IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

HIGH COUNRTY MINING, INC., and
WOODROW W. CHURCH and
DARREN J. SPENCER, Individually and as Incorporators
And Officers of HIGH COUNTRY MINING, INC.,

PLAINTIFFS/COUNTER-DEFENDANTS, CIVIL ACTION NO.: 17-C-77-MW

V.

TRIPLE 7 COMMODITIES, INC.,

DEFENDANT/COUNTER-PLAINTIFF.

ORDER

On the 2nd day of October, 2019, the above-captioned matter came before the Court for hearing on Plaintiffs' Motion to Appoint Special Commissioner. There appearing were the Plaintiffs, High Country Mining Inc., in person and by Counsel, William Sanders, Esq., and Lane Austin, Esq., and the Defendant, Triple 7 Commodities Inc., in person and by counsel, Nicholas Preservati, Esq., and Kendall Enyard, Esq.[1]

I. Background

Woodrow Church and Daren Spencer are incorporators and principles of the Plaintiffs' Corporation, High Country Mining Inc. (hereinafter "High Country"). Prior to August 22, 2016, Mr. Spencer and Mr. Church worked for a corporation named Wellston Coal, LLC (hereinafter "Wellston"). Plaintiff intended to assist Wellston in its mining activities. In 2016, Wellston decided to abandon its plans to mine coal and give Plaintiffs the right to assume the mineral rights so long as they could obtain funding for the operation.

Plaintiffs agreed to enter into a Joint Venture Agreement (hereinafter "JVA") with Triple 7 Commodities Inc. (hereinafter "Triple 7"). The JVA was drafted entirely by Triple 7. The

[1] Mr. Enyard appeared by telephone.

parties executed the JVA on August 22, 2016. The express purpose of the JVA was to purchase the Wellston property and all related mineral rights.

By Deed dated September 13, 2016, Defendant acquired the mineral rights associated with the Wellston property. However, Plaintiff, High Country, was not included as a grantee in the Deed. Plaintiffs filed this action asking that this Court reform the Deed to include Plaintiff High Country as a grantee on the Deed pursuant to the JVA. On December 1, 2018, a settlement was reached in this matter, which led to the filing of Plaintiffs' Motion to Appoint Special Commissioner.[2]

II. Motion to Appoint Special Commissioner

On August 6, 2019, Plaintiffs filed their Motion to Appoint Special Commissioner. Plaintiffs argue that after lengthy and expensive litigation between the parties, on December 1, 2018, all parties entered into a Confidential Settlement Agreement and Mutual Release (hereinafter "Agreement"), wherein the parties agreed to settle this lawsuit. The Agreement, among other things, provided the following:[3]

1. Pursuant to Paragraph 3.1 of the Agreement, Triple 7 was to pay unto High Country, Woodrow. W. Church and Darren J. Spencer $600,000.00 within sixty (60) days of the date of the Agreement;
2. Pursuant to Paragraph 3.2 of the Agreement, if Triple 7 did not pay said amount by January 30, 2019, the Plaintiffs would be entitled to the Deed prayed for with the parties co-owners of the mineral rights and rights to the permits as aforesaid with Triple 7 owning 51% and Plaintiffs owning 49%;

[2] The Court notes that on or around October 18, 2017, Triple 7 filed a counterclaim against Plaintiffs which alleged willful breaches of fiduciary, contractual, and statutory obligations by High Country in connection with the operation of Triple 7's mining business.

[3] Because the Agreement and Extensions are confidential, the Court will direct that the clerk distribute this Order to counsel of record and thereafter seal this Order in the court file.

3. Pursuant to Paragraphs 3.3 and 3.4, if the aforesaid amount were paid to Plaintiffs as agreed by the aforesaid deadline, the lawsuit would be dismissed with prejudice and Triple 7 would be the sole owners of the subject mineral rights and mining permits, and Plaintiffs' would have no interest in the mineral rights or permits purchased or transferred by Wellston Coal and Royal Energy Resources, Inc.;
4. Pursuant to Paragraph 5, Plaintiffs would file a release of the Notice of Lis Pendens that had previously been filed on July 21, 2017, within fifteen (15) calendar days of the Effective Date of the Agreement;
5. Pursuant to Paragraph 15, the Parties were not to disparage one another in a manner likely to be harmful to them or their business or personal reputation.

Triple 7 failed to pay any portion of the agreed amount by January 30, 2019, thus, the parties entered into an Extension to Confidential Settlement Agreement and Mutual Release on February 6, 2019, wherein Triple 7 was to pay unto Plaintiffs an additional $100,000.00 for the extension as well as an additional $900,000.00. The first $100,000.00 was to be paid by March 3, 2019, and the additional $900,000.00 was to be paid by April 2, 2019. Triple 7 was unable to pay the agreed amount by April 2, 2019. Thus, the parties entered into a Second Extension to Confidential Settlement Agreement and Mutual Release, wherein Triple 7 would pay an additional $300,000.00 on April 3, 2019, as consideration for an extension of time. Further, Triple 7 would pay an additional $400,000.00 on May 3, 2019, as additional consideration for an extension of time. Finally Triple 7 would pay an additional $1,000,000.00 by June 2, 2019.

