In The

United States Court of Appeals

For The Fourth Circuit

GERALD W. CORDER, et al.,

Plaintiffs – Appellees/Cross-Appellants,

v.

ANTERO RESOURCES CORPORATION,

a Delaware corporation,

Defendant – Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA AT CLARKSBURG

BRIEF OF *AMICUS CURIAE* WEST VIRGINIA ROYALTY OWNERS' ASSOCIATION AND WEST VIRGINIA FARM BUREAU IN SUPPORT OF APPELLEES

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STATEMENT OF *AMICUS CURIAE* PARTY'S IDENTITY, INTERESTS AND SOURCE OF AUTHORITY TO FILE THIS BRIEF

Your *Amicus* West Virginia Royalty Owners Association ("WVROA") is an association of mineral royalty owners with 563 members, interested in issues affecting the ownership of royalty interests in real property in West Virginia, including, but not limited to, royalty interests in oil and gas estates. WVROA's mission is to inform West Virginia mineral owners about the state of the oil and gas industry, leasing, and their rights as real property owners, as well as promoting legislation that protects the rights of all property owners, whether fee, surface, or mineral owners, to ensure that oil and gas development in West Virginia is done responsibly and fairly.

Your *Amicus* West Virginia Farm Bureau ("WVFB") represents over 22,721 members who are interested in issues affecting the ownership of mineral interests and real property in West Virginia, including, but not limited to, royalty interests in oil and gas estates. WVFB's mission is to provide leadership, education, information, training and economic services to members and county farm bureaus to enhance the quality of farming in West Virginia through the betterment of conditions of those engaged in agricultural pursuits, the improvement of the grade of their products, and development of a high degree of efficiency in their agricultural pursuits.

Amici have an interest in this case given its potential impact on the calculation and payment of royalties to landowner lessees on hydrocarbons, including natural gas and natural gas liquids ("NGL's") produced from land which comprises the State of West Virginia. These issues directly affect the membership of all *amici* and movants believe that their perspective will be of assistance to this Court in the resolving the above referenced certified questions.

By their brief, your *amici* will attempt to add insight to the important questions before the Court in this matter regarding the application of the holdings of the West Virginia Supreme Court of Appeals in *Wellman v. Energy Resources, Inc.*, 557 S.E.2d 254 (W.Va. 2001) and *Est. of Tawney v. Columbia Nat. Res., L.L.C.*, 633 S.E.2d 22 (W.Va. 2006), in the calculation and payment of royalties due to landowners for hydrocarbons including natural gas and natural gas liquids under leases, which include so-called "market value" royalty clauses.

CONTRIBUTIONS TO *AMICUS CURIAE* BRIEF

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, WVROA and WVFB represent that no counsel for a party to this appeal authored this *amicus curiae* brief in whole or in part. Neither a party to this appeal nor counsel for any party has made a monetary contribution intended to fund the preparation or submission of this brief. No persona other than WVROA and WVFB, their members and counsel have contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

WVROA and WVFB submit this *amicus curiae* brief in support of the position taken by Plaintiffs/Appellees in their brief filed with the Court on September 22, 2021, and in support of the District Court's May 12, 2021 Order granting summary judgment to Plaintiffs/Appellees and against defendant Antero or the application of the West Virginia Supreme Court of Appeals' decision in *Wellman v. Energy Resources, Inc.*, 557 S.E.2d 254 (W.Va. 2001) and *Est. of Tawney v. Columbia Nat. Res., L.L.C.*, 633 S.E.2d 22 (W.Va. 2006) to the royalty provisions of the leases at issue in this case.

Longstanding West Virginia caselaw provides that the lessee under an oil and gas lease bears all post-production costs associated with processing and transporting the oil and gas and derivative products to the "point of sale" unless there is clear lease language to the contrary. *See Wellman, supra,* and *Tawney, supra*. The District Court below followed these precedents in granting summary judgment to Plaintiff/Appellees and denying the cross motions of Defendant/Appellant Antero, who now launch a frontal attack on these precedents using precedent and dicta. Accordingly, the Court should reject Antero's arguments and affirm the District Court's Order.

