IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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NO. 23-522

FRANCIS KAESS
Petitioner

vs.

BB Land, LLC
Respondent

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

REPLY BRIEF OF PETITIONER FRANCIS KAESS

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INTRODUCTION

This Honorable Court, in considering the Certified Question before it, was predated by a full briefing on the same issue in the Federal Court for the Northern District of West Virginia [Joint Appendix, p. 270 – 291]. As such, Petitioner in this matter had the unique ability to provide a prebuttal, of sorts, to the arguments Respondent was likely to make in its Response Brief. True to form, in Respondent's Brief, it has indeed made many of the same arguments, and cited the same authorities, Petitioner was anticipating and has already addressed in its Opening Brief, along with that of the Amicus Curiae Brief filed in support of Petitioner's position. Therefore, rather than treat this as a traditional Reply Brief and waste this Honorable Court's time by simply repeating arguments already made on the record, Petitioner will reiterate its prior arguments while not belaboring the point. Further, Petitioner will address any new arguments posed by Respondent in its Brief.

In its Brief, Respondent again attempts to effectively overturn the well-established caselaw stated by this Honorable Court in *Tawney* and *Wellman*, later reinforced in *Kellam*. Respondent further goes on to discuss the circumstances in *Leggett*, which are also factually substantially different from the matter at hand, as well as ignoring the fact that *Kellam*, a certified question which came after *Leggett*, already gave this court the opportunity to state—as it did emphatically therein—that *Tawney* and *Wellman* are still the law-of-the-land in the State of West Virginia. Finally, Respondents misrepresent to the Court the terms of the lease at issue in an attempt to analogize to irrelevant out of state case law. This Court should continue to find that an oil and gas lessee cannot take deductions for post-production expenses to royalties unless the lease complies with this Court's holdings in Tawney.

REPLY ARGUMENT – CERTIFIED QUESTIONS 1 & 2

Petitioner reiterates that this Court should answer the first Certified Question in the affirmative: the language of the lease clearly provides that the covenant to market is present.

A. The Lease Language at Issue Directly Contemplates the Lessee's Duty to Market.

First, Respondent glosses over the operative lease language in an attempt to bolster its legal arguments. The lease, however, demonstrates that the duty to market is plainly implicated. 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 lease language is important—and Respondent has attempted to dodge its implications. Respondent's brief repeatedly references the royalty language at issue as follows: "one eighth (1/8) part of [the oil or gas] produced" into "the pipe line to which he may connect his wells". See, e.g., Res. Br. at 18, 23. Respondent ignores the "produced and sold" and "produced and marketed" language found in each royalty clause at issue. The reasoning for this is clear: both clauses implicated the lessee's duty to market the oil and gas and pay lessor royalties based on the sales proceeds. Indeed, a close reading of the lease at issue undermines many of the case law cited to by Respondent's. For example, Respondent relies on the following lease language to establish this is an in-kind lease:

> The lessee shall deliver to the credit of the lessor free of cost, into the pipeline to which he may connect his wells, the equal one-eighth (1/8) part of all oil and gas produced and saved from the leased premises.

Res. Br. at 16 (citing *Horner v. Phila. Co. of W. Va*., 71 W. Va. 345, 76 S.E. 662 (1912)). Notably absent from this language is the "produced and sold" and "produced and marketed" language found in each royalty clause at issue here. Accordingly, the Court should find that the duty to market is present in this lease as presented in the certified questions.

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 implicating 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]. In its Brief, Respondent attempts to obfuscate the matter by stating "This Court, however, has never considered a situation whereby the parties agree that the lessee will *__not__* convert the gas into money." [Res. Br. at. 15]. By any reasonable definition of the word "marketed" it means to sell gas, i.e. convert that gas into money" Merriam-Webster defines marketed as being the past tense of the verb market, which is defined as "to expose for sale" and/or "sell". (https://www.merriam-webster.com/dictionary/marketed). To state that the language of the lease in question states otherwise is misleading and counterfactual.

B. The Implied Duty to Market Exists in More Than Just Proceeds Leases

This idea is further solidified by the prior 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] [*Id.* 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.

C. Respondent's Authority is Easily Distinguishable.

As astutely pointed out by Amicus Curiae—filed on behalf of the West Virginia Royalty Owners' Association and West Virginia Farm Bureau—in support of Petitioner's position, Respondent references cases from other jurisdictions that contain substantial factual differences, which make them inapplicable to the case at-bar. The following highlights one of the major differences between oil production and gas production with respect to "in-kind" provisions:

> Oil is liquid and more or less easily stored on lease or in the field unless susceptible to periodic as opposed to continuous marketing. In contracts, gas by its very nature cannot be stored on lease or in the field and requires a series of pipes from wellhead to end user (Or to regional underground storage reservoirs) in order for a gas well to even produce. The infrastructure required for gas marketing is much more pervasive and capital intensive than for oil.

