3, *State ex rel. Affiliated Constr. Trades Found. v. Stucky*, 229 W. Va. 408, 729 S.E.2d 243 (2012) (quoting, Syllabus Point 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977)). In this situation:

> this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. Pt. 4, *Stucky*, 229 W. Va. at 408, 729 S.E.2d at 243 (quoting, Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996)). Moreover, "[a]lthough all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." *Id.*

In support of each factor, Defendants bemoan the cost they will incur in further discovery and litigation in the Circuit Court. Further discovery and litigation will benefit all parties and will provide a better background for a proper future appeal. Even so, cost-incurrence itself should not constitute grounds for any party – including business litigants or oil and gas producers – to have rights to an interlocutory appeal, especially so here. Defendants find themselves in their present circumstance by virtue of their own conduct: they paid royalties in a state that adheres to the marketable condition rule as though that rule does not exist. They took full deductions against royalty payments, in defiance of the rule; consequently, they have suffered civil liability for not complying with the law.

The first factor does not apply because Defendants have another means for obtaining their desired relief – besides their current efforts to create precedent for appealing any adverse partial summary judgment. Defendants can continue with discovery and pre-trial litigation in the Circuit Court. All parties would benefit from this activity; they need to determine whether the Residue Gas and NGL portion of the Lease (in clause 5(b)) or the Condensate portion (in clause 5(a)) contains more in controversy. They need to know the magnitude for any amount in controversy. Only after such further discovery and litigation can a meaningful, helpful appeal take place.

The second factor does not apply because Defendants can remedy errors, if any existed, in the Circuit Court's Orders following a normal appeal after the conclusion of trial-court litigation.

The third factor, perhaps the most important one, does not apply because the Circuit Court merely applied this State's settled law on the marketable condition rule, as Defendants themselves acknowledge that rule to be.[2] The Circuit Court cannot lack jurisdiction or exceed its legitimate powers simply by enforcing settled law. *See* Syl. Pt. 3, *Stucky*, 229 W. Va. at 408, 729 S.E.2d at 243. Likewise, the Circuit Court cannot be committing repeated error – or grossly disregarding procedural or substantive law – by merely enforcing this State's settled law on the marketable condition rule. Thus, the fourth factor too does not apply here.

Finally, the fifth factor does not apply because this case implicates straightforward applications of both the "market value" standard and the marketable condition rule. First, the Circuit Court ruled that Defendants must pay royalties on market-value prices for Residue Gas, NGLs and Plant Condensate, and those market-value prices are found at TETCO and at plant tailgates, where Defendants sell gas products according to their own gas-marketing contracts. Second, the Circuit Court ruled that Defendants must bear all costs for rendering and selling marketable products (*i.e.*, Residue Gas, NGLs and Plant Condensate), which are those costs occurring before Defendants sell these products at TETCO and at plant tailgates.

Plaintiffs oppose all Questions Presented in Defendants' Petition. They reference those Questions Presented (along with subsections from Defendants' Petition) in their subsection-ordered arguments in the "Argument" Section V below.

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[2] As block-quoted just below in the next section, Defendants correctly state the marketable condition rule at pages 20 and 26 of their Petition.

II. SUMMARY OF THE ARGUMENT. [Response to Defendants' Subsections III & V.A., and All Questions Presented.]

Defendants repeatedly state – without record support – that they have sold gas to WER at Corley and Birch Ridge, have realized prices on unprocessed-gas sales there, and have paid royalties on those prices. But Defendants' say-so does not constitute evidence. The Circuit Court found against Defendants at every turn – by reading and applying their own contracts that spell out their Residue Gas sales at TETCO and their NGL and Plant Condensate sales at plant tailgates. The Court further studied Defendants' royalty practices showing their usage of TETCO and tailgate prices – net of deductions paid to Williams OVM – for royalty payments. Defendants would have this Court address Corley and Birch Ridge – which are not markets, points of sale, title-transfer points, or price-originating locations under the facts of this case. Defendants would have this Court ignore TETCO and the plant tailgates, which are the actual markets, points of sale, title-transfer points, and price-originating locations in this case.

The Circuit Court found and concluded that Defendants ought to have paid Residue Gas royalties on TETCO prices, and NGL royalties and Plant Condensate royalties at tailgate prices, *without netting off* Williams OVM's post-production fees. The Court found that TETCO and plant tailgates are the first markets involving gas-product sales, per Defendants' own contracts and activities. The Court was merely enforcing West Virginia's marketable condition rule, which twice Defendants correctly state as follows:

> West Virginia's version of the marketable product rule precludes a lessee [like Defendants] from deducting costs it incurs between the well and the point of sale or market [like TETCO and plant tailgates].
>
> [Also:] West Virginia adopted a version of the "marketable product rule" in *Wellman*, stating that "the lessee [like Defendants] must bear all costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale [*i.e.*, to TETCO and to plant tailgates]," that includes "get[ting] the oil or gas

in marketable condition and actually transport[ing] it to market [*i.e.*, to TETCO and to plant tailgates]."[3]

A "market value" valuation – which Defendants drafted into the 15 Leases[4] – requires royalties on prices for marketable products *even when* such prices exceed what Defendants themselves ultimately realized.[5] "Market value" prices may differ from the Defendants' actual sales proceeds or amounts realized, often exceeding the same.[6] Defendants, thus, may have to pay royalties on prices higher than their own net proceeds whenever market values (market prices) exceed (i) the prices underlying their sales or (ii) the net effect of such sales. Defendants cannot ask this Court for relief from the specific "market value" language they drafted into the Leases.[7]

In direct contradiction to their position in the Circuit Court, Defendants now claim a *Tawney*-style analysis should occur because lease-language permission (for lessening royalties

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3 Defendants' Petition at 26 & 20.

4 Defendants are misstating the record or, at the very least, obfuscating it by claiming the underlying Leases are "net proceeds leases." *See* Question Presented No. 3, Petition at 1. The 15 Leases unquestionably are "market value leases."

5 Even in the most producer-friendly State, Texas, whose jurisprudence Defendants seek to install here, it is a bedrock principle that a lessee may have to pay royalties on *higher* "market value" prices under "market value" royalty-valuation clauses, despite the lessee's having obtained *lower* actual sales proceeds. *E.g.*, *Texas Oil & Gas Corp. v. Vela*, 429 S.W.2d 866, 871 (Tex. 1968) ("The lease obligation [to pay 'market value' royalties] may prove financially burdensome to a lessee who has made a long-term contract without protecting itself against increases in market price."); *Union Pacific Resources Group, Inc. v. Hankins*, 111 S.W.3d 69, 75 (Tex. 2003) (holding that "the third-party sale price might conceivably be lower than market value, in which case the proceeds [royalty] owners would receive less than the market-value [royalty] owners").

6 *See Imperial Colliery Co. v. OXY USA Inc.*, 912 F.2d 696, 700 & 707 (4th Cir. 1990); *Cather v. EQT Prod. Co.*, No. 1:17-CV-208, 2019 U.S. Dist. LEXIS 136306, at *14 & *12, 2019 WL 3806629 (N.D. W. Va. Aug. 13, 2019) (both requiring that a lessee pay royalties in accordance with the lease (on the higher "market value") and not on the lessee's actual sales proceeds); *cf.* VEN 747: 3 EUGENE KUNTZ, LAW OF OIL AND GAS § 40.4, at 332 (rev. ed. 1989)("If, however, the lessee is a corporate affiliate of the purchaser and that sale is not at an arm's length, the sale price will not be accepted as representing the market price or market value. Nor will sales on a market which is dominated by a few producers and purchasers establish an acceptable market price of gas.").

7 *See Tawney v. Columbia Nat'l Res.*, 219 W. Va. 266, 273; 633 S.E.2d 22, 29 (2006) ("'[T]he general rule as to oil and gas leases is that such contracts will generally be liberally construed in favor of the lessor and strictly as against the lessee.' Syllabus Point 1, *Martin v. Consolidated Coal & Oil Corp.*, 101 W.Va. 721, 133 S.E. 626 (1926)."); *id.* ("Under our law, '[u]ncertainties in an intricate and involved contract should be resolved against the party who prepared it.' Syllabus Point 1, *Charlton v. Chevrolet Motor Co.*, 115 W.Va. 25, 174 S.E. 570 (1934).").

with deductions) may exist in the Leases. No lease-language permission exists in Lease clause 5(a) governing royalties on Plant Condensate and Skim Oil; Defendants do not argue otherwise. The potential lease-language permission in clause 5(b) governing royalties on Residue Gas and NGLs is patently ambiguous under West Virginia precedents and lacks any specificity to survive a *Tawney*-style analysis.

For instance, Defendants' key arguments surrounding this phrase in clause 5(b): "making allowance and deduction for a fair and reasonable charge for gathering, compressing, and making the gas merchantable" fail to identify Defendants' actually-incurred costs or the reasonableness of such costs. "[A] fair and reasonable charge" expressly directs the reader away from Defendants' actually-incurred costs and towards an objective, generic concept. Moreover, nothing in this phrase addresses Defendants' specific costs (which appear in an "Exhibit E" to their 2014 Gathering Agreement[8]) or royalty-calculations based upon those specific costs.

Furthermore, Defendants' key arguments surrounding this phrase in clause 5(b): "the market value at the wells in no event to exceed the net proceeds received by Lessee" fail to identify the "net proceeds" that act as the price ceiling. A reader could not determine whether "net proceeds" here means Defendants' sales proceeds (1) at Corley and Birch Ridge for unprocessed gas, (2) at TETCO for Residue Gas, and (3) at plant tailgates for NGLs. Sales proceeds actually exist only at places (2) and (3); this fact compounds the phrase's ambiguity and lack of specificity.

