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**

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

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CERTIFIED QUESTION 1

I. THIS COURT SHOULD RE-AFFIRM ITS PRIOR HOLDINGS THAT THE LESSEE IS REQUIRED TO PAY ROYALTIES BASED UPON THE PRICES THE LESSEE RECEIVES ON ITS SALE OF NATURAL GAS PRODUCTS AT THE POINT OF SALE.

A. Antero Is Making The Same Request Which This Court Recently Rejected In *Kellam.*

Antero Resources Corporation's ("Antero") Response Brief is clearly and unequivocally a request for this Court to overrule its decisions in *Wellman*, *Tawney* and *Kellam*, where this Court repeatedly recognized, without qualification, that the lessee is required to pay the lessors royalties based upon the selling price of the natural gas products which the lessee sells to purchasers of those products "at the point of sale," unless the parties' lease says otherwise. Antero makes this request despite the fact that, less than two years ago, this Court addressed the very same request, and definitively held that "*Tawney* is still good law in West Virginia." *Kellam*, 247 W. Va. at 89, 875 S.E.2d at 227. In making that determination, this Court re-affirmed the holdings in both *Wellman* and *Tawney* that the lessee is required to pay the lessor royalties based upon the selling price of the natural gas products sold by the lessee at the point of sale. *Id.*, 247 W. Va. at 83-85, 875 S.E.2d at 221-223. Antero's Response Brief fails to demonstrate "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." *Id.*, 247 W. Va. at 88, 875 S.E.2d at 226.

B. Antero's Stated Position Is That The Location Of The Purported "First Available Market" Is At The Wellhead.

Antero wrongly contends that its established duty to pay the Class members royalties based upon the sale price which Antero receives on its sale of natural gas products should be jettisoned in favor of a rule which reduces Antero's royalty obligations to the value of the natural gas products

at the location of "the first available market," which location Antero's Response Brief curiously fails to disclose. (Resp. Br., pp. 1, 2, 6, 12, 14-21). In truth, Antero's stated position in this litigation is that the location of the first available market is at the wellhead, as Antero clearly argued in its Opposition to the Class members' motion for summary judgment on their breach of contract claims:

> "Even if *Wellman* and *Tawney* apply, the evidence is undisputed that Antero has taken no deductions until its gas reaches a market. In other words, because the gas is in a marketable form at the wellhead, the wellhead is the first place where the gas can be sold. Therefore, Antero has not breached the Class Leases as a matter of law."

(App. Vol. 25, p. 6846).

Thus, Antero is asking this Court to completely abrogate its holdings in *Wellman* and *Tawney*, in favor of a rule which permits Antero to deduct all of the post-production costs which it incurs between the wellhead and the point of sale.

C. This Court's Determination That The Lessee Is Required to Pay Royalties Based Upon The Sale Price Of The Natural Gas Products At The Point of Sale Is In Accordance with West Virginia Settled Law That The Lessors' Royalties Should Be Based On The Sale Price Which The Lessee Receives On the Sale Of Its Natural Gas Products.

In its Response Brief, Antero wrongly contends that this Court's determination that the lessee is required to pay royalties based upon the prices received at the point of sale was based solely on this Court's adoption of the marketable product rule in both *Tawney* and *Wellman*. (Resp. Br., pp. 2-3, 12-15). The plain language of the *Wellman* and *Tawney* decisions confirms that Antero's contention is erroneous. The holding in *Wellman* and *Tawney* that the lessee must pay the lessors royalties based upon the prices the lessee receives on its sale of the natural gas products to third party purchasers at the point of sale was made for a very valid and legitimate reason – this Court's express recognition that traditionally in West Virginia the landowner has received a royalty

based on the sale price of the gas received by the lessee. In *Tawney*, this Court acknowledged that other jurisdictions have reached differing results on the effect of "at the wellhead" – type language on the allocation of post-production costs between the lessor and lessee. *Tawney*, 219 W. Va. at 270, 633 S.E.2d at 26. This Court, however, declined to adopt the reasoning of any other jurisdiction, and instead relied upon West Virginia law in determining the extent of the lessee's royalty payment obligations:

> This Court finds it unnecessary to adopt wholesale the reasoning of either of the courts above in answering the question before us. Instead, we simply look to our own settled law. 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," citing to Robert Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia* § 104 (1951).

