IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0967

MIKE ROSS, INC.,
Defendant-Below, Petitioner

v.

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

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

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

BRIEF OF THE RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court correctly determined that there was sufficient consideration to form a contract between the Petitioner, Mike Ross, Inc. ("MRI"), and the Respondent, Antero Resources Corporation ("Antero") relative to MRI's reimbursement of Antero for contested royalty payments made by Antero to MRI during the pendency of the litigation.

2. The Circuit Court correctly rejected MRI's argument that any alleged breach by Antero insulated MRI from its contractual obligation to reimburse Antero for contested royalty payments made by Antero to MRI during the pendency of the litigation.

3. The Circuit Court correctly calculated and awarded the amount of indemnification owed by MRI to Antero of $6,914,943.75 for contested royalty payments made by Antero to MRI during the pendency of the litigation except to the extent that it granted MRI an offset for MRI's $4,000,000.00 Offer of Judgment while also awarding L&D the $4,000,000.00 in escrow, thereby resulting in a double recovery or windfall to L&D, as explained in Antero's separate appeal.

II. STATEMENT OF THE CASE

The Plaintiffs/Respondents, L&D Investments, Inc., et al., ("L&D"), initiated this action by filing a complaint on December 10, 2013, contending that they not MRI, were the proper recipients of royalty payments under the Subject Lease arising from a dispute over the validity of a tax deed.[1] As a result of the lawsuit, Antero prudently suspended MRI's royalty payments for production from the Subject Lease.[2] Thereafter, at MRI's request, Antero and MRI entered into an Agreement ("MRI/Antero Agreement") whereby Antero resumed royalty payments to MRI

[1] App. 1945.

[2] App. 1375, 1378, 1379.

in exchange for MRI's agreement to indemnify Antero, in full, for any overpayment of royalties, plus interest.[3] Antero ultimately paid MRI $6,914,943.75 in royalties from the Subject Lease.[4]

On May 22, 2018, this Court reversed the Circuit Court, held that "the tax deed issued to MRI [was] void and the statute of limitation [was] inapplicable," and remanded the case to the Circuit Court consistent with the determinations and directives provided therein.[5] After the Circuit Court entered an order declaring the tax deed "VOID AB INITIO as a matter of law,"[6] and after MRI's Offer of Judgment was accepted by L&D,[7] Antero amended its cross-claim setting forth its claim for contractual indemnity under the MRI/Antero Agreement, and demanding judgment against MRI for all amounts paid to MRI, including interest.[8] Antero had agreed to pay royalties during the pendency of litigation to MRI with a promise by MRI to reimburse Antero for those payments, including interest, and it was now demanding enforcement of that Agreement.

On December 9, 2019, Antero entered into a settlement agreement with L&D.[9] As part of the settlement, Antero agreed to pay L&D a total of $7,000,000.00, which represented $5,621,285.25 owed to L&D in royalties and $1,378,714.75 in interest.[10] Antero paid

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[3] App. 227-231.

[4] App. 232-233, 351-354.

[5] *L&D Investments, Inc. v. Mike Ross, Inc.*, 241 W. Va. 46, 49, 818 S.E.2d 872, 875 (2018).

[6] App. 2139.

[7] App. 337.

[8] App. 108-109.

[9] App. 1929.

[10] App. 1940, 3042 ("Antero will pay Plaintiffs the sum of $5,621,285.25 representing the current estimate of their royalty due through July 21, 2019, pursuant to the fractional ownership percentages set forth in the Stipulation of Ownership, attached hereto. Royalties accruing after July 2019, will be paid within 30 days or when they would be paid in Antero's ordinary course of business, and future royalties will likewise be paid in Antero's ordinary course of business. Antero will pay Plaintiffs an additional $1,378,714.75 representing interest accrued for the foregoing unpaid royalties.").

$3,000,000.00 to L&D immediately and deposited $4,000,000.00 into an escrow account, which represented the amount paid to L&D by MRI via its Offer of Judgment. The escrow was established because the parties (Antero, MRI, and L&D) disputed the impact of MRI's Offer of Judgment and the parties agreed to submit such issues to the Circuit Court.[11]

The agreements among the parties can best be summarized as follows:

- Antero and MRI agreed that Antero would pay royalties to MRI during the pendency of the litigation, but MRI would make Antero whole if MRI did not ultimately prevail vis-à-vis L&D
- Antero paid $6,914,943.75 to MRI in royalty payments during the pendency of the litigation
- MRI made a $4,000,000.00 Offer of Judgment to L&D, which L&D accepted
- Antero's $7,000,000.00 settlement with L&D was comprised of $5,621,285.25 in unpaid royalties and $1,378,714.75 in interest[12]
- Antero and L&D then agreed that Antero would pay $3,000,000.00 to L&D of the approximately $7 million in dispute (for which Antero could seek indemnification per its Agreement with MRI) and Antero would deposit the remaining $4,000,000.00 into an escrow account (for which Antero would either get indemnification from MRI or credit against its $7,000,000.00 settlement with L&D)

On June 5, 2020, Antero[13] and MRI[14] filed cross-motions for summary judgment on Antero's cross-claim. On July 8, 2020, Antero,[15] MRI,[16] and L&D[17] filed responses to the cross-

[11] App. 1930.