STATEMENT OF THE ISSUES

I. Whether the District Court was justified in holding that the royalty language relied upon by Antero in the leases at issue in this case was insufficient to allow Antero to deduct from the Appellee/Plaintiffs' royalty any portion of the costs that Antero incurred in processing and transporting the product, including both natural gas and natural gas liquids ("NGL's") between the wellhead and the point of sale?

STATEMENT OF THE CASE

Plaintiffs-Appellees are owners of property and mineral interests situated in Harrison County and Doddridge County, West Virginia. At issue in this case are eight separate leases covering separate tracts of land, each with its own royalty provision. Five (5) of these leases (Nos. 3, 4,6, 7 and 9 as described in Appellee's Brief at pp. 8-9) contain so called "market value" royalty provisions which purport to calculate royalty due the lessor based upon the "value at the well" or "prevailing price at the well."

Following a civil partition lawsuit filed against them by the Defendant-Appellant Antero, Plaintiffs-Appellees executed the Confidential Settlement Agreement in August 2015. Several of the Appellee's Leases were amended by a Confidential Settlement Agreement and a related Release of All Claims ("the Settlement Agreement"), which provided, in relevant part:

> Antero acknowledges that per the terms of said June 29, 1979 leases identified in the preceding two paragraphs, production royalties payable pursuant to said leases shall be deemed gross royalties and shall be calculated without regard to any postproduction or market enhancements costs claimed or incurred by Antero.

JA2091.

Included in the modification of these leases is a so-called Market Enhancement (Gross Proceeds) Clause that provides as follows:

> It is agreed between the Lessor and Lessee that notwithstanding any language herein to the contrary, all oil, gas or other proceeds accruing to the Lessor under this lease or by state law shall be without deduction, directly or indirectly, for the cost of producing, gathering, storing, separating, treating, dehydrating, compressing, processing, transporting, and marketing the oil, gas and other products produced hereunder to transform the product into marketable form; however, any such costs which result in enhancing the value of the marketable oil, gas or other products to receive a better price may be deducted from Lessor's share of the production so long as they are based on Lessee's actual cost of such enhancements. However, in no event shall Lessor receive a price that is less than, or more than, the price received by Lessee

JA2107.

The present cases were filed on December 6, 2017, in the Circuit Court of Harrison County, West Virginia. JA35. On February 12, 2018, the defendant/Appellant Antero Resources Company ("Antero") removed the cases to this Court on the basis of diversity jurisdiction, 28 U.S.C. §1332. JA 27-21. The complaint was thereafter amended on multiple occasions. JA24-371, JA544-547.

In their Second Amended Complaint, Plaintiffs asserted that the deduction of post-production expenses for the processing and fractionation of NGLs from gas produced by Antero based on the Market Enhancement Clause in the Settlement Agreement violated the proceeds royalty clauses in the modified leases of the Settling Plaintiffs. Plaintiffs/Appellees also asserted that the deduction of post-production expenses for the gathering and transportation of gas and oil produced by Antero constituted a violation of the market value royalty clauses contained in the leases not subject to the Settlement Agreement. These claims were the subject of cross motions for summary judgment filed by Plaintiffs/Appellees and Antero.

On May 12, 2021, the district court entered an order granting in part the Plaintiffs' Motion for Summary Judgement (and denying Antero's cross-Motion for Summary Judgement) as to the applicability of the holdings in *Wellman v. Energy Resources, Inc.*, 557 S.E.2d 254 (W.Va. 2001) and *Est. of Tawney v. Columbia Nat. Res., L.L.C.*, 633 S.E.2d 22 (W.Va. 2006) to the Leases 2 through 7, and the failure of the Market Enhancement Clause to meet the heightened specificity required thereunder to permit post-productions under West Virginia law. JA 1979-2016.

The district court entered its final and appealable judgment on May 25,2021. JA2051-2056. Plaintiffs filed timely noticed their appeal on June 24, 2021. JA2060-2061.