Id. (emphasis added).

Similarly, in *Wellman* this Court emphasized:

> 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, 210 W. Va. at 209, 557 S.E.2d at 263.

The above-referenced recognition, coupled with this Court's determination in *Wellman* that "the lessee should bear the costs associated with marketing products produced under a lease," *id.*, 210 W. Va. at 211, 557 S.E.2d at 265, supported this Court's determination that:

> "if an oil and gas lease provides for a royalty based on proceeds received by a lessee, 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."

Id. (emphasis added).

Thus, contrary to Antero's contention, the lessee's obligation to pay royalties based upon prices received on the lessee's sale of natural gas products at the point of sale is based upon West Virginia "settled law," which was firmly established long before the *Wellman* and *Tawney* decisions were issued.

D. The Factual Circumstances In This Litigation Are The Same Circumstances Which Existed In *Tawney* and *Wellman*.

Antero's primary justification for its request that this Court overrule *Wellman*, *Tawney*, and *Kellam* is that the "factual circumstances" in this litigation are materially different from those which existed when *Wellman* and *Tawney* were decided in 2001 and 2006. (Resp. Br., p. 1). Antero contends that the circumstances are different because when *Wellman* and *Tawney* were decided, "the gas was sold locally, in-basin and therefore the Court evaluated costs that were incurred in rendering gas marketable, not costs incurred thereafter." (Resp. Br., p. 2). Antero's contention is clearly not correct. In *Tawney*, this Court recognized that the natural gas at issue was "not sold until the lessee adds value to it by preparing it for market, processing it, and transporting it to the point of sale." *Tawney*, 219 W. Va. at 270, 633 S.E.2d at 26. Because the *Tawney* gas was processed, the Y Grade mix of natural gas liquids was extracted at the processing plant, and then transported to a fractionation facility located hundreds of miles away from the leased premises, where the Y grade natural gas liquid mix was fractionated into the five natural gas liquid products sold to purchasers of those products, exactly like it was in this case. (App. Vol. 11, pp. 3390-91). In a footnote, Antero claims that the lessee in *Tawney* did not actually sell the natural gas products after fractionation, but the Defendant's appellate brief in *Tawney* upon which Antero relies for that statement does not say whether it was the lessee which sold the natural gas liquid products after they were fractionated, or the lessee's designated agent. *See Defendant Columbia Nat. Res., LLC's* Brief on Certified Questions, at * 7-8, cited to in Respondent's Brief, at p. 20 fn. 5. In either event,

in this case and in *Tawney*, the raw gas which the lessee produced was transported to a processing plant, where the natural gas liquids were extracted from the raw gas, after which the Y grade natural gas liquid mix was transported to a fractionation facility which was located outside of West Virginia, where the natural gas liquids were sold by the lessee or its designated agent after fractionation to third party purchasers at the location of the fractionation facility. Thus, the process which was utilized in *Tawney* to obtain and sell the natural gas liquid products was the exact same process which Antero utilized in this case.

Nor are there any material differences regarding the sale of the residue gas product in *Tawney* and in this case. In both cases, the residue gas product was separated from the natural gas liquids at the processing plant, and thereafter delivered into a long-distance transmission pipeline, where all of the residue gas was sold to third party purchasers at various interconnect points to the long-distance pipeline. (Opening Br., pp. 6-7) Moreover, although Antero argues that the residue gas at issue in *Tawney* was sold "locally, in-basin" (Resp. Br., p. 2), Antero has not pointed to any evidence which suggests that any appreciable percentage of the residue gas which was at issue in *Tawney* was sold "locally" or "in-basin." (Resp. Br., p. 2). The *Tawney* decision does not describe the locations along the interstate pipeline where the residue gas product at issue was sold, no doubt because the exact location of such sales was not legally relevant to the lessee's duty to pay royalties based on the sale price of the residue gas at the point of sale. *Tawney* and *Wellman* expressly hold that the lessee must bear all of the post-production costs the lessee incurs between the wellhead and the point of sale, including the cost of transporting the natural gas products to the point of sale. There are numerous types of post-production costs which a lessee incurs between the wellhead and the point of sale, including compression, dehydration, gathering, processing, treating, fractionation, and transporting the natural gas products to the point of sale. Antero's contention

that the *Tawney* and *Wellman* decisions should be overruled simply because there might be some unspecified increase in one of those costs – transportation – for a small percentage of one of the six natural gas products at issue – residue gas – is fundamentally absurd.

