IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0964

ANTERO RESOURCES CORPORATION,
Petitioner, Defendant and Cross-Claim Plaintiff and Defendant Below,

vs.

L&D INVESTMENTS, INC., et al.,
Respondents and Plaintiffs Below,

And

MIKE ROSS, INC.,
Respondent, Defendant, Cross Claim Plaintiff and Defendant Below.

Hon. Thomas A. Bedell
Circuit Court of Harrison County
Civil Action No. 13-C-528-2

RESPONSE BRIEF OF RESPONDENTS/PLAINTIFFS BELOW

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I. STATEMENT OF THE CASE/FACTS:

The Case Below:

This Appeal stems from a civil action which began as a quiet title action but morphed into claims of fraud, conversion, trespass, slander of title and constitutional infractions after this Court's unanimous decision[1] in 2018 which voided the bogus Tax Deed claimed by MRI [2] and endorsed by

[1] L&D Investments, Inc. v. Antero, 241 WV 46, 818 S.E.2d 872 (2018).

[2] Mike Ross, Inc.

Antero[3] with Antero paying more than $7 million dollars in royalties to MRI which MRI was not entitled. [APP 0051 & 1557]. After the remand by this Court, the case complexion changed dramatically when it was discovered for the first time that Antero had knowingly and intentionally diverted to MRI those millions of dollars of royalties from the rightful mineral owners, including the Plaintiffs below,[4] pursuant to the void Tax Deed. Such knowledge that MRI's Tax Deed was void was contained in two Title Exams that Antero possessed prior to this Civil Action being filed but Antero did not disclose such until the Trial was about to begin. This is discussed in more depth *infra*. The civil action then matured towards Trial but ended on the eve of Trial, when both Antero and MRI *voluntarily* settled[5] all of their claims with the Plaintiffs, by separate settlements totaling $11,000,000.00.[6] As part of Plaintiffs' Settlement Agreement with Antero, Plaintiffs agreed that $4 million of the $7 million settlement payment would not be distributed to the individual Plaintiffs, but instead, such funds would be held in an interest bearing escrow account pending any action by either MRI or Antero regarding claims of offset or reduction as a result of either Antero's settlement payment of $7 million dollars or MRI's Rule 68 Offer of Judgment of $4 million dollars [APP 2373-74, 2252 & 2266]. MRI has not pursued any claim of setoff or reduction against Plaintiffs before the Trial Court or in its separate Appeal in this case.[7]

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[3] Antero Resources Corporation

[4] L&D Investments, Inc., Richard Snowden Andrews, Jr., David L. Young, Charles A. Young, Lavinia Young Davis, Charles Lee Andrews, IV and Frances L. Andrews [hereinafter collectively ["Plaintiffs"].

[5] MRI submitted a Rule 68 Offer of Judgment to Plaintiffs, and Antero entered into a binding Settlement Agreement with Plaintiffs.

[6] There were a few additional successor mineral producer Defendants who also settled and are not part of this Appeal; Plaintiffs also negotiated with Antero and others requiring deposit with the Circuit Court any unpaid royalties belonging to those owners of the subject mineral property who had not yet been located or claimed their royalty monies.

[7] MRI filed a separate Appeal No. 20-0967 before this Court which Appeal should be consolidated with Antero's Appeal No. 20-0964; both Antero and MRI's Appendices which are

The Voluntary Pre-Trial Resolutions by Defendants Antero & MRI:

Antero was caught "flat footed" by MRI's Offer of Judgment made shortly before the Trail was to begin. Due to MRI's Offer of Judgment, Antero quickly decided to settle all of their claims with Plaintiffs [APP 2373-88] rather than defend themselves at Trial where Antero's questionable conduct would be judged. Antero faced two significant problems which motivated Antero to settle instead of facing a jury and using specific jury interrogatories and verdict forms to preserve any claims of setoff or reduction. [APP 2285]. First, Antero no doubt feared presenting to a jury how Antero knew that MRI's Tax Deed was void and when Antero knew that MRI was not entitled to the $7 million dollars of royalties Antero had paid MRI including during the last six years of litigation. Antero most certainly understood that a reasonable jury might be upset that Antero had made a "side deal" with MRI to keep paying MRI the Plaintiffs' monies while the Plaintiffs twisted in the wind, especially when Antero knew that MRI was not entitled to such monies. [Plaintiffs' Br. p. 4-8, *infra.*] Also, Antero clearly understood that based on the different causes of action against Antero and MRI it was reasonable to ponder that the jury could have directed that Antero pay all the royalties it diverted from Plaintiffs to MRI with 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. The combined verdicts against Antero and MRI could have easily exceeded $20 to $30 million dollars with the jury awards being separate, and thus, without any setoff or reduction between these Defendants. Such was significant impetus for Antero to settle one business day before the Trial. [Plaintiffs Br. p. 3-5, *infra*].

Antero also had failed to allege at any time during the prior six years of litigation, its claim regarding a purported indemnity agreement with MRI. Antero had continually asserted throughout

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substantially identical, total almost 10,000 pages which that alone should result in a summary affirmance of the Trial Court! Plaintiffs intend to file a Motion to Consolidate.

the litigation that Antero was an "innocent stakeholder" with no position in the case other than to pay royalties to whomever owned the subject mineral property, known as the Andrews Tract.[8] The Trial Court later rejected Antero's claim of "innocent stakeholder" in its pre-settlement Omnibus Order entered on October 30, 2019. [APP 2194, ¶ 7]. However, Antero's claim of "innocent stakeholder" was quite untrue for several reasons. First, Antero well knew prior to paying MRI any royalties from the Andrews Tract that MRI was not entitled to any such monies as Antero possessed two title exams which clearly indicated MRI's Tax Deed likely was void. Second, Antero obtained an indemnity agreement from MRI in July 2014, six months after the filing of the quiet title action, yet Antero did not advise the Trial Court of the indemnity agreement, nor did Antero file a cross-claim against MRI for reimbursement of royalties paid to MRI until immediately before the Trial was to begin. [APP 2320]. Instead, Antero continued paying MRI with Plaintiffs' money as Antero had included in its indemnity agreement a provision that MRI would not only payback the royalties if MRI did not own an interest in the Andrews Tract, but MRI would also pay an unspecified amount of interest!

