IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0964

ANTERO RESOURCES CORPORATION, formerly known as ANTERO RESOURCES APPALACHIAN CORPORATION,
Defendant-Below, Petitioner

v.

L&D INVESTMENTS, INC., a West Virginia corporation, RICHARD SNOWDEN ANDREWS, JR., MARION A. YOUNG TRUST, CHARLES A. YOUNG, DAVID L. YOUNG and LAVINIA YOUNG DAVIS, successors of Marion A. Young, CHARLES LEE ANDREWS, IV, and FRANCES L. ANDREWS,
Plaintiffs-Below, Respondents

MIKE ROSS, INC.,
Defendant-Below, Respondent

Hon. Thomas A. Bedell, Judge
Civil Action No. 13-C-528-2

REPLY BRIEF OF THE PETITIONER

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I. STATEMENT OF THE CASE

The Brief by the Respondent, L&D Investments, Inc., etc., et al. ("L&D") is long on hyperbole[1] but short on a cogent discussion of what objectively appears in the record and is otherwise supported by the applicable law.

First, L&D spends much of its Brief arguing that it was undisputed that MRI's tax deed was void when the only thing that is undisputed is the Circuit Court's holding, ultimately reversed by this Court on appeal, that the tax deed was not void.[2]

Second, L&D attempts to ascribe some sinister motive to the agreement between the Petitioner, Antero Resources Corporation ("Antero") and the Respondent, Mike Ross, Inc. ("MRI"), for Antero to pay MRI the disputed royalties pending the outcome of the litigation with MRI obligated to indemnify Antero if L&D and others ultimately prevailed, but that agreement

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[1] *See, e.g.*, L&D's Brief at 1 ("morphed into claims of fraud, conversion, trespass, slander of title and constitutional infractions"), at 1-2 ("bogus Tax Deed claimed by MRI and endorsed by Antero"); at 2 ("Antero had knowingly and intentionally diverted to MRI those millions of dollars of royalties from the rightful mineral owners"); at 3 ("Antero was caught 'flat footed' by MRI's Offer of Judgment made shortly before the Trail [sic] was to begin"); at 3 ("Antero had made a 'side deal' with MRI to keep paying MRI the Plaintiffs' monies while the Plaintiffs twisted in the wind"); at 3 ("Antero knew that MRI was not entitled to such monies"); at 3 ("an award of punitive damages while MRI was only liable for slander of title and constitutional torts which itself could sustain a significant verdict as both causes of action permit recovery of attorneys' fees and costs as part of the damages, as well as punitive damages"); at 4 ("Antero continued paying MRI with Plaintiffs' money as Antero"); at 6 ("Surely that would be the prudent and right thing to do? Nope, instead, Antero, while clearly knowing that the MRI Tax Deed was void, chose to secure an indemnity agreement and then continue depriving the rightful Andrews owners of their royalties from the Andrews Tract for another seven years which continues today as regards the $4 million dollars of Antero's voluntary settlement which is being held in escrow while Antero again seeks that which it is not entitled."); at 6 ("But it gets worse. Antero already had in its possession documents confirming that there were Andrews Tract owners, including the Tschappats, paying property assessments on the Andrews Tract sufficient to void the MRI Tax Deed.").

[2] *L&D Invs., Inc. v. Mike Ross, Inc.*, 241 W. Va. 46, 48, 818 S.E.2d 872, 874 (2018) ("Through its Omnibus Order, the circuit court declared MRI to be the owner of eighty percent of the oil and gas interests in two adjacent tracts of land in Harrison County pursuant to a 2003 tax deed issued to MRI after it purchased the subject property at a delinquent tax sale.").

was a legitimate compromise that resulted in no harm to L&D, which has received the full amount of royalties owed plus interest.

Third, L&D inaccurately portrays two title opinions as establishing that Antero knew the subject tax deeds were void as even a cursory review of L&D's Brief demonstrates. Obviously, "assuming the correctness" of a tax deed for purposes of a title opinion[3] is not an acknowledgment of a tax deed's invalidity, it is the opposite. Indeed, here is the language quoted in L&D's Brief:

> 5. Our opinions herein are expressly subject to the correctness **of our assumption that the tax sale which led to the tax deed described in Paragraph No. 6 under the heading, "Chain of Title" was conducted without any substantive or procedural irregularities which would render it void or voidable**, and is subject to our assumption that the interest in the oil and gas within and underlying the subject property which was conveyed to Mike Ross, Inc. by this tax deed was not, at the time of said sale, covered by any other assessments for real estate tax purposes on the land books of Harrison County, West Virginia and included the undivided interests in the subject property herein above outlined in said Paragraph No. 6.[4]

That "assumption" turned out to be incorrect, but the argument that assuming one thing is proof of knowledge of the opposite thing is absurd.