AGRUMENT

I. *Wellman* and *Tawney* remain the law in the State of West Virginia and Provide for the Lessee's Duty to Bear All Post-Production Costs Through the Point of Sale in the Absence of Express Lease Language to the Contrary.

It has long been the law in State of West Virginia that lessor receives its royalty based on the sale price of the gas received by the lessee. *Tawney, supra,* 633 S.E.2d at 27 ("Since the 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 to him the landowner one-eighth of the sale price received.") (citing Robert Donley, *The Law of Coal, Oil, and Gas in West Virginia and Virginia* §104 (1951)). *See also, Wellman,* 557 S.E.2d at 263 ("The one-eighth received is commonly referred to as the landowner's royalty.").

Decided in 2001, *Wellman* reaffirmed the duty of a lessee to market the oil or gas produced, and further held that "the landowner's royalty" is not chargeable with any of the costs of discovery and production, providing:

> [T]here has been an attempt on the part of oil and gas producers in recent years to charge the landowner with a *pro rata* share of various expenses connected with the operation of an oil and gas lease such as the expense of transporting oil and gas to a point of sale, and the expense of treating or altering the oil and gas so as to put it in a marketable condition. To escape the rule that the lessee must pay the cost of discovery and production, these expenses have been referred to as "post-production expenses."…

Wellman, 557 S.E.2d at 263-264.

Under *Wellman,* therefore, and unless there is clear lease language to the contrary, the lessee must bear all costs incurred in exploration, production, marketing, and transportation of the product to the point of sale. "Production" does not end until gas is in marketable condition and actually transported to the point of sale. *Wellman, supra,* at syl. pt. 4; *Tawney, supra,* at syl. pt. 1.

Five years after *Wellman* was decided, the West Virginia Supreme Court of Appeals soundly reaffirmed and expanded upon its holding in *Tawney*, issuing the following syllabus points:

1. "If an oil and gas lease provides for a royalty based on proceeds received by the 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." Syllabus Point 4, *Wellman v. Energy Resources, Inc.,* 210 W.Va. 200, 557 S.E.2d 254 (2001).

2. "If an oil and gas lease provides that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, the lessee shall be entitled to credit for those costs to the extent that they were actually incurred and they were reasonable. Before being entitled to such credit, however, the lessee must prove, by evidence of the type normally developed in legal proceedings requiring an accounting, that he, the lessee, actually incurred such costs and that they were reasonable." Syllabus Point 5, *Wellman v. Energy Resources,* Inc., 210 W.Va. 200, 557 S.E.2d 254 (2001).

3. "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syllabus Point 1, *Cotiga Development Co. v. United Fuel Gas Co.,* 147 W.Va. 484, 128 S.E.2d 626 (1962).

4. The term “ambiguity” is defined as Language reasonably susceptible of two different meanings or language of such doubtful meaning that the reasonable minds might be uncertain or disagree as to its meaning.

5. “The question as to whether a contract is ambiguous is a question of law to be determined by the court.” Syllabus Point 1, in part, *Berkeley County Pub. Serv. Dist. V. Vitro Corp of AM.*, 152 W.Va. 252, 162 S.E.2d 189 (1968).

6. “[W]hen new points of law are announced… those points will be articulated through syllabus points as required by our state constitution.” Syllabus Point 2, in part, *Walker v. Doe,* 210 W.Va. 490, 558 S.E.2d 290 (2001).

7. “The general rule as to oil and gas leases is that such contracts will generally be liberally construed in favor of the lessor, and strictly as against the lessee.” Syllabus Point 1, *Martin v. Consolidated Coal & Oil Corp*., 101 W.Va. 721, 133 S.E. 626 (1926)

8. “Uncertainties in an intricate and involved contract should be resolved against the party who prepared it.” Syllabus Point 1, *Charlton v. Chevrolet Motor Co.*, 115 W.Va. 25, 174 S.E. 570 (1934).