Triple 7 did not pay the required amount by the deadline, thus, the parties entered into a Third Extension to Confidential Settlement Agreement and Mutual Release (hereinafter "Third Extension"), dated June 4, 2019, wherein Triple 7 was to pay unto Plaintiffs an additional

$100,000.00 on June 7, 2019 as consideration for an extension of time and an additional $1,100,000.00 to Plaintiffs no later than July 9, 2019. Further, Triple 7 would pay an additional $1,800,000.00 no later than August 5, 2019. The new agreed settlement amount was $3,600,000.00. If all sums were not paid, pursuant to subparagraph "h" of the Third Extension, Plaintiffs would be entitled to a new Deed retaining 51% ownership in addition to all sums paid by that time.[4]

The Third Extension provided that if Triple 7 failed to make any of the agreed payments either in the full amounts agreed to or on the dates agreed to, High Country would be entitled to all remedies referred to in paragraph 3.2 of the original Agreement, which entitled High Country to procure a new Deed naming High Country as co-owner of the mineral rights and mining permits that are at issue in this case. The Third Extension modified the aforementioned paragraph 3.2 to include that the new Deed would grant High Country 51% ownership of the minerals and permits with Triple 7 owning 49%. Plaintiffs argue that on each occasion that Triple 7 was unable to make the agreed payments, it was Triple 7 that made offers of the new timeframes for payments and of additional amounts of money to be paid, with only little input from High Country Mining.

A. Triple 7's Response in Opposition to Plaintiffs' Motion to Appoint Special Commissioner

Defendant argues that Plaintiffs cannot enforce the Agreement nor any of the three Extensions because they breached material terms of the Agreement. First Plaintiffs failed to release the Notice of Lis Pendens within fifteen (15) days of the initial Agreement.[5] In addition, Defendant argues that pursuant to the Agreement, Plaintiffs agreed that they no longer would

[4] This 51% ownership was a modification from the original Agreement which gave Plaintiffs 49% ownership in the event of default.
[5] See Paragraph 5 of the Settlement Agreement

interfere with Tripe 7's mining operations.[6] The parties were "not to disparage one another in manner likely to be harmful to them or their business reputation, or personal reputation ..." [7] Further, Defendant argues that the Plaintiffs expressly relinquished any right to be co-grantees on a deed upon execution of the Agreement.[8] Finally, Defendant argues that equity demands that the Agreement, including the three Extension Agreements, be set aside because they are unconscionable.

Plaintiffs' concede that they failed to release the Notice of Lis Pendens on the property within fifteen (15) days of the Agreement. Triple 7 argues that this failure significantly impacted its ability to obtain financing because it was a cloud on the title which would preclude it from obtaining financing.[9] Defendant explains that in order for lenders to loan significant amounts of money, they require first priority security interests. With the Notice of Lis Pendens on file, no lender would have a first priority security interest. Thus, Triple 7 argues that the failure to release the Notice of Lis Pendens was a material breach of the Agreement.

Triple 7 also claims that the non-disparagement provision of the Agreement was a material term because during the litigation it learned that there were multiple instances when Plaintiffs made disparaging remarks that affected Triple 7's reputation in the community. Specifically it claims that High Country dissuaded individuals from seeking employment with Triple 7, claiming that Triple 7 was unable to pay its employees, dissuaded vendors and contractors from working with Triple 7, claiming that Triple 7 would not be able to continue its mining operations, and stating that Plaintiffs ultimately would own Triple 7's operations.[10] Triple

[6] See Paragraph 10 of the Settlement Agreement
[7] See Paragraph 15 of the Settlement Agreement
[8] See Paragraph 9.2 of the Settlement Agreement
[9] Triple 7 also argues that when Plaintiffs filed their Release of Lis Pendens, it was defective. Plaintiffs filed a supplement Release of Lis Pendens thereafter which corrected the alleged error.
[10] These allegations all arise from the Affidavit of Damian Caldwell.

7 argues that on or about May 1, 2019, it arranged to obtain funding from a private lender. This lender/attorney contacted Plaintiffs' counsel as part of her due diligence before making a decision on whether to provide financing. When Plaintiffs' counsel was contacted by the lender/attorney Plaintiffs' counsel allegedly advised that "I wouldn't loan them anything if it was my money; I wouldn't give them a dime."