E. Neither *Tawney* nor *Wellman* Indicates That There is a Geographical Limit to The Lessee's Duty to Incur the Expenses of Transporting the Natural Gas Products to the Point of Sale.

Antero's contention that the *Tawney* and *Wellman* decisions are limited to local, in-basin natural gas product sales is not only factually erroneous, it is also in direct contradiction to the plain language of the *Tawney* and *Wellman* decisions. Neither *Wellman* nor *Tawney* holds, or suggests, that there is or should be a geographical limit to the lessee's duty to incur all of the costs of transporting the natural gas products to the point of sale.

In both *Wellman* and *Tawney*, this Court expressly held that, unless the lease provides otherwise, the lessee must bear all costs incurred in exploring for, producing, marketing, and transporting the natural gas product to the point of sale. *Wellman*, 210 W. Va. at 211, 557 S.E.2d at 265; *Tawney*, 219 W. Va. at 274, 633 S.E.2d at 30. There is no indication in the *Wellman* or *Tawney* decisions that the lessee's duty to bear all of the costs incurred in transporting the natural gas products to the point of sale should be subject to a geographical limit, in any respect. Instead, this Court determined, "in light of [West Virginia's] 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, that the lessee is required to bear all costs incurred in transporting the natural gas product to the point of sale. *Id.*, 219 W. Va. at 274, 633 S.E.2d at 30. Antero's contention that the *Wellman* and *Tawney* decisions should be construed to impose a geographical limit on the lessee's duty to transport the natural gas products to the point of sale is in direct contradiction to the plain language of the *Wellman* and *Tawney* decisions.

F. Antero Wrongly Contends That The *Kellam* Decision Negates Antero's Duty To Pay Royalties Based Upon The Prices Received On The Sale Of Natural Gas Products At The Point of Sale.

Antero also wrongly contends that the *Kellam* decision modifies the lessee's duty to pay royalties based on the selling price of the natural gas products at the point of sale, and instead holds that the lessee's obligation is limited to paying royalties based upon the value of natural gas products at the location of a first available market, which Antero claims is at the wellhead. (Resp. Br., pp. 2, 20-21). In fact, the *Kellam* decision does not modify or limit the *Wellman* and *Tawney* decisions in any respect.

In *Kellam*, this Court expressly held, without qualification, that "*Tawney* is still good law in West Virginia." *Kellam*, 247 W. Va. at 89, 875 S.E.2d at 227. The *Kellam* opinion recognizes that: (1) *Wellman* and *Tawney* hold 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." *Id.*, 247 W. Va. at 83, 85, 875 S.E.2d at 221, 223; (2) *Tawney* and *Wellman* "are the result of a reasonable and justifiable interpretation of this State's common law as evidenced by the fact that several other states employed nearly identical reasoning in concluding that, absent a contract provision to the contrary, the implied covenant to market requires the lessee to bear all post-production costs." *Id.*, 247 W. Va. at 88, 875 S.E.2d at 226; (3) "*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; and (4) "In actuality, it is far more likely in our opinion 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 [the *Wellman* and *Tawney*] opinions were published." *Id.* (emphasis in original).

Thus, contrary to Antero's contention, the *Kellam* decision did not modify the *Tawney* and *Wellman* decisions in any respect, but instead re-affirmed their holdings that the lessee is required to bear all costs incurred in marketing and transporting the natural gas products to the point of sale unless the oil and gas lease provides otherwise, and that the lessee must pay royalties based upon the sale price of those natural gas products. *Id.*

G. Antero Falsely Contends That There Is A Legal Distinction Between "Point Of Sale" And "Final Point Of Sale."

Antero argues that *Wellman* and *Tawney* should be overruled because there is a recognized legal distinction between the term "point of sale," as referenced in the *Wellman* and *Tawney* decisions, and "final point of sale," a term which Antero repeatedly references in its Response Brief. (Resp. Br., pp. 3, 4, 6, 11, 12, 16, 17, 18, 19, 21, 22, 24, 27, 28, 29 and 30). In its repeated reliance on this purported legal distinction, however, Antero fails to cite to any court decision, from West Virginia or anywhere else, which has ever suggested that there is a substantive distinction between "point of sale" and "final point of sale." In truth, there is no such decision, and there is no such substantive distinction.

