IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

HG ENERGY II APPALACHIA, LLC,

Plaintiff,

v. Civil Action No. 20-C-21
Judge Kurt W. Hall

_____________________, and others,

Defendants.

ANSWER OF

Comes now the Defendant ________________ seeking denial of the prayers of the plaintiff for partition of an interest in minerals either by sale at public judicial auction to the highest bidder or by allotment, and also seeking denial of the prayer for a declaration of any unprecedented implied right to pool and/or unitize in an oil or gas lease including the lease in the present case which was executed in 1952; but the defendant does not come seeking denial of the prayers of the Plaintiff for declaration of the ownership of the oil and gas underlying the subject property or for a declaration that the subject property is not susceptible to partition in kind; and the defendant comes without taking a position on the prayer of the plaintiff for an order that any lease executed by any defendant after the filing of the amended complaint is void and set aside as a cloud on title; and the defendant comes using affirmative defenses to establish that the partition statute is a round peg in a square hole for dealing with ownership of mineral interests and, because the current attempts to use the partition statute to accomplish forced leasing and pooling that was not contemplated by the Legislature in its enactment, it fails for that purpose until it is amended or the Legislature passes a forced pooling statute; and the defendant therefore says:

1. The defendant is without knowledge or information sufficient to form a belief as to the

truth of paragraphs 1 through109 and of paragraphs 112 and 113 of the Complaint and demands strict proof thereof.

2. In particular the defendant was first told by a land agent for the plaintiff that his interest was already leased and the plaintiff wanted only a lease amendment, and then counsel for the defendant was told by counsel for the plaintiff that in fact the defendant's interest was unleased as stated in the complaint, and the defendant is without sufficient knowledge or information to form a belief personally that the latter or the former is true and demands strict proof thereof.

3. The Defendant denies the allegations of paragraphs 110, 111, 114, 115, and 116 of the Complaint and demands strict proof thereof.

FIRST AFFIRMATIVE DEFENSE
REGARDING PARTITION BY ALLOTMENT

4. The partition statute does not provide for this relief sought by the plaintiff.

5. W.Va. Code §37-4-3 provides that, "When partition [in kind] cannot be conveniently made, *the entire subject* may be allotted to any party or parties who will accept it, and pay therefor . . . [Emphasis added]".

6. Paragraph 1 of the complaint lists twenty-four cotenants (or unknown heirs of those cotenants) that appear to be denominated in the Complaint as the "Partition Defendants".

7. One hundred cotenants are named as defendants in the caption of the Complaint.

8. The ownership tables for tracts 1 and 2 on pages 46 through 56 of the Complaint show 184 owners for tract 1 and 216 owners for tract 2, which are many more cotenants than the twenty-four "Partition Defendants".

9. Prayer "d." of the complaint prays only that the interest in the oil and gas underlying the subject property belonging to "Partition Defendants" be allotted to the Plaintiff; and that is not "the entire subject" required by the Code as cited above.

10. To complete the unlawful allotment proposed by the plaintiff, the general partition statute requires that the cotenant whose share has been allotted to another cotenant must be paid "fair market value" for their interests.

11. . Fair market value for interests in minerals, and for fractional interests in severed mineral interests in particular, cannot be determined for the reasons set out in the subsections below:

a. W.Va. Code §37-4-3 provides that if allotment is made and the parties cannot agree on a value, the court appoints three "disinterested and qualified persons" to make, "an appraisal of the *fair market value* of the subject", and if they cannot agree then three more such persons can be appointed "as often as may be necessary."

b. The final appraisers' report of "fair market value" can be appealed to the judge who "shall take evidence upon the value of the subject in the same manner as in other chancery matters, shall find the fair market value of the subject, and shall decree payment . . ."

c. "Fair market value" as opposed to just "market value" ". . . for the purpose of valuating land and improvements taken under the power of eminent domain, is the amount of money which, as of the date of valuation, *an informed and knowledgeable purchaser* willing, but not obligated, to buy property would pay to an *informed and knowledgeable owner* willing, but not obligated to sell it. [Citation omitted] [Emphasis added]" MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST *Virginia, Words and Phrases*, "Fair Market Value".

