IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-589

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JACKLIN ROMEO, SUSAN S. RINE, and DEBRA SNYDER MILLER,
on behalf of themselves and the other members of the certified Class,

Petitioners,

v.

ANTERO RESOURCES CORPORATION

Respondent.

***Upon Certified Questions from the United States District Court for the Northern District of West Virginia*, Case No. 1:17-CV-88-TSK-MJA**

OPENING BRIEF OF PETITIONERS JACKLIN ROMEO, SUSAN S. RINE, AND DEBRA SNYDER MILLER

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I. CERTIFIED QUESTIONS

On October 10, 2023, the district court granted Defendant Antero Resources Corporation's ("Antero") motion to certify the following two questions to this Court:

1. Do the requirements of *Wellman v. Energy Resources, Inc.*, 210 W.Va. 200, 557 S.E.2d 254 (2001) and *Estate of Tawney v. Columbia Natural Resources*, 219 W.Va. 266, 633 S.E.2d 22 (2006), extend only to the "first available market" as opposed to the "point of sale" when the duty to market is implicated?

2. Does the first marketable product rule extend beyond gas to require a lessee to pay royalties on natural gas liquids ("NGLs"), and if it does, do the lessors share in the cost of processing, manufacturing, and transporting the NGLs to sale?

App. Vol. 26, pp. 7299-7315.

On October 10, 2023, the district court also entered its Order of certification of the above-referenced questions to this Court. App. Vol. 26, pp. 7316-20.

II. STATEMENT OF THE CASE

A. INTRODUCTION

1. Certified Question 1.

Certified Question 1 asks this Court to decide whether the requirements of *Wellman* and *Tawney* extend only to the "first available market" as opposed to the "point of sale" when the duty to market is implicated. This Court has previously answered Certified Question 1 in the *Wellman* decision which it issued in 2001, in the *Tawney* decision which it issued in 2006, and in its decision in *SWN Production Company, LLC v. Kellam*, 247 W.Va. 78, 875 S.E.2d 216 (2022), which was issued on June 14, 2022.

In *Wellman*, in syllabus point number 4, this Court held that "[i]f an oil and gas lease provides for a royalty based on proceeds received by the lessee, unless the lease provide otherwise, the lessee must bear all costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale." *Wellman*, 210 W.Va. at 202, 557 S.E.2d at 256. (emphasis added). This Court recognized that its holding on this issue is "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." *Id.*, 210 W.Va. at 211, 557 S.E.2d at 265.

Five years later, this Court in *Tawney* expanded upon its holding in *Wellman*, and recognized that a lessee's duty to bear all of the costs incurred between the wellhead and the point of sale is not limited to "proceeds" leases. Syllabus points 4 and 5 in the *Tawney* decision confirm that the lessee's duty to bear all costs between the wellhead and the point of sale applies to all West Virginia oil and gas leases except for those which expressly provide that the lessor must bear specifically identified post-production costs, and the lessee's method for calculating such costs. *Tawney*, 219 W.Va. at 267-268, 271-274, 633 S.E.2d at 23-24, 27-30.

Sixteen years later, this Court in *Kellam* held that "*Tawney* is still good law in West Virginia." *Kellam*, 247 W.Va. at 89, 875 S.E.2d at 227. This Court emphasized that in *Tawney*, it had "reiterated that our default rule is that lessees bear the brunt of post-production costs absent lease language shifting that cost – or a portion thereof – to the lessor." *Kellam*, 247 W.Va. at 85, 875 S.E.2d at 223. This Court also reaffirmed its holding in *Tawney* that "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 expressly identified post-production costs, and the lessee's method for calculating the amount of such costs. *Id.* (emphasis added).

Based upon this Court's holdings in *Wellman*, *Tawney*, and *Kellam*, this Court's answer to Certified Question 1 should be that the holdings in *Wellman* and *Tawney* require the lessee under an oil and gas lease to bear all costs of marketing the natural gas products and transporting such products to the point of sale of such products, without regard to any alleged "first available market" for such products.

2. Certified Question 2.

Certified Question 2 asks this Court to answer whether "the first marketable product rule extend[s] beyond gas to require a lessee to pay royalties on natural gas liquids ("NGLs"), and if it does, do the lessors share in the cost of processing, manufacturing, and transporting the NGLs to sale?"

The plain language of the *Wellman* and *Tawney* decisions provides the answer to Certified Question 2. In *Wellman*, this Court did not exclude natural gas liquids from its holdings addressing the allocation of post-production costs between the lessee and the lessor. Instead, this Court in *Wellman* recognized that "the lessee should bear the costs associated with <u>marketing products produced under a lease</u> … 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*, 210 W.Va. at 211, 557 S.E.2d at 265. (emphasis added). This Court did not state, or suggest, that the extent of the lessee's royalty payment obligations to the lessor should depend on whether the natural gas product sold by the lessee is dry gas (*i.e.*, residue gas) or natural gas liquids. Instead, in *Wellman* this Court emphasized that "the lessee must bear all costs incurred in exploring for, producing, marketing, and transporting <u>the product</u> to the point of sale." *Wellman*, 210 W.Va. at 211, 557 S.E.2d at 265. (emphasis added).

