NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

CARDINAL MIDSTREAM II, LLC	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ENERGY TRANSFER LP, F/K/A ENERGY TRANSFER OPERATING, L.P., AND ETC NORTHEAST PIPELINE, LLC, F/K/A ETC NORTHEAST MIDSTREAM, LLC, F/K/A ETC CARDINAL MIDSTREAM, LLC	:	No. 1000 WDA 2025
Appellants	:	

Appeal from the Judgment Entered July 23, 2025
In the Court of Common Pleas of Beaver County Civil Division at No(s): 2021-10523

BEFORE: McLAUGHLIN, J., KING, J., and BENDER, P.J.E.

MEMORANDUM BY BENDER, P.J.E.: **FILED: November 17, 2026**

Appellants, Energy Transfer LP, f/k/a Energy Transfer Operating, L.P., and ETC Northeast Pipeline, LLC, f/k/a ETC Northeast Midstream, LLC, f/k/a ETC Cardinal Midstream, LLC (collectively "Energy Transfer"), appeals from the judgment entered following a bench trial where the trial court found in favor of Appellee, Cardinal Midstream II, LLC ("Cardinal"), and awarded Cardinal $51,977,261.40 in the underlying breach of contract action. After careful review, we affirm on the basis of the trial court's opinions entered on November 15, 2021 (TCO 1), March 10, 2025 (TCO 2), and July 14, 2025 (TCO 3).

The trial court provided a very thorough background of the facts, parties, and procedure in this matter. ***See*** TCO 2 at 1-53. Briefly, Cardinal

instituted this action alleging breach of contract. Cardinal asserted that it sold a midstream company to Energy Transfer pursuant to a contract, executed February 3, 2017, which provided for an upfront purchase price plus a deferred, post-closing earnout payment of $55 million. The earnout was contingent on a third party, PennEnergy, being ready, willing and able to produce an average quantity of gas over a 45-day period between August 31, 2018 and March 31, 2019, through the gathering system purchased by Energy Transfer from Cardinal pursuant to the February 3, 2017 contract. Cardinal did not receive the $55 million payment, and its breach of contract claim centered on its allegation that Energy Transfer's own conduct prevented PennEnergy from delivering the volumes of gas.

Energy Transfer filed preliminary objections to Cardinal's amended complaint, seeking dismissal based on improper venue and arguing that the parties' Membership Interest Purchase Agreement ("MIPA") contained a forum selection clause mandating litigation in federal or state court in Dallas County, Texas. Cardinal conceded the MIPA clause's applicability but disputed that it was mandatory in nature. The trial court concluded that the forum selection clause was permissive rather than mandatory and overruled the preliminary objections.[1]

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[1] Although we concede that waiver is not implicated, we point out that despite the zeal with which Energy Transfer argues on appeal that the trial court erred in overruling its preliminary objection with respect to venue in Texas, Energy Transfer could have pursued an interlocutory appeal on this issue, which could
(Footnote Continued Next Page)

Cardinal's position was that PennEnergy was ready, willing, and able to deliver during the earnout period. Cardinal further contended that Energy Transfer's failure to develop and construct the necessary gathering capacity, including related pipelines, compressor stations, and processing facilities, prevented PennEnergy from delivering the required gas. Cardinal also challenged the adequacy of Energy Transfer's Revolution Pipeline, which Cardinal alleged was defectively designed and constructed and which was required to be fully operational for the earnout quantity to be received and processed. Critically, that pipeline ruptured and exploded in September 2018, just days into the earnout period, rendering it inoperable.

Energy Transfer denied that PennEnergy could produce the requisite quantities during the earnout period. Energy Transfer also invoked a *force majeure* defense, attributing the pipeline rupture to Tropical Storm Gordon, which struck Louisiana in September 2018 and moved northward, depositing substantial rainfall over a three-day period in September of 2018.

The trial court conducted a bench trial beginning December 2, 2024, which continued through January 14, 2025. Following trial, the court found that Energy Transfer had breached the MIPA and entered judgment in favor

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then have prevented the 18-day trial from occurring in Pennsylvania. After the lengthy trial, and once Energy Transfer learned that a verdict of nearly $52 million was entered against it, it renewed this claim of error. As noted at oral argument, this awaiting verdict before an appeal, although certainly permissible, appeared strikingly similar to a criminal defendant seeking to withdraw his guilty plea upon being dissatisfied with his sentence.

of Cardinal for $33,000,000[2] in damages plus $18,977,261.40 in prejudgment interest, for a total award of $51,977,261.40. ***See id.***; Order, 7/10/25 (single page); ***see also*** TCO 1, at 1-5; TCO 3, at 1-4.

Post-trial motions were filed and denied, and judgment was entered on July 23, 2025. This timely appeal followed. Both Energy Transfer and the trial court have complied with Pa.R.A.P. 1925.

On appeal, Energy Transfer raises the following issues:

> 1. Did the trial court err in overruling Energy Transfer's objection to litigating in Beaver County, Pennsylvania based on a mandatory forum selection clause in MIPA § 14.12(b) that gave "exclusive jurisdiction" to courts in Dallas County, Texas?
>
> 2. Did the trial court commit legal error in its interpretation of the MIPA by holding that:
>
> > a. PennEnergy had "tendered" the contractually required volume of natural gas where PennEnergy was merely "ready, willing, and able" to offer it;
> >
> > b. A tropical storm and resulting landslide were not *force majeure* events under MIPA § 2.7(d); and
> >
> > c. Cardinal need not provide an Earnout Calculation Statement, which the plain language of MIPA § 2.7(a) made a condition precedent for the First Earnout Payment?

Energy Transfer's Brief at 4-5.

Our standard and scope of review for an order overruling preliminary objections are as follows:

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[2] The $33 million represents 60% of the $55 million enumerated in the contract. TCO 2, at 2. The trial court noted that "[t]he settling plaintiff, PER Midstream, LLC, would be entitled to the remaining 40%, but that claim is resolved." ***Id.*** at n.2.

> In ruling on preliminary objections in the nature of a demurrer, the trial court was required to accept as true all well-pleaded allegations of material fact and all reasonable inferences deducible from those facts and resolve all doubt in favor of the non-moving party. The question presented was whether, on the facts averred, the law says with certainty that no recovery is possible. When any doubt exists as to whether the demurrer should be sustained, this doubt should be resolved in favor of overruling it.
>
> On appeal from the trial court's order overruling preliminary objections in the nature of demurrer, our standard of review is *de novo* and our scope of review is plenary. Hence, we apply the same standard as the trial court in evaluating the legal sufficiency of the complaint, and examine whether, on the facts averred, the law says with certainty that no recovery is possible.

Wentworth v. Steinmetz, 349 A.3d 189, 192 (Pa. Super. 2025).

Furthermore, our standard and scope of review of a non-jury trial verdict are well established.

> Our standard of review in non-jury trials is to assess whether the findings of facts by the trial court are supported by the record and whether the trial court erred in applying the law. Upon appellate review, the appellate court must consider the evidence in the light most favorable to the verdict winner and reverse the trial court only where the findings are not supported by the evidence of record or are based on an error of law. Our scope of review regarding questions of law is plenary.

Myers Water Transfer, LLC v. LOLA Energy PetroCo, LLC, 351 A.3d 256, 264 (Pa. Super. 2025).

After careful review, we agree with the rationale and conclusions reached by the trial court. Accordingly, upon consideration of the record, the parties' briefs, the trial court's opinions, and the relevant authority, we conclude that further discussion by this Court is not necessary. We adopt the

trial court's opinions as our own in affirming the judgment entered on July 23, 2025. ***See*** TCO 1, at 1-16;[3] TCO 2, at 1-70; and TCO 3, at 1-15.

Judgment affirmed.

Judge McLaughlin files a concurring statement.

Judge King files a dissenting memorandum.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

11/17/2026

[3] We note that there is a printing error in TCO 1: the final three lines on page 12 are restated at the top of page 13.

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IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY
PENNSYLVANIA
CIVIL DIVISION - LAW

CARDINAL MIDSTREAM II, LLC, individually, and PER MIDSTREAM, LLC, by and through CARDINAL MIDSTREAM II, LLC, its Sellers' Representative,	:	
Plaintiffs	:	
vs.	:	No. 10523-2021
ENERGY TRANSFER, LP, f/k/a Energy Transfer Operating, L.P., f/k/a Energy Transfer Partners, L.P. and ETC NORTHEAST PIPELINE, LLC, f/k/a ETC Northeast Midstream, f/k/a ETC Cardinal Midstream, LLC,	:	
Defendants	:	

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MICHAEL ROSSI
PROTHONOTARY
BEAVER COUNTY, PA

ROSS, J. November 15, 2021

MEMORANDUM OPINION

INTRODUCTION

Plaintiffs, Cardinal Midstream, II, LLC, individually (hereinafter "Cardinal Midstream"), and PER Midstream, LLC, by and through Cardinal Midstream, II, LLC, its Sellers' Representative (hereinafter "PER Midstream"), bring this action against defendants, Energy Transfer, LP, f/k/a Energy Transfer Operating, L.P., f/k/a Energy Transfer Partners, L.P. (hereinafter "Energy Transfer") and ETC Northeast Pipeline, LLC, f/k/a ETC Northeast Midstream, f/k/a ETC Cardinal Midstream, LLC (hereinafter "ETC Pipeline"), alleging two counts of breach of contract for a total claim of $55 million. Plaintiffs contend that they sold a Midstream Company, which owned pipelines and other assets used to transport natural gas from wells to downstream delivery points. Plaintiffs allege that defendants agreed to make a $55 million payment if an affiliate of plaintiff PER Midstream, was ready, willing and able to deliver specified amounts of natural gas to defendant Energy Transfer and its affiliates during

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EXHIBIT
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an agreed-upon time period. Plaintiffs further claim that defendant Energy Transfer and its affiliates were required to provide sufficient facilities to enable receipt of the gas in a certain fashion.

Plaintiffs further allege that in September of 2018, an explosion to the pipeline, before any of the gas was delivered, prevented the delivery of the natural gas. Plaintiffs allege that the explosion was caused by defective construction of the pipeline and that this conduct by defendants prevented delivery. Plaintiffs contend that since they were in a position to deliver the natural gas, defendants should be responsible, under two different counts of breach of contract, for the $55 million payout.

The defendants have filed preliminary objections to plaintiffs' Amended Complaint. This Court will address the preliminary objections in this Opinion and overrule them.

FACTS/PLEADINGS

Plaintiffs initiated this action by the filing of an original Complaint on April 19, 2021. Preliminary objections were filed to that Complaint, and thereafter an Amended Complaint was filed on June 30, 2021. Preliminary Objections were also filed to the Amended Complaint.

In paragraph 7 of plaintiffs' Amended Complaint, plaintiffs allege that they are parties to a February 3, 2017 Membership Interest Purchase Agreement (hereinafter "MIPA"), pursuant to which defendant ETC Pipeline bought the membership interest in Cardinal PA Holdings, LLC, which owned and operated a Midstream company called Cardinal PA Midstream, LLC. Through paragraph 8 of the Amended Complaint plaintiffs contend that pursuant to the MIPA, both defendant Energy Transfer and defendant ETC Pipeline are responsible for making certain post-closing earn out payments to plaintiffs. This serves as the basis for plaintiffs' claim that defendants have failed and refused to make these payments, which serves as the basis for this lawsuit.

In a lengthy Amended Complaint, containing 119 paragraphs and over 30 pages, plaintiffs allege, in Count I, a breach of contract claim for defendants' failure to pay $33 million, and in Count II, an additional breach of contract for an additional payout of $22 million.

Defendants have filed preliminary objections to the Amended Complaint. The first preliminary objection asserts that the Court lacks subject matter jurisdiction because this action was initiated against corporate entities that no longer exist. In the alternative, defendants allege that the Court must dismiss the Amended Complaint for improper venue in the second preliminary objection, because plaintiffs allege a breach of contract with a forum selection provision requiring litigation in Dallas County, Texas. The third, and final, preliminary objection is a demurrer that alleges that the Amended Complaint is legally insufficient.

With regard to the first preliminary objection, defendants allege that there is no subject matter jurisdiction before this Court because this case was initially filed against non-existent entities. Defendants contend that the original Complaint against Energy Transfer Operating, LP, and Northeast Midstream, LLC, was improper because both had merged into their successors, and they cease to exist. Their contention is that these defendants cannot be sued following their mergers and cancellations. Plaintiffs counter this argument by asserting that the present named defendants have been parties to this lawsuit since its inception, just under their former names. The parties have entered into a Stipulated Order to amend the caption to properly name the defendants, and plaintiffs contend that this correction, pursuant to Pa.R.Civ.P. 1033(a), corrects any defect.

With regard to the second preliminary objection regarding venue, defendants contend that an alleged mandatory forum selection clause in the MIPA mandates that venue in this case should properly be in Dallas County, Texas. Plaintiffs concede that the forum selection

clause under the MIPA is applicable here, but deny that it is a mandatory forum or venue requirement. In paragraphs 13 and 14 of their response to the preliminary objections, plaintiffs assert as follows:

> II. **Defendants' second objection lacks merit as this court is a proper venue.**
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> 13. The averments in Paragraph 13 are admitted insofar as Section 14.12(b) of the MIPA contains thefollowing language:
>
> > Except for the [dispute resolution procedures set forth in other parts of the MIPA that provide for arbitration of narrow categories of disputes,] ... any legal suit, action or proceeding arising out of or based upon this Agreement, the other Transaction Documents or the transactions contemplated hereby or thereby **may be instituted** in the federal courts of the United States of America or the courts of the State of Texas in each case located in Dallas County, Texas, and each Party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding. Service of process, summons, notice or other document by mail to such Party's address set forth herein shall be effective service of process for any suit, action or other proceeding brought in any such court. The Parties irrevocably and unconditionally waive any objection to the laying of venue of any suit, action or proceeding in such courts and irrevocably waive and agree not to plead or claim in any such court that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.
>
> (Emphasis added). Several courts have interpreted forum provisions with nearly identical language as "consent to jurisdiction" or permissive forum clauses, which permit suit to be filed in the permissive forum identified, but do not require it or prohibit filing suit in another forum with proper venue. *See Antiop, Inc. v. Reckitt Benckiser Pharms., Inc.*, 198 F. Supp. 3d 777, 782 (E.D. Ky. 2016); *Encompass Aviation, LLC v. Surf Air Inc.*, 2018 WL 6713138, at *8 (S.D.N.Y. Nov. 30, 2018); *Nymbus, Inc. v. Sharp*, 2018 WL 705003, at *3 (D. Conn. Feb. 5, 2018) (applying Texas law).
>
> 14. The averments in Paragraph 14 contain conclusions of law to which no response is required. To the extent that a response is deemed necessary, Plaintiffs admit that their claims arise out of and are based on the MIPA. Plaintiffs deny that suit on their

claims must be filed in Dallas County, Texas or otherwise dismissed.

Finally, in their demurrer, defendants allege that plaintiffs have pled a legally insufficient breach of the MIPA on the following bases: (1) plaintiffs have not tendered any gas; (2) plaintiffs cannot allege a breach through the actions of non-party affiliates; (3) *res judicata* bars plaintiffs' claims; and (4) collateral estoppel bars plaintiffs from relying on the alleged conduct of ETC Pipeline.

Plaintiffs counter these allegations of the demurrer by asserting that any conditions precedent to the earn out payment have occurred or are excused, and the defendants are responsible for the conduct that prevented the receipt of gas volumes. Plaintiffs further contend that neither *res judicata* nor collateral estoppel bars the claims in their Amended Complaint.

These facts and allegations in the pleadings serve as a basis for the Court to determine the validity of the preliminary objections. The Court will engage in the legal analysis in the following section.

LEGAL ANALYSIS

As noted above, defendants have asserted preliminary objections asserting three grounds. The Court will address each ground in separate subsections below.

A. Preliminary Objection Alleging Lack of Subject Matter Jurisdiction Because the Case Was Originally Initiated Against Non-Existent Entities

As stated above, defendants allege that there is no subject matter jurisdiction because this case was initiated, in both the Original and Amended Complaints, against non-existent entities. The Court notes that the parties entered into a Stipulated Order to amend the caption to properly name the defendants and to designate what each of the defendants was formerly known as. The stipulation asserts the following language:

> This amendment relates back to the date this action was commenced in accordance with Pa.R.Civ.P. 1033, and shall be reflected on all future pleadings and other filings with this Court. The Prothonotary is directed to update the caption on the Court's docket accordingly.
>
> As a result of this stipulation, Plaintiffs' Motion to Amend Case Caption that was scheduled for re-argument on September 15, 2021 before this Court is moot and argument on that Motion is cancelled. By agreeing to this Stipulated Order, the parties are not waiving any arguments or defenses related to Defendants' pending Preliminary Objections to the Amended Complaint, including with respect to the preliminary objection that this Court lacks subject matter jurisdiction over this case.

Even though this language was included in the stipulation, defense counsel did not argue this issue at the argument on preliminary objections on September 15, 2021. Instead, defense counsel focused his arguments on the two other preliminary objections addressed below.

For purposes of this preliminary objection, defendants have cited to cases that involved deceased individuals and the need to name an estate, rather than a deceased individual. Those cases are clearly not applicable here. Pennsylvania Rule of Civil 1033(a) clearly states that a party, either by consent or by leave of court, may amend an action to correct the name of a party. Here, defendants stipulated to the correction of the names of the defendants. The Court finds that amendment cures any alleged defect and requires that defendants' preliminary objection on this basis be overruled, which will be done in an Order to be entered this same date.

B. Preliminary Objection Alleging that Venue is Improper In Beaver County

Defendants' major contention through this preliminary objection is that §14.12(b) of the MIPA mandates that this action be filed/transferred to the state court in Dallas County, Texas, and that venue is not proper in Beaver County, Pennsylvania. The Court again sets forth the language of the forum selection clause in this case as follows:

> Except for the [dispute resolution procedures set forth in other parts of the MIPA that provide for arbitration of narrow categories of disputes,] ... any legal suit, action or

> proceeding arising out of or based upon this Agreement, the other Transaction Documents or the transactions contemplated hereby or thereby may be instituted in the federal courts of the United States of America or the courts of the State of Texas in each case located in Dallas County, Texas, and each Party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding. Service of process, summons, notice or other document by mail to such Party's address set forth herein shall be effective service of process for any suit, action or other proceeding brought in any such court. The Parties irrevocably and unconditionally waive any objection to the laying of venue of any suit, action or proceeding in such courts and irrevocably waive and agree not to plead or claim in any such court that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.

The Pennsylvania Superior Court, in *Patriot Commercial Leasing Company, Inc. v. Kremer Restaurant Enterprises, LLC*, 915 A.2d 650-51 (2006), relying upon the Pennsylvania Supreme Court decision in *Central Contracting Co. v. CE Youngdahl & Company*, 418 Pa. 122, 209 A.2d 810 (1965), set forth proper interpretation of forum selection clauses as follows:

> We begin our analysis with the Supreme Court's seminal decision in *Central Contracting Co. v. C.E. Youngdahl & Co.*, 418 Pa. 122, 209 A.2d 810 (1965). In that case, the Court ruled that forum selection clauses are presumed to be valid, noting that the "modern and correct rule" permits enforcement "when the parties have freely agreed that litigation shall be conducted in another forum and where such agreement is not unreasonable at the time of litigation." *Id.* at 133, 209 A.2d at 816. The Court explained that a forum selection clause will be considered unreasonable "only where its enforcement would, under all circumstances existing at the time of litigation, seriously impair [a party's] ability to pursue his cause of action." *Id.*
>
> > Mere inconvenience or additional expense is not the test of unreasonableness since it may be assumed that [the party] received under the contract consideration for these things. If the agreed upon forum is available to [a party] and said forum can do substantial justice to the cause of action then [that party] should be bound by his agreement.

> *Id.* at 133–34, 209 A.2d at 816. *Accord Bancorp Group, Inc. v. Pirgos, Inc.*, 744 A.2d 791 (Pa.Super.2000) (upholding unambiguous forum selection clause).
>
> As noted in *Central Contracting*, the modern trend is to uphold the enforceability of forum selection clauses where those clauses are clear and unambiguous. *E.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972); *Secure Financial Service, Inc. v. Popular Leasing USA*, 391 Md. 274, 892 A.2d 571 (2006); *Ex parte Leasecomm Corp.*, 879 So.2d 1156 (Alabama 2003); *Kennecorp Mtge. Brokers, Inc. v. Country Club Convalescent Hospital*, 66 Ohio St.3d 173, 610 N.E.2d 987 (1993); *Chase Third Century Leasing Co., Inc. v. Williams*, 782 S.W.2d 408 (Mo.App.1989); *Manrique v. Fabbri*, 493 So.2d 437 (Fla.1986); *ABC Mobile Systems, Inc. v. Harvey*, 701 P.2d 137 (Colo.App.1985); *Hauenstein & Bermeister, Inc. v. Met–Fab Industries, Inc.*, 320 N.W.2d 886 (Minn.1982); *Volkswagenwerk, A.G. v. Klippan, GmbH*, 611 P.2d 498 (Alaska 1980); *Societe Jean Nicolas Et Fils v. Mousseux*, 123 Ariz. 59, 597 P.2d 541 (1979); *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal.3d 491, 131 Cal.Rptr. 374, 551 P.2d 1206 (1976); *Reeves v. Chem Industrial Co.*, 262 Or. 95, 495 P.2d 729 (1972); *see also* Restatement (Second) of Conflict of Laws § 80 (forum selection clause will be given effect unless unfair or unreasonable).