Antero's Knowledge that MRI's Tax Deed Was Void:

Antero knew well prior to the filing of the Quiet Title civil action in December 2013, that MRI's Tax Deed was void. Antero knew this from two Title Exams in its possession, including one dated February 22, 2007 which was prior to Antero having even drilled its Marcellus Well on the Andrews Tract.[9] Antero had been advised by that 2007 Title Exam that the MRI Tax Deed would be void if there were other joint owners of the Andrews Tract who were paying property tax

[8] The Andrews Tract is a 1050 acre mineral parcel located in Harrison County upon which Antero had drilled a lucrative Marcellus well which in less than a 10 year period generated over a $100 million dollars in natural gas proceeds.

[9] The 2007 Title Exam was prepared for Dominion Exploration & Production which was the predecessor Lessee of the Andrews Tract.

assessments for the same property, i.e. the Andrews Tract. It further stated that the preparer of the 2007 Title Exam was "assuming" the correctness of the Tax Deed and that there were no other owners who were paying such assessments on the Andrews mineral property. Of course, there were other Andrews Tract owners paying property tax assessments and that is why this Court held the MRI Tax Deed "void *ab initio*." L&D, *supra*, at 882.[10]

Antero knew this as Antero had received this warning not once, but twice, in separate title examinations prepared by the same attorneys at Steptoe & Johnson (S&J), which is the same Law Firm also defending Antero in the case below and in this Appeal. Antero also had received both Title Exams wherein both the 2007 and 2013 Title Exams contained the following Paragraph:

> "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 my 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." [APP 3968 at 3979, and 4123 at 4142-43].

Antero's knowledge of the 2007 Title Exam is confirmed by its express approval for S&J to limit the 2013 Title Exam to include only the time frame from the end date of the 2007 Title Exam and the completion date of the 2013 Title Exam, which was from February 12, 2007 until August 30, 2013. [APP 4142 at ¶20].

The 2013 Title Exam was requested by Antero from S&J for a specific purpose after Antero received L&D's notice that it had acquired on March 12, 2013, the 3.11% interest of Catherine Lee

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[10] All page references will be to the South Eastern Reporter 2nd citation.

Tschappat, who was an Andrews Heir and owner of an undivided interest in the 1050 acre Andrews Tract. [APP 56, 82-87]. **Surely such disclosure of an unknown owner of such a valuable mineral producing property would have prompted any prudent and reasonable gas producer to have promptly determined if such was correct and whether there were other "undivided interests in the subject property [Andrews Tract]" that "was not, at the time of said [tax] sale [to MRI] covered by any other assessments for real estate tax purposes on the land books of Harrison County..."** [APP 3968 at 3979, and 4123 at 4142-43]. 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 ownership issues. 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.

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. Antero did not even have to search the Records of the Harrison County Assessor, the Clerk or the Sheriff as Antero had access to its predecessor's Transfer Orders which identified each Andrews Tract owner and their addresses. [APP 2678– 2833]. [11] MRI also

[11] These Transfer Orders were prepared in 2003 by Dominion Exploration & Production which was Antero's predecessor owner of the lease to produce gas and oil from the Andrews Tract; the Transfer Orders were dated in July and September 2003 just months after MRI's Tax Deed was issued; they listed the name and address for the Andrews Heirs who owned the Andrews Tract, including all of the named Plaintiffs including L&D's predecessor in title, Catherine Lee Tschappat [APP 2740]; Marian A. Young, Charles Lee Andrews III, and Richard Snowden Andrews, [APP 2678, 2712, 2745]; these Andrews Heirs were being assessed and were paying property taxes on their undivided interests in the Andrews Tract during this time and for almost a Century prior thereto and many years after the MRI Tax Deed was

had signed each such Transfer Order and did so within a few months after representing that a thorough title search[12] had been conducted to identify all of the Andrews Tract owners so that due process notice could be provided to them to satisfy both the Federal and State constitutional requirements imposed by our West Virginia tax sale procedure. Huggins v. Professional Land Res., 2013 WL 431770 (ND WV 2013); see also, O'Neal v. Rollyson, 729 Fed. Appx. 254 (4th Cir. 2018).

Why did Antero work so hard to hide its conduct as revealed by the 2007 and 2013 Title Exams? The 2013 Title Exam's conclusions were significantly different from the 2007 Title Exam even though both were prepared by the same Law Firm. There was no attempt to reconcile the two title exams but only to "create" a plausible, but albeit contrived, narrative that Antero was pushing whether accurate or not. The 2013 Title Exam instead of recognizing the facts, instead artificially divided the undivided 1050 acre Andrews mineral tract into two separate tracts with no basis whatsoever to arrive at such conclusion as there was no deed or other recorded instrument that divided the Andrews Tract. [APP 4128-29]. What Antero had concocted was a means to minimize Plaintiff L&D's interest by using an old shallow Well Plat showing the surface acreage and then the title examiner limited L&D's purchase to only that acreage of 240.92 acres used for location purposes. Antero ignored the Andrews tracts total acreage of more than 1000 acres which essentially rejected L&D's Deed from the Tschappats and the record title filed in the Harrison County Clerks' Office, which Chain of Title had been provided to Antero in 2013 both before and with the Complaint. [APP 53-55]. Why did Antero create such an unsupported title exam? It fit Antero's

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issued; Antero was aware of these Dominion Transfer Orders when it purchased the Andrews Tract lease from Dominion and also after receiving the February 22, 2007 S&J Title Exam; [APP 3968]; yet Antero did not take any remedial action to protect the monies of the Andrews Tract owners, even after receiving the second Title Exam on September 19, 2013; Antero deliberately ignored the facts to continue its unlawful payments to MRI.