In *Wellman*, *Tawney* and *Kellam*, this Court repeatedly recognized that the lessee is required to pay royalties based upon the sale price which the lessee receives on its sale of natural gas products at the point of sale, and that the lessee "must bear all costs incurred in marketing and transporting the product to the point of sale unless the oil and gas lease provides otherwise." *Tawney*, 219 W. Va. at 268, 633 S.E.2d at 24; accord, *Wellman*, 210 W. Va. at 211, 557 S.E.2d at 265 ("… unless the lease provides otherwise, the lessee must bear all costs incurred in exploring far, producing, marketing, and transporting the product to the point of sale"); *Kellam*, 247 W. Va. at 85, 875 S.E.2d at 223 (recognizing that *Tawney* holds that "language in an oil and gas lease that is intended to allocate between the lessor and the 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 …”). Contrary to Antero’s persistent argument, there is no suggestion in the *Wellman*, *Tawney* and *Kellam* decisions, or any other decision, that there is a distinction between the “point of sale” of the lessee’s natural gas products, and the “final point of sale” of those products.

Antero’s repetitive contention that there is a recognized distinction between “point of sale” and “final point of sale” is not only legally baseless, it is also factually impossible. It is an undeniable matter of fact that no lessee could sell its natural gas products at the point of sale to third party purchasers, and later sell the same natural gas products to other purchasers at a “final point of sale.” Antero’s persistent contention that there is a recognized distinction between “point of sale” and “final point of sale” of a lessee’s natural gas products is therefore both legally and factually baseless. For this reason, Antero’s contentions that the Class members have wrongly relied on the *Wellman* and *Tawney* syllabus points as announcing a “final point of sale rule,” and that the “point of sale” language in the *Wellman* and *Tawney* syllabus points actually means “first point at which gas could be sold” (Resp. Br., pp. 25-26), are patently frivolous. For this same reason, Antero’s contention that the Class members have wrongly relied on the *Wellman* and *Tawney* syllabus points as announcing a “final point of sale rule” is also incorrect. Instead, the Class members have relied on the *Wellman* and *Tawney* syllabus points, including *Wellman* syllabus point 10 and *Tawney* syllabus point 13, to correctly state that the lessee under an oil and gas lease must bear all costs incurred in exploring for, producing, marketing and transporting the natural gas product to the point of sale. (*See*, *e.g.*, Opening Br., pp. 1-2, 18-19). Neither *Tawney* nor *Wellman* recognizes a difference between “point of sale” and “final point of sale.” In addition, the Class members have correctly identified the residue gas and natural gas liquid products which

Antero obtained from the Class members' wells, and the prices Antero received on the sale of those products. (Opening Br., pp. 6-7).

Antero, on the other hand, wrongly contends that the *Wellman* and *Tawney* syllabus points do not require Antero to incur all of the costs which it incurs between the wellhead and the point of sale of its natural gas products, but instead only require Antero to pay royalties between the wellhead and the "first point at which gas could be sold." (Resp. Br., pp. 25-26). There is no language in any of the *Wellman* and *Tawney* syllabus points, or in any other portion of the *Wellman* and *Tawney* decisions, which suggests that Antero's royalty payment obligation under the Class Leases is limited to bearing the post-production costs only between the wellhead and the "first point at which gas could be sold."

H. Antero's Other Criticisms Of The *Wellman*, *Tawney* And *Kellam* Decisions Should Be Rejected.

Antero also proffers a series of other misguided criticisms of the *Wellman*, *Tawney* and *Kellam* decisions, virtually all of which were previously addressed in the *Wellman*, *Tawney* and *Kellam* decisions. For example, Antero argues that this Court should overrule *Wellman*, *Tawney* and *Kellam*, and instead adopt what Antero misdescribes as the "prevailing, accepted understanding of the marketable product rule." (Resp. Br., p. 14). This very same argument – the extent of a lessee's royalty obligations to lessors under "silent" lease agreements – was addressed in the *Wellman* decision which this Court issued twenty-three years ago. In considering the appropriate royalty payment rule to adopt under West Virginia law for silent leases, this Court considered numerous decisions from other jurisdictions, and recognized that other jurisdictions have issued decisions which adopt essentially the same rule of law this Court ultimately adopted in *Wellman* and *Tawney*. As this Court stated in *Wellman*, under Arkansas law, a "lease which provides for the lessor to receive 'proceeds at the well for all gas' means gross proceeds when the