Next, Triple 7 argues that pursuant to paragraph 9.2 of the Agreement, Plaintiffs expressly waived all claims that they may have in the ownership of the property as part of that Agreement. Paragraph 9.2 provides:

> 9.2 High Country Releases. Upon execution of this Agreement by all parties, High Country, Woodrow W. Church and Darren J. Spencer forever discharge relinquish, disclaim and/or release any current or future claim or Claims of ownership or title of the mining-related permits, the mineral rights which are the subject of, and defined in the Deed or any other right conveyed to Triple 7 through the Deed.

Triple 7 argues that the language in this provision is clear, unambiguous, and not subject to alternate interpretations. Plaintiffs argue that there is a general "Release" provision in paragraph 9.1 that states that the parties shall be released from liability upon Triple 7's payment of the Settlement Payment. Triple 7 argues that paragraph 9.1 is superseded by paragraph 9.2 because specific provisions of a contract control over potentially conflicting general provisions.

With regard to unconscionability, Defendant points out that:

1. The final settlement amount was more than six and one half times (6.5x) the amount of the original Settlement Payment;
2. By May 3, 2019, Triple 7 had already paid Plaintiffs $800,000; and
3. Triple 7 made another payment of $100,000 on June 7, 2019, thereby increasing its total payment to Plaintiffs to $900,000.

Triple 7 argues that the extension agreements are procedurally unconscionable because they were contracts of adhesion, thrust upon Triple 7 as a take-it-or-leave-it offer. Triple 7 claims it had no bargaining power. Further, it argues that the extension agreements are substantively unconscionable because of the overly-harsh effect of requiring Triple 7 to pay more than $2,000,000 dollars more to the Plaintiffs for only a seven (7) month delay in payment.

Triple 7 argues that if it had known that Plaintiffs' previously committed material breaches of the Agreement, it would not have (1) continued to seek extensions; (2) agreed to Plaintiffs' excessive demands for the extensions; or (3) made any payments because of Plaintiffs' material breaches of the Agreement. Defendant asks this Court to declare the Agreement and all three Extensions null and void and order Plaintiffs to return the monies that have already been paid to Defendant. In the alternate, Defendant asks that the Court declare the Settlement Agreement effectuated by the parties, deny Plaintiffs' Motion, and dismiss this case with prejudice.

B. High Country Mining's Reply to Triple 7's Response in Opposition to Plaintiffs' Motion to Appoint Special Commissioner

Plaintiffs point out that according to the deposition testimony of Damian Caldwell,[11] (hereinafter "Mr. Caldwell") Triple 7 has approached more than ten (10) lenders seeking money for the purpose of developing the subject coal mine and paying the settlement amount owed to High Country. Moreover, Mr. Caldwell testified that he told every lender or financial institution that some of the proceeds from any loan would be used to satisfy amounts owed to Plaintiff.[12] Specifically, one of the lenders who knew about the pending lawsuit did not cite the Lis Pendens as the reason for not loaning money. Instead, that lender allegedly would not loan Triple 7 money because it was "too risky." However, in ***Mr. Caldwell's opinion***, the only reason lenders

[11] Mr. Caldwell is the President/CEO of Triple 7.
[12] Depo Tr. At 21:16-22:11; 23:1-5; 32:2; 40:5-15; 58:12-18; 59:1-5; 61:7-19.

would not lend to him was because the Notice of Lis Pendens had not been released. Defendant indicated that the Notice of Lis Pendens constituted a cloud on the title and that as long as it was on record, Triple 7 would not be able to offer lenders a first lien on the property. Plaintiffs argue that each lender knew that once the settlement proceeds were paid to High Country, the lawsuit would be dismissed and would no longer be considered a cloud on the title. Further, that potential lenders knew about the pending lawsuit, thus, the failure to release the Notice of Lis Pendens was inconsequential. Plaintiffs assert that no breach of any contract can be considered material if the breach creates no harm, which is what happened in this case. [13]

Plaintiffs dispute the fact that they made disparaging comments about Triple 7. They argue that Triple 7 carries the burden of proof that the Plaintiffs have violated the provision against non-disparaging comments by producing witnesses. The only evidence of disparaging comments is an affidavit from Mr. Caldwell claiming he has been told various things or heard various things without providing any witnesses or substantiation of his allegations.

Plaintiffs assert that the Agreement, taken as a whole, shows that any waiver to claims that they may have in the ownership of the property was contingent on Triple 7 paying $600,000.00 dollars to High Country within sixty (60) days from the date of execution of the Agreement. Plaintiffs argue that if there is a conflict within the paragraphs of the Agreement, the document must be read as a whole to determine the intent of the parties and if there is any ambiguity it must be interpreted against the drafter.[14] In addition, the parties entered into three Extensions that superseded the original Agreement, which each provided that if the payments

[13] In addition, Plaintiffs allege that Triple 7 has a long history of failed promises and a bad reputation in McDowell County.

