



*Frank W. Volk*  
Frank W. Volk, Chief Judge  
United States Bankruptcy Court  
Southern District of West Virginia

12/18/17

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON**

IN RE:  HARD ROCK EXPLORATION, INC., CARALINE ENERGY COMPANY, BROTHERS REALTY, LLC, BLUE JACKET GATHERING, LLC, and BLUE JACKET PARTNERSHIP, <i>Joint Administration</i>  Debtors.	CASE NO. 2:17-bk-20459  CHAPTER 11   JUDGE FRANK W. VOLK
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Pending is the Motion by the Debtors to Use Cash Collateral [Dckt. 21] (“cash collateral motion”). The Court held hearings on the cash collateral motion on September 28 and October 4, 2017, and requested further briefing. The United States Trustee’s Office (the “UST”) filed its brief [Dckt. 119], followed by the Debtors [Dckt. 121]. The Huntington National Bank (“HNB”) filed its post-hearing brief [Dckt. 123] and then a follow-up brief [Dckt. 141]. Once formed, the Official Committee of Unsecured Creditors also filed a Response [Dckt. 161]. On December 4, 2017, the Court held another hearing on the cash collateral motion.

All that is presently before the Court is the extent of HNB’s lien and the extent of the Debtors’ assets that constitute collateral.

**I.**

Hard Rock Exploration, Inc. (“Hard Rock”); Caraline Energy Company (“Caraline”); Brothers Realty, LLC (“Brothers”); Blue Jacket Gathering, LLC (“BJG”); and Blue

Jacket Partnership (“BJP”) (collectively the “Debtors”) are all entities organized under West Virginia laws. The Debtors are independent oil and gas development companies who share a principal place of business in Charleston, West Virginia. The Debtors have developed over 350 miles of pipeline systems to gather and transport production from certain oil and gas wells. The Debtors have two distinct operation arrangements: 2003-2008 wells (“Hard Rock Wells”) and 2009-2014 wells (“Program Wells”). The Hard Rock Wells were almost exclusively vertical wells placed on property leased by Hard Rock. The Debtors operate the Hard Rock Wells and transport and sell the gas from those wells. However, entities other than the Debtors also have an interest in these wells. The Debtors’ share of the proceeds ranges from approximately 0.5-44.5%.

After 2009, the Program Wells entered production. They are owned by six West Virginia limited partnerships. These six limited partnerships were formed from 2009-2014. To raise money for exploration and drilling, investors were solicited by Hard Rock to buy units of the limited partnerships. Those funds were placed with HNB, who served as the Escrow Agent. HNB held the funds in escrow until the minimum funding requirements were met. Then HNB distributed the funds for well placement and development. After forming the limited partnerships, the Debtors would enter into a general partnership with the limited partnership with the Debtors retaining a 10% share, known as a working interest. Hard Rock leased mineral rights from property owners to acquire the right to drill on the land. After the leases were acquired, Hard Rock assigned the wells to the limited partnerships. In consideration of that assignment, Hard Rock operates the wells and sells the gas for an operating fee and a transportation fee.

Currently, the Debtors are operating over 380 wells. Sales of the oil and gas under both arrangements yield approximately \$500,000 of revenue each month. A significant portion of



the Debtors' monthly revenue, around \$140,000 each month, is derived from the monthly operating fees and transportation fees paid by the limited partnerships.

In 2005, HNB began providing a series of loans to the Debtors. HNB has filed documentation to support its claim that all of the Debtors' assets, including its cash, are encumbered by liens securing the \$26 million in loans. The Debtors disagree.

HNB's interest in the Debtors' property is set forth in the Deeds of Trust, which have been recorded in various counties, and the UCC-1 Financing Statements filed with the West Virginia Secretary of State. The granting language in the Deeds of Trust states:

[T]he Mortgagor, for and in consideration of the premises and the sum of TEN DOLLARS (\$10.00) and other good and valuable consideration paid to the Mortgagor, the receipt and sufficiency of which is hereby acknowledged, and for and in consideration of the debts and trusts hereinafter mentioned, have granted, bargained, sold, warranted, mortgaged, assigned, transferred and conveyed, and by these presents do grant, bargain, sell, warrant, mortgage, assign, transfer and convey unto the Trustee and to their successor or successors or substitute in this trust, with power of sale for the use and benefit of the Bank, all of the Mortgagor's right, title and interest, whether now owned or hereafter acquired, in all of the hereinafter described properties, rights and interests; and, insofar as such properties, rights and interests consist of equipment, general intangibles, accounts, contract rights, inventory, fixtures, as extracted collaterals, instruments, proceeds of collateral or any other personal property of a kind or character defined in or subject to the applicable provisions of the Uniform Commercial Code of the State of West Virginia, the Mortgagor hereby grants to said Trustee for the use and benefit of the Bank a security interest therein; namely:

- (a) the Lands described in Exhibit A, as said Exhibit A may from time to time be amended or supplemented,
- (b) the Gas System and all Gas Contracts and accounts resulting from the operation thereof,
- (c) the Operating Equipment,
- (d) the proceeds and products of the foregoing, together with any and all corrections or amendments to, or renewals, extensions or ratifications of, any of the same or of any instrument relating thereto, all rights-of-way, franchises, licenses, permits, certificates of public conveniences and necessity, easements, contractual rights, tenements, hereditaments and appurtenances now existing or in the future obtained in connection with any of the aforesaid, and all other things of value and incident thereto that any Mortgagor might at any time have or be entitled to, and all the interests specified in Exhibit A and all the aforesaid properties, rights and interests



described in this Granting Paragraph, together with any additions thereto, that may be subjected to the lien of this instrument by means of supplements hereto, being hereinafter called the "Mortgaged Property". . . .

The UCC-1 Financing Statements provide the following collateral description:

COLLATERAL:

- (a) the Lands described in Exhibit A, as said Exhibit A may from time to time be amended or supplemented,
- (b) the Gas System and Gas Contracts and all accounts resulting from the operation thereof,
- (c) the Operating Equipment,
- (d) the proceeds and products of the foregoing, together with any and all corrections or amendments to, or renewals, extensions or ratifications of, any of the same or of any instrument relating thereto, all rights-of-way, franchises, licenses, permits, certificates of public conveniences and necessity, easements, contractual rights, tenements, hereditaments and appurtenances now existing or in the future obtained in connection with any of the aforesaid, and all other things of value and incident thereto that Mortgagor might at any time have or be entitled to.

DEFINITIONS:

- A. "Gas Contracts" shall mean (i) all contracts (whether preliminary or final in nature) now or hereafter entered into by the Mortgagor and another party (and any and all amendments or modifications thereto) providing for the sale, purchase, exchange, processing and/or storage by the Mortgagor of natural (whether processed or not processed), manufactured or mixed gas or of natural gas liquids or other liquid hydrocarbons and (ii) all contracts (whether preliminary or final in nature) now or hereafter in effect (and any and all amendments or modifications thereto) providing for the sale, purchase, exchange, processing, transportation and/or storage of natural (whether processed or not processed), manufactured or mixed gas or of natural gas liquids or other liquid hydrocarbons under which contracts the Mortgagor has, whether as a result of assignment or by operation of law, any rights of any nature whatsoever.
- B. "Gas System" shall mean all lands, leases, surface leases, rights-of-way, road crossings, railroad crossings, ditch, canal and river crossings, easements, licenses, franchises, permits, pipelines (including gathering lines, laterals and trunklines), compressors, regulating stations, metering stations, valves, wells, tanks, separators, fencing and other facilities comprising a gas gathering and gas delivery system (in which the Mortgagor has or may have any interest) or necessary for or used or useful primarily in connection with the gathering, transporting, transmitting, distributing or supplying of natural, manufactured or mixed gas or of natural gas liquids or other liquid hydrocarbons, together with all storage tanks and facilities for storage of gas on, under or over ground, located on or forming a part of such gas gathering and gas delivery system . . .



- E. "Lands described in Exhibit A" shall include all of the Company's right, title and interest in and to the real estate, leases, leasehold estates and all other interests in real estate, the description of which is contained in Exhibit A or incorporated in Exhibit A by reference to another instrument or document. References in Exhibit A to individual leases or percentage interests are included only to identify particular leases. All of the Company's interests (whether such interests are properly identified or not) are subject to the lien of the Mortgage . . .
- I. "Operating Equipment" shall mean all surface or subsurface machinery, equipment, facilities or other property of whatsoever kind or nature (excluding drilling rigs, trucks, automotive equipment or other property taken to the premises to drill a well or for other similar temporary uses) now or hereafter located in or on any of the Lands described in Exhibit A that are used or useful for the production, treatment, storage or transportation of Hydrocarbons, including, without limiting the generality of the foregoing all oil wells, gas wells, water wells, injection wells, all casing, tubing, rods, pumping units and engines, Christmas trees, derricks, separators, heater treaters, valves, gun barrels, flow lines, tanks, gas systems and compressors (for gathering, treating and compression), water systems (for treating, disposal and injection), pipelines (including gathering lines, laterals and trunklines), files, records, logs, maps, writings, database, information, systems, title opinions, title abstracts, title materials and information, technical data, interpretative and analytical reports of any kind or nature, computer hardware and software and all documentation therefor or relating thereto (including all licenses relating to or covering such computer hardware, software and/or documentation), power plants, poles, lines, transformers, starters and controllers, machine shops, tools, storage yards and equipment stored therein, buildings and camps, telegraph, telephone and other communication systems, roads, loading racks and shipping facilities.