[12] App. 1940, 3042.

[13] App. 212.

[14] App. 144.

[15] App. 166.

[16] App. 235.

[17] App. 197, 296.

motions for summary judgment. Also, on the same day, L&D filed a motion for summary judgment against Antero regarding offset and contribution.[18] On July 22, 2020, Antero[19] and MRI filed replies.[20]

On September 15, 2020, the Circuit Court entered its "Omnibus Ruling Order," wherein it awarded judgment in Antero's favor, in part, on its amended cross-claim against MRI as molded therein and granted L&D's motion for summary judgment against Antero regarding post-settlement set-off or contribution.[21] Antero has filed a separate appeal from the Circuit Court's ruling relative to L&D, but the Circuit Court did not err in rejecting MRI's efforts to avoid its contractual obligations.

Concerning the MRI/Antero Agreement and rejecting the arguments again advanced by MRI on appeal, the Circuit Court held as follows:

> The July 14, 2014 Agreement by and between Antero and MRI states, *inter alia*, and in pertinent part to these immediate ruling matters:
>
> 1. 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. ...
>
> **That Agreement also contemplates and further speaks of**, inter alia:

[18] App. 324.

[19] App. 302.

[20] App. 201.

[21] App. 52.

- **Indemnification** (i.e.; "any overpayment and any interest due or accrued on the overpayments as a result of the competing claim of L& D Investments, Inc.").

- **Reimbursement** (i.e.; "in full for any amount of royalties paid [by Antero] 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 [MRI] now claims").

- **Legal protections for Antero in this instant litigation** (i.e.; "is not and shall not be construed as an admission by Antero of any acts or wrongdoing whatsoever against the Plaintiff [L&D herein at the time of execution] or anyone else, under any theory whatsoever" or that Antero violated any legality or otherwise "caused any injury to Plaintiff"..."cannot be used as evidence, as an admission, or in any other manner...").

- Antero's and MRI's agreed position that "the language of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against either of the parties." (Underline emphasis provided by this Court).

* * *

As a result of Antero and MRI agreeing to allow MRI to keep receiving such contested royalty payments pending this litigation's determination of contested royalty ownerships (which, again, our State Supreme Court determined as to MRI and this Court's affirmation thereof), **MRI was provided a distinct and highly lucrative financial benefit**; that being a very significant cash flow during an extended period of time for pursuing and financing other mineral rights and income producing investments from which MRI could yield additional investment income.

The deposition of MRI's president, Mike Ross, confirmed his desire for that very benefit pending this litigation and Antero voluntarily allowed him to achieve such end.[22]

Frankly, MRI's argument that there was no consideration for the MRI/Antero Agreement when it was MRI which proposed it and received nearly $7 million from Antero in contested royalty

[22] App. 70-71, 73 (emphasis supplied and footnotes omitted).

payments during the litigation is absurd. Equally absurd is the argument that Antero somehow breached the agreement precluding Antero from the very indemnification that was the heart of the MRI/Antero Agreement. Consequently, the Circuit Court concluded "as a matter of law that the July 14, 2014 *Agreement* by and between Antero and MRI in its totality of mutually considered purposes for coming into existence and provisions therein made, is deemed a valid contract and free of ambiguity as to the particularly identified royalty payments."[23]

III. SUMMARY OF ARGUMENT

The Circuit Court correctly determined that there was sufficient consideration to form a contract between the Petitioner, Mike Ross, Inc. ("MRI"), and the Respondent, Antero Resources Corporation ("Antero") relative to MRI's reimbursement of Antero for contested royalty payments made during the pendency of the litigation. The Circuit Court correctly rejected MRI's argument that any alleged breach by Antero insulated MRI from its contractual obligation to reimburse Antero for contested royalty payments made by Antero to MRI during the pendency of the litigation. The Circuit Court correctly calculated the amount of indemnification owed by MRI to Antero in the amount of $6,914,943.75 for contested royalty payments made by Antero to MRI during the pendency of the litigation.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

R. App. P. 19 argument is appropriate in this case where MRI is contractually obligated to reimburse Antero for the full $6,914,943.75 in royalty payments, including interest, for which MRI received from Antero but was not entitled.