All parties to this action agree that the forum selection clause, §14.12(b) of the MIPA, is applicable here; the argument or distinction is as to whether this clause is mandatory or permissive. In fact, plaintiffs have asserted the following in paragraph 13 of their Amended Complaint:

> 13. The MIPA contains a consent to jurisdiction clause providing that the parties "may" (but are not required to) file claims related to the MIPA in federal court or a state court in Dallas County, Texas. (Ex. 1, §14.12(b)). If the parties exercise their option to file in one of these permissive forums, the parties agreed to waive any jurisdiction or venue arguments and accept service of process by mail. *Id.* Cardinal and PER Midstream have chosen not to exercise their option to file this case in one of these permissive forums and have, instead, filed this case in a county where significant transactions and occurrences took place out of which the cause of action at issue arose.

Defendants argue that the language of the forum selection clause (§14.12(b)) is clear and unambiguous. Citing the portion of the clause that states that "each Party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding," they argue that this language requires that this action be brought in Dallas County, Texas. Plaintiffs, on the other hand, assert that the word "may" is a permissive statement that permits this claim to be brought in Beaver County, Pennsylvania.

There is no Pennsylvania appellate case that addresses language in a forum selection clause similar to this situation. This appears to be a case of first impression regarding this particular language.

Defendants cite the Pennsylvania Superior Court decision in *IDT Corp. v. Clariti Carrier Services, Ltd.*, 772 A.2d 1019 (2001). In that case, there was a forum selection clause in the agreement between the parties. That forum selection clause provided for the case to be governed by the laws of England. The forum selection clause further stated that if the parties were unable to resolve their differences through negotiations or mediation, the case would be referred to arbitration under the London Court of International Arbitration, and if the case was not submitted to arbitration, the exclusive jurisdiction was with English courts. *Id.* at 1021. The Philadelphia Court of Common Pleas determined that this was a forum selection clause that needed to be enforced pursuant to preliminary objections and determined that the Complaint was subject to the exclusive jurisdiction of the English courts, thereby granting the preliminary objections. The trial court ruled that the jurisdiction of that action belonged in England. *Id. at 1021-22.* The Court believes this case is distinguishable from *IDT Corp.*

Plaintiffs have cited the Court to federal district court cases that have dealt with virtually identical language to the forum selection clause in this case. This Court recognizes that these cases are not precedential for this Court, but the Court does find them persuasive since they deal with the exact language, or type of language, confronting this Court.

In *Nymbus, Inc. v. Sharp,* 2018 W.L. 705003, the United States District Court for the District of Connecticut addressed a forum selection clause that is identical to the one contained in this case, even to the extent that both the United States Courts and the Texas State Courts were the forums specified in the clause. The *Nymbus* Court found that jurisdiction was proper before it on the basis that the case was brought in a federal court, which was permitted under the language of the clause; it did not have to be a federal district court in Texas per the language of the clause. *Id.* at *3-4. The Court acknowledges that *Nymbus* was an unreported opinion, but it should be noted that *Nymbus* was relied upon by the United States District Court for the Southern District of New York in *Encompass Aviation v. Surf Air, Inc.,* 2018 W.L. 6713138. In addressing the forum selection clause in that case, which is virtually identical to the forum selection clause in this case with the exception that the forums specified were the federal courts of the United States of America or the courts of the State of New York (*Id.* at *3), the *Encompass Aviation* Court found that the forum selection clause was permissive. Relying upon a decision by the Second Circuit Court of Appeals, the New York District Court found that "the use of the word 'may' in a forum selection clause means that it is permissive, not mandatory." *Id.* at *8 (relying upon *Blanco v. Banco Industries de Venezuela, S.A.,* 997 F.2d 974, 979 (2d Cir. 1993)). The Southern District of New York Court in *Encompass Aviation* found that "[i]t is obvious that the first part of the MIPA's forum selection clause is permissive." After this finding, the Encompass Aviation Court found that the second portion of the forum selection clause regarding "exclusive jurisdiction" is mandatory to the extent that if a party files in either the state court or the federal court mentioned in the forum selection clause, then the opposing party may not object to that court as an inconvenient forum or on any other basis. *Id.* at *9.

The *Encompass Aviation* decision is also rooted in the decision of the United States District Court for the Southern District of New York in *ICICI Bank, Ltd. v. Essar Ltd.,* 565

B.R. 241 (2017), which held that the two clauses ("may" and "waiving any objection to venue once brought") cannot not be read in isolation. *Id.* at 252-3. The sum and substance of these decisions is that under the MIPA, either party to the agreement "may" or may not file in one of the forums mentioned under the forum selection clause, but if a party permissively files one of the stated forums, it becomes the "exclusive jurisdiction." These federal decisions lead this Court to the conclusion that a party may first file in another jurisdiction if it is an appropriate and convenient forum. *See also Antiop, Inc. v. Reckitt Benckiser Pharmaceuticals,* 198 F.Supp.3d 777, 782 (E.D. KY 2016).

As plaintiffs allege and argue here, much of the work occurred in, and many of the witnesses are located in, Beaver County, Pennsylvania. The plaintiffs initiated the action here, and the Court does not find that the language of §14.12(b) of the MIPA is mandatory. Accordingly, the Court will deny the preliminary objections on this basis in an Order to be entered this same date.[1]

C. Preliminary Objection in the Nature of a Demurrer Alleging that Plaintiffs Have Failed to Allege a Breach of the MIPA

Defendants' final preliminary objection is in the nature of a demurrer pursuant to Pa.R.Civ.P. 1028(a)(4), alleging that plaintiffs' breach of contract claims are legally insufficient. Before addressing the merits of this preliminary objection, the Court will set forth the general law regarding preliminary objections in the nature of a demurrer.

In *Bower v. Bower*, 531 Pa. 54, 57, 611 A.2d 181, 182 (Pa. 1992) (citations omitted), the Pennsylvania Supreme Court addressed the standard for addressing preliminary objections in the nature of a demurrer as follows:

[1] The Court interprets defendants' preliminary objection to rely exclusively upon the forum selection clause in the MIPA and that, if the Court did find that section to be mandatory (which the Court did not), the case would be transferred to Texas State Court. The Court does not interpret the preliminary objection to be one of transfer for forum *non conveniens*.

> 222, 225, 213 A.2d 362, 364 (1965). The test on preliminary objections is whether it is clear and free from doubt from all of the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief. *Firing v. Kephart,* 466 Pa. 560, 563, 353 A.2d 833, 835 (1976).

In addressing this type of preliminary objection, the trial court must accept, as true, all of the well-pleaded facts, along with any reasonable inferences that may arise therefrom. *Id.* In order for a trial court to sustain such preliminary objections, it must appear with certainty that the law will not allow recovery. *East Lampeter Twp. v. County of Lancaster,* 696 A.2d 884, 886 (Pa. Cmwlth. 1987). "If doubt exists concerning whether the demurrer should be sustained, then 'this doubt should be resolved in favor of overruling it.'" *Bruno v. Erie Insurance Co.,* 630 Pa. 79, 91, 106 A.3d 48, 56 (Pa. 2014), quoting *Bilt-Rite v. The Architectural Studio,* 866 A.2d 270, 274 (Pa. 2005). These principles guide the Court in its analysis of defendants' preliminary objections in the form of a demurrer.

Defendants have asserted four grounds for this preliminary objection. The Court will address each of the bases for this preliminary objection in separate subsections below.

1. Defendants Allege that Plaintiffs Have Not Tendered Any Natural Gas as a Basis for the Claim of Breach of Contract

Defendants contend that plaintiffs' claims for breach of contract hinge upon an earn out payment set forth in §2.7(a) of the MIPA. Defendants insist that plaintiffs cannot make this claim because the natural gas was never received by defendants. Defendants argue that plaintiffs' claim for unreceived gas is only applicable if the unreceived gas was "available from and tendered by producers." Since the natural gas was never delivered, defendants argue that it was never "tendered" and cannot serve as a basis for the claims.

Plaintiffs counter these arguments by asserting that they state in their Amended Complaint that natural gas was tendered by producer Penn Energy but not received because of a contractual breach by defendants or their affiliates. Plaintiffs also argue that defendants

Plaintiffs counter these arguments by asserting that they state in their Amended Complaint that natural gas was tendered by producer Penn Energy but not received because of a contractual breach by defendants or their affiliates. Plaintiffs also argue that defendants and their affiliates engaged in transactions and arrangements that prevented receipt of tendered gas volumes from producer Penn Energy. Plaintiffs argue that to allow the defendants to avoid paying the earn out because defendants breached their contractual obligations is not consistent with the terms of the MIPA and well established principles of contract law. In sum, plaintiffs strenuously argue that it was defendants' conduct that prevented the tender and that defendants must pay for this.

In this Court's eyes, when viewing the allegations of the pleadings and all attached documents as true, the Court finds that there is doubt regarding whether this preliminary objection should be granted at this point, and the Court therefore overrules the preliminary objection on this basis. *Bruno*, 630 Pa. at 91, 106 A.3d at 56.[2]

2. Defendants' Allegation that Plaintiffs Cannot Allege a Breach of Contract Through the Actions of Non-Party Affiliates

The next ground asserted for purposes of the demurrer is that plaintiffs cannot allege a breach of contract through the actions of non-party affiliates. In this preliminary objection, defendants argue that the natural gas was never received yet plaintiffs somehow insist that unrelated conduct, not involving the plaintiffs or defendants, entitles them to invoke the earn out provisions. Citing §2.7(c) of the MIPA, which plaintiffs have alleged that defendants breached here, defendants argue that this section is not applicable because plaintiffs do not claim that any of the alleged conduct on the part of the defendants involves Cardinal PA

[2] The Court refers here, and will refer to *infra*, to doubt regarding the preliminary objection created by the pleadings and arguments of counsel. With regard to all of the situations referred to herein, the Court is not attempting to make a final ruling on these matters; rather, the Court believes that the establishment of a better record and discovery will place this case in a posture for these issues to be decided properly through summary judgment.

conduct of affiliates, they argue that it does not impose any obligations or guarantees upon them with respect to those affiliates. In sum, defendants contend that plaintiffs have not adequately alleged a breach of contract for failing to make payments.

Plaintiffs counter that there are common law doctrines, citing Texas law at page 17 of its brief in opposition to this preliminary objection, that serve as a basis to hold a contracting party responsible for reliance upon others, including affiliates that are considered agents of the contracting party. For this reason, plaintiffs allege that the preliminary objections on this basis should be denied. Because there is doubt regarding this issue, the Court will overrule the preliminary objection on this basis. *Bruno,* 630 Pa. at 91, 106 A.3d at 56.

3. Defendants' Allegation that the Doctrines of *Res Judicata* and/or Collateral Estoppel Bar Plaintiffs' Claims

Defendants' next argument is that the doctrines of *res judicata* and collateral estoppel bar plaintiffs' claims in this case. As a basis for this argument, defendants cite to a case filed in the Court of Common Pleas of Allegheny County, Pennsylvania, namely *PennEnergy Resources, LLC v. ETC Northeast Pipeline, LLC,* GD 19-13445. Defendants assert that in November, 2020, PennEnergy agreed to dismiss that claim with prejudice. Contending that the same issues and essentially the same parties were involved in that case and that the case was resolved and discontinued, defendants contend that this case is barred under the doctrines of *res judicata* and collateral estoppel.

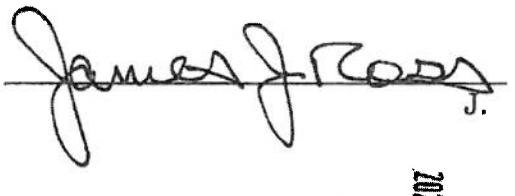
Plaintiffs counter this argument by first citing this Court to the Pennsylvania Supreme Court decision in *Callery v. Municipal Authority of Blythe Township,* 432 Pa. 307, 310, 243 A.2d 385, 386 (1968) for the proposition that unless the circumstances necessary to sustain an allegation of these defenses appear on the face of the Complaint, these defenses must be raised in an Answer and New Matter and not by preliminary objections. The Court cannot determine from the face of the Amended Complaint whether this contention by defendants

has validity. Plaintiffs further point out that defendants' argument regarding the prior lawsuit in Allegheny County involved a different contract, and not the MIPA. Plaintiffs also argue that there is no common identify of the parties and that the civil action in Allegheny County did not involve the same claims or causes of action. These contentions and considerations by the Court again raise doubt regarding this basis for the demurrer, and the Court denies the preliminary objection on this basis pursuant to *Bruno*, 630 Pa. at 91, 106 A.3d at 56.

CONCLUSION

The Court will enter an Order this same date denying the preliminary objections, consistent with the content of this Memorandum Opinion.

THE COURT:



BY THE COURT
2021 NOV 15 P 1:20
JAMES J. ROSS
JUDGE

FILED OR ISSUED
2021 NOV 16 AM 10:22
MICHELLE ROSSI
PROTHONOTARY
BEAVER COUNTY, PA

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY
PENNSYLVANIA
CIVIL DIVISION – LAW

CARDINAL MIDSTREAM II, LLC, individually, and PER MIDSTREAM, LLC, by and through CARDINAL MIDSTREAM II, LLC, its Sellers' Representative,	:	
Plaintiffs	:	
vs.	:	No. 10523-2021
ENERGY TRANSFER, LP, f/k/a Energy Transfer Operating, L.P., f/k/a Energy Transfer Partners, L.P. and ETC NORTHEAST PIPELINE, LLC, f/k/a ETC Northeast Midstream, f/k/a ETC Cardinal Midstream, LLC,	:	
Defendants	:	

FILED OR ISSUED
2021 NOV 16 AM 10: 22
MICHAEL ROSSI
PROTHONOTARY
BEAVER COUNTY, PA

ORDER

AND NOW, this 15th day of November, 2021, upon consideration of defendants' preliminary objections, and upon consideration of the pleadings, the record attached to those pleadings, the briefs of the parties and the arguments of counsel heard on September 15, 2021, the Court will deny the preliminary objections for the reasons stated in this Court's Memorandum Opinion entered this same date.

IT IS FURTHER ORDERED that defendants shall file an Answer to plaintiffs' Amended Complaint within twenty days of the date of this Order.

BY THE COURT:

JAMES J. ROSS
JUDGE

2021 NOV 15 P 1:21

BY THE COURT

J.

TS

Received 8/29/2025 5:45:06 PM Superior Court Western District

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IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY
PENNSYLVANIA
CIVIL DIVISION—LAW

CARDINAL MIDSTREAM II, LLC, Plaintiff, vs. ENERGY TRANSFER LP, f/k/a Energy Transfer Operating, L.P., f/k/a Energy Transfer Partners, L.P., and ETC Northeast Pipeline, LLC f/k/a ETC Northeast Midstream, LLC, f/k/a ETC Cardinal Midstream, LLC, Defendants.	:	No. 10523 of 2021

J. Ross

March 10, 2025

MEMORANDUM OPINION

INTRODUCTION

Plaintiff, Cardinal Midstream II, LLC (hereinafter "Cardinal"), instituted this action against defendants for alleged breach of contract. [1] Plaintiff contends that it sold a midstream company to defendants and that the sales contract involved an upfront purchase price and a deferred, post-closing earnout payment of $55 million dollars if a third party, PennEnergy Resources, LLC (hereinafter "PennEnergy"), which is an oil and gas operator/producer, was ready, willing and able to produce an average quantity of gas over a 45-day period between August 31, 2018 and March 31, 2019 through the gathering system purchased by defendants from the plaintiff through a contract executed February

[1] There was another plaintiff previously involved in this action, namely PER Midstream, LLC, which also asserted a breach of contract claim in Count II of the operative Amended Complaint in this action. The claim has been resolved and Count II is no longer at issue in this case and PER Midstream, LLC has been removed as a party.

3, 2017. At issue in this case is exclusively the earnout payment. The remaining plaintiff, Cardinal, if successful is entitled to 60% of the $55 million dollars, [2] or $33 million, and plaintiff also claims ancillary damages under the terms of the contract.

Plaintiff asserts that PennEnergy expended substantial resources, time and money in an effort to develop the required quantity of gas to meet the earnout requirements and PennEnergy was ready, willing and able to produce the required quantity of gas during the specified earnout period. Plaintiff contends that PennEnergy was precluded from delivering the gas by defendants' failure to develop and construct the gathering capacity, related pipeline, compressor stations(s) and processing locations to allow for the delivery of the requisite amount. Plaintiff also contends that defendants designed and constructed a defective pipeline, called the Revolution Pipeline, which plaintiff claims had to be in full operation in order for the earnout quantity to be received and processed. In September, 2018 there was an explosion/rupture of that pipeline, which occurred only days into the commencement of the earnout period and which prevented the flow of gas into the delivery system. This explosion/rupture caused the Revolution Pipeline to be inoperable until well after the earnout period expired.

The defendants deny plaintiff's claims. Defendants' primary defenses are, first, that PennEnergy was not capable of producing and providing the requisite quantity of gas during the earnout period and still has not produced and provided the requisite quantity through today, and, second, that there was a significant storm event in September of 2018, namely the remnants of Tropical Storm Gordon that hit Louisiana and traveled north, causing a substantial quantity of rain to fall in a three-day period (September 8-10, 2018)

[2] The settling plaintiff, PER Midstream, LLC would be entitled to the remaining 40%, but that claim is resolved.

and thereby cause the pipeline to rupture/explode. Defendants assert this as a force majeure defense available under the contract(s), thereby absolving them of liability/responsibility.

The Court conducted a nonjury trial that began on December 2, 2024 and continued through January 14, 2025. [3] The Court heard testimony from numerous witnesses and received numerous exhibits during this time period, which included a total of 18 trial days. Through this Memorandum Opinion the Court will address the relevant evidence, analyze the events, apply the applicable law, and render its decision.

THE PARTIES

As stated above, Cardinal is the plaintiff in this action. The defendants, Energy Transfer LP, f/k/a Energy Transfer Operating L.P., f/k/a Energy Transfer Partners, L.P., and ETC Northeast Pipeline, LLC, f/k/a ETC Northeast Midstream, LLC, f/k/a ETC Cardinal Midstream, LLC, will, for the most part, be referred to as Energy Transfer or the Energy Transfer defendants. Also included in the evidence is ETC Northeast Field Services, LLC, which is not a party to this action, which is an affiliate of Energy Transfer and which was the entity responsible for operating the gathering system in question. The evidence at trial reflected that, although the Energy Transfer entities have different names, there is little distinction between the operation of the various companies and the companies share the same employees. In fact, in the testimony of some of the representatives/employees, it was apparent that they simultaneously performed tasks for the various companies and, at times, did not exactly know which of the companies they

[3] The parties assured the Court pretrial that they could conclude all evidence and the trial by December 19, 2024. However, the plaintiff did not conclude its case until December 19, 2024, thereby causing the Court to suspend the trial for the Christmas and New Year's holidays and resume again on January 2, 2025.

were working for at a particular time. What is clear is that Energy Transfer LP is the parent company of all entities and is responsible for the operation of all companies and responsible for the actions of all agents, servants and employees. There was no real challenge or contest to this fact. In this Memorandum Opinion, the Court will mostly refer to Energy Transfer unless reference to a particular entity is necessary by the Court.[4]

THE CONTRACTS/AGREEMENTS

1. The Gathering Agreement

The first agreement in question is the Gathering Agreement (Plaintiff's Ex. 3), which was executed on March 7, 2014. The parties to that agreement are Plaintiff Cardinal and PennEnergy, with PennEnergy referred to as the Producer of gas and Cardinal as the Gatherer of gas. This agreement served as a basis for a gas producing/gathering system in which PennEnergy secured leases for property and drilled for gas and Cardinal constructed a gathering system to transport the gas from well pads (to which the wells were connected) to compressor and processing locations.

Pursuant to this agreement, PennEnergy, as the Producer, agreed through Articles II and III to establish leases for the gas rights to property and to drill for and produce the gas to Receipt Point(s), and Cardinal, as the Gatherer, agreed to accept/receive the gas from the Receipt Point(s) and redeliver the gas to the Delivery Point(s). [5] The agreement provided for a daily capacity volume to gather the gas; compression horsepower to

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[4] The parties agreed to Joint Exhibit 1, which is part of the record and which references a declaration by Laura Sutton, Esquire, an attorney and Chief Counsel for Energy Transfer, L.P. (Plaintiff's Ex. 829). That declaration explains the history and former names of the defendants.

[5] The original delivery point was identified in Exhibit B to the agreement as the MarkWest Bluestone Processing Complex.

maintain the volume; that Cardinal would construct a pipeline to connect the well pads to a compression station known as the Pike Station (Article IV, 4.3 and Ex. C to the agreement); compression, stabilization and dehydration of the rich gas at the Pike Station; and ultimate delivery through the pipeline to the MarkWest Bluestone Processing Complex. This was a joint venture between Cardinal and PennEnergy. [6]

2. The First Amendment to the Gathering Agreement

On November 12, 2014, plaintiff Cardinal and PennEnergy entered into a First Amendment to Gas Gathering Agreement (Plaintiff's Ex. 4) to address the potential/risk posed by a citizen challenge to Cardinal's award of a Conditional Use Approval by the New Sewickley Township Board of Supervisors to permit Cardinal to locate its compressor station at the Pike Station within the township. The challenge was apparently unsuccessful, and this amendment was, therefore, not needed or of no significance.