9. “‘It is the province of the court, and not of the jury, to interpret a written contract.’ *Franklin v Lilly Lumber Co.,* 66 W.Va. 164,66, S.E. 225 [1909].” Syllabus Point 1, *Stevens v. Bartlett,* 118 W.Va. 421, 191 S.E. 550 (1937).

10. Language in an oil and gas lease that is intended to allocate between the lessor and lessee the costs of marketing the product and transporting it to the point of sale must expressly provide that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, identify with particularity the specific deductions the lessee intends to take from the lessor’s royalty (usually 1/8), and indicate the method of calculating the

> amount to be deducted from the royalty for such post-production costs.
>
> 11. Language in an oil and gas lease that provides that the lessor's 1/8 royalty (as in this case) is to be calculated "at the well", "at the wellhead", or similar language, or that the royalty is "an amount equal to 1/8 of the price, net all costs beyond the wellhead," or "less all taxes, assessments, and adjustments" is ambiguous and, accordingly, is not effective to permit the lessee to deduct from the lessor's 1/8 royalty any portion of the costs incurred between the wellhead and the point of sale.

Tawney, 633 S.E.2d at 23-24.

In tandem, and for well over a decade, *Tawney* and *Wellman* have provided clear direction to lessees such as Antero regarding their rights and obligations with respect to taking deductions in the computation of royalty due their lessors.

A. *Wellman* and *Tawney* apply to So-Called "Market Value" Royalty Provisions.

Tawney's syllabus points 10 and 11 plainly restate the lessee's obligation to bear the burden of all costs incurred between "the wellhead" and the point of sale.

Antero contends that the *Tawney* decision is limited in scope to so-called "proceeds" leases, and therefore does not apply to "market value" type leases, because the latter were somehow not addressed in *Tawney's* reformulated question such as the ones at issue here.

In its reasoning, contained in the body of the opinion, the *Tawney* Court specifically rejected the arguments advanced by Appellant Antero that its ruling does not apply to so-called "market value leases":

> CNR asserts, however, that when read with accompanying language such as “gross proceeds,” “market price,” and “net of all costs,” the wellhead-type language clearly calls for allocation of post-production expenses. We disagree. First, we note that the word “gross” implies, contrary to CNR’s interpretation, that there will be no deductions taken. Hence, the phrase” gross proceeds at the wellhead” could be construed to mean the gross price for the gas received by the lessee. On the other hand, the words “gross proceeds” when coupled with the phrase “at the well head” could be read to create an inherent conflict due to the fact that the lessees generally do not receive proceeds for the gas at the wellhead. Such an internal conflict results in an ambiguity. Likewise, the phrase “market price at the wellhead” is unclear since it contemplates the actual sale of gas at the physical location of the wellhead, although the gas generally is not sold at the wellhead.

Tawney, 633 S.E.2d at 28-29.

Moreover, Footnote 2 of *Tawney* reveals that the original questions that had been certified by the trial court arose from defendant “CNR’s motion for summary judgment which was denied,” and “requested summary judgment only as to leases with the language ‘at the well,’ ‘at the wellhead’ (or similar language), or that the royalty is to be ‘one-eighth of the price, net all costs beyond the wellhead,’ or ‘less all taxes, assessments, and adjustments.’” *Tawney,* 633 S.E.2d at 25, n. 2. However, the West Virginia Supreme Court of Appeals found that the trial court’s certified questions went

> beyond the scope of CNR’s motion for summary judgment in that the questions include lease language never placed in issue by CNR’s motion for summary judgment.

Tawney, 633 S.E.2d at 25, n. 2. The Court therefore declined to answer the original certified questions formulated by the trial court, and instead reformulated the certified question to conform to the motion for summary judgment:

> In light of the fact 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, <u>is lease language that provides that the lessor's 1/8 royalty is to be calculated "at the well</u>," "at the wellhead" or similar language, or that the royalty is "an amount equal to 1/8 of the price, net of all costs beyond the wellhead," or "less all taxes, assessments, and adjustments" sufficient to indicate that the lessee may deduct post-production expenses from the lessor's 1/8 royalty, presuming that such expenses are reasonable and actually incurred.