[12] MRI had non-lawyers hired as independent contractors to review the Court House records and opine that all persons owning an interest in the Andrews Tract and entitled to notice of sale had been found and proper notice provided; this was not correct. [APP 3589 & 687, 723-24, 985 & 1558-60].

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." The Trial Court later gleaned that Antero had very "unclean hands" and such conclusion by the Trial Court was not only proper but very necessary to address such "questionable" conduct. [APP 2214-17, 3105-6 & 3083-85].

The Trial Court did not learn the content of these two title exams until after this Court reversed the Trial Court and after further discovery was ordered requiring the title exams to be produced. [APP 2240-50]. The Trial Court noted in its Order requiring production that the most recent 2013 Title Exam [APP 4142], which included as Exhibit G the 2007 Title Exam, that both referenced the Andrews Tract issues. [APP 2242]. The Trial Court's Order compelling the production of the Title Exams was entered on October 30, 2019, approximately three weeks prior to the Trial set for November 18, 2019. The production of both Title Exams changed the complexion of the entire case as now there was little doubt that Antero had acted deliberately and maliciously the entire time it paid MRI royalties generated from the Andrews Tract which Antero well knew did not belong to MRI. The Trial Court so found in its post-settlement Omnibus Order. [APP 3106 incl FN 14]. It also explained why Antero was anxious to keep paying royalties to MRI during the pendency of the case while simultaneously extracting from MRI an indemnity agreement requiring repayment by MRI "with the full amount of interest due or accrued on the overpayments..." [APP 2459]

The Trial Court clearly understood what Antero had done and when Antero knew about MRI's Tax Deed being void [APP 3106 & FN 14], and relied upon such facts to deny both Antero and CNX's Motions for Summary Judgment. [APP 2090, 2218-21]. Accordingly, the Trial Court made short shrift of Antero's "innocent stakeholder" defense. Such Ruling also led to Antero's precipitous Settlement Agreement with Plaintiffs on the eve of Trial. All of these facts, while seemingly irrelevant to Antero's denied request for setoff or reduction from Plaintiffs, are necessary

as it supports the Trial Court's post-settlement Omnibus Order entered on September 15, 2020 [APP 3083] by exposing the complete picture known to the Trial Court after the Remand from this Court. The Trial Court had at the beginning of this case been told that Antero was an "innocent stakeholder" but that picture was "turned inside out" after the two Title Exams and Transfer Orders were produced and the revelations that Antero had an indemnity agreement with MRI since July 2014, both revealed after the Remand and shortly before Trial was to begin.

Plaintiffs ultimately moved the Trial Court to dismiss Antero's belated cross-claims filed for the first time on November 12, 2019, six days before Trial, based on Antero's "sandbagging" from December 2013 until November 2019, even though the indemnity "Agreement" had been signed in July 2014. [APP 2320]. Plaintiffs asserted that such conduct by Antero was a fraud on the Court by not raising such cross-claims earlier in the proceedings just so Antero could masquerade as an innocent stakeholder, which had been rejected by the Trial Court in its pre-settlement Omnibus Order [APP 2194]. Alternatively, Plaintiffs requested the Trial Court to bifurcate Antero's cross-claims from the imminent Trial which is what the Trial Court decided. [APP 2336]. No doubt, the Trial Court recognized that Antero was "playing games" for failing to disclose the indemnity agreement with MRI until right before Trial as well as considering the recent revelations in the two Title Exams and Transfer Orders. Such conduct by Antero constituted "unclean hands" and the Trial Court was well aware of it as the Trial Court was duty bound to apply equity in this matter.[13] [APP 2214-17].

Trial Court's Ruling Denying Contribution or Setoff:

After MRI's Rule 68 Offer of Judgment was accepted by Plaintiffs and Antero's subsequent

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[13] The accounting for royalties involves the application of equity which requires even-handed justice; Drake v. Waco Oil & Gas Co., Inc., 223 WV 568, 678 S.E.2d 301 (2009); "Equity suffers not a right to be without a remedy", Laurent v. PricewaterhouseCoopers LLP, 945 F.3d 739, 748 (2nd Cir. 2019)[internal citations omitted].

voluntary settlement of all claims with Plaintiffs,[14] Antero pursued its claim of contribution and setoff from Plaintiffs. However by this juncture, the Trial Court recognized that Antero had been "playing fast and loose" by not disclosing the indemnity agreement and by failing to earlier file a cross-claim against MRI, as well as Antero's early knowledge of the MRI's void Tax Deed. The Trial Court obviously deduced that Antero's conduct was purposely directed to bolster its position as an "innocent stakeholder" hoping that Antero's knowledge that MRI's Tax Deed was likely void would not surface. [APP 3085, FN 11 & "Antero's Knowledge that MRI's Tax Deed Was Void" *supra*]. However, the Trial Court, recognizing Antero's "gamesmanship" considered such conduct by Antero to constitute "unclean hands" as reflected in the Trial Court's post settlement Omnibus Order entered on September 15, 2020. [APP 3083].