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[8] VEN 294: Ex. 6, at TH 15937 ("Exhibit E"), to Venable MSJ. Herein, citations to Exhibits accompanying the Motion for Summary Judgment by Venable Plaintiffs and Memorandum in Support Thereof filed May 8, 2020 ("Venable MSJ") reference those exhibits appearing in Plaintiffs' Appendix as VEN 87 – VEN 656 (at bottom left of PDF pages). Citations to Exhibits accompanying Venable Plaintiffs' Response in Opposition to Cross-Motion for Summary Judgment by Tug Hill Defendants and Atinum Marcellus I, LLC filed July 23, 2020 ("Venable Cross-MSJ Response") reference those exhibits appearing in Plaintiffs' Appendix as VEN 682 – VEN 752.

In Defendants' actual royalty accounting (in their Gas Value Breakdowns[9]) they lessen prices paid at TETCO for Residue Gas and at plant tailgates for NGLs and Plant Condensate with various per-MMBTU costs and per-gallon costs (coming from Exhibit E to the 2014 Gathering Agreement). Nothing in the above two phrases "making allowance and deduction . . ." and "in no event to exceed . . ." identifies these specific costs or the resulting deductions. Nothing in the two phrases explains how the Venable Plaintiffs are supposed to bear a share of such costs, what proportion of such costs the Plaintiffs must bear, or the mathematical calculations that turn these costs into deductions against royalties. Thus, the two phrases do not satisfy *Tawney*.

III. FACTUAL BACKGROUND. [Subsections "A" through "F" below are responsive to Defendants' Subsections II.A-C.]

A. The Venable Plaintiffs Have 15 Leases, All in Marshall County.

1. Plaintiffs have a mere 15 leases[10] in the District of Franklin, Marshall County, West Virginia (collectively, the "15 Leases" or simply "Leases"). Plaintiffs do not own "thousands of leases" in West Virginia, have not brought a lawsuit affecting thousands of leases or threatening "industry-wide effects," and have not challenged all producers' marketing practices underlying every "sale of wellhead gas" in West Virginia.[11] Defendants' assertions to the contrary constitute alarmist rhetoric, lacking any record support.

2. Each of the 15 Leases contain this royalty-valuation language, important parts of which Defendants omit in their Petition:

> 5. Royalty Payments: The royalties reserved by Lessor, and which shall be paid by Lessee, are: (a) on oil (including but not limited to distillate and condensate) [respective royalty rate] of that produced and saved from the lease premises, the same to be delivered at the wells or to the credit of Lessor in the pipeline to which the wells may be connected, provided; however, Lessee, at its option, may from time to time purchase the royalty oil, paying not less than the

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9 VEN 401-07: Ex. 13 (Defendants' "Gas Value Breakdown" spreadsheets) to Venable MSJ.

10 *See* VEN 87-173 (Exhibits 1.1 to 1.15 of Venable MSJ).

11 Defendants' Petition at 1, 8, 12 & 24.

> price prevailing in the pricing area for oil of like grade and gravity at the time of delivery; (b) on gas, including casinghead gas and all other gaseous or vaporous substances, produced from the Land and sold or used off the lease premises or in the manufacture of gasoline or in the extraction of Sulphur or any other product, the market value at the wells of [respective royalty rate] of the gas sold or used, with the market value at the wells in no event to exceed the net proceeds received by Lessee calculated or allocated back to the wells from which produced, making allowance and deduction for a fair and reasonable charge for gathering, compressing, and making the gas merchantable, provided, that on gas sold at the wells, the royalty shall be [respective royalty rate] of the net proceeds received by the Lessee from the sale, all allowances and deductions, . . .

3. At all times, Defendants have had a co-owner in the 15 Leases' working interests, Atinum Marcellus I LLC ("Atinum"), as well as an important predecessor owner, Gastar Exploration USA, Inc. ("Gastar USA"), which had drilled and operated wells under the Leases between January 2013 and January 2016. For itself and Atinum, Gastar USA paid royalties to Plaintiffs between January 2013 and January 2016. Gastar USA assigned its interest in the Leases to Tug Hill Exploration II, LLC ("TH-E II") April 7, 2016. Since then, for itself and Atinum, TH-E II has paid royalties to Plaintiffs.

B. Plant Processing – Downstream of Corley and Birch Ridge – Renders the Gas Products that Defendants Sell in the Market and on Which They Pay Insufficient Royalties.

4. Defendants have paid Plaintiffs royalties for Residue gas (dry, vaporous gas meeting interstate pipeline specifications), Natural Gas Liquids ("NGLs": ethane, propane, butane, isobutane, and pentane), Plant Condensate (plant-processed liquids that are heavier than the NGLs), and Skim Oil (*i.e.*, Field Condensate falling out at well sites and sold there).[12]

5. After being produced from its respective well, the unprocessed gas undergoes basic separation at the well site, which leaves Defendants with (1) a wet, raw gas stream containing entrained liquids and contaminants (which after plant processing ultimately yields Residue Gas,

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[12] VEN 52 & 54: Venable MSJ at 10 & 12.

NGLs, and Plant Condensate) and (2) a separate condensate stream (which yields Skim Oil at/near well sites or Plant Condensate when processed in a plant).[13] Except for Skim Oil, the royalty-bearing products have always been processed by plants and related facilities owned first by Caiman Midstream, LLC ("Caiman") and second, starting in 2014, by Williams Ohio Valley Midstream LLC ("Williams OVM" or "OVM").[14]

6. The two relevant entry points to Williams OVM's facilities are the inlet flanges located at Corley and Burch Ridge. Corley and Burch Ridge are proprietary points on OVM's gathering and processing system, requiring OVM's permission to gain access to them.[15] Gas does not exist as Residue Gas, as NGLs, or as Plant Condensate at Corley and Burch Ridge.[16] Further, in their condition at Corley and Burch Ridge, the unprocessed gas and condensate have no commercial uses.[17] At Corley and Burch Ridge, these streams are unprocessed, contain contaminants and entrained liquids, and do not meet interstate pipeline specifications.[18]

7. Plant processing further downstream of Corley and Burch Ridge renders the gas and condensate into separate, identifiable products.[19] After such plant processing, the Residue Gas is then transported to the TETCO[20] interstate pipeline, where it is commingled with other residue gas from the area and bought and sold by multiple companies. After plant processing, NGLs and

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13 VEN 631: Ex. 18, at TH Depo at 45, to Venable MSJ.

14 VEN 50 & 54-55: Venable MSJ at 8 with Exs. 3-5 & Venable MSJ at 12-13 with Ex. 6.

15 VEN 673 & 719-20: Venable Cross-MSJ Response at 16 & Ex. 60 thereto, at TH Depo at 277-78; VEN 643: Ex. 18, at TH Depo at 111, to Venable MSJ.

16 VEN 462-63: Ex. 16, TH Depo at 63-64, to Venable MSJ.

17 VEN 637: Ex. 18, at TH Depo at 80, to Venable MSJ; VEN 710-11 & 683-84: Ex. 60, at TH Depo at 112-13 & Ex. 59 (¶ 6), to Venable Cross-MSJ Response.

18 VEN 704-05 & 685: Ex. 60, at TH Depo at 106-07 & Ex. 59 (¶ 10), to Venable Cross-MSJ Response.

19 VEN 698-99: Ex. 60, at TH Depo at 61-62, to Venable Cross-MSJ Response.

20 TETCO is shorthand for the Texas Eastern interstate pipeline system, which runs along the northeastern part of the United States. The TETCO "M2" region covers Marshall County, West Virginia. *See* VEN 494, 512-13 & 526: Ex. 16, at TH Depo at 214, 290-91 & 428, to Venable MSJ; VEN 338: Ex. 8.4, at TH 98449, to Venable MSJ.

Plant Condensate are sold at Williams OVM's plant tailgates.[21] Skim Oil, the small volume of Field Condensate falling out at well sites, does not go through Corley and Burch Ridge or through the Williams OVM plants. Defendants sell such Field Condensate in the field.[22]

8. Defendants TH-E II and Atinum have always had written contracts with a *single* marketing company – first and briefly SEI Energy, LLC ("SEI") and, subsequently, Williams Energy Resources, LLC ("WER") – that govern the transaction between them at or beyond Corley and Birch Ridge.[23] During SEI's tenure with Defendant Atinum and Gastar USA, lasting from 2010 to April 2016, the *sole* purported buyer of gas at Corley and Burch Ridge was SEI.[24] During SEI's tenure with Defendants TH-E II and Atinum, lasting less than one month (*i.e.*, April 2016), Defendants' *sole* purported buyer was SEI.[25] Finally, during WER's tenure with Defendants, lasting from May 2016 to present, Defendants' *sole* purported buyer was WER. Thus, Corley and Burch Ridge have never had more than a single purported buyer during the time of the Leases.

9. The constant presence of only a single purported buyer undermines the sincerity of Defendants' "extensive bid process in 2017 [for] proposals to purchase the unprocessed gas at Corley and Birch Ridge."[26] The 2017 bid submissions did not result in creating multiple actual or potential buyers for the gas at Corley, Burch Ridge, or elsewhere in the OVM system. Undisputedly, WER was the sole purported buyer for gas under the Leases both before and after the 2017 bid submissions.[27]

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21 VEN 514-15: Ex. 16, at TH Depo at 292-93 (TETCO sales of Residue Gas), to Venable MSJ.; VEN 533: Ex. 16, at TH Depo at 488 (tailgate sales of liquids), to Venable MSJ.

22 VEN 401-07: Ex. 13 (Defendants' "Gas Value Breakdown" spreadsheets) to Venable MSJ.

23 VEN 50, 60 & 433-34: Venable MSJ at 8 & 18 & Ex. 15 thereto.

24 VEN 175 et seq.: Ex. 2 to Venable MSJ.

25 VEN 433-34, 498 & 501: Ex. 15; Ex. 16, at TH Depo at 241 & 253, to Venable MSJ.

26 Defendants' Petition at 3.

27 VEN 719-20: Ex. 60, at TH Depo at 277-78, to Venable Cross-MSJ Response.

C. In 2016 Defendants Succeeded to Contracts (of Gastar USA and SEI), Quickly Entered "Filler" Contracts (with WER), and Thereby Fixed Their Sales Points and Title-Transfer Points Downstream of Corley and Burch Ridge.