Tawney, 633 S.E.2d at 24-25 (emphasis added). Thus, *Tawney's* holding is clearly not limited to "proceeds" type leases but applies equally to the "market value" type leases employing the "at the wellhead" language as well.

Moreover, *Tawney's* reformulated certified question emphasizes "the fact that West Virginia recognizes that a lessee to an oil 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, …" *Id.* at 24. In doing so the West Virginia Supreme Court of Appeals has signaled clearly that the lessee's obligation to bear all costs in transporting the product to the point of sale is not limited to either "proceeds" leases or "market value" leases (or any other particular type of lease language) but instead applies to any lease which does not clearly provide otherwise.

Recent district court decisions from the Norther District of West Virginia have adopted this reasoning. *See Sandra Goodno, et al. v. Antero Resources Corp.*, Case No. 5:20-CV-00100-JPB, U.S. Dist. Ct. N.D. W.Va. (Doc. 23, July 21, 2020). *Goodno*, Doc. 23, pp. 4-5 (District Court "agree[d] with the other courts that have addressed the issue that the holdings of *Tawney* are not limited to any specific type of royalty provision.") *Id.*, Doc. 23, p. 5; *Cather v. EQT Prod. Co.*, 2019 WL 3806629 (N.D. W.Va. August 13, 2019) (Court held lease which requires the gas producer to pay that "*Tawney* [does not] limit its own application to any particular lease language.") *Id.*

Accordingly, and contrary to the arguments set forth by Antero, the language contained in leases 2 through 7 in the present case is subject to the requirements set forth in *Wellman* and *Tawney* relative to the deduction of post-production expenses.

II. Neither *Imperial Colliery Co. v. Oxy USA Inc.*, Nor *Leggett v. EQT Productions Co.*, Overruled *Wellman* and *Tawney*

Contrary to Antero's assertions in its brief, neither *Imperial Colliery Co. v. Oxy USA Inc.*, 912 F.2d 696 (4th Cir. 1990), or *Leggett v. EQT Productions Co.*, 800 S.E. 2d 850 (W.Va. 2017), do not override *Wellman* and *Tawney* or otherwise negate or diminish their holdings.

A. *Imperial Colliery* Was Decided By This Court Well Prior to *Wellman* and *Tawney* and Cannot Therefore Overrule Them.

As noted by the district court in its Order:

> A federal court exercising diversity jurisdiction is obliged to apply the substantive law of the state in which it sits." *Volvo Const. Equip. N. Am. V. CLM Equip. Co., Inc.*, 386 F.3d 581, 599-600 (4th Cir. 2004) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938)). Under West Virginia law, "[a]n oil and gas lease is both a conveyance and a contract." Syl. Pt. 2, *Ascent Res. – Marcellus, LLC v. Huffman,* 851 S.E.2d 782 (W. Va. 2020).

JA1992.

Because federal jurisdiction in this case rests upon diversity of citizenship, this Court's role is to apply the governing West Virginia substantive law, as it has been applied by West Vriginia's Supreme Court of Appeals. *See Westfield Insurance Co. v. Sisterville Tank Works, Inc.*, 2020 WL 535196, at *6 (N.D. W.Va. September 4, 2020), citing to *Commissioner of Internal Revenue Service v. Estate of Bosch*, 387 U.S. 456, 465 (1967). As this Court recently stated in *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937 (4th Cir. 2020), in a diversity case, a federal court should not interpret state law in a manner that has "not been approved by the state whose law is at issue." *Id.* at 963.

Since *Imperial Colliery* was decided in 1990 under the above cited standard, some eleven years before *Wellman* was issued, and sixteen years before the West Virginia Supreme Court of Appeals decided *Tawney* it cannot be seen, as Antero argues, to have overruled or otherwise negated their effectiveness.