In that post settlement Omnibus Order which denied Antero's Motion for contribution and setoff, and granted Plaintiffs counter Motion, the Trial Court, which was empowered by the Parties Settlement Agreement to resolve "both legal and factual" issues,[15] made the following finding of facts and conclusions of law:

a) That the only remaining issues after acceptance of MRI's Offer of Judgment and the voluntary settlements by "Gas Producer Defendants" was the "crossclaims asserted by the Gas Producer Defendants against MRI remain in dispute"; [APP 2396 & 3098];

b) That "MRI voluntarily chose to tender its Offer of Judgment to Plaintiffs on November 1, 2019 full well knowing the existence of its July 14, 2014 *Agreement* with Antero and without further addressing or possibly resolving that outstanding claim/issue in concert with Antero prior to making its Offer Of Judgment to Plaintiff." [APP 3099];

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[14] MRI's Offer of Judgment is sometimes referred herein as a "settlement" but a Rule 68 is not a settlement *per se*, it is a admission of wrongdoing to all causes of action asserted and allowing judgment to be entered against such party; here MRI did so for the sum certain of $4 million dollars; Croft v. TBR, Inc., 222 WV 224, 664 S.E.2d 109 (2008).

[15] See "Standard of Review" *infra*.

c) That "Antero also voluntarily chose to settle with Plaintiffs full well knowing the existence of such *Agreement* and having just filed its Amended Cross-Claim against MRI without, to this Court's knowledge, attempting any additional negotiations with MRI as to whatever implications that contract might have post-settlement." [APP 3099];

d) That Antero's Cross-Claim regarding the July 14, 2014 indemnity agreement with MRI was not filed until after MRI's Offer of Judgment was disclosed on November 8, 2019 immediately before Trial set of November 18, 2019; [APP 3100];

e) That the July 14, 2014 indemnity agreement between Antero and MRI required interpretation but regardless all royalties generated from the Andrews Tract should have been deposited with the Court during the pendency of this Quiet Title action; [APP 3102-03];

f) That Antero's failure to suspend royalty payments once this action was filed was done to "serve" Antero's "own business interests" while also accommodating "MRI's business cash flow interests" which was "a distinct and highly lucrative financial benefit" to MRI; [APP 3103];

g) That both "Antero and MRI played 'fast and loose' with royalty monies that they knew did not belong to them to the detriment of the Plaintiffs and was "highly disingenuous" and "contrary to appropriate notions of fair play" by Antero and MRI all of which under equity constitutes "unclean hands"[16]; [APP 3105-06 & FN 14];

h) That both "Antero and MRI respectively settled with all Plaintiffs ***on the totality of claims separately asserted against them.***" (emphasis added) [APP 3107];

i) That the Settlements considered the royalties owed to Plaintiffs based on the percentages of ownership stipulated by the Parties; [APP 3107];

j) That Antero's settlement with Plaintiffs was completed on the basis:

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[16] While the Trial Court did not specifically use the term "unclean hands' in its Omnibus Order, the totality of its findings, including the use of terms like "fast and loose" "highly disingenuous" and "contrary to ...fair play" clearly evidence "unclean hands" by a Trial Court sitting in equity.

- "***Involved the settlement of a multitude of claims asserted by Plaintiffs against Antero including any potential liability.*** (emphasis added);
- Included a lump sum settlement ***without any specific amount carved-out or being specifically allocated in satisfaction of outstanding royalty payments due and owing Plaintiffs.*** (emphasis added);
- ***Negated any trial proceedings wherein a jury would have determined the apportionment of both liability and damages among the Parties by appropriate verdict forms and special interrogatories as necessary to settle multiple divisible causes of action and potential verdicts for separate conduct.***" (emphasis added) [APP 3107];

k. "Other that general mediation efforts known to this Court, neither MRI nor Antero were given an opportunity by the other to mutually participate in settlement negotiations ultimately leading to their final settlements with Plaintiffs even though all such parties' litigant were fully aware of the existence of the July 14, 2014 *Agreement.*" [APP 3107].

These findings of fact and conclusions of law, although factually uncontested also without any contrary law, by Antero or any other Party, are binding on Antero 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. [See FN 17, *infra.*] Clearly, Antero's seeking of contribution or setoff is without any merit whatsoever. But if Antero raised any substantial legal or factual issues, such issues were properly rejected by the Trial Court based on the law and the facts as conclusively determined by the Trial Court as empowered by Antero and Plaintiffs pursuant to their Settlement Agreement.

II. SUMMARY OF ARGUMENT:

This Appeal is one of two Appeals emanating from the same Harrison County Civil Action involving all three of the Parties to these Appeals (Plaintiffs, Antero and MRI). Only Antero has lodged an appeal against Plaintiffs wherein Antero seeks reversal of the Trial Court's denying Antero's claim for contribution or setoff from Antero's voluntary settlement with Plaintiffs on the eve of Trial. Antero cavalierly asserts Plaintiffs received "double recovery" but Antero voluntarily settled all of its claims with Plaintiffs without availing itself to trial where the liability and damages could have been determined by a jury or the court. Nor did Antero provide any factual basis or persuasive law to the Trial Court that would entitle Antero to voluntarily settle all its claims and still seek contribution or setoff even though Antero's claims were separate and distinct from those asserted against MRI, which Antero has not contested. Additionally Antero and Plaintiffs agreed to permit the Trial Court to conclusively decide all factual and legal issues regarding Antero's claim to contribution and setoff. With no basis to maintain this appeal, Plaintiffs assert that Antero's appeal against Plaintiffs is frivolous and should be summarily denied.

Also, because Antero did not provide any factual or legal basis in its Brief to support its appeal, Plaintiffs reserve the right to file a sur-response with this Court pursuant its Rules of Appellate Procedure 10(h) and (i) should Antero's Reply Brief include "new" or additional facts or law.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION:

The Plaintiffs believe that the issues raised by Antero against Plaintiffs are without any legal or factual bases, and therefore, a Memorandum decision pursuant to Rules of Appellate Procedure 21(d) would be appropriate as the Trial Court was correct in denying Antero's Motion seeking contribution or setoff from Plaintiffs. However, Plaintiffs are comfortable agreeing to Rule 19 Argument as requested by both Antero and MRI.