10. Defendants succeeded to the rights of prior producers in several gas-marketing contracts. The contract secession is important to understanding Defendants' present-day marketing activity, including points of sale for gas products, as found by the Circuit Court.

11. First, Gastar USA and Atinum had engaged the SEI under a [1] December 3, 2010 Gas Purchase Agreement. Next, SEI had contracted with Caiman to gather and process gas produced under the Leases: on December 3, 2010, SEI and Caiman entered a [2] Gas Gathering Agreement, a [3] Condensate Gathering Agreement, and a [4] Gas Processing Agreement.[28] These three Agreements plus the Gas Purchase Agreement coordinated SEI's and Caiman's post-production activities surrounding gas gathering and processing. Consequently, all four of these December 3, 2010 Agreements contain important internal references to each other.

12. These four December 3, 2021 Agreements (*i.e.*, [1] through [4] above) create intractable "sales points" and "title-transfer points" for Defendants – once Defendants and their predecessors in 2014 and 2016 began installing new contracts *in place of* these initial four.

13. Under the 2010 Gas Purchase Agreement, Gastar USA and Atinum would sell and relinquish title to their equity gas and to Plaintiffs' royalty gas at "Delivery Points," also called "Central Receipt Points."[29] No name for the "Delivery Points" appears in the 2010 Gas Purchase Agreement, but the name "Corley" appears as a "CRP" in the 2010 Gas Gathering Agreement and in the related 2010 Condensate Gathering Agreement.[30] The name "Burch Ridge" never appears in any of the 2010 Agreements.

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[28] VEN 175-257: Exs. 2, 3, 4 & 5 to Venable MSJ.

[29] VEN 179 & 184-85: Ex. 2 to Venable MSJ, at TH 15871 & TH 15876-77 ("Title to the Gas delivered hereunder shall pass from Seller to Buyer at the applicable Delivery Point.").

[30] VEN 233 & 237: Ex. 3, at TH 16707 & Ex. 4, at TH 16668, to Venable MSJ.

14. In 2014 Williams OVM succeeded to the rights of Caiman in the three related December 3, 2010 Agreements. Williams OVM and SEI terminated those three Agreements and, in their place, engaged with a June 1, 2014 Gathering, Processing, Dehydrating and Treating Agreement ("2014 Gathering Agreement").[31] However, the December 3, 2010 Gas Purchase Agreement (between Gastar USA and Atinum as Sellers and SEI as Buyer) remained in place – until TH-E II replaced it in 2016.[32]

15. Under the 2014 Gathering Agreement, SEI and Williams OVM defined various title-transfer points for the "Field Grade Condensate," "Pipeline Condensate," "NGLs," and "Residue Gas" resulting from Williams OVM's gathering and processing of gas delivered by SEI, including the gas from the 15 Leases. First, title to Residue Gas would remain with SEI and would not transfer to Williams OVM, except for Residue Gas consumed in gathering and plant operations.[33] Second, SEI would transfer title to NGLs to Williams OVM "at the tailgate of the processing Plant" once the same "become identifiable."[34] This title-transfer provision effectuated also SEI's title transfer to Williams OVM of Plant Condensate (*i.e.*, Field Grade Condensate and Pipeline Condensate having undergone processing and fractionation).[35]

16. Under the 2014 Gathering Agreement and the three 2010 processing agreements, SEI was a mere pass-through entity; any revenue it received from Williams OVM or costs it incurred to Williams OVM flowed directly through to Gastar USA and Atinum. (Subsequently,

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31 VEN 269-70: Ex. 6 to Venable MSJ, at TH 15912-13.

32 Again, the Tug Hill Defendants' replacing of the December 3, 2010 Gas Purchase Agreement on May 7, 2016, discussed below, creates intractable "sales points" and "title-transfer points" for Defendants' present-day marketing.

33 VEN 287: Ex. 6 to Venable MSJ, at TH 15930 (¶ J.3).

34 VEN 262, 263-64, 287 & 299: Ex. 6 to Venable MSJ, TH 15905 (¶ 1.2), TH 15906-07 (¶ 1.8), TH 15930 (¶ J.3) & TH 15942 (Ex. J).

35 VEN 263-64 & 299: Ex. 6 to Venable MSJ, TH 15906-07 & 15942.

from April 2016 to present, WER has been a mere pass-through entity; any proceeds it receives from Williams OVM, or costs it incurs to OVM, flow directly through to TH-E II and Atinum.)

17. Although the 2014 Gathering Agreement had superseded the three 2010 Agreements between SEI and Caiman, the 2010 Gas Purchase Agreement between Gastar USA and Atinum as "Seller" and SEI as "Buyer" remained in effect. In 2016, Defendant TH-E II succeeded to Gastar USA's rights under that Agreement. Therefore, as of April 2016, Defendants TH-E II and Atinum as "Seller" and SEI as "Buyer" operated under the 2010 Gas Purchase Agreement, but for less than a month.[36]

18. The 2010 Gas Purchase Agreement was the only contractual instrument addressing when, where, and how Defendants TH-E II and Atinum might transfer title to SEI of at least some of the unprocessed gas. More specifically, that Agreement mentioned a title transfer from Seller to Buyer at the "Delivery Point," which two related contracts, the 2010 Gas Gathering Agreement and Condensate Gathering Agreement, had identified as "Corley CRP" before they were terminated in 2014.[37] With the arrival of the 2014 Gathering Agreement, the 2010 Gas Purchase Agreement's indirect mentioning of "Corley CRP" became ineffective. The 2014 Gathering Agreement expressly superseded all three of the 2010 Agreements between SEI and Caiman. Consequently, without the existence of the 2010 Gas Gathering Agreement or Condensate Gathering Agreement – which were the only contracts mentioning "Corley CRP" – the definition of "Delivery Point" or "Delivery Point(s)" in the 2010 Gas Purchase Agreement became ineffective.[38]

36 VEN 433-34 & 501: Ex. 15 & Ex. 16, TH Depo at 253, to Venable MSJ.

37 VEN 185, 233 & 237: Ex. 2, at TH 15877 (¶ 7.1), Ex. 3, at TH 16707 & Ex. 4, at TH 16668, to Venable MSJ.

38 VEN 591-94: Ex. 17 to Venable MSJ, Gastar Depo at 240-43.

19. The 2010 Gas Purchase Agreement did not mention other potential title-transfer points, such as Burch Ridge, other gathering-system points, plant inlets, or plant tailgates. Thus, the 2010 Gas Purchase Agreement contained no provision effectuating title transfers from Gastar USA and Atinum to SEI at (a) the Burch Ridge CRP, (b) any point on William OVM's gathering system, (c) a plant inlet, or (d) any plant tailgate.

20. On May 7, 2016, Defendants TH-E II and Atinum terminated the 2010 Gas Purchase Agreement with SEI. The same day, Defendants (*i.e.*, TH-E II and Atinum), and Williams OVM agreed that WER, OVM's marketing affiliate, would assume the role of "Shipper" under the 2014 Gathering Agreement.[39] WER paid to OVM the same fees and deductions,[40] including the 10% give-away of NGL volumes, as SEI previously had been paying. Ultimately, in their royalty accounting, Defendants lessen royalty payments by way of these fees, deductions, and 10% give-away of NGLs in favor of OVM.[41]

21. Also in early 2016, THQ Marketing LLC ("THQ") entered the marketing landscape. THQ is Defendants' affiliate. It has no employees and, according to Defendants' corporate representative, "very little functionality."[42] In May or June 2016, THQ entered a gas sales contract with WER, the "NAESB" form contract, which contains four sub-contracts called

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[39] VEN 433-34 & 501: Ex. 15 & Ex. 16, at TH Depo at 253, to Venable MSJ.

[40] Throughout this Response, "deductions" refers to post-production cost deductions, such as gathering, compression, transportation and processing, collectively called "PPDs" in most of the summary judgment briefing in the Circuit Court. Unless specifically noted, the term does not refer to production-related cost deductions, such as those resulting from exploration, drilling and completion.

[41] VEN 294, 262 & 401-07: Ex. 6 thereto (at 15937 ("Exhibit E"), at TH 15905 (¶ 1.2), & Ex. 13 thereto ("Gas Value Breakdown").

[42] VEN 469 & 480-81: Ex. 16 to Venable MSJ, TH Depo at 75 ("THQ Marketing was just used as a convenience.") & TH Depo at 177-78 ("[T]here's really nothing that happens between the two of them [*i.e.*, THQ and TH-E II] of substance.").

"Confirmations."[43] The fourth and current Confirmation is dated March 1, 2020; THQ and WER entered it following substantial discovery in this case.

22. In the 2017 Confirmation and 2020 Confirmation, THQ reserved a right to take in kind NGLs and Plant Condensate from Williams OVM by and through WER.[44] Accordingly, WER takes some NGLs and Plant Condensate from Williams OVM rather than selling the same to Williams OVM; then, WER transfers those NGLs and condensate to THQ.[45]

23. There is no instrument under which the agent THQ, after obtaining title to NGLs and Plant Condensate from WER under the Confirmations, transfers title to those NGLs and condensate to Defendant TH-E II, the principal. Nonetheless, on March 7, 2018, TH-E II as seller entered a sales contract for the take-in-kind NGLs with EQT Energy, LLC ("EQT") as buyer. This is another NAESB form contract with confirmation; the parties refer to it as the 2018 Liquids Contract.[46] THQ is not a party to the 2018 Liquids Contract.

D. Under Their Live Contracts, Defendants Hold Title to Gas Products Until Either TETCO for Residue Gas, or Plant Tailgates for NGLs and Plant Condensate, and Sell Those Products at Those Locations; Yet THQ's Role In These Sales Remains Obscure.