[14] The Court notes that the Agreement provides that ambiguities will not be construed against either party.

were not made within the specified timeframe, High Country would acquire a deed granting them ownership of the minerals and permits.[15]

With regard to unconscionability, Plaintiffs argue that Triple 7 cannot argue that the Agreement nor any of the three Extensions are unconscionable because it was represented by counsel who is a graduate of Yale Law School and a partner in a major law firm with offices in New York City and Washington D.C. Further, counsel for Defendant wrote the original Agreement. Although the amounts for the settlement continued to increase, Plaintiffs assert that coal prices were increasing substantially during that time period. An engineering report in possession of both parties, indicated that the value of coal already under permit could equal or exceed One Hundred Million Dollars. Thus, the highest amount agreed upon between the parties was only a small amount to pay for one-half the value of the coal and for a clear title. Plaintiffs assert that the amounts and dates for the Extensions originated from Mr. Caldwell.[16]

III. Discussion

A. Plaintiffs breaches of the Agreement

"Generally, a party who commits the first breach of a contract is not entitled to enforce the contract." *Federal Insurance Co. v. Starr Electric Co.*, 242 Va. 459, 468, 410 S.E.2d 684, 689 (1991); *Hurley v. Bennett*, 163 Va. 241, 253, 176 S.E. 171, 175 (1934). "An exception to this rule arises when the breach did not go to the 'root of the contract' but only to a minor part of the consideration." *Federal Insurance Co.*, 242 Va. at 468, 410 S.E.2d at 689; *Neely v. White*, 177 Va. 358, 366, 14 S.E.2d 337, 340 (1941). "If the first breaching party committed a material breach, however, that party cannot enforce the contract." *See Neely*, 177 Va. at 366–67, 14

[15] The initial Agreement and first two Extensions gave High Country 49% ownership, however, the last Extension gave High Country 51% ownership.

[16] Plaintiffs assert that in July of 2019, Mr. Caldwell made and offer by text message directly to Woodrow Church to settle with High Country by paying $1,600,000.00 dollars by the end of July and that if High Country refused that offer Defendant would sue Plaintiffs for breach of contract.

S.E.2d at 341. "A material breach is a failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract." See *Ervin Construction Co. v. Van Orden*, 125 Idaho 695, 874 P.2d 506, 510–11 (1993); *Cady v. Burton*, 257 Mont. 529, 851 P.2d 1047, 1052 (1993); *Management Computer Services Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis.2d 157, 557 N.W.2d 67, 77–78 (1996). "If the initial breach is material, the other party to the contract is excused from performing his contractual obligations." *See Neely*, 177 Va. at 367, 14 S.E.2d at 341; *Bernstein v. Nemeyer*, 213 Conn. 665, 570 A.2d 164, 168 (1990); *Eager v. Berke*, 11 Ill.2d 50, 142 N.E.2d 36, 39 (1957); *Quintin Vespa Co. v. Construction Service Co.*, 343 Mass. 547, 179 N.E.2d 895, 899 (1962); *Gulf South Capital Corp. v. Brown*, 183 So.2d 802, 804–805 (Miss.1966); *Management Computer Services, Inc.*, 557 N.W.2d at 77.

"The type of evidence required to establish a material breach of contract will vary depending on the facts surrounding a particular contract." See Restatement (Second) of Contracts § 241 cmt. a (1979). "In many cases, a material breach is proved by establishing an amount of monetary damages flowing from the breach." *See, e.g., Federal Insurance Co.*, 242 Va. at 468, 410 S.E.2d at 689. "However, proof of a specific amount of monetary damages is not required when the evidence establishes that the breach was so central to the parties' agreement that it defeated an essential purpose of the contract." See, *e.g., J.P. Stravens Planning Associates, Inc. v. City of Wallace*, 129 Idaho 542, 928 P.2d 46, 49 (App.1996); *Rogers v. Relyea*, 184 Mont. 1, 601 P.2d 37, 40–41 (1979); *Macon Mining & Manufacturing, Inc. v. Lasiter*, 61 Or.App. 689, 658 P.2d 505, 507 (1983).

"The Restatement (Second) of Contracts § 241 (1981) outlines the circumstances which are significant in determining whether a breach of contract is material. That section reads as follows:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances, including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing."

Milner Hotels, Inc. v. Norfolk & W. Ry. Co., 822 F. Supp. 341, 346 (S.D.W. Va. 1993), aff'd, 19 F.3d 1429 (4th Cir. 1994).

The application of these factors to the case *sub judice*, warrant the conclusion that High Country's failure to release the Notice of Lis Pendens and the alleged violation of the non-disparagement provision are not material breaches of the Agreement. First, Triple 7, by High Country's breach, was not completely deprived of the benefit it reasonably expected under the Agreement. The express purpose of the Agreement is "[t]o fully and finally resolve any and all current or future Claims...or claims arising from their relationship as described..."; "[t]o fully and finally resolve any and all current or future Claims...in the Mercer County Litigation and the McDowell County Litigation."; "[t]o fully and finally resolve any and all current or future

Claims...arising under the Joint Venture Agreement"; "[t]o fully and finally resolve any and all current or future Claims...or claims by High Country, Woodrow W. Church of Daren J. Spencer related to or contesting the ownership or title of the Deed held in Triple 7's name..." Clearly the benefit that Triple 7 expected to receive was the settlement of this dispute so it could commence with its mining operations.

