IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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NO. 23-522

FRANCIS KAESS
Petitioner

vs.

BB Land, LLC
Respondent

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Upon Certified Questions from the United States District Court for the Northern District of West Virginia, Case No. 1:22-CV-51

OPENING BRIEF OF PETITIONER FRANCIS KAESS

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CERTIFIED QUESTIONS

Certified Questions issued to the West Virginia Supreme Court of Appeals by the Honorable Thomas S. Kleeh, Chief Judge of the United States Federal Court for the Northern District of West Virginia; pursuant to the Uniform Certification of Questions of Law Act, being W. Va. Code §51-1A-1, *et seq.* are as follows:

1. Is there an implied duty to market for leases containing an in-kind royalty provision?
2. Do the requirements for the deductions of post-production expenses from *Wellman v. Energy Resources, Inc.*, 557 S.E.2d 254 (W. Va. 2001) and *Estate of Tawney v. Columbia Natural Resources*, 633 S.E.2d 22 (W. Va. 2006), apply to leases containing an in-kind royalty provision?

STATEMENT OF THE CASE

Introduction

Property ownership and property rights are a vitally important part of the American tradition since before its inception as an independent nation; dating back to John Locke's treatises of government in which he refers to life, liberty, and property as being fundamental rights in the nature of law; which are widely believed to be the template for language in the Declaration of Independence and U.S. Constitution. Protection of an individual's property is mentioned twice in the U.S. Constitution, once in the Bill of Rights via the Fifth Amendment "No person shall […] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." And then again in the Fourteenth Amendment, where is states "…nor shall any State deprive any person of life, liberty, or property, without due process of law;"

The importance of real property ownership in particular is expressed colloquially in our culture on a frequent basis. The following quotes illustrate that point:

o "The wise young man or wage earner of today invests his money in real estate."

-Attributed to Andrew Carnegie

o “Buy land, they’re not making it anymore.” **Attributed to Mark Twain**

o “The best investment on earth is earth.” **Attributed to Louis Glickman**

Individual property rights, in this matter, are highlighted with respect to oil and gas in particular. Energy generation has historically been essential to regional and national economic growth in the United States; and oil and gas plays an important role in that. However, most individuals do not have the means to extract natural resources, including oil and gas, from the ground on their own. Therefore, property owners must rely on companies who have the knowledge, experience, money, and general wherewithal to extract those resources and place them into the stream of commerce[1]. Any time companies need to enter onto and/or into lands held by other individuals, it is vitally important for those companies to garner trust with Oil and Gas owners; and to foster that trust by doing what they said they will do and honor their commitments to said Oil and Gas owners. In this instance, Respondent Exploration and Production Company broke that trust, and the original filing is designed to hold Respondent accountable for breaking that trust.

This Court is no stranger to the issues presented in these certified questions. Just last year, this Court revisited the issue of whether post-production expenses are permissible under an oil and gas lease when it reaffirmed *Wellman v. Energy Resources, Inc.*, 557 S.E.2d 22 (W. Va. 2001) (hereinafter, “*Wellman*”) and *Estate of Tawney v. Columbia Natural Resources*, 633 S.E.2d 22 (W. Va. 2006) (hereinafter, “*Tawney*”) in the case of *SWN Prod. Co., LLC v. Kellam*, 875 S.E.2d 216 (W. Va. 2022) (hereinafter, “*Kellam*”). In *Kellam*, this Court upheld *Wellman* and *Tawney*, and found that

[1] For performing this work, exploration and development companies already receive the lion’s share of the monies generated by natural resource extraction. Often this is in the range of 80% to 87.5%. As such, the benefits of such extraction are already “baked into the cake”; there is no reason for exploration and development companies insist on cutting corners, like taking undue deductions from interest holders, in order to extract even more of that pie. And yet, time and time again in this State, that is exactly what they do.

if oil and gas lessors wish to deduct post-production expenses from a lessor's royalty payments, they must clearly provide for as such in the lease's language. In doing so, this Court upheld the decades long expectations that royalties will be paid free of post-production expenses unless the lessee specifically contracts for post-production expenses to be taken as called for by *Tawney*.