Fourth, faced with the reality that Antero had assumed the validity of MRI's tax deed in its dealings with MRI, L&D attempts in its Brief to belatedly convert its theory of the case into some negligence-based cause of action it never asserted: "Any prudent and reasonable gas producer who had **any inkling** that there may be such 'other assessments' which could void the very document that provided Antero with its authority to be paying MRI millions of dollars of royalties, **would immediately have suspended all royalty payments and filed a quiet title action to resolve any**

[3] L&D's Brief at 5.

[4] *Id.* (emphasis added).

ownership issues."[5] The Court will notice no reference to the record or any legal support for the proposition that Antero had a duty – if it had any "inkling" that there might be other tax assessments for the subject property that were not included in the tax sale – to suspend royalty payments and file a declaratory judgment action, because there are none.

Fifth, confronted by a title examination report that assumed, based on the records reviewed, the validity of MRI's tax deed, and by the absence of any legal duty on the part of Antero to conduct an independent investigation of all tax assessments on the subject property at the time of the tax sale or to file a declaratory judgment action if anyone stepped forward challenging the tax sale, the next layer of L&D's argument is to allege that a second title examination was "contrived."[6] This is based on the laughable argument – in light of the undisputed adversity between Antero and MRI which is the subject of not one but two pending appeals – that the second title examination was prepared "only to 'create' a plausible, but albeit contrived, narrative that Antero was pushing"[7] to benefit MRI: "Why did Antero create such an unsupported title exam?[8] It fit Antero's need to keep MRI as the major owner of the Andrews Tract with the hopes that Antero's failure to heed the warning in the 2007 Title Exam would be 'swept under the rug.'"[9] Of course, it was irrelevant

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[5] *Id.* at 6 (emphasis supplied).

[6] *Id.* at 7.

[7] *Id.*

[8] Again, the Court will notice no reference to either the record or legal authority to support this assertion. Apparently, L&D believes that merely alleging that a title examination was "unsupported" is sufficient to make it so. Antero notes that MRI describes this same 2013 title opinion as follows: "In fact, Antero obtained a title opinion in September 2013 on the subject property … concluding MRI was the rightful owner of the royalties." MRI Brief at 3.

[9] L&D's Brief at 7-8.

to Antero whether royalty payments were made to MRI or L&D and, as noted, the first title examination assumed, based on the information reviewed, the validity of MRI's tax deed.

Sixth, L&D intimates that Antero was somehow hiding the title examination reports,[10] but (1) Antero's title examination reports were irrelevant to whether MRI's tax deed was valid and (2) title opinions are protected by the attorney/client privilege and work product doctrine.[11] Antero's obligations were purely contractual. It had a contractual obligation to pay royalties to the rightful owners of the mineral properties. Indeed, L&D's Brief describes Antero's obligations as follows: "Antero had a contractual duty to pay the Plaintiffs and the other owners of the Andrews Tract their royalties produced from the mineral property."[12] If the tax deed was valid, it had a contractual obligation to pay royalties to MRI. If the tax deed was invalid, it had a contractual obligation to pay royalties to L&D and others. Thus, the idea that, "The production of both Title Exams changed the complexion of the entire case as now there was little doubt that Antero acted deliberately and maliciously"[13] is ridiculous. One does not "maliciously" write a royalty check to one party or the other who are disputing between themselves as to the rightful payee.[14] Moreover, Antero offered

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[10] *Id.*

[11] *Running Foxes Petroleum, Inc. v. Nighthawk Prod. LLC*, No. 14-CV-01466-MSK-MJW, 2015 WL 12967851 (D. Colo. Sept. 8, 2015), *report and recommendation adopted*, No. 14-CV-01466-MSK-MJW, 2015 WL 9312097 (D. Colo. Dec. 23, 2015); *North Dakota v. United States*, 64 F. Supp. 3d 1314, 1355 (D.N.D. 2014) ("With respect to the title opinions that are the subject of the second category of documents, the court concludes these opinions are also privileged and that any waiver of the privilege does not extend to these documents."); *Ishee v. Fed. Nat. Mortg. Ass'n*, No. 2:13-CV-234-KS-MTP, 2014 WL 2162753, at *5 (S.D. Miss. May 23, 2014) ("Plaintiff seeks the title search and title opinion on any property owned by Plaintiff. Underwood states that it will produce the abstractor notes and land records copied as a result of the title search, but Underwood objects to the production of the title opinions as they are protected by the attorney-client privilege. This is an adequate response to the subpoena.").

[12] L&D's Brief at 15.

[13] *Id.* at 8.

[14] Likewise, L&D's statement that Antero's alleged breach of its contractual obligation "could have resulted in a ... verdict against Antero upwards of $20 million dollars," *id.* at 15, is unaccompanied by any

to interplead the disputed royalty payments pending the litigation, which L&D rejected.[15] So, it is a bit of a stretch for L&D to now argue that Antero acted in bad faith.