Although the Notice of Lis Pendens was not timely released, and the Plaintiffs allegedly disparaged Triple 7, there has not been any actual evidence presented that shows the aforementioned actions were the cause of Triple 7 inability to obtain the funding needed to settle this lawsuit, which was the primary benefit it expected to receive. Instead, there was mere speculation presented, that in Mr. Caldwell's opinion those reasons are why Triple 7 was unable to obtain funding.[17] The only evidence submitted to support this theory is the testimony of Mr. Caldwell. In reality, there are potentially a plethora of reasons that Triple 7 would be unable to obtain funding.[18] Mr. Caldwell indicated that he notified all potential lenders of the pending lawsuit, thus, by his own admission, even if the Notice of Lis Pendens had been released, the potential lenders were still aware of the pending lawsuit. Further, the only information the Court was presented regarding the inability to obtain a loan, other than the speculation of Mr. Caldwell, was the fact that one of the lenders thought the loan would be "too risky."[19] In addition, there was no evidence offered to show that Plaintiffs (1) actually disparaged Triple 7; or (2) that this

[17] There was also Triple 7's Counsel's representation that lenders want a first priority security interest, however, there was no evidence to support that the lack of a first priority security interest was the reason that Triple 7 was unable to obtain funding.

[18] Triple 7 asserts that during the litigation it learned that there were multiple instances when Plaintiffs made disparaging remarks that affected Triple 7's reputation in the community. Specifically it claims that High Country dissuaded individuals from seeking employment with Triple 7, claiming that Triple 7 was unable to pay its employees, dissuaded vendors and contractors from working with Triple 7, claiming that Triple 7 would not be able to continue its mining operations, and stating that Plaintiffs ultimately would own Triple 7's operations. However, there was no actual evidence of this presented and as counsel for Triple 7 pointed out, a disparaging remark made in McDowell County would likely not result in a large bank's decision to grant or deny funding.

[19] The Court notes that even if the Notice of Lis Pendens had been timely released, anyone doing their due diligence would also check to see if there was a lawsuit pending in the Circuit Clerk's office, where they would have discovered the pending lawsuit.

disparagement was the reason Triple 7 was unable to obtain funding. Again, the only information the Court was presented with was the speculation of Mr. Caldwell. The evidence presented is certainly not enough to conclude that Triple 7 was completely deprived of the benefit it reasonably expected under the Agreement, which was the settlement of this dispute, due to the failure to release the Notice of Lis Pendens or the alleged disparagement.[20]

Second, there was no evidence presented that shows whether Triple 7 could be adequately compensated in damages for the part of that benefit of which it was deprived. Counsel for Defendant opposed any arguments concerning damages, arguing that the only issue for the Court to decide was whether High Country's breach of contract was material. Moreover, counsel argued that the "material" requirement applies to the term allegedly breached, and not the damages emanating from that breach. However, without any evidence of what the damages for the breach of the Agreement would be, the Court must conclude that there were not any damages that flowed from Plaintiffs breach of the Agreement. Furthermore, the fact that Triple 7 continued with the terms of the third Extension even after it was aware that the Notice of Lis Pendens had not been released, makes it apparent that there was no harm resulting from the failure to release the Notice of Lis Pendens. Third, High Country will suffer a major forfeiture if either breach is deemed material. The comment and illustrative notes to section 241 in Restatement (Second) of Contracts make clear that the breach is less likely to be regarded as material if it occurs late, after substantial preparation or performance, and is more likely to be regarded as material if it occurs early, before such reliance. Although the failure to release the

[20] Triple 7 also argues that the alleged disparaging statements also amount to a breach of paragraph 10 of the Agreement, in which Plaintiffs agreed that they would not take any action that interfered with Triple 7's activities.

Notice of Lis Pendens technically occurred early, neither party realized the breach until after substantial negotiations had occurred.[21]

Fourth, once Plaintiffs realized their failure to perform, they released the Notice of Lis Pendens. This occurred on July 9, 2019. Defendant argues that the first release was not a full release. Plaintiffs filed an additional release thereafter on September 12, 2019. The Court takes no position with regard to whether the first release was full or partial, however, it is clear that once Defendant notified Plaintiffs of their failure, they were willing to comply right away, and when Defendant was unsatisfied, Plaintiffs cooperated by filing a new release. With regard to the fifth consideration under section 241 of the Restatement (Second) of Contracts, the extent to which the High Country's performance comports with standards of good faith and fair dealing, there is no evidence that High Country's actions were not in good faith or in a spirit of fair dealing. Defendants offered unsupported allegations of disparagement, however, no evidence was presented to show that this occurred. Further, the willingness of High Country to promptly correct their failure to release the Notice of Lis Pendens shows that they acted in good faith. Balancing the five factors, leads to the conclusion that neither of High Country's breaches of the Agreement were material.