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[23] App. 75.

V. ARGUMENT

A. STANDARD OF REVIEW

As this is an appeal from summary judgment rulings, the standard of review is *de novo*[24] and applying that standard, Antero is entitled to an order affirming the Circuit Court's rulings relative to MRI's cross-appeal.

B. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THERE WAS SUFFICIENT CONSIDERATION TO FORM A CONTRACT BETWEEN MRI AND ANTERO RELATIVE TO MRI'S REIMBURSEMENT OF ANTERO FOR CONTESTED ROYALTY PAYMENTS MADE DURING THE PENDENCY OF THE LITIGATION.

As noted, after the filing of suit in this matter and at the request of MRI, Antero agreed to resume making royalty payments to MRI in exchange for MRI's agreement to indemnify Antero, in full, for any overpayment of royalties, plus interest. Specifically, the Agreement provides:

> 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.[25]

In other words, MRI decided to contractually obligate itself to reimburse Antero if MRI was determined not to own an interest in the Subject Lease, which is what ultimately transpired. Eventually, Antero paid MRI a total of $6,914,943.75 in royalties for production from the Subject Lease.[26] Moreover, consistent with their Agreement, MRI signed multiple documents between

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[24] Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

[25] App. 228.

[26] App. 232, 352.

2011 and 2014 that expressly stated, "Payor [Antero] is authorized to withhold payment pending resolution of a title dispute or adverse claim asserted regarding the interest in production claimed herein by the undersigned [MRI]. **The undersigned agrees to indemnify and reimburse any amount attributable to an interest to which the undersigned is not entitled**."[27] As MRI's principal testified, he wanted to be paid to "keep the cash stream flowing."[28]

After the Circuit Court entered its Order effectuating this Court's decision in *L&D Investments, Inc. v. Mike Ross, Inc.*,[29] ruling against MRI,[30] and after MRI's Offer of Judgment was accepted by L&D,[31] Antero amended its cross-claim setting forth its claim for contractual indemnity under the Agreement, and demanding judgment against MRI for all amounts paid to MRI, including interest. The relevant provisions of this cross-claim are as follows:

> 2. On November 8, 2019, Plaintiffs and Mike Ross, Inc. announced to the Court Plaintiffs' Acceptance of Rule 68 Offer of Judgment by Defendant Mike Ross, Inc., in the amount of $4,000,000.00 ("Judgment").
>
> 3. Antero and Mike Ross, Inc. are parties to an "Agreement" dated July 14, 2014, attached hereto as "Exhibit No. 1."
>
> 4. The Agreement provides that "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."
>
> 5. Antero demands judgment against Mike Ross, Inc. pursuant to the terms of the Agreement for all amounts paid to Mike Ross, Inc., including interest, and further for any and all damages and interest that may be awarded to Plaintiffs by the

[27] App. 1390-1403 (emphasis supplied).

[28] App. 192.

[29] 241 W. Va. 46, 49, 818 S.E.2d 872, 875 (2018).

[30] App. 2126.

[31] App. 337.

Court or jury to the extent the Judgment does not fully compensate Plaintiffs for all damages and interest allegedly due from Antero and fully extinguish any claims by Plaintiffs against Antero for royalties paid to Mike Ross, Inc.[32]

This Court has recognized that, "[i]n construing the language of an express indemnity contract, the ordinary rules of contract construction apply."[33] 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."[34] 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."[35] 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.[36]

In *VanKirk*, the Department of Highways ("DOH") entered into contracts with two separate construction companies, Green Construction Company ("Green") and Elmo Greer and Sons, Inc. ("Greer"), for the construction of different segments of Route 64.[37] During the course of the construction, Greer incurred a variety of additional costs due to Green's failure to meet

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[32] App. 108-109.

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

[34] *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)).

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

[36] *Id.*

[37] *VanKirk*, supra at 716, 466 S.E.2d at 784.

deadlines, which became the subject of the underlying claims before the court.[38] Greer sought judgment against the DOH and prevailed.[39] The DOH then sought indemnification from Green for amounts paid by the DOH to Greer.[40] The contract signed by Green included several indemnity provisions, including language that would "require[] Green to indemnify DOH against any claims or suits arising because of injuries or damage to any persons or property on account of the operations of the contractor [Green]." Further, Green signed a contract bond which included language that Green would "save harmless [DOH] from any expense incurred through the failure of said contractor [Green]. . . to complete the work as specified, and for any damages growing out of the carelessness or negligence of said contractor [Green] . . . [and] from all losses to it [DOH] . . . from any cause whatever . . . in the manner of constructing said Road[.]"[41] This Court held that "the indemnity language in question to be sufficiently plain, unambiguous, and broad to cover the losses incurred by Greer."[42]

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."[43]

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[38] *Id.*

[39] *Id.* at 717, 466 S.E.2d at 785.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 720, 466 S.E.2d at 788.