In *Tawney*, this Court again recognized that "traditionally in this State the landowner has received a royalty based on the sale price of the gas received by the lessee," and that "West Virginia recognizes that a lessee to an oil and gas lease must bear all costs incurred in marketing and transporting <u>the product</u> to the point of sale unless the oil and gas lease provides otherwise …" *Tawney*, 219 W.Va. at 271, 274, 633 S.E.2d at 27, 30 (emphasis added). In accordance with the *Wellman* decision, this Court in *Tawney* did not state that a lessee's royalty payment obligation on the sale of natural gas liquid products should differ in any respect from the lessee's obligation to pay royalties on residue gas based upon the prices received by the lessee at the point of sale. The absence of any such indication is not surprising. The natural gas liquid hydrocarbons and the dry gas (methane) hydrocarbons are both valuable components of the raw gas stream which emerges from the well when the natural gas is produced. There would be no rational basis to limit a lessee's royalty payment obligations only to the lessee's sale of the residue gas product, and to release the lessee from its obligation to pay royalties on its sale of natural gas liquid products. Nor would there be any rational basis to limit the lessee's obligation to pay royalties based upon the selling price of the natural gas products at the point of sale only to the lessee's sale of residue gas, and to permit the lessee to deduct post-production costs in calculating the lessors' royalties on the lessee's sale of natural gas liquid products.

The *Wellman* and *Tawney* decisions confirm that this Court's answer to Certified Question 2 should be that a lessee under an oil and gas lease is required to pay the lessors royalties on the sale of natural gas liquid products which are obtained from the raw gas produced from wells subject to the lessors' royalty interests, based on the selling price of such natural gas liquid products at the point of sale, without deduction of the costs of separating the natural gas liquids from the raw gas stream at the processing plant, manufacturing the Y grade mix of natural gas liquids into natural

gas liquid products, or transporting the natural gas liquid hydrocarbons to the point of sale of the natural gas liquid products.

B. STATEMENT OF FACTS

1. The Applicable Natural Gas Royalty Provisions In The Class Members' Leases.

The 1,033 members of the certified Class in this class action litigation have been paid royalties by Antero on natural gas sales under 446 leases ("the Class Leases") which contain either of two royalty provisions setting forth the lessee's royalty payment obligations on natural gas sales, commonly referred to as the Mutschelknaus royalty provision and the Matthey royalty provision. App. Vol. 11, pp. 3386-87. 437 of the 446 Class Leases contain the Mutschelknaus royalty provision. App. Vol. 11, p. 3387. Nine of the 446 Class Leases contain the Matthey royalty provision. App. Vol. 11, p. 3387.

The Mutschelknaus natural gas royalty provision provides that the lessee agrees:

> "[T]o pay monthly Lessors' proportionate share of the one-eighth (1/8) of the value at the well of the gas from each and every gas well drilled on said premises, the product from which is marketed and used off the premises, said gas to be measured at a meter set on the farm."

App. Vol. 11, pp. 3387-88. The Matthey natural gas royalty provision states that the:

> "Lessee covenants and agrees to pay Lessor as a royalty for the native gas from each and every well drilled on said premises producing native gas, an amount equal to one-eighth (1/8) of the gross proceeds received from the sale of the same at the prevailing price for gas sold at the well, for all native gas saved and marketed from the said premises, payable quarterly."

App. Vol. 11, p. 3388.[1] The Mutschelknaus and Mathey royalty provisions do not expressly provide that the lessor shall bear any part of the costs incurred between the wellhead and the point

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[1] Six of the 446 Class Leases do include a modification to the natural gas royalty provisions in such Leases, but none of those six modifications alters Antero's obligation to pay royalties under

of sale, or identify with particularity any specific deductions which the lessee intends to take in its calculation of the lessor's royalties. App. Vol. 11, pp. 3387-88. In accordance with this Court's decisions in *Tawney* and *Kellam*, Antero therefore has been obligated to pay royalties to all members of the certified Class based upon the prices which Antero received at the point of sale on its sale of residue gas and natural gas liquid products obtained from wells subject to the 446 Class Leases. *Tawney*, 219 W.Va. at 268, 273-274, 633 S.E.2d at 24, 29-30; *Kellam*, 247 W.Va. at 80, 875 S.E.2d at 218.

2. Antero's Production of Raw Gas From The Class Wells, and The Marketing of Residue Gas and Natural Gas Liquid Products Obtained from Those Wells.

Since December 2009, and continuing through the present, Antero has produced natural gas from wells subject to the Class Leases ("Class wells"). App. Vol. 11, p. 3390. The gas which Antero has produced from the Class wells is "raw gas," which contains valuable dry methane gas and valuable natural gas liquid hydrocarbons. App. Vol. 11, p. 3390. The natural gas liquid hydrocarbons consist of ethane, propane, normal butane, iso-butane, and natural gasoline. App. Vol. 11, p. 3390. After the raw gas emerges from the well, the raw gas stream enters a gathering system, where it is commingled with gas from other wells, and transported to a processing plant. App. Vol. 11, p. 3390. At the processing plant, the natural gas liquid components are extracted from the raw gas stream and collected into a Y Grade mix of natural gas liquids. App. Vol. 11, p. 3390.