3. Membership Interests Purchase Agreement

On February 3, 2017, Plaintiff Cardinal and PER Midstream, LLC, [7] (as Sellers) and Defendants Energy Transfer Partners, L.P. (as Parent) and ETC Cardinal Midstream, LLC (as Buyer) [8] entered into a Membership Interests Purchase Agreement (hereinafter "MIPA") for the purpose of conveying Plaintiff's interest in the joint venture to the Energy

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[6] Marshall McCrea, CEO of defendant Energy Transfer, testified by video deposition at trial. McCrea stated that Energy Transfer inherited the rights and obligations of the Gathering Agreement when it purchased Cardinal's interest and assets. (Court Ex. 4, p. 5 of 31, 19:20-20:05).

[7] PER Midstream, LLC was a prior party to this case, but settled its claim and is no longer involved.

[8] ETC Cardinal Midstream, LLC merged into, and is now known as defendant ETC Northeast Pipeline, LLC (*See* Joint Ex. 1 and Plaintiff's Ex. 829), which is a defendant in this case.

Transfer defendants (Plaintiff's Ex. 1). As noted in footnote 6, the Energy Transfer defendants inherited the rights and obligations contained in the Gathering Agreement discussed above as part of this transaction. An entity known as ETC Northeast Field Services, LLC, which is not a named party to this action but which is an entity under the control of the Energy Transfer parent, was the entity, along with ETC Northeast Pipeline, responsible for the design, construction and operation of the pipeline and facilities after the execution of the MIPA.

There are many provisions in the MIPA, but the key ingredients for this case are contained in Article II, sections 2.2 and 2.7, which provide as follows:

> 2.2 **Consideration.**
>
> In consideration for the purchase of the Membership Interests, Buyer shall pay to Sellers Three Hundred Ten Million Dollars ($310,000,000)(the "**Purchase Price**"), as adjusted in accordance with Section 2.4 (Adjustments to Purchase Price), and the amount payable to each Seller will be calculated in accordance with Schedule 2.2 (the resulting amount as to each Seller, its "**Proportionate Share**"). Further, Sellers shall have the right to receive additional cash payments in an aggregate amount of One Hundred Ten Million Dollars ($110,000,000) at the time and on the terms described in Section 2.7 (Earnout Payments), and the portion of any such additional cash payment to be made to each Seller is set forth on Schedule 2.2.
>
> * * * *
>
> 2.7 **Earnout Payments.**
>
> (a) ***First Earnout Period***. If the Aggregate Average Volume during any consecutive forty-five (45) day period (each a "**Measurement Period**") from August 31, 2018 through March 31, 2019 (the "**First Earnout Period**") exceeds 200,000 Mcf per day (the "**First Earnout Base Volume**"), Parent shall, or shall cause Buyer to, pay to Sellers Fifty-Five Million Dollars ($55,000,000) (the "**First Earnout Payment**") by wire transfer of immediately available funds to the account(s) designed by the Sellers' Representative, within fifteen (15) Business Days after the Earnout Calculation Statement (as defined below) for the First Earnout Period becomes final in accordance with this Section 2.7. If the First Earnout Payment is not paid in full to the

> account(s) designated by the Sellers' Representative within fifteen (15) Business Days after the Earnout Calculation Statement for the First Earnout Payment becomes final in accordance with this **Section 2.7**, interest shall accrue at a rate of 10% per annum based on a 365-day year. Once paid, the First Earnout Payment will be non-refundable, and the financial condition and results of operations of Parent, Buyer or any of their respective Affiliates during and following the First Earnout Period will not affect Sellers' right to receive and retain the First Earnout Payment. If the Aggregate Average Volume never exceeds the First Earnout Base Volume during any Measurement Period within the First Earnout Period, then upon expiration of the First Earnout Period, all obligations of Parent, Buyer and Company with respect to the First Earnout Payment will lapse and terminate.

Thus, there was an initial upfront payment involved plus an incentive for additional payments based upon production. Section 2.7 cited above serves as the basis for Plaintiff's claim here. Moreover, it is clear from a reading of the MIPA and the other agreements collectively as well as from the evidence adduced at trial that the Gathering Agreement was considered as part of, and incorporated into, the MIPA.

Note that the First Earnout period refers to the "Aggregate Average Volume" of gas during the "Measurement Period." As defined at page 2 of the MIPA, "Aggregate Average Volume" is the "sum of all Inlet Volumes during any Measurement Period divided by forty-five." In turn, the "Inlet Volumes" is defined at page 9 of the MIPA. That term includes "all volumes of natural gas actually available from and tendered by . . . [PennEnergy] or any of their respective Affiliates at the receiving points on the system pursuant to the Cardinal Gathering Agreement . . . . " [9]

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[9] This language provides clear evidence that the Gathering Agreement and its amendment became part of the MIPA.

4. The Second Amendment to Gas Gathering Agreement

On the very same date that the MIPA was executed, February 3, 2017, Plaintiff Cardinal and PennEnergy entered into a second amendment to the Gas Gathering Agreement (Plaintiff's Ex. 5) that had two main provisions as follows:

> 2. **Delivery Points**. Section 5.2 (Delivery Point) of the Agreement is deleted in its entirety and replaced with the following:
>
> "5.2 **Delivery Points**. The initial Delivery Point for Producer's Gas is listed on **Exhibit B**. If requested in writing by Producer, Gatherer agrees to install an additional "Delivery Point" at the discharge side of the Pike Station. Gatherer will use commercially reasonable efforts to diligently install such Delivery Point. The Parties agree to amend **Exhibit B** to add such additional Delivery Point."
>
> 3. **Delivery Pressure**. Section 7.4 (Delivery Pressure) of the Agreement is deleted in its entirety and replaced with the following:
>
> "7.4 **Delivery Pressure**. Gatherer shall redeliver Producer's Gas at an adequate pressure to arrive at each Delivery Point, but not to exceed: (i) 1,000 psig at the initial MarkWest Bluestone Delivery Point described in **Exhibit B**, and (ii) 1,300 psig at an additional Delivery Point if installed in accordance with Section 5.2."
>
> 4. **Effectiveness of Amendment**. This Amendment will not be effective unless and until the Acquisition is consummated by the Members and ETP.

Thus, the Gathering Agreement was amended because the acquisition was consummated by Energy Transfer purchasing Plaintiff Cardinal's interest (defined as the Member in the amendment). This amendment established a basis for a second delivery point at the discharge side of Pike Station and a formula for the distribution of gas through the gathering system with 1,000 psig to be delivered to the MarkWest Bluestone Processing Complex on a daily basis and 1,300 psig to be delivered to the second delivery point if installed. Again, Energy Transfer clearly inherited these obligations and requirements

per the testimony of Marshall McCrea, and these provisions and obligations became part of the MIPA according to the credible evidence.

5. Gathering and Processing Agreement

Shortly after the execution of the MIPA, PennEnergy and ETC Northeast Pipeline, LLC executed a Gathering and Processing Agreement on March 6, 2017 (Plaintiff's Ex. 6). This agreement provided a basis for the continuation of the gathering process between PennEnergy and ETC Northeast Pipeline, LLC, which was the entity now designated as the Gatherer in place of Cardinal. As noted above, ETC Northeast Pipeline, LLC was clearly operating under the auspices of the Energy Transfer defendants. The Court found nothing in this agreement that altered or vitiated the terms of the previous agreements discussed in subparagraphs 1. – 4. above.

6. Individual Transaction Confirmation to Gathering and Processing Agreement

On the very same date as the execution of the Gathering and Processing Agreement (March 6, 2017), PennEnergy and defendant ETC Northeast Pipeline, LLC executed a document titled Individual Transaction Confirmation to Gathering and Processing Agreement (hereinafter "ITC")(Plaintiff's Ex. 7). The significance of this agreement was centered around ETC Northeast Pipeline's commitment to construct a high-pressure gathering pipeline ("Revolution Pipeline") and a processing plant in Washington County, Pennsylvania, identified in Exhibit A to the agreement as the Revolution Cryo & Deethanization Plant. The agreement required the Energy Transfer defendants to use

commercially reasonable efforts to have the pipeline and plant in commercial service on or before December 31, 2017. [10]

The clear language of the ITC incorporates much of the previous language from the agreements discussed above. For example, the ITC recognizes committed reserves, at page 2, by recognizing that the first 100,000 Mcfd in gas gathered was committed to be delivered to the MarkWest Bluestone processing plant. The ITC also recognized the need to increase the capacity of the gathering system, which would be consistent with the provisions of the Gathering Agreement and the earnout provision of the MIPA. Of interest is the fact that the ITC recognized the discharge side of the Pike Station as a Receipt Point, which is defined as in the Gathering and Processing Agreement (Plaintiff's Ex. 6), at page 6, as "the point(s) identified in the applicable ITC at which Shipper is to deliver, and Gatherer is to receive, gas into the HPGP." Thus, the discharge side of Pike Station, which Energy Transfer inherited as a delivery point in the Second Amendment to Gas Gathering Agreement at 5.2 (Plaintiff's Ex. 5), now also became a Receipt Point as defined at page 4 of the ITC. A careful reading of all of these agreements makes it clear that Energy Transfer had an obligation to construct all of these facilities. The same ITC made it Energy Transfer's responsibility to deliver the gas to the Revolution Processing Plant.

7. First Amendment to ITC

Finally, PennEnergy and ETC Northeast Pipeline, LLC entered into a first amendment to the ITC on May 18, 2018 (Plaintiff's Ex. 8). The only significance of this amendment was that it extended the "in-service date" for the Revolution pipeline and

[10] The same provision provided that if commercial service did not occur by July 1, 2018, PennEnergy, as shipper, could terminate the agreement.

plant from July 1, 2018 to August 1, 2018 before PennEnergy/shipper could terminate the agreement. This provision is of little relevance or significance to the issues in this case.

8. Miscellaneous

The Court has given a broad overview of the various agreements in the preceding subsections. There are other provisions and/or specifics of these agreements that the Court may cite to or call upon in its factual and/or legal analysis sections below. Moreover, the Court will detail the interplay and/or integration amongst the agreements below.

THE PROCESS INVOLVED

The Court will attempt to outline the process for the production of gas in this section. PennEnergy is the producer or seller of gas in this case. It is not a party to this litigation, but its role and involvement here has a definite impact on the issues involved. A producer or seller of gas goes about the process by entering into leases with land owners for the right to drill for gas in the layers of earth beneath the owners' properties in return for monetary compensation. Once the leases are secured, the producer or seller, at its expense, drills beneath the surface to frac rock and soil for the purpose of producing natural gas. According to the evidence in this case, hydraulic fracing involves the injection of high-pressure fluid into rock and soil to create cracks or fractures through which gas can flow more easily.

The gas in question in this case is known as "rich gas," which contains liquid. The wells paid for and drilled by the seller or producer are then connected through pipelines or cracks or fractures to well pads, which become receipt points for the producer or seller to deliver the gas to the gathering system. There may be up to approximately six wells connected to a single well pad. The well pads are the point/location at which the gas is

tendered/turned over to the gathering system for compression and delivery to processing plants to be sold. There is a meter at a well pad that measures the quantity of gas going into the gathering system. The producer is paid for the gas delivered.

The gatherer is the entity responsible for compressing and delivering the gas, through high-pressure pipelines and compressor stations, to delivery locations for sale. The gatherers in this case are, first, Cardinal, which originated and began construction of a gathering system (consistent with the Gathering Agreement) in 2014, and, second, Energy Transfer, which purchased Cardinal's interest and assets (through the MIPA) in February of 2017. Energy Transfer continued and expanded the system after purchase.

The gatherer has the responsibility to design and construct high-pressure pipelines to collect the gas from the well pads and to transport/deliver it to compressor stations, which the gatherer is responsible for designing and constructing. At a compressor station, the gatherer compresses and dehydrates the gas to remove liquids such as hydrogen and nitrogen, which are placed into tanker trucks and sold by the gatherer for profit. The remaining gas is then delivered from the compressor station to processing stations for sale. The gatherer is compensated for this service.

In this case, there were two delivery plants or stations involved, namely one owned by MarkWest known as the Bluestone processing complex located in Butler County, Pennsylvania and one owned by Energy Transfer known as the Revolution processing complex or the Revolution Cryo & Deethanization complex located in Washington County, Pennsylvania. Both locations sell the gas for compensation. MarkWest and Energy Transfer are competitors in the gas business. This entire process will be further discussed and expanded upon in the factual and legal analysis sections below.

CONTENTIONS OF THE PARTIES

Plaintiff Cardinal contends, in Count I of the Amended Complaint, that it is entitled to 60% of the $55 million first Earnout payment provided for in 2.7(a), page 22-23, of the MIPA, or $33 million on several bases. Those bases will be discussed at this time.

Cardinal asserts that PennEnergy was ready, willing and able to provide/supply the requisite volume of gas required by 2.7(a) of the MIPA within the prescribed period of time (August 31, 2018 through March 31, 2019), but was prevented from doing so by the conduct and actions of Energy Transfer and its affiliates both leading up to and during the prescribed period. The conduct and actions are asserted to constitute breaches of contract, namely the MIPA, by the defendants. Plaintiff Cardinal also argues that defendants should be judicially estopped from arguing that the quantity of gas requirement would not have been met based upon a directly contrary position taken by defendants in an insurance coverage claim made by defendants in a lawsuit filed against multiple insurance carriers in a Delaware state court action, which was recently resolved by settlement. The Court will discuss these positions in more detail below.

First, plaintiff contends that the evidence clearly reveals that PennEnergy had expended large sums of money to acquire leases to property, drill wells, and establish well pads to supply the gas required into the gathering system to meet the MIPA requirements. According to Cardinal, wells and well pads were in place when defendants purchased its (Cardinal's) interest, and PennEnergy continued to expand the production system by drilling more wells, adding additional well pads, providing notices of expansion to place defendants on notice of the need for increased capacity, and providing projections or forecasts of the amount of gas that would be produced and forthcoming over a future period of time. Plaintiff contends that despite these events, defendants failed to take the

requisite steps to increase the capacity in the gathering system and actually impeded the ability of the gathering system to accept and deliver the gas to the processing locations.

Initially, Cardinal argues that defendant should be judicially estopped from arguing that PennEnergy could not produce/tender the requisite amount of gas to meet the MIPA requirements because Energy Transfer accepted and relied upon PennEnergy's projections and forecasts to pursue and advance a lawsuit against insurance carriers in the state of Delaware pursuant to business interruption insurance policies. Cardinal alleges that Energy Transfer submitted the projections and forecast figures in that case, which resulted in a settlement being paid by the insurance carriers, and should not be permitted to assert and rely upon a completely inconsistent position here.

Moreover, Cardinal contends that Energy Transfer failed and delayed in increasing the capacity of the gathering system to receive the requisite amounts of gas on a daily basis to meet the MIPA Earnout requirements, despite the fact that PennEnergy was forecasting and projecting increases in production that would meet the MIPA requirements during the relevant period. Specifically, Cardinal asserts that Energy Transfer delayed the construction and implementation of the Freedom compressor station in New Sewickley Township, Beaver County, Pennsylvania. This delay resulted in a lack of volume capacity in the gathering system that precluded the flow of available gas into the system because PennEnergy knew that it could not introduce extra volumes of gas into the gathering system unless the system had the adequate capacity to allow gas to be compressed and shipped forward to a processing location. Cardinal also argues that once the Freedom Station was constructed and in place, Energy Transfer failed to construct a pipeline to connect the flow of gas from Freedom Station to a designated delivery point at the discharge side of the Pike Compressor Station and failed to construct

an additional pipeline to connect this delivery point to the Revolution Pipeline. It is Cardinal's position that the various agreements discussed above, when read collectively, required these connections to allow for the compression and passage of increased volumes of gas through the gathering system and to provide "optionality" for Penn Energy to supply gas to either MarkWest Processing Plant through the Bluestone Pipeline or to Energy Transfer's Processing Plant through the Revolution Pipeline. Such an arrangement provided PennEnergy with the ability to deal with multiple companies and not be held captive to a single recipient or, in the alternative, to have the ability to move gas through the system in more than one fashion if one of the recipients was not receiving gas or terminated business. It is Cardinal's further position that Energy Transfer devised and attempted to implement a plan to only connect the Freedom Station to its (Energy Transfer's) own Revolution Pipeline in order to monopolize all gas received at and compressed through the Freedom Station and thereby eliminate any competition with Energy Transfer's competitor, MarkWest.

Finally, Cardinal claims that Energy Transfer did not meet the required standard in its design and construction of the Revolution Pipeline, resulting in its rupture/explosion in Center Township, Beaver County, Pennsylvania on September 10, 2018, just ten days into the Earnout period specified in the MIPA. This rupture/explosion resulted in the inability of Energy Transfer to utilize that pipeline to gather gas for a period of approximately two years. When this incident is combined with the discussion in the immediately preceding paragraph, Cardinal argues that defendants' improper design and construction led to a situation in which the Prevention Doctrine is triggered under Texas

law. [11] That doctrine essentially provides that a party who/which prevents or makes impossible the occurrence of a condition precedent upon which liability under a contract may depend cannot rely on the nonoccurrence to prevent or escape liability. In other words, plaintiff argues that because Energy Transfer defectively designed and constructed the Revolution Pipeline causing it to explode/rupture, it (Energy Transfer) cannot now argue that PennEnergy did not produce/tender the requisite amount of gas, some of which would have passed through that pipeline, to escape liability. The Court will discuss and analyze these arguments in more detail in the factual and legal analysis subsections below.

Defendant Energy Transfer has pled defenses in New Matter in this case and has challenged plaintiff's ability to meet its burden of proof on the breach of contract claim under the MIPA. First, and foremost, Energy Transfer argues that PennEnergy failed to deliver the required amount of gas during the Earnout period. In fact, defendants argue that PennEnergy has failed to produce the requisite amount of gas at any time through today.

Energy Transfer expands this argument beyond the fact that PennEnergy failed to deliver the required amount of gas by asserting that PennEnergy's wells and production were not capable of producing the requisite amount of gas during the Earnout period.

Next, defendants claim that plaintiff attempts to excuse PennEnergy's failure to deliver gas by making unfounded claims of breaches of other agreements that involve non-parties to this case. This defense is pled in New Matter by defendants, but was not made clear to the Court and not developed in the evidence.

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[11] The parties agree that Texas law is applicable to substantive issues in this case pursuant to the agreements in question.

Defendants further contend that PennEnergy did not tender the Earnout base volume of gas to meet the requirements of the MIPA provision at 2.7. The argument is asserted at pages 10–13 of Energy Transfer's trial brief. The essence of this argument is that plaintiff cannot satisfy the tender requirement of gas by relying upon forecasts, projections and expansion notices.

Finally, defendants assert a force majeure defense to plaintiff's claim in two respects. First, defendants point to Article 14 of the Gathering Agreement (Plaintiff's Ex. 3) and Article 16.1 of the Gathering and Processing Agreement (Plaintiff's Ex. 6), at page 9 of their trial brief, and argue that a force majeure, or "act of God," excuses their obligations under the MIPA. [12] Specifically, defendants contend that an unprecedented tropical storm in Beaver County on September 8-10, 2018 caused the Revolution Pipeline to explode/rupture. Under the language in the agreements referenced above, a finding of force majeure can suspend a party's obligation to perform under the agreement(s). Second, defendants look to the language of 2.7 (d) (i) of the MIPA, which states:

> In the event that a force majeure event occurs that negatively affects the Inlet Volumes of any days within the First Earnout Period . . .
> The Inlet Volumes for each affected day shall be deemed to be the average daily Inlet Volumes for the five (5) most recent prior days that were unaffected by such force majeure event.

This storm occurred only 8-10 days (September 8-10, 2018) into the Earnout period (August 31, 2018 – March 31, 2019), and defendants assert that since PennEnergy did not produce any gas in the aforesaid five-day period, plaintiff's claim has no merit. The Court

[12] It is interesting to note that defendants point to agreements involving other parties for defense purposes and when it is to their advantage, but challenge plaintiff's ability to rely upon the same agreements in pursuing its claim here.

will discuss and analyze these defenses in more detail in the factual and legal analysis subsections below.

FACTS

The Court notes and emphasizes that it has heard extensive testimony from numerous witnesses and received volumes of exhibits over the 18 days of trial. The Court will make its best effort to summarize that evidence and make factual findings in this section. The testimony was quite diverse with many disputed issues of material fact. This will require the Court to make credibility determinations in its findings in order to arrive at the accepted factual findings. The Court will engage in that process here. The Court will compartmentalize its factual findings in the following subsections.

1. General/Undisputed Background Facts

PennEnergy is a company that originates, produces, and sells natural gas. It leases the gas and mineral rights from property owners, drills/fracs for gas beneath the surface of land, builds/develops wells to bring the gas to the surface, connects the wells to well pads, and delivers the gas to the well pads for shipment to processing locations for sale. PennEnergy began to develop its system for production of gas in Beaver County, and surrounding counties, in Pennsylvania prior to 2014.