[43] App. at 228 (Emphasis supplied).

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. Again, MRI's arguments to the contrary are absurd.

In its Brief, MRI acknowledges, "Plaintiffs asserted claims against MRI for the wrongful receipt of funds tied to the mineral interests and against Antero for the wrongful payment of funds tied to the mineral interests to MRI."[44] MRI also concedes, "Ownership of the gas royalties was disputed because MRI purchased the rights to Plaintiffs' mineral interests at a delinquent tax sale, and Plaintiffs contended that the tax sale was invalid."[45] So, Antero was faced with two parties each claiming entitlement to the same royalty payments – L&D and MRI.

MRI's Brief then makes the preposterous argument that because Antero owed a duty to the rightful owner – even though the identity of that rightful owner was in dispute – it could not enter into an Agreement with MRI to pay the disputed royalties to MRI during the pendency of litigation if MRI agreed to reimburse Antero should it ultimately be determined that L&D was the rightful owner:

> On July 14, 2014, Antero used this existing obligation as a bargaining chip to create **a one-way legal obligation on MRI to indemnify Antero for Antero's existing legal duty**. In that Agreement, Antero promised to perform its pre-existing duty and
>
> > 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.

[44] Petitioner's Brief at 4.

[45] *Id.*

Id. at 161. The Agreement expressly conditioned resumption of a duty that Antero owed on an agreement by MRI

> 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.

Id. at 162. Put simply, **Antero agreed to continue doing what it was obligated to do all along**, and in return, it sought to foist a new set of indemnity obligations onto MRI. In short, Antero offered nothing for something—a quintessential empty promise.[46]

Of course, this is facially absurd. Antero had been sued by L&D claiming that L&D, not MRI, owned the mineral interests and that Antero should be paying L&D, not MRI. It is correct that, at one point, Antero believed that MRI's argument might prevail relative to the delinquent tax sale and, indeed, the Circuit Court initially agreed with MRI's position, only to be reversed by this Court in *L&D Investments, Inc. v. Mike Ross, Inc.*[47] Still, Antero was obviously not "obligated to do all along" what MRI was suggesting at the time MRI proposed the MRI/Antero Agreement as L&D ultimately prevailed on its delinquent tax sale argument.

As MRI's brief acknowledges, that indemnification Agreement was predicated on MRI's contractual obligation "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."[48]

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[46] Petitioner's Brief at 5-6 (emphasis supplied).

[47] 241 W. Va. 46, 49, 818 S.E.2d 872, 875 (2018).

[48] Petitioner's Brief at 5.

"The fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement."[49]

Certainly, "A promise or contract where there is no valuable consideration, and where there is no benefit moving to the promisor or damage or injury to the promisee, is void."[50]

On the other hand, "A valuable consideration may consist either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other."[51]

Accordingly, "A valuable consideration, **however small**, if bargained for in good faith in the absence of fraud will be sufficient to sustain a contract."[52]

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[49] Syl. pt. 3, *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 737 S.E.2d 550 (2012) (*quoting* Syl. pt. 5, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W. Va. 559, 131 S.E. 253 (1926)) (quotation marks omitted).

[50] Syl. pt. 4, *Dan Ryan*, *supra* (*quoting* Syl. pt. 2, *Sturm v. Parish*, 1 W. Va. 125 (1865)) (quotation marks omitted).

[51] Syl. pt. 5, *Dan Ryan*, *supra* (*quoting* Syl. pt. 1, *Tabler v. Hoult*, 110 W. Va. 542, 158 S.E. 782 (1931)) (quotation marks omitted); *see also First Nat'l Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W. Va. 636, 642, 153 S.E.2d 172, 177 (1967) ("Consideration has been defined as some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by another. A benefit to the promisor or a detriment to the promisee is sufficient consideration for a contract.") (internal quotations and citations omitted); 17 C.J.S. *Contracts* § 115 (June 2020 Update) ("'Consideration,' is something of value given in return for a performance or a promise of performance that is bargained for."); RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) ("A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.").