Respondent BB Land, LLC, now seeks to avoid this Court's ruling in *Kellam* by characterizing certain oil and gas leases as "in-kind" leases and urges this Court to rely upon out-of-state case law to find that the implied duty to market and *Wellman* and *Tawney*'s holdings to do not extend to such leases. This Court should reject this invitation and answer both certified questions in the affirmative. The implied duty to market and *Wellman* and *Tawney*'s holdings have been guiding principles of how oil and gas leases have been drafted and understood in West Virginia for decades. There is nothing in those cases' holdings that have limited their legal rulings to any specific oil and gas lease form. Further, the lease in question in this case specifically implicates the implied covenant to market by denoting that lessor's oil shall be sold and lessor's gas should be marketed. The meaning of the Petitioner's lease could not be clearer. Accordingly, Petitioner requests this Court uphold its longstanding principles as enshrined in *Wellman* and *Tawney* and find that the implied covenant to market exists in "in-kind" leases, and therefore *Wellman* and *Tawney*'s protection of royalty owners applies regardless of lease form.

Statement of Facts

The Petitioner owns certain mineral interests for approximately 103.5 acres in Pleasants County, West Virginia (the "Subject Property") [Joint Appendix - p. 4]. Petitioner's interest is subject to an oil and gas lease dated January 6, 1979 (the "Base Lease"), to which the Respondent is the successor-in-interest. [Joint Appendix – p. 48] The Base Lease grants the Respondent the right to drill and explore for and extract oil and gas "to the depth of 5000 feet or to the Oriskany Sand," including the Marcellus Shale formation.

The Base Lease contains a provision for the payment of royalties which states:

1. To deliver to the credit of Lessors free of cost in the pipe lines to which he may connect his wells, the equal one-eighth (1/8) part of all oil produced and sold from the leased premises.
2. To deliver to the credit of Lessors free of cost in the pipe line to which he may connect his wells, the equal one-eighth (1/8) part of all gas produced and marketed from the leased premises, and the Lessors shall have the right to free gas from any such well or wells for hearing and lighting any building on or off the property, making their own connections therefor at their own risk and expense. [Joint Appendix – p. 49]

On May 19, 2016, the parties modified the Base Lease by entering into a Pooling Modification Agreement which added "certain voluntary pooling and unitization terms and conditions" [Joint Appendix – p. 52]. Specially, the Pooling Modification Agreement added the following provision to the Base Lease:

> POOLING AND UNITIZATION: Lessee, at its option is hereby given the right to pool or combine the acreage covered by this Lease or any portion thereof with other land, lease or leases in the immediate vicinity thereof, when in the Lessee's judgment it is necessary to advisable to do so in order to property develop and operate said premises in compliance with any lawful spacing rules which may be prescribed for the field in which this lease is situated by an duly authorized authority, or when to do so would, in the judgment of the Lessee, promote the conservation of the oil and gas in and under and that may be produced from said premises Lessee shall execute in writing an instrument identifying and describing the pooled acreage. The entire acreage so pooled in a tract or unit shall be treated, for all purposes except the payment of royalties on production from the pooled unit, as if it were included in this lease. If production is found on the pooled acreage, it shall be treated as if production is had from this lease, whether the well or wells be located on the premises covered by this lease or not. In lieu of royalties elsewhere herein specified, Lessor shall receive on production from a unit so pooled only such portion of the royalty stipulated herein as the amount of his/her acreage placed in the unit or his/her royalty interest therein on an acreage basis bears to the total acreage so pooled in the particular unit involved. [Joint Appendix – p. 52]

In or about March 2018 the Respondent began reporting production of oil and gas from the Subject Property which is included in the P2S unit. The Subject Property contributes 64.093 acres of the unit's 624.5024 total acres. The Respondent sold the Petitioner's share of oil and gas on the market.

It paid him a royalty calculated from the percentage of leasehold acreage he contributed to the P2S unit's acreage and deducted certain post-production costs, which in part has given rise to this case.