Seventh, L&D accuses Antero of "sandbagging" its indemnification agreement with MRI,[16] which ignores the history of the litigation. Before L&D filed suit, Antero make royalty payments to MRI. Once the suit was filed, Antero stopped making those royalty payments.[17] MRI then proposed that Antero resume payments with MRI agreeing to indemnify Antero if MRI did not prevail on the validity of its tax deed. MRI and Antero then entered into an indemnification agreement and Antero resumed payments. Initially, as noted, MRI prevailed in the Circuit Court, which held that the tax deed was valid. It was not until this Court reversed that decision that the MRI/Antero indemnification agreement was implicated, prompting a cross-claim by Antero against MRI under that agreement. There was no "sandbagging" of anything.

Eighth, L&D next argues that because "Antero had been 'playing fast and loose' ... by failing to earlier file a cross-claim against MRI,"[18] and claims that this argument finds support in the rulings of the Circuit Court, but the Circuit Court granted Antero's motion for summary judgment against MRI on its cross-claim,[19] although not to the extent that Antero was entitled.

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rational explanation of how that could have occurred because there is none. Antero paid MRI about $7 million it was ultimately determined that should have been paid to L&D and others, and those are the only damages L&D could recover, which explains why neither L&D nor MRI bother to brief the alleged causes of action separate from breach of contract which motivated Antero's settlement with L&D.

[15] App. 109 ("Antero has the lawful right to deposit the disputed funds into the Clerk of Court."); App. 140 ("Plaintiff does not believe that this is a true interpleader case under the law or the Rules of Civil Procedure as Defendant Antero is not a mere stakeholder.").

[16] *Id.* at 9. MRI similarly states, "Antero tardily began pressing a crossclaim against MRI." MRI's Brief at 5.

[17] MRI's Brief at 3.

[18] L&D's Brief at 10.

[19] App. 3083.

Finally, in a tacit acknowledgment of the weakness of the foregoing arguments, L&D contends, without cross-assigning any error or offering any legal support, that Antero is barred from challenging the Circuit Court's decision "based on the Settlement Agreement provision that the Trial Court would decide both the facts and the law regarding Antero's claim to contribution or setoff."[20] The actual language of the L&D/Antero Agreement is not quoted in this section of L&D's Brief but later and states, "Any claim by Antero ... to offset or reduce" the amount of the L&D/Antero settlement "by Plaintiffs' acceptance of Mike Ross, Inc.'s $4,000,000.00 Offer of Judgment will be preserved ... as will Plaintiffs' right to contest such offset or reduction. ... Antero and Plaintiffs agree to submit such issues to Judge Bedell for resolution."[21] Nowhere did either L&D or Antero agree to be bound by the Circuit Court's rulings on an offset or reduction, nor did they waive their right to appeal. Instead, L&D and Antero agreed that each would be bound by a "final court order of the court of last resort,"[22] preserving the appellate rights of each.

In contrast to L&D's florid rewrite of the history of this litigation, its Brief states, "MRI generally agrees with Antero regarding the basic facts of this case."[23] For example, MRI concedes, "Despite its cessation of payment" to MRI after L&D filed its suit, "Antero never disputed that it owed royalty payments to the owner of the contested mineral estates."[24] Where MRI and Antero differ concerns MRI's clear indemnification obligation if Antero paid to MRI royalties ultimately determined to belong to L&D and others.

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[20] L&D's Brief at 12.

[21] *Id.* at 14, n.17.

[22] App. 2374.

[23] MRI Brief at 2.

[24] *Id.* at 3.

First, MRI's argument that "Antero used this existing obligation" under the applicable leases, "as a bargaining chip to create a one-way legal obligation on MRI to indemnify Antero"[25] is ridiculous. Antero was faced with two competing claims – those of L&D and MRI – to royalty payments. Prudently, after L&D filed suit, it suspended royalty payments to MRI, and then later conditioned resumption of those payments on MRI's agreement to indemnify Antero if MRI did not prevail in its dispute with L&D. There was nothing "one-way" about this agreement – MRI got its royalty payments and Antero got an agreement by MRI to make Antero whole if MRI lost in its tax deed dispute with L&D.

Second, MRI makes a convoluted argument that because fewer than all property owners appealed the Circuit Court's initial ruling regarding the validity of the tax deed its clear indemnification obligation is undermined.[26] Obviously, however, if the tax deed was void as to some of the owners, it was void as to all, and MRI acknowledges that the Circuit Court so ruled.[27]

Third, MRI advances the curious contention that because it settled with L&D through an offer of judgment, it obtained a "full release of all claims,"[28] but unlike Antero, MRI accepted a judgment against itself and never settled with L&D. The idea that its offer of judgment "extinguish[ed] the claims for wrongfully received royalties asserted by Plaintiffs"[29] such that Antero is not entitled to indemnification from MRI is unworthy of any response.