[52] *Wetzel v. Watson*, 174 W. Va. 651, 654 n.4, 328 S.E.2d 526, 530 n.4 (1985) (emphasis supplied) (*citing Peyton v. Peyton*, 271 S.W.2d 493, 500 (Tex. Civ. App. 1954); *Lovett v. Eastern Oil Co.*, 68 W. Va. 667, 670, 70 S.E. 707, 708 (1911)); *see also Federal Deposit Ins. Corp. v. Fedorov*, 2010 WL 2944569, at *6 (E.D. Mich. July 22, 2010) (*quoting General Motors Corp. v. Dep't of Treasury*, 466 Mich. 231, 239, 644 N.W.2d 734 (2002)) ("'Courts generally do not inquire into the adequacy of consideration to support a contract,' and even a 'cent or a peppercorn, in legal estimation,' would suffice."); *First Nat'l Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W. Va. 636, 642, 153 S.E.2d 172, 177 (1967) ("A benefit to the promisor or a detriment to the promisee is sufficient consideration for a contract.").

For these reasons, "Courts of law, as a rule, will not enter upon any inquiry as to the adequacy of a consideration in a contract. They presume this to have been determined by the parties to the contract, if they are capable of contracting."[53]

Here, of course, there is no question that MRI could contract and, thus, the Circuit Court properly rejected its argument there was inadequate consideration where there was a legitimate dispute – in which MRI did not prevail – over MRI's entitlement to royalty payments from Antero. The MRI/Antero Agreement was like an insurance policy or any other contract of indemnity. 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.

Certainly, "In the absence of a mutual agreement, based on a valid consideration, establishing modification of a written contract, there can be no subsequent modification of such a contract without consideration, and the mere promise of one of the parties to perform what he is already bound to do under the terms of the contract is not a sufficient consideration."[54] But, here, both requirements are satisfied because (1) the MRI/Antero Agreement was mutual and (2) it was based on new and separate consideration, i.e., royalty payments by Antero to MRI during the pendency of litigation over MRI's legal entitlement to those royalty payments. Also, unlike in the *Bischoff* case where the alleged modifications were oral,[55] the MRI/Antero Agreement is in writing and signed by both parties.

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[53] *Rease v. Kittle*, 56 W. Va. 269, 49 S.E. 150, 153 (1904).

[54] Syl. pt. 5, *Bischoff v. Francesa*, 133 W. Va. 474, 56 S.E.2d 865 (1949).

[55] *Id.* at 488-490, 56 S.E.2d at 873-874.

The "[p]erformance of a disputed duty may be adequate consideration even if it is ultimately determined that the duty was pre-existing."[56] Indeed, 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.[57] Moreover, "The execution of a written instrument surrendering a claim or defense by one who is under no duty to execute it is consideration if the execution of the written instrument is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists."[58] Here, both are satisfied.

First, by entering the MRI/Antero Agreement, 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. These claims and defenses were both doubtful as to their resolution as the history of this case amply illustrates and MRI, L&D, and Antero each acted upon their good faith beliefs in their legal positions.

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[56] *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); see also *Roth v. Isomed, Inc.*, 746 F. Supp. 316, 319 (S.D. N.Y. 1990) ("Plaintiff did not have a pre-existing duty to continue to provide the standby letter of credit. He could have decided to refuse to continue to provide the standby letter of credit and take his losses, but in doing so he would have thereby deprived defendant of a benefit. Joseph's agreement to continue to provide the standby letter of credit beyond the date he had expressed his desire to be freed from this standby obligation and the extension of the letter of credit to June 30, 1989, on July 12, 1988, was sufficient consideration to validate the June 23rd agreement.").

[57] RESTATEMENT (SECOND) OF CONTRACTS § 74(1) (1981).

[58] RESTATEMENT (SECOND) OF CONTRACTS § 74(2) (1981).

Second, MRI and Antero executed the MRI/Antero Agreement surrendering those claims and defenses even though they were under no obligation to do so irrespective of their subjective beliefs in the validity of their claims and defenses.

For these reasons, as a matter of black-letter law, MRI's inadequate consideration argument is absurd.

C. THE CIRCUIT COURT CORRECTLY REJECTED MRI'S ARGUMENT THAT ANY ALLEGED BREACH BY ANTERO INSULATED MRI FROM ITS CONTRACTUAL OBLIGATION TO REIMBURSE ANTERO FOR CONTESTED ROYALTY PAYMENTS MADE BY ANTERO TO MRI DURING THE PENDENCY OF THE LITIGATION.

MRI's argument in this regard is a model of misstatement and misdirection: "Antero admittedly broke its empty promise to MRI" when it "suspended payments to MRI ... after it became 'uncertain' regarding MRI's ownership status following this Court's opinion *L&D Investment, Inc. v. Mike Ross, Inc.*"[59]

First, as noted, the MRI/Antero Agreement provided, "Antero agrees to resume payments to Mike Ross, Inc. pending resolution of the ownership dispute that is the subject of the Civil Action."