lease is silent as to how post-production costs must be borne," citing to *Hanna Oil & Gas v. Taylor*, 297 Ark. 80, 759 S.W.2d 563, 565 (1988). *Wellman*, 210 W. Va. at 210, 557 S.E.2d at 264. This Court in *Wellman* also cited to the Supreme Cout of North Dakota decision in *West v. Alpar Resources, Inc.*, 298 N.W. 2d 484, 491 (N.D. 1980), which holds that when "the lease does not state otherwise, lessors are entitled to royalty payments based on [a] percentage of total proceeds received by the lessee, without deduction for costs." *Wellman*, 210 W. Va. at 210-11, 557 S.E. 2d at 264-65. Thus, contrary to Antero's incorrect contention, this Court in *Wellman* cited to other states' decisions which have adopted a rule regarding the extent of a lessee's royalty payment obligations which is essentially identical to the point of sale rule this Court adopted in *Wellman*.

After the *Wellman* decision was issued, this Court again addressed the extent of the natural gas producers' royalty payment obligations in *Tawney*, in which this Court again addressed decisions from other jurisdictions regarding the extent of the natural gas producers' royalty payment obligations, and re-affirmed, and expanded upon, the *Wellman* decision. *Tawney*, 219 W. Va. at 270-74, 633 S.E.2d at 26-30.

In the *Kellam* decision issued less than two years ago, this Court considered various gas producers' objections to the holdings in *Wellman* and *Tawney*. This Court rejected the natural gas producers' arguments that *Tawney* and *Wellman* reflect "any serious judicial error in interpretation, …" *Kellam*, 247 W. Va. at 89, 875 S.E.2d at 227, and conclusively determined not only that "*Tawney* is still good law," but also that *Tawney* is settled law in West Virginia. *Id.*, 247 W. Va. at 83-89, 875 S.E.2d at 221-227.

I. Overruling *Tawney* And *Wellman* Would Clearly Result In The Instability And Uncertainty Which *Kellam* Emphasized Is Not Warranted.

Antero's request for this Court to overrule *Tawney* and *Wellman* is without merit for an additional reason which this Court emphasized in *Kellam* – the likelihood 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 these opinions were published." *Id.*, 247 W. Va. at 89, 875 S.E.2d at 227. Twenty-three years have elapsed since the *Wellman* decision held 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." *Id.*, 210 W. Va. at 211, 557 S.E.2d at 265. During that time period, thousands of West Virginia landowners have relied upon this Court's decision in *Wellman* to understand and determine their rights under new and amended lease agreements, as summarized in the December 5, 2023 Amicus Curiae Brief of the West Virigina Royalty Owners' Association and West Virginia Farm Bureau ("December 5, 2023 Amicus Br."), at page 7. As the December 5, 2023 Amicus Brief correctly states, to suddenly change the well-established rules regarding what lease language is necessary to require the oil and gas lessee to bear responsibility for all post-production costs incurred between the wellhead and the point of sale, would be highly detrimental to West Virginia mineral owners, who have justifiably relied upon the contractual expectations which were firmly established when *Wellman* and *Tawney* were decided. (December 5, 2023 Amicus Br., pp. 7-8).

In addition, as the December 5, 2023 Amicus Brief accurately states, "the mandates and requirements of *Wellman* and *Tawney* were no secret." (December 5, 2023 Amicus Br., p. 8). To the extent that any oil and gas producer wanted mineral owners to share in some or all post-production costs, it could have insisted upon lease language which reflected such an agreement. In sum, the royalty payment obligations established in *Wellman* and *Tawney* are well-settled, and both royalty owners and natural gas producers must abide by them.