Procedural History

Based on the facts as stated above, the Petitioner initiated this lawsuit against BB Land, Jay-Bee Oil & Gas, Inc., and Jay-Bee Production Company (collectively, "Respondents"), asserting three causes of action: (1) Payment Misallocation; (2) Improper Deductions – Marcellus; and (3) Excessive Deductions – Utica [Joint Appendix – p. 6 & 9]. On March 7, 2023, the Court granted in part and denied in part a motion to dismiss filed by the Defendants [Joint Appendix – p. 151]. The District Court found that Count Three and part of Count One (related to a February 15 Lease) were subject to an arbitration agreement, and the District Court stayed those counts pending their arbitration. The District Court also dismissed all non-arbitration claims against Jay-Bee Oil & Gas, Inc. and Jay-Bee Production Company. [Joint Appendix – p. 159]

As a result, only BB Land remains as the Respondent herein, and only Count Two and a portion of Count One remained for disposition at the District Court level. At the conclusion of discovery, the Respondent filed a motion for summary judgment [Joint Appendix – p. 183]. On July 21, 2023, the Court granted in part and denied in part said motion [Joint Appendix – p. 252].

As to Count One, the Petitioner asserted that the Respondent improperly calculated his royalties based on the acreage Petitioner's interest contributed to the P2S Unit rather than actual "production from the boundaries of the P2S6 Well itself" [Joint Appendix – p. 9]. The District Court granted the Respondent summary judgment on this issue, finding that the Pooling Modification Agreement unambiguously permitted it to calculate the Petitioner's royalty based on the amount of acreage his interest contributed to the production unit [Joint Appendix – p. 264].

With Respect to Count Two, the Petitioner alleged that the Respondent breached the lease by improperly deducting post-production costs from Petitioner's share of production royalties. The

Respondent contended it is permitted to deduct such costs from the Petitioner's royalty because Petitioner did not take Petitioner's share of production "in-kind" as contemplated by the Base Lease and so the Respondent was required to take Respondent's share of production to market along with its own share of production to avoid waste. The District Court denied the Respondent's request for summary judgment on Count Two, finding that the holdings of *Wellman* and *Tawney* apply in this case regardless of whether the lease at issue is an in-kind or proceeds lease [Joint Appendix – p. 267].

Subsequently, at the final pretrial conference, Respondent moved the District Court for leave to file a motion to certify a question of law to this Court pursuant to W. Va. Code §51-1A-1, et seq. entitled the Uniform Certification of Questions of Law Act. After briefing on the matter submitted by both the Petitioner (against certification) [Joint Appendix – p. 285] and the Respondent (in support of certification) [Joint Appendix – p. 270], the District Court granted Respondent's motion and sent the Certified Questions now before this Honorable Court. [Joint Appendix – p. 307]

SUMMARY OF ARGUMENT

Summary of Argument – Certified Question 1 is there an implied duty to market for leases containing an in-kind royalty provision?

This Court should answer this question in the affirmative. The holdings this Court in both *Tawney* and *Wellman* do not limit them to only "proceeds leases" nor does it exclude "in-kind leases", but rather they state clearly that a lessee covenants that he will market oil or gas. The plain language is clear and unambiguous on its face.

In fact, the language of the lease in question in this matter in-and-of-itself contains an implied (or otherwise) duty to market the oil and gas. Specifically, the royalty provisions for oil and gas respectively both contain provisions, which indicate to any reasonable person that there is a duty on the part of the Lessee to market the oil and gas in question.[2]

Summary of Argument – Certified Question 2 - Do the requirements for the deductions of post-production expenses from *Wellman v. Energy Resources, Inc.*, 557 S.E.2d 254 (W. Va. 2001) and *Estate of Tawney v. Columbia Natural Resources*, 633 S.E.2d 22 (W. Va. 2006), apply to leases containing an in-kind royalty provision?

This Court should answer this question in the affirmative, as the decisions made by this Court, both *Tawney* and *Wellman,* unequivocally apply to all oil and gas leases in West Virginia without limitation. In *Wellman,* this Court clearly established the history of expectations regarding royalty shares of Lessors in this State, as well as the applicability of that expectation over time. Both cases were further solidified/confirmed most recently by this Court in *Kellam.*

Further to this point, in multiple cases in front of the Federal Court for the Northern District of West Virginia, multiple decisions have interpreted the holdings in *Tawney*, *Wellman,* and *Kellam* as applying to both so-called "proceeds leases" and "in-kind leases" in the oil and gas context. This interpretation was further solidified by the Fourth Circuit Court of Appeals who also agreed with this sentiment in *Corder v. Antero Res. Corp*., 57 F.4th 384 (4th Cir. 2023).