The gas produced from Beaver County was referred to as "wet gas," which contains both methane/dry gas and liquid gas. In order to effectively ship and process this gas, it must be shipped/transported through high-pressure pipelines to a compressor station. At the compressor station, the gas is compressed, the liquids are removed (dehydrated) and shipped elsewhere, and the dry or methane gas is transported to a processing center through high-pressure pipelines for sale.

In this case, PennEnergy had an arrangement with MarkWest to deliver gas to MarkWest for sale. MarkWest has a processing station known as Bluestone in Butler County, Pennsylvania for receipt and sale of the gas.

From the testimony the Court learned that it is typical for a gas producer (such as PennEnergy) to contract with/engage a "midstream" company to construct and operate the high-pressure pipelines and other facilities to gather the gas from the well pads, deliver the gas through the high-pressure pipelines to compressor stations constructed and operated by the gatherer, dehydrate the gas at the compressor stations, and transport the dry gas through the high-pressure pipelines to a processing station such as MarkWest Bluestone.

Here, PennEnergy initially contracted with Cardinal PA Midstream, LLC as its gatherer for the purpose of gathering gas from PennEnergy's Beaver County wells. A written agreement was signed between the two entities on March 7, 2014 and was titled "Gathering Agreement." (Plaintiff's Ex. 3). That agreement will be discussed in more detail below. At this point, the Court notes that Exhibit C to this agreement acknowledged one compressor station in 2014, namely the Pike Station, to receive, compress, stabilize and dehydrate gas and deliver the gas to the MarkWest Bluestone processing complex.

The testimony of witnesses for both parties to this action reflected that there was a joint agreement and intention for both PennEnergy and Cardinal PA Midstream to develop and expand this system/enterprise by increasing the number of gas wells, increasing the number of well pads, increasing the size of the gathering system to include a larger high-pressure pipeline system and an additional compressor station, and adding a second processing station to receive and sell gas and compete with the MarkWest Bluestone processing complex.

This process grew and developed after 2014 and continued through early 2017. In and around 2016, another company by the name of ETC Cardinal Midstream, LLC expressed interest in acquiring/purchasing the interest and assets of Cardinal PA Midstream with regard to the gathering system just discussed in the immediately preceding paragraphs. The sale/transfer of the gathering system and its assets was consummated by a written agreement between Cardinal PER Midstream, as Sellers, and Energy Transfer Partners, L.P., as Parent, and ETC Cardinal Midstream, LLC, as Buyer, dated February 3, 2017. The written agreement was labeled the MIPA. This agreement will be discussed in more detail below along with other supplemental agreements between various entities, some of which are parties to this case and some are not.

The caption of the case listed in the amended/operative complaint names Cardinal as the plaintiff and Energy Transfer Operating, L.P., and ETC Northeast Midstream, LLC as defendants. During the trial, counsel provided the Court with a stipulation as Joint Ex. 1, [13] which attaches Plaintiff's Ex. 829. The attached exhibit is a declaration by Chief Counsel for Energy Transfer L.P., Laura Sutton, dated August 2, 2021. The declaration gives some clarity to the present identity/names of the defendants in this case and the testimony at trial gave information on an Energy Transfer affiliate. What is now known as Energy Transfer L.P. was formerly known as Energy Transfer Partners, L.P., which was listed as the parent in, and was a signator to, the MIPA. It was also formerly known as Energy Transfer Operating, L.P., a defendant listed in the caption of the Amended Complaint. Also, what is now known as ETC Northeast Pipeline, LLC was formerly known as ETC Cardinal Midstream LLC, which was listed as the buyer in, and was a signator to,

[13] The stipulation is titled "Stipulation Regarding Witnesses and Exhibits."

the MIPA. It was also formerly known as ETC Northeast Midstream, LLC, the other defendant listed in the Amended Complaint. It should also be noted that ETC Northeast Pipeline was a party and signator to the following agreements with PennEnergy, all of which were executed shortly after the MIPA closed:

1. the Gathering and Processing Agreement dated March 6, 2017 (Plaintiff's Ex. 6);

2. the Individual Transaction Confirmation to the Gathering and Processing Agreement (hereinafter "ITC") also dated March 6, 2017 (Plaintiff's Ex. 7); and

3. the First Amendment to the ITC again dated March 6, 2017 (Plaintiff's Ex. 8).

These other agreements and entities may also be referenced below.

Also with regard to the entities involved ETC Northeast Field Services, LLC was referenced in the testimony. Through testimony, a breakdown of all of the Energy Transfer and ETC companies/entities reveals that what is now known as Energy Transfer LP was/is the parent company to what is now known as ETC Northeast Pipeline, which had the responsibility for overseeing the design and construction of the gathering system (pipeline, compressor station, etc.) after the MIPA was signed. ETC Northeast Field Services was identified as the operator of the gathering system. The testimony clearly indicated that all three entities (Energy Transfer, L.P.; ETC Northeast Pipeline, LLC; and ETC Northeast Field Services, LLC) are under one umbrella, with some employees working for more than one entity and the entities working out of the same office. For purposes of this Opinion, the Court will refer to the entities collectively as Energy Transfer or the Energy Transfer defendants or entities. If needed on limited occasions, the Court may refer to a single entity.

2. Agreements and Their Effect

The Court has listed and discussed the various agreements and some of their content above. At this point the Court will attempt to discuss the interplay and/or integration between the agreements. The clear purpose behind the Gathering Agreement (Plaintiff's Ex. 3) in 2014 was for Cardinal to construct and operate a pipeline and compression station(s) to receive gas from the well pads and to deliver the gas to a Delivery Point, which at that time (2014) was defined as MarkWest Bluestone Processing Plant. According to Ex. C to that agreement, there were five well pads identified in the initial gathering system to be connected to the original compressor station, Pike Station, for stabilization, dehydration and further transportation of the gas. Section 4.2 of the agreement provided for expansion of the initial facilities upon notice.

The system grew over time with additional well pads added to the enterprise, and negotiations for the sale of the gathering system and its assets occurred between Cardinal and Energy Transfer. The Gathering Agreement provided for expansion of the gathering facilities and the connection of new wells in Sections 4.2 - 4.4 (Plaintiff's Ex. 3). In anticipation of the sale and transfer of the facilities and other assets of the gathering system, PennEnergy and Cardinal entered into a Second Amendment to the Gathering Agreement (Plaintiff's Ex. 5). This amendment contained two major provisions. First, the amendment provided for the ability to create a second delivery point to the gathering system at the discharge side of Pike Station. Section 5.2 of the amendment specifically stated that "[t]he Parties agree to amend Exhibit B [of the Gathering Agreement] to add such Delivery Point." Second, the amendment provided, at 7.4, for increased Delivery Pressure to service both delivery points. The clear language of the amendment in the Background section states that the amendment was being executed contemporaneously

with the MIPA, and paragraph 4 of the amendment would not be effective "unless and until" the MIPA was executed between Cardinal and Energy Transfer and took effect. Clearly there was a direct relationship between the Gathering Agreement, its second amendment, and the MIPA to be discussed next. This was confirmed by the videotaped deposition testimony of Marshall McCrea, Co-CEO of Energy Transfer, played for the Court at trial, with the transcript of that deposition admitted into evidence as Court Ex. 4, wherein McCrea stated:

> Q. With respect to the MIPA, you do recall that there was consideration paid to the sellers, correct?
>
> A. Yes
>
> Q. It was a cash payment and two earn-outs, correct?
>
> A. Yes
>
> Q. And do you understand that as part of the acquisition, Energy Transfer obtained the obligations and rights related to the 2014 gathering agreement that you reviewed in preparation for your deposition today?
>
> A. I'm familiar with the - - as I referenced at the beginning of this, with the agreement that was already in place that we inherited when we purchased the Cardinal assets.
>
> Q. Very good.

Page 19, Line 13 – Page 20, Line 5.

The next agreement in time sequence is the MIPA (Plaintiff's Ex. 5), which served as the basis for the transfer of plaintiff's gathering facilities and assets to defendant Energy Transfer. This is the key agreement for purposes of this case. Its most pertinent provisions regarding the initial purchase price and earnout payments are set forth above.

At this time, the Court will set forth some other provisions of the MIPA that are extremely relevant to this case along with the interplay of these provisions with some testimony and other supplemental agreements executed by and between PennEnergy and Energy Transfer affiliate ETC Northeast Pipeline approximately one month after the execution of the MIPA.

The trial testimony established that Cardinal and Energy Transfer engaged in negotiations and due diligence regarding the sale/purchase of the gathering system during 2016 and continuing into early 2017. During this same time period, PennEnergy continued to expend substantial sums of money to develop gas wells in Beaver County. By 2017, PennEnergy had plans for and was developing in excess of 60 wells. The language of the earnout provision in the MIPA (2.7 of Plaintiff's Ex. 1) makes it clear that this aspect of the MIPA was intended to be a deferred incentive payment beneficial to all, with PennEnergy having the ability to earn more money by producing more gas; Energy Transfer having the ability to earn more money by gathering and delivering more gas; and Cardinal earning more money on the sale of the facilities and assets, beyond the original price, by the increased production, delivery and sale of the gas from which the others would also profit.

Within the MIPA itself, the Cardinal Gathering Agreement is defined in Article I as the original Gathering Agreement executed by PennEnergy and Cardinal on March 7, 2014 and the Second Amendment to that agreement dated the same date as the MIPA, February 3, 2017. This reference and definition reflects a clear relationship between the MIPA and the Gathering Agreement and its Amendment. In fact the Second Amendment was attached to and made a part of the MIPA.

The MIPA also referred to the Gathering and Processing Agreement between PennEnergy and ETC Northeast Pipeline (Plaintiff's Ex. 6) and stated that agreement had "the meaning set forth in Section 3.2 (b) (iv) [of the MIPA] (Buyer Deliverables)." Section 3.2 (b) (iv) notes that the Gathering and Processing Agreement was attached to the MIPA as Ex. K and was to be executed by Energy Transfer.

The Gathering and Processing Agreement between PennEnergy and ETC Northeast Pipeline was signed on March 6, 2017 (Plaintiff's Ex. 6). That agreement provided definitions for Delivery Point(s), High Pressure Gathering Pipeline ("HPGP"), and Receipt Point(s) by referring to still another agreement, namely the ITC (Plaintiff's Ex. 7). The HPGP definition under the Gathering and Processing Agreement (Plaintiff's Ex. 6) specifically states that any "new Gas gathering pipeline system to be constructed by Gatherer . . . ."

Finally, the ITC to the Gathering and Processing Agreement (Plaintiff's Ex. 7) was also signed between PennEnergy and ETC Northeast Pipeline on March 6, 2017. The ITC provided for construction of the Revolution Pipeline, as evidenced by Exhibit A to the ITC, and for a processing plant in Washington County, Pennsylvania. The ITC, when read in conjunction with the underlying Gathering and Processing Agreement as its base, clearly calls for the expansion of the facilities (including pipelines and attendant assets) and increased pressure and capacity to move more gas. The ITC further includes a "Timing" provision that required Energy Transfer to "use its commercially reasonable efforts to place the HPGP and the Plant in commercial service on or before December 31, 2017." [14]

[14] The same provision provides that if the in-service date does not occur by July 1, 2018, shipper (PennEnergy) could terminate the agreement. Further, a First Amendment to the ITC was executed between the parties on May 18, 2018 (Plaintiff's Ex. 8), which extended this date to August 1, 2018.

The ITC also provided, under a "Facilities" provision, for Energy Transfer to construct a high-pressure gathering pipeline extending from the Receipt Point to the new processing plant (Revolution) to be constructed in Washington County, Pennsylvania for the purpose of delivering the gas to the new plant. The Receipt Point in the ITC was identified as the discharge side of the original Pike compressor station. Under 19.2 of the governing Gas Processing Agreement, these agreements could only be modified in writing.

The testimony at trial clearly established that everyone involved agreed to the need for increased flow and capacity with regard to the gathering system. This was clear not only from the increased forecasts for gas production by PennEnergy and the May 11, 2017 Expansion Notice sent by Greg Muse of PennEnergy noting the addition of well pads to the system (Plaintiff's Ex. 62), but also from the limited capacity of Pike Station to gather and compress gas (135 million cfd). The increased capacity was to be accommodated by a new compressor station, known as Freedom Station, to be constructed by Energy Transfer. This is confirmed by an e-mail by Kenneth Squires, an Energy Transfer coordinator on the project in question, admitted into evidence as Plaintiff Ex. 62.

The foregoing discussion evidences that the Gathering Agreement (Plaintiff's Ex. 3) serves as a basis for all later agreements. Sections 4.2, 4.3 and 4.5 of that agreement address expansion of the gathering system, including the addition of a compressor facility (Freedom). Section 4.2 provides the following:

> 1. "Producer [(PennEnergy)] shall give Gatherer [(originally Cardinal and later Energy Transfer)] written notice at least one hundred and eighty (180) days prior to request [sic] a new pad connection or compression facility ("Expansion Notice")."
>
> 2. Energy Transfer must install increased horsepower in the new compressor facility to accommodate the forecasted increased quantities of gas.

3. Energy Transfer must "use good faith efforts to commence activities necessary to construct facilities within thirty (30) days [of] receipt of the Expansion Notice."

Further, 4.3 of the same agreement requires that Energy Transfer "shall use commercially reasonable efforts to . . . construct the necessary compression facility on or before the date the well(s) . . . are completed, equipped and capable of production." The PennEnergy Expansion Notice here was sent on May 11, 2017 and confirmed by receipt of Ken Squire of Energy Transfer on the same date (Plaintiff Ex. 62). In fact, Squire's e-mail of that date to an Energy Transfer Engineer states "[c]an you let everyone know when we have confirmed compression and facility capacity requirements for the 'Freedom' compressor station."

Moreover, the Gathering Agreement (Plaintiff's Ex. 3), at 3.5, 7.4 and 9.3, requires that Energy Transfer must have the gas received at the compressor stations delivered to each of the identified Delivery Points. The only Delivery Points identified in the second amendment to the Gathering Agreement and the ITC are the discharge side of the Pike Station and the inlet flange of the Rover Pipeline. These provisions were never modified through a written agreement. Moreover, the Revolution Pipeline was never referenced as either a Delivery Point or a Receipt Point in any of the agreements.

Finally, the Energy Transfer defendants rely on the Force Majeure defense provided for in the Gathering Agreement (Plaintiff's Ex. 3) as a defense here. Article XIV defines Force Majeure, in part, as "acts of God." Energy Transfer argues and presented testimony regarding the aftermath of Tropical Storm Gordon that allegedly was unforeseen and caused a rupture/explosion of the Revolution Pipeline on September 10, 2018. Defendants contend, under Article XIV, that this event relieves them of any liability. They also rely upon the Force Majeure defense as it may impact the

determination of the Aggregate Average Volume under the MIPA (Plaintiff's Ex. 1), through 2.7 (d) (1) of that agreement, arguing that this particular Force Majeure negatively impacted the Inlet Volumes, thereby requiring that the average daily Inlet Volumes be determined by "the five (5) most recent prior days that were unaffected by such force majeure event," which amount PennEnergy did not meet.

This collective assessment and analysis of the agreements and some surrounding testimony leads to the following conclusions:

1. Energy Transfer had the sole responsibility to construct the gathering lines and compressor station (Freedom) from the time of the execution of the MIPA forward;

2. Energy Transfer had the sole responsibility to construct the second (Revolution) processing plant;

3. The parties to the various agreements clearly set forth requirements and deadlines so that the complete system would be fully operational by the commencement date of the earnout period, August 31, 2018;

4. The intended delivery and receipt points were clearly defined in the agreements;

5. PennEnergy had the responsibility to have available and tender the requisite amount of gas to meet the requirements of the earnout provision in the MIPA as supplemented and based upon the definitions of Aggregate Average Volume and Inlet Volumes definitions in the same agreement; and

6. There are force majeure provisions in the agreements for consideration.

With these facts and circumstances in mind, the Court now turns to the factual testimony and exhibits presented by both sides. In an effort to present this evidence in an orderly and comprehensible fashion, the Court will compartmentalize it in sections based upon the contentions of the parties listed above. In doing so, the Court will make credibility

and other determinations that are necessary to the Court's factual findings, [15] upon which legal conclusions will have to be made in the Legal Analysis section.

3. Contentions of the Parties

a. Plaintiff's Contention that PennEnergy Would Have Met the Quantity Requirements for the Earnout Payment but for the Conduct of Defendants

As noted above, under the MIPA Earnout provision (2.7), Cardinal would be entitled to a payment by Energy Transfer of 60% of $55 million, or $33 million, "[i]f the Aggregate Average Volume during any consecutive forty-five (45) day period . . . from August 31, 2018 through March 31, 2019 . . . [exceeded] 200,000 Mcf [(200 million cubic feet)] per day . . . ." Under the definition section of the MIPA, Aggregate Average Volume is defined as "the sum of all Inlet Volumes during any Measurement Period divided by forty-five (45)." In turn, Inlet Volumes is defined as "all volumes of natural gas actually available and tendered by producers . . . at the receiving points on the System pursuant to the Cardinal Gathering Agreement, as may hereafter be amended, . . . but that were not received by Parent, Buyer . . . due to a breach of parent, . . . of a contractual obligation . . . ." Here Cardinal contends that the gas in question was available and tendered by PennEnergy, but not received due to contract breaches by Energy Transfer. The Court will address the testimony in that regard.

Plaintiff offered the testimony of Greg Muse, President and COO of PennEnergy. (TT 12/18/24, p. 177.) According to Muse, PennEnergy acquired leases from property owners, collected acres, drilled wells, produced gas to the surface and moved the gas

[15] The trial judge is in the best position to pass on the credibility of witnesses in a nonjury trial. *Kornfeld v. Atlantic Financial Federal*, 856 A.2d 170, 173 (Pa. Super. 2004), *appeal denied*, 582 Pa. 700 (2005); *Bonenberger v. Nationwide Mut. Ins. Co.*, 791 A.2d 378, 380 (Pa. Super. 2002).

through Midstream companies for sale. (TT 12/18/24, pp. 181-82). PennEnergy operated gas wells in Beaver, Butler and Armstrong counties of Pennsylvania during the period in question. (TT 12/18/24, p. 184).

PennEnergy established a working relationship with Cardinal, which Muse described as a good relationship that began around 2014. (TT 12/18/24, pp. 188-190). Muse also testified regarding Energy Transfer's takeover of the gathering system via the MIPA and his communications with Energy Transfer on the gathering process thereafter. Muse was adamant in his testimony that he understood the various agreements to require Energy Transfer to construct the Freedom Compressor Station and to construct a high-pressure pipeline from the Freedom Station to the discharge pipeline of the Pike Station. This according to Muse would give PennEnergy the optionality to deliver its gas into a system so that all aspects of the gathering system could transport/distribute gas to either the MarkWest Bluestone Processing Plant or to the Revolution Processing Plant without one facility or the other having a monopoly on any aspect of the gas and also to allow PennEnergy to have the ability to ship all gas to either processing plant if one could not handle the delivery or if one company went out of business. Muse stated that he communicated this concern at monthly meetings in 2017 and 2018, and Energy Transfer, at first, advised that it was going to do this until eventually an Energy Transfer engineer, Nick Holroyd, stated at a meeting in May of 2018 that it (Energy Transfer) was not going to make the connection. (TT 12/18/24, pp. 191-98 and 204). Plaintiff admitted into evidence Plaintiff's Exhibit 318, which was an e-mail sent by Muse dated July 6, 2018 stating the very things set forth above and demanding that a discharge line be constructed from Freedom Station to the discharge side of Pike Station. Plaintiff also offered into evidence Plaintiff's Exhibit 868, which is an e-mail from Adam Arthur of Energy Transfer

regarding the optionality concept, and Muse testified that this issue was discussed and made known to Arthur and Energy Transfer during the negotiations on the MIPA in 2016. (TT 12/18/24, pp. 205-211).

Eventually Energy Transfer advised PennEnergy in May of 2018 that it was going to connect Freedom Station into the Revolution Pipeline and would thereafter, at some point not specified, connect Freedom Station to the discharge side of Pike Station. PennEnergy accepted this arrangement at that time, without a written modification to the MIPA or any other agreement (TT 12/18/24, pp. 238-240), because it had spent millions in developing the wells and did not have much choice. (TT 12/18/24, pp. 228-232 and 253-254).

Muse further testified that PennEnergy had spent $100 million to drill 18 additional wells while all of this was occurring. (TT 12/18/24, p. 254). Muse stated that PennEnergy had "the capacity to move and process the 200 million [cubic feet of gas] a day that was in the earnout" as a result of its expansion of wells. (TT 12/18/24, pp. 259, and 274-276). Muse also described how all of this gas was ready to flow despite there being no discharge pipeline from Freedom to Pike Station, no connection of a pipeline from Freedom Station to the Revolution Pipeline, no backhaul line in place to replace the pipeline between Freedom and Pike Stations, no amendments or modifications to the agreements, a rupture or explosion to the Revolution Pipeline that precluded it from being used to move gas and nowhere for the gas from the Freedom Station to go that would increase the capacity of the flow of gas to meet the earnout requirements. (TT 12/18/24, pp. 249-271). There were multiple reasons why PennEnergy could not physically produce the gas. (TT 12/18/24, p. 279).