Accordingly, the Court FINDS and CONCLUDES neither the failure to release the Notice of Lis Pendens nor the alleged disparagement by Plaintiffs are a material breach of the Agreement.

B. Waiver of the right to be a co-grantee on the Deed

Defendant argues that pursuant to paragraph 9.2 of the Agreement, Plaintiffs expressly waived all claims they may have in the ownership of the property "[u]pon execution of this Agreement by all Parties." Moreover, although there is a general "Release" provision in

[21] There was little evidence presented to show when the alleged disparaging comments were made.

paragraph 9.1, which states that the parties shall be released from liability upon Triple 7's payment of the Settlement Payment, that provision is superseded by paragraph 9.2 because the specific provisions of a contract control over potentially conflicting general provisions.[22] Plaintiffs argue that considering the whole agreement, it is clear that the waiver of claims in ownership of the property was contingent on the Settlement Payment. The Court has reviewed the Agreement and the relevant terms are as follows:

> 3.1 **Settlement Payment Amount and Transfer Information.** In full and final settlement of Claims asserted or which could have been asserted by, or through, High Country, Woodrow W. Church or Darren J. Spencer, and their respective successors and assigns against Triple 7 arising out of or in any way related to the Joint Venture Agreement, the Deed, the mining-related permits, the mineral rights, which are the subject of, and defined in the Deed, or any other rights conveyed to Triple 7 through the Deed, Triple 7 shall pay High Country, Woodrow W. Church or Darren J. Spencer collectively Six Hundred Thousand Dollars US$600,000 (the "Settlement Payment") within sixty (60) calendar days of the Effective Date of this Agreement pursuant to the instructions below...
>
> 3.2 **Non-Payment of Settlement Payment.** If the Settlement Payment is not made within sixty (60) calendar days of the Effective Date of this Agreement Triple 7 agrees to a reformation of the Deed to include High Country Mining as co-grantee of forty-nine percent (49%) of the rights that were conveyed, sold, and granted to Triple 7 as part of the Deed between Triple 7 and Wellston Coal, LLC and Royal Energy Resources, Inc. Triple 7 agrees to cooperate and assist High Country with its attempt(s) to be added as co-grantee of forty nine percent (49%) to any mining related permits...
>
> 9.1 **Mutual Releases of the Parties.** Effective upon receipt of Triple 7's Settlement Payment, inconsideration for the promises set forth herein, the Parties, on behalf of themselves and their respective parents, affiliates, subsidiaries, predecessors, officers, directors, employees, shareholders, attorneys and representatives and their heirs, successors and assigns, hereby fully mutually, fully and forever, release on another and their respective parents, affiliates, subsidiaries, predecessors, officers, directors, employees, shareholders, attorneys an d representatives and their heirs, successors and assigns from any and all Claims, claims, demands, damages, losses, liabilities, obligations, debts, liens, costs, attorney's fees, actions or causes of action, whether known or unknown, asserted or unasserted, foreseen or unforeseen, under any theory or combination of theories, whether past present or future, that they made or could have made against each other in or arising out of or related to the Joint Venture Agreement, the Deed, the mining-related permits or the mineral rights which

[22] Triple 7 also argues that paragraph 3.2 of the Agreement is inoperable because of the broad waiver language in paragraph 9.2.

are the subject of, and defined in, the Deed or any other rights conveyed to Triple 7 through the Deed.

9.2 **High Country Releases.** Upon execution of this Agreement by all Parties, High Country, Woodrow W. Church, and Darren J. Spencer forever discharge, relinquish, disclaim, and/or release any current or future claim or Claims to be a co-grantee or joint owner of the Deed; and any claim or Claims of ownership or title of the mining-related permits, the mineral rights which are the subject of, and defined in, the Deed or any other rights conveyed to Triple 7 through the Deed.

"Contract language is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken." Syllabus Point 6, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W.Va. 275, 569 S.E.2d 796 (2002). See also Syllabus Point 4, *Estate of Tawney v. Columbia Natural Res., L.L.C.*, 219 W.Va. 266, 633 S.E.2d 22 (2006) ("The term 'ambiguity' is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning."). "If an inquiring court concludes that an ambiguity exists in a contract, the ultimate resolution of it typically will turn on the parties' intent. Exploring the intent of the contracting parties often, but not always, involves marshaling facts extrinsic to the language of the contract document. When this need arises, these facts together with reasonable inferences extractable therefrom are superimposed on the ambiguous words to reveal the parties' discerned intent." *Fraternal Order of Police*, 196 W.Va. at 101 n. 7, 468 S.E.2d at 716 n. 7 (1996).

