# IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**No. 20-0967**

**MIKE ROSS, INC.,**

***Petitioner and Cross-claim Defendant Below,***

**v.**

**ANTERO RESOURCES CORPORATION,**

***Respondent and Cross-claim Plaintiff Below.***

## Petitioner's Reply Brief

Civil Action No. 13-C-528-2
In the Circuit Court of Harrison County, West Virginia
(Honorable Thomas A. Bedell, Chief Judge)

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## INTRODUCTION

Antero's Response, gamely channeling Camus' early works, hyperbolically claims that MRI's position is "absurd" no fewer than six times. But, as Ambrose Bierce famously wrote, absurdity is simply "[a] statement or belief manifestly inconsistent with one's own opinion." And while Antero is "entitled to [its] own opinion," it is certainly not entitled to its "own facts."[1] Instead of grappling with the reality of this case, Antero bends over backwards to distort key facts, avoid pertinent clauses in the July 14, 2014 Agreement, and misapply relevant case law. Indeed, Antero's Response is premised on three key fictions: its limited interpretation of West Virginia's law regarding consideration, its constrained reading of this Court's opinion in *L&D Invs., Inc. v. Mike Ross, Inc.*, 241 W. Va. 46, 56, 818 S.E.2d 872, 882 (2018) and the events that occurred afterward, and its continued misrepresentation of the claims and settlements below. These fictions fade when subjected to minimal scrutiny, and the lower court's opinion must be overturned, as stated in MRI's opening brief.

## STATEMENT OF CASE

Under West Virginia Rule of Appellate Procedure 10(d), a respondent's brief may include a "statement of the case" to "correct[] any inaccuracy or omission in the petitioner's brief." But the statement of the case in Antero's respondent's brief contains several instances of selective citation and misrepresentation that necessitate correction in MRI's Reply.

First, Antero continues to close its eyes to portions of the July 14, 2014 Agreement, contending that the Agreement entitles it to wholesale reimbursement of royalties. But, much like its initial brief in its separate appeal, Antero never once mentions that the Agreement (if it is

[1] "Everyone is entitled to his [or her] own opinion, but not his [or her] own facts." -- Daniel Moynihan

enforceable at all) contains a clause that specifically states MRI intended to indemnify Antero for Plaintiffs' claims for mis-directed royalty payments—not reimburse Antero wholesale for royalties. Indeed, the contract specifically ties indemnification to Plaintiffs' misdirected royalty claim, stating, "Antero will resume making royalty payments to Mike Ross, Inc. with the understanding that Mike Ross, Inc. will indemnify Antero for any overpayment and any interest due or accrued on the overpayment *as a result of the competing claim of L&D Investments, Inc.*" J.A. 227.

Next, Antero continues to perpetuate the fiction that its settlement with Plaintiffs was somehow limited to resolving only misdirected royalties—despite the fact that Plaintiffs asserted a legion of claims, including claims for trespass, fraud, deceit, conversion, slander of title, unauthorized pooling of mineral interests, and punitive damages in addition to the claims for the royalties paid to MRI.[2] J.A. 106-112;113-128. To do so, it again cites to the language of its *settlement offer*—not the actual settlement agreement. *See* Resp. Br. 2. But the language of the settlement agreement plainly shows the settlement resolved a whole host of claims including "unpaid royalties . . . loss of value/interest, tort claims, contract claims, or any other known or unknown claims except for the separate settlement regarding the pooling issues." J.A. 1940. Additionally, the precise amount of the settlement that was allocated to each claim was not itemized. *Id.* ("Plaintiffs arrived at the final settlement figure of $7,000,000 to compensate for all claims and all expected damages that could have been returned by the jury and did not itemize each such damage item as some were intangible dependent only on the jury's determination after hearing all evidence.").

[2] Unsurprisingly, the claims Antero attempts to handwave away have historically entailed hefty damages. *See, e.g., TXO Prod. Corp. v. All. Res. Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992) (upholding a $10 million award of damages in a slander of title case).