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those Leases based upon the prices Antero receives on its sale of natural gas liquid products at the point of sale. App. Vol. 23, pp. 6601-66; Vol. 26, pp. 7265-70. The modification in five of those six Class Leases may permit Antero to deduct long distance transportation costs in its calculation of certain lessors' royalties on residue gas sales. App. Vol. 26, pp. 7265-67. Only five of the 1,033 Class members agreed to such modification. App. Vol. 26, pp. 7265-70.

The dry methane gas which remains after the natural gas liquids are extracted at the processing plant is commonly referred to as "residue gas." App. Vol. 11, p. 3390. The residue gas is delivered from the processing plant into a natural gas transmission pipeline. App. Vol. 11, pp. 3390-91. Antero has consistently sold the residue gas which has been obtained from the Class wells to third party purchasers at points of sale which interconnect to a natural gas transmission pipeline. App. Vol. 11, pp. 3390-91.

With respect to the Y Grade mix of natural gas liquids which Antero has extracted at the processing plant, Antero has consistently transported the Y grade mix to a fractionation facility. App. Vol. 11, p. 3391. At the fractionation facility, the Y Grade mix is fractionated into five marketable natural gas liquid products – ethane, propane, normal butane, iso-butane, and natural gasoline. App. Vol. 11, p. 3391. Antero has sold each of these five natural gas liquid products to third party purchasers at points of sale which are at or near the outlet of the fractionation facility. App. Vol. 11, p. 3391. Between December 1, 2009, and February 28, 2020, Antero was paid more than 79 million dollars on its sale of the five natural gas liquid products in which the Class members have a percentage interest.[2] App. Vol. 21, pp. 5462-5554; Vol. 22, pp. 5555-5727. The data which reflects the additional revenues which Antero has received on its sale of natural gas liquids in which the Class members have a percentage interest for the time period of March 1, 2020 through

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[2] Because Antero routinely pooled the lands which it leased from various mineral owners into a single pooled unit, each Class member's percentage interest in a single Class well is far less than the 12.5 percent royalty interest set forth in the Class Leases. Because there are hundreds of Antero lessors who have royalty interests in the pooled units at issue who are not members of the certified Class in this case, Antero's total revenues received on its sale of the natural gas liquid products obtained from the Class wells are much greater than the 79 million dollars in which the Class members have a royalty interest. A conservative estimate of Antero's total revenues received on its sale of natural gas liquid products from the Class wells between December 1, 2009 and February 28, 2020 is approximately one billion dollars.

December 31, 2023 has not yet been produced to the Class members' attorneys. App. Vol. 11, p. 3395.

3. Antero's Method of Calculating the Royalties Paid To The Class Members.

In its calculation of royalties paid to the Class members, Antero has consistently calculated such royalties based upon dollar amounts which are substantially less than the dollar amounts which Antero has been paid on its sale of residue gas and natural gas liquid products at the point of sale. App. Vol. 11, p. 3391. With respect to Antero's calculation of royalties paid to the Class members on residue gas sales, Antero has deducted from the selling price of the residue gas various post-production costs, including gathering costs, compression costs, and the costs of transporting the residue gas to the point of sale of the residue gas to third party purchasers. App. Vol. 11, pp. 3391-92. As a result of Antero's deduction of those post-production costs, Antero has substantially underpaid the royalties owed to the Class members on Antero's residue gas sales between December 1, 2009 and the present. App. Vol. 11, p. 3391.

With respect to Antero's calculation of royalties paid to the Class members on its sale of the five natural gas liquid products, Antero has utilized two alternative methods for calculating such royalties. App. Vol. 11, p. 3392. Under one method, commonly described as the processing cost deduction method, Antero has deducted from the revenues it receives on its sale of natural gas liquid products the costs of processing the raw gas, transporting the Y Grade mix of natural gas liquids to the fractionation facility, and fractionating the Y Grade mix into the five natural gas liquid products. App. Vol. 11, p. 3392.

The second method which Antero has utilized to calculate the Class members' royalties on the sale of natural gas liquid products is commonly referred to as the "shrink value method." App. Vol. 11, pp. 3392-93. Under this method, Antero has calculated the volume of natural gas used to

produce natural gas liquids, and then multiplied that volume number by a weighted average sales price received by Antero on its sales of residue gas. App. Vol. 11, pp. 3392-93. In making this "shrink value" calculation, Antero does not take into account the revenues which Antero receives on its sale of natural gas liquid products at the point of sale. App. Vol. 11, p. 3392. The royalties which Antero has paid to the Class members under the shrink value method have been substantially less than the royalties which the Class members would have received if they were paid royalties based upon prices Antero received on its sale of the natural gas liquid products at the point of sale. App. Vol. 11, p. 3392.