IV. STANDARD OF REVIEW:

Antero's assertion in its Brief that the Standard of Review by this Court regarding the Trial Court's granting of summary judgment in favor of Plaintiffs is *de novo*, and ordinarily such would be correct. This Court's general review of a challenge to the lower court's summary judgment order is usually *de novo* and if there were any material disputed facts such precludes summary judgment. However in this matter, as it regards Antero's claims of contribution or setoff from Plaintiffs after Antero voluntarily settled with Plaintiffs, "both legal and factual" issues were agreed by the Parties in their Settlement Agreement to be conclusively resolved by the Circuit Court Judge, the Honorable Thomas A. Bedell.[17] The Trial Court did just that and Antero lost.

Accordingly, any disputed material issues of fact, which there were none, or application of law to those facts necessarily considered and resolved by the Trial Court in ruling on Antero's and Plaintiffs' cross motions for Summary Judgment, are final and this Court should enforce the Agreement of the Parties. Accordingly, Antero's request for "offset or reduction" of Antero's $7 million dollar lump sum settlement payment was conclusively decided by the Trial Court as set forth in the Settlement Agreement. Thus, the Trial Court was empowered by Antero and Plaintiffs, to resolve any disputed material fact issues and questions of law and the Trial Court was correct in granting Plaintiffs's Motion for Summary Judgment and denying Antero's claim for setoff or contribution including the Trial Court's findings that Plaintiffs did not receive a "double recovery."[18]

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[17] Paragraph 2 of the "Settlement Agreement and Release of All Claims" states: " Any claims by Antero or MRI to offset or reduce the amounts in Section 1, above, by Plaintiff's' acceptance of Mike Ross, Inc.'s $4,000,000.00 Offer of Judgment will he 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,...*** " (emphasis added); [APP 2373-74] (These Appendix pages were for some reason not numbered by Antero but are in numerical sequence.)

[18] The Trial Court's decision was also correct under the *de novo* standard of review.

V. ARGUMENT:

Plaintiffs do not belong in this Appeal between Antero and MRI, as Antero has no legal or factual basis to seek any contribution and/or setoff from Plaintiffs once Antero voluntarily settled with Plaintiffs for all claims asserted against it without any determination of liability and damages among the various Defendants, especially when there were multiple causes of action asserted separately against such Defendants. [Br. p. 10-12, *supra.*] For instance, Antero had a contractual duty to pay the Plaintiffs and the other owners of the Andrews Tract their royalties produced from their mineral property. Antero had a duty to pay them independent from MRI which had no contractual duty to Plaintiffs and other owners of the Andrews Tract. This separate and distinct cause of action alone could have resulted in a jury or Trial Court [19] verdict against Antero upwards of $20 million dollars. [APP 2928 FN 1]. This would not include the tort claims damages asserted against Antero for intentional and malicious conversion, trespass and misappropriation of Plaintiffs' royalties, which claims were also separate and distinct from those claims asserted against MRI.[20] Antero's assertions are mere "paper Tigers" as Antero provides not one scintilla of support for its claim of setoff, contribution or credit and the Trial Court appropriately ruled so in its post settlement Omnibus Order. [Br. p. 10-12, *supra.*].

Antero also conveniently ignores that it had every opportunity to put its assertions before the

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[19] The issue lies in equity so the Trial Court could have made the factual determination regarding damages with the assistance of an advisory jury. Drake, *supra*, at 305, "The question in this case [who and how much royalties to be paid] is ultimately one of equity."

[20] The claims asserted by Plaintiffs against MRI included slander of title, constitutional torts for unlawful taking of Plaintiffs mineral property and intentional and malicious tortious conduct any of which could have resulted in an award of punitive damages as well as compensatory damages including attorneys fees and costs; such verdicts would not have resulted in double recovery regardless of the amounts as Antero banters about, but does so without any factual support; the separate and distinct claims alleged against Antero and MRI would have resulted in separate awards for individualized conduct; moreover, any award of punitive damages is always individually assessed and not subject to any claim of contribution or setoff as it is not a "double recovery"; Burgess v. Porterfield, 196 WV 178, 469 S.E. 2d 114 (1996)[double recovery rule not applicable as punitive damages are not compensation but punishment to the wrongdoer to whom they are assessed.].

court or jury and obtain a determination of its separate liability and damages. Antero chose not to do so as it was fearful of the outcome and as has been noted many times, juries are unpredictable and such unpredictableness is why cases settle. Antero cannot have its "cake and eat it too." Antero had a choice and chose not to risk trial but it wanted the Trial Court to speculate as to both Antero and MRI's liability and damages to satisfy Antero's request for contribution and setoff. The Trial Court correctly said "no." Antero sought a "free shot" to have the Trial Court decide that the fact finder would have determined that the only viable claim against Antero would be Antero's contractual duty to pay Plaintiffs their royalties in the amount Antero proffered and presumably the amount of interest due. Such argument is absurd as Antero waived this avenue when it settled with the Plaintiffs. The Trial Court easily understood that such request was without factual or legal underpinnings. "Antero chose to settle with Plaintiffs rather than go to trial and, by doing so, it knowingly did not advance litigation herein to jury trial which would have determined what, if any, Plaintiffs' causes of action against it were proven and the amount of damages each thereon" [APP 3095]. Of course, the Trial Court was totally correct and its factual and legal findings in this regard was binding on Antero pursuant to the Settlement Agreement. [APP 2373-74]; see also Standard of Review, *supra.*