Second, in *L&D Investment, Inc. v. Mike Ross, Inc.*, this Court held, "we reverse 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."[60]

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[59] Petitioner's Brief at 15-16.

[60] *L&D Investment, Inc. v. Mike Ross, Inc., supra* at 56, 818 S.E.2d at 882.

Finally, as noted, upon remand, the Circuit Court entered an order declaring the tax deed "VOID AB INITIO as a matter of law."[61] Of course, this was the reason MRI made an Offer of Judgment, following this Court's decision and the implementation of that decision by the Circuit Court, that was accepted by L&D.[62]

Accordingly, the "pending resolution of the ownership dispute" provision of the MRI/Antero Agreement was triggered and Antero's suspension of royalty payments to MRI was consistent with and not in violation of the MRI/Antero Agreement. Indeed, 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.'"[63] Moreover, MRI concedes that ownership of all disputed mineral interests was "squarely resolved" once "the lower court issued its ruling ... declaring all tax deed transfers to MRI *void ab initio*,"[64] which of course occurred in reliance on this Court's decision which occurred **before** Antero suspended its royalty payments to MRI.

Under these circumstances, MRI's argument that, "Antero preemptively breached its contract ... and it is therefore not entitled to enforce the agreement"[65] is absurd.

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[61] App. 2139.

[62] App. 337.

[63] Petitioner's Brief at 16.

[64] *Id.*

[65] *Id.* at 17.

D. THE CIRCUIT COURT CORRECTLY CALCULATED THE AMOUNT OF INDEMNIFICATION OWED BY MRI TO ANTERO OF $6,914,943.75 FOR CONTESTED ROYALTY PAYMENTS MADE BY ANTERO TO MRI DURING THE PENDENCY OF THE LITIGATION EXCEPT TO THE EXTENT THAT IT GRANTED MRI AN OFFSET FOR MRI'S $4,000,000.00 OFFER OF JUDGMENT WHILE ALSO AWARDING L&D THE $4,000,000.00 IN ESCROW, THEREBY RESULTING IN A DOUBLE RECOVERY OR WINDFALL TO L&D, AS EXPLAINED IN ANTERO'S SEPARATE APPEAL.

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.*,[66] the plaintiff filed suit against Appalachian Power, Stone & Webster ("S&W"), and The Shaw Group (collectively "defendants").[67] The plaintiff then settled separately with all defendants.[68] At oral argument, the parties agreed that claims for contribution and implied indemnity were extinguished by settlements with the plaintiff.[69] However, the court noted that the express indemnity cross-claim between Appalachian Power and S&W survived and remained after settlement.[70]

Other courts have reached similar conclusions. For example, in *C. L. Peck Contractors v. Superior Court*,[71] the plaintiff was injured while working at a construction site and sought recovery

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

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

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] 159 Cal. App. 3d 828 (Cal. Ct. App. 1984).

from the general contractor, the owner, and a subcontractor.[72] The plaintiff settled with the subcontractor, and the subcontractor sought a dismissal of all cross-claims against it for indemnification.[73] The lower court dismissed the cross-claims for indemnity, holding that settlement extinguished all claims for indemnity, even those provided by contract.[74] 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.[75] The appeals court recognized that express indemnity permitted "great freedom of action to the parties in the establishment of the indemnity arrangement."[76] 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.[77]

As was the case in *Deloach*, *C. L. Peck*, and *Bay Development*, MRI's Offer of Judgment to L&D for $4,000,000.00 did not extinguish MRI's contractual obligation under the MRI/Antero Agreement to reimburse Antero for the $6,914,943.75 in royalties paid to MRI for production from the Andrews Lease. MRI has argued that its Rule 68 Offer of Judgment to L&D satisfied the amounts MRI received from *all* the gas producers for production from the Andrews Lease in this

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[72] *Id.* at 831.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at 757.

[77] *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).

case.[78] 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.

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 Rule 68 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 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,

[78] App. 1797.

> 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. . . . [79]

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 raised before the settlement.[80] So, MRI cannot legitimately claim surprise that Antero's settlement with L&D 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*,[81] 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."

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.

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[79] App. 1929-1930 (Emphasis supplied).

[80] App. 1797, 1828, 1834.

[81] 237 W. Va. 512, 526-527, 788 S.E.2d 40, 54-55 (2016) (footnote omitted).

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 Circuit Court was correct in reducing 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.[82]

3. The MRI/Antero Agreement Provided that MRI Would Indemnify Antero for Any Disputed Royalty Payments Made by Antero to MRI During the Pendency of the Litigation.