4. The Principal Amount of Antero's Royalty Underpayments to The Class Members Through February 2020.

The principal amount of Antero's royalty underpayments to the 1,033 Class members on Antero's sale of residue gas, for the period of January 1, 2009 through February 28, 2020, is $415,380, exclusive of prejudgment interest. App. Vol. 26, pp. 7141-59. The principal amount of Antero's royalty underpayments to the 1,033 Class members on its sale of natural gas liquid products, from January 1, 2009 through February 28, 2020, is $3,481,465, exclusive of prejudgment interest. App. Vol. 26, pp. 7141-59. The Class members' attorneys have not yet received the royalty accounting data which will permit the Class members to calculate Antero's royalty underpayments to them on Antero's sale of residue gas and natural gas liquid products from March 1, 2020 through the present. App. Vol. 26, p. 7117.

C. PROCEDURAL HISTORY

1. Plaintiffs' Second Amended Class Complaint.

On May 15, 2017, Plaintiffs filed this class action in the district court. App. Vol. 1, pp. 1-8. On October 2, 2017, Plaintiffs filed their second amended class complaint, which has not been further amended. App. Vol. 1, pp. 35-68. In that complaint, Plaintiffs, on behalf of themselves and

a class of similarly situated lessors, allege that Antero has breached its royalty payment obligations to Plaintiffs and the Class members under the leases at issue by substantially underpaying the amount of royalties owed to Plaintiffs and the other Class members on both residue gas and natural gas liquid products produced and sold by Antero, by improperly deducting post-production costs, and failing to pay royalties based upon the prices Antero has received on its sale of those natural gas products at the point of sale. App. Vol. 1, pp. 39-49.

2. The District Court's Denial of Antero's Fed. R. Civ. P. 12(b)(6) motion to dismiss Plaintiffs' Second Amended Class Complaint.

Antero filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss the second amended class complaint, arguing, *inter alia*, that Plaintiffs have failed to state a plausible breach of contract claim because their leases allow Antero to deduct post-production costs. App. Vol. 1, pp. 69-190. On September 5, 2018, the district court denied Antero's motion to dismiss, stating:

> Here the royalty provisions in the lease agreements at issue appear to require royalty payments based on the market price due to either of the following clauses: (1) "value at the well," or (2) "gross proceeds received from the sale of the same at the prevailing price" (Dkt. No. 31 at 6, 9). Accordingly, this Court concludes, as it did in *Corder* [*v. Antero Resources Corporation*], that Antero has failed to identify any provision rendering the lease agreements at issue "unambiguous enough to escape" *Wellman* and *Tawney*. *Corder*, 2018 WL 2925128 at *6 (N.D.W.Va. June 11, 2018).

App. Vol. 1, pp. 228-29.

3. The District Court's Order Granting Plaintiffs' motion to certify a Fed. R. Civ. P. 23(b)(3) Class.

On August 2, 2019, Plaintiffs filed their motion requesting certification of a Fed. R. Civ. P. 23(b)(3) Class. App. Vol. 1, pp. 248-529. On March 23, 2020, the district court granted Plaintiffs' motion, and certified a Rule 23(b)(3) Class defined as follows:

> Persons and entities, including their respective successors and assigns, to whom Antero has paid royalties ("Royalties") on Natural

> Gas, including natural gas liquids, produced by Antero from wells located in West Virginia at any time since January 1, 2009, pursuant to Leases which contain either of the following gas royalty provisions: (a) [Lessee] covenants and agrees "to pay monthly Lessors' proportionate share of the one-eighth (1/8) of the value at the well of the gas from each and every gas well drilled on said premises, the product from which is marketed and used off the premises, said gas to be measured at a meter set on the farm"; or (b) "Lessee covenants and agrees to pay Lessor as royalty for the native gas from each and every well drilled on said premised producing native gas, as amount equal to one-eighth (1/8) of the gross proceeds received from the sale of the same at the prevailing price for gas sold at the well, for all native gas saved and marketed from the said premises, payable quarterly."
>
> The Class excludes: (1) agencies, departments, or instrumentalities of the United State of America; (2) publicly traded oil and gas exploration companies; (3) any person who is or has been a working interest owner in a well produced by Antero in West Virginia; and (4) Antero.

App. Vol. 2, pp. 1211-12.

In its class certification Order, the district court identified four common questions of law and fact:

> (1) Do *Wellman* and *Tawney* apply to both market value and proceeds leases?
>
> (2) If so, do the leases at issue, as modified by any subsequent modifications (if any), have the specific language required by *Wellman* and *Tawney* that would allow Antero to deduct post-production expenses from the Plaintiffs' royalty payments?
>
> (3) If not, did Antero unlawfully deduct postproduction expenses from the Plaintiffs' royalty payments?
>
> (4) If so, how did Antero calculate these deductions?

App. Vol. 2, p. 1201.

On April 6, 2020, Antero filed a Fed. R. Civ. P. 23(f) Petition in the Fourth Circuit seeking permission to appeal the district court's class certification Order. App. Vol. 2, pp. 1215-92. On April 15, 2020, the Fourth Circuit denied Antero's Petition.