d. The only value of the use mineral property is that it can be leased.

e. The value of the interest in the property for leasing by a lessor cannot be

determined by the financial terms of comparative lease transactions because the West Virginia Code allows memoranda of leases to be recorded to preserve public notice of leases of property instead of the full leases (*WV Code* §40-1-8), and the memoranda do not contain financial terms such as signing bonuses and royalty percentages terms the way that recorded deeds contain declarations of consideration or value for tax purposes which declarations are what is used by real estate appraisers to do fair market value analysis of surface property.

f. Drillers will not give out their leasing data to others.

g. Drillers are not required to disclose it anywhere.

h. Therefore a fair market valuation of mineral property which must be based on its leasing value cannot be informed and knowledgeable.

i. There are virtually no informed and knowledgeable sales by deed of partial or even whole interests in minerals for direct comparable sales evaluations (except by speculators using junk mail purchase offers to entice the unknowledgeable into, to use a Biblical analogy, selling their birthright for a bowl of soup). The reasons for the lack of informed and knowledgeable comparable sales are:

    i. The populace has heard of the very, very high value of horizontal shale drilling, and with real estate taxes for un-producing mineral interests is so low, and with no other use for the minerals other than leasing to drillers, selling out is generally recognized as a terrible idea.

    ii. Right now in particular the market is so down and drilling was so reduced even before the pandemic that no serious exploration and development entity is buying minerals, coupled with the fact that,

    iii. The value of oil and gas mineral interests are inherently more speculative

and uncertain than any other type of real property that could be partitioned.

j. In the experience of counsel for the defendant no appraiser will give an estimate of value without comparable transaction information somewhere in their analysis.

12. The plaintiff's prayer for partition by allotment as sought in the complaint should therefore be denied as not provided for in the statue and as not capable of occurring according to the terms set out in the statute.

SECOND AFFIRMATIVE DEFENSE
REGARDING PARTITION BY SALE

13. West Virginia Code §37-4-3 provides partition by sale can only occur if, "the interest of the other person or persons so entitled [to the subject] will not be prejudiced thereby . . . "

14. The obvious meaning of this provision in confirmed in Syllabus point 3, *Consolidated Gas Supply Corp. v. Riley* 161 W. Va. 782, 247 S.E.2d 712 (1978): "By virtue of W. Va. Code, 37-4-3, a party desiring to compel partition through sale is required to demonstrate that the property cannot be conveniently partitioned in kind, that the interest of one or more of the partes will be promoted by the sale*, and that the interests of the other parties will not be prejudiced by the sale* [Emphasis added]." .

15. In the present case the interest of the defendant Buddy Lee Terterman will be prejudiced by the sale.

16. "So sacred is the right of property that to take it from one man and give it to another for private use is beyond the power of the state itself, even upon payment of full compensation" *Elder vs. Diehl*, Circuit Court of Pleasants County, Case No 14-C-9, Judge Sweeney, "Order Denying Partition", September 11, 2014, Page 2, Paragraph 5.

17. "To force a sale, whether by allotment or public sale, violates basic tenants of individual

property rights and in this particular case forces the exchange of an interest in real property for a sum of personal property in violation of the unqualified owner's right to have such interest remain in such condition as he sees fit [citations omitted]." *Supra*., Paragraph 6.

18. The interests of defendants, "would be prejudiced by a sale due to their likely inability to compete for purchase as individuals against a large oil and gas producing bidder, which inability will likely result in the loss of their mineral interest . . . " *Supra* Page 3, Paragraph 7.