This Court found Muse to be both credible and knowledgeable. His demeanor and manner of testimony is noted by the Court. Muse is not affiliated now with Cardinal. He was involved with PER Midstream, which was a previous plaintiff to this action. However, that claim has now been resolved and PennEnergy has now entered into new agreements to do business with Energy Transfer. Thus, the Court sees no apparent basis for bias or prejudice on the part of Muse to damage his credibility.

Also, plaintiff admitted into evidence Exhibit 88 and other similar documents, which were schedules and updated forecasts for the production of gas up to and during the earnout period. These forecasts contained projected figures/quantities of gas to be produced that well exceeded the gas quantities required by the earnout provision (2.7) during the period in question.

Plaintiff also presented the expert testimony of Michael Krehel, a reservoir and petroleum engineer. (TT 12/17/24, p. 290). In connection with his testimony, Krehel used and relied upon the following:

1. Plaintiff's Exhibit 88 (TT 12/18/24, p. 16) referenced in the immediately preceding paragraph;

2. Plaintiff's Exhibit 443, which is a daily measurement of volumes of gas on each well pad during the relevant period (TT 12/18/24, pp. 20-21);

3. Defendant's Exhibit C-3, which are the monthly updates between PennEnergy and Energy Transfer showing "that the production forecast out paces the throughput capacity of the system" (TT 12/18/24, pp. 26-31); and

4. Plaintiff's Exhibit 194, including a PennEnergy spreadsheet showing that "the earnout rate of 200 million cubic feet [of gas] a day would be met based on their forecast in the document." (TT 12/18/24, pp. 32-34).

Using these documents and other information, Krehel rendered the opinion that the earnout quantity/requirement would have been met based upon forecasted data rather than actual production data. He did this because he felt the forecast data was more reliable due to the pipeline rupture/explosion on September 10, 2018. He stated he used this approach because he believed "that using actual data would have not represented what the wells would have actually done had the situation [(rupture/explosion)] not occurred." (TT 12/18/24, pp. 65-66). In the final analysis, Krehel testified that PennEnergy's gas was available to meet the earnout standard "[b]ecause the wells were drilled, completed, fraced. In some cases they were already producing wells. In some cases they were ready to be produced. They just were not connected. So the gas was available, was ready to go." (TT 12/18/24, p. 77).

Carrying this issue one step further, Plaintiff called Rhett Metz, corporate designee, chief counsel and vice-president of Energy Transfer, on cross examination. During the examination of Metz on December 17, 2024, counsel for plaintiff admitted into evidence plaintiff's Exhibits 784, 786 and 787. These are two expert reports prepared by an expert by the name of Mark O'Rear in July and August of 2023 and a videotaped deposition transcript of O'Rear in November, 2023 in connection with Energy Transfer's affiliate, ETC Northeast Pipeline's litigation against insurance carriers in the state of Delaware regarding a claim for insurance proceeds under business interruption insurance policies against a number of insurance carriers in the aftermath of the rupture/explosion of the Revolution Pipeline. Through the examination of Metz using Exhibits 784, 786 and 787, counsel established that O'Rear actually sided with and relied upon the expert report of plaintiff's expert here, Michael Krehel, in the Delaware litigation. (TT 12/17/24, pp. 48-83). In fact, counsel established that O'Rear actually sided with and relied upon the

same methodology that Krehel used in his testimony here and O'Rear actually cited to Krehel's report in this case to support his testimony in Delaware. (TT 12/17/24, pp. 72-74 and Plaintiff's Ex. 787, pp. 175-176). In fact, O'Rear testified in Delaware that the best data available for his review and reliance was the pre-production volumes and forecasts, consistent with Krehel's opinion here. (TT 12/17/24, pp. 67-70 and Plaintiff's Ex. 787, pp. 107-109). The Delaware case was a case in which Energy Transfer was seeking business loss revenues due to the rupture/explosion of the Revolution Pipeline and took a directly opposite position than taken here.

Finally through Metz, Cardinal elicited testimony to establish that in the Delaware litigation Energy Transfer relied upon and used the same spreadsheets and forecasts prepared by PennEnergy that it (Energy Transfer) is challenging in this case. Those forecasts were submitted to the insurance carriers as a basis for Energy Transfer's business loss claim and resulted in an over $70 million business loss settlement in that case. (TT 12/12/24, pp. 201-244). Energy Transfer, which is attempting to minimize the production figure here, has taken a directly opposite approach and has presented the testimony of an expert here to minimize production which will be discussed below.

b. Plaintiff's Contention that Energy Transfer Failed and Delayed in Increasing the Capacity of the Gathering System

The Pike Compressor Station had the capacity to receive and compress 137 million cfd per day in gas. Of that amount 100 million cfd was targeted at, and going to, the MarkWest Bluestone processing location (TT 12/10/24, pp. 210-211). Any amount over the 100 million cfd would have to be piped to the Revolution Cryo Plant. (TT 12/10/24, p. 212). There were additional wells and well pads being added to the system that required not only additional capacity in the gathering system, but also an additional compressor

station, namely the Freedom Station. (TT 12/10/24, pp. 126-145). Plaintiff contends that Energy Transfer failed to timely increase the capacity, delayed in the construction of the Freedom Station and failed to connect the Freedom Station by a discharge pipe directly to the discharge side of the Pike Station as required by the agreements.

Plaintiff again relies on the testimony of Greg Muse. Muse testified to the construction of the Freedom Compressor Station in New Sewickley Township, Beaver County and PennEnergy's expectation based upon the contracts and PennEnergy's requests for an interconnecting discharge pipe from Freedom Station to the discharge side of the Pike Station so that gas could be delivered from the Freedom Station to both the MarkWest processing plant to the north and to the Revolution processing plant to the south. (TT 12/18/24, pp. 190-192). He testified regarding a meeting between Energy Transfer and PennEnergy in May of 2018 at which time a project engineer for Energy Transfer (Nick Holroyd) advised PennEnergy for the first time that Energy Transfer was not going to build the discharge line as promised. This caused Muse to send a July 6, 2018 e-mail (Plaintiff's Ex. 318) voicing displeasure with PennEnergy's position not to build the discharge pipeline and demanding that it be built in accordance with the requirements of the agreements. (TT 12/18/24, pp. 193-202). [16] As noted above, Muse testified regarding the optionality or flexibility to not only meet the contractual obligations and earnout requirements, but also "in the event that one plant or the other had the upset, the one that didn't remained [sic] operational could then receive more gas than normal perhaps and receive the fees for that and we could keep our production flowing." (TT 12/18/24, pp. 203-204). He also stated that PennEnergy was spending $7

[16] Muse attached the Second Amendment to the Gathering Agreement (Plaintiff's Ex. 5) to the e-mail and explained his position on how that agreement was breached.

million per well developed and upwards of $45 million per well pad and wanted assurance that the gas could flow based upon that type of investment. (TT 12/18/24, p. 204). The rupture/explosion of the Revolution Pipeline on September 10, 2018 and the failure to connect the Freedom Station to Pike Station precluded PennEnergy from delivering the requisite quantities of gas to meet the earnout requirements. (TT 12/18/24, pp. 256-259).

Plaintiff called Ken Squire, Energy Transfer's project coordinator and liaison with PennEnergy on the pipeline project, on cross examination. Squire was extensively questioned on the decision to not connect the Freedom Station to the discharge side of Pike Station by a pipeline. Squire appeared not only very nervous, but also very evasive in his answers to the questions on cross. This occurred to the point that the Court had to admonish the witness for not answering the questions asked and instructing him to answer the questions asked in a proper manner. [17] (TT 12/18/24, pp. 119-120). After being pressed on the issue several times, Squire admitted that he was the person who made the decision to not construct the pipeline from the Freedom Station directly to the discharge side of Pike. He did this without approval from his boss. (TT 12/18/24, pp. 154-56). Squire attempted to say that he did this with agreement by PennEnergy (TT 12/18/24, p. 151), but that is directly contrary to the testimony of Greg Muse, whose credibility the Court finds to be superior to that of Squire based upon a comparison of both witness' demeanor and testimony.

Plaintiff also called Rhett Metz, vice-president of and general counsel to Energy Transfer as a witness, on cross-examination. The testimony and exchange between

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[17] This manner of testifying also was evidenced by two other Energy Transfer representatives who testified. These witnesses' testimony will be discussed and assessed below in this opinion.

Plaintiff's counsel and Metz contained at pages 208-216 of the Transcript of December 12, 2024 is telling to the Court on this issue of the discharge pipe between the Freedom and Pike Stations. At this point counsel began questioning Metz about Plaintiff's Exhibit 769, including an e-mail between gentlemen by the names of Popko and Frazee. The e-mail is dated August 18, 2020. This e-mail describes how the capacity of the gathering system was limited to the capacity of the Pike Station because the Revolution Pipeline could not be used due to the rupture/explosion. In fact the pertinent part of the e-mail was written by Metz.

When Metz was questioned further, he agreed that the "Freedom [Station] could not be used because it was connected [to] and required the use of Revolution Pipeline...." (TT 12/12/24, p. 211). Metz contended that "[t]he gathering agreement does not require a high-pressure discharge pipeline to be constructed from Freedom to Pike." (TT 12/12/24, p. 212). When Metz was pressed with the question of "[i]s that still Energy Transfer's position today?" He responded with: "Yes. That's PennEnergy [sic] position today also." (TT 12/12/24, p. 212). This response is very strange to the Court in light of the testimony of Greg Muse, President and COO of PennEnergy, on December 18, 2024, just six days after the testimony of Metz. Muse was adamant in his testimony that the discharge pipe between Freedom and Pike Stations was required by the agreements, was demanded by PennEnergy and was essential to the optionality concept described by Muse in his testimony (TT 12/18/24, pp. 191-279). The Court has already found Muse to be a credible witness.

The Court had to admonish Metz as a witness for not answering the question asked and instead answering a question that he wanted to answer instead, just as with Mr. Squire. (TT 12/12/24, p. 188). This was further exemplified by Metz's testimony

contained at pages 208-216 of the transcript of 12/12/24. Ultimately, Metz conceded that if the Freedom Station "had been connected directly to Pike on the discharge side, Revolution Pipeline would not have been necessary to deliver gas from Freedom to the discharge side of Pike . . ." and, thus, there would have been no interruption of gas gathered to and coming from the Freedom Station. (TT 12/12/24, pp. 216-217).

Plaintiff also called Adam Arthur, vice-president of crude oil for Energy Transfer, who reports directly to Energy Transfer's CEO Marshall McCrea, on cross examination. (TT 12/12/24, p. 171). Arthur was the lead negotiator for the MIPA transaction on behalf of Energy Transfer in 2017. (TT 12/12/24, pp. 190-191). In his testimony, Arthur testified that Energy Transfer never knew that it was Cardinal's responsibility to construct either the Freedom Compressor Station or the discharge pipe from it. (TT 12/13/24, p. 252). This answer defies logic and is directly contrary to the content of the agreements discussed above. He further stated that he knew that the discharge "pipeline had to go somewhere, but I'm not sure we knew what, that we never, whether or not we could do this . . . ." (TT 12/13/24, p. 253). Ultimately Arthur admitted that there had to be a discharge pipe from Freedom Station, but he didn't think "Field Services" (Energy Transfer) would have to pay for it. (TT 12/13/24, p. 257). Again this defies logic because a collective reading of all agreements discussed above indicates that Cardinal, and later Energy Transfer, as gatherers had the responsibility to construct the gathering system.

Shortly after the above testimony Arthur finally conceded that a high-pressure pipeline had to be built to accept the discharge of gas from Freedom Station, but didn't know who would have to pay for the line. (TT 12/13/24, p. 263). To get to this point the questioning and answers was like "pulling teeth." (TT 12/13/24, pp. 258-263). Ultimately,

Arthur conceded that a discharge line was built and paid for by Energy Transfer. (TT 12/13/24, p. 264).

This testimony was very suspect and concerning to the Court because the agreements discussed above definitely called for a second compressor station to increase the capacity of the gathering system. The original gathering system and its one compressor station and capacity was clearly limited to an amount (135 million cfd) below the requirements of the MIPA earnout. PennEnergy was spending considerable money and drilling more wells. The agreements required Energy Transfer to construct the gathering system. [18] Yet Arthur stonewalled these questions.

Common sense dictates that the gas from the Freedom Station had to discharge somewhere. The evidence reflected that a discharge pipe from Freedom to Pike Station would cost $25 million dollars to construct (TT 12/19/24, p. 46); whereas a backhaul pipe system as proposed by Energy Transfer would cost only approximately $3 million and would connect Freedom Station to the Revolution Pipeline which is owned by Energy Transfer and connects to Energy Transfer's processing plant in Washington County with no connection to either Pike Station or the MarkWest Bluestone Plant, a direct competitor to Energy Transfer.

The Court had to admonish Adam Arthur for not answering the questions asked. (TT 12/13/24, pp. 239 and 255). Collectively Squire, Metz and Arthur were in the Court's eyes programmed witnesses who had standard or programmed answers when questioned

[18] *See* the definition of High Pressure Gathering Pipeline in the Gathering and Processing Agreement between PennEnergy and ETC Northeast Pipeline (Plaintiff's Ex. 6), which states that the gatherer shall construct any new or added system.

on cross; whereas when called on direct by Energy Transfer their demeanor changed and they answered questions clearly and without hesitation.

Two other witness' testimony is relevant on this issue of the discharge pipe between Freedom and Pike Stations; both were called by Energy Transfer. First Timothy Roberts, CFO and President of Cardinal, was called on cross examination by Energy Transfer and thereafter questioned by Cardinal. Roberts was questioned about the discharge pipe from Freedom to Pike and Muse's e-mail of July 6, 2018 requesting that the pipe be built. As Roberts explained, the request for, and construction of, the discharge pipe was not a request for a new delivery point; rather, the request was one for the construction of the line to connect to a delivery point. (TT 1/13/25, pp. 68-70). Roberts was also questioned by both sides regarding Defendants' Exhibit B-75, which was an e-mail of January 23, 2017 attaching a copy of the Second Amendment to the Gathering Agreement (Plaintiff's Ex. 5) before it was signed. As Roberts explained to both sides upon questioning, the e-mail was sent with the proposed agreement (later signed) because Cardinal wanted assurances of the need for an interconnection of any new system to Pike so that gas could flow two ways (TT 1/13/25, pp. 64-68 and 111-113).

Finally, Energy Transfer called Richard Weber, Chairman and CEO of PennEnergy, as a witness. Weber basically confirmed Muse's testimony regarding the need to connect Pike Station to Freedom Station, confirmed that Muse demanded that this be done throughout, and stated that PennEnergy only agreed to a backhaul connection as a temporary or precautionary solution because it had no other choice or alternative based upon the timing involved and the amount of money PennEnergy had at risk in the wells and production. Weber was adamant that PennEnergy never agreed to a backhaul as a

third delivery point. He also stated that a discharge pipe from Freedom to Pike would have solved the entire problem. (TT 1/13/25, p. 157).

The Court finds both Roberts and Weber to be credible witnesses. Neither witness hesitated in answering questions by either side and neither was evasive in answering questions.

c. Plaintiff's Contention that Energy Transfer failed to meet the required standard of design and construction of the Revolution Pipeline

In light of the foregoing discussion in the preceding section, plaintiff next contends that defendant Energy Transfer failed to meet the required standards in design and construction of the Revolution Pipeline. This apparently became important in the eyes of Cardinal because there was no discharge pipeline from the Pike Station to the Freedom Station, with Energy Transfer proposing a backhaul into and through the Revolution Pipeline. When the Revolution Pipeline ruptured/exploded on September 10, 2018, there was no outlet for the gas to pass through the newly constructed Freedom Station and into the gathering system for delivery to a processing plant. Plaintiff further argues that with the limited capacity available through the Pike Station (135 million cfd) there was no ability to meet the earnout requirement of 200 million cfd. Plaintiff attributes this, in part, to the faulty design and construction of the Revolution Pipeline, which Cardinal asserts is a breach of the MIPA and related agreements. The Court will discuss the facts related to this contention here. Defendants contend that there was nothing faulty, or below the required standard, with regard to the design and construction of the pipeline. Rather, Energy Transfer asserts that the rupture/explosion was due to a force majeure, namely a tropical storm, which was an "act of God" and beyond its control. Relying upon the language of the agreements in question, Energy Transfer contends that this storm,

resulting in the rupture/explosion, relieves it of responsibility under the MIPA. This defense, and the facts related to it, will be discussed later in this Opinion.

Cardinal called Dr. Philip Shaller as an expert witness. He is an engineering geologist, who has training and experience in slope stability. (TT 12/5/24, pp. 267-274). He has work experience in construction of structures in hilly and sloped areas and has done root cause analysis relating to landslides and damage to construction and structures due to landslides. (TT 12/5/24, pp. 274-280). In connection with his testimony, Shaller reviewed the design documents, the environmental and construction inspection reports, the investigation reports of engineering firms conducted after the rupture/explosion of the Revolution Pipeline, maps and photographs, and other documents. (TT 12/5/24, pp. 283-286).

Shaller offered the opinion that Energy Transfer did not exercise reasonable care when constructing the Revolution Pipeline. (TT 12/6/24, p. 21). He went on to explain this opinion in his testimony.

Shaller testified to his familiarity with the rugged and hilly terrain in Pennsylvania generally and specifically at the site of the pipeline and rupture. He noted that he reviewed geological information and surveys including slips and landslide data regarding the site of the rupture/explosion dating back to 1975. He noted that such information is important for two reasons, namely first that it raises a flag because the slope has failed in the past and needs to be scrutinized for potential future landslides and second the data reveals that the past slide(s) has/have weakened the stability of the slope. He also reviewed a published geological map by a man named Pomeroy published in 1979. The map shows a history of landslides in the area. All information he relied upon is public information. (TT 12/6/24, pp. 24-51). Shaller expressed concern about the location of

the pipeline because "the potential for future landslide activity there would be high." (TT 12/6/24, pp. 52-53).

Shaller further developed his testimony by referring to documents from the period of the 1970s forward. Included within these documents were aerial photographs using advanced technology. These photographs and other information from 2005 and 2009 confirmed continued slope movement according to Dr. Shaller. (TT 12/6/24, pp. 53-59).

According to Shaller, the party responsible for the design and construction of the pipeline should have been proactive rather than reactive. There was a Geohazard Study performed for, and at the request of, Energy Transfer by a company named Terracon (Plaintiff's Ex. 24) prior to construction. This study identified geological hazards and ranked them according to severity from one to nine. The Revolution Pipeline ran directly through a designated nine area (highest level of severity) and, according to Shaller, a geotechnical engineer or company should have been consulted during construction. Moreover, the Terracon Study should have been provided to engineering and environmental inspectors as part of their review during construction, which was not done. (TT 12/6/24, pp. 68-90).

Shaller also referred to investigative reports by third-party engineering firms performed after the rupture/explosion of the pipelines. These entities were retained by Energy Transfer, and their reports were admitted into evidence. Two reports were prepared by Dynamic Risk (Plaintiff's Ex. 40 and 42) and a third report was prepared by a second entity named GeoEngineers (Plaintiff's Ex. 38). These reports were referenced by Shaller and all reports attributed fault for the rupture/explosion to the location of the pipeline through areas susceptible to landslides and significant earth movement. (TT

12/6/24, pp. 90-163). Shaller agreed with these assessments, and this information confirmed his testimony.

Finally, Dr. Shaller provided two other assessments/opinions. First, Shaller testified to the stability of the pipeline based upon the type of ground in which it was placed. He noted that the pipeline was embedded into a bedrock trench at points and then continued on into soil where slips or landslides had occurred in the past. According to Shaller, this created instability, including in areas at or near the rupture/explosion. (TT 12/6/24, pp. 166-181). Second, Shaller addressed the heavy rain issue. Shaller conceded that the rainfall on September 8-10, 2018 was heavy, but stated that if the pipeline had been designed properly, the rain would not have affected it. He noted that Dynamic Risk made a similar finding in its investigative report after the accident. (TT 12/6/24, pp. 192-195). The Court finds Shaller to be a knowledgeable and credible witness who not only gave firm answers on direct, but also readily conceded answers asked on cross and was not evasive.

Shaller's testimony was supplemented by the testimony of Dr. Alfred Pettinger, a mechanical engineer. Pettinger's testimony focused mainly on defects in design of the pipeline and its route. (TT 12/11/24, pp. 7-87).

Plaintiff also called Laura Wible as a witness. She is a civil engineer, who works at Civil & Environmental Consultants and previously worked for Environmental Solutions and Innovations. While working for Environmental Solutions & Innovations she worked as the engineering project manager on the Revolution Pipeline. She oversaw the design and worked as the engineer of record regarding the erosion and sedimentation controls. (TT 12/5/24, pp. 167-170). Her company was working for ETC Northeast Pipeline on the

project. (TT 12/5/24, p. 180). She was responsible for working with Energy Transfer to secure permit approval on the project. (TT 12/5/24, p. 191).