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[25] *Id.*

[26] *Id.* at 4.

[27] *Id.*

[28] *Id.* at 5.

[29] *Id.*

Fourth, MRI complains that "Antero neither invited MRI to participate in the settlement of the claim nor sought MRI's input in determining which portion of the settlement was directed towards misdirected royalties and which portion was directed toward Plaintiffs' other claims,"[30] but (1) MRI had already settled with L&D; (2) Antero had already asserted its indemnification cross-claim against MRI; (3) Antero had to resolve royalty claims by L&D in excess of MRI's $4 million offer of judgment; and (4) the amount of L&D's settlement with Antero was the remaining difference with nothing allocated for L&D's additional "claims" for which there was no legal or evidentiary support. The Court will also notice MRI has no legal authority for its proposition that Antero had some duty to include MRI in Antero's settlement negotiations with L&D.

Fifth, MRI persists in its efforts to rewrite the MRI/Antero Indemnification Agreement: "Antero myopically focuses on the portion ... that states ... MRI will 'reimburse Antero in full for any amount of royalties paid in excess of what [MRI] may actually own along with the full amount of interest ... on the overpayments in the event L&D ... or any other party, is deemed to own an interest' ... But, as a portion of the Agreement that Antero cagily omits ... the Agreement was intended to 'indemnify Antero for any overpayment as a result of the competing claim of L&D.'"[31] Of course, these two provisions say the same thing – MRI agreed to indemnify Antero for payments made to MRI that, based on the invalidation of its tax deed, should have been paid to L&D or

[30] *Id.*

[31] MRI Brief at 6.

others. Moreover, to describe as a "improper windfall"[32] MRI's making Antero whole for royalty payments to MRI that should have been made to L&D or others is absurd.[33]

Sixth, Antero does not dispute that L&D's asserted claims against Antero, much like the Brief filed in this Court, asserts "a bevy of claims and an accompanying bevy of damages, including misappropriation, trespass, fraud, deceit, conversion, slander of title, unauthorized pooling of mineral interests, and punitive damages,"[34] but MRI does not dispute that (1) Antero paid MRI a total of $6,914,943.75 in royalties for production from the Subject Lease[35] and (2) Antero's $7 million settlement with L&D represented $5,621,285.25 in royalties and $1,378,714.75 in interest.[36] The idea that some part of Antero's settlement with L&D was to resolve claims other than over the royalties paid by Antero to MRI that should have been paid to L&D speaks for itself. L&D and MRI can argue that the $7 million settlement by Antero was something other than for misdirected royalty payments, but the record is undisputed that all the $7 million settlement represented misdirected royalties and interest. Moreover, Antero cannot help but note MRI's hypocrisy in arguing that this Court should accept the argument that some of Antero's $7 million settlement

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[32] *Id.* at 7.

[33] That the Circuit Court was misled by MRI into describing this as "unjust enrichment," *id.*, hardly strengthens the argument.

[34] *Id.* at 7-8.

[35] *Id.* at 7.

[36] *Id.* at 9. In its brief, L&D does not dispute these numbers and concedes they were provided during the parties' settlement negotiations. *Id.* at 18. That "there was never any agreement that the settlement was solely based on the amount of royalties and the interest 'calculated' by Antero," *id.*, is irrelevant. The undisputed fact is that unpaid royalties and interest were $7 million and L&D accepted Antero's offer of $7 million. Antero also takes exception to L&D's accusation that Antero misrepresented the way the royalty and interest calculations were presented in its opening Brief. Antero never represented that those calculations were included in the formal settlement agreement, but the calculations were included in an email exchange that is attached to the settlement agreement as "Exhibit No. 1", which stated, "Yes, Antero agrees to the $7M (Antero calculates as royalties of $5,621,285.25; interest of $1,378,714.75)." App. 2384.

with L&D was to resolve something other than the royalty claims, but that all MRI's $4 million offer of judgment to L&D was to settle only the royalty claims when, as L&D notes in its brief, L&D asserted "causes of action for slander of title and Constitutional violations" against MRI "relating to its deliberate and intentional failure to provide due process notice to the Plaintiffs."[37] Apparently, relative to MRI, where one stands depends on where one sits.

Finally, as a last resort, MRI argues that Antero somehow waived its right to judgment against MRI for the $6,914,943.75 in royalty payments Antero paid MRI, and for pre- and post-judgment interest on that amount, or judgment against L&D refunding to Antero the amount of $4,000,000.00 paid by Antero into an escrow account as per the terms of an agreement between Antero & L&D, by stating in its briefing below that "MRI should be entitled to receive a credit for the $4,000,000 MRI paid to Plaintiffs,"[38] but of course that is entirely consistent with Antero's position that it is entitled to full indemnification from MRI for $6,914,943.75 in royalty payments Antero paid MRI, and for pre- and post-judgment interest on that amount, or in the alternative, judgment against L&D refunding to Antero the amount of $4,000,000.00, in which circumstance MRI would receive such credit.