Once a party settles and forgoes a trial to have determined the alleged facts and damages there is no right to seek contribution and/or setoff as such relief has been waived. Antero's Appeal is solely against MRI based on their contractual indemnity agreement. Antero only has an appealable issue with MRI. Because Antero globally settled with Plaintiffs and obtained a full release of all claims asserted by Plaintiffs, there is no avenue for the application of contribution and/or setoff principles because there is no way to ascertain the percentages of culpability, whether Antero acted with deliberate and intentional conduct done with reckless indifference regarding Plaintiffs' mineral

rights, committed conversion, unjust enrichment[21] and trespass. [APP 1558 at ¶6 & 7]. Also, there has been no determination of the amount of damages caused by Antero, including Plaintiffs' entitlement to punitive damages. Such findings are essential to the application of contribution and/or setoff principles and Antero has provided no statutory or case law support for their position in this Appeal that a party can seek contribution and/or setoff after a voluntary settlement of all claims including those claims seeking punitive damages. [Antero Brief p. 18-22]. Antero asserted these tort claims were not valid against Antero due to Antero being "an unbiased stakeholder" but the Trial Court denied Antero's request for Summary Judgment on these very issues due to serious factual disputes needing resolution by Trial. [APP 2214-17]. Antero was well aware that it would face a jury and the application of equity as to its conduct so Antero "bailed out" and voluntarily settled all of its claims without any conditions or findings as to liability or damages. [APP 2373]. Unfortunately for Antero, but fortunately for Plaintiffs, Antero cannot now make up its own facts. However, its Brief to this Court tries in earnest to do so which is troubling.

For instance, Antero's Brief, quite unbelievably, states as fact that the calculation in its Argument C regarding Antero's settlement with Plaintiffs was "comprised of $5,621,285.25 in unpaid royalties and $1,378,714.75 in interest" suggesting that such monetary breakdown was by mutual agreement of the Parties as part of the settlement. It was not, and to infer that such was agreed is grossly inaccurate. It is "made up" and should not be stated to this Court as a fact. What occurred was ***Plaintiffs agreed to accept the lump sum of $7 million dollars*** as full settlement on behalf of Antero to resolve "any and all claims". Antero then sent an email stating "Yes, Antero

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[21] The unjust enrichment stems from the profits Antero received from the sales of Plaintiffs' gas, which Antero sold for well over $100 million dollars while the Plaintiffs received none of their royalties for more than 17 years due to Antero's "playing fast and loose" by deliberately ignoring the warning in their two Title Exams and by joining with MRI to continue diverting Plaintiffs royalties for the duration of the litigation, and finally trying to seek setoff, contribution or credit of their voluntary settlement; perhaps the Trial Judge said it best: "To such end, as this litigation has demonstrated, innocent mineral and/or royalty owners appear at risk of being marginalized, forgotten, ***or even surreptitiously victimized in the pursuit of such profit.***" (emphasis added) [APP 3085].

agrees to the $7M (***Antero calculates as royalties of $5,621,285.25; interest of $1,378,714.75***)." (emphasis added) [APP 2384].[22] However, there was never any agreement that the settlement was solely based on the amount of royalties and interest as "calculated" by Antero because Plaintiffs would not have settled on such terms and no such terms are found in the Settlement Agreement. If Antero had insisted that such language be in the Settlement Agreement, Plaintiffs would have proceeded to trial regarding Antero's "trespass, conversion, and unjust enrichment" including punitive damages, all of which the Trial Court refused to grant summary judgment as requested by Antero prior to Trial. [APP 2217].

Antero repeatedly quoted portions of the Steptoe & Johnson's November 15, 2019, letter in its Brief without advising this Court that such letter was prepared after the settlement with Plaintiffs was confirmed, and was not part of the Settlement Agreement. However, Antero continuously repeated it as though repetition makes it true. It was not. Such statements are inaccurate and when stated without explaining there context, become grossly misleading. Such is inappropriate and not fair to this Court or the Plaintiffs. Antero stated in its Brief no less than five times that the settlement between Plaintiffs and Antero was "comprised of $5,621,285.25 in unpaid royalties and $1,378,714.75 in interest." [Antero Br. p. 1, 3, 4, 5 & 18]. Such is "made up." Antero's "fast and loose" "gamesmanship" by including misleading quotes in its Brief to this Court is an effort to factually support its assertions that were rejected by the Trial Court and the Trial Court was the final arbiter of the contribution or set off issue. Antero has gone so far as to give the Parties Settlement

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[22] It's beyond cavil that Antero makes such assertion in its Brief as the so called "interest" part of Antero's asserted settlement appears only twice in the 4210 pages of Antero's Appendix; at 2384 and 2964, which are the emails attached as Exhibit 1 to the "Settlement Agreement and Release of All Claims" and in S&J's letter after the settlement was confirmed [APP 2964]; that is why the Settlement Agreement does not contain either the $5,621,285.25 or the $1,378,714.75 amounts nor does it limit the settlement to any cause of action or type of damages; perhaps Antero has forgotten the rule regarding interpretation of contracts that only what is specifically contained in the document is germane especially when the document limits it to what is "expressly set forth in this Agreement." [APP 2375]; see also Plaintiffs' Br. p. 19-22, *infra*.

document a new, but "made up", name. The Settlement document signed by Plaintiffs and Antero was titled, "Settlement Agreement and Release of All Claims." [APP 2373]. Antero in its "Joint Appendix-Amended Table of Contents, Part III, second unnumbered page, filed with this Court on March 8, 2021", named the document, "Final and Executed Royalty Settlement Agreement." A mere negligent error or a deliberate attempt to improperly mischaracterize the actual Record in this Appeal? There was no document titled "Final and Executed Royalty Settlement Agreement" between Antero and Plaintiffs but only a "Settlement Agreement and Release of All Claims" [APP 2373].[23] The Settlement Agreement states:

> "...Plaintiff's do hereby fully release, acquit, and forever discharge Antero...of and from any and all claims, liabilities, demands, controversies, damages, and causes of action, *of every kind and character whatsoever, including but not limited to claims for payment of royalties, payment of interest, loss of value, waste, conversion, trespass, accounting, breach of contract, annoyance and inconvenience, attorney fees or other expenses, punitive damages, and interest, and all other related costs and any other direct or consequential losses of any nature* whatsoever, that in any way arises out of or relates to the Present Litigation and the Andrews Lease." (emphasis added); *Id.*