None of MRI's arguments relative to the Circuit Court's enforcement of its contractual indemnification obligation vis-à-vis payments made to MRI by Antero that, with the benefit of hindsight, should have been made to L&D make any sense.

First, MRI argues that it was somehow "inconsistent" for the Circuit Court to rule that Antero was entitled to reimbursement by MRI relative to any "misdirected royalty payments" and that MRI had an obligation to "return[] to Antero a sum certain amount determined by this Court."[83] Obviously, these things are not "inconsistent," but are entirely consistent. MRI agreed to reimburse Antero for any payments made by Antero to MRI that were ultimately determined to be payable to L&D or any other party, and all the Circuit Court did was enforce that agreement.

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[82] 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).

[83] Petitioner's Brief at 18.

Second, MRI argues that because L&D has obtained a double recovery – an issue Antero has raised in a separate appeal – that somehow obviates MRI's contractual obligation to return to Antero royalty payments made by Antero to MRI that should have been made, with the benefit of hindsight, to L&D.[84] To some extent, Antero agrees with MRI's assertion that, "Antero was not entitled to recover for an injury for which Plaintiffs also recovered."[85] The remedy, however, is not as MRI suggests – the unjust enrichment of MRI or L&D at Antero's expense. The remedy is, as suggested in Antero's separate appeal, 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 the Antero into an escrow account as per the terms of an agreement between Antero and L&D.

Third, MRI argues that the Circuit Court erred in failing to consider whether MRI had any "actual liability" to Antero.[86] Again, the MRI/Antero Agreement states, "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." Here, this Court deemed L&D and others to own the interest in the subject minerals claimed by MRI. So, MRI's argument that it had no "actual

[84] Petitioner's Brief at 19-20.

[85] Petitioner's Brief at 19.

[86] Petitioner's Brief at 20-21.

liability" to Antero under their Agreement is nonsensical.[87] MRI wants to characterize the dispute as having been resolved by "settlement" requiring some judicial inquiry, but as the Circuit Court properly held, the disputes over mineral ownership and right to royalty payments were resolved by judicial decree, not by settlement. As argued by Antero in its separate appeal, where the Circuit

[87] MRI relies on *Valloric v. Dravo Corp.*, 178 W. Va. 14, 357 S.E.2d 207 (1987), for the proposition that Antero must prove actual liability to recover royalty payments Antero paid to MRI, with interest. Critically, the applicable indemnity provision at issue in Valloric reads as follows: "**The Contractor agrees to indemnify and hold harmless the Owner, Engineer and General Contractor against any and all claims for loss, liability, or damage**, on account of property damage or personal injury (including death), arising out of or in connection with the work done or to be performed and in connection with or arising out of the acts or omissions of Contractor's employees, however caused, while said employees are upon, entering or leaving the premises upon which this Agreement is being or is to be performed . . . ." *Id.* at 16, 357 S.E.2d at 209 (emphasis added). In other words, the indemnity provision at issue in *Valloric* was for "all claims for loss, liability, or damage." MRI's reliance on *Valloric* in this regard is therefore misplaced because it ignores the plain language of the MRI/Antero Agreement. Specifically, the Agreement at issue in this case is for reimbursement of "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 another party was determined to own the interest MRI claimed. Liability simply is not mentioned in the Agreement. Thus, the actual or potential liability standard set forth in *Valloric* is inapposite. The amounts and claims for which Antero settled with L&D likewise have no bearing on what Antero is entitled to recover under its Agreement with MRI, which are tied to royalty payments made to MRI, plus interest. As this Court counseled in *VanKirk*, supra, ordinary rules of contract construction apply to the Agreement. Liability, either actual or potential, was never intended to be a prerequisite to Antero's recovery under the Agreement if MRI was determined not to own an interest. MRI cannot inject such an intention now. Even if the actual and potential liability standards set forth in *Valloric* guided this action, the potential liability standard undoubtedly would apply. As the Court held in Syllabus Point 4 of *Valloric*: "Under a potential liability standard, the indemnitee must in his indemnity suit show that the original claim is covered by the indemnity agreement. Then he must demonstrate that he was exposed to liability which could reasonably be expected to lead to an adverse judgment. Finally, he must prove that the amount of the settlement was reasonable." L&D's claims regarding royalty payments clearly were covered by the Agreement. The fact that Antero was forced to separately settle with L&D following MRI's Rule 68 Offer of Judgment, which did not secure a release for Antero, also firmly establishes Antero's potential liability. In addition, the reasonableness of the settlement amount, which patently has no bearing on the actual amount Antero is entitled to recover from MRI under the express terms of the Agreement, cannot be doubted. Antero settled with L&D and the other plaintiffs for the royalties due them, plus interest. Antero subsequently paid an additional approximately $2,000,000.00 into Court for royalties due to non-plaintiff parties. App. 352, 367. In addition, MRI can hardly contend that it lacked notice of Antero's settlement in this case. MRI has been a party to this litigation since the case was filed, and MRI's eleventh-hour Rule 68 Offer of Judgment cornered Antero into its settlement with the L&D, an undesirable position for which Antero can hardly be faulted. Thus, even if *Valloric* applies, which it does not, Antero has satisfied any potential liability standard thereunder.