II. ARGUMENT

A. ANTERO IS NOT JUDICIALLY-ESTOPPED FROM APPEALING THE CIRCUIT COURT'S REFUSAL TO REQUIRE MRI TO REIMBURSE ANTERO FOR THE $6,914,943.75 IN ROYALTY PAYMENTS IT RECEIVED FROM ANTERO, AND WITHOUT INTEREST, DESPITE THE CLEAR TERMS OF THE PARTIES' AGREEMENT TO THE CONTRARY.

The sentence fragment relied on by MRI in asserting judicial estoppel is misrepresented in its Brief. The heading on the section of Antero's brief was entitled, "MRI's Rule 68 Offer of

[37] L&D's Brief at 24.

[38] *Id.*

Judgment Did Not Extinguished Its Obligation under the Agreement to Reimburse Antero for All Royalties Paid to MRI for Production from the Andrews Lease."[39] Later in the same section of Antero's brief, it stated, "Antero alone paid MRI nearly $7,000,000.00 in royalties ... MRI's $4,000,000.00 Offer of Judgment ... categorically does not cover the entire amount for which MRI is required to reimburse Antero pursuant to the Agreement."[40] The statement "MRI should be entitled to receive a credit for the $4,000,000 MRI paid to Plaintiffs" is followed by "Antero should receive the $4,000,000.00 placed in escrow as part of its settlement with Plaintiffs as an offset against the amounts for which MRI is contractually obligated to reimburse Antero and MRI should be required to pay Antero the remaining $3,000,000.00 it received from Antero, plus interest. To hold otherwise would allow Plaintiffs to recover twice for the same injuries,"[41] which is precisely Antero's argument on appeal. Accordingly, MRI's judicial estoppel[42] argument fails: (1) Antero did not assert an inconsistent position; (2) Antero received no benefit from the position MRI misrepresents Antero asserted; and (3) MRI does not explain how it was misled.

B. THE CIRCUIT COURT ERRED BY HOLDING THAT MRI WAS ONLY REQUIRED TO PAY ANTERO $2,914,943.75 OF THE $6,914,943.75 IN ROYALTY PAYMENTS IT RECEIVED FROM ANTERO, AND WITHOUT INTEREST, DESPITE THE CLEAR TERMS OF THE PARTIES' AGREEMENT TO THE CONTRARY.

The MRI/Antero Indemnification Agreement provides:

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[39] App. 2651.

[40] App. 2653.

[41] App. 2654.

[42] Syl. pt. 2, *W. Virginia Dep't of Transp., Div. of Highways v. Robertson*, 217 W. Va. 497, 618 S.E.2d 506 (2005) ("Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.").

> Antero agrees to resume payments to Mike Ross, Inc. pending resolution of the ownership dispute that is the subject of the Civil Action. In consideration of Antero's promise to resume payments to Mike Ross, Inc., Mike Ross, Inc. agrees to reimburse Antero in full for any amount of royalties paid in excess of what Mike Ross, Inc. may actually own along with the full amount of interest due or accrued on the overpayments in the event that L&D Investments, Inc., or any other party, is deemed to own an interest in the subject minerals for which Mike Ross, Inc. now claims.[43]

In other words, MRI contractually obligated itself to reimburse Antero if MRI was determined not to own an interest in the Subject Lease, which is what ultimately transpired.

This Court has recognized that, "[i]n construing the language of an express indemnity contract, the ordinary rules of contract construction apply."[44] As such, "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent."[45] This Court further has held that the language of indemnity contracts should "clearly and definitely show an intention to indemnify against a certain loss or liability; otherwise it is not a contract of indemnity. . . . [T]he primary purpose is to ascertain and give effect to the intention of the parties."[46] In addition, this Court has indicated that when considering the language of the indemnity provision, "facts and the surrounding circumstances" should be included in the interpretation.[47]

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[43] App. 2459.

[44] Syl. pt. 4, *VanKirk v. Green Const. Co.*, 195 W. Va. 714, 466 S.E.2d 782 (1995).

[45] *Id.* at Syl. pt. 5 (quoting Syl. pt. 1, *Cotiga Dev. Co. v. United Fuel Gas* Co., 147 W. Va. 484, 128 S.E.2d 626 (1962)).

[46] *Sellers v. Owens-Illinois Glass Co.*, 156 W. Va. 87, 92–93, 191 S.E.2d 166, 169 (1972).