B. The West Virginia Supreme Court of Appeals' Holding in *Leggett* Does Not Overrule or Otherwise Negate *Wellman* and *Tawney*

Antero's assertion that the West Virginia Supreme Court of Appeals' second opinion in *Leggett v. EQT Production Company*, 800 S.E.2d 850 (W.Va. 2017) somehow sanctions the so-called "net back" method in computing and paying royalties is just plain wrong. Indeed, the analysis contained in *Leggett* was focused on the "at the wellhead" language contained in an older version of West Virginia's "flat rate well" statute, W.Va. Code §22-6-8(e). Indeed, the *Leggett* Court specifically noted that its statutory construction was inapposite to any correlative analysis involving interpretation of "at the wellhead" as used in the context of freely negotiated private leases such as those at issue in this case. Specifically, the Court noted that the statutory analysis cannot involve common law rules of contractual construction, notably including both the implied covenant to market and the rule of construction of contractual language against its drafter. *See Leggett, supra*, 800 S.E.2d., at 860, 863. ("[T]he issue presently before the court does not permit intrusion into these issues [regarding private gas leases]. We therefore leave for another day to continued vitality and scope of *Wellman* and *Tawney*").[1]

[1] *Tawney's* syllabus point 1 reaffirms that a lessee to an oil and gas lease "must bear all costs incurred in marketing and transporting the product <u>to the point of sale</u> unless the oil and gas lease provides otherwise." *Tawney*, 633 S.E.2d at 30 (emphasis added). Notably, Antero ignores the Fourth Circuit's holding in *Young v Equinor USA Onshorte Properties, Inc.*, 982 F .3d 201 (4th Cir. 2020), that a West Virginia "oil and gas lease must satisfy *Tawney's* three-pronged test to rebut the *Wellman* presumption that the lessee will bear all post-production costs." *Young*, 982 F.3d at 207, and its holding that "*Leggett* didn't overrule *Wellman* and *Tawney*." *Id.*

Antero effectually concedes as it must that *Leggett v EQT Production Co*., 800 S.E. 2d 850 (W.Va. 2017) did not overrule *Wellman* or *Tawney*. The Court in *Leggett* expressly stated that the issues involved did not permit intrusion into the *Wellman* and *Tawney* decisions and even stated "the leases in *Wellman* and *Tawney* and other such leases obviously are unaffected by the statute and therefore this opinion…, freely negotiated leases remain subject to the holdings of *Wellman* and *Tawney*." *Leggett*, 800 S.E.2d at 863, 868.

Finally, it is worth noting that as the *Leggett* Court recognized "the inherent tension between holders of leases subject to our interpretation of *West Virginia Code §22-6-8* and those freely-negotiated leases which remain subject to the holdings of *Wellman* and *Tawney*" it "therefore implore[d] the Legislature to resolve the tensions" as it saw fit. *Leggett,* 800 S.E.2d at 869. In its very next session, the West Virginia Legislature answered this call, and *West Virginia Code §22-6-8(e)* was amended, effectively May 31, 2018, to require the owner of the working interest in a well to tender to the owner of oil and gas in place" not less than one eight of the gross proceeds, free from any deductions from post-production expenses." This amendment rebutted and effectively reversed the effect of the *Leggett* opinion and its endorsement of the work-back- method as to flat rate leases.[2]

[2] It does not appear that the parties in *Young v Equinor USA Onshorte Properties, Inc.*, 982 F .3d 201 (4th Cir. 2020), advised this Court of W.Va. Code § 22-6-8's amendment. *Cabot Oil & Gas Corp. V. Beaver*

C. *Young v. Equinor USA* Did Not Overrule or Otherwise Negate *Tawney*

Antero incorrectly contends that the Fourth Circuit's decision in *Young v. Equinor USA Onshore Properties, Inc.*, 982 F.3d 201 (4th Cir. 2020), has overruled or somehow negated *Tawney's* application to oil and gas lease royalty provisions.

First off, the royalty provision at issue in *Young* was completely inapposite to the royalty language at issue in this case.