And the claims to which Antero was exposed were substantial. Indeed, Antero obtained two title opinions on the subject property in which its counsel—counsel from the very same firm hired to litigate the underlying dispute—advised that MRI was the rightful owner of the royalties and that Antero should obtain assent before executing a pooling agreement.[3] *See, e.g.*, *id.* at 281 (recommending that Antero "obtain a modification or pooling agreement from Mike Ross, Inc., or its successors or assigns, before beginning operations that pool the captioned oil and gas with other property"). Antero did not obtain that agreement, pooled the mineral estates, and generally threw caution to the wind while operating. This, of course, carried substantial risk. Indeed, similar slander of title cases have carried multi-million-dollar price tags. *See TXO Prod. Corp. v. All. Res. Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992) (upholding a $10 million award of damages in a slander of title case). Therefore, to the extent Antero contends that its settlement in this case, the claims to which it was exposed, and the potential damages recoverable were somehow cabined to misdirected royalties, that is a flat misrepresentation of the proceedings below.

## ARGUMENT

### a) Antero's promise to continue doing what it was always obligated to do does not amount to consideration.

The majority of Section V.B. of Antero's brief is not about consideration at all. Instead, it is a near verbatim echo of Antero's arguments regarding the interpretation of the July 14, 2014 Agreement from its opening brief in Case No. 20-0964. And that argument fails for the reasons pointed out in MRI's Respondent's Brief in that case. Namely, West Virginia law requires courts to "ascertain and give effect to the intention of the parties." *Sellers v. Owens-Illinois Glass Co.*, 156 W. Va. 87, 92–93, 191 S.E.2d 166, 169 (1972). In so doing, courts must "give effect to each

[3] An unredacted version of the most recent title opinion containing the pooling recommendations was only obtained by Plaintiffs and MRI late in the litigation after successful motions to compel.

provision of the contract." *Am. Nat'l Prop. & Cas. Co. v. Clendenen*, 238 W. Va. 249, 267, 793 S.E.2d 899, 917 (2016). Despite this plain law, Antero shuts its eyes to a provision of the contract showing that it was put in place to indemnify Antero from "competing claim[s] of L&D Investments, Inc."—not to provide Antero with wholesale reimbursement. J.A. 227. This Court should refuse Antero's invitation to interpret a contract by omitting clauses harmful to Antero's position.[4]

Antero only begins addressing MRI's arguments regarding consideration on page eleven of its brief (four pages into its argument purportedly regarding consideration), boldly proclaiming that MRI's arguments regarding consideration are "preposterous" and "absurd." Resp. Br. 11-12. Despite Antero's incendiary language, its counterarguments are more smoke (and mirrors) than sizzle.

First, Antero contends that MRI's argument that Antero cannot use its pre-existing obligation to pay the owner of a mineral estate to extract new duties from the apparent owner of that mineral estate is "facially absurd." Instead, according to Antero, the fact that ownership of the royalties was disputed gave it grounds to impose a new set of indemnity obligations on MRI. But this argument presumes that disputed ownership is a hardship sufficient to extinguish the existing

[4] Antero briefly attempts to bolster its argument regarding the interpretation of the contract on pages 7 and 8 of its brief by pointing to several Division Orders executed in 2011 and 2014 between Antero and MRI. This argument fails for two reasons. First and foremost, Antero never asserted that it was entitled to indemnification under these Division Orders or asserted a claim based on those Orders below. More importantly, the Division Orders are—like the July 14, 2014 Agreement—documents unsupported by consideration. The Division Orders state the payment that Antero is providing to mineral rights owners pursuant to an underlying lease. Despite the fact that these documents merely state the payment that Antero is obligated to provide pursuant to another contract, Antero uses them in an attempt to foist new obligations on mineral right owners, including a duty to notify Antero in writing of changes in ownership, the limitation of mineral right owners to receive payment only when their accounts accrue $25, and indemnification duties that do not exist under the originating lease. Put simply, these agreements are wholly consistent with Antero's attempts to foist its obligations on other parties in return for nothing.