24. At present, the live contracts are (1) the 2014 Gathering Agreement, (2) the 2016 NAESB Contract and (3) its 2020 Confirmation, and (4) the 2018 Liquids Contract. None of these four contracts addresses when or how Defendants TH-E II and Atinum transfer title to gas to the marketing affiliate THQ (so that it can sell gas to WER or other buyers). However, all four contracts conclusively establish that Defendants hold title to gas past Corley and Birch Ridge,

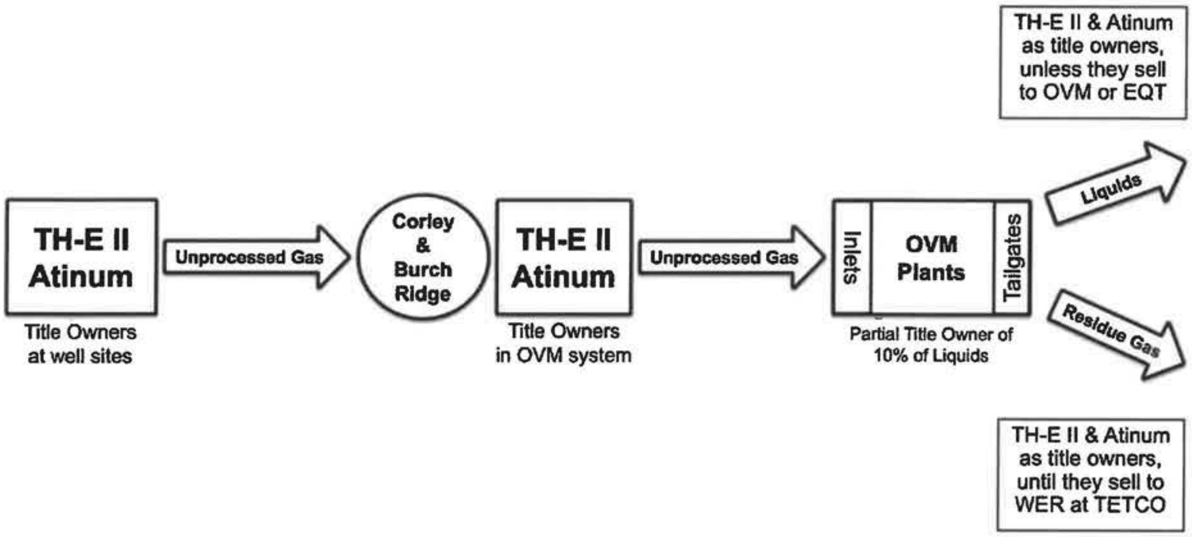
43 VEN 310 et seq. & 327-39: Exs. 7 & 8.1 – 8.4 to Venable MSJ.

44 VEN 335 & 339: Ex. 8.3, at TH 15899 & Ex. 8.4, at TH 98450, to Venable MSJ.

45 VEN 299-300 & 339: Ex. 6, at TH 15942-43 & Ex. 8.4, at TH 98450, to Venable MSJ.

46 VEN 341 et seq.: Ex. 9 to Venable MSJ.

through the plant system, and (after plant processing has rendered marketable products) to points of sale: to TETCO for Residue Gas, and to plant tailgates for NGLs and Plant Condensate.



25. By April 2018, Defendant TH-E II was selling NGLs to EQT; it was simultaneously still allowing WER to sell some volume of NGLs as well as Plant Condensate to Williams OVM. These concurrent sales have occurred from April 2018 forward.[47]

26. The 2016 NAESB Contract specifies "Delivery Point(s)" for title-transfer points and defines those as "such point(s) as are agreed to by the parties in a transaction." The "transaction" is the "Confirmation" accompanying the NAESB Contract. The four Confirmations all provide as follows: "Delivery Point(s): [a]s defined in Exhibit D of the [2014] Gathering Agreement." That "Exhibit D" identifies two TETCO pipeline meters downstream of plant

47 VEN 519: Ex. 16 to Venable MSJ, TH Depo at 358.

tailgates.[48] Those "Exhibit D" TETCO meters cannot receive liquids such as NGLs or Plant Condensate; they can receive only Residue Gas (dry gas).[49]

27. The 2020 Confirmation, coming after Defendants' corporate representative's deposition, contains the following provision, which had not appeared in previous Confirmations:

> Title Transfer. Pursuant to Section 8 of the Base Contract, title to Seller's [THQ's] Gas shall transfer to Buyer [WER] at the Receipt Point. Seller [THQ], as agent to and affiliate of TH Exploration II, LLC hereby warrants that it has authority to transfer title at the Receipt Point.

28. The Base Contract (the 2016 NAESB Contract) does not contain the term "Receipt Point" in its Section 8 or elsewhere. Instead, it specifies title transfers at "Delivery Point(s)," which are "such point(s) as are agreed to by the parties in a transaction." Those Delivery Points are the TETCO meters.[50]

29. THQ's exact role – in relation to Defendants TH-E II and Atinum and their purported buyers – in NGL sales (at tailgates) or in Residue Gas sales (at TETCO) remains obscure. Further discovery or a trial may resolve that obscurity. Defendants' corporate representative acknowledged in deposition that "THQ Marketing, LLC has never taken and does not take title to any TH Exploration II's [TH-E II's] oil and gas production."[51]

30. The most recent Confirmation dated March 1, 2020 was created after the deposition of Defendant's corporate representative, taken September 25-26, 2019. This 2020 Confirmation identifies THQ "as agent for TH Exploration II, LLC" (*i.e.*, Defendant TH-E II).[52] This statement,

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48 VEN 314, 311, 451-53, 527-28 & 293: Ex. 7, TH 16768 (at ¶ 8.1) & 16765 (at ¶ 2.16); Ex. 16, TH Depo at 41-43 & 455-56; Ex. 6, at TH 15936 ("Exhibit D") to Venable MSJ.

49 VEN 513-14 & 526: Ex. 16 to Venable MSJ, TH Depo at 291-92 & 428.

50 VEN 314, 311, 337 & 293: Ex. 7, TH 16768 (at ¶ 8.1) & 16765 (at ¶ 2.16); Ex. 8.4, at TH 98448; Ex. 6, at TH 15936 ("Exhibit D") to Venable MSJ.

51 VEN 487 & 469: Ex. 16 to Venable MSJ, TH Depo at 199 & 75.

52 VEN 337: Ex. 8.4, at TH 98448, to Venable MSJ.

standing alone, does not address title transfers of gas from either Defendant TH-E II or Defendant Atinum to THQ, thereby enabling THQ to sell gas.

E. Defendants' Live Contracts and Marketing Efforts Fix "Points of Sale" at TETCO for Residue Gas and at Plant Tailgates for NGLs and Plant Condensate.

31. Defendants' true points of sale are located at TETCO for Residue Gas and at OVM's plant tailgates for NGLs and Plant Condensate, according to the written terms of Defendants' 2016 NAESB Contract and 2020 Confirmation (specifying TETCO: Residue Gas) and the 2014 Gathering Agreement (specifying tailgates: NGLs and Plant Condensate).[53] Defendants' true points of sale are not located at Corley and Burch Ridge because the products on which Defendants pay Plaintiffs royalties do not exist there – not in substance, price, or volume. Such products do not exist at all until the tailgates of OVM's plants.[54]

32. Defendants maintain substantial control over their unprocessed gas past Corley and Burch Ridge: they direct most of WER's sales of Residue Gas to third parties at TETCO, and they control whether Williams OVM or EQT purchases NGLs and Plant Condensate.[55] Defendants cause Williams OVM and WER to transfer liquids back to Defendants (or to their marketing affiliate THQ) so that Defendant TH-E II can sell such liquids to EQT. Finally, WER and Williams OVM cannot amend the 2014 Gathering Agreement without Defendants' consent.[56]

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[53] VEN 513-14, 337 & 293 (TETCO): Ex. 16, at TH Depo at 291-92, Ex. 8.4, at TH 98448 & Ex. 6, at TH 15936 ("Exhibit D"), to Venable MSJ. VEN 645 & 299 (Tailgates): Ex. 18, at TH Depo at 205 & Ex. 6, at TH 15942 ("Exhibit J"), to Venable MSJ.

[54] VEN 462-63 & 685: Ex. 16, at TH Depo at 63-64, to Venable MSJ; Ex. 59 (¶ 10), to Venable Cross-MSJ Response.

[55] VEN 427, 492-94 & 519: Ex. 14, at page 19 & Ex. 16, at TH Depo at 212-14 & 358, to Venable MSJ.

[56] VEN 467-69, 334 & 338: Ex. 16, at TH Depo at 73-75, Ex. 8.3, at TH 15898 & Ex. 8.4, at TH 98449, to Venable MSJ.

F. Defendants Pay Royalties on Prices Created by Downstream Markets, *Less* All Deductions Necessary to Reach Those Markets.

33. Defendants have based royalty pricing for Residue Gas, NGLs, and Plant Condensate on prices not existing at Corley and Burch Ridge, but rather existing at the TETCO market (for Residue Gas) and at plant tailgates (for NGLs and Plant Condensate).[57] Specifically, WER passes through to Defendants the proceeds from the downstream sales of Residue Gas, NGLs, and Plant Condensate, less a small marketing fee associated with Residue Gas sales at the TETCO market (which Defendants do not deduct against royalty payments[58]) and less fees and a 10% NGL volume give-away in favor of Williams OVM (which Defendants do deduct against royalty payments).[59] Also, WER passes through to Defendants all the cost charges by Williams OVM for the processing and related services. Thus, Defendants use per-MCF prices, per-Gallon prices, and per-BBL prices for royalties on gas products that are "net of" many gathering, processing, fractionation, and transportation fees appearing in the 2014 Gathering Agreement. These fees relate to rendering the gas produced under the Leases into marketable products.[60]

G. Defendants Mischaracterize the Circuit Court's Order in Their "Procedural History." [Response to Defendants' Subsection II.D.]

Defendants assert – without citation to the Order – that "the Circuit Court held that royalties cannot be based on the sale of unprocessed gas, concluding that the only valid markets for oil and

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57 VEN 346, 334 & 338: Ex. 9, at TH 14542, Ex. 8.3, at TH 15898 & Ex. 8.4, at TH 98449, to Venable MSJ.