19. In *Bowyer v. Wyckoff*, 238 W.Va. 446, 796 S.E.2d 233, the West Virginia Supreme Court agreed with the position of the defendant that his mineral interest is not subject to partition by sale or allotment as set out in the following subparagraphs:

a. The Supreme Court did not uphold one of the reasons that the Circuit Court below denied the partition sale. That failed reason was that "there be an inability of the mineral owners to agree on how to develop the mineral estate." At p. 451; 239.

b. However, the Circuit Court also found another reason to deny the partition sale, saying, "The forced sale of oil and gas minerals precludes the owner the benefit of lease consideration [a signing bonus which alone is equal to some forced allotment reimbursement valuations] and the prospect of production proceeds [royalty payments which over time which are even more valuable than up front payments] which represent the primary and perhaps the exclusive value which such ownership vests. Therefore, the public interest [i.e. the interest of "the other person or persons"] will not be promoted by sale". *Ibid.*

c. The Supreme Court affirmed the Circuit Court's denial of partition by sale (or allotment) below stating, "This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record regardless of the ground, reason or theory assigned by the

lower court as the basis for its judgement. [Citation omitted]" *Supra*., Syllabus point #3.

d. "Affirmed." (*Supra* p. 241; 454) on the legal ground stated in b. above.

20. A forced sale by auction on the courthouse steps would not result in a fair market value for the reasons stated in the following subparagraphs:

a. Because a mineral tract can only be produced under West Virginia law with the signature of each and every owner on a lease, and because the plaintiff holds a plurality of ownership of the mineral interest (shared with another owner with an equal plurality) and a 94% dominant position of the signed leasehold interest, the interest of the defendant that would be auctioned has no value to any other person or entity whose bid amounts could be said to be a bid competent to establish the interest's fair market value to the plaintiff.

b. "Fair market value" as opposed to just "market value" ". . . for the purpose of valuating land and improvements taken under the power of eminent domain, is the amount of money which, as of the date of valuation, *an informed and knowledgeable purchaser* willing, but not obligated, to buy property would pay to an *informed and knowledgeable owner* willing, but not obligated to sell it. [Citation omitted] [Emphasis added]" MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST *Virginia, Words and Phrases*, "Fair Market Value".

c. The only value of use of mineral property is that it can be leased.

d. Bidders at a public auction will not know the leased value of mineral property because West Virginia Code allows memoranda of leases to be recorded to preserve public notice of leases instead of the recording of the full leases (*WV Code* §40-1-8) , and the memoranda do not contain financial terms such as

signing bonuses and royalty percentages terms the way that recorded deeds contain declarations of consideration or value for tax purposes which declarations are what is used by real estate appraisers to do fair market value analysis of surface property. Therefore a purchase by public auction would only lead to a speculative market value, and such a purchase would not be competent evidence of an informed and knowledgeable fair market value.

e. "Given the speculative and uncertain nature of the value of oil and gas mineral interests which are not leased and/or under production and [particularly if] situate in a geographical area which has yet to be developed, a public sale is deficient and inadequate to calculate and equitably reflect the value of such interests, thus creating a substantial risk of prejudice of the owners of not realizing a fair value for their respective interests." *Elder* 'Supra. Page 3, Paragraph 8. And the plaintiff is assuredly not going to provide its proprietary research of the productivity of the formation to all of the bidders at the sale.

21. The plaintiff's prayer for partition by sale should therefor be denied.

THIRD AFFIRMATIVE DEFENSE
REGARDING NO IMPLIED COVENANT TO POOL.

22. Should strict proof show that the interest of the defendant has already been leased so that the plaintiff is seeking a declaration of an implied right to pool in an existing lease, the defendant states that no such implied right to pool as stated in Paragraph 110 of the Complaint exists in the law.

23. The 1952 lease does not have a pooling clause and is obsolete for that and other reasons for purposes of modern horizontal shale exploration and production.

24. The creation of an implied right to pool would not be an extension of existing law, but

alchemy of existing law into one-sided forced pooling gold for drillers.

25. No court, except one trial court the opinion of which will be discredited below, has held there is an implied right to pool.

26. Long-standing law in every jurisdiction in the country holds that contracts, and especially oil and gas leases, are interpreted against the drafters, in this case the drillers.

27. Where the courts have implied covenants into leases, like the covenant to fully develop, it is because the leases are drafted by the drillers and presented by them to the landowners who are infinitely less sophisticated in oil and gas operations and law (and it is because the leases are not subject to any consumer protection statutes or regulations). So, courts have historically adopted "implied covenants" to the leases in order to fill in gaps in the language of lease contracts to protect mineral owners and not to protect the drafters/drillers. This would be the first implied covenant anywhere that benefits the drafter/driller and certainly the first that would do so by imposing outdated economic terms such as royalty amounts that are made obsolete by new drilling techniques to new types of formations etc.