Court erred was not entering judgment against MRI, for the $6,914,943.75 in royalty payments Antero paid to MRI without an offset of MRI's Offer of Judgment of $4,000,000.00, and for pre- and post-judgment interest on that amount, or entering judgment against L&D, refunding to Antero the amount of $4,000,000.00 paid by the Antero into an escrow account as per the terms of an Agreement between Antero and L&D. No matter how much it wishes, MRI does not have the right to pocket royalty payments made to MRI which should have been made to L&D and others – either before or after the MRI/Antero Agreement.

Finally, MRI makes a single paragraph argument that there was a disputed issue of fact regarding the amount of its indemnification obligation,[88] but there was no dispute. Indeed, MRI concedes that the only record evidence regarding the amount came from the same Antero witness who updated his earlier deposition testimony with an affidavit as to the correct amount of disputed royalties paid by Antero to MRI.[89] Under this Court's summary judgment standard, once Antero offered an affidavit in support of its motion, it was incumbent on MRI to offer its own counter-affidavit or other evidence contradicting the affidavit. After all, MRI has records of disputed royalty payments received.[90] When MRI failed to do so, it was perfectly appropriate for the Circuit

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[88] Petitioner's Brief at 22.

[89] *Id.*

[90] Syl. pt. 4, *Horizon Ventures of W. Virginia, Inc. v. Am. Bituminous Power Partners, L.P.*, No. 19-0171, 2021 WL 1220951 (W. Va. Apr. 1, 2021) ("'If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.' Syllabus point 3, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).").

Court to enter summary judgment for Antero consistent with the affidavit submitted in support of its summary judgment motion.[91]

VI. CONCLUSION

WHEREFORE, Antero Resources Corporation respectfully requests that this Court affirm the judgment of the Circuit Court of Harrison County relative to Mike Ross, Inc., except to the extent of the separate appeal of Antero Resources Corporation from that judgment.

ANTERO RESOURCES CORPORATION

By Counsel:

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[91] *W. Virginia Employers' Mut. Ins. Co. v. Bunch Co.*, 231 W. Va. 321, 331, 745 S.E.2d 212, 222 (2013) ("The rules of civil procedure clearly allow for affidavits to be opposed by deposition or counteraffidavit upon the filing of same in support of a motion for summary judgment."); *Payne's Hardware & Building Supply, Inc. v. Apple Valley Trading Co.*, 200 W. Va. 685, 490 S.E.2d 772 (1997) (trial court did not abuse its discretion in denying a motion to reconsider its grant of summary judgment, where parties opposing summary judgment failed to file counter-affidavits and did not avail themselves of procedures concisely articulated in Rule 56(f) for requesting additional time for discovery). Indeed, what MRI argues would turn the "sham affidavit" rule on its head as it only applies where an affidavit is submitted after a deposition to "create a genuine issue of fact." See Syl. pt. 4, *Kiser v. Caudill*, 215 W. Va. 403, 599 S.E.2d 826 (2004) (emphasis supplied) ("To defeat summary judgment, an affidavit that directly contradicts prior deposition testimony is generally insufficient **to create a genuine issue of fact for trial**, unless the contradiction is adequately explained. To determine whether the witness's explanation for the contradictory affidavit is adequate, the circuit court should examine: (1) Whether the deposition afforded the opportunity for direct and cross-examination of the witness; (2) whether the witness had access to pertinent evidence or information prior to or at the time of his or her deposition, or whether the affidavit was based upon newly discovered evidence not known or available at the time of the deposition; and (3) whether the earlier deposition testimony reflects confusion, lack of recollection or other legitimate lack of clarity that the affidavit justifiably attempts to explain.") (emphasis supplied). Moreover, the affidavit was based on additional information obtained by the affiant after his deposition testimony. Specifically, subsequent to the deposition, Antero located two miscellaneous well payments totaling an additional $412,000. App. 352. Accordingly, there is no genuine issue of material fact in the record regarding the proper amount of MRI's indemnification obligation.

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CERTIFICATE OF SERVICE

I do hereby certify that on May 3, 2021, I served the foregoing "BRIEF OF THE RESPONDENT" 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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