Wible was directed to address Plaintiff's Exhibit 52, which was an Erosion and Sedimentation Pollution Control Plan Narrative for the project. In that narrative, at page 52, Wible wrote that "construction activities in areas susceptible to slope failures should be investigated." She also wrote that those areas should be "evaluated by a licensed geotechnical engineer in order to address any stability issues." She recommended that a geotechnical engineer be hired both in the report and in a phone call to the Environmental Project Manager, Tom Glisson. Glisson responded that construction was going to fix the issues, but never agreed that a geotechnical engineer would be called. Some of the slope failures were in the area of the pipeline rupture/explosion. (TT 12/5/24, pp. 173-200).

Wible testified to recommendations she made regarding sedimentation and erosion on the project that were not followed. She also testified that she noted modifications made to the project that she did not approve. When she advised Glisson of this, he responded "[t]hat's just how construction rolls." (TT 12/5/24, pp. 196-205).

Wible went to the rupture/explosion site after the accident. She noted that most of the environmental and sedimentation controls (over 50%) in place were inadequate. She also stated that the Terracon geohazard report was not provided to her until after the accident. (TT 12/5/24, pp. 206-211).

Wible was clearly a neutral witness in this case. She was actually working as an outside contractor to assist Energy Transfer. She testified in a "very matter of fact way," and the Court found her to be credible.

Cardinal also called Daniel Counahan as a witness. Counahan is employed by the Pennsylvania Department of Environmental Protection (hereinafter "DEP"). He was the

district manager of the oil and gas program in the southwest region for DEP in 2018. (TT 12/9/24, pp. 20-22). He learned of the rupture/explosion and went to the scene to inspect. (TT 12/9/24, pp. 36-38). Most of Counahan's testimony dealt with findings at the scene after the incident which are not necessarily relevant to what occurred leading up to the incident. However, the scope of his testimony details the findings after the incident giving rise to the instability of the pipeline and numerous, continuing environmental and safety concerns after September 10, 2018. These concerns led to the shutdown of the pipeline during the earnout period in question. He referenced the findings in the GeoEngineers Investigative Report referenced above, which indicated that the situation presented post-accident continued to be unstable and a threat to the environment. He also testified to noncompliance by Energy Transfer at times that extended the delay in re-opening the pipeline. (TT 12/9/24, pp. 43-138). Although not necessarily relevant to the design and construction of the pipeline prior to rupture/explosion, this information bears upon the inability to operate the Revolution Pipeline during the earnout period. Counahan appeared as a very emotional and passionate witness. His demeanor evidenced some hostility toward Energy Transfer here, especially on cross examination. However, the Court had no reason to doubt the facts recited in his testimony.

Finally in this subsection, the Court notes testimony by Donald Lehocky, who lives in a neighborhood adjoining the rupture/explosion. He identified Plaintiff's Exhibit 31, which was an aerial photograph of his neighborhood and the accident scene and which was admitted into evidence. (TT 12/4/24, pp. 12-13). He also described the rupture/explosion that he heard and observed in the very early morning hours of September 10, 2018. He videoed the event, which was admitted into evidence as

Plaintiff's Exhibits 774-776. The Court viewed the video on the record and observed a very large fire coming from the area of the pipeline and the rupture/explosion. (TT 12/4/24, pp. 16-33).

d. Defendant Energy Transfer's Contention that PennEnergy failed to deliver the required amount of gas during the earnout period

Energy Transfer contends that PennEnergy never delivered the required amount of gas during the earnout period or at any time up through the present. Greg Muse admitted this on cross examination. (TT 12/19/24, p. 100). Also, Energy Transfer has argued and entered evidence to establish that no Earnout Calculation Statement was provided to establish that the quantity of gas necessary to meet the earnout provision's gas quantity requirement was met. (TT 12/2/24, p. 74). As will be discussed in the Legal Analysis section below, there is a doctrine under Texas law known as "the prevention doctrine," which provides that if a party to a contract prevents or makes impossible the occurrence of a condition precedent to a contract term or requirement, that party cannot rely upon the nonoccurrence to escape liability.

e. Defendant Energy Transfer's Contention that PennEnergy's gas wells and production were not capable of producing the requisite amount of gas during the earnout period

Energy Transfer called John Hughett as an expert in petroleum and reservoir engineering. Hughett was offered with regard to whether PennEnergy was capable of providing the requisite amount of gas to meet the earnout requirement in the MIPA during the relevant period. He stated that in performing calculations in preparation for his testimony, he used a computer program known as ARIES. He also testified that he was present in the courtroom to hear the testimony of plaintiff's expert on the subject, namely Michael Krehel. (TT 12/19/24, pp. 264-267). Hughett's criticism of Krehel's

testimony centered around the fact that he (Hughett) used actual product information to arrive at the figures he testified to, whereas Krehel used forecast information, which Hughett said is not as reliable. (TT 12/16/24, pp. 266-268 and 271-272).

Hughett testified that there were 75 gas wells at issue and 39 of those wells were producing at the time of the rupture/explosion. (TT 12/19/24, p. 274). He used the actual data from those 39 wells and projected them over the earnout period. (TT 12/19/24, p. 275). Hughett carried his testimony one step further by comparing his testimony against that of Krehel. He noted that Krehel relied not only on forecasts, but also considered curtailment of gas due to the rupture. Hughett stated that his calculations relied upon the actual production and that he did not see an obvious curtailment on the 39 wells from inception until the first date of the earnout provision, namely August 31, 2018. (TT 12/19/24, pp. 275-277). Notably, Hughett stated that he did not take into consideration gas through the Freedom Compressor Station because it was not online prior to the rupture/explosion. (TT 12/19/24, p. 277). [19]

Hughett compiled four different analyses, which he explained at pages 279-286 of the transcript of December 19, 2024, and determined that PennEnergy was not capable of producing gas in excess of 200 million cfd during the earnout period. (TT 12/19/24, p. 287). In fact, he stated that PennEnergy did not exceed that amount on any single day during the earnout period. (TT 12/19/24, p. 287). Hughett's projection was that PennEnergy would have produced 160-174 million cfd of gas during the relevant period. (TT 12/19/24, p. 292).

[19] The Court sees a weakness in Hughett's testimony in this respect because the Freedom Station was scheduled to be online before this date.

On cross examination, Hughett admitted that forecasts are normally and widely used in the oil and gas industry. (TT 1/2/25, p. 10). He also conceded that it is normal and customary to use forecasts in determining what a well might produce in the future. (TT 1/2/25, pp. 10-11). Also, Hughett, like other witnesses discussed above, was confronted with the O'Rear expert testimony from the Delaware litigation in which O'Rear relied upon forecasts and put those forecasts forward in his testimony in that Delaware case on behalf of Energy Transfer. Hughett said he was aware of the testimony but disagreed with it while testifying on Energy Transfer's behalf here. (TT 1/2/25, pp. 18-22). [20]

f. Defendant Energy Transfer's Contention that Cardinal attempts to excuse PennEnergy's failure to deliver gas by making unfounded claims of breaches of other agreements that involve non-parties to this case

Defendants pled this defense in New Matter. All of the agreements in question except the MIPA involve a non-party to this case, namely PennEnergy. This Court is perplexed by this argument because, as stated above, all of the agreements intertwine, with each agreement building upon and incorporating previous agreements within. There was no real evidence presented to support defendants' contention, and the Court will not discuss it further.

g. Defendant Energy Transfer's Contention that Cardinal cannot satisfy the tender requirement of gas under the earnout provision by relying upon forecasts, projections and expansion notices

Defendants point to the earnout provision of the MIPA (2.7), which requires Cardinal to produce an " 'Aggregate Average Volume' [of gas] during any consecutive forty-five (45) day period . . . from August 31, 2018 through March 31, 2019 . . . ." In turn,

[20] This reveals two separate experts for Energy Transfer taking polar opposite positions in separate cases.

the MIPA defines the Aggregate Average Volume as "the sum of all Inlet Volumes during any Measurement Period divided by forty-five (45)." Finally, Inlet Volumes is defined as "all volumes of natural gas actually available from and tendered by producers. . . ." Energy Transfer asserts that this requirement (tendered) cannot be satisfied by relying upon forecasts, projections and expansion notices.

The Court has already discussed the testimony of expert witness John Hughett above, and defendants offered that testimony in partial support of this contention. In addition, defendants offered the testimony of Richard Weber, whose testimony as Chairman and CEO of PennEnergy is partially discussed above. When questioned by Energy Transfer's counsel on direct, Weber stated that the term "tender" means plans to frac and stimulate, not actually fraced and stimulated. Weber stated that PennEnergy tendered gas here by drilling wells and spending large sums of money in anticipation of producing gas during the earnout period. (TT 1/13/25, pp. 193-194). Weber was also questioned about defendants' Exhibit B-193 (admitted into evidence), which is a September 12, 2018 e-mail by PennEnergy's Greg Muse sent two days after the rupture/explosion of the Revolution Pipeline and which sets forth steps that PennEnergy was still taking to develop wells and send gas despite the Revolution Pipeline interruption. This information led Weber to give his definition of tender set forth above. (TT 1/13/25, pp. 191-193).

Finally, Energy Transfer presented the testimony of Justin Clapper as an expert on oil and gas terminology. Clapper testified that in the oil and gas industry "tender" means that gas must be physically present and offered for delivery. According to Clapper,

making gas available is not sufficient to meet the tender requirement. [21] Clapper also testified that tender cannot be met by a production forecast. (TT 1/14/25, pp. 53-57). [22]

h. Defendant Energy Transfer's force majeure defense

With regard to its force majeure defense, Energy Transfer offered the testimony of David Mitchell, a forensic meteorologist. Mitchell testified first to the monthly rainfall for September, 2018 for this area, which he stated to be 5.39 inches above normal. (TT 12/19/24, pp. 145-146). This was the month of the rupture/explosion of the Revolution Pipeline. He also stated that 4.75 inches of rain fell in the two days (September 8-9, 2018) that preceded the event. (TT 12/19/24, p. 146). Mitchell also stated that there was a total of over eight inches of rain over the three day period of September 8-10, 2018, which far exceeded a monthly average for rain. (TT 12/19/24, p. 151).

According to Mitchell, this heavy rain was a remnant of Tropical Storm Gordon that occurred in 2018. (TT 12/19/24, pp. 156-161). Also according to Mitchell, no one could have predicted this storm and amount of rain. (TT 12/19/24, p. 161).

Mitchell further testified that rain of this quantity cannot be absorbed into the soil "so it starts moving, flowing across soil, especially moving downhill . . . . to displace soil." (TT 12/19/24, pp. 197-198). He also testified that this amount of rain was not foreseeable. (TT 12/19/24, p. 197). [23]

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[21] The Court questions this statement in light of the definition of Inlet Volumes in the MIPA which states "Inlet Volumes shall include all volumes of natural gas actually available from . . . ."

[22] The Court heard Clapper's testimony for purposes of his opinions based upon industry usage and not for the purpose of attempting to establish legal conclusions for the Court.

[23] In an argument regarding the scope of Mitchell's testimony during voir dire, defendants' counsel stated that Mitchell was not offered to give an opinion on the cause of the rupture of the pipeline or pipeline construction, rather he was offered from a

In the Court's eyes Mitchell was a credible and passionate witness. His testimony will be compared and contrasted with other evidence in the Legal Analysis section below.

To supplement the testimony of David Mitchell, defendants called Patrick Gallagher as an expert witness. Gallagher is a geotechnical engineer who has experience and training in gas pipeline construction and issues. Using his own training and experience and relying upon the meteorological testimony of Mitchell, Gallagher offered the opinion that the Revolution Pipeline rupture was caused by the storm. (TT 1/2/25, pp. 58-59 and 119). Gallagher also opined that the construction of the pipeline was consistent with industry standards and there were no problems or issues with the pipeline's design or construction. (TT 1/2/25, p. 58).

Specifically Gallagher stated that there was no need or reason to reroute the pipeline. (TT 1/2/25, p. 70). [24] Also in his testimony Gallagher found no fault with the design of the pipeline. (TT 1/2/25, pp. 70-90). Specifically addressing the construction of the pipeline, Gallagher referred to defendants' Exhibits 77 and 78, which are photographs of the trench in which the pipe was laid at the rupture site, and noted that the trench in which the pipe was installed was 9.2 feet deep. Gallagher found this depth sufficient. He also opined that the soil and bedrock into which the pipe was laid was sufficient and appropriate. (TT 1/2/25, pp. 95-101). Further, Gallagher stated that there was nothing that he knew of or observed that would have required Energy Transfer to call

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meteorological standpoint on rain conditions, the weight of water, and the effects of water on soil. (TT 12/19/24, pp. 129-133).

[24] It should be noted that Energy Transfer retained Dynamic Risk, an engineering firm, to do an investigation after the rupture/explosion. Dynamic Risk's draft and final reports were admitted into evidence as plaintiff's Exhibits 40 and 42. Although they do not specifically criticize the route of the pipeline, the reports note that the rupture/explosion occurred in a historically active landslide area.

out geotechnical engineers to the rupture site during the construction that preceded the incident. (TT 1/2/25, pp. 108-109 and 115-116). Finally, Gallagher stated that he found nothing in the field and inspection reports that he reviewed with regard to the rupture site that revealed anything Energy Transfer could have done to prevent the rupture/explosion. [25] Again Gallagher's testimony will be assessed, evaluated and compared in the Legal Analysis section below.

LEGAL ANALYSIS

1. Introduction and General Texas Contract Law

As previously noted multiple times in the discussion above, this case is based upon the earnout provision (2.7) contained in the MIPA (Plaintiff's Ex. 1). Pursuant to 14.12 of the MIPA (titled Governing Law; Jurisdiction), the "Agreement shall be governed by and construed in accordance with the Laws of the State of Texas, without giving effect to any choice or conflict of law provision or rule (whether of the State of Texas or any other jurisdiction)." Thus this Court, when necessary, will apply Texas substantive law to the issues to be addressed in this Legal Analysis section. During the trial, the Court applied Pennsylvania evidentiary and procedural rules when necessary without any objection by counsel. If evidentiary or procedural rulings need to be addressed below, the Court will continue on that same course for consistency purposes.

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[25] Again the Court notes the findings in the Dynamic Risk Reports (Plaintiff's Ex. 40 and 42). Those reports state that there were no soil retention controls to mitigate earth movement affecting the pipe and that the pipeline was not properly trenched to prevent movement. This was a firm that Energy Transfer hired. Also Gallagher's testimony fails to consider and account for the testimony of Laura Wible, the engineering project manager on the pipeline project, cited above regarding inadequacies on the project.

Plaintiff's Amended Complaint contains one count against defendants, namely a claim for breach of contract. To sustain a claim for breach of contract under Texas law, a plaintiff must establish the following four elements:

1. the existence of a valid contract;
2. the plaintiff performed or tendered performance;
3. the defendant breached the contract; and
4. the plaintiff suffered damages as a result of defendant's breach

Parker Drilling Co. v. Romfor Supply Co., 316 S.W. 3d 68, 72 (Tex. App. 2010), *review denied* (2011); *Aguiar v. Segal*, 167 S.W. 3d 443, 450 (Tex. App. 2005), *review denied* (2006). There is no dispute in the evidence that the first element exists (the MIPA is an undisputed valid contract). Also, the damage amount is set by the contract. The Court will have to examine and determine whether the other two elements have been established. Under Texas law, the burden of proof/persuasion in civil matters is by a preponderance of the evidence, which "is generally defined in terms of the greater weight of credible evidence admitted in the case." 34 Tex. Prac., Jury Charge in Texas Civil Litigation § 6:2 (3rd ed.) Plaintiff bears that burden here with regard to its breach of contract claim. These principles guide this Court in its analysis below.

2. Quantity of gas available from and tendered by PennEnergy to Energy Transfer at the receiving points on the system pursuant to the Gathering Agreement

As stated multiple times above, the earnout provision of the MIPA for the first earnout payment (2.7 (a)) reads that "[i]f the Aggregate Average Volume during any consecutive forty-five (45) day period . . . from August 31, 2018 through March 31, 2019 . . . exceeds 200,000 Mcf per day . . . Parent [(Energy Transfer)] shall, or shall cause Buyer [(ETC Northeast Pipeline)] to, pay to Sellers [(Cardinal and PER Midstream)] Fifty-

Five Million Dollars ($55,000,000) . . . ." Cardinal is entitled to 60% of this amount, or $33,000,000, if this requirement was met. The MIPA defines Aggregate Average Volume as "the sum of all Inlet Volumes" during the period. In turn Inlet Volumes "means all quantities of natural gas received . . . at the receiving points . . . ." Cardinal, as plaintiff, bears the burden of proof or persuasion on this issue under the standard set forth above. Plaintiff contends that the gas was available and tendered by PennEnergy, but could not be processed due to the alleged breaches of the MIPA which the Court will discuss throughout its legal analysis.

As also stated above, the Court found the testimony of Greg Muse, President and COO of PennEnergy, credible with regard to this first issue. Muse was a very emphatic and convincing witness. During his testimony, he explained in detail how PennEnergy drilled and developed a number of wells and wellpads, spending millions of dollars in doing so. By the time of the commencement of the initial date of the earnout period PennEnergy had over 60 wells and multiple wellpads either delivering or ready to deliver gas into the gathering system for distribution to the receiving points. Muse stated that PennEnergy would easily have met the quantity threshold. Richard Weber, Chairman and CEO of PennEnergy, also testified and confirmed much of Muse's testimony. Weber was also a credible witness. The Court found this testimony to be of particular importance not only because of the substance and quality of the testimony of these two witnesses, but also because PennEnergy and PER Midstream, in which Muse is involved, have resolved their differences with Energy Transfer and are now doing business together again. This renewed relationship and business opportunity could give rise to the thought or belief that Muse and Weber may want to tone down or minimize their support of Cardinal

through unemotional or bland testimony. Instead the demeanor and fashion in which their testimony was delivered evidenced strength in support of Cardinal's position.

Moreover, the testimony of plaintiff's expert on this subject, Michael Krehel, was clear and convincing. As stated above, Krehel based his opinions on forecasted, as opposed to actual, data and gave valid reasons for that approach to his testimony. Most importantly plaintiff established that an expert called by Energy Transfer in Delaware litigation regarding business interruption insurance claims as a result of the Revolution Pipeline rupture/explosion actually relied upon Krehel's expert report and projections in an effort to increase production in that litigation to receive a larger recovery for Energy Transfer. This evidence was developed through the cross examination of Rhett Metz, Energy Transfer's corporate designee, by plaintiff's counsel. The expert for Energy Transfer in the Delaware case was Mark O'Rear, who cited Krehel's report during deposition testimony in that case and who stated that the best data available for his review and reliance was the pre-production volumes and forecasts, the very same information relied upon by Krehel and Cardinal here.

Moreover, the testimony and evidence recited in the facts section above gives rise to the applicability of the doctrine of judicial estoppel with regard to any argument by Energy Transfer with regard to whether PennEnergy was ready and prepared to meet the earnout requirement for gas production during the requisite period. Although judicial estoppel is a recognized doctrine under Pennsylvania law, the Court believes it is applicable here because the parties are appearing before a Pennsylvania, and not a Texas, court and because, as the language of and purpose behind the doctrine set forth below will evidence, the doctrine is designed to protect the integrity of the court in its

proceeding. [26] As the Pennsylvania Supreme Court stated in *Sunbeam Corp. v. Liberty Mutual Ins. Co.*, 566 Pa. 494, 500, 781 A.2d 1189, 1192-93 (2001):

> **Judicial estoppel** is an equitable, judicially-created doctrine designed to protect the integrity of the courts by preventing litigants from "playing fast and loose" with the judicial system by adopting whatever position suits the moment. *Gross v. City of Pittsburgh*, 686 A.2d 864, 867 (Pa. Cmwlth. 1996). Unlike collateral estoppel or res judicata, it does not depend on relationships between parties, but rather on the relationship of one party to one or more tribunals. In essence, the doctrine prohibits parties from switching legal positions to suit their own ends. *Id.* Thus, having represented to the insurance department, a regulatory agency, that the new language in the 1970 policies—"sudden and accidental"—did not involve a significant decrease in coverage from the prior language, the insurance industry will not be heard to assert the opposite position when claims are made by the insured policyholders.

The Pennsylvania Supreme Court noted its longstanding reliance upon this doctrine in *Tops Apparel Mfg. Co. v. Rothman*, 430 Pa. 583, 244 A.2d 436, 438 n.8 (1968) by stating "[w]hen a man alleges a fact in a court of justice, for his advantage, he shall not be allowed to contradict it afterwards. It is against good morals to permit such double dealing in the administration of justice." The doctrine was also recognized in the decision of *Trowbridge v. Scranton Artificial Limb Co.*, 560 Pa. 640, 645, 747 A.2d 862, 865 (2000), wherein the Pennsylvania Supreme Court noted that the United States Supreme Court had accepted and relied upon a form of this doctrine in deciding a case shortly before the *Trowbridge* decision, namely *Cleveland v. Policy Management Systems Corp.*, 526 U.S.

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[26] Even if considered under Texas law, Texas recognizes the doctrine of judicial estoppel and its law is virtually identical to the Pennsylvania law on the subject discussed herein. *See and compare, Long v. Knox*, 155 Tex. 581, 585, 291 S.W. 2d 292, 295 (1956) and *Aetna Life Ins. Co. v. Wells*, 557 S.W. 2d 144, 147 (Tex. App. 1977), *writ refused*, 566 S.W. 2d 900 (1978) with the Pennsylvania law cited herein.