Finally, as the December 5, 2023 Amicus Brief further states, the "first available market" proposal which Antero proffers is "undeniably ambiguous," and the purported location of such a

hypothetical market undoubtedly would be a constantly litigated issue in nearly every royalty dispute between royalty owners and West Virginia oil and gas producers. (December 5, 2023 Amicus Br., p. 8). By contrast, the established point of sale rule of *Tawney* and *Wellman* "is a finite and obvious point and one that is not susceptible to debate." (December 5, 2023 Amicus Br., p. 8 fn. 5).

CERTIFIED QUESTION 2

II. THIS COURT SHOULD RE-AFFIRM THAT THE LESSEE IS REQUIRED TO PAY THE LESSORS ROYALTIES BASED ON THE SALE PRICE OF THE NATURAL GAS LIQUID PRODUCTS AT THE POINT OF SALE, WITHOUT DEDUCTIONS.

A. Antero's Arguments On Certified Question 2 Directly Contradict The Clear And Unambiguous Holdings In *Wellman* And *Tawney*.

Antero's arguments regarding Certified Question 2 repeatedly contradict *Wellman* and *Tawney's* holdings that the lessee is required to pay royalties based upon the sale price of the natural gas products at the point of sale. *Wellman*, 210 W. Va. at 211, 557 S.E.2d at 265; *Tawney*, 219 W. Va. at 274, 633 S.E.2d at 30. *Wellman* and *Tawney* require the lessee to bear all of the costs incurred in marketing and transporting all of the lessee's products to the point of sale. *Id.* The lessee's natural gas liquid products – ethane, propane, normal butane, iso-butane and natural gasoline – comprise five of the six natural gas products which are produced and marketed by lessees in West Virginia. The *Wellman* and *Tawney* holdings do not suggest that the five natural gas liquid products are exempt from the lessee's duty to pay royalties based upon prices received on its sale of its natural gas products at the point of sale, without deductions. Antero fails to point to any language in *Wellman*, in *Tawney*, or in *Kellam* which suggests any such exemption, because clearly there is no such language. Thus, all of Antero's arguments regarding Certified Question 2 are effectively a "wish list" of what Antero would like the law of West Virginia to be, not what the substantive law of West Virginia actually is.

B. Antero Wrongly Contends That West Virginia's Point Of Sale Rule Does Not Extend To Natural Gas Liquid Products.

Antero wrongly contends that this Court should reject the Class members' statement that "West Virginia's marketable product rule always extends to [natural gas liquids] (as a matter of law) because 'whether gas is marketable is a question of fact,' citing to *Leggett v. EQT Prod. Co.*, 239 W. Va. 264, 273 n.13, 800 S.E.2d 850, 859 n. 13 (2017)." (Resp. Br., p. 31). This argument fails for several reasons. First, and most importantly, Antero's argument directly contradicts *Wellman* and *Tawney's* mandate that the lessee is required to pay royalties based upon prices received on the sale of natural gas products at the point of sale, without deductions. *Wellman*, 210 W. Va. at 211, 557 S.E.2d at 265; *Tawney*, 219 W. Va. at 274, 633 S.E.2d at 30. Second, there is no statement or suggestion in *Wellman* or *Tawney* that the lessee's obligation to pay royalties on the sale price of natural gas liquids products at the point of sale is a "question of fact." Third, Antero's reliance on a footnote in the *Leggett* decision to support its "question of fact" argument is clearly misplaced. The footnote in *Leggett* upon which Antero relies is a reference to the applicable standard for determining the location of the first commercial market under Colorado substantive law. *Leggett*, 219 W. Va. at 273 n. 13, 800 S.E.2d at 850 n. 13. That footnote does not make any suggestion that the lessee's obligation to pay royalties based upon the sale price of natural gas products at the point of sale is a "question of fact" under West Virginia substantive law. Indeed, there is no statement in *Wellman*, in *Tawney*, in *Kellam*, or in any other West Virginia decision that the lessee's obligation to pay royalties based on the sale price of natural gas liquid products at the point of sale is a question of fact. Antero's "question of fact" argument is yet another example of an Antero argument which contradicts the clear and unambiguous language of the *Wellman* and *Tawney* decisions.

C. The Lessee's Obligation To Pay Royalties Based On The Sale Price Of Natural Gas Products At The Point Of Sale Clearly Applies To The Five Natural Gas Liquid Products Which Antero Has Consistently Sold To Purchasers At The Point Of Sale.