If the Settlement Agreement only released unpaid royalty payments owed to Plaintiffs it would have so stated in the document but it did not. Antero repeatedly quotes in its Brief the letter from Steptoe & Johnson instead of the actual Settlement Agreement between the Parties. [Antero Br. pgs. 3-4]. Such is a ploy to convince this Court of something that is not true. Antero sparsely quoted the actual "Settlement Agreement and Release of All Claims" [APP 2373] which did not describe the amount of royalties and interest owed by or paid by Antero. *Id.* Antero only quoted the full title of the "Settlement Agreement and Release of All Claims" once on page 12 of its Brief and that was a quote from the Trial Court's post settlement Omnibus Order. Antero only decided after

[23] For some reason Antero failed to number the "Settlement Agreement and Release of All Claims" in its Appendix but the sequence would make its first page at 2373 and last 2388.

the settlement was agreed and confirmed by counsel for the Parties to begin acting as though the settlement represented a set amount to royalties and interest. However, the Settlement Agreement itself counters any such conclusion. Nor did Antero advise this Court that Exhibit 1[APP 2384] attached to the actual Settlement Agreement clearly demonstrated Antero's post-settlement attempts to reshape its position to better seek setoff or credit from MRI by belatedly altering Plaintiffs' Settlement Agreement language. The emails attached as Exhibit 1 to the Settlement Agreement [APP 2384], clearly demonstrate that the settlement terms were confirmed prior to Steptoe & Johnson's November 15 letter. No such language regarding the breakdown of the $7 million dollar lump sum was part of the final "Settlement Agreement and Release of All Claims." The Settlement Agreement was complete and each Party confirmed that:

> "8. The Parties warrant that they have carefully read this Agreement and know its contents, they have entered this Agreement freely, voluntarily, and of their own accord with the advice of counsel, and they have not relied on any inducement, promise, or representation by any other party, except those which are expressly set forth in this Agreement." [APP 2375].

The emails between counsel for Antero and Plaintiffs document Antero's verbal offer to pay $7 million dollars as full settlement in return a full release, and Plaintiffs' counsel's acceptance which was confirmed in writing by the exchange of emails [APP 2384, Ex. No. 1, see FN 9 *supra*], which all took place on Friday morning of November 15 with the Trial beginning that Monday November 18. [APP 3098 at ¶5]. Of course, the most significant pronouncement on this matter is the Trial Court's findings that:

"41. However, Antero's settlement with Plaintiffs:

- "***Involved the settlement of a multitude of claims asserted by Plaintiffs against Antero Including any potential liability.*** (emphasis added);
- Included a lump sum settlement ***without any specific amount carved-***

out or being specifically allocated in satisfaction of outstanding royalty payments due and owing Plaintiffs. (emphasis added);

- ***Negated any trial proceedings wherein a jury would have determined the apportionment of both liability and damages among the Parties by appropriate verdict forms and special interrogatories as necessary to settle multiple divisible causes of action and potential verdicts for separate conduct.***" (emphasis added) [APP 3107].

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51. Antero cannot established [sic] that the amount of its settlement with Plaintiffs is entirely tied to any royalty payments made to MRI that should have been paid to Plaintiffs as MRI presented its Offer of Judgment to settle, inter alia, Plaintiffs' claims for any royalty payments lawfully theirs that had been paid to MRI as a result of the July 14, 2014 Agreement (and in further contemplation of MRI's 2003 Tax Deed) as well as other related claims and before Antero reached its full settlement with Plaintiffs.

52. Antero is not entitled to any set-off or contribution insofar that it would recover any of their $7,000,000.00 settlement with Plaintiffs in resolving Plaintiffs' totality of claims against it (and which included, inter alia, claims of negligence or intentional conduct)." [APP 3110].

End of story and the end of Antero's attempt to "rewrite" history. Such is just another example of Antero's "playing fast and loose" with the Court. Such conduct is not new to Antero or this Court.[24] The irony of Antero's unnecessary gyrations is that however Antero couches its $7

[24] In the case of Bison Interests, LLC v. Antero Resources, __ WV ___, 854 S.E.2d 211 (WV 2020) this Court stated: "We begin with Antero's assertion that it only altered its position on Bison's override entitlement after it received the Agreements, which purportedly contain a depth limitation, limiting Bison's interests to the shallower Benson Sands. Indeed, Antero's brief is replete with thinly veiled accusations that Bison wrongfully withheld these documents from it and only belatedly produced

million dollar settlement amount is inconsequential as Antero had every opportunity to seek a factual determination of its liability and damages at a Trial on that Monday instead of settling all claims on the Friday before. Antero did so because it was beneficial to Antero as the potential verdict against Antero could have exceeded $20 million dollars.[25] Plaintiffs had proffered in its pre-trial expert disclosures that in addition to the unpaid royalties owed to Plaintiffs, which Antero has admitted in its Brief would have been at least $5,621,285.75, that the Jury or Trial Court could have awarded Plaintiffs interest or loss of use of such unpaid royalties amounting to a low of $4.3 million dollars and a high of $14.1 million dollars just for interest/loss of use for a combined total of royalties and interest/loss of use amounting to $9.9 to $19.7 million dollars not including any additional tort damages including punitive damages. [APP 2477-78]. Antero's settlement with Plaintiffs for $7 million dollars was a bargain and that's why Antero settled all of its claims for that amount. Now Antero wants more but the facts do not support its quest nor does the case law cited by Antero.[26]

The law in West Virginia regarding contribution and setoff is clear. Antero's argument that

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them. ***However, these insinuations are demonstrably false***: Antero forwarded the Ash turnkey agreement to CGAS by letter dated May 21, 2015, and Bison produced the Clark turnkey agreement in response to discovery requests in July, 2015. ***Therefore, Antero was in possession of both applicable Agreements no later than four months after the case was first filed in March, 2015."*** See also FN 16 " .... Antero's characterization of the significance of this testimony in view of what it claims is " unambiguous" depth-limiting language in the Agreements-- ***is overstated, to say the least."*** This Court further held that ***Antero's purpose was to avoid " production of a [relevant] title report "which equated to "... Antero essentially played " hide the ball"***. Finally. this Court held that Antero was engaging in ***"gamesmanship" and was " ... playing fast and loose with the courts ... "*** (emphasis added).