4. The Class members' and Antero's motions for summary judgment.

On February 12, 2021, the Class members and Antero filed their respective motions for summary judgment on the Class members' breach of contract claims. App. Vol. 11, pp. 3383-3406; Vol. 23, pp. 5869-6043. The Class members argued that summary judgment should be granted in their favor on their breach of contract claim because: (1) under all of the Class Leases, Antero has been obligated to pay royalties to the Class members based upon the selling price Antero received on its sale of the residue gas and natural gas liquid products at the point of sale; (2) none of the Class Leases includes the required language referenced in *Tawney* which would permit Antero to deduct any post-production costs from the proceeds received by Antero on its sale of residue gas and natural gas liquid products in its calculation of the Class members' royalties; (3) Antero has substantially underpaid the Class members' royalties because Antero has consistently paid such royalties based upon dollar amounts which were substantially less than the amounts which Antero was paid on its sales of residue gas and natural gas liquid products, as a result of Antero's deduction of various post-production costs; and (4) the Class members' damage expert has accurately calculated the principal amount of the Class members' damages. App. Vol. 11, pp. 3396-3405.

In its motion for summary judgment, Antero argued that summary judgment should be granted in its favor on the Class members' breach of contract claims, because: (1) the *Wellman* and *Tawney* decisions do not apply to the Class leases, because those decisions are limited to "proceeds" royalty provisions, and do not apply to "market value" royalty provisions; and (2) "even if *Tawney* and *Wellman* applied to the Class Leases, Antero is obligated only to bear costs

until the gas reaches a market, and as a result, Antero did not violate the holdings of those cases." App. Vol. 23, pp. 5877-95.

On February 12, 2021, the Class members also filed their motion for summary judgment on each of the eighteen affirmative defenses which Antero alleged in its answer to the second amended class complaint. App. Vol. 11, pp. 3243-3382.

The briefing on the parties' summary judgment motions was completed on March 19, 2021. App. Vol. 26, pp. 7372-73. The district court has not yet ruled on the parties' summary judgment motions. App. Vol. 26, pp. 7372-78.

5. The district court's Order staying this case pending the Fourth Circuit's decision on Antero's appeal from the district court's judgment in the *Corder* litigation.

After this class action was filed, an individual royalty underpayment lawsuit was filed in the district court, which involved the same primary issues which the Class members and Antero addressed in their respective summary judgment motions on the breach of contract claims filed on February 12, 2021. App. Vol. 26, pp. 7204-08. On May 21, 2021, the district court issued its summary judgment order in that case, which decided the same disputed issues which are the focus of the Class members' and Antero's summary judgment motions on the Class members' breach of contract claims. *Corder v. Antero Resources Corporation*, 2021 WL 1912383 (N.D.W.Va. May 12, 2021). In particular, the district court held that certain royalty provisions at issue in *Corder*, which are identical to the Mutchelknaus and Mathey royalty provisions in the Class Leases, are subject to "the dictates of *Wellman* and *Tawney*." *Id.* at * 9. The district court therefore held that those royalty provisions "do not permit Antero to deduct any post-production costs" in its payment of royalties to the *Corder* plaintiffs, which included Antero's deduction of processing, transportation and fractionation costs from the selling price of the natural gas liquid products. *Id.* at *4, 11. On

May 25, 2021, the district court entered its final judgment in *Corder*, which reflected Antero's intention to appeal that judgment to the Fourth Circuit. App. Vol. 26, p. 7187.

On June 18, 2021, Antero filed a motion to stay this litigation pending the outcome of its appeal in *Corder*, based upon its contention that the Fourth Circuit's decision on the applicability of *Wellman* and *Tawney* to the royalty provisions at issue in *Corder* would likely resolve the disputed summary judgment issues which exist in this case. App. Vol. 26, pp. 7180-92. The Class members opposed Antero's motion to stay. App. Vol. 26, pp. 7193-97. On July 12, 2021, the district court granted Antero's motion to stay, because: (1) "[i]n *Corder*, the [district court] ruled that market value leases are subject to the dictates of *Wellman* and *Tawney*," which is "the first common question of law identified in *Romeo* …"; (2) the issue of whether the Class members' "market value" royalty provisions are subject to the dictates of *Wellman* and *Tawney* has been addressed at length in the Class members' and Antero's cross motions for summary judgment; and (3) "each of the Class Leases here may be impacted by the Fourth Circuit's decision in *Corder*." App. Vol. 26, pp. 7199-7210.

6. The Fourth Circuit's decision in the *Corder* appeal.

On January 5, 2023, the Fourth Circuit issued it decision in the *Corder* appeal. *Corder v. Antero Resources Corporation*, 57 F.4th 384 (4th Cir. 2023). The Fourth Circuit rejected Antero's primary argument that "market value leases are not subject to the requirements of the *Tawney* decision", holding that this Court's "analysis in *Tawney* was not limited to 'proceeds' leases", but also "applies with equal force to leases that calculate royalties based on the 'value' of the gas at the wellhead." *Corder*, 57 F.4th at 394. Thus, the Fourth Circuit's decision in *Corder* confirms that the royalty provisions in the Class Leases in this case are subject to *Tawney's* requirement that the

lessee is responsible for bearing all of the costs incurred between the wellhead and the point of sale.