Therefore, this Court need not reinvent the wheel, but rather follow its own holdings in previous cases—and agree with the distinguished jurists of the Federal Court for the Northern District of West Virginia and the Fourth Circuit Court of Appeals—by answering the second Certified Question in the affirmative.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rules 18(a)(3) and 18(a)(4) of the West Virginia Rules of Appellate Procedure,

[2] Respondent herein does not concede the point that the "Base Lease" in question is an in-kind lease on its face. As a matter of practicality, Respondent has only ever paid royalties to Petitioner based on oil/gas produced and sold. However, for purposes of this certified question, Petitioner asserts *Tawney* and *Wellman* apply irrespective of whether the lease is deemed to be an "in-kind lease" or a "proceeds lease"

Petitioner asserts oral argument in this matter is unnecessary. More specifically, Petitioner believes that the dispositive issues have been authoritatively decided by this Court in *Tawney, Wellman*, and *Kellam* at a minimum. Further, the facts and legal arguments are (or will be) adequately presented in the briefs and the record provided to this Court from the Federal Court for the Northern District of West Virginia, and the decisional process would not be significantly aided by oral argument as a result.

PETITIONER'S ARGUMENT – CERTIFIED QUESTIONS 1 & 2

ARGUMENT – CERTIFIED QUESTION 1

This Court should answer the first Certified Question in the affirmative: the implied covenants to market exists in in-kind leases. First, to the extent the lease at issue is viewed by this Court as an "in-kind" lease, the language of the lease clearly provides that the implied covenants to market is present. The royalty provisions of the lease in question are as follows:

"In consideration of the premises the said Lessee covenants and agrees as follows:

1. To deliver to the credit of Lessors free of cost in pipe lines to which he may connect his wells, the equal one-eighth (1/8) part of all oil produced ***and sold*** from the leased premises.
2. To deliver to the credit of the Lessors free of cost in the pipe line to which he may connect his wells, the equal one-eighth (1/8) part of all gas produced ***and marketed*** from the leased premises, and the Lessor shall have the right to free gas from any such well or wells for heating and lighting any building on or off the property, making their own connections therefor at their own risk and expense." [emphasis added] [Joint Appendix – p. 49]

This court has continuously endeavored to enforce the written meaning of parties' contracts. "[W]e are to ascertain the meaning of the agreement as manifested by its language. Our task is not to rewrite the terms of contract between the parties; instead, we are to enforce it as written." *Fraternal*

Order of Police, Lodge No. 69 v. City of Fairmont, 468 S.E.2d 712, 716 (W. Va. 1996). As reinforced by this Court in *Tawney*, "[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." Syl. Pt. 7, *Est. of Tawney v. Columbia Nat. Res., L.L.C.,* 219 W. Va. 266, 268, 633 S.E.2d 22, 24 (2006) (quoting Syllabus Point 1, *Martin v. Consolidated Coal & Oil Corp.,* 101 W.Va. 721, 133 S.E. 626 (1926)).

When Petitioner's lease is examined, it is clear that the lease contemplates the oil produced is to be sold, and the gas produced is to be marketed—thereby directly implicated the lessee's implied duty to market the hydrocarbons produced. Indeed, clause one states the oil royalty is to be "one-eighth (1/8) part of all oil produced **and sold**." (emphasis added) [Joint Appendix – p. 49]. Further, clause two states the gas royalty is to be "one-eighth (1/8) part of all gas produced **and marketed**…" (emphasis added) [Joint Appendix – p. 49]. Examined liberally in favor of the lessor, the royalty clauses clearly imply monies will be collected—of which one-eighth (1/8) belongs to Lessor. As defined recognized by this Court, "the lessee not only has a right under an oil and gas lease to produce oil and gas, but he also has a duty, either express, or under an implied contract, to market the oil and gas produced." *SWN Prod. Co., LLC v. Kellam*, 247 W. Va. 78, 84, 875 S.E.2d 216, 222 (2022). The language present in this lease is a clear duty to market as defined so many times by this Court. Accordingly, under the lease at issue in this case, the duty to market applies, and Certified Question No. 1 should therefore be answered in the affirmative.