[25] Plaintiffs had proffered expert disclosures that in addition to the unpaid royalties, which Antero has asserted in its Brief would have been at least $5,621,285.75, including interest or loss of use damages alone could equal more than $20 million dollars; [APP 2477-78] and this does not include the potential tort damages for Antero's deliberate conduct in diverting Plaintiffs royalties when it knew such was unlawful; moreover all these claims were specific to Antero and not MRI; [APP 3107 ¶39].

[26] Antero cited very few West Virginia cases in support of its arguments none of which cases were remotely on point as almost all involved written indemnity agreements rather than common law contribution issues; Antero did cite Deloach I, [Antero Br. p.19], but Antero did not explain the subsequent "clarified" Deloach II Opinion [Deloach v. Appalachian Power Co., 2011 WL 131189803 (SD WV 2011)], where Judge Chambers stated that "proportional indemnity" is only available after "a determination of proportional liability"; such holding in Deloach is supportive of Plaintiffs position in this Appeal that Antero is not entitled to any contribution unless there was a determination of liability and damages.

Plaintiffs have received "double recovery" is devoid of any facts to support such assertion. Frankly such statement is made from "whole cloth." Moreover, Antero has provided no West Virginia law, or any other jurisdictions' law, that would approve a setoff or credit stemming from voluntary settlements among a plaintiff and a defendant that involves separate and distinct causes of action and there has been no determination by a fact finder whatsoever regarding liability or damages among other settling defendants. Antero cavalierly asserts that it is entitled to $4 million of the $7 million dollars Antero paid for its full and complete release from Plaintiffs. However, Antero makes no effort to demonstrate that its settlement payment to Plaintiffs was more than Antero's liability would have been if Antero had gone to trial. Such is a necessary element to be entitled to contribution or setoff. Sydenstricker v. Unipunch Products, Inc., 169 WV 440, 288 S.E.2d 511 (1982)[Syl. Pts. 4, 5 & 6). This Court's case law is clear that for contribution or setoff to be applicable the party claiming such relief must be a joint tortfeasor, the other joint tortfeasor must be joined as a party or otherwise able to participate in any verdict or judgment, and a judgment or verdict must establish the liability and damages of the joint tortfeasors. Also instructive is this Court's opinion in Modular Bldg. Consultants.[27] In the Modular case this Court reaffirmed a joint tortfeasors right to contribution if a) it is established that such party is a joint tortfeasor and b) ***that such joint tortfeasor has paid more than its pro tanto share of a verdict or judgment.*** (emphasis added) *Id.* at 561. Antero did not establish that it was a joint tortfeasor or that it paid more than its pro tanto share of any verdict or judgment. *Id.* at 564 & FN 9. Antero only acted after MRI extinguished its liability to Plaintiffs by submitting its Rule 68 Offer of Judgment. Antero had the option to continue with the Trial and establish its own and MRI's liability and damages for contribution purposes, but Antero chose not to and no doubt because Antero had the contractual indemnity agreement in hand. However, Antero cannot seek contribution or setoff from Plaintiffs as there are no facts supporting Antero's hollow claim that Plaintiffs obtained "double recovery."

Antero must be a joint tortfeasor and have common liability which it did not demonstrate to the Trial Court as Antero committed separate and independent causes of action. *Id.* A verdict is an essential element to recover contribution or setoff, as well as proof that such verdict was for one

[27] Modular Bldg. Consultants v. Poerio, Inc., 235 WV 474, 774 S.E.2d 555 (2015).

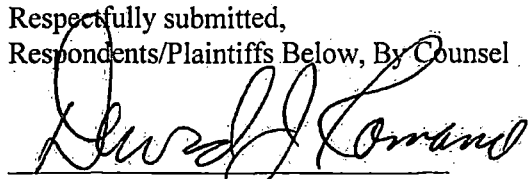
indivisible injury which is not present in this matter. *Id.* at 516-18. A jury could not have found Antero guilty of slander of title as the Trial Court granted Antero summary judgment on that cause of action but permitted Plaintiffs' other causes of action to move forward to trial against Antero. [APP 2217]. MRI was charged with causes of action for slander of title and Constitutional violations relating to its deliberate and intentional failure to provide due process notice to the Plaintiffs as required by law and Antero was not subject to those causes of action. Such highlights the frivolousness of Antero's assertions that it is entitled to contribution, setoff or credit after voluntarily settling all claims prior to trial.

Accordingly, Antero's request for contribution, setoff or credit must fail and Plaintiffs should be awarded its costs pursuant to Rule 24 of the Rules of Appellate Procedure regarding this Appeal.

VI. CONCLUSION:

Antero's voluntary settlement was final and waived any avenue for Antero to seek contribution or setoff and Antero provided no facts or law to the Trial Court entitling Antero to such relief. Accordingly, Antero's appeal against Plaintiffs should be summarily denied.

Respectfully submitted,
Respondents/Plaintiffs Below, By Counsel



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CERTIFICATE OF SERVICE

I, David J. Romano, do hereby certify that on the 3rd day of May, 2021, I served the foregoing "RESPONSE BRIEF OF RESPONDENTS/PLAINTIFFS BELOW" upon the below listed counsel of record **by U.S. Mail** to them at their office addresses:

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