contractual relationship and enable Antero to use the payments it used as consideration for the initial agreement to pay royalties as consideration for the subsequent July 14, 2014 Agreement. But a "party relying on a defense of impracticability [to abrogate a contractual relationship] must show more than a mere increase in difficulty and/or cost to be excused from performance of a contractual obligation." *Waddy v. Riggleman*, 216 W. Va. 250, 259, 606 S.E.2d 222, 231 (2004). Because mere difficulty is insufficient to extinguish existing contractual terms, courts have widely held that a mere increase in the difficulty of performing a contractual duty cannot be used to demand additional duties from the opposing party. *See, e.g.*, *Dugan & Meyers Constr. Co. v. Ohio Dep't of Adm. Servs.*, 2007-Ohio-1687, ¶ 30, 113 Ohio St. 3d 226, 231, 864 N.E.2d 68, 73–74 ("Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." (citation omitted)); *Mobile Turnkey Housing, Inc. v. Ceafco, Inc.*, 294 Ala. 707, 321 So.2d 186, 190 (1975) ("But where one party refuses to do the work, which his contract requires him to do, . . . unless he is paid more, and the other promises to pay more, the original contract still remaining subsisting, we consider it merely a promise to pay for what he was already obliged to do, and a nudum pactum . . . ."). Indeed, as the Supreme Court of Alabama explained, while refusing to allow a more-difficult-than-anticipated-pre-existing-duty to serve as additional consideration "seems on occasion to be rather harsh. . . . [, to] hold otherwise would permit one party to a valid and unambiguous contract to use his failure of performance as a coercive force to extract a higher price than was originally contracted for." *Mobile Turnkey Hous., Inc.*, 294 Ala. at 713, 321 So. 2d at 191.

And that is precisely what happened here. Antero used uncertainty regarding the ownership of the royalties that it was undisputedly obligated to pay to secure additional indemnification

obligations from MRI (which, at the time, had a valid deed through tax sale) even though Antero was doing something it was obligated to do all along. In fact, it is more egregious than that. Despite Antero's contention that "[t]he MRI/Antero Agreement was like an insurance policy or any other contract of indemnity [where] MRI agreed to indemnify Antero for any risk to Antero vis- à-vis L&D's claims to the disputed royalties in exchange for Antero's agreement to pay MRI instead of L&D until rightful ownership of the mineral interests was resolved," Antero now treats the July 14, 2014 Agreement as a mechanism to profit from the disputed royalties. Indeed, under the reading urged by Antero, MRI will have paid eleven million dollars to resolve this matter (a four million dollar offer of judgment that resolved the misdirected royalties claim, and a $6,914,943.75 "reimbursement" to Antero for the royalties resolved by the offer of judgment) while Antero pays essentially nothing *and* gets interest on top of that.[5] That outcome would, in fact, be absurd. The law does not permit the opportunistic to extort new duties in exchange for the performance of a pre-existing duty.

Next, Antero, citing *Rease v. Kittle*, 56 W. Va. 269, 49 S.E. 150, 153 (1904), apparently contends that courts are not entitled to review whether sufficient consideration exists to support a contract. *See* Resp. Br. 14. That is, of course, wrong. Indeed, this Court has repeatedly—and recently—reviewed whether adequate consideration exists to support a contract. *See, e.g.*, *Young v. Young*, 240 W. Va. 169, 177, 808 S.E.2d 631, 639 (2017) (determining that "under these circumstances, the exchange of these promises, in the absence of other consideration, is legally

[5] Indeed, in the proceedings below, Antero asked for *$9,544,968* (minus a $4 million credit to account for MRI's accepted offer of judgment), which represented $6,914,943.75 plus $2,630,024.50 in pre-judgment interest. *See, e.g.*, J.A. 224-225. If Antero truly viewed the July 14, 2014 Agreement as an "insurance policy," it would not be attempting to recover for claims beyond the scope of that insurance policy (namely, mis-paid royalty claims) and interest on top of that. But, it does not truly view the policy that way; instead, it views the July 14, 2014 Agreement as a mechanism to profit off of a royalty dispute.

insufficient consideration."). Therefore, to the extent Antero is suggesting that this Court is not entitled to review the sufficiency of consideration, that argument is unavailing.

Third, Antero contends that "[p]erformance of a disputed duty may be adequate consideration even if it is ultimately determined that the duty was pre-existing" based on *Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.*, 769 F. Supp. 671, 738 (D. Del. 1991), *aff'd*, 988 F.2d 414 (3d Cir. 1993) (citing *Kinnison v. Kinnison*, 627 P.2d 594, 596 (Wyo. 1981). But *Coca-Cola* presents a far different situation. In that case, the parties disputed whether syrup for Diet Coke fell within the ambit of a provision contract. *Id.* During the pendency of litigating whether the syrup fell within the contract, the parties entered an amendment whereby Coca-Cola agreed to provide Diet Coke syrup in exchange for additional duties from the other parties. *Id.* Because the precise syrup Coca-Cola was obligated to provide was unclear, the court determined that providing the Diet Coke syrup in the pendency of the dispute amounted to consideration. That is not the case here.