The Agreement has a patent ambiguity. The terms clearly contradict each other. "Where there is a patent ambiguity, by which is meant an uncertainty appearing on the face of the instrument, proof of the situation of the parties, the circumstances surrounding them at the time of the writing and their subsequent conduct relating thereto, showing a practical construction of it...is admissible to aid in its construction. *Crislip, Guardian, v. Cain,* 19 W. Va. 438; *Knowlton*

v. Campbell, 48 W. Va. 294, 37 S. E. 581; *Scraggs v. Hill*, 37 W. Va. 706, 17 S. E. 185, and *Uhl v. Ohio River R. R. Co.*, 51 W. Va. 106, 41 S. E. 340. There was no extrinsic evidence offered to help explain the ambiguity in this Agreement. Thus, the Court will consider the circumstances that led to this Agreement. The very purpose of this lawsuit was to reform the Deed to include Plaintiff High Country as a grantee on the Deed pursuant to the JVA. The effect of nonpayment of the Settlement Payment was that the Deed was to be reformed as requested in the original Complaint. Subsequently, after Triple 7's non-payment, the Parties entered into the first Extension wherein both Parties agreed that if the Settlement Payment was not timely received, then Plaintiffs would be entitled to "all remedies provided under paragraphs 3.1 and 3.2 of the original Settlement Agreement." Likewise in the second and third Extensions the same language was included. The majority of the relevant terms in the Agreement provide that the Deed will be reformed in the event of non-payment. Despite the ambiguity in the Agreement, when the Court looks to the circumstances surrounding the time of the writing of the first Agreement and the parties subsequent conduct relating thereto, the only rational conclusion is that Plaintiffs' relinquishment of their claims to be co-grantees on the Deed was contingent on Triple 7's timely payment of the Settlement Amount. Thus, the waiver in paragraph 9.2 of the Agreement was only to occur after the Settlement Payment occurred.

Accordingly, the COURT FINDS and CONCLUDES that Plaintiffs did not waive their right to be co-grantees on the Deed.

C. Unconscionability

"Under West Virginia law, unconscionability is analyzed in terms of two component parts: procedural unconscionability and substantive unconscionability. Procedural and substantive unconscionability often occur together, and the line between the two concepts is

often blurred. For instance, overwhelming bargaining strength against an inexperienced party (procedural unconscionability) may result in an adhesive form contract with terms that are commercially unreasonable (substantive unconscionability). ***A contract term is unenforceable if it is both procedurally and substantively unconscionable***. However, both need not be present to the same degree. Courts should apply a 'sliding scale' in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa." *Brown* 228 W. Va. 681, 724, 729 S.E.2d at 285; *Nationstar Mortgage, LLC v. West,* 237 W. Va. 84, 88, 785 S.E.2d 634, 638 (2016) (emphasis added).

1. Procedural Unconscionability

"Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.

Considering factors such as these, courts are more likely to find unconscionability in consumer transactions and employment agreements than in contracts arising in purely commercial settings involving experienced parties. Procedural unconscionability often begins with a contract of adhesion.

A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only the opportunity to adhere to the contract or reject it. A contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person." *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 391–94, 729 S.E.2d 217, 226–29 (2012).

As the Court recognized in *State ex rel. Dunlap v. Berger*, "[f]inding that there is an adhesion contract is the beginning point for analysis, not the end of it; what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not."

2. Substantive Unconscionability

"Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.

Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. In any challenge to such a provision, the responsibility of

showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent is for the court." *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 391–94, 729 S.E.2d 217, 226–29 (2012).

The Court recognized in *Brown I* that "[n]o single, precise definition of substantive unconscionability can be articulated" because "the factors to be considered vary with the content of the agreement at issue." "Accordingly, courts should assess whether a contract provision is substantively unconscionable on a case-by-case basis."*Id.* Further, "in assessing whether a contract provision is substantively unconscionable, a court may consider whether the provision lacks mutuality of obligation. If a provision creates a disparity in the rights of the contracting parties such that it is one-sided and unreasonably favorable to one party, then a court may find the provision is substantively unconscionable. Syl. pt. 10, *Dan Ryan Builders, Inc. v. Nelson,* 230 W.Va. 281, 737 S.E.2d 550 (2012).

Turning to the first issue of procedural unconscionability, this Court is mindful of the recent West Virginia Supreme Court case of *Rent-A-Ctr., Inc. v. Ellis*, 241 W. Va. 660, 827 S.E.2d 605 (2019). With regard to procedural unconscionability, the Court found that a Delegation clause in an employment arbitration agreement, providing that an arbitrator was the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of agreement, ***was not procedurally unconscionable, even if the clause was part of a preprinted, form contract that the employee, a high school graduate, signed on her first day of work at her manager's direction as part of signing numerous documents in quick succession, apparently without being advised that the forms involved legal matters.*** *Rent-A-Ctr., Inc. v. Ellis*, 241 W. Va. 660, 827 S.E.2d 605 (2019) (emphasis added).