The Fourth Circuit also addressed the same issue which is presented in Certified Question 1 – Antero's argument that "[o]nce gas reaches the point of marketability, …, the presumption that the lessee bears post-production costs no longer applies, and … the leases allow Antero to use the work-back method to deduct costs." *Id.* at 396. The Fourth Circuit, relying on the express language of the *Wellman* and *Tawney* decisions, rejected Antero's "point of marketability" argument, and held that Antero was required to bear all of the post-production costs incurred through the point of sale:

> Ultimately, though, we cannot ignore the express "point of sale" language in the syllabus points in *Wellman, Tawney*, and *Kellam.* Because the West Virginia Supreme Court has not adopted a contrary rule, we conclude that the *Tawney* requirements apply through the point of sale.

Corder, 57 F.4th at 397.

The Fourth Circuit also addressed the same issue which is presented in Certified Question 2, and held that under leases which are silent as to the allocation of post-production costs, Antero is required to pay royalties on its sale of natural gas liquid products based upon the selling price received on the sale of those products at the point of sale, without deduction of the costs of processing, fractionation, or transporting the natural gas liquids to Antero's point of sale of such products. *Id.* at 388-90, 397.

7. The district court's order granting Antero's motion to certify the two certified questions at issue.

After the Fourth Circuit's decision in *Corder* effectively rejected Antero's two primary summary judgment arguments in this case, Antero filed its motion in the district court to certify the two questions at issue to this Court. App. Vol. 26, pp. 7283-87. The Class members opposed

Antero's motion to certify the two proposed questions, based upon this Court's decisions in *Wellman*, *Tawney*, and *Kellam*, and the Fourth Circuit's decision in *Corder*. App. Vol. 26, pp. 7288-93. The district court, however, certified both of Antero's proposed questions to this Court, stating that "[n]either the [West Virginia Supreme Court of Appeals] or courts in this district have addressed whether marketable product rule extends to [natural gas liquids] or whether the *Wellman* and *Tawney* requirements extend beyond the 'first available market.'" App. Vol. 26, pp. 7313-14. The district court also stayed this case pending this Court's decision in this appeal. App. Vol. 26, p. 7339.

III. SUMMARY OF ARGUMENT

A. Certified Question 1

The *Wellman*, *Tawney* and *Kellam* decisions confirm that the lessee under an oil and gas lease is required to bear all of the post-production costs incurred between the wellhead and the point of sale, unless the lease expressly provides that the lessor shall bear its share of specifically identified post-production costs in the lessee's calculation of the lessor's royalties, and the method of calculating such costs. This Court's holdings that the lessee is obligated to bear the costs incurred between the wellhead and the point of sale are in accordance with this Court's consistent recognition that traditionally in West Virginia the lessor has received a royalty based on the sale price of the gas received by the lessee.

In addition, in the *Corder* decision, the Fourth Circuit rejected Antero's argument that under the *Wellman* and *Tawney* decisions, Antero was required to bear the post-production costs incurred "only until gas first becomes marketable, not through the point of sale," and held that "the *Tawney* requirements apply through the point of sale." *Corder*, 57 F.4th at 396-97.

B. Certified Question 2

In the *Wellman* decision, this Court held that "the lessee should bear the costs associated with marketing products produced under a lease." 210 W.Va. at 211, 557 S.E.2d at 265. This Court did not indicate that the lessee's obligation to bear such costs is limited only to the dry gas product, and not to the natural gas liquid products obtained from the natural gas liquid hydrocarbons which are a valuable component of the raw gas stream which emerges from the gas wells in which lessors have a royalty interest. Nor would there be any rational basis for any such distinction.

Similarly, in *Tawney* this Court held that "West Virginia recognizes that a lessee to an oil and gas lease must bear all costs incurred in marketing and transporting <u>the product</u> to the point of sale unless the oil and gas lease provides otherwise, …" 219 W.Va. at 268, 633 S.E.2d at 24. (emphasis added). In accordance with the *Wellman* decision, the *Tawney* decision does not suggest that the lessee should be required to pay royalties only on the dry gas product which a lessee sells, but not the natural gas liquid products which the lessee sells. Nor did this Court suggest that the lessee's obligation to "bear all costs incurred in marketing and transporting the product to the point of sale" applies only to the dry gas product sold by the lessee, but not the natural gas liquid products sold by the lessee. *Id.*, 219 W.Va. 267-273, 633 S.E.2d at 23-30.

Finally, the Fourth Circuit's decision in *Corder* further confirms that under West Virginia law, a lessee's obligation to bear all costs incurred in marketing and transporting the product to the point of sale applies to both the dry gas product and the natural gas liquid products sold by the lessee.

IV. PETITIONERS' STATEMENT REGARDING ORAL ARGUMENT

Pursuant to the oral argument criteria set forth in West Virginia R.A.P. 18(a), oral argument in this appeal is unnecessary because: (1) the dispositive issues raised in the two certified questions have already been authoritatively decided by this Court; and (2) the facts and arguments will be

adequately presented in the parties' briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

V. ARGUMENT

A. Standard of Review.

This Court applies a de novo standard of review in addressing legal issues presented by certified questions received from a federal district court. *Kellam*, 247 W.Va. at 83, 875 S.E.2d at 221.

CERTIFIED QUESTION 1

B. The *Wellman*, *Tawney*, and *Kellam* Decisions confirm that the lessee is obligated to bear all costs incurred in marketing and transporting the natural gas products to the point of sale.