HNB offers four arguments alleging that its lien extends to all property including post-petition cash collateral, because it has perfected a lien on the Gas System, Gas Contracts, Equipment and Lands as well as all accounts, proceeds, and products thereof. All of HNB's arguments hinge on the fact that it properly recorded the Deeds of Trust in the counties where the Debtors operate, including Roane, Putnam, Cabell, Mason, Jackson, Lincoln, Boone and Kanawha. HNB also provided the UCC filings to the West Virginia Secretary of State. Perfection has been evidenced.

First, HNB argues that, based on the language of the Deeds of Trust and Security Agreements, all of the Debtors' personal property and real property is encumbered by the liens. As noted, the language in the Deeds of Trust and UCC filings encompasses the "Gas System and Gas Contracts and all accounts resulting from the operation thereof." Gas System includes, but is not limited to, all lands, leases, easements, and pipelines used in gathering, transporting, and distributing gas. Gas Contracts includes, but is not limited to, all contracts "providing for the sale, purchase, exchange, processing and/or storage of gas." HNB further argues that all revenue sources are encumbered based on the granting language, which encompasses "all proceeds and products" of "the Gas System and Gas Contracts and all accounts resulting from the operation thereof" including, but not limited to, all "easements, contractual rights, tenements, hereditaments and appurtenances" "now existing or in the future obtained in connection with any of the aforesaid, and all other things of value and incident there to that [Debtors] might at any time have or be entitled to." Further, HNB's security interests cover the Debtors' headquarters pursuant to (1) a Credit Line Deed of Trust and Security Agreement, and (2) an Assignment of Leases and Rents, which were recorded in Kanawha County.

Second, HNB argues that the Deeds of Trust serve as security agreements. Again based on the same language above, the Debtors granted HNB security interests and liens in the Gas System, the Gas Contracts, the Operating Equipment, and all accounts resulting therefrom and all proceeds and products arising therefrom.

Third, HNB argues that the granting language covers after-acquired property, including leases. HNB argues that, based on the granting language, all of the Debtors' leases are covered regardless of whether they are specifically identified in Exhibit A attached to the Deeds of Trust. This argument focuses on the granting language that defines "Lands described in Exhibit



A” to include “all of the Company’s interests whether such interests are properly identified or not . . . whether now owned or hereafter acquired.” HNB contends that the Debtors’ leases are covered whether they are specifically listed or not in Exhibit A. Furthermore, the granting language gives HNB an interest in any “Gas Contracts”, “contractual rights”, “hereditaments”, and “all other things of value” that are “now owned or hereafter acquired.” Because of this specific language, HNB asserts that it has an interest in all property including that which is after-acquired.

Fourth, HNB argues that bona fide purchasers have constructive notice of HNB’s interest in all of the property as required by West Virginia recording statutes. Inasmuch as the Deeds of Trust were properly recorded in every county in which the Debtors operate, a record search in any of those counties would result in the discovery that the Debtors’ property was encumbered. HNB argues that the granting language would give notice that not only the land in Exhibit A was encumbered but also the Gas System, all as-extracted collateral, and all proceeds and products related thereto including all present and future interests of the Debtors, based on the preceding argument described more thoroughly above. In addition, HNB argues that broad property descriptions are frequently upheld, as exhibited by the decision of the Supreme Court of Appeals of West Virginia in *Holley’s Ex’r v. Curry*, which holds that general descriptions are usually held good. 58 W. Va. 70, 51 S.E. 135 (1905). Because the Deeds of Trust are properly recorded and comply with West Virginia laws, HNB argues that adequate notice is provided and that the Debtors’ property interest is encumbered.

The Debtors respond with three arguments alleging that the extent of HNB’s lien on the cash collateral, if it exists, is sharply limited. First, the Debtors argue, based on the granting language of the Deeds of Trust, that the extent of HNB’s lien is limited to only real property and fixtures described in Exhibit A of the Deeds of Trust. This argument focuses on the granting

language and emphasizes the phrase “the description of which is contained in Exhibit A by reference to another instrument or document.” Because HNB did not amend Exhibit A, the Debtors argue that after-acquired property is not subject to HNB’s lien. The Debtors argue that HNB has not met the description requirement of West Virginia Code § 46-9-502(b). The Debtors believe that it is illogical to conclude that the self-correcting language in the granting documents meets statutory description requirements. In essence, it would allow a creditor to claim a lien on all property whether or not it was properly described as required by the governing law. Because HNB has failed to use specific language to properly identify its interest, the Debtors argue that only that interest specifically identified in Exhibit A is covered. The Debtors go on to state that those leases described in Exhibit A have all expired and are no longer enforceable. However, the Debtors have offered no evidence of this expiration.