58 This is the "Marketing Fee" in the Confirmations to the 2016 NAESB Contract (*e.g.*, VEN 334). Throughout the case, Defendants have praised themselves for not deducting this marketing fee against royalties. *E.g.*, Petition at 4. However, their arbitrary decision not to deduct from royalties a small marketing fee while fully taking large deductions (namely, those coming from Exhibit E to the 2014 Gathering Agreement, VEN 294) only highlights their ability to shield royalties from deductions – or to burden royalties with them – according to Defendants' own accounting practices.

59 VEN 338, 294 & 262: Ex. 8.4, at TH 98449, Ex. 6, at TH 15937 ("Exhibit E") & TH 15905 (¶ 1.2), to Venable MSJ.

60 VEN 346, 334 & 338: Ex. 9, at TH 14542, Ex. 8.3, at TH 15898 & Ex. 8.4, at TH 98449, to Venable MSJ.

gas are the interstate pipeline and plant-tailgate where processed gas and its products are sold." Defendants erroneously ascribe a breadth to the Order simply because the Court found and concluded – in light of Defendants' own contracts – that Defendants do not sell unprocessed gas at Corley and Birch Ridge, but rather sell gas products at TETCO and at plant tailgates.[61]

Paying royalties on unprocessed gas sold at a market, such as royalties based upon sales of sweet dry gas requiring little or no treatment, is entirely possible under the Order's various Findings and Conclusions. Markets other than interstate pipelines and plant tailgates, such as upstream meters at which several buyers are active, are entirely possible as well.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

Plaintiffs believe this appeal ought to be dismissed without oral argument as an improper effort to obtain writ of prohibition under Rule of Appellate Procedure 16 and related case law. However, Plaintiffs' counsel requests to be heard at oral argument in the event one occurs.

V. ARGUMENT. [Response to Defendants' Subsection V.A.]

This appeal improperly seeks a writ of prohibition. "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. Pt. 1, *Crawford v. Taylor,* 138 W.Va. 207, 75 S.E.2d 370 (1953) (emphasis added). At pages 12-15 of their Petition and elsewhere, Defendants present no colorable argument that the Circuit Court acted without jurisdiction or exceeded its legitimate powers. Indeed, no statement in Defendants' three Questions Presented suggests that the Circuit Court acted without jurisdiction or exceeded its legitimate powers.

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61 VEN 54 & 60-61; 294 & 262; & 401-07: Venable MSJ at 12 & 18-19; Ex. 6, at TH 15937 ("Exhibit E" schedule) & TH 15905 (¶ 1.2), & Ex. 13 to Venable MSJ ("Gas Value Breakdown").

First, Defendants have not provided the Court with a record[62] showing that the Circuit Court committed any error – and certainly not error amounting to "exceeding . . . legitimate powers." But for this Response, this Court would lack any record on which to evaluate either Defendants' arguments or the Findings of Fact and Conclusions of Law. Moreover, the underlying record – first provided by Plaintiffs – supports the lower Court's Findings and Conclusions, which rest on Defendants' own marketing contracts.

Second, Defendants unabashedly request this Court to make new law, hoping for changes to the marketable product rule as presented in *Wellman* and *Tawney*.[63] The Circuit Court could not commit error or exceed legitimate powers by merely applying this State's settled law on the marketable product rule.

This Court would review the Circuit Court's Order under "an abuse of discretion standard" and would "review challenges to findings of fact under a clearly erroneous standard" with "conclusions of law . . . reviewed de novo." *E.g.*, Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996)). The Findings of Fact correspond directly to Defendants' own contracts and royalty calculations; such Findings would not merit correction under "a clearly erroneous standard." Moreover, the lower Court's refusal to create new law – and, instead, to

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62 Defendants' inclusion of their witnesses' affidavit and deposition snippets, along with a Venable representative's deposition snippets, do not constitute a record for reviewing contracts and royalty calculations. *See* APP 571-622. *Mere witness testimony* as to locations for sales, prices for sales, and royalty accounting on such sales does not control over the unambiguous contractual language in the 2016 NAESB Contract (VEN 310 et seq.), the 2020 Confirmation (VEN 337-39), the 2014 Gathering Agreement (VEN 259 et seq.), the 2018 Liquids Contract (VEN 341 et seq.), and Gas Value Breakdown spreadsheets (VEN 401-07), all of which address the actual locations for sales, the actual prices for sales, and the actual royalty accounting on such sales. For instance, a witness's claiming – without documentary support – that Residue Gas sales occur at Corley and Birch Ridge does not override contractual language in the 2020 Confirmation and 2014 Gathering Agreement fixing Residue Gas sales at the TETCO "M2" region. *See* VEN 337 & 293: Ex. 8.4, at TH 98448 & Ex. 6, at TH 15936 ("Exhibit D"), to Venable MSJ.

63 *E.g.*, Defendants' Petition 8 (bewailing "'chaos' that currently exists in West Virginia royalty jurisprudence"); *id.* at 29 (urging the adoption of Kansas law).

apply the settled marketable product rule – would neither run afoul of a clearly erroneous standard nor merit correction by de novo review.

A. Defendants Go Awry Early in the Petition, First, by Obscuring and Misquoting Lease Language. [Response to Defendants' Subsection II.C and Questions Presented Nos. 1 & 3.]

In the Statement of the Case at "The Calculation of Royalties,"[64] Defendants obscure and misquote Lease language. First, Defendants delete important portions of Lease clause 5(a) (the "Condensate Royalty Clause"), which governs royalties for Plant Condensate and Skim Oil. By way of its fully-quoted language above, that Clause not only covers the two products that may contain a majority of damages in this case,[65] but also lacks any language potentially giving permission to Defendants to take deductions against royalty payments. To the extent Defendants seek lease-language permission for taking deductions against royalties on Plant Condensate and Skim Oil, no such language appears in 5(a).

Second, Defendants misquote the lease-language permission in clause 5(b) (the "Gas Royalty Clause"): 5(b) mentions "*a* fair and reasonable *charge* for gathering, compressing, and making the gas merchantable," but does not contain Defendants' expression of "fair and reasonable *charges* for [the same]."[66] This distinction becomes important under a *Tawney*-style analysis of whether 5(b) permits the taking of some deductions against royalty payments; such analysis focuses carefully on the *specificity* of the lease-language permission. As shown below

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64 Defendants' Petition at 4-6.

65 Here is yet another reason this appeal is premature: further discovery and litigation in the Circuit Court may reveal that the Condensate Royalty Clause (paragraph 5(a)) contains more in controversy than the Gas Royalty Clause (paragraph 5(b)). Defendants' Petition virtually ignores the Condensate Royalty Clause and spends all resources on the Gas Royalty Clause, which may carry less of the amount in controversy.

66 Defendants' Petition at 4.

in Subsections V.H (on "ambiguity") and V.I (on "specificity"), singulars and plurals (and all other particulars) matter under the analysis.[67]

B. Defendants Go Awry Early in the Petition, Second, by Assuming Facts that Contradict Specific Findings of the Circuit Court. [Response to Defendants' Subsection II.C and Question Presented No. 2.]

In the same "The Calculation of Royalties" section, Defendants make several erroneous factual assumptions that directly contradict the Circuit Court's findings: (a) that they have sold gas to WER at Corley and Birch Ridge, (b) that WER has paid Defendants for unprocessed gas, (c) that WER (not Defendants) holds title ownership to gas in and through the OVM system, and (d) that WER (not Defendants) sells Residue Gas at TETCO to other buyers and NGLs and Plant Condensate to other buyers at plant tailgates. Defendants wish these assumed facts were correct: after all, they must cede ownership to unprocessed gas in a sale to a third party (like WER) at Corley and Birch Ridge to support their arguments that they have met their marketing duty there – by reaching a "point of sale" for a "marketable product" there.

Unfortunately for Defendants, the Circuit Court specifically found against them at every turn, relying entirely on Defendants' own marketing contracts and marketing activity:

(a) Defendants have not sold unprocessed gas to WER at Corley and Birch Ridge – they sell Residue Gas, NGLs and Plant Condensate far downstream of those points;

(b) WER is a mere pass-through entity through which Defendants obtain TETCO-originated prices from various buyers for Residue Gas, and tailgate-originated prices from Williams OVM and EQT for NGLs and Plant Condensate;

(c) Defendants (not WER) hold title ownership to gas in and through the Williams OVM system; and

[67] Also, on this topic, clause 5(b) does not contain Defendants' other mis-quotations: "*allowances and deductions*" and "*making allowance for fair and reasonable charge.*" Defendants' Petition at 1 & 34 (emphasis in original). Defendants, possibly, here mean "making allowance and deduction for a fair and reasonable charge," a phrase that does appear in 5(b).

(d) Defendants (not WER) sell Residue Gas at TETCO to WER and NGLs and Plant Condensate at plant tailgates to either Williams OVM or EQT.[68]

The Circuit Court correctly made these findings by reading the Plain English in Defendants' marketing contracts and applying those contract as written. Specifically, no contract provides for Corley or Burch Ridge as a "point of sale" or title-transfer point. Rather, Defendants' 2016 NAESB Contract and 2020 Confirmation specify TETCO as the point of sale for Residue Gas (from seller Defendants to buyer WER).[69] Moreover, the 2014 Gathering Agreement specifies plant tailgates as the point of sale for NGLs and Plant Condensate (from seller WER to buyer Williams OVM)[70]; however, because WER first obtains title ownership of NGLs and Plant Condensate from Defendants at those same tailgates, Defendants in effect are selling NGLs and Plant Condensate to OVM, using WER (OVM's wholly-owned subsidiary) as a pass-through entity.[71] Finally, for NGLs that Defendants take back from WER (and, thus, are not sold to OVM), Defendants are taking back NGLs at plant tailgates and are selling at those same tailgates to EQT.[72]

Under the Circuit Court's Findings, Defendants pay Residue Gas royalties on the TETCO prices net of Williams OVM's processing and transportation fees; WER, a wholly owned subsidiary of OVM, is a mere pass-through entity between Defendants as seller and various buyers at TETCO.[73] Further, Defendants pay NGL and Plant Condensate royalties on plant tailgate prices net of OVM's processing fees (including the 10% volume giveaway to OVM); WER is a mere

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68 Order at 17 (¶ 41), 18 (¶ 43), 20 (¶¶ 57-60), 24 (¶ 81), 25 (¶ 84) & 26-27 (¶¶ 91-94).