> 2. GAS: To pay Lessor on actual volumes of gas sold from said land, fourteen percent of the net amount realized by Lessee, computed at the wellhead. As used in this Lease, <u>the term 'net amount realized by Lessee, computed at the wellhead' shall mean the gross proceeds received by Lessee from the sale of oil and gas minus post-production costs incurred by Lessee between the wellhead and the point of sale. As used in the Lease, the term 'post-production costs' shall mean all costs and expenses of (a) treating and processing oil and/or gas, and (b) separating liquid hydrocarbons from gas, other than condensate separated at the well, and (c) transporting oil and/or gas, including but not limited to transportation between the wellhead and any production or treating facilities, and transportation to the point of sale, and (d) compressing gas for transportation and delivery purposes, and (e) metering oil and/or gas to determine the amount sold and/or the amount used by Lessee, and (f) sales charges, commissions and fees paid to third parties (whether or not affiliated) in connection with the sale of the gas, and (g) any and all other costs and expenses of any kind or nature incurred in regard to the gas, or the handling thereof,</u>

Coal Co, Ltd., No. 16-0904, 2017 WL 5192490 (W.Va. November 19, 2017), does not hold, nor does it suggest that *Tawney* does not apply to market value leases. In *Cabot*, the Court considered a 2004 arbitration award which was issued two years before *Tawney* was decided. The Court merely applied the doctrine of *res judicata* to the 2004 arbitration award and held that such award could not be vacated based upon *Tawney's* change in the applicable law since the award was issued before *Tawney* was decided. *Id.* At *3.

> <u>between the wellhead and the point of sale.</u> Lessee may use its own pipelines and equipment to provide such treating, processing, separating, transportation, compression and metering services, or it may engage others to provide such services; and if Lessee uses its own pipelines and/or equipment, post-production costs shall include without limitation reasonable depreciation and amortization expenses relating to such facilities, together with Lessee's cost of capital and a reasonable return on its investment in such facilities ....

Young, 982 F.3d at 203-04 (emphasis added).

In considering this language, which is admittedly much more specific regarding deductions than that at issue in the present case, this Court nonetheless reaffirmed and applied the three-pronged standard from the *Tawney* decision:

> … an oil and gas lease that intends to allocate post-production costs between the lessor and lessee must: (1) "expressly provide that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale"; (2) "identify with particularity the specific deductions the lessee intends to take from the lessor's royalty"; and (3) "indicate the method of calculating the amount to be deducted from the royalty for such post-production costs." 633 S.E.2d at 30. Applying this test, *Tawney* held that lease language that provides for the lessor's royalty to be calculated "at the wellhead" is ambiguous, and therefore fails to rebut the *Wellman* presumption [that the lessee is presumptively responsible for all post-production costs until the product is sold]. *Id.*

Young, 982 F.3d at 206.

Moreover, after noting the criticism of *Tawney* contained in *Leggett,* and in spite of the criticisms, the Court further held:

> An oil and gas lease must satisfy *Tawney's* three-pronged test to rebut the *Wellman* presumption that the lessee will bear all post-production costs.

Young, 982 F.3d at 207. Applying the above-referenced legal principles, this Court determined that the royalty provision in the royalty provision in the *Young* lease did indeed satisfy *Tawney's* three-pronged test. *Id.*

Contrary to Antero's contentions, and as recognized by the District Court, the *Young* decision does not have application to the royalty provisions of the leases at issue in this case, all of which fail to satisfy *Tawney's* three-pronged test, in that they do not: (1) expressly provide that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale; or (2) identify with particularity the specific deductions the lessee intends to take from the lessor's royalty; or (3) indicate the method of calculating the amount to be deducted from the royalty for such post-production costs.

D. Antero is Obligated, Under West Virginia Law, to Pay Plaintiffs' Royalties Based Upon Prices Received at the Point of Sale.