Second, the Debtors argue that HNB’s various descriptions of real estate and other property in the Deeds of Trust are insufficient under West Virginia law to give a bona fide purchaser constructive notice of a competing claim. The Debtors argue that West Virginia law requires the granting language in deeds of trust to have an adequate and ascertainable description of the real estate and does not allow generic, broad language. The Debtors attempt to distinguish the present case from the decision in *Holley*, arguing that the approved language in *Holley* provided some specific, concrete description of the property in question. Inasmuch as HNB used broad language to define its interest in the property instead of specifically describing the property, the Debtors argue that if a title or similar search was performed, HNB’s mortgage or security interest would not be found in the chain of title. Because a bona fide purchaser could not obtain constructive notice of the lien, it could be avoided under 11 U.S.C. §§ 544(a)(3) and 1107(a).



Third, the Debtors argue that the bank did not perfect its security interest in the as-extracted minerals or fixtures, because the HNB's documents did not meet the description requirements under the West Virginia Uniform Commercial Code. The Debtors argue that a financing statement covering fixtures must provide a sufficient description to reasonably identify the collateral so that constructive notice is given. Further, the Debtors argue that generic language is prohibited under West Virginia Code § 46-9-108. The Debtors argue that HNB failed to properly identify the lands or leases that comprise the Gas System and as such the Gas Contracts and accounts resulting therefrom cannot be identified. Because HNB's documents used broad language, the Debtors argue that HNB's lien is limited to the Debtors' interest and leases only in Mason County that is identified in Exhibit A and the ownership interest in the equipment thereon.

## **II.**

### **A. Governing Law**

One of the most important assets for a trustee or debtor-in-possession is cash (or proceeds derived from property of the estate), namely, that working capital needed to keep the business open by maintaining inventory, making payroll, and more. However, there is usually a wrinkle; the wrinkle often arises when the cash or the proceeds from property of the estate are encumbered by one or more liens in favor of creditors. These funds are known as "cash collateral," which is defined in Section 363(a) of the Bankruptcy Code as "cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest . . . ." 11 U.S.C.S. § 363(a). Importantly, Section 363 does not *create* property interests; rather, the existence of interests in

cash collateral are determined by state law. Thus, a threshold issue is whether the funds in question qualify as cash collateral.

The Debtors are all West Virginia corporations, their operations are confined within West Virginia's borders, and the parties contracted in the Deeds of Trust to be governed by West Virginia law. It is thus evident that West Virginia law controls, and no one contends otherwise.

In West Virginia, deeds of trust "convey title to real property in trust as security until the grantor repays the loan." *Arnold v. Palmer*, 224 W. Va. 495, 503, 686 S.E.2d 725, 733 (2009). They may convey "both real property or some interest therein and personal property or only real property or some interest therein or only personal property in order to secure a debt." W. Va. Code § 38-1-1a. If the deed of trust "conveys both real and personal property," a financing statement is required regarding the personal property, as required by W. Va. Code § 38-1-1a. Deeds of trust, along with other types of conveyances, are invalid as to other creditors and subsequent purchasers until they are recorded in the county wherein the property exists or "may be." W. Va. Code § 40-1-9. This is done for personal property via a Uniform Commercial Code filing, after which the lien is "perfected." W. Va. Code § 46-9-310.

Generally, a valid financing statement under West Virginia law will be "sufficient" when it "(1) [p]rovides the name of the debtor; (2) [p]rovides the name of the secured party . . . ; and (3) [i]ndicates the collateral covered by the financing statement." W. Va. Code § 46-9-502(a). And, if a financing statement is filed as a fixture filing, it must "(1) [i]ndicate that it covers this type of collateral; (2) [i]ndicate that it is to be filed for record in the real property records; (3) [p]rovide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property; and (4) [i]f the debtor does not have an interest of



record in the real property, provide the name of a record owner.”<sup>1</sup> W. Va. Code § 46-9-502(b). Reasonable identification, in terms of the sufficiency of description, includes specific listing, category, a type of collateral defined in the UCC, quantity, computational or allocational formula or procedure, or any other method, if the identity of the collateral is objectively determinable. W. Va. Code § 46-9-108(b). Importantly, “[a] description of collateral as ‘all the debtor’s assets’ or ‘all the debtor’s personal property’ or using words of similar import does not reasonably identify the collateral.” W. Va. Code. § 46-9-108(c).

A “fixture” under West Virginia law is defined as “goods that have become so related to particular real property that an interest in them arises under real property law.” W. Va. Code § 46-9-102(41). A fixture filing is thus “the filing of a financing statement covering goods that are or are to become fixtures and satisfying section 9-502(a) and (b).” W. Va. Code § 46-9-102(40). The Supreme Court of Appeals of West Virginia has decided that, “[b]efore a machine can become a fixture the following must occur: attachment to the real estate; adaptation to the use of real estate and intention of the party to make it permanently part of the real estate.” *West Virginia Dep’t of Highways v. Thompson*, 180 W. Va. 114, 117, 375 S.E.2d 585, 588 (1988) (citing *Syl.*, *Smuffler v. Spangler*, 79 W. Va. 628, 92 S.E. 106 (1917)).