Antero also presents the patently erroneous argument that once the raw gas which a lessee produces reaches a "market," the lessee has no further royalty payment obligations to its lessors, and therefore has no obligation to pay royalties on its sale of any of the five natural gas liquid products to third party purchasers at the point of sale. (Resp. Br., pp. 32-35). In advancing this argument, Antero makes no reference to the *Wellman* and *Tawney* decisions. Antero instead implicitly acknowledges that there is no statement in the *Wellman* or *Tawney* decisions which provides any support for its argument that West Virginia lessors have no right to receive royalties based on the lessee's sale of natural gas liquid products at the point of sale.

Instead of adhering to West Virginia's firmly established law that the lessee must pay royalties based upon its sale of the natural gas products at the point of sale, Antero relies upon a mix of inapposite decisions from other jurisdictions, as well as a series of statements which have no relevance to determining the applicable point of sale for all of the natural gas liquid products which Antero has sold to third party purchasers of those products. (Antero Br., pp. 32-33).

In citing to inapplicable decisions from other jurisdictions, Antero fails to explain how these decisions have any relevance to the lessee's obligation under West Virginia law to pay royalties based upon the sale price of natural gas products sold to purchasers of those products at the point of sale. In any event, the decisions cited by Antero are factually inapposite to the natural gas liquid products at issue in the litigation. Antero cites to three decisions regarding this issue – *Garman v. Conoco*, 886 P.2d 652, 659 (Colo. 1994); *Sternberger v. Marathon Oil Co.*, 894 P.2d 788, 800 (Kan. 1995); and *Mittelstaedt v. Santa Fe Mins., Inc.*, 954 P.2d 1203, 1207 (Okla. 1988). None of those three decisions contains any statement regarding the extent of a natural gas

producer's obligation to pay royalties on its sale of natural gas liquid products. *Garman*, 886 P.2d at 659-60; *Sternberger*, 894 P.2d at 793-800; *Mittelstaedt*, 954 P.2d at 1204-10. Instead, each of those decisions focuses exclusively on the extent of a natural gas producer's royalty obligations with respect to the dry gas product produced and sold by a natural gas producer. *Id.* Moreover, none of those three decisions gives any indication that a natural gas producer is exempt from paying royalties to lessors based on the proceeds it receives on its sale of natural gas liquid products. *Id.*

Antero also relies upon certain testimony in this litigation which has no factual relevance to Antero's sale of the natural gas liquid products to third party purchasers at the location of the fractionation facility. (Resp. Br., p. 32). Antero instead focuses on where the dry residue gas "is capable of being sold." Antero, however, ignores the uncontradicted evidence that the raw gas in this litigation was consistently transported to the processing plant, where the Y grade natural gas liquid mix was extracted from the raw gas, and that the Y grade was thereafter fractionated into the five natural gas liquid products, and consistently sold to third party purchasers of those products at the fractionation facility. (Opening Br., pp. 6-7) Based upon this uncontradicted evidence, under West Virginia law Antero has been obligated to pay the Class members royalties based upon the substantial revenues which Antero has received on its sale of the five natural gas liquid products at the point of sale.

D. Antero's Contention That The Natural Gas Liquid Products At Issue Are By-Products Directly Contradicts The Holdings In *Wellman* And *Tawney.*

Antero also wrongly contends that the natural gas liquid products which it has sold to third party purchasers at the point of sale are a "by-product" of the natural gas which Antero produces from the Class members' wells. (Resp. Br., pp. 33-34). This argument, like all of Antero's arguments, is in direct contradiction of the holdings in *Wellman* and *Tawney*. There is no statement

in *Wellman*, in *Tawney*, in *Kellam*, or in any other West Virginia decision, that natural gas liquids products are a "by-product" of the natural gas produced by Antero from the Class members' wells. Instead, the natural gas liquid products are the primary products which Antero has obtained from the natural gas liquid hydrocarbons which are entrained in the raw gas produced from the Class members' wells. (Opening Br., p. 6). The evidence is uncontradicted that all of the natural gas products which Antero sells to purchasers are obtained from the raw gas which Antero has produced from the Class members' wells. (Opening Br., pp. 6-7). Thus, the natural gas liquid products are clearly the primary products which Antero has sold to third party purchasers of such products, and are not a by-product of the residue gas.