69 VEN 337 & 293: Ex. 8.4, at TH 98448 & Ex. 6, at TH 15936 ("Exhibit D"), to Venable MSJ.

70 VEN 262, 263-64, 287 & 299: Ex. 6 to Venable MSJ, TH 15905 (¶ 1.2), TH 15906-07 (¶ 1.8), TH 15930 (¶ J.3) & TH 15942 (Ex. J).

71 The Court concluded such sales of NGL and Plant Condensate are sales of goods under the Uniform Commercial Code. *See* Order at 38, Conclusion in ¶ 55; *see also Welch v. Cayton*, 183 W. Va. 252, 256; 395 S.E.2d 496, 500 (1990) ("Article 2 provisions apply to contracts for the sale of goods. A contract for the sale of oil and gas to be removed from realty by the seller is a contract for goods. W. VA. CODE, 46-2-107(1) [1974].").

72 VEN 467-69, 335 & 339: Ex. 16, at TH Depo at 73-75, Ex. 8.3, at TH 15899 & Ex. 8.4, at TH 98450, to Venable MSJ.

73 Order at 21-22 (¶¶ 64-69) & 27 (¶ 94).

pass-through entity between Defendants as seller and the two tailgate buyers (*i.e.*, OVM itself and EQT).[74] Ultimately, the Circuit Court concluded that Defendants should have paid Residue Gas royalties on TETCO prices and NGL-Plant Condensate royalties at tailgate prices, *without netting off* OVM's various processing and transportation fees.

C. Regardless of the Circuit Court's Findings and Conclusions on the "Market," Defendants Do Not Sell Gas at Corley and Burch Ridge. [Response to Defendants' Subsection V.B.2(a) and Question Presented No. 2.]

Defendants express great concern that the Circuit Court has created an "unprecedented standard on the definition of 'market.'"[75] The Circuit Court has done no such thing, as explained below. But more importantly, Defendants' entire argument over "market" rests upon this faulty premise, which lacks any evidentiary support:

> . . . Corley and Burch Ridge are markets because the gas is sold to an unaffiliated third-party purchaser [WER].[76]

Defendants' say-so does not constitute evidence and cannot override specific Court findings to the contrary. Defendants do not sell any gas to WER at Corley and Birch Ridge. By and through WER, Defendants sell Residue Gas to various buyers at TETCO, and they sell NGLs and Plant Condensate to EQT and Williams OVM at plant tailgates.

The Circuit Court defined "market" as "a place where multiple active sellers and buyers exchange title to gas and gas products that are in a 'marketable condition.'"[77] This particular definition describes accurately *TETCO* for the sales of Residue Gas in this case, as well as *plant tailgates* for the sales of NGLs and Plant Condensate in this case. Moreover, although they may

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74 Defendants appear to pay Skim Oil royalties on field prices paid by various trucking-service buyers. Defendants' Petition does not adequately address Skim Oil, on which discovery is incomplete, but does incorrectly assume that the Court's summary judgment Order has absolved them of underpayment liability for Skim Oil royalties. *See* Petition at 2, n.6. Whether Defendants owe such underpayments is a subject for further discovery and litigation.

75 Defendants' Petition at 23.

76 Defendants' Petition at 25.

77 Order at 23, Finding in ¶ 72.

disagree that their own sales are occurring at these locations, Defendants do agree with Plaintiffs and with the Circuit Court that TETCO and plant tailgates are, in fact, "markets."[78]

Defendants raise concerns that the Circuit Court – a trial court in West Virginia – could by its order "overturn" precedents of Federal Courts sitting in the Southern and Northern Districts of West Virginia.[79] This is incorrect for reasons even beyond the jurisdictional limitations. The Circuit Court's definition of "market" agrees harmoniously with *W.W. McDonald Land*. Both the Circuit Court and the Federal Court in *W.W. McDonald Land* conclude that a lessee's merely selling gas at any "point of sale" will not suffice under West Virginia's marketable product rule. Rather, the lessee must bear all costs to bringing gas "to a market." *See W.W. McDonald Land Co. v. EQT Prod. Co.*, 983 F. Supp. 2d 790, 802 (S.D.W. Va. 2013) ("*Tawney* and *Wellman*'s reliance on the implied duty to market gas, as well *Tawney*'s focus on the costs of bringing gas to market, convinces me that lessees have a duty to bear all costs incurred until the gas reaches market, not to a point of sale."). Moreover, the Circuit Court effectively follows *W.W. McDonald Land*'s statement that "the market . . . is the first place downstream of the well where the gas can be sold to any willing buyer and title passed to that buyer" (983 F. Supp. 2d at 802) because the Circuit Court concluded the "first place downstream of the well" where a willing buyer acquired title to gas was TETCO (for Residue Gas) and the plant tailgates (for NGLs and Plant Condensate).[80]

The Circuit Court's definition of "market" is harmonious with *Richards* as well. Nothing in the Circuit Court's Order contradicts *Richard*'s statement that the existence of a market at one

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[78] Order at 24, Finding in ¶ 79; *id.* at 25, Finding in ¶ 82.

[79] Defendants' Petition at 24 (citing *W.W. McDonald Land Co. v. EQT Prod. Co.*, 983 F. Supp. 2d 790 (S.D.W. Va. 2013) & *Richards v. EQT Production Co.*, No. 1:17CV50, 2018 U.S. Dist. LEXIS 111821, 2018 WL 3321441 (N.D.W. Va. July 5, 2018)).

[80] Order at 24, Finding in ¶ 81; *id.* at 25, Finding in ¶ 84.

location "does not mean that 'markets' do not also exist at other potential points of sale." *Richards v. EQT Production Co.*, No. 1:17CV50, 2018 U.S. Dist. LEXIS 111821, at *12, 2018 WL 3321441 (N.D.W. Va. July 5, 2018). Multiple markets could exist under the Circuit Court's Order: TETCO and elsewhere for Residue Gas, or at multiple plant tailgates for NGLs and Plant Condensate.

Defendants misread or misuse the Circuit Court's Order in *Huey v. EQT Prod. Co.*, No. 17-C-43, at 17 (W.Va. Cir. Ct. Wetzel County July 17, 2018) (Cramer, J.). That Order addresses "alter ego" issues having no relation to the "marketable product rule" issues in this case. That Order's statement on the "first sale of natural gas and related products to an unrelated and unaffiliated third-party purchaser" applies only to the alter-ego context of the underlying case's facts, a very narrow and specialized context. Finally, in this case, the first sale of natural gas and related products to an unrelated, unaffiliated buyer is occurring at TETCO (for Residue Gas) and at plant tailgates (for NGLs and Plant Condensate).

D. Regardless of the Circuit Court's Findings and Conclusions on the Quality and Characteristics of Marketable Gas, Defendants Do Not Sell Unprocessed Gas at Corley and Burch Ridge. [Response to Defendants' Subsection V.B.2(b) and Question Presented No 2.]

Using more hyperbole, Defendants first lament that the Circuit Court imposed a "quality standard" in the marketable product rule "for the first time in West Virginia," and they then erroneously claim the Circuit Court "held that royalties can never be based on gas in any condition but that which meets an interstate pipeline standard."[81] Defendants have no record support for this erroneous claim; nor do they attempt to cite any. Indeed, this portion of their Petition in mashes up and mischaracterizes various portions of the Circuit Court's Order.[82] But more importantly,

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[81] Defendants' Petition at 26.

[82] Defendants' Petition at 28 (Defendants' combining of the Court conclusions in ¶¶ 11-13 with the finding in ¶ 88 in order to assert, incorrectly, that the Court applied "indeterminate interstate pipeline specifications" for any and all "marketable" gas).

Defendants' entire argument over the "quality standard" rests upon this erroneous premise lacking evidentiary support and arising solely from their say-so:

> . . . the undisputed fact that Tug Hill *actually sold* its unprocessed gas to a willing third-party buyer [WER] . . .[83]

Defendants do not sell any gas to WER at Corley and Birch Ridge – not unprocessed gas, not processed gas, and not gas products. By and through WER, Defendants do sell Residue Gas to various buyers at TETCO, and they do sell NGLs and Plant Condensate to EQT and Williams OVM at plant tailgates. Thus, even if the Circuit Court had incorrectly imposed a "quality standard" in the marketable product rule, Defendants would have this Court address the unprocessed gas at Corley and Birch Ridge – when Defendants are not selling such unprocessed gas under the facts of this case.

The Circuit Court did not define the "quality standard" that Defendants bewail. Instead, the Court found that identifiable, usable gas products do *not* exist at Corley and Birch Ridge, but rather exist at plant tailgates as Residue Gas, NGLs and Plant Condensate.[84] These findings describe accurately the actual sales products in this case: Defendants are selling Residue Gas (once it is transported from tailgates to TETCO) and NGLs and Plant Condensate (at tailgates).

Defendants' real intention with this portion of the Petition is to usher in this new version of West Virginia's marketable condition rule: if a party buys gas, then *ipso facto* the gas must be marketable regardless of the gas's condition.[85] Again, Defendants want to make new law on facts not existing in this record; WER does not buy Defendants' unprocessed gas – in whatever condition it may be – at Corley and Burch Ridge.

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83 Defendants' Petition at 28 (emphasis in original).

84 Order at 25-26, Findings in ¶¶ 87-89.

85 Defendants' Petition at 29 (Defendants' appealing to Kansas case law and then pronouncing, "A buyer willing to pay money in exchange for a seller's gas determines whether it [*i.e.*, the gas] is marketable.").