[47] *Id.*

In this litigation, MRI and Antero's Agreement expressly provides that MRI will reimburse "Antero **in full for any amount of royalties paid in excess** of what Mike Ross, Inc. may actually own **along with the full amount of interest due or accrued on the overpayments** in the event that **L&D** Investments, Inc., **or any other party**, is deemed to own an interest in the subject minerals for which Mike Ross, Inc. now claims."[48]

Here, like in *VanKirk*, the indemnity language is "sufficiently plain, unambiguous, and broad" and is irrespective of any claim against Antero. Therefore, utilizing ordinary rules of contract construction, the plain language of the Agreement requires MRI to reimburse Antero for the full amount of royalties paid, plus interest. For these reasons, the Circuit Court should have fully granted Antero's motion for summary judgment.

As noted, MRI argues that the language "indemnify Antero for any overpayment as a result of the competing claim of L&D" in the MRI/Antero Indemnification Agreement somehow relieves it of its indemnification obligation,[49] but that language supports rather than undermines Antero's position. MRI's contention that this language meant "MRI agreed to repay Antero for any mis-paid royalties—but not any other type of claim or damage"[50] is accurate but all Antero seeks in this appeal is full indemnification from MRI for $6,914,943.75 in royalty payments Antero paid MRI, and for pre- and post-judgment interest on that amount, or in the alternative, judgment against L&D refunding to Antero the amount of $4,000,000.00. Antero seeks nothing from MRI other than "any overpayment as a result of the competing claim of L&D," which is the precise

[48] App. at 2459 (Emphasis supplied).

[49] MRI's Brief at 13.

[50] *Id.*

language on which MRI relies. Antero had no reason to "bend[] over backwards to avoid mentioning this provision"[51] as it reinforces Antero's argument.

Accordingly, the Circuit Court erred as a matter of law in holding that MRI was obligated to Antero for only $2,914,943.75 of the $6,914,943.75 in royalty payments Antero paid to MRI.

C. THE CIRCUIT COURT ERRED BY AWARDING A WINDFALL OR DOUBLE RECOVERY TO THE RESPONDENTS, L&D INVESTMENTS, INC., ET AL., BY EFFECTIVELY AWARDING THEM A TOTAL OF $11,000,000.00 WHEN ONLY $7,000,000.00 WAS DUE, WHICH WAS COMPRISED OF $5,621,285.25 IN UNPAID ROYALTIES AND $1,378,714.75 IN INTEREST.

1. MRI's Rule 68 Offer of Judgment Did Not Extinguish Its Obligation under the Agreement to Reimburse Antero for All Royalties Paid to MRI for Production from the Subject Lease.

Although this Court has not addressed this specific issue, the United States District Court for the Southern District of West Virginia has indicated that express indemnity survives settlement with the plaintiff.

In *Deloach v. Appalachian Power Co.*,[52] the plaintiff filed suit against Appalachian Power, Stone & Webster ("S & W"), and The Shaw Group (collectively "defendants").[53] The plaintiff then settled separately with all defendants.[54] At oral argument, the parties agreed that claims for contribution and implied indemnity were extinguished by settlements with the plaintiff.[55] However, the court noted that the express indemnity cross-claim between Appalachian Power and S & W survived and remained after settlement.[56]

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[51] MRI's Brief at 14.

[52] No. 3:10-cv-1097, 2011 WL 5999877, at *1 (S.D. W. Va. Nov. 30, 2011).

[53] *Id.*, order clarified, No. 3:10-cv-1097, 2011 WL 13189803 (S.D. W. Va. Dec. 19, 2011).

[54] *Id.*

[55] *Id.*

[56] *Id.*

Other courts have reached similar conclusions. For example, in *C. L. Peck Contractors v. Superior Court*,[57] the plaintiff was injured while working at a construction site and sought recovery from the general contractor, the owner, and a subcontractor.[58] The plaintiff settled with the subcontractor, and the subcontractor sought a dismissal of all cross-claims against it for indemnification.[59] The lower court dismissed the cross-claims for indemnity, holding that settlement extinguished all claims for indemnity, even those provided by contract.[60] On appeal, the court considered whether a good-faith settlement between a plaintiff and defendant barred the remaining co-defendants from seeking indemnity from the settling defendant based under an express contract.[61] The appeals court recognized that express indemnity permitted "great freedom of action to the parties in the establishment of the indemnity arrangement."[62] The appeals court further reasoned that the policy favoring settlement must be subordinated to the policy favoring enforcement of contracts and went on to hold that the contractual express indemnity provision survived the settlement.[63]

As was the case in *Deloach*, *C. L. Peck*, and *Bay Development*, MRI's Offer of Judgment to Plaintiffs for $4,000,000.00 did not extinguish MRI's contractual obligation under the Agreement

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[57] 159 Cal. App. 3d 828 (Cal. Ct. App. 1984).

[58] *Id.* at 831.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* at 757.