In this case, the facts are quite different than *Rent-A-Ctr.* Instead of a preprinted form contract, there was a negotiated Settlement Agreement with both parties represented by competent counsel. Not only was Triple 7 represented by accomplished counsel, the President and Chief Operation Officer ("CEO"), Damian Caldwell, has also been President and CEO of another company, 777 Commodities, Inc. This would certainly suggest that Mr. Caldwell is a sophisticated party, capable of negotiating and understanding the Agreement and Extensions. Moreover there are no hidden or unduly complex terms in the Agreement or Extensions. In fact, Plaintiffs assert, and it was not disputed, that Defense Counsel prepared the original Agreement. There has been no evidence presented to show that there was unfairness in the bargaining process of the Agreement nor the Extensions. Defendant argues that the Extensions were contracts of adhesion, thrust upon Triple 7 as a take-it-or-leave-it offer and as a result, there was no real and voluntary meeting of the minds. The evidence presented indicates otherwise. Plaintiffs presented testimony indicating that it was Triple 7 who suggested the terms and time frames for the Extensions. Triple 7 knew ahead of time that it would be in breach by non-payment, thus, there was time for it to seek advice from counsel and consider the terms of each Extension. Accordingly, the Court must conclude that the Agreement and Extensions are not procedurally unconscionable.

Because a court must find both procedural and substantive unconscionability to render a contract unenforceable, and the Court has already concluded that the Agreement and Extensions are not procedurally unconscionable, the analysis could end here. However, assuming *arguendo* that the Court concluded otherwise, the Extensions are not substantively unconscionable. "It is an elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration. This rule is almost as old as the law of consideration itself. Therefore anything

which fulfills the requirements of consideration will support a promise whatever may be the comparative value of the consideration and of the thing promised." Williston on Contracts, par. 115. "Any benefit resulting to the party promising by the act of the promisee, is a sufficient consideration and it is not essential that there should be any adequacy in point of actual value, but a slight benefit will be sufficient." *Byrne v. Cummings*, 41 Miss. 192; *Furman University v. Waller et al.*, 124 S. C. 68, 117 S. E. 356, 33 A. L. R. 615; *De Remer v. Anderson*, 41 Nev. 287, 169 P. 737, 25 A. L. R. 775; *Conover v. Stillwell*, 34 N. J. Law, 54; *Bolling v. Munchus*, 65 Ala. 558; 3 R. C. L. par. 127, p. 932; 6 *Am. & Eng. Ency. Law*, par. 5, p. 694. At first glance, the increased amount of the Settlement Payment from the original Agreement and the Third Extensions seems somewhat harsh. The final Settlement Payment was more than six and one-half (6 ½) times the initial $600,000 Triple 7 agreed to. Triple 7 argues that for a simple extension of the Settlement Payment deadline from January 31, 2019 to August 5, 2019, Triple 7 was paying 500% interest.[23] Plaintiffs argue that although this was an increased amount, an engineering report in possession of both parties, indicated that the value of coal already under permit could equal or exceed One Hundred Million Dollars. Thus, the highest amount agreed upon between the parties was only a small amount to pay for one-half the value of the coal and for a clear title. That fact weighs heavily in favor of finding the Agreement and Extensions substantively conscionable. Moreover, the Court is not permitted to enter into an inquiry as to the adequacy of the consideration for either party.

Accordingly, the Court must conclude that the Agreement and Extensions are procedurally and substantively conscionable.

[23] It appears that Triple 7 is attempting to argue that the contract was usurious, however, this was not argued specifically, thus, the Court will not address this argument.

IV. Plaintiff's Motion to Strike

Finally, on October 9, 2019, Plaintiffs moved to strike Mr. Caldwell's Affidavit and the statements made by Triple 7's counsel during the October 2, 2019 hearing. Plaintiffs argue that the Affidavit is "self-serving" and may contain "hearsay." The Defendant argues that Mr. Caldwell's Affidavit meets all of the criteria for an affidavit in the State of West Virginia, and the Court is more than qualified to give that Affidavit, as well as the arguments of both counsels during the hearing and give them the weight that the Court believes is appropriate.

V. Ruling

Based upon the forgoing findings of fact and conclusions of law, does hereby **ORDER, ADJUDGE**, and **DECREE** that the Plaintiffs' Motion to Appoint Special Commissioner is **GRANTED** for the reasons aforesaid. The Court further **ORDERS** that the Plaintiffs' Motion to Strike is **DENIED.**

The Circuit Clerk is directed to forward a copy of this Order to all counsel of record and thereafter seal this Order and place it in the court file. The Court further directs that this matter be **DISMISSED** and **STRICKEN** from this Court's civil docket.

ENTER: This 27th day of January, 2020.

J. Mark Wills

MARK WILLS, JUDGE 9th Judicial Circuit