There must be a degree of certainty and description in every deed of trust, such that anyone looking at land records must be able to identify the subject real property. Regarding the description of real estate secured by a deed of trust, “[i]t may be laid down generally that great liberality is allowed in the matter of description” and “[u]sually, general descriptions, such as ‘all the estate both real and personal of the grantor,’ ‘all my land’ in a certain town, county or state,

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<sup>1</sup> “Fixtures” under the West Virginia UCC are “goods that have become so related to particular real property that an interest in them arises under real property law.” W. Va. Code § 46-9-102.

‘all my land wherever situated,’ . . . and the like, are held good.” *Holley’s Ex’r v. Curry*, 58 W. Va. 70, 51 S.E. 135, 136 (1905); *see also White v. Core*, 20 W. Va. 272, 280 (1882) (holding that the description on land “purchased by White of Core,” was sufficient, given that there was only one tract of land purchased from Core by White). The real estate in the *Holley* case was described as being “near Hamlin,” and was also identified by the individuals involved in the conveyance and by common nickname. *Id.* “A deed will not be declared void for uncertainty if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property it is intended to convey.” *Harper v. Pauley*, 139 W. Va. 17, 21, 81 S.E.2d 728, 731-32 (1953); *see also Sally-Mike Properties v. Yokum*, 175 W. Va. 296, 301-02, 332 S.E.2d 597, 602 (1985); *Consolidation Coal Co. v. Mineral Coal Co.*, 147 W. Va. 130, 126 S.E.2d 194 (1962). In contrast, other descriptions have been declared insufficient, such as “boundary of land containing 600 acres, more or less, situate in Crook district, Boone county, West Virginia . . . On the West Fork of Little Coal River, and James [C]reck of said West Fork” and “mere description[s] of a tract of land as containing a certain number of acres . . . .”. *Crawford v. Workman*, 64 W. Va. 10, 61 S.E. 319, 320 (1908); *Harper*, 139 W. Va. at 29.

Importantly, deeds of trust are subject to the “principles of interpretation and construction that govern contracts generally.” *Arnold*, 224 W. Va. at 503 (internal quotation marks omitted). And, generally, in West Virginia, “[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.” *Id.* (quoting *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1963)). However, if judicial construction is necessary, “the function of a court is to ascertain the intent of the parties as expressed in the language used by them.” *Id.* (quoting *Davis v. Hardman*, 148 W. Va. 82, 89, 133



S.E.2d 77, 81 (1963)). That means that it must be interpreted as “a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith.” *Id.* (quoting Syl. pt 1, *Maddy v. Maddy*, 87 W. Va. 581, 105 S.E. 803 (1921)). Importantly, “[i]t is not the right or province of a court to alter, pervert, or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.” *Faith United Methodist Church and Cemetery of Terra Alta v. Morgan*, 231 W. Va 423, 444, 745 S.E.2d 461, 482 (2013) (quoting Syl. pt. 3, *Cotiga Development Co.*, 147 W. Va. 484).

“The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court.” Syl. pt 2, *In re Joseph G.*, 214 W. Va. 365, 589 S.E.2d 507 (2003) (quoting Syl. pt. 1, *Berkeley County Public Service District v. Vitro Corporation of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968)). Language in a contract “is considered ambiguous where an agreement’s terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken.” Syl. pt. 3, *Joseph G.*, 214 W. Va. 365, 589 S.E.2d 507.

Some deeds of trust contain “after-acquired property” clauses. These clauses often provide security interests in certain property owned at the time of the agreement and in property that arises or is acquired in the future. In West Virginia, these clauses are enforceable. *Stanley v. Harrison County Bank*, 212 W. Va. 880, 883, 575 S.E.2d 639, 642 (2002). Specifically, an equitable lien in the future property is created in favor of the mortgagor or grantor of the deed of trust. *Triumph Electric Co. v. Empire Furniture Co.*, 70 W. Va. 164, 73 S.E. 325, 325 (1911).

One other matter deserves mention, although the Debtors devoted little space thereto. Title 11 U.S.C. § 522(a) says that “property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.” 11 U.S.C. § 552(a). However, that section is modified by section 552(b)(1), which explains that, if the debtor and an entity had a security agreement before the case, and if that security agreement extends both to property acquired pre-filing, as well as “proceeds, products, offspring, or profits of such property,” then the security agreement extends to those “proceeds, products, offspring, or profits” acquired post-filing. 11 U.S.C.S. § 522(b)(1). Section 522 “gives the bankruptcy court considerable latitude in applying pre-petition security interests to post-petition proceeds,” and a court may decide to apply security interests to those post-petition proceeds “based on the equities of the case.” *United Virginia Bank v. Slab Fork Coal Co. (In re Slab Fork Coal Co.)*, 784 F.2d 1188, 1191 (4th Cir. 1986).