In this case, the scope of the duty owed by Antero is not at issue—it undisputedly owed royalties to the owners of the mineral estates—and at the time the agreement was struck, Antero believed it owed those royalties to MRI. The issue here, however, is that the duty owed was rendered more difficult by a subsequent ownership dispute. As shown above, a more difficult performance does not amount to new consideration.

Finally, Antero contends that "it is black-letter law that forbearance or surrender of a claim or defense which proves to be invalid is sufficient consideration to support the formation of a valid contract as long as the claim or defense is doubtful as to the law or facts or the forbearing or surrendering party believes the claim or defense may be fairly determined to be valid." But the July 14, 2014 Agreement contains no promise by either party to surrender a claim or defense.

Instead, Antero asks this Court to re-write the contract to include terms that it believes were implied by the July 14, 2014 Agreement, arguing, "MRI surrendered its claim against Antero that it was breaching its contractual obligation to pay royalties to MRI instead of L&D, and Antero surrendered its defense that it would breach its contractual obligation to L&D by paying royalties to MRI instead of L&D." Resp. Br. 15. Antero makes this request, obviously, because absent a re-written contract, the July 14, 2014 Agreement is unsupported by consideration. This Court should decline Antero's invitation and reject its argument that "implied" contract terms can amount to consideration because consideration must be "bargained for in good faith." *Wetzel v. Watson*, 174 W. Va. 651, 654 n.4, 328 S.E.2d 526, 530 n.4 (1985) (citation omitted). An unnegotiated ancillary benefit that does not form the basis of the bargain plainly should not amount to consideration.

Accordingly, this Court should reject Antero's counterarguments and overturn the lower court's ruling that the July 14, 2014 Agreement was supported by consideration.

**b) Antero is not entitled to enforce a contract that it breached.**

Next, Antero posits that MRI's simple arguments that Antero cannot enforce a promise that it broke are a "a model of misstatement and misdirection" and, yet again, labels MRI's arguments "absurd." Despite this huffery-puffery, Antero devotes five threadbare paragraphs to revealing MRI's purported "misdirection," offering virtually no explanation for its aspersions. Antero's rhetorical, diversionary accusations are no accident—meaningful scrutiny into this Court's opinion in *L&D Investments, Inc. v. Mike Ross, Inc.*, 241 W. Va. 46, 56, 818 S.E.2d 872, 882 (2018) and the events that followed show that Antero undoubtedly jumped the gun, preemptively breaching the July 14, 2014 Agreement before ownership of the mineral estates was fully resolved.

Antero admits, as it must, that it resumed payments "pending resolution of the ownership dispute" in the case below under the July 14, 2014 Agreement. But it oversimplifies this Court's

decision in *L&D Investments, Inc. v. Mike Ross, Inc.*, 241 W. Va. 46, 56, 818 S.E.2d 872, 882 (2018) to cast that decision as a definitive resolution of the ownership dispute below, myopically focusing on the Court's statement that it was "revers[ing] the circuit court's grant of summary judgment to MRI declaring it the owner of eighty percent of the mineral interests in the subject property and remand this case for entry of an order declaring the tax deed issued to MRI void as matter of law." That lone statement, however, did not definitively resolve the ownership of the mineral estates below.

Indeed, while the phrasing Antero hones in on is broad, this Court's reasoning only reached the 36% interest held by appellants in the prior appeal. Specifically, it invalidated the tax sales of those interests "[b]ecause of the double assessments and the payment of the taxes." *Id.* at 55. MRI continued to contend—first by asking this Court for clarification regarding the 44% remainder of the mineral estate on a denied petition for rehearing and later by pursuing summary judgment following remand—that the mineral estates held by parties who were not present in the prior appeal rightfully belonged to MRI because they were not double assessed and were therefore not within the ambit of this Court's opinion. *See, e.g.*, J.A. 1234 (wherein MRI sought summary judgment on the remainder of the mineral estate following remand "[t]he Supreme Court declined to address the issue of ownership of interests in the subject property that were not separately assessed and declined MRI's petition for rehearing. Therefore, the issue of ownership of interests in the subject property that were not separately assessed is pending before [the lower court] on remand"). Antero ignores this critical fact and attempts to boil this Court's prior decision down to one sentence in an effort to evade the fact that this Court's prior opinion did not definitively resolve the ownership dispute below. It does this, of course, to obfuscate the undisputed fact that it willingly breached the July 14, 2014 Agreement in May 2018, when it admittedly halted payments to MRI, despite

the fact that MRI continued to dispute the ownership of the remainder of the mineral estate—and pay taxes on the estate—until October 30, 2019, when the lower Court entered an order squarely dealing with the remainder of the mineral estate. J.A.238-239; 288-292; 347-350; 2126-2203.