Both the *Wellman* and the *Tawney* decisions expressly hold that the lessee's royalty payment obligations to lessors require the lessee to bear all of the costs incurred in marketing and transporting the natural gas products to the point of sale of such products unless the lease provides otherwise. *Wellman*, 210 W.Va. at 211, 557 S.E.2d at 265; *Tawney*, 219 W.Va. at 268, 272, 633 S.E.2d at 24, 30. By requiring the lessee to bear all costs incurred to the point of sale, this Court has appropriately adhered to its "traditional rule that lessors are to receive a royalty of the sale price of gas." *Tawney*, 219 W.Va. at 272, 633 S.E.2d at 28. Indeed, in both *Tawney* and *Wellman*, this Court emphasized the significance of this traditional rule in its determinations that the lessee's royalty payment obligation requires the lessee to bear all the costs between the wellhead and the point of sale. *Tawney*, 219 W.Va. at 271, 633 S.E.2d at 27 ("We begin our analysis with the recognition that traditionally in this State the landowner has received a royalty based on the sale price of the gas received by the lessee"); *Wellman*, 210 W.Va. at 209, 557 S.E.2d at 263 ("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 situations where gas is found …," citing to Robert Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia*, § 104 (1951)). This Court's determinations that the lessee is required to bear all costs incurred in marketing and transporting the natural gas products to the point of sale assures that the lessors' traditional right to be paid royalties based upon the sale price received by the lessee on its sale of the natural gas products will remain intact, and will not be substantially diminished.

In its 2022 decision in *Kellam*, this Court not only confirmed that *Tawney* is "still good law in West Virginia," 247 W.Va. at 81, 875 S.E.2d at 219, it also: (1) quoted with approval the statement in *Wellman* holding that "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," *Kellam*, 247 W.Va. at 83, 875 S.E.2d at 221; and (2) quoted with approval the statement in *Tawney* holding that "[l]anguage 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 <u>point of sale</u> must provide that the lessor shall bear some part of the costs incurred between the wellhead and the <u>point of sale</u> …" and also identify the specific costs the lessee intends to deduct, and the method for calculating the amount of such costs. *Kellam*, 247 W. Va. at 85, 875 S.E.2d at 223. (emphasis added).

Moreover, the majority opinion in *Kellam* did not question or criticize the holdings in *Tawney* and *Wellman* requiring the lessee to bear all of the costs incurred between the wellhead and the point of sale. 247 W.Va. at 83-89, 875 S.E.2d at 221-227. Instead, this Court stated that: (1) "an appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious 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." *Id.*, 247 W.Va. at 88, 875 S.E.2d at 226, citing *Dailey v. Bechtel Corp.*, 157 W.Va. 1023, 207 S.E.2d 169 (1974); (2) "*Wellman* and *Tawney* are consistent with decades of oil and gas jurisprudence in this state, as well as general principles of contract which undergird the formation of oil and gas leases – including the use of implied covenants when a lease is silent on an issue." *Id.*, 247 W.Va. at 89, 875 S.E.2d at 227; (3) litigation which has arisen under the *Tawney* and *Wellman* opinions "is not indicative of instability or 'chaos' but is the 'unavoidable consequence' of any opinion of this Court." *Id.* and (4) "In actuality, it is far more likely that overruling *Tawney* and *Wellman* would *result* in instability and uncertainty, particularly for the thousands of leases that have been executed in the years since those opinions were published." *Id.* (emphasis in original).

In sum, this Court's decisions in *Wellman*, *Tawney*, and *Kellam* confirm that the answer to Certified Question 1 is that the requirements of *Wellman* and *Tawney* do not extend only to the "first available market" as opposed to the "point of sale" when the duty to market is implicated.

C. The Fourth Circuit's Decision In *Corder* Further Confirms The Lessee's Duty To Bear All The Costs Incurred Between The Wellhead And The Point Of Sale.

Not only has this Court already answered Certified Question 1 in the *Wellman*, *Tawney*, and *Kellam* decisions, so too has the Fourth Circuit in the *Corder* decision which was issued earlier this year. As discussed above (*supra*, pp. 14-15), in *Corder* the Fourth Circuit rejected Antero's argument that its duty to bear all post-production costs applies only until "gas reaches the point of marketability," at which point the silent leases "allow Antero to use the work-back method to deduct costs." *Corder*, 57 F.4th at 396. Based upon " the express point of sale" language in the syllabus points in *Wellman*, *Tawney*, and *Kellam*, the Fourth Circuit held that "the *Tawney* requirements apply through the point of sale." *Id.* at 397.

D. The District Court Incorrectly Stated That There Is No Controlling West Virginia Precedent Regarding Certified Question 1.