Antero argues that under the *Wellman* and *Tawney* decisions, Antero is only obligated to bear the costs incurred until the natural gas reaches any market rather than the ultimate point of sale. This contention conveniently ignores the fact that there is no such directive contained in any of the many syllabus points set forth in both cases, nor any other language which would indicate the lessee's duty is limited to bearing the costs of marketing and transporting the natural gas from the wellhead the first “alleged market.” Instead, both *Tawney* and *Wellman*, repeatedly clearly provide 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*, 633 S.E.2d at 30, syl. pts. 10 and 11 (emphasis added); *Wellman*, 557 S.E.2d at 256 (“If an oil and gas lease provides for a royalty based on proceeds received by the 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”) (emphasis added).Under both *Tawney* and *Wellman,* the lessee is responsible for all costs incurred in both the marketing and transporting of the natural gas products to the point of sale unless the lease specifically states otherwise. *Tawney, supra,* syl. pt. 1,2,10,11; *Wellman, supra*, syl. pt. 5.[3]

Moreover, in *W.W. McDonald v. EQT Production Co.,* 983 F.Supp. 2d 790 (S.D. W.Va. 2013), which is cited by Antero in support of its argument, District Judge Goodwin explicitly rejected EQT’s attempted employment of the so-called “work back method” which Antero now seeks to utilize in deducting costs incurred between the wellhead and the point of sale in order to arrive at its fictional “at the well” price.

[3] The *Leggett* Court also stated that the duty to market requires a lessee to bear the costs of transporting the product to the “point of sale,” *Leggett at* 862-863.

Judge Goodwin stated plainly that "absent lease language to the contrary, *Tawney* requires lessees to pay royalties free of all [post-production costs which enhance the value of the gas from the interstate connection price]." *W.W. McDonald*, 983 F.Supp. at 804. In essence, under the lease language at issue here, the "market" and the "point of sale" are one in the same.

Accordingly, Antero is not permitted to deduct from Plaintiffs' royalty any costs between the wellhead and the point of sale.

III. The Plain the Language of the Market Enhancement Clause in the Settlement Agreement Precludes Antero From Deducting Post-Production Costs

The plain language of the Settlement Agreement's "Market Enhancement (Gross Proceeds) Clause" prohibits Antero from taking deductions of any kind from gas or other products, including NGL's. Paragraph 14 plainly states that the royalties shall be deemed to be gross royalties and shall be calculated without regard to any post-production or market enhancement costs. Moreover, the gross proceeds provision also states that there shall be no costs, direct or indirect for oil, gas and other products produced, including NGL's. Accordingly, Plaintiffs are entitled to be paid royalty on the gross sales price of their gas and each of its constituents, including NGL's.

In any event, the Market Enhancement Clause fails to satisfy *Tawney's* second prong, in that it fails to identify "the particular products from which the costs of "enhancement" are to be deducted. *See Young*, 982 F. 3d at 208-209. Indeed, the district court found that, under the *Tawney* analysis, it is unclear whether NGL's are included as "other products", or what efforts must be undertaken to get oil, gas, and other products into their "marketable form." Had it intended that a portion of these enhancement costs be borne by the lessor, Antero was obliged under *Tawney* to use "specific language which clearly informed the [Plaintiffs]… what deductions were to be taken." *Tawney,* 633 S.E.2d at 29-30. The market enhancement clause fails to meet this standard and is therefore insufficient to allow deduction of post-production costs.

CONCLUSION

For all the reasons set forth herein, your *amici*, WVROA and WVFB respectfully request that this Court affirm the District Court's Order granting Plaintiff/Appellee's motion for summary judgment and denying Antero's Motion for summary judgment.

STATEMENT REGARDING ORAL ARGUMENT

Amicus Curiae parties WVROA and WVFB will participate in oral argument for this appeal if the Court determines that its participation would be useful and only with the Court's prior permission.

DATED: September 29, 2021

Respectfully submitted,

WEST VIRGINIA ROYALTY OWNERS' ASSOCIATION and WEST VIRGINIA FARM BUREAU

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2021, I caused this Brief of *Amicus Curiae* West Virginia Royalty Owners' Association and West Virginia Farm Bureau to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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