795, 119 S.Ct. 1597, 143 L.E. 2d 966 (1999). Thus this Court believes it appropriate to accept and rely upon this doctrine here.

As set forth above, Energy Transfer had multiple insurance policies to insure against business interruption at the time of the rupture/explosion of its Revolution Pipeline. By an e-mail admitted into evidence as Plaintiff's Exhibit 163, Energy Transfer provided a notice of loss to the insurance carriers. Thereafter, Energy Transfer engaged the services of a consulting firm, BDO, on January 22, 2019 to assist in providing loss information to the carriers. (Plaintiff's Ex. 166). Plaintiff's Exhibits 164, 167, 171 and 187 are examples of the estimates of loss provided to the carriers, and these exhibits attach and incorporate spreadsheet and projection information provided by PennEnergy, the very same information that Energy Transfer is attempting to thwart as reliable here. For example, Exhibit 171 contains an e-mail dated November 13, 2019 from BDO to a representative of the insurance carriers with attached spreadsheet information based upon PennEnergy's projections. This exhibit reflects that Energy Transfer expected to receive the following amounts of gas through its gathering system from PennEnergy during the following periods (all within the earnout period):

1. 208 million cfd in January, 2019;
2. 214 million cfd in February, 2019; and
3. 212 million cfd in March, 2019.

When the claim was not resolved through negotiations, Energy Transfer filed a lawsuit in Delaware on October 21, 2021, the same year that this lawsuit was filed in this Court. The complaint filed in Delaware by Energy Transfer was admitted into evidence as Plaintiff's Exhibit 766. The content of that complaint clearly reflects Energy Transfer's reliance upon the figures cited above to support its claims. On December 31, 2023, Energy

Transfer settled the claim and received $71,574,338.40, thereby receiving a benefit by asserting a position that it now seeks to dispute. Even though the Delaware case was not actually litigated to conclusion, or determined by a court, it can still serve as a basis for judicial estoppel. *In re Adoption of S.A.J.*, 575 Pa. 624, 636 n. 4, 838 A.2d 616, 623 n.4 (2003) (judicial estoppel is not dependent upon the underlying issue being actually litigated), *see also N.T. v. Children's Hospital of Philadelphia*, 308 A.3d 1284, 1291 (Pa. Super. 2024). Successfully obtaining a benefit is all that is required (*Id.*) and that occurred for Energy Transfer in the Delaware litigation. Thus, Energy Transfer is precluded from arguing that PennEnergy would not have produced enough gas to meet the earnout requirement here.

Finally in this section, the Court notes that defendants produced testimony by experts John Hughett and Justin Clapper. Hughett testified that PennEnergy was not capable of producing the requisite amount of gas to meet the earnout requirement. Clapper testified that gas in the ground is not being physically brought to the recipient and offered for tender. Clapper further testified that providing drilling schedules, production forecasts and expansion notices is not sufficient to meet the tender requirement under the MIPA. This testimony carries no weight in the Court's eyes in light of the Court's discussion in the preceding paragraphs.

3. Energy Transfer failed and delayed in increasing the capacity of the Gathering System

A discussion of this issue must begin with a view toward the Gathering Agreement (Plaintiff's Ex. 3) dated March 7, 2014 and the Second Amendment to the Gathering Agreement (Plaintiff's Ex. 5) dated February 3, 2017. Both are agreements between Cardinal and PennEnergy. The requirements of these agreements were absorbed into the

MIPA (between Cardinal and Energy Transfer) and, as stated above, Energy Transfer assumed the responsibility for the requirements of these agreements through the MIPA (Plaintiff's Ex. 1) and the purchase of the gathering system and its assets.

Sections 4.2, 4.3 and 4.5 of the Gathering Agreement address and provide for expansion of the gathering system. Section 4.2 specifically states that PennEnergy as producer would provide an expansion notice at least 180 days prior to requesting a new pad connection and/or compression. Once received, Cardinal, and later Energy Transfer, had the obligation to increase the compression horsepower to handle the forecasted gas quantities. Moreover, 4.2 requires that the gatherer "use good faith efforts to commence activities necessary to construct facilities within thirty (30) days receipt of such Expansion Notice." Section 4.3 requires the gatherer to "use commercially reasonable efforts to . . . construct the necessary compression facility on or before the dates the Well(s) behind such pad are completed, equipped and capable of production."

In turn, the Second Amendment to the Gathering Agreement created a second Delivery Point (5.2), in addition to the MarkWest Bluestone processing complex identified as the initial Delivery Point in the Gathering Agreement, at the discharge side of the Pike Station. The same agreement served to increase the Delivery Pressure (7.4) to accommodate the additional Delivery Point.

Further the Gathering Agreement as amended contained provisions, such as Sections 3.5, 7.4 and 9.3, to require the gatherer to have the compressor stations deliver gas to the Delivery Points. For example, 7.4 required that the gatherer redeliver gas to each Delivery Point at adequate pressure, and 9.3 required gatherer to receive the gas and redeliver it to the Delivery Points.

On May 11, 2017, PennEnergy sent an expansion notice requesting additional well pad connections. Energy Transfer, through Ken Squire, circulated an internal e-mail to not only forward the expansion notice to others in Energy Transfer, but also to state that the new Freedom Compression Station was necessary to increase the capacity of the system.

Greg Muse testified clearly that there were monthly meetings conducted about this entire situation during which PennEnergy was told and assured by Energy Transfer that not only would Freedom Station be completed, but also that a discharge pipeline would be built between Freedom Station and the discharge side of the Pike Station. This would allow the optionality for the gas to flow to two different purchasers (MarkWest and Energy Transfer) without interruption that could be caused by one of the companies being unable to receive the gas. The meetings referenced above occurred on a monthly basis after the May 11, 2017 expansion notice, and it was not until May, 2018 that Energy Transfer revealed that it would not install such a discharge pipeline, much to the dismay and consternation of Muse and PennEnergy. The clear testimony of Ken Squire, coordinator for Energy Transfer, recited above clearly reveals that he made this decision as an agent of Energy Transfer, without seeking approval.

Moreover, other Energy Transfer witnesses (agents), namely Metz and Arthur, made feeble and unconvincing attempts to explain why no discharge pipe was constructed. Metz, for example, attempted to explain that there was no obligation to build such a discharge pipeline under the agreements, which is dispelled by the discussion above. Arthur, the negotiator for PennEnergy on the MIPA, testified that he never knew that Cardinal, as Energy Transfer's predecessor, had the responsibility to construct either the Freedom Station or a discharge pipeline. Arthur further testified at another point that

he knew a discharge pipeline from the Freedom Station was necessary to carry the gas from the Freedom Station, but he didn't know where the discharge pipe was to go or who would pay for it.

Ultimately, Energy Transfer sought an agreement to extend the time for putting the Freedom Station into service from July until August, 2018 and proposed a backhaul system to connect the Freedom Station to the Revolution Pipeline, as opposed to the Pike Station, which was never formalized by a written modification as required by the agreements in question. The backhaul concept was never installed, leaving no connection from the Freedom Station. This, as will be discussed in the next section regarding the Revolution Pipeline rupture/explosion, made it impossible for PennEnergy to meet the earnout requirements.

This conduct by Energy Transfer constituted a clear breach of the Gathering Agreement and Second Amendment to that agreement as incorporated into the MIPA as part of its (the MIPA's) requirements. This breach is heightened by the other facts and inferences that arise in this case. Those other facts and considerations are, first, that Energy Transfer was attempting to orchestrate an exclusive connection between the Freedom Station and the Revolution Pipeline which was owned by Energy Transfer and flowed only to Energy Transfer's Processing Station without connection to Energy Transfer's competitor's processing station (MarkWest Bluestone) and, second, the cost of the discharge pipeline from Freedom to Pike was $25 million and the cost of the backhaul pipeline from Freedom to the Revolution Pipeline was only $3 million. Energy Transfer's greed overcame legal requirements.

4. Energy Transfer failed to meet the required standard of design and construction of the Revolution Pipeline

The testimony of Dr. Philip Shaller, an engineering geologist, was summarized in the Facts section above and was credible to the Court. He stated specific and valid bases for his opinions that, Energy Transfer did not meet the standard and did not exercise the requisite care when constructing the Revolution Pipeline. His testimony was supplemented by the testimony of Alfred Pettinger, a mechanical and pipeline engineer, also as set forth above. Pettinger's testimony was focused more on the design of the pipeline.

Defendants countered this testimony with the testimony of Patrick Gallagher, a geotechnical engineer, also discussed above. Gallagher opined that the construction and design of the pipeline were consistent with industry standards. Again the Court found Gallagher to be a credible witness.

When confronted with competing credible witnesses, the Court must look to other factors and evidence to assist its evaluation and determinations. Here the Court can look to, at least, two other key factors that assist the Court in its determination on this issue. First, the Court looks to findings in the Dynamic Risk Reports (Plaintiff's Exhibits 40 and 42). Dynamic Risk is an engineering company that Energy Transfer hired in the aftermath of the rupture/explosion of the Revolution Pipeline to investigate the matter. These reports were admitted into evidence. Among other things, the reports state that the pipeline was not properly trenched and that there were no soil retention controls during construction to mitigate against earth movement affecting the pipeline. This cuts directly against the opinions of Gallagher and actually supports the plaintiff's position here. Second, the testimony of the engineering project manager on the Revolution

Pipeline project, Laura Wible, who credibly recounted the environmental and other inadequacies during the construction phase, also undermines defendants' position on this subject.

All of these factors substantiate plaintiff's contention that Energy Transfer did not meet the requisite standards for appropriate construction of this pipeline. This finding by the Court constitutes a breach of the MIPA for two reasons. First, defendants chose to designate the Revolution Pipeline as the receipt point for the discharge pipe from the Freedom Station, contrary to contract terms. When the Revolution Pipeline was not available due to faulty construction, that this Court finds to be a factual cause of the rupture/explosion, there was nowhere to discharge the gas intended to flow from Freedom Station. Second, defendants' choices/decisions left the gathering system with inadequate capacity to accept the requisite amount of gas to meet the earnout provisions of the MIPA once the Revolution Pipeline was not available during the earnout period.

5. Defendants' force majeure defense

As noted above, the defendants have asserted a force majeure defense under the agreements. Force majeure is defined under Article XIV of the Gathering Agreement as "acts of God . . . ."

With regard to this defense, defendants presented the testimony of an expert meteorologist, David Mitchell, who testified to the large volume of rain that fell between September 8 and 10 and also he opined that no one could have predicted this amount because it was not foreseeable. He also gave the opinion that this quantity of rain could not be absorbed into the soil and flowed downhill to displace soil below. His testimony is discussed in the Facts section above. This testimony primarily serves as the basis for defendants' force majeure defense.

There is a major problem with defendants' assertion under Texas law. An "Act of God" is defined under Texas law as "an accident that is due directly and *exclusively* to natural causes without human intervention .... The accident must be occasioned by the violence of nature, and all human agency is to be excluded from creating or entering into the cause." *Scott v. Atchison, Topeka and Santa Fe Railway Co.*, 572 S.W. 2d 273, 279-280 n. 9 & 10 (Tex. 1978) (emphasis added). Here, the Court has already cited to and found a human created cause in the immediately preceding section, namely human negligence and error in constructing the pipeline. The Dynamic Risk Report referred to in that section (Plaintiff's Ex. 40) addresses the "Rainfall" issue at 2.5 (page 5), but found that "heavy precipitation" to be a contributing factor to the pipeline rupture/explosion along with the following findings in 7 (findings - page 23):

1. "the pipeline was not trenched consistently into the bedrock of the slope;"

2. "[t]he newly-placed pipeline fill slope surrounding the downstream portion of the failed pipe did not provide structural resistance necessary to prevent the unrestricted movement of the pipe during the land movement event;" and

3. "[t]he heavy precipitation event preceding the incident saturated the hillside soils and impacted hillside slope stability, which changed the loading conditions on the pipeline."

Energy Transfer retained Dynamic Risk to investigate the failure and to prepare a report. Section 6, page 22, of the report specifically states "[t]he scope of this Investigation was specifically directed to determine the direct cause of the failure." Thus, rainfall was a factor, but Energy Transfer's own investigation finds "human intervention" as a cause, which negates an "Act of God" under Texas law. That same report does not find that this rainfall was unforeseeable. Cause is established under Texas law if the "act or omission

was a substantial factor in bringing about injury." *Prudential Ins. Co. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995). Moreover, there can be concurring causes to such a situation and the Court has found that Energy Transfer's construction inadequacies were a cause to this failure as contributed to by the storm. Thus, under the law cited above the force majeure defense must fail.

6. Energy Transfer's claim that Cardinal failed to deliver an Earnout Calculation Statement for the first earnout period as required by the MIPA

Section 2.7(d) of the MIPA defines an Earnout Calculation Statement as an account or statement "setting for the Inlet Volumes for each day of a calendar quarter." Under 2.7 (a) of the MIPA this statement is required to be submitted in order to determine whether the quantity required by the MIPA has been met for the earnout payment. Energy Transfer argues that since no Earnout Calculation Statement was submitted no earnout payment is owed.

This argument carries no weight with the Court in light of the contract breaches cited above. Here, the evidence establishes that PennEnergy was prepared to deliver the requisite quantities of gas, but there was insufficient capacity to receive the quantity necessary to meet the MIPA requirement, especially in light of the rupture/explosion of the Revolution Pipeline on September 10, 2018, only 10 days into the earnout period. The capacity of the gas through the Pike Station was only 135 million cfd and there was no discharge pipeline or capacity from the Freedom Station. The amount of gas required by the MIPA to meet the earnout requirement was an average of over 200 million cfd on average for a 45-day consecutive period. The gathering system could not handle that amount. Texas law is clear that "a party who 'prevents or makes impossible' the occurrence of a condition precedent upon which its liability under a contract depends

cannot rely on the nonoccurrence to escape liability." *Clear Lake City Water Authority v. Friendswood Development Co., Ltd.*, 344 S.W.3d 514, 519 (Tex. App. 2011) (and the multiple Texas appellate cases cited in footnote 10 of the Opinion). This legal principle dispels Energy Transfer's argument here.

7. Miscellaneous

The Court believes that the foregoing discussion and analysis in this Legal Analysis section thus far is sufficient to address and reject the following arguments/positions asserted by Energy Transfer:

1. PennEnergy's gas wells and production were not capable of producing the requisite amount of gas during the earnout period; and

2. Cardinal/plaintiff cannot satisfy the tender requirement of gas under the earnout provision by relying upon forecasts, projections and expansion notices.

CARDINAL'S CLAIM FOR PRE-JUDGMENT INTEREST

In its "Wherefore" clause to Count I of its complaint, Cardinal asserts a claim for pre-judgment interest. Section 2.7 of the MIPA states in pertinent part as follows:

> If the First Earnout Payment is not paid in full . . . within fifteen (15) Business Days after the Earnout Calculation Statement for the First Earnout Payment becomes final in accordance with this Section 2.7, interest shall accrue at a rate of 10% per annum based on a 365-day year.

Plaintiff bases its claim for pre-judgment interest upon this language/provision.

As Cardinal correctly asserts, when a contract specifies the rate of pre-judgment interest that rate controls. *See Exxon Mobil Corp. v. Valence Operating Co.*,174 S.W.3d 303, 319 (Tex. App. 2005), *review denied* (2006). Pre-judgment interest "shall be computed as simple interest." *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W. 2d 507, 532 (Tex. 1998), *superseded by statute on other grounds*, Tex. Fin. Code

Ann. § 304.1045, (citing Tex. Rev. Civ. Stat. art. 5069-1.05, § 6 (g)). Pre-judgment interest is "compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment." *Cavnar v. Quality Control Parking, Inc.*, 696 S.W. 2d 549, 552 (Tex. 1985). "[U]nder common law, prejudgment interest begins to accrue on the earlier of (1) 180 days after the date a defendant receives written notice of a claim or (2) the date suit is filed." *Johnson & Higgins*, 962 S.W. 2d at 531. (citing Tex. Rev. Civ. Stat. art. 5069-1.05, § 6 (a)).

Here defendants' Exhibit B 220 reflects that written demand for payment of the first earnout was sent by e-mail of December 11, 2018. It requested that payment be made by April 1, 2019. To the Court's understanding no payment has ever been made. Pre-judgment interest at the simple rate of interest of 10% from the date of 180 days after the December 11, 2018 demand, which would be June 9, 2019, through today (March 10, 2025) is $ 18,977,261.40. The Court will include that amount as part of its Order.

ATTORNEYS' FEES

Plaintiff argued a claim for attorney's fees in closing argument. There is no claim for attorneys' fees in the "Wherefore" clause of Count I of the Complaint. Thus, at this time, there is no claim for attorneys' fees properly before the Court. Moreover, plaintiff has not cited the Court to any provision in the MIPA that provides for attorney's fees.

In its closing argument summary, plaintiff has cited 42 Pa. C.S.A § 2503 as a basis for recovery of attorneys' fees here. Specifically, plaintiff cites to subparagraphs (7) and (9) within that statutory section, which provide as follows:

The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:

* * * *

(7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.

* * * *

(9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.

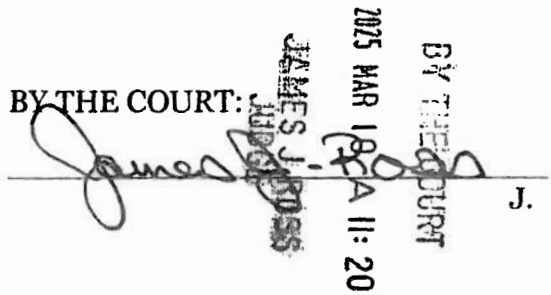
The Court begins its analysis by citing the general law in Pennsylvania regarding recovery of attorney's fees. Pennsylvania has a statute that addresses recovery of attorney's fees, 42 Pa. C.S.A. § 1726 (a)(1), which states that "[a]ttorney's fees are not an item of taxable costs except to the extent authorized by Section 2503 . . . ." This is what is often referred to as the " 'American Rule' that each party is responsible for his or her own attorney's fees . . . ." *Krassnoski v. Rosey*, 454 Pa. Super 78, 83, 684 A.2d 635, 637 n.2 (1996). An exception to this can be found in 42 Pa. C.S.A. § 2503(10), which provides that attorney's fees may be recovered if specified in a statute.

Cardinal has cited to a statute here in its closing summary, but there is not a pleading that places this issue before the Court at this time. Thus, the Court will not address the issue of attorney's fees at this time, without prejudice to plaintiff to file a petition or other pleading to place the subject at issue.

CONCLUSION

The Court will enter an Order consistent with the content of this Memorandum Opinion on this same date.

BY THE COURT:



IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY
PENNSYLVANIA
CIVIL DIVISION—LAW

CARDINAL MIDSTREAM II, LLC, Plaintiff, vs. ENERGY TRANSFER LP, f/k/a Energy Transfer Operating, L.P., f/k/a Energy Transfer Partners, L.P., and ETC Northeast Pipeline, LLC f/k/a ETC Northeast Midstream, LLC, f/k/a ETC Cardinal Midstream, LLC, Defendants.	:	No. 10523 of 2021

ORDER

AND NOW, this 10th day of March, 2025, upon consideration of all evidence and testimony presented before this Court in a nonjury trial heard on various days between December 2, 2024 and January 14, 2025, and based upon the content of this Court's Memorandum Opinion filed this same date, which is incorporated herein by reference,

It is hereby ordered as follows:

1. Plaintiff Cardinal Midstream II, LLC has sustained its burden of proof on Count I of its Complaint filed in this case claiming breach of contract against defendants.

2. Plaintiff is awarded $33,000,000 in damages against defendants Energy Transfer LP and ETC Northeast Pipeline, LLC.

3. Plaintiff is also awarded pre-judgment interest in the amount of $ 18,977,261.40.

4. The total award in favor of plaintiff and against defendants is $ 51,977,261.40 and judgment in that total amount is entered in favor of plaintiff and against defendants.

BY THE COURT:

James J. Ross J.

JAMES J ROSS
JUDGE

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BY THE COURT

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IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY
PENNSYLVANIA
CIVIL DIVISION—LAW

CARDINAL MIDSTREAM II, LLC, Plaintiff, vs. ENERGY TRANSFER LP, f/k/a Energy Transfer Operating, L.P., f/k/a Energy Transfer Partners, L.P., and ETC Northeast Pipeline, LLC f/k/a ETC Northeast Midstream, LLC, f/k/a ETC Cardinal Midstream, LLC, Defendants.	:	No. 10523 of 2021

J. Ross July 14, 2025

MEMORANDUM OPINION

This Court presided over a non-jury trial in this case that occurred between December 2, 2024 and January 14, 2025. The Court issued a Memorandum Opinion and Order to decide this case, which was filed on March 10, 2025. After obtaining an extension of time to file a post-trial motion, defendants timely filed a motion for post-trial relief on March 27, 2025. The Court set a schedule for briefing and argument on the motion, with which both parties complied. Plaintiff timely filed its response to the motion, after a permitted extension, on April 23, 2025. Defendants filed their brief in support of the motion on May 8, 2025 and plaintiff filed its brief in opposition to the motion on May 29, 2025. In accordance with the schedule set by the Court, the Court heard argument on the motion, on the record, on June 12, 2025. Through this Memorandum Opinion, and Order to be issued this same date, the Court will rule upon/decide the issues raised in the post-trial motion.