In its October 10, 2023 Order granting Antero's motion to certify the two questions at issue, the district court stated that there is no controlling decision of this Court "addressing whether West Virginia's 'marketable product rule' extends only to the 'first available market' as opposed to the 'point of sale.'" App. Vol. 26, pp. 7310-11. The district court's statement ignores this Court's holdings in *Wellman*, *Tawney*, and *Kellam*, which expressly state that the lessee is required to bear all of the costs incurred between the wellhead and the point of sale. *Wellman*, 210 W.Va. at 202, 557 S.E.2d at 256; *Tawney*, 219 W.Va. at 267-268, 271-274, 633 S.E.2d at 23-24, 27-30; *Kellam*, 247 W.Va. at 85-89, 875 S.E.2d at 223-27. The district court's statement also contradicts its earlier determination, in its January 21, 2021 Order ruling on the Plaintiffs' motion to exclude the expert witness testimony of Kris Terry, that "[i]f *Wellman* and *Tawney* apply [to the Class Leases], Antero is obligated to pay natural gas royalties based on the price received at the point of sale, not on the market value of natural gas at the well, or on the net factory value received for the extracted [natural gas liquids]." App. Vol. 11, p. 3237.

CERTIFIED QUESTION 2

E. The *Wellman* And *Tawney* Decisions Confirm That The Lessee Is Obligated To Pay Royalties On All Natural Gas Products Obtained From Wells Subject To The Lessors' Royalty Interests.

The *Wellman* and *Tawney* decisions confirm that a lessee is required to pay the lessors royalties on all natural gas products obtained from wells subject to the lessors' royalty interests, and that the lessee's royalty payment obligations are not limited only to the dry gas product produced and sold by the lessee.

In *Wellman*, this Court expressly stated that "the lessee should bear the costs associated with <u>marketing products produced under a lease</u> … 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*, 210 W.Va. at 211, 557 S.E.2d at 265. (emphasis added). Similarly, in *Tawney* this Court held that under West Virginia law "a lessee to an oil and gas lease must bear all costs incurred in marketing and transporting the product to the point of sale unless the oil and gas lease provides otherwise, . . ." 219 W.Va. at 268, 633 S.E.2d at 24. There is no statement in the *Wellman* or *Tawney* decisions suggesting that a lessee's royalty payment obligations apply to the residue gas product obtained from the methane hydrocarbons entrained in the raw gas produced by the lessee from a well, but do not apply to the natural gas liquid products obtained from the natural gas liquid hydrocarbons which are also entrained in the raw gas which the lessee produces from the well.

F. The *Corder* Decision Further Confirms The Lessee's Duty To Pay Royalties Based On Its Sale Of The Natural Gas Liquid Products At The Point Of Sale.

In the *Corder* litigation, as in this case, the *Corder* plaintiffs had leases with Antero which were silent as to the allocation of post-production costs. *Corder*, 2021 WL 1912383, at *1-2. Antero produced raw gas from wells subject to the *Corder* plaintiffs' leases, which Antero subsequently processed at a processing plant, where the natural gas liquids were separated from the residue gas, and thereafter fractionated into individual natural gas liquid products which Antero sold to third party purchasers of such products. *Id.* at *3. Antero calculated and paid certain plaintiffs ("the non-settling plaintiffs") royalties in the same manner that it has paid the Class members' royalties in this case, either by deducting the processing and fractionation costs from the selling price of the natural gas liquid products, or by using the "shrink value" method to pay such royalties based upon the weighted average sales price Antero received on its sale of residue gas. *Id.* at *4. The district court determined that Antero was not permitted to deduct any post-

production costs in its payment of royalties to the non-settling plaintiffs on Antero's sale of natural gas liquid products. *Id.* at *11.

On appeal, the Fourth Circuit affirmed the district court's determination that Antero was not permitted to deduct the costs of processing, fractionating or transporting the natural gas liquids to the point of sale in its payment of royalties to the *Corder* plaintiffs. *Corder*, 57 F.4th at 388-90, 392-97. The Fourth Circuit recognized that: (1) under "silent" lease agreements which do not specifically permit a lessee to deduct post-production costs, the lessee is obligated to pay royalties based upon the selling price of the natural gas liquid products at the point of sale; and (2) the lessee is not permitted to deduct any post-production costs from the selling price of the natural gas liquids in its payment of royalties to the lessors. *Id.* The *Corder* decision therefore confirms that under West Virginia law, the lessee's duty to market includes the obligation to pay royalties on its sale of natural gas liquid products, without deducting any of the post-production costs incurred between the wellhead and the point of sale.

CONCLUSION

This Court should answer Certified Question 1 as follows: "The holdings in *Wellman* and *Tawney* require the lessee under an oil and gas lease to bear all costs of marketing the natural gas products and transporting such products to the point of sale of such products, without regard to any alleged 'first available market' for such products."

This Court should answer Certified Question 2 as follows: "A lessee under an oil and gas lease is required to pay the lessors royalties on the sale of natural gas liquid products which are obtained from the raw gas produced from wells subject to the lessors' royalty interests, and such royalties must be paid based on the selling price of such natural gas liquid products at the point of sale, without deduction of the costs of separating the natural gas liquids from the raw gas stream

at the processing plant, manufacturing the Y grade mix of natural gas liquids into natural gas liquid products, or transporting the natural gas liquid hydrocarbons to the point of sale of the natural gas liquid products."

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December, 2023, I electronically filed the foregoing "Opening Brief of Petitioners Jacklin Romeo, Susan S. Rine, and Debra Snyder Miller" with the Clerk of this Court, which will send notification of such filing to the attorneys listed below, and that I also served the Petitioners' Opening Brief on the attorneys listed below by email:

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