In conclusion, this portion of Defendants' Petition ignores (or seeks to change) that West Virginia's marketable product rule incorporates a quality standard: namely, that oil and gas must be of marketable quality before a lessee may begin to shift post-production costs to royalty owners. *See generally Wellman v. Energy Res., Inc.*, 210 W. Va. 200, 209; 557 S.E.2d 254, 263 (2001); *Tawney v. Columbia Nat'l Res.*, 219 W. Va. 266, 271; 633 S.E.2d 22, 27 (2006) (both embracing the commentary of Robert Donley that a lessee must run oil and gas production "to a common carrier" (which accepts marketable products) and must pay royalties on "the sale price received [there]" (citing Robert Donley, THE LAW OF COAL, OIL AND GAS IN WEST VIRGINIA AND VIRGINIA, § 104 (1951)).[86]

E. Defendants' (a) Contrary Position in the Circuit Court, (b) Worldview that They Sell Gas at Corley and Birch Ridge, and (c) Defiance to Paying Royalties on Marketable-Product Prices Trouble Their Late-Coming Efforts to Seek Lease-Language Permission for Taking Deductions. [Response to Defendants' Subsection V.B.1 and V.B.3(a)-(b) and Questions Presented Nos. 1 & 3.]

At pages 15-22 and 29-35 of their Petition, Defendants seek lease-language permission to take deductions against royalty payments, even though they had abandoned such arguments in the Circuit Court. Indeed, based upon Defendants' summary judgment briefing, the Court accurately concluded that Defendants had conceded the inapplicability of a *Tawney*-style analysis.[87]

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86 *See also Rogers v. Westerman Farm Co.*, 29 P.3d 887, 905 (Colo. 2001) ("In defining whether gas is marketable, there are two factors to consider, condition and location. First, we must look to whether the gas is in a marketable condition, that is, in the physical condition where it is acceptable to be bought and sold in a commercial marketplace. Second, we must look to location, that is, the commercial marketplace, to determine whether the gas is commercially saleable in the oil and gas marketplace."), cited with approval by *Leggett v. EQT Prod. Co.*, 239 W. Va. 264, 273 n.13; 800 S.E.2d 850, 859 n.13 (2017); *Leggett*, 239 W. Va. at 271-72 & n.11; 800 S.E.2d at 857-58 & n.11 (observing the relationship between "marketability" and usability for gas, after it has undergone processing and transportation to market).

87 Order at 35-36, Findings in ¶¶ 40-41. Defendants now seek to backtrack on their position before the Circuit Court, but clearly they conceded *Tawney*'s inapplicability there. *See, e.g.*, APP 336: Defendants' Brief in Support of Cross-Motion for Summary Judgment, filed June 12, 2020, at page 29 (stating "*Tawney* Does Not Apply to This Case" and "the *Tawney* analysis of whether the Leases allow for deductions is inapplicable and unnecessary").

Defendants at pages 15-19 and 29-35 perpetuate their erroneous premise that they are selling gas to WER at Corley and Birch Ridge, despite evidence from Defendants' own marketing contracts and Court findings to the contrary. Defendants' arguments for lease-language permission, accordingly, can be dismissed as resting on an erroneous premise.

Defendants' worldview conflicts with their decision now to seek lease-language permission to take deductions against royalties. In their worldview, Defendants do not take deductions; therefore, they do not need permission to take any deductions. Defendants believe they have sold gas to WER at Corley and Birch Ridge, have received gas prices at those meters, and have paid royalties on such prices without lessening such prices with deductions. Although Defendants' worldview conflicts with the record, it at least explains why they generally do not seek lease-language permission to take deductions.

To the extent Defendants do seek lease-language permission, they seemingly need permission so that deductions can lessen the TETCO prices for Residue Gas and the tailgate prices for NGLs and Plant Condensate. Defendants do not wish to pay royalties on those TETCO prices and tailgate prices, which are the actual prices at which they sell marketable products. Nonetheless, West Virginia's jurisprudence on "market value" as well as its marketable product rule require that Defendants pay royalties on such prices.

A "market value" valuation requires royalties on prices for marketable products even when such prices exceed what Defendants themselves have realized. "Market value" prices may differ from – and often may exceed – the Defendants' proceeds or amounts realized from sales.[88] Defendants, accordingly, may have to pay royalties on prices higher than their own proceeds.

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88 *See Imperial Colliery Co. v. OXY USA Inc.*, 912 F.2d 696, 700 & 707 (4th Cir. 1990); *Cather*, 2019 U.S. Dist. LEXIS 136306, at *14 & *12, 2019 WL 3806629 (both requiring that a lessee pay royalties in accordance with the lease (on the higher "market value") and not on the lessee's actual sales proceeds).

Likewise, the marketable product rule requires royalties on prices for marketable products even when such prices exceed what Defendants themselves have realized.[89] In *Wellman* and in *Imperial Colliery*, West Virginia law compelled lessees to pay royalties on higher downstream gas values even when the lessees had sold the gas at lower prices to unaffiliated buyers. In both cases, the lessees had to pay royalties on prices higher than they had realized from their unaffiliated buyers. In *Wellman* particularly, the lessee could not pass on to its lessor deductions that were imposed by an unaffiliated buyer, and which the lessee itself had born.[90]

F. A *Tawney*-Style Analysis Condemns Defendants' Late-Coming Efforts to Seek Lease-Language Permission for Taking Deductions. [Response to Defendants' Subsection V.B.1 and V.B.3(a)-(b) and Questions Presented Nos. 1 & 3.]

At pages 15-19 and 29-35 of their Petition, Defendants do not satisfy a *Tawney*-style analysis for obtaining lease-language permission. West Virginia law, such as *Wellman*, contemplates that the parties may draft a lease "that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, [so] the lessee shall be entitled to credit for those costs to the extent that they were actually incurred and they were reasonable." *Wellman*, 210 W. Va. at 211; 557 S.E.2d at 265. *Tawney* clarified that, in addition to (***i***) the lessee's actually incurring the costs and (***ii***) the reasonableness[91] of such costs, the lease language:

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89 *See* VEN 751: 3 EUGENE KUNTZ, LAW OF OIL AND GAS § 40.4, at 347 (rev. ed. 1989) ("It is true that, according to the literal provisions of the [proceeds] lease, compliance is made with the royalty clause if the lessee pays royalty on the basis of the proceeds from any sale, but all of the lessee's duties are not completely discharged by a literal compliance with the royalty clause. The lessee has a duty to market the gas and to obtain the most favorable price possible.").

90 *See Wellman v. Energy Res., Inc.*, 210 W. Va. at 204 & 211; 557 S.E.2d at 263 & 265 (holding that West Virginia's marketable-condition rule forbade a lessee's taking of deductions against royalties on gas sales to an unaffiliated buyer called "Mountaineer Gas Company"); *see also Imperial Colliery*, 912 F.2d at 699 & 704 (applying West Virginia law and imposing on a lessee the duty to pay royalties on a downstream market-value price even when the lessee had sold the gas upstream to an unaffiliated buyer "by the terms of a 1948 gas sale contract"); *W.W. McDonald Land*, 983 F. Supp. 2d at 798 (deeming *Imperial Colliery* to be an application of the marketable-condition rule: "[t]here is no indication from the court's opinion in *Imperial Colliery* that deductions were allowed for post-production costs").

91 In 2017, this Court reiterated that – if a lease gives permission – lessors must bear only "reasonable" post-production costs "actually incurred by the lessee." *Leggett*, 239 W. Va. at 282, 800 S.E.2d at 868.

> must [*iii*] *expressly provide* that the lessor shall bear some part of the costs incurred *between the wellhead and the point of sale*, [*iv*] *identify with particularity the specific deductions* the lessee intends to take from the lessor's royalty (usually 1/8), and [*v*] *indicate the method of calculating the amount to be deducted* from the royalty for such post-production costs.

Tawney, 219 W. Va. at 271; 633 S.E.2d at 30 (emphasis added). A court considering whether the parties had intended for the lessor to bear some post-production costs would apply critical analysis to the specific lease language at issue. The court would consider the various factors (*i*) through (*v*) above. *See, e.g.*, *W.W. McDonald Land*, 983 F. Supp. at 805-09; *see also Cather v. EQT Prod. Co.*, No. 1:17-CV-208, 2019 U.S. Dist. LEXIS 136306, at *14 & *12, 2019 WL 3806629 (N.D. W. Va. Aug. 13, 2019) (holding that "*Wellman* and *Tawney* remain the law of the state of West Virginia" and "deductions are impermissible absent express language permitting them").

G. Clause 5(a) Does Not Contain Lease-Permission Language, But Does Reveal Something Important About Defendants' Royalty-Accounting Practices.
[Response to Defendants' Subsection V.B.1 and V.B.3(a)-(b) and Questions Presented Nos. 1 & 3.]

Clause 5(a), which pertains to Plant Condensate and Skim Oil, entirely lacks lease-permission language. Defendants make no arguments otherwise. Royalties on these gas products may constitute most of the amount in controversy, and Defendants lack any lease language to lessen such royalties with deductions.

On this point, Defendants admitted in deposition to making no distinction between calculating royalties under clause 5(a) (which lacks any lease-permission language) and clause 5(b) (which contains some deficient lease-permission language, discussed below). Rather, Defendants pay royalties on Skim Oil and Plant Condensate (under 5(a)) and on Residue Gas and NGLs (under 5(b)) without regard to lease language in either clause.[92] Even if Defendants had

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92 VEN 740: Venable Cross-MSJ Response at Ex. 60, at TH Depo at 349.

written lease-language permission into the 15 Leases, by their own conduct they do not implement the specific permission into their royalty calculations.

H. Clause 5(b)'s Various Phrases Are Ambiguous. [Response to Defendants' Subsection V.B.3(a)-(b) and Questions Presented Nos. 1 & 3.]

A *Tawney*-style analysis would condemn as ambiguous clause 5(b), the relevant portion of which follows:

> (b) on gas, including casinghead gas and all other gaseous or vaporous substances, produced from the Land and sold or used off the lease premises or in the manufacture of gasoline or in the extraction of Sulphur or any other product, the *market value at the wells* of [respective royalty rate] of the gas sold or used, with the market value at the wells *in no event to exceed* the net proceeds received by Lessee calculated or allocated back to the wells from which produced, *making allowance and deduction for* a fair and reasonable charge for gathering, compressing, and making the gas merchantable . . . [Emphasis added.]