## **B. Analysis**

At the outset, one consideration seems apparent: the parties’ mutual intention was for HNB to have a lien on every asset owned by the Debtors, given the \$26 million scale resulting from the ongoing draw and lending relationship. In order to see the extent to which that objective was accomplished, the Court turns now to the documentary web consisting of the Deeds of Trust and Financing Statements. The material language found in the Deeds of Trust is set forth again below to aid the reader:<sup>2</sup>

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<sup>2</sup> Note that the Court is using as an exemplar the Deed of Trust between Caraline Energy Company and HNB, dated August 17, 2007, found at Claim no. 6-2, p. 273 of 1655. The parties have assured this Court that all of the Deeds of Trust filed regarding the Debtors’ property are substantially similar such that only an example is necessary for review.



all of the Mortgagor's right, title and interest, *whether now owned or hereafter acquired*, in all of the hereinafter described properties, rights and interests; and, insofar as such properties, rights and interests consist of equipment, general intangibles, accounts, *contract rights*, inventory, *fixtures*, *as extracted collaterals*, instruments, *proceeds of collateral* or any other personal property of a kind or character defined in or subject to the applicable provisions of the Uniform Commercial Code of the State of West Virginia,

(emphasis added). That language is then more fully described as “(a) the Lands described in Exhibit A, as said Exhibit A may from time to time be amended or supplemented, (b) the Gas System and all Gas Contracts and accounts resulting from the operation thereof, (c) the Operating Equipment, (d) the proceeds and products of the foregoing . . . .” Exhibit A of the Court’s exemplar Deed of Trust states that HNB shall have a lien in “[a]ll of Caraline Energy Company’s real estate and real estate interests in whatever form located in Jackson County, West Virginia, excluding any working interests in oil and gas wells.”

The language is neither ambiguous nor difficult to understand. HNB has a lien on all of the property listed in Exhibit A. The next sentence, line (b), does not modify and is not modified by line (a), because there is no modifying contraction between the two. They are separate and distinct entries in list form. Thus, “Gas System” and “Gas Contracts” are not modified by or limited to the “Lands described in Exhibit A.” The entire gas system and any and all contracts relating to the production, processing, storage, or transportation of gas produced by the gas system are encompassed within line (b) of the Deeds of Trust. This would mean, for example, that HNB has a lien on any interest of the Debtors in any contracts dealing with the management of wells in the system, along with transportation and sale of gas.

HNB also has a lien in any related fixtures, and in the gas itself, as the “as extracted collaterals” indicates. Most importantly, HNB has a lien on any cash or proceeds following from the Gas System or *any* Gas Contract, as listed in line (d), which includes “the proceeds and

products of the foregoing.” And that final word – “foregoing” – means that line (d) is modified by its three predecessor lines. Thus, any product or proceed from any collateral on lines (a) – (c) is captured by HNB’s lien.

And, inasmuch as West Virginia recognizes after-acquired property clauses, the language indicates that HNB has a lien on any asset acquired by the Debtors following the effective date of the Deeds of Trust. The phrase “hereafter acquired” property, or words indicating the like, is listed several times in the Deeds of Trust, namely, in the “Gas Contracts” definition, in the “Gas System” definition (“in which the Mortgagor has or may have any interest”), in the “Operating Equipment” definition, and in the paragraph describing the collateral being given (“all of the Mortgagor’s right, title and interest, whether now owned or hereafter acquired, in all of the hereinafter described properties, rights, and interests . . . “). There is no question that the security-producing instruments before the Court provide HNB with a lien on all assets of the Debtors, along with any asset of the like that may be acquired in the future. That is the only natural reading of the subject provisions in the Deeds of Trust.

It is also consistent with the nature of the lending relationship. The liens secure a line of credit, which is an obligation that does not naturally reduce over time in a situation like this, as a mortgage would. Thus, it makes perfect sense that after-acquired property would be covered under the Deeds of Trust and HNB’s lien would continue to be secured, regardless of which gas wells or gas contracts or operating agreements or real property the Debtors sold or bought or lost or gained during the entire lending relationship.



HNB recorded the Deeds of Trust and filed corresponding UCC-1 Financing Statements.<sup>3</sup> The Financing Statements contain descriptions of the collateral in a shorter form, as follows:

- (a) the Lands described in Exhibit A, as said Exhibit A may from time to time be amended or supplemented,
- (b) the Gas System and all accounts resulting from the operation thereof,
- (c) the Operating Equipment,
- (d) the proceeds and products of the foregoing, together with any and all corrections or amendments to, or renewals, extensions or ratifications of, any of the same or of any instrument relating thereto, all rights-of-way, franchises, licenses, permits, certificates of public conveniences and necessity, easements, contractual rights, tenements, hereditaments and appurtenances now existing or in the future obtained in connection with any of the aforesaid, and all other things of value and incident thereto that any Mortgagor might at any time have or be entitled to.