In further addressing Certified Question 1, Petitioner turns to the holdings of this Court on the topic, when it stated, "…West Virginia holds that a lessee impliedly covenants that he will market oil or gas produced. See *Robert Tucker Donley, The Law of Coal, Oil and Gas in West Virginia and Virginia* §§ 70 & 104 (1951)." *Wellman v. Energy Resources, Inc.,* 210 W.Va. 200, 557 S.E.2d 254 (W. Va. 2001). As recently explained by Chief Justice Hutchinson in his concurring opinion in *Kellam*:

> For over a century, the first guideline has been that lessee/oil-and-gas companies cannot lease oil and gas rights and then sit on those rights, to the detriment of the owner/lessor of the rights. ***Thus, the fundamental goal implied into every single oil and gas lease is that the lessee has a duty to extract the minerals and get them to market for sale***. Included in that goal is an understanding that the lessee bears all of the risks and costs of drilling, producing, and getting the oil and gas to market.

SWN Prod. Co., LLC v. Kellam, 247 W. Va. 78, 91, 875 S.E.2d 216, 229 (2022) (emphasis added). Nowhere in the Court's language across these cases does it denote that the implied covenant to market only applies to "proceeds" leases, nor does it exclude "in-kind" leases; but rather, it states clearly that a lessee covenants that he will market oil and/or gas. The plain language is clear and unambiguous on its face.

The idea expressed above is also reiterated by this Court in answering certified questions from the Federal Court for the Northern District of West Virginia in *SWN Prod. Co. v. Kellam, 875 S.E.2d 216* (W. Va. 2022), by stating "The rationale for holding that a lessee may not charge a lessor for "post-production" expenses appears to be most often predicated on the idea that the lessee not only has a right under an oil and gas lease to produce oil or gas, *but he also has a duty, either express, or under an implied covenant, to market the oil or gas produced*. The rationale proceeds to hold the duty to market embraces the responsibility to get the oil or gas in marketable condition and actually transport it to market." [emphasis added] [quoting *Wellman* at 210, 557 S.E.2d at 264].

This Court in *Kellam* went on to discuss the rationale of foreign jurisdictions with those it accepts, namely stating in *Kellam* footnote 3, "The highest courts of Colorado, Kansas, Oklahoma, and Arkansas have all recognized, just as we did in *Wellman*, that the implied duty to market necessarily encompasses a duty to render the product marketable...". This Court also goes on, in the same footnote, to quote *Sternberger v. Marathon Oil Co.* (894 P.2d 788, 799 (Kan. 1995)), when it stated "*The lessee has the duty to produce a marketable product,* and the lessee alone bears the expense in making the product marketable." [emphasis added].

A continued reading of the Court makes sound sense when considering the practical implications of royalties being paid "in-kind" rather than the lessee marketing the oil and gas produced. As explained by legal scholars in this arena, "[i]n West Virginia, most oil production is stored in tanks at the well and subsequently transported by truck to an oil company. Gas is always transported by pipelines from the well to transmission lines where it is commingled with other gas and ultimately marketed." Lane, Thomas J., OIL AND GAS, 50 (2000). Further, "most royalty owners do not have the tanks or other facilities or infrastructure necessary to physically possess any part of the oil and gas production." Byron C. Keeling, *Fundamentals of Oil and Gas Royalty Calculation*, 54 St. Mary's L.J. 705 (2023). As recognized by this Court, lessors in West Virginia understand that the lessee is bargaining for the right to produce a lessor's oil and gas, and in turn, the lessee will market the same and pay royalties. Most lessors lack the ability to physically take oil and gas in-kind as their royalty—and require lessees to sell the oil and gas produced. The Court should continue to find the implied covenant to market exists in the background of oil and gas leases under West Virginia law to conform with long standing expectations found in West Virginia law.