28. An implied covenant should not be read into an obsolete lease negotiated based on entirely different techniques, formations, production, and production efficiencies. The obsolescence of the lease in the present case is obviated by the fact that it is a flat rate lease that only requires the payment of a gas royalty of $300 a year for a well that produces just gas, and $25 a year for a well that produces oil and gas, that if applicable now would only pay $300 a year for a well that over its life will produce a conservative estimate of more than $50,000 worth of gas – per acre.

29. The only opinion establishing an implied right to pool is an unpublished Circuit Court judge's opinion in *American Energy -- Marcellus, LLC vs. Poling*, Tyler County Circuit Court, Civil Action No. 15-C-34 H, April 15, 2016, and it is erroneous as set out in the subparagraphs

below.

a. First, by the time the Circuit Court judge ruled on the issue there was no party on the other side of the issue in the case to argue against it. For any party that was personally served and appeared, the driller entered into agreed leases to pay something like current market payments for pooling amendments and other terms. For unlocatable and unknown parties who could not be personally served but were served only by publication, the driller negotiated a lease with their court-appointed guardian ad litem to pay something like current market payments for pooling amendments and other terms. So the ruling was made only against the only persons left in the case, those persons who were personally served and did not appear in person or by counsel in opposition.

b. Second, because there was no party left to argue against the ruling, there was no party who could have, and certainly would have, appealed the ruling to the West Virginia Supreme Court where it almost certainly would have been overturned.

c. Third, a necessary party or necessary parties, the surface owner or owners, were missing in the case.

   i. "A person who is subject to service of process shall be joined as a party in the action if . . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined the Court shall order that the person be

made a party." WV Civ. Proc. Rule 19 Joinder of persons needed for just adjudication.

ii. The surface owner or owners had an interest relating to the subject of the action because:

(1) The partition was of the mineral tract which carried with it the right of the owner/lessee of the mineral tract to enter onto the surface owners' property reasonably and in the contemplation of parties at the time of severance.

(2) Until the unanimous ruling of the West Virginia Supreme Court in *EOT Prod. Co. v. Crowder*, 242 W.Va. 1, 828 S.E.2d 800 (W. Va. 2019) drillers were claiming that the right to reasonable use of the surface above a mineral tract was the right to use that surface to drill not only into the mineral tract underlying the surface tracts, but for drilling miles of horizontal well bores into acres and acres of neighboring mineral tracts.

(3) The ruling removed the need for the driller to use the alternative legal procedure in West Virginia Code 55-12A-1 *et seq*.," Lease and Conveyance of Mineral Interests Owned by Missing or Unknown Owners or Abandoning Owners," against the abandoning owners who were served but did not appear, and the use of that procedure could have led to the surface owner or owners being given an interest in the minerals plus all the royalties and signing bonus which were held by the Court!

iii. The surface owner or owners were not joined in the suit and did not have

the opportunity to argue against or appeal the ruling. So a necessary party to the suit was missing.

d. Fourth, the legal conclusions of the Circuit Court contradict all the cases on the same point in other states, and those decisions would have influenced the judge to rule differently had there been a party in opposition to do the research and make the arguments.

e. Fifth, it is based on a “cross-conveyance” property law theory of pooling, and the West Virginia Supreme Court has adopted the “contract” law theory of pooling.

f. Sixth, the ruling also stated in its implied pooling covenant that the royalties for gas produced from a well bore draining the mineral tract in question would be shared with the owners of all of the tracts in the unit in proportion to the acreage of each tract to the total acreage in the unit; so in situations where all the wells that the driller planned to be drilled in a unit as designated by the driller ended up not being drilled and completed, then royalty paid on gas from the tract in question would be paid to the owners of all of the tracts including those not being drained by any planned, but undrilled well (but the owner of the tract in question would not get paid any royalty from gas in tracts that would have been drained by the undrilled wells) — which is an unheard of gift of royalty from the production of gas in the tract belonging to the defendant ________________'s to the owners of other mineral tracts as a result of a court's implying a provision in a lease.

g. Seventh, as written, the ruling also stated in its implied pooling covenant that (in those same some situations where all the wells in a designated unit are not drilled and completed) a lease on a tract could be held in effect by production from wells drilled into other tracts in a unit as it is designated by the driller while only paying

an amount that is only a fraction of the royalty that would be due to the defendant if gas was being produced from all the tracts in the unit or if he was paid all the royalties from his gas — which is also an unheard of, inequitable, implied provision in a lease.