The Financing Statement attachment also lists the same definitions of “Gas Contracts” and “Gas System” as are contained in the Deeds of Trust. Thus, the Financing Statements are subject to the same analysis set forth earlier.

In challenging the existence of the liens, Debtors assert that certain leases contained in the Exhibit A attachments to the Deeds of Trust have expired.<sup>4</sup> But the liens unambiguously extend far beyond those explicitly mentioned leases to all interests, present and future, mentioned

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<sup>3</sup> The Court is using as an exemplar the UCC-1 Statement found in Claim no. 6-2 of HNB, at page 869 of 1655. The attachment indicates that the financing agreement is between Hard Rock Exploration, Inc. and HNB. The parties have assured the Court that all of the UCC-1 statements filed regarding the Debtors’ property are substantially similar such that only an example is necessary for review.

<sup>4</sup> Counsel has mentioned this frequently throughout the proceedings and Mr. Stephens testified to this as well at the hearing on October 4, 2017. He claimed that certain leases in Mason County have all expired. However, this has been a bare allegation with no supporting documentation.

in the Deeds of Trust and their attachments, not just leases existing at a moment in time when the liens attached.

The Court, accordingly, concludes that the language in the Deeds of Trust and the Financing Statements provide HNB with a lien in all of the lands described in Exhibit A (whatever those may be, according to each Deed of Trust), and in the entire gas pipeline system, including gas before and after extraction, and in every single contract relating to the gas system under which the Debtors have an interest. The language does not limit the lien to the interests in existence at the time the particular Deed of Trust was produced. It also covers any interest of the like that may have arisen since that and other Deeds of Trust were executed.

The Court will now address the remaining contentions offered by the Debtors in an effort to lessen the extent of HNB's liens.

The Debtors first claim that the descriptions of collateral in the Deeds of Trust and other filings are not "sufficient" under West Virginia law. But this set of instruments is unlike those previously interpreted by the Supreme Court of Appeals, such as when the description of the land in a deed of trust referenced "a tract of land as containing a certain number of acres" as in the *Harper* case, or when it referred to land as containing around 600 acres, situate in a certain county, on a river fork and a creek, as in the *Crawford* case. The subject Deeds of Trust say who the owner of the land is and where the land is located. The language here reasonably approximates other sanctioned usages, such as "all my land" in a certain town, county or state, or "all my land wherever situated." The Exhibit A attachment to the Deeds of Trust lists "[a]ll of Caraline Energy Company's real estate and real estate interests in whatever form located in Jackson County, West Virginia . . ." This description includes the name of the owner of the interests, as well as the location of the real estate interests. It is therefore, according to *Harper*, "possible, by any



reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property it is intended to convey.”

The Court notes, as an aside, that the Debtors cite the *Roane County Bank v. Phillips* case for the proposition that the subject land tracts must be described in the deed of trust, and that reference in the deed of trust to an unrecorded document for further description of the land conveyed is not enough to “cover the parcel of land in question.” *Roane County Bank v. Phillips*, 124 W. Va. 720, 22 S.E.2d 291, 293 (1942). Importantly, this other document referenced in the case was not recorded. *Id.* However, in the instant case, the Exhibits A to the Deeds of Trust, which list the real estate interests, *were* filed with the Deeds of Trust and the UCC-1 Financing Statement and *were* recorded as Exhibits on the real estate records of this state. Thus, the *Roane* decision does not apply to limit the security interest of HNB here.

It is also the case that the description of the Gas System, the Operating Equipment, and the “proceeds and products of the foregoing” is enough to satisfy West Virginia law. The Deeds of Trust have a thorough description of the Gas System, listing for example, “lands, leases surface leases . . . licenses . . . permits, pipelines . . . and other facilities comprising a gas gathering and gas delivery system . . .”. The instruments then grant a security interest in “the Gas System” and “all accounts resulting from the operation thereof . . .” and “the proceeds and products of the foregoing . . .” which includes “contractual rights.” A reasonably diligent visitor to the public records would appreciate that HNB has a lien on all of the lands described in Exhibit A, along with, for example, a gas system that Caraline Energy Company owns and or operates. These Deeds of Trust were apparently properly recorded in every county in which the Debtors operate. Thus, a search of the records of those counties would disclose the Deeds of Trust, which indicate that

lands, the Gas System, Gas Contracts, and any and all proceeds are encumbered. There is both a certainty and fulsome descriptiveness required by West Virginia law.