ARGUMENT – CERTIFIED QUESTION 2

This Court has previously and definitively determined that *Estate of Tawney v. Columbia Natural Resources*, 633 S.E.2d 22 (W. Va. 2006) and *Wellman v. Energy Resources, Inc.* 557 S.E.2d 254 (W. Va. 2001) apply to all oil and gas leases under West Virginia law. Specifically in *SWN Prod. Co., LLC v. Kellam* 875 S.E.2d 216 (W. Va. 2022), this Court recently reaffirmed the holdings of *Tawney* and *Wellman*, and stated "[o]ver twenty years ago, this Court issued its opinion in

Wellman, wherein we essentially held that: (1) lessees may not deduct postproduction costs unless the lease agreement explicitly permits such deductions; and (2) where there is such a provision, only reasonable and actually incurred expenses may be deducted." *Kellam* at 221.

With respect to the history of oil and gas leases in West Virginia, this Court stated in *Wellman* the following:

> "From the very beginning of the oil and gas industry it has been the practice to compensate the landowner by selling the oil by running it to a common carrier and paying him [the landowner] one-eighth of the sale price received. This practice has, in recent years, been extended to the situations where gas is found....' [*Wellman*, quoting Robert Donley, The Law of Coal, Oil and Gas in West Virginia and Virginia §104 (1951)]. The one-eighth received is commonly referred to as the landowner's royalty. In *Davis v. Hardman*, 148 W.Va. 82, 133 S.E.2d 77 (1963), this Court stated that a distinguishing characteristic of such a royalty interest is that it is not chargeable with any of the costs of discovery and production. The Court believes that such a view has been widely adopted in the United States. In spite of this, there has been an attempt on the part of oil and gas producers in recent years to charge the landowner with a pro rata share of various expenses connected with the operation of an oil and gas lease such as the expense of transporting oil and gas to a point of sale, and the expense of treating or altering the oil and gas so as to put it in a marketable condition. To escape the rule that the lessee must pay the costs of discovery and production, these expenses have been referred to as "post-production expenses."

Wellman, 557 S.E.2d at 263-64. In the excerpt above, this Court in *Wellman* described the history of expectations regarding royalty shares of Lessors in this state, as well as the applicability of that expectation over time. The *Wellman* Court continued:

> "the Court also believes that historically the lessee has had to bear the cost of complying with his covenants under the lease. It, therefore, reasonably should follow that the lessee should bear the costs associated with marketing products produced under a lease. Such a conclusion is also consistent with the long-established expectation of lessors in this State, that they would receive one-eighth of the sale price received by the lessor."

Wellman at 265. None of the language contained in *Wellman* and later reiterated in *Kellam* as illustrated above shows any limitation to only "proceeds" leases, but rather the Court applies the language to an oil and gas lease. Further, in *Tawney,* the former holding in *Wellman* was reinforced when this Court in *Tawney* stated:

> “Language in an oil and gas lease that is intended to allocate between the lessor and lessee the costs of marketing the product and transporting it to the point of sale must expressly provide that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, identify with particularity the specific deductions the lessee intends to take from the lessor's royalty (usually 1/8), and indicate the method of calculating the amount to be deducted from the royalty for such post-production costs.”

Tawney, Syl. Pt. 10, 633 S.E.2d 22. The holding quoted above begins “Language in an oil and gas lease…”, which unambiguously applies to all oil and gas leases as a whole without specifying, as Respondents have previously asserted in this matter, this applies to a “proceeds” lease versus an “in-kind” lease; and/or any limitation of any kind in the context of oil and gas leases.

In addressing the issues facing this Honorable Court now, judges in the Northern District of West Virginia have also interpreted *Wellman* and *Tawney* as not being limited to proceeds leases. These cases are referenced (and quoted in part) as follows:

Goodno v. Antero Resources Corporation, 2020 WL 13094067 (N.D. W. Va. July 21, 2020) (Bailey, J), stating “This Court agrees with other courts that have addressed the issue that the holdings of *Tawney* are not limited to any specific type of royalty provision.” The *Goodno* Court continued, finding “Nor does *Tawney* limit its own application to any particular lease language.” [*Goodno* ECF No. 23, at 6] quoting *Cather v. EQT Production Co.,* 2019 WL 3806629 (N.D. W. Va. August 13, 2019) (Kleeh, C.J.). The *Cather* Court also states, in part, “…unless the lease provides otherwise, the lessee must bear all costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale” [ECF No. 74, at 9] quoting Syl. Pt. 4 of *Wellman*. Also, *Kellam vs. SWN Production Company, LLC*, No. 5:20-cv-00085 (N.D. W. Va. September 15, 2021) reiterated this point by stating “[t]he Court established clear precedent that royalties must be paid on the full value of the mineral extracted free of deductions.” *Romeo v. Antero Resources Corp.,* 2021 WL 1912383 (N.D. W. Va. Sept 5, 2018) (Keeley, J.); and *Hooper v. Jay-Bee Oil & Gas, Inc.* (N.D. W. Va. Nov. 22, 2022) (Bailey, J.) further solidify the points expressed above. The Court of Appeals for the Fourth Circuit also recently weighed in on the issue presented in this certified question, stating "the *Kellam* court never suggested that the decision applies only to leases that calculate leases based on 'proceeds." in *Corder v. Antero Resources Corporation*, 57 F.4th 384 (4th Cir. 2023).

In Respondent's motion for certified question—filed in the Federal Court for the Northern District of West Virginia [Joint Appendix – p. 270]—Respondent makes its argument, in part, by referencing out-of-jurisdiction case-law from Courts in Oklahoma, Colorado, California, and Texas. Without addressing each case on an individual basis, Petitioner asserts that none of them, by their very nature, are binding on this Court, and none of them should be given preference over the case-law referenced above in this Brief and established repeatedly by this Court and others. Furthermore, the cited authority is not even particularly persuasive. For example, Respondent references *XAE Corp. v. SMR Prop. Mgmt. Co*. 968 P.2d 1201, 1202 (Okla. 1998) [Joint Appendix – p. 275]. In *XAE Corp*. the crux of the matter related to overriding royalty interests. This type of royalty is factually distinct from the case at-bar as the Petitioner herein is the owner of oil and gas in place who is entitled to royalty interest and not an overriding royalty interest holder. The Court in *XAE Corp.* stated that "Oklahoma has recognized that the overriding royalty interest is different from the lessor's royalty interest. An overriding royalty 'overrides,' or is in addition to the royalty reserved to landowner or lessor, and generally arises through contracts between the lessee and a third person." [*XAE Corp.* at 1207.] Also, *XAE Corp.* was a company involved in oil and gas extraction, whereas the Petitioner herein is an individual who is obviously not an exploration and production company.

As *XAE Corp.* is factually dissimilar from the case at-bar, so to is *Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC* (573 S.W.3d 198, 201 (Tex. 2019)), which is another foreign jurisdiction case to which Respondent replies upon [Joint Appendix – p. 277, footnote 6]. *Burlington* also involved an overriding royalty interest, rather than a royalty interest holder as Petitioner is in this matter. More troubling for *Burlington's* value in this case, it directly contradicts *Tawney* and

Wellman, by relying upon the general rule in Texas which states, in part, "oil and gas royalty interests are free of production expenses but usually subject to post-production costs [omitted] the parties may modify this general rule by agreement" *(Burlington at 203*). The case is therefore both factually significantly different on its face, and is also significantly different from this State with respect to general rules regarding post-production expenses.

Respondent further quotes a Louisiana case from 1934 captioned *Wall v. United Gas Public Serv. Co.*, (152 So. 561, 563) [Joint Appendix – p.277 footnote 5]. The text quoted apparently in furtherance of Respondent's argument is as follows:

> ("Previous to the moment the gas reached the surface of the ground, the parties owned nothing so far as the gas was concerned, except the right to explore for it and reduce it to possession and ownership. But when the gas reached the surface of the ground, the parties owned it in the proportion of one-eighth to the lessor and seven-eighths to the lessee, and, if it had been contemplated or provided in the lease contract that the gas should be divided in kind, it would hardly be disputed that the division should be made at the well. This lease provides that in case oil is discovered, it shall be divided in kind, one-eighth thereof to be delivered to the credit of the lessor 'in the pipe line to which he (the lessee) may connect his wells.' The division of the oil is made at the well and the lessor's one-eighth thereof is delivered to him there."[Joint Appendix – p.277 footnote 5]

However, the controversy in that case had nothing to do with the above quoted text; as such, the Court did not address post-production costs any form. Instead, in summarizing the crux of the matter, the Court stated, "The present suit is for an accounting, the plaintiffs demanding the difference between the price which they were paid for their proportion of the gas and the price at which it was sold." *Wall* at 561.