[63] *Id.* The Supreme Court of California later affirmed this decision on other grounds and stated that, "[w]hen an indemnitee under such an agreement reasonably relies on express terms in the agreement in conducting its affairs, *it would be unfair to permit a party that has agreed to indemnify to escape its express contractual obligations by entering into a partial settlement.*" *Bay Dev., Ltd. v. Superior Court*, 791 P.2d 290, 302 (Cal. 1990) (Emphasis supplied).

to reimburse Antero for the $6,914,943.75 in royalties paid to MRI for production from the Andrews Lease. MRI argued that its offer of judgment to L&D satisfied the amounts MRI received from *all* the gas producers for production from the Andrews Lease in this case.[64] Antero alone paid MRI $6,914,943.75 in royalties for production from the Andrews Lease. MRI's $4,000,000.00 offer of judgment to L&D categorically did not cover the entire amount for which MRI is required to reimburse Antero pursuant to the Agreement. MRI's argument is specious. Why would a party enter an indemnity contract if the party providing the indemnity could thwart its express contractual obligations by settling with some, but not all the parties to which the indemnified party owed payments to, for far less than the amount owed? The simple answer is, they would not.

In its appellate Brief, MRI shifts its argument to "Antero asked MRI to indemnify it for payments wrongfully made to MRI instead of Plaintiffs. MRI, however, already made full payment, in the form of its accepted offer of judgment, to Plaintiffs to compensate them for royalty payments it received from Antero that should have been paid to Plaintiffs,"[65] but this statement is false because Antero paid MRI nearly $7 million that should have been paid to L&D and others, and MRI's offer of judgment was only $4 million, which leaves the problem – raised in Antero's appeal – of a $3 million gap to be filled either by MRI or L&D. Antero's claim against MRI is contractual and MRI's offer of judgment accepted by L&D has absolutely no legal impact on MRI's contractual obligation to indemnify Antero for the nearly $7 million paid to MRI. This Court may notice MRI offers no legal support for this argument because there is none.

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[64] App. 2289.

[65] MRI Brief at 16-17.

MRI next makes an alternative argument – that even if its offer of judgment did not extinguish the mis-paid royalty claims, it nevertheless was entitled to a credit.[66] This argument, again, actually supports Antero's position: "'[A] double or duplicative recovery for a single injury is invalid.'"[67] The "double or duplicative recovery," however, is not "[b]ecause MRI satisfied $4 million of misdirected payments through its offer of judgment to Plaintiffs."[68] It is because the evidence is undisputed that Antero paid MRI nearly $7 million that should have been paid to L&D and others, but MRI's offer of judgment was only $4 million, leaving a $3 million gap.

2. Antero's Settlement With L&D Expressly Preserved Its Rights Against MRI.

It is ludicrous to suggest that Antero's $7,000,000.00 settlement with L&D was completely divorced from the $6,914,943.75 it had paid to MRI or MRI's offer of judgment which was the exact amount -- $4,000,000.00 – that had been deposited by Antero into escrow as per Antero's agreement with L&D. To this end, Antero's settlement agreement with L&D stated in pertinent part as follows:

> 1. Antero will pay Plaintiffs the sum of $7,000,000.00 ...
>
> 2. **Any claims by Antero** or MRI **to offset or reduce the amounts in Section 1**, above, **by Plaintiffs' acceptance of Mike Ross, Inc.'s $4,000,000.00 Offer of Judgment will be preserved by all Parties**, as will Plaintiffs' right to contest such offset or reduction. If the issues need to be resolved among Antero, MRI and/or Plaintiffs, then Antero and Plaintiffs agree to submit such issues to Judge Bedell for resolution of both legal and factual issues, if any, and reserve the rights of any party to appeal Judge Bedell's rulings on those issues. **Antero agrees to deposit $4,000,000.00 of the $7,000,000.00 settlement payment in Paragraph 1, above, in an interest bearing account at an agreed FDIC insured institution**, in West Virginia, with Counsel for Antero and Plaintiffs being joint Escrow Agents, **with such fund representing the amount of MRI's Offer of Judgment accepted**

[66] *Id.* at 18.

[67] *Id.*, citing 22 Am. Jur. 2d *Damages* § 32.

[68] *Id.*

> **by Plaintiffs** which upon resolution of the offset or reduction issues whether by agreement of Antero and Plaintiffs or by final court order of the court of last resort, Antero and Plaintiffs will agree to pay or refund all or any part of such deposited funds and accrued interest as agreed or as ordered in a final decision by such court of last resort. . . .[69]

The reason this language was included in the settlement between Antero and L&D is because the issue of Antero's entitlement to a credit for the $4,000,000.00 had been briefed before the settlement.[70] Indeed, L&D filed a motion to extinguish Antero's claims for contribution and setoff in which it acknowledged, "Antero ... [has] asserted" that it is "entitled to set-off or contribution regarding the $4,000,000.00 Offer of Judgment made by MRI and accepted by Plaintiffs."[71] So, L&D cannot legitimately claim surprise that Antero's settlement with both L&D and MRI was predicated on the $4,000,000.00 escrow being returned to Antero if the Court determined that MRI was entitled to a credit for such amount.