Antero also disingenuously attempts to bend statements in MRI's opening brief into key concessions. Again, these efforts fall apart with minimal scrutiny. For example, Antero contends that "MRI acknowledges in its brief that the Circuit Court held, 'Once MRI's ownership of any of the subject minerals was conclusively resolved herein by our Supreme Court declaring on appeal (with reaffirmation thereof by the Court upon remand) that MRI's 2003 Tax Deed was void ab initio, Antero properly suspended, yet again, (and actually ended) any further royalty payments to MRI'" as though this amounts to a key admission by MRI. Resp. Br. 17. Of course, MRI acknowledged that statement—*it contended it was error*. *See* Pet. Br. 17-18 ("The lower court only fleetingly touched on Antero's preemptive breach, stating, 'Once MRI's ownership of any of the subject minerals was conclusively resolved herein by our Supreme Court declaring on appeal (with reaffirmation thereof by the Court upon remand) that MRI's 2003 Tax Deed was void ab initio, Antero properly suspended, yet again, (and actually ended) any further royalty payments to MRI.' J.A. 72. But the lower court's opinion omits MRI's challenge to the remainder of the mineral estates following the remand of this case." (emphasis added, phrase omitted by Antero)). Similarly, Antero tries to paint MRI's argument that ownership of all mineral interests were only "squarely resolved" once "the lower court issued its ruling … declaring all tax deed transfers to MRI void ab initio" as a damning concession because the lower court's October 30, 2019 decision "occurred in reliance on this Court's decision which occurred before Antero suspended its royalty payments to MRI." Resp. Br. 17. But Antero's riposte misses the mark. While the lower court's decision on October 30, 2019 might have relied on this Court's prior opinion to determine ownership of all

mineral interests, the issue was not squarely resolved until that October 30, 2019 opinion—not an earlier opinion the October 30, 2019 decision referenced.

Accordingly, this Court should reverse the lower court's determination that Antero was entitled to enforce a contract that it admittedly breached.

**c) Antero's arguments regarding the lower court's holding on the indemnification issue misstate (at least) the lower court's opinion, Plaintiffs' Complaints, the settlement agreement, and Antero's 30(b)(7) deposition, and should be summarily ignored.**

Section D of Antero's response again largely fails to address MRI's arguments and simply regurgitates portions of its Petitioner's Brief in Case No. 20-0964. To the extent those arguments are repeats, they fail for the same reasons stated in MRI's Respondent's Brief in Case No. 20-0964. A few points are worth clarifying, however.

First, to the extent Antero, once again, contends that the July 14, 2014 Agreement calls for wholesale reimbursement of royalties, it ignores the provision of that Agreement that specifically states it was intended "to indemnify Antero for any overpayment and any interest due or accrued on the overpayment *as a result of the competing claim of L&D Investments, Inc.*" J.A. 227. (Emphasis added).

Second, Antero again repeats the myth that its $7,000,000 settlement was intended solely to cover mis-directed royalty payments (the only claims covered under the July 14, 2014 Agreement). But Antero knows that Plaintiffs asserted claims well beyond the mis-directed royalty payments. And it (hopefully) knows that its settlement resolved all of those claims and failed to earmark any particular portion for mis-directed royalty payments. J.A. 1940 ("Plaintiffs arrived at the final settlement figure of $7,000,000 to compensate for all claims and all expected damages that could have been returned by the jury and did not itemize each such damage item as some were intangible dependent only on the jury's determination after hearing all evidence."). So the

"windfall" that Antero once again attempts to conjure up simply does not exist—it simply turns a blind eye to the vast world of damages to which it could have been exposed.