The descriptions in the Financing Statements also provide enough certainty and description to satisfy West Virginia law. A financing statement must contain the name of the debtor, the name of the secured party, and an indication of the collateral covered by the financing statement. The UCC-1s here contain the name of the debtor (Hard Rock in the Court's exemplar), the name of the secured party (HNB), and a description of the collateral (Lands described in Exhibit A, the Gas System and all accounts resulting, the Operating Equipment, and the proceeds and products of the foregoing, including contractual rights). It seems that the UCC-1 filings provide more than enough information to qualify as "sufficient" in West Virginia. And, although language such as "all the debtor's assets" or "all the debtor's personal property" are not enough, the filings in this case go beyond those mentions. The UCC-1 exemplar does not simply say "all the debtor's assets"; it instead lists specific assets – the Lands described in Exhibit A, along with the Gas System and proceeds therefrom. Even the language in the Deeds of Trust exemplar, "[a]ll of Caraline Energy Company's real estate and real estate interests in whatever form located in Jackson County, West Virginia . . . " is far different than a blanket statement covering "all assets." The subject description lists the owner of the property, as well as the location, and says that it covers "real estate and real estate interests." If that was all that was attached to the financing statement, it would be enough. However, Exhibit A attached to the UCC-1 exemplar contains a *highly* detailed description of "Lands described in Exhibit A": an eleven-page listing of the programs, wells and working interest assignments in each county in West Virginia. This satisfies the West Virginia UCC-1 requirements.



The Debtors elaborate upon their “description” challenge by asserting in a somewhat confounding,<sup>5</sup> additional argument that the “as-extracted gas” is a fixture, as is potentially the entire gas system, and the Financing Statements filed by HNB do not meet the requirements under West Virginia law for a fixture filing. There is little case law in West Virginia regarding gas systems and whether they are personal property or fixtures according to the UCC. Fortunately, the Court need not adjudicate that question, as it finds that the Financing Statements as filed satisfy both the general personal property requirements contained in W. Va. Code § 46-9-502(a) *and* the requirements for a fixture filing contained in § 46-9-502(b).

The UCC-1 Financing Statement contains a list of the collateral subject to HNB’s lien. In the list, it says “the Lands described in Exhibit A,” which would lead a bona fide purchaser or other entity reviewing the filing to understand that the Deeds of Trust would have been recorded in the real property records. That satisfies the second requirement. The first requirement is satisfied because the financing agreement indicates that it is to cover fixtures. It lists “the Gas System and all accounts resulting from the operation thereof,” contains a definition of the Gas System and Gas Contracts, also lists “proceeds and products of the foregoing,” which naturally includes as-extracted minerals as a “proceed and product” of the Gas System. Thus, the first requirement is satisfied. The third requirement, that the real property relating to the fixture collateral be described sufficiently enough to provide constructive notice of a mortgage, is satisfied

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<sup>5</sup> For example, Debtors state “[a] security interest in ‘as extracted minerals’ may only be perfected by a real estate filing. A security interest in fixtures is perfected by filing a financing statement with the Secretary of State . . . .” But then, not two pages later, the Debtors say “while natural gas is in the ground, it is real estate and may be secured by a Deed of Trust. However, once the gas leaves the earth, it becomes personal property subject to the perfection and filing provisions of Article 9.” So, are the Debtors asserting that the extracted gas is real estate, or personal property or a fixture? The Court is genuinely unsure. [Dckt. 121, ¶¶ 36-42]. The Court also notes that HNB’s briefs are of little help as well, devoting only a paragraph or two to the issue.

as well. Exhibit A in the exemplar UCC filing lists Hard Rock's programs and wells, along with the counties in which they are situated. Further, the Deed of Trust's Exhibit A, as mentioned before, lists the location of the Debtors' real estate interests, along with the name of the company that holds the interests. This UCC-1 filing would lead any reviewer to the relevant county record room. And finally, the fourth requirement is inapplicable here.

Thus, the filings by HNB satisfy both the requirements for a personal property UCC filing, as well as a fixture filing. The Court concludes that the description of the Lands in Exhibit A of the exemplar covers the fixtures in this case such that there is notice from the Deeds of Trust as well.

Finally, the Debtors assert that Bankruptcy Code section 552(a) serves to sever HNB's lien from the collateral as of filing. To the extent that argument is fairly raised given its brevity and lack of development, it is not well-taken. As discussed above, the Deeds of Trust extended HNB's lien, pre-filing, to the proceeds and products of the Lands described in Exhibit A, the Gas System and all accounts resulting therefrom, and the Operating Equipment. Thus, that lien shall extend to the proceeds and products post-filing as well. The Court need not even resort to its "considerable latitude" as mentioned by the *Slab Fork Coal Co.* court to arrive at that conclusion. That result is the only sensible one under the circumstances here presented.

It is, accordingly, **ORDERED** that the portion of the Motion by the Debtors to Use Cash Collateral which presents the issues discussed herein be, and hereby is, adjudicated in accordance with the preceding discussion.