FACTS

The Court has extensively and adequately set forth the facts in this case in its Memorandum Opinion issued on March 10, 2025. The Court relies upon, and incorporates into this Memorandum Opinion, those facts for purposes of the legal analysis and discussion herein.

LEGAL ANALYSIS

The Court gave this case great thought and consideration in its Memorandum Opinion and Order of March 10, 2025. The Court believes its Memorandum Opinion of March 10, 2025 already addresses most of the issues raised by defendants in their post-trial motion. For that reason, the Court will rely upon, and incorporate discussion from, that Opinion into this Memorandum Opinion by reference to address many of the issues raised by defendants and not address those issues further here. However, there are some issues that the Court will address and comment further upon. Accordingly, the Court will designate two subsections in its legal analysis, one to identify the issues raised by defendants that the Court will rely upon its previous Memorandum Opinion to address and not comment further upon and a second to concisely render further discussion and analysis for purposes of addressing the post-trial motion.

1. Issues raised that the Court will not comment further upon and will rely upon the discussion in its previous Memorandum Opinion of March 10, 2025 to address

The Court believes that it has adequately addressed, and will not comment further upon, the following issues raised by defendants in their post-trial motion:

1. The Court erred as a matter of law in determining that the MIPA earnout provision was satisfied;

2. The Court erroneously determined that defendants had a duty to build a high-pressure gas pipeline;

3. The Court erred in determining that defendants failed to meet a standard of care for pipeline design and construction;

4. The Court erred by considering agreements to which plaintiff was not a party; and

5. The Court erroneously determined that defendants were responsible for the actions of non-party ETC Northeast Field Services.

2. Issues addressed in this Memorandum Opinion

There are seven other issues raised by defendants in their post-trial motion that the Court has addressed either in its Memorandum Opinion of March 10, 2025 issued to decide the case or in its Memorandum Opinion of November 15, 2021 issued to decide defendants' preliminary objections. The Court will further address these issues in separate subsections below, while also incorporating the discussion in the previous Memorandum Opinions by reference as necessary.

a. The Court erroneously applied the doctrine of judicial estoppel

Defendants contend that the Court erred by "determining that defendants were judicially estopped from disputing that 'Penn Energy was ready and prepared to meet the earnout requirement for gas production during the requisite period.' " *See* par. 31 of post-trial motion. As a basis for this argument defendants allege the following:

1. defendants did not take an inconsistent position in the Delaware litigation when compared with their position in this case;

2. the Court erred to the extent that it determined that the expert report and deposition testimony of Mark O'Rear on behalf of defendants in the Delaware litigation merited a finding of judicial estoppel;

3. ETC Pipeline did not successfully maintain its position in the Delaware litigation because the litigation in that forum was settled;

4. the Court erred in applying the doctrine of judicial estoppel because plaintiff failed to plead it;

5. the Court erred in determining that Pennsylvania, rather than Texas, law applied to the issue of judicial estoppel; and

6. the Court erred in that it did not consider the testimony of defense experts John Hughett and Justin Clapper based upon the doctrine of judicial estoppel.

The Court will address these issues below.

First, the Court set forth extensive facts at pages 29-34 of its March 10, 2025 Memorandum Opinion for the purpose of not only establishing an independent basis and evidence for its finding that plaintiff would have met the earnout requirement separate and apart from the application of the doctrine of judicial estoppel, but also to establish why the doctrine applied to this case and why the positions taken by the defendants in the two litigations were inconsistent. Relying upon these facts, the Court made findings and legal conclusions at pages 54-59 of the same Memorandum Opinion to establish why the earnout requirement was met based upon independent evidence even before considering the doctrine of judicial estoppel (discussion on pages 54-56 of Opinion). Thereafter, at pages 56-59, the Court explains in detail why the doctrine applies to these facts and why the positions taken by the defendants in two separate litigations were inconsistent under the law as a supplement to, and not a substitute for, the independent evidence. The clear and undisputed facts establish that the positions in the two cases were totally inconsistent.

Second, at pages 33-34 and 56 of its March 10, 2025 Memorandum Opinion, the Court set forth relevant facts to establish the applicability of the judicial estoppel doctrine

as applied to the testimony of Mark O'Rear, a defense expert in the Delaware litigation. This finding is clearly grounded in a reading of Exhibits 784, 786 and 787 and the transcript of trial testimony before this Court on December 17, 2024 at pages 48-83. In the Delaware litigation, O'Rear cited the testimony of Michael Krehel, plaintiff's expert here, to advance his position in Delaware that the earnout requirements would have been met and significant gas would have been available for business purposes based upon forecasts and projection data for insurance revenue loss purposes in Delaware, while defendants took the exact opposite position here to combat plaintiff's claims.

Third, defendants argue that ETC Pipeline did not successfully maintain its position in the Delaware litigation because the case was settled and judicial estoppel, therefore, does not apply. This argument is directly contrary to applicable Pennsylvania Supreme Court law. In *In re Adoption of S.A.J.*, 575 Pa. 624, 636 n. 4, 838 A.2d 616, 623 n. 4 (2003), the Supreme Court discusses judicial estoppel and contrasts it with the doctrine of collateral estoppel by noting that collateral estoppel is intended to protect the finality of judgments and conserve judicial resources in cases where the matter is actually litigated, whereas judicial estoppel is concerned solely with the integrity of the courts and does not require that the issue be actually litigated. Defendants argue that Texas law applies under the MIPA to negate this Pennsylvania Supreme Court holding. While Texas substantive law applies under 14.12 of the MIPA, Texas law itself recognizes that judicial estoppel is a procedural rule (*Long v. Knox*, 155 Tex. 581, 585, 291 S.W. 2d 292, 295 (1956)), and this Court has applied Pennsylvania procedural rules without objection throughout this case. Moreover, even if defendants' argument was to be considered under Texas law, in the *Long* decision the Texas Supreme Court makes the same distinction as the Pennsylvania Supreme Court, namely that the issue need not be litigated to finality

for judicial estoppel to apply. Under Texas law, "a party is estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding under oath the contrary to the assertion sought to be made." *Id.* That certainly has occurred here. In fact, the *Long* Court made it clear "that it is not necessary that the party invoking the doctrine should have been a party to the former proceeding." *Id.* Thus, plaintiff had every right to invoke the doctrine here under either Pennsylvania or Texas procedural law.

Fourth, defendants contend that the Court erred in applying the doctrine of judicial estoppel because plaintiff failed to plead it. This argument lacks merit for multiple reasons. First, as noted above, judicial estoppel is a procedural issue and not an affirmative defense that must be pled in new matter pursuant to Pa. R. Civ. P. 1030. Second, judicial estoppel is a doctrine invoked "to protect the integrity of the judicial process," and "is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 749-50, 121 S.Ct. 1808, 1814-15 (2001). Although plaintiff raised this issue at trial, the Court exercised its discretion to accept the evidence and argument because defendants' position in this case was clearly inconsistent with its position in the Delaware litigation and defendants would have derived an unfair advantage if not estopped from presenting and relying upon a completely inconsistent position here. Thus, plaintiff did not have to plead this as new matter because the Court exercised its discretion to apply the doctrine. Finally, as noted by plaintiff and confirmed by the record here, the settlement in the Delaware case occurred shortly before the trial of this case commenced and the settlement documents and terms were not disclosed by defendants until November 20, 2024, only 12 days before the trial commenced here (December 2, 2024). Thus, the $70 million settlement amount, which served as the benefit acquired in the Delaware litigation to satisfy a necessary requirement for judicial

estoppel to apply (*In re: Adoption of S.A.J.*, 575 Pa. at 636 n. 4, 838 A.2d at 623 n. 4), was not known by plaintiff until the eve of trial and gave little time for plaintiffs to give any notice of its intention to raise or assert the doctrine.

Fifth, defendants allege that the Court erred in applying Pennsylvania rather than Texas law on the issue of judicial estoppel. The Court has addressed this issue above and has noted that even if Texas law was applied the result would be the same.

Sixth, and finally, defendants allege that the Court improperly did not consider the testimony of defense experts John Hughett and Justin Clapper based upon the doctrine of judicial estoppel. Nothing is further from the truth. A careful reading of pages 47-49 and 50-51 of this Court's Memorandum Opinion of March 10, 2025 reveals that the Court set forth and considered the testimony of these two individuals. At page 59 of the same Opinion, the Court exercised its discretion by not accepting their testimony in light of the weight of the testimony and evidence in total cited at pages 54-59 of the Opinion. The Court is entitled to exercise said discretion under the law; the Court did not reject the testimony on the basis of the doctrine of judicial estoppel as argued by defendants.

b. The Court Erred by failing to find that a force majeure applied

Defendants assert and argue that the Court erred as a matter of law by failing to find that a force majeure defense applied to these facts. They base this argument on a tropical storm that occurred and Pennsylvania Department of Environmental actions regarding the issuance of permits necessary to complete the construction of the pipeline after the explosion. First, defendants question the Court's use of the definition of a force majeure as an "act of God." Defendants also argue that the Court was required to find a force majeure caused the pipeline explosion as a matter of law based upon the evidence

regarding the rainfall as an aftermath of Tropical Storm Gordon and the evidence of regulatory impediments of the DEP. Defendants also cite to the Court's reliance upon the Dynamic Risk report in addressing the force majeure issue. Finally, defendants advance the argument that the Court erred as a matter of law in determining that "human intervention" was a cause of the explosion of the pipeline. The Court addresses these arguments below.

It is first interesting to the Court that defendants used the very same definition for force majeure at page 9 in its trial brief filed with the Court prior to trial on November 15, 2024, namely "acts of God." In citing this definition in that brief, defendants did not cite to the MIPA; rather they cite to the definitions for force majeure in the Gathering and Gas Processing Agreements, thereby lending credence to the Court's finding that these agreements were incorporated into, and became a part of, the MIPA. Moreover, defendants have repeatedly argued that Texas substantive law must be applied here, which the Court did at page 65 of its Memorandum Opinion of March 10, 2025. At that point, the Court cited a Texas Supreme Court case defining "act of God" as "an accident that is due directly and exclusively to natural causes without human intervention .... The accident must be occasioned by the violence of nature, and all human agency is to be excluded from creating or entering into the cause." *Scott v. Atchison, Topeka and Santa Fe Railway Co.*, 572 S.W. 2d 273, 279-80 n. 9 & 10 (Tex. 1978). The Court's decision of March 10, 2025, detailed in its Memorandum Opinion, is replete with instances of human error and fault by defendants that led to the pipeline failure. Defendants not only ignore these details in their motion, but also ignore the cited Texas law on force majeure and offer nothing to the contrary. Further defendants ask the Court to find that regulatory impediments delayed completion of the pipeline (which is a specious argument at best)

while ignoring the fact the regulatory intervention would never have been necessary if the explosion had not occurred due to human error. In sum, defendants ask the Court to consider the storm and regulatory requirements in a vacuum, without reference to the entire body of evidence which puts the issue in proper perspective.

The Court did rely upon the Dynamic Risk reports (Exs. 40-42) here. The reports were commissioned by the defendants after the explosion to determine the cause of the pipeline explosion. The authors of the reports did cite rainfall as a contributing factor in the rupture, but emphasized the human failures in construction of the pipeline in their findings as the cause. This is all detailed at page 65 of this Court's Memorandum Opinion of March 10, 2025, at which point the Court found human failure to be the cause of the rupture, thereby negating the force majeure defense under applicable Texas law.

In finalizing this section, the Court notes that Texas recognizes that an act can be a cause if it is a substantial factor in causing an injury. *Prudential Ins. Co. v. Jefferson Assocs., Ltd.*, 896 S.W. 2d 156, 161 (Tex. 1995). Defendants continuously ignore this concept/principle throughout their argument. They repeatedly argue that the storm was a force majeure that caused the rupture as a matter of law without reference to other evidence, facts and circumstances that were substantial factors in the explosion of the pipeline, thereby negating the applicability of the force majeure defense under the Texas law cited above.

c. The Court erroneously applied the prevented performance doctrine to eliminate a contractual requirement

Defendants next contend that the Court erred by applying the prevented performance doctrine retroactively to absolve plaintiff of its obligation to provide an earnout calculation statement for the first earnout period under the terms of the MIPA.

The Court's discussion of this subject is contained at pages 66-67 of its March 10, 2025 Memorandum Opinion. As the Court noted at page 66, the gathering system developed and constructed did not have the requisite capacity to accept and deliver the amount of gas to meet the earnout requirements due to contract breaches by defendants in design and construction of the pipeline and gathering system and due to the explosion of the Revolution Pipeline because of construction and design defects.

Defendants' argument is grounded in § 11.11(c) of the MIPA, which provides that the duties and obligations of the parties could not be "expanded" beyond the terms of the agreement on the basis of "any legal or equitable principle." According to defendants, the prevented performance doctrine is an equitable principle. Defendants cite no cases to support this proposition in their brief. This argument continues defendants' quest to have the Court rely upon terms, provisions and other circumstances in a vacuum without considering all of the facts and evidence. Defendants demand that the Court rely upon Texas substantive law to decide matters, yet when the Court does just that, defendants protest the applicability of that law based upon nebulous contract provisions.

The Court has grounded its findings and determination in the facts and evidence of this case and in the clear breaches of the contract by defendants to eliminate the need for plaintiff to provide a calculation that would have been an exercise in futility because the gathering system could not have handled the amount of gas necessary to meet the earnout provision once offered. This determination is clear from the evidence, and the Court believes it properly relied upon clear Texas law cited at pages 66-67 of its March 10, 2025 Memorandum Opinion that "a party who 'prevents or makes impossible' the occurrence of a condition upon which its liability under a contract depends cannot rely upon the nonoccurrence to escape liability." *Clear Lake City Water Authority v.*

Friendswood Development Co., Ltd., 344 S.W. 3d 514, 519 (Tex. App. 2011). There are numerous other Texas case decisions cited in footnote 10 in support of this quote in the *Clear Lake City Water Authority* decision. Moreover, there are seven additional Texas cases, both state and federal, that have cited this quote and headnote from the *Clear Lake City Water Authority* decision with approval through January, 2025. *See, e.g., Thang v. Defy International, LLC*, 712 S.W. 3d 647, 659 n. 3 (Tex. App. - Houston 2025).

Defendants do cite to two federal district court decisions that state that the prevented performance doctrine does not apply in a commercial setting involving sophisticated parties on both sides. *Arrow Child & Family Ministries v. Rite of Passage, Inc.*, 2024 WL 3174375, * 7 (N.D. Texas 2024) and *Devonshire Real Estate & Asset Mgmnt, LP v. American Ins. Co.*, 2014 WL 4796967, * 1 (N.D. Tex. 2014). The Court notes that both decisions are unpublished decisions that are not persuasive to this Court in light of the federal courts' failure to cite any Texas state appellate decisions in support of the position taken by those two federal courts and in light of the distinct factual situations presented in those cases. As the appellate courts of Pennsylvania have held, state courts are not bound by a federal court's interpretation of state law. *Martin v. Hale Products, Inc.*, 699 A.2d 1283, 1287 (Pa. Super. 1997). In light of the clear holdings of the Texas state appellate courts cited in the preceding paragraph above, the Court does not find the cases cited by defendants as persuasive.

d. The Court erroneously awarded prejudgment interest

Defendants contend that no prejudgment interest is owed/due on the following grounds:

1. plaintiff never produced an earnout calculation statement as required to trigger the interest under the terms of the MIPA;

2. the Court improperly relied upon common law, rather than the terms of the MIPA, in awarding pre-judgment interest; and

3. the Court erred by relying upon improper notice to trigger the claim

First defendants argue that a decision that plaintiff relies upon to support its claim for pre-judgment interest, *E.F. Johnson Co. v. Infinity Global Technology*, 2016 WL 4254496 (Tex. App. 2016), does not apply to this situation. Defendants claim that unlike the defendant in the *E.F. Johnson Co.* case, they hotly contest liability and do not concede it. Defendants miss the key language at page * 11 of that opinion, wherein the Court stated that it could not read the contract in that case in a manner that rendered the defendant's breach of contract meaningless. In making this determination, the Texas appeals court relied upon the Texas Supreme Court decision in *City of Midland v. Waller*, 430 S.W. 2d 473, 477-78 (1968), in which the Supreme Court held that a contractor could not be relieved from responsibility for faulty workmanship by arguing and relying upon an opposing party's failure to comply with contract terms, which defendants are attempting to do here. As the *City of Midland* Court went on to state/hold that a court has "the duty . . . to read, construe, and consider the contract within its four corners so that all of its provisions will be taken into consideration and construed together to give effect to all, if possible, and ascertain the meaning and effect of the contract." *Id.* at 478. Here, defendants had an obligation to construct a proper gathering system that would permit the requirements of the earnout provision to be met. They failed to do so, and cannot now hide behind an isolated contract term (production of an earnout calculation statement) that was rendered meaningless by the gathering system's inability to accept the gas even if such a statement was produced.

Second, defendants incorrectly argue that the Court improperly relied upon common law rather than the terms of the MIPA. This argument is dispelled by a reading of pages 67-68 of this Court's Memorandum Opinion of March 10, 2025 at which point the Court relied on section 2.7 of the MIPA and the 10% interest rate provided therein as a basis for its award of prejudgment interest. Interestingly, defendants urge the Court, at pages 16-17 of their brief in support of the post-trial motion, to ignore 2.7 of the MIPA and its 10% pre-judgment interest rate and award interest at a statutory rate of 7.5%, which this Court will not do. This is again an attempt by defendants to cite contract provisions that may be favorable to them and ignore others.

Finally, defendants argue that the December 11, 2018 email by Greg Muse (Ex. B-220) was not proper notice and demand for payment. First, defendants assert that "[t]he email was not from Cardinal but from PennEnergy." Actually, the email was authored by Greg Muse, who was and is, a principal in both PennEnergy and PER Midstream; PER Midstream was also entitled to an earnout payment under the terms of the MIPA but settled its claim with defendants. More importantly, the email language states "ET shall pay to Cardinal Midstream PA and PER the first Earn-Out of $55 MM on April 1, 2019 . . . ." This final contention is a very weak argument. Moreover, in its trial brief filed in November, 2024, just before the start of trial, defendants stated:

> Notably, Plaintiff and PennEnergy had not satisfied several key requirements for receiving the Earnout Payment. This included ignoring steps necessary to tender undelivered gas such that it counted toward the volume requirements of the Earnout Payment and providing proper notices to claim payment. These basic requirements were wholly within Plaintiff's control-irrespective of the Incident or the status of the Revolution Pipeline—*and yet plaintiff demanded immediate payment regardless of what obligations were or were not satisfied.*

(emphasis added). Now defendants argue that no demand was made.

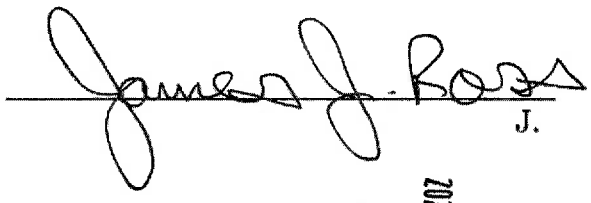
e. The Court erred as a matter of law in excluding Defendant's Exhibits A-18, F-45 and F-46

This issue was not briefed by defendants, and the Court therefore deems that it is withdrawn or waived. The Court will not address it further.

f. The Court erred in determining that it has subject matter jurisdiction over this case and that Beaver County is the proper venue for the litigation

Defendants raised these issues through preliminary objections to plaintiff's amended complaint. The Court addressed them through a Memorandum Opinion and Order of November 15, 2021. The specific discussion addressing these issues is contained at pages 6-11 of that Memorandum Opinion, and the Court attaches a copy as Exhibit A to this Memorandum Opinion and incorporates the discussion at those pages into this Opinion by reference in response to these issues/arguments raised by defendants.

BY THE COURT:



J.

BY THE COURT
2025 JUL 14 P 2:57
JAMES J. ROSS
JUDGE

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY
PENNSYLVANIA
CIVIL DIVISION—LAW

CARDINAL MIDSTREAM II, LLC, Plaintiff, vs. ENERGY TRANSFER LP, f/k/a Energy Transfer Operating, L.P., f/k/a Energy Transfer Partners, L.P., and ETC Northeast Pipeline, LLC f/k/a ETC Northeast Midstream, LLC, f/k/a ETC Cardinal Midstream, LLC, Defendants.	:	No. 10523 of 2021

ORDER

AND NOW, this 14th day of July, 2025, upon consideration of defendants' motion for post-trial relief, and upon further consideration of the briefs of the parties both in support of and in opposition to the motion, and after hearing the arguments of counsel on June 12, 2025,

It is hereby Ordered that the motion is denied for the reasons stated in this Court's Memorandum Opinion filed this same date, which is incorporated into this Order by reference. The Court affirms its previous Order of March 10, 2025.

BY THE COURT:

James J. Ross J.

2025 JUL 14 P 2:57
JAMES J. ROSS
JUDGE
BY THE COURT