Under *Tawney*, "market value at the wells" is "ambiguous," "lacks definiteness," "is imprecise" and "does not indicate how or by what method the royalty is to be calculated or the gas is to be valued." *Tawney*, 219 W. Va. at 272; 633 S.E.2d at 28. Accordingly, Plaintiffs – by having "at the wells" in their 15 Leases – have not given permission to take deductions.

The two phrases beginning with "in no event to exceed" and "making allowance and deduction for" are ambiguous as well – especially when "[t]he general rule as to oil and gas leases is that such contracts will generally be liberally construed in favor of the lessor and strictly as against the lessee." *Tawney*, 219 W. Va. at 273; 633 S.E.2d at 29. The first phrase ("in no event to exceed . . .") depends entirely on an already-ambiguous phrase: "market value at the wells." For that reason alone, the first phrase is ambiguous. Its interdependence on an ambiguous phrase does not "clearly inform[ ] the lessors exactly how their royalties were to be calculated and what deductions were to be taken from the royalty amounts for post-production expenses." 219 W. Va. at 274; 633 S.E.2d at 30.

For the same reason, the second phrase ("making allowance and deduction for . . .") is ambiguous because, for its own meaning, it depends on the "in no event to exceed" phrase, which itself depends on the already-ambiguous "market value at the wells." The second phrase's interdependence on two preceding ambiguous phrases condemns it to ambiguity.

Defendants could have avoided these interdependency-related ambiguity problems by drafting a stand-alone "proceeds" or "amount realized" phrase, such as they did for "gas sold at the wells" in the same clause 5(b):

> the royalty shall be [respective royalty rate] of the net proceeds received by the Lessee from the sale . . .

This phrase is inapplicable to Plaintiffs' royalties (because Defendants do not sell gas at the wells), but at least avoids an ambiguity problem arising from interdependency.

The first phrase ("in no event to exceed . . .") is further ambiguous because it is "'reasonably susceptible of two different meanings'" and "'of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning.'" *Tawney*, 219 W. Va. at 272; 633 S.E.2d at 28 (citing *Payne v. Weston*, 195 W. Va. 502, 507; 466 S.E.2d 161, 166 (1995)). By this phrase, Defendants could mean "the net proceeds received by [Defendants]" (1) at Corley and Birch Ridge for unprocessed gas, (2) at TETCO for Residue Gas, or (3) at plant tailgates for NGLs. Although proceeds at (1) do not exist, Defendants believe they do and have structured this entire interlocutory appeal around that belief. Defendants could be intending to cap Plaintiffs' royalties with one or three types of proceeds, only two of which (*i.e.*, (2) and (3)) actually exist.

The second phrase ("making allowance and deduction for . . .") is further ambiguous because it incorporates the words and concepts "a fair and reasonable charge." It does not state "an actual charge" or a charge stating dollars or cents per MCF (or per other volumetric measure). Instead, the phrase injects the elusive concepts of fairness and, more specifically, fairness in light of reasonableness – concepts that are "'of such doubtful meaning that reasonable minds might be uncertain or disagree as to [their] meaning.'" *Tawney*, 219 W. Va. at 272; 633 S.E.2d at 28. If this case focused on lease-language permission (which it does not), the Venable Plaintiffs would get all the way to a jury because only a finder of fact could resolve the ambiguity surrounding "a fair and reasonable charge" in the second phrase as well as which "net proceeds" are intended by the first phrase.

I. **Clause 5(b)'s Various Phrases Fail for Lack of Specificity.** [Response to Defendants' Subsection V.B.3(a)-(b) and Questions Presented Nos. 1 & 3.]

Beyond their ambiguity, the phrases "in no event to exceed" and "making allowance and deduction" fail under *Tawney* factors (***i***) through (***v***): namely, (***i***) the lessee's actual incurrence of post-production costs, (***ii***) the reasonableness of such costs, (***iii***) express provisions for the lessor to bear some of such costs "between the wellhead and the point of sale," (***iv***) particular identification of specific deductions to be taken against royalties, and (***v***) identification of the method of calculating deductions.

The first phrase ("in no event to exceed . . .") simply imposes an ambiguous price ceiling and, consequently, does not attempt to address Defendants' actual incurrence of post-production costs or the reasonableness of such costs, thus failing to satisfy factors (***i***) and (***ii***). Likewise, this first phrase – working with the concept of "net proceeds" – does not provide or even mention that Plaintiffs must bear some post-production costs between the wellhead and points of sale, thus failing to satisfy factor (***iii***). Finally, the first phrase does not attempt to identify any specific deductions or spell out a method for calculating such deductions' effects on royalties, thus failing to satisfy factors (***iv***) and (***v***).

The second phrase ("making allowance and deduction for . . .") interjects concepts surrounding "a fair and reasonable charge" (for certain generic costs) and, consequently, does not attempt to address Defendants' actual incurrence of post-production costs or the reasonableness of such costs. Indeed, this phrase implicates a general concept – that is, some fair and reasonable charge objectively exists for gathering, compressing and making-gas-merchantable; therefore, it avoids entirely Defendants' *actual costs* for such activities, thus failing to satisfy factor (*i*). Finally, the second phrase does not attempt to identify any specific deductions or spell out a method for calculating such deductions' effects on royalties, thus failing to satisfy factors (*iv*) and (*v*). Although the second phrase is lengthier than the phrases "market value at the wells" and "in no event to exceed," it nonetheless fails to constitute "specific language which clearly informed the lessors exactly how their royalties were to be calculated and what deductions were to be taken from the royalty amounts for post-production expenses." *Tawney*, 219 W. Va. at 274; 633 S.E.2d at 30.

In Defendants' actual accounting, best shown in their Gas Value Breakdowns, they lessen prices paid at TETCO for Residue Gas and at plant tailgates for NGLs and Plant Condensate with various per-MMBTU costs and per-gallon costs coming from the 2014 Gathering Agreement. Nothing in the two phrases "in no event to exceed" and "making allowance and deduction" identifies these specific costs or the resulting deductions. Nothing in the two phrases explains how the Venable Plaintiffs are supposed to bear a share of such costs, what proportion of such costs the Plaintiffs must bear, or the mathematical calculations that turn these costs into deductions against the Plaintiffs' royalties. Thus, the two phrases do not satisfy *Tawney* factors (*i*) through (*v*).

Here, "years before production under the [15 Leases] began, the Supreme Court of Appeals provided a roadmap [in *Tawney*] to Defendants and other lessees on how to properly, legally deduct post-production expenses from royalty payments in the State of West Virginia." (Defendants did not heed *Tawney* when drafting the Leases and then made no efforts to synchronize royalty-calculations with any lease language.) Defendants' "failure to follow th[e] [*Tawney*] map cannot be excused by an argument without a legal basis." *See generally Cather*, 2019 U.S. Dist. LEXIS 136306, at *14, 2019 WL 3806629.

J. Defendants Hope to Delay This Case by Relying on *Young* and *Kellam*. [Response to Defendants' Subsection V.B.3(b) and Question Presented No. 3.]

After conceding the inapplicability of a *Tawney*-style analysis in the Circuit Court, Defendants attempted to backtrack once the Fourth Circuit issued *Young v. Equinor USA Onshore Props., Inc.*, 982 F.3d 201 (4th Cir. 2020). *See* APP 438-40. Plaintiffs demonstrated that *Young* was entirely inapposite. The Circuit Court agreed with Plaintiffs.[93] In short, *Young* involved a royalty-valuation clause radically different from clauses 5(a) and 5(b) here. *Young* involved a "net amount realized" clause with defined terms on allowable deductions, including instructions on how such deductions were to apply against royalties. Defendants cannot and, truly, do not make a serious argument that *Young* is persuasive precedent for this case.

Kellam v. SWN Prod. Co., No. 5:20-CV-85, 2021 U.S. Dist. LEXIS 195308, 2021 WL 4621067 (N.D.W. Va. Sept. 13, 2021), involves an "amount realized"-style clause (*i.e.*, "price paid to Lessee") and lease-permission language that are quite different from the market-value clauses 5(a) and 5(b) here. Awaiting this Court's decision on *Kellam*'s certified questions will provide little guidance, if any, for this case's unique issues. Nothing in *Kellam*'s certified questions or *obiter dicta* removes the ambiguity or lack of specificity from clause 5(b)'s phrases beginning with "in no event to exceed" and "making allowance and deduction for." Moreover, the *Kellam* court openly prays that *Tawney* (with its effect on the marketable product rule) may remain controlling law in this State. *Id.* 2021 U.S. Dist. LEXIS 195308 at *33.

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93 *See generally* APP 438-40; APP 451-53; Order at 33-35, Conclusions in ¶¶ 24-39.

VI. CONCLUSION.

Defendants want this new law: sold gas *ipso facto* is marketable gas. However, they are requesting this new law on facts not existing in the record – namely, that they have sold gas (any kind of gas) to some buyer at Corley and Birch Ridge. The Circuit Court – studying and then relying on Defendants' own contracts and accounting practices – found and concluded that they had not sold any gas at Corley and Birch Ridge, but rather had sold usable gas products (*i.e.*, Residue Gas, NGLs and Plant Condensate) to various buyers at the TETCO "M2" region and at Williams OVM's plant tailgates. Therefore, the Circuit Court's November 10, 2021 Order enforces royalty payments on actual sales prices for the gas products actually sold.

The Venable Plaintiffs do not represent a potential class of royalty owners. They merely seek application of this State's settled law for their 15 Leases. Applying settled law to their 15 Leases will not unleash chaos or confusion in this State's oil and gas industry, as Defendants assert. Plaintiffs respectfully request that this Court deny the Defendants' Petition and thereby allow this case to progress further through discovery and litigation in the Circuit Court.

Respectfully submitted this 1st day of February, 2022.

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CERTIFICATE OF SERVICE

I, John McCusky, counsel for Respondents/Plaintiffs Below, do hereby certify that I serve a true and correct copy of the foregoing ***"Response to Writ of Prohibition"*** upon those listed below:

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