James C. T. Hardwick, *Private Landowner Royalties on Oil – Theory and Reality,* Rocky Mountain Mineral Special Institute, 2003-1RMMLF-INST. 10 (2003). To that end, Respondent referenced *Wolfe v. Prairie Oil & Gas Co.* 83 F.2d 434, 437 (10th Cir. 1936); the quoted text from that case in Respondent's Brief refers to a royalty owner "[failing] to either provide storage or to arrange for the marketing of his share of the royalty *oil*, not only was [the lessee] impliedly authorized to sell it as his agent, but it became its duty so to do." The facts as illustrated in the referenced quote are substantially different from the case at-bar in the sense that, *inter alia*, it refers to royalty oil "in-kind" versus gas. As illustrated by the quote from Mr. James C.T. Hardwick above, the very nature of oil storage versus that of gas storage is wholly and substantially different. Even taking that argument in a light most favorable to Respondent, it still fails in as much as the logistics of gas storage are markedly different and implausible for an individual mineral owner to accomplish.

Respondent, on page 34 of its Brief, cites *Nettye Engler Energy, LP v. BlueStone Nat. Res. II, LLC,* 639 S.W.3d 682 (Tex. 2022), which Respondent states is a case relevant to the circumstances in the case at-bar. However, there are two important factual distinctions between that instance and the case at-bar. First, the language being analyzed in *Nettye* (analyzed under Texas law mind you) comes from a deed rather than a lease. The Texas Court in recapitulating the facts of the case indicate an interceding lease was signed, which is not the subject of adjudication in *Nettye (id* at 683). Second, there was a stipulation of facts between the parties involved, specifically "The parties agree that a gas pipeline exists and that the royalty is free of production costs and postproduction costs incurred before delivery into that pipeline, but they disagree about its location under the deed's terms." *Nettye Engler Energy, LP v. Bluestone Natural Res. II*, *LLC*, 639 S.W.3d 682 (Tex. 2022). The inherent value in that stipulation is that there is no dispute over what the language of the document itself portends to mean, simply where in the flow of gas from the ground to the end-user the post-production costs exceptions apply. That changes the nature of the questions at issue to be litigated in that matter, which is not relevant to the case at-bar. Also, the language in dispute in the matter is different from that of the lease in the case at-bar. *Nettye* states "The 1986 deed describes the royalty as 'a free one-eighth (1/8) of gross production of any such oil, gas, or other mineral said amount to be delivered to Grantor's credit, free of cost in the pipe line, if any, otherwise free of cost at the mouth of the well or mine…." (*Nettye* at p. 685, 686). The language in question does not contain the phrase "produced and marketed" nor "produced and sold", making it markedly different from the language in the case at-bar and therefore irrelevant in form and function.

Respondent follows the same playbook when it states, on page 16 of Respondent's Brief, as follows:

> "As West Virginia courts have long recognized, the following language is indicative of an in-kind lease: 'The lessee shall deliver to the credit of the lessor free of cost, into the pipeline

> to which he may connect his wells, the equal one-eighth (1/8) part of all oil and gas produced and saved from the leased premises."

(*Horner v. Phila. Co. of W. Va.,* 71 W. Va. 345, 76 S.E. 662 (1912)). This once again obfuscates the issue in the case at-bar since language quoted from *Horner* likewise does not contain the phrase "produced and marketed" and/or "produced and sold", which are contained in the lease at issue in this matter. Therefore, *Horner* is not relevant to the case at-bar. On page 17 of Respondent's Brief, Respondent continues to obfuscate the matter by stating as follows:

> "Courts and scholars alike are in accord. See Wall v. United Gas Pub. Serv. Co., 152 So. 561, 562 (La. 1934) (finding an in kind lease where "[t]he royalty clause in the leases provides that in case oil is discovered the lessees shall 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 part of all oil produced and saved from the leased premises"); Blasi v. Bruin E&P Partners, LLC, 959 N.W.2d 872, 877 (N.D. 2021) ("The oil royalty clause requires the lessee 'to deliver' a fraction of 'all oil produced.' In other words, it requires an in-kind delivery at a specified location."); Nancy Saint-Paul, Introduction to Calculation of Oil and Gas Royalties, 3A SUMMERS OIL AND GAS § 33:1 (3d ed.) ("Royalty in kind is 'to be delivered at the wells or to the credit of Lessor into the pipelines to which the wells may be connected.'"); Eugene Kuntz, Treatise on the Law of Oil and Gas § 40.5(a) (2019) ("If the royalty clause provides for delivery of royalty gas to the lessor's credit free of cost in the pipeline to which the well is connected, the parties contemplate a delivery of royalty gas at the well").[4]" *[footnote 4 is omitted, but otherwise incorporated by reference so as to not misrepresent Respondent's text on page 17 of its Brief.]*

All of the authorities quoted by Respondent in the excerpt above once again do not contain the phrases "produced and marketed" and/or "produced and sold", making each and every one of them irrelevant to the case at-bar.

CONCLUSION

Nothing contained in Respondent's Brief changes Petitioner's position and conclusion accordingly. That is, Petitioner states 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).

Respondent's position 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,

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By:

/s/ J. Anthony Edmond Jr.

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CERTIFICATE OF SERVICE

I, J. Anthony Edmond Jr., do hereby certify that on this 21st day of December, 2023, I electronically filed a true and exact copy of the forgoing Petitioner, Francis Kaess', Reply 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.