E. Antero's Arguments That It Has No Obligation To Pay Royalties On Its Sale Of Natural Gas Liquid Products Directly Contradict The Fourth Circuit's Decision In *Corder v. Antero*.

In arguing that a natural gas lessee has no obligation to pay royalties based on the sale price of the natural gas liquid products sold to third party purchasers (Resp. Br., pp. 31-36), Antero ignores the fact that one year ago, the Fourth Circuit issued its decision which specifically rejected all of Antero's arguments that *Tawney* and *Wellman* do not require Antero to pay royalties based on the sale price of natural gas liquid products sold by Antero. *Corder v. Antero Resources Corporation*, 57 F.4th 384, 388-397 (4th Cir. 2023). As the Class members correctly stated in their Opening Brief (pp. 22-23), the relevant facts in *Corder* were identical to the relevant facts in this case in every respect: (1) the *Corder* plaintiffs had leases with Antero which were silent as to the allocation of post-production costs. *Id.* at 389; (2) Antero utilized the exact same process in extracting the natural gas liquids from the raw gas it produced, fractionating the Y grade mix of natural gas liquids, and selling the fractionated natural gas liquid products to third party purchasers of those products. *Id.* at 388-89; and (3) Antero consistently failed to pay the *Corder* plaintiffs

royalties based on the sale price of the natural gas liquid products sold by Antero, and instead consistently deducted the post-production "expenses associated with processing, fractionating, and transporting [natural gas liquids]." *Id.* at 390. With respect to the "silent" leases at issue, the Fourth Circuit addressed the district court's holding that "the leases that are silent on the allocation of post-production costs do not satisfy *Tawney's* requirements, and thus do not permit Antero to deduct any post-production costs," *id.* at 391, and agreed with the district court that "[t]he leases which are silent on the allocation of post-production costs fail to satisfy the *Tawney* requirements and therefore do not permit Antero to deduct post-production costs from Lessors' royalties." *Id.* at 392.

Thus, the Fourth Circuit's decision in *Corder* definitively rejects all of Antero's arguments regarding Certified Question 2, and expressly answers the questions which are presented in Certified Question 2, *i.e.* that under the marketable product point of sale rule adopted by this Court in *Wellman* and *Tawney*, an oil and gas lessee is required to pay the lessors royalties on its sale of natural gas liquid products, without deduction of the post-production costs of processing, transportation and fractionation which the lessee incurs prior to its sale of the natural gas liquid products. *Id.* at 391-92.

F. Antero Wrongly Contends That The Natural Gas Product Referred To In *Wellman* And *Tawney* Is Limited To The Raw Gas Which Antero Produces From The Wells Subject To The Lessors' Interests.

Antero contends that the holdings in *Wellman* and *Tawney* that a lessee must bear all costs incurred in exploring for, producing, marketing, and transporting the product to the point of sale do not extend to the natural gas liquid products which Antero has sold to third party purchasers. (Resp. Br., p. 35). Antero argues that "[r]ead in context, *Wellman* and *Tawney* equated 'product' or 'products' with the oil or gas taken from the well – not whatever sub-products are **derived** from

the oil or gas." (Resp. Br., p. 35). This argument by Antero is, once again, in direct contradiction to the plain language of the *Wellman* and *Tawney* decisions. Both the *Wellman* and *Tawney* decisions expressly hold that the lessee's royalty payment obligations extend to paying royalties based upon the sale price of the products which the lessee sells at the point of sale, and that 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 211, 557 S.E.2d at 265; accord, *Tawney*, 219 W. Va. at 274, 633 S.E.2d at 30 (stating that "West Virginia recognizes that 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 …"). Antero's contention that the word "product," as used in the *Wellman* and *Tawney* decisions, refers to the raw gas which a lessee produces from the well, directly contradicts the clear and unambiguous language in the *Wellman* and *Tawney* decisions.

CONCLUSION

For the reasons stated above and in the Petitioners' Opening Brief, this Court's answer to the two certified questions should be as stated in the Conclusion to the Petitioners' Opening Brief (pp. 23-24) in this appeal.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 2024, I electronically filed the foregoing "Reply 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' Reply Brief on the attorneys listed below by email:

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