30. So there is no implied right to pool in any lease and certainly not the 1952 lease in question and the plaintiff's prayer for that relief should be denied.

FOURTH AFFIRMATIVE DEFENSE
REGARDING TERM "CONJOINTLY"

31. Should strict proof show that the interest of the defendant has already been leased and the plaintiff is seeking a declaration of an implied right to pool, the defendant states in Paragraph 10, that the use of the term "conjointly" in the 1952 lease also does imply a right to pool and unitize the tract with other tracts in the sense that those concepts are applied for the drilling of horizontal well bores through shale formation for miles using techniques not contemplated by the partes in 1952, many of which techniques result in efficiencies and therefore financial rewards not contemplated by the parties.

32. Modern pooling and unitization clauses have a long variety of provisions relating to modern horizontal shale drilling some of which establish the processes and grant rights to carry out the processes to the lessee and some of which protect the lessor from overreaching by the lessor; and a decision implying a right to pool and unitize merely by the use of the word "conjointly" in a lease would not address all of those issues while violating the well-established point of common law that is emphasized for oil and gas leases that such documents are construed against the drafter/lessor.

33. In the alternative, unlike the lease in the case cited in Paragraph 110 of the Complaint herein, namely *Stern v. Columbia Gas Transmission*, LLC, C.A. No. 5:15CV98, 2016 WL

7053702 (N.D. W.Va. December 5, 2016), the five words, "and conjointly with other lands," in the present lease are not in the granting "Leasing Clause" or any lease extension clause, but are instead in the next paragraph and follow language providing for the rights to have surface operations on the leased tract for production from wells drilled on the surface of neighboring tracts, to wit: "; together also with rights of way and servitudes on, over and through said land for pipe lines, telephone and telegraph lines, electric power lines, structures, plants, homes and building for employees, drips tanks, stations, homes for gates, meters and regulators, and all other rights and privilege necessary, incident to and convenient for the economical operation of this land alone and conjointly with other lands for the production and transportation of oil and gas, and for the storage of any gas therein; ". These words as used in the lease in the present case do not therefore imply pooling and unitization for the drilling of horizontal well bores under and through the ground.

RESERVATION OF FIFTH AFFIRMATIVE DEFENSE
SHAM CONVEYANCE

34. The defendant reserves the right to raise appropriate affirmative defenses that may be discovered after further investigation and discovery, as a result of any sham conveyance to the plaintiff for the purpose of enabling it to file a partition suit that it would not be able to file if its only interest in the subject tract was as a lessor.

PRAYER

WHEREFORE the defendant prays that the Court:

Deny the prayer of the Plaintiff in prayer paragraph “b.” to declare the right to pool and/or unitize is implied generally or in particular implied in the 1952 lease by use of the term “conjointly”,

Deny the prayer of the Plaintiff in prayer paragraph “d.” for partition by allotment,

Deny the prayer of the Plaintiff in prayer paragraph “e.” for partition by judicial sale,

Deny the prayer of the Plaintiff in prayer paragraph “g.” for appointment of a special commissioner to conduct the judicial sale, and

Order such other and further relief as the court may deem just and proper.

_____________________, Defendant
By counsel

__________________________________________
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CERTIFICATE OF SERVICE

I, David B. McMahon, attorney for the defendant ________________, do hereby certify that I have this ____ day of June, 2020, served a copy of the foregoing Answer, upon the plaintiff and other parties who have appeared in the case, by depositing the same postage prepaid in the United States mail addressed as set out below:

___________________________
___________________LLP
Counsel for the Plaintiff
____________________________
Morgantown, West Virginia 26501

_____________________________
_____________________________
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______________________________________

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