Pages twenty-two through twenty-six of Antero's brief tread new ground and attempt to address MRI's arguments, summarily contending that MRI's arguments do not "make any sense." It appears, however, that Antero's contention might be premised on arguments that it only partially read. For example, Antero, in a hasty paragraph, decries MRI's contention that the lower court's opinion is inconsistent. But in one paragraph the lower court held that Antero "misconstrue[d] the actual tenor and terms of such Agreement between these parties [to the extent Antero contended that the Agreement] called for a blanket return of royalties paid plus interest in the event any disbursed royalty proceeds by Antero to MRI under that Agreement were subsequently deemed improper through this instant litigation" and yet, in another, it determined that Antero was entitled to the very "blanket return" that did not exist under the Agreement, holding that "any previous royalty payments to MRI by Antero that cannot be otherwise assigned by this Court as further and collectively addressed within the settlements of Plaintiffs' claims against Antero and MRI respectively shall be relinquished by MRI and returned to Antero in a sum certain amount determined by this Court as further reflected herein infra." J.A. 73; 78. These holdings cannot be reconciled.[6]

Finally, Antero attempts to salvage its 30(b)(7) witness's contradictory testimony by claiming that testimony somehow does not run afoul of the sham affidavit rule. But during his 30(b)(7) deposition, Antero's witness testified that Antero paid MRI $6,506,754.11 and later, in an affidavit in support of Antero's motion for summary judgment, the same witness testified that

[6] Page twenty-three of Antero's brief begins with yet another attempt to misconstrue L&D's settlement with Antero as a "double recovery." For the sake of brevity, MRI will not address this position again. The record establishes that it is false regardless of whether Antero says it five times or fifty times.

Antero paid MRI $6,914,943.75. *Compare* J.A. 238-239; 288-292; 347-350 *with* J.A. 232-233. Although Antero claims that the rule only applies "[t]o defeat summary judgment," that proposed limitation makes no sense. Syl. Pt. 4, *Kiser v. Caudill*, 215 W. Va. 403, 599 S.E.2d 826 (2004). The rule was put in place to keep witnesses from "contradict[ing] prior deposition testimony"—and it seems that general proposition is served whether the contradictory testimony is offered in support of or opposition to summary judgment.

Indeed, Antero offers no compelling reason why it is entitled to $400,000 extra merely by offering a self-serving affidavit that contradicts prior testimony offered by the affiant. This is especially true where the figures offered during deposition regarding what Antero paid to MRI were pulled from documents produced by Antero, and the amounts included in the affidavit, filed in support of Antero's affirmative claim as opposed to one Antero was defending, are drawn from a previously, un-produced chart that does not explain how it arrived at its numbers. *See* J.A. 234. The affidavit is also troubling because it presumes Antero's entitlement to pre-judgment interest. Specifically, the affidavit contends that Antero is entitled to interest dating back to 2011, when it began paying MRI, under W. Va. Code § 53-6-1. *Id.* (claiming that Antero is seeking prejudgment interest under W. Va. Code § 53-6-1 dating back to 2011). But West Virginia law is clear: "Prejudgment interest [is] calculated from the date on which the cause of action accrued." *Bd. Educ. McDowell Cty. v. Zando, Martin & Milslead. Inc.*, 182 W. Va. 597, 611, 390 S.E.2d 796, 810 (1990). And Antero admitted below that "a claim for breach of contractual indemnity does not accrue until 'actual loss or damage' is sustained by the indemnitee" and that loss arose, under Antero's theory, when the court below declared the tax deeds in this case void ab initio in October 2019. J.A. 170. Therefore, not only did Antero's affiant expressly contradict his prior

testimony, he also presumed Antero was entitled to *nine years of pre-judgment interest* that Antero in its own briefing showed it was not entitled to.

And while Antero also claims that the witness can explain the discrepancies, no explanation was offered during the summary judgment briefing or in the witness's affidavit, and thus MRI had no reason or opportunity to respond to what is a clear dispute of a material fact in issue. Therefore, Antero's arguments – whatever they could have been - about the discrepancy were waived, and the amount of royalties paid simply remained, and remains, an open $400,000 question of fact.

## CONCLUSION

The July 14, 2014 Agreement was an empty promise and a broken promise by Antero, and a fulfilled promise by MRI. The lower court's determinations that Antero was entitled to enforce an agreement with no consideration, that Antero was entitled to enforce an agreement that it broke, and that Antero was entitled to more than the Agreement entitled it to (if it was enforceable) must be reversed.

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## CERTIFICATE OF SERVICE

I, Benjamin L. Bailey, do hereby certify that on the 24th day of May 2021, I have caused to be served a true and accurate copy of the foregoing **Petitioner's Reply Brief** upon the below listed counsel of record by depositing a true copy thereof in the United States Mail, postage prepaid, as follows:

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