In *Old Republic Ins. Co. v. O'Neal*,[72] this Court held, "Old Republic is attempting to recover money that it never paid and that its insured is not entitled to receive. If this Court were to allow Old Republic to exercise the statutory right of subrogation in this matter, Old Republic would receive a windfall insofar as it would receive monies it never expended. Moreover, under such a scenario, Old Republic's insured, Speed Mining, would be allowed to circumvent its settlement of the deliberate intention claim entered into with the Plaintiffs, as Speed Mining gave up any claim of reimbursement as part of the terms of the settlement of that claim."

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[69] App. 2373-2374 (Emphasis supplied).

[70] App. 2320.

[71] App. 2591.

[72] 237 W. Va. 512, 526-527, 788 S.E.2d 40, 54-55 (2016) (footnote omitted).

Similarly, in this case, L&D is receiving a windfall to the extent that L&D obtains both the full amount of MRI's $4,000,000.00 Offer of Judgment and the $4,000,000.00 placed by Antero into escrow, for an effective recovery of $8,000,000.00, instead of $4,000,000.00 under the settlement terms of the parties. Or, has been noted, $11,000,000.00 on claims worth $7,000,000.00.

In its Brief, L&D argues "Once a party settles and forgoes a trial ... there is no right to seek contribution and/or setoff as such relief has been waived,"[73] but (1) L&D offers no legal authority in support of this statement; (2) what Antero seeks against MRI is neither contribution nor setoff, but the enforcement of their express indemnification agreement and (3) what Antero seeks in the alternative against L&D is not contribution or setoff but a credit of the $4 million judgment offered by MRI to L&D to satisfy the same obligation arising from the misdirected royalty payments.

L&D also argues that if the settlement between Antero and L&D "only released unpaid royalty payments owed to Plaintiffs it would have so stated,"[74] but (1) it would not have effectuated a settlement - which was the objective of both parties - if it did not resolve all claims; (2) L&D could have insisted that a portion of the $7 million settlement be allocated to something other than the royalty claims, but it did not; and (3) the course of the parties' negotiations and Antero's calculations of how the $7 million figure was derived speak for themselves. It is not Antero "attempt[ing] to 'rewrite' history,"[75] it is L&D.

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[73] L&D's Brief at 16.

[74] *Id.* at 19.

[75] *Id.* at 21.

If, indeed, as L&D and MRI suggest, Antero's settlement was motivated by "$20 million" in potential exposure to "additional tort damages and punitive damages,"[76] each had a forty-page brief to set forth the elements of those torts and the record evidence supporting those torts and the award of punitive damages but made no effort to do so.[77]

Accordingly, Antero clearly should have been awarded the $4,000,000.00 placed in escrow as part of its settlement with L&D if the Court reduced the amount owed by MRI to Antero by MRI's $4,000,000.00 Offer of Judgment. To hold otherwise would allow L&D to recover twice for the same injuries, which is anathematic to our justice system.[78]

III. CONCLUSION

WHEREFORE, Antero respectfully requests that this Court reverse the judgment of the Circuit Court of Harrison County, and remand with directions that it enter judgment against MRI for the $6,914,943.75 in royalty payments Antero paid to MRI, and for pre- and post-judgment interest on that amount, or that it enter judgment against L&D, refunding to Antero the amount of $4,000,000.00 paid by Antero into an escrow account as per the terms of an agreement between Antero and L&D.

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[76] *Id.* at 22.

[77] Indeed, L&D concedes, "A jury could not have found Antero guilty of slander of title ..." L&D's Brief at 24. As to what torts a jury could have found Antero liable to L&D, both L&D and MRI leave this Court nothing but rank speculation.

[78] See Syl. pt. 7, *Harless v. First Nat'l Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982) ("It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories."); see also *City of Fairmont v. W. Virginia Mun. League, Inc.*, No. 18-0873, 2020 WL 201188, at *4 (W. Va. Jan. 13, 2020) (memorandum) ("The law does not permit a double recovery for a single injury."); *Doe v. Pak*, 237 W. Va. 1, 5, 784 S.E.2d 328, 332 (2016) ("Therefore, we hold that when an insurer makes an advance payment to a tort-claimant upon condition that the advance payment will be credited against a future judgment or determination of damages, the damages recovered by the claimant on a subsequent judgment shall be reduced by the amount of the advance payment.") (footnote omitted).

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CERTIFICATE OF SERVICE

I do hereby certify that on May 24, 2021, I served the foregoing "REPLY BRIEF OF THE PETITIONER" on counsel of record by having a true copy thereof placed in the United States mail, postage prepaid, addressed as follows:

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