Yet another foreign jurisdiction case, this time in California, is referenced by Respondent, captioned *Vedder Petroleum Corp. v. Lambert Lands Co.* 122 P.2d 600 (Cal. 1942) [Joint Appendix – p. 278]. Respondent asserts that "the California Court of Appeals analyzed an in-kid royalty provision. However, based on the record it appears the Court in *Vedder* never analyzed such a provision. Instead it stated the issue as follows:

> "The action was brought by Vedder Petroleum Corporation, Ltd., the lessee, against Lambert Lands Co., the lessor. The Ring Oil Company, Ltd., which has succeeded to all of the rights of the Vedder Petroleum Corporation, Ltd., intervened in the action and will be referred to as the lessee. The lease provided for monthly payments to the lessor of a fixed part of the value of all oil produced from wells on the leased premises or, at the option of the lessee, for a similar division of the oil in kind. *This option has never been exercised as yet and the main controversy here relates to oil which has been dehydrated and sold by the lessee.* (*Vedder Pet. Corp. v. Lambert Lands Co.*, 74 Cal.App.2d 720, 721-22 (Cal. Ct. App. 1946)) [emphasis added]

Given the emphasized text above, *Vedder* is not on point, it does not analyze the provision as Respondent has stated, and should be given no weight in this matter.

CONCLUSION

The answers to both Certified Questions presented to this Court—in this matter—originate from opinions issued by this very Court itself. Opinions in *Wellman*, *Tawney,* and *Kellam* provide clear doctrine to this Honorable Court to continue to follow as it answers the Certified Questions. This Court has stated, "An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law." Syl. Pt. 2, *Dailey v. Bechtel Corp.,* 157 W. Va. 1023, 207 S.E.2d 169 (1974).

Finally, Respondent's position below can be seen as an attempt to work-around this Court's recent ruling in *Kellam* that *Wellman* and *Tawney* remain the law of this state. This Court should answer the second question in the affirmative and reject Respondent's attempted work-around. *Kellam* confirmed that *Wellman* and *Tawney* were not limited to any specific lease, a finding that has been echoed by the Court of Appeals for the Fourth Circuit as well as numerous judges in the Northern District of West Virginia. *See supra*. Respondent attempts to cast Petitioner's lease as an "in-kind" lease and ignore the plain language implicating the implied covenant to market so as to allow Respondent to continue to take impermissible deductions for post-production expenses from

Petitioner's royalties. The facts and law on these issues are clear: Petitioner's lease plainly implicates the implied covenant to market by referring the lessee selling the oil produced and marketing the gas produced. (*See* Joint Appendix – p. 49). Under clear West Virginia law, this lease is to be paid free and clear of post-production expenses unless the lease provides otherwise. *See* Syl. Pt. 4, *Wellman*, 210 W. Va. 200, 557 S.E.2d 254. This lease does not provide otherwise.

In short, by following the doctrine of *Stare Decisis* as expressed in *Dailey* above and/or combining this Court's holdings with the very persuasive opinions by the Federal Courts for the Northern District of West Virginia as well as the Fourth Circuit Court of Appeals, which only bolster the *Wellman, Tawney* and *Kellam* rulings; accordingly, the only logical conclusion to be drawn is that each question should be answered in the affirmative.

Respectfully Submitted,

Francis Kaess

By:

/s/ J. Anthony Edmond Jr.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 23-522

FRANCIS KAESS
Petitioner

vs.

BB Land, LLC
Respondent

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Upon Certified Questions from the United States District Court for the Northern District of West Virginia, Case No. 1:22-CV-51

CERTIFICATE OF SERVICE

I, J. Anthony Edmond Jr., do hereby certify that on this 6th day of November, 2023, I electronically filed a true and exact copy of the forgoing Petitioner, Francis Kaess', Opening Brief in the matter of the Certified Questions from the United States District Court for the Northern District of West Virginia, Case No. 1:22-CV-51, upon all counsel/parties of record via this Court's e-filing system.

/s/ J. Anthony Edmond Jr.
J. Anthony Edmond, Jr., Esq.