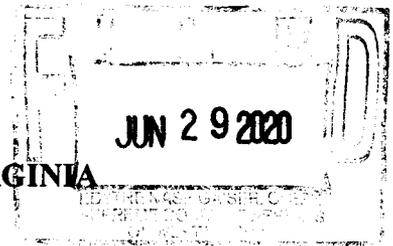


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0155

TRIPLE 7 COMMODITIES, INC.,

Triple 7,

v.

HIGH COUNTRY MINING, INC.,
WOODROW W. CHURCH, AND
DARREN J. SPENCER,

Respondents.

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TRIPLE 7 COMMODITIES, INC.'S APPEAL BRIEF

Counsel of Record: Nicholas S. Preservati (WV Bar #8050)
Nicholas P. Mooney (WV Bar No. 7204)
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
P.O. Box 273
Charleston, WV 25321-0273
Phone: 304.340.3800; Facsimile: 304.340.3801

Counsel for Triple 7 Triple 7 Commodities, Inc.

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ASSIGNMENTS OF ERROR

1. The lower court committed reversible error by finding that the Settlement Agreement was enforceable against Triple 7 despite Respondents' material breach of the Settlement Agreement prior to any purported breach by Triple 7. This Court should review this issue because the lower court made erroneous findings of fact and misapplied the "First Breach" doctrine so as to improperly deprive Triple 7 of its rights under the Settlement Agreement as well as to ultimately divest it of a significant real property interest that cannot be replaced.

2. The lower court committed reversible error by finding that the Settlement Agreement was not unconscionable. This Court should review this issue because Respondents materially breached the Settlement Agreement in a manner that prevented Triple 7 from making the original settlement payment. Once Triple 7 was unable to make the original settlement payment, Respondents leveraged that failure into an exorbitant settlement demand and the eventual forfeiture of a significant real property interest.

3. The lower court committed reversible error by finding that Respondents did not expressly waive their right to be listed as a co-granted on the deed upon execution of the Settlement Agreement. This Court should review this issue because the lower court's findings deprive the Triple 7 of the benefit of its bargain while giving Respondents a benefit that they have expressly relinquished.

4. The lower court committed reversible error and deprived Triple 7 of its procedural and substantive due process rights by dismissing the Triple 7's counterclaim when dismissal was contingent upon Triple 7's payment of the confidential amount set forth in the Settlement Agreement. This Court should review this issue because Respondents did not seek dismissal of the counterclaim in their Motion to Appoint Special Commissioner. Accordingly, the lower

court dismissing the entire case, including Triple 7's counterclaim, *sua sponte* and without providing Triple 7 with the opportunity to be heard on the issue.

STATEMENT OF THE CASE

Triple 7 appeals from the entry of an Order appointing a special commissioner and dismissing this matter from the Circuit Court's docket. Respondents sued Triple 7 in the Circuit Court of Mercer County in an attempt to have Respondent High Country Mining, Inc. listed as a "Grantee" on the deed conveying property to Triple 7 on the basis that the property was purchased as part of a joint venture between Triple 7 and Respondent, High Country Mining, Inc. Triple 7 filed a counterclaim against Respondents setting forth six separate causes of action. Afterwards, the Respondents filed a Notice of Lis Pendens against Triple 7.

The parties entered into a Settlement Agreement setting forth the terms upon which the matter would be resolved and dismissed. The Settlement Agreement stated that the parties would release their respective claims against each other upon Triple 7's payment of a confidential amount to respondents. The Settlement Agreement was extended three separate times, and in each instance, the confidential settlement amount was increased. The third extension of the Settlement Agreement stated that if Triple 7 defaulted on its payment of the confidential settlement amount, that respondent High Country Mining, Inc. would be entitled to have the deed reformed so that it was listed as a grantee with a fifty-one percent (51%) interest in the property.

Triple 7 was unable to make the confidential settlement payment pursuant to the terms of the third extension of the Settlement Agreement, and the Respondents thereafter filed their Motion to Appoint a Special Commissioner for purposes of reforming the deed. The Triple 7 objected to the Respondents motion on the basis that the Settlement Agreement was unenforceable because it was unconscionable and because of the application of the "first breach"

doctrine. Triple 7 also challenged the motion on the basis that Respondent High Country Mining, Inc., waived its right to be listed as a co-grantee on the deed. The Circuit Court granted the respondents Motion to Appoint Special Commissioner and dismissed the case from its docket.

Triple 7 appeals from the entry of the Circuit Court's order granting the Motion to Appoint Special Commissioner and dismissing this matter, and respectfully requests that this Court reverse the lower court's decision by declaring the Settlement Agreement null and void and remand the matter for trial, or in the alternative reverse the lower court's decision and declare the original Settlement Agreement effectuated by the parties and dismiss the case with prejudice.

STATEMENT OF FACTS

On August 22, 2016, the parties entered into a Joint Venture Agreement (“JVA”), pursuant to which, they agreed to “contribute certain assets and business knowledge and contacts for the purpose of mining coal and offering contracts for the purchase of that coal” related real property known as the West Virginia Wellston Coal Properties. (R. at 2-8 and 117.) Significantly, and contrary to High Country’s arguments in this action, nothing in the JVA provided that High Country would own any percentage of any real property that was acquired for the purposes of mining. High Country want to argue that they were supposed to receive 49% ownership of any property that was acquired for the purposes of mining. The JVA simply does not provide that. Instead, what it addresses when it references 49% is how compensation for mining activity shall be distributed. More specifically, in paragraph 4, entitled “Profits and Losses,” the JVA states:

Both Parties agree that any and all net profits resulting from operations pursuant to this JV[A] shall be shared with 51% to be distributed to [Triple 7] and its affiliates, 49% distributed to High Country[, and the Parties] will have a mutually acceptable accounting firm monitor the sales of all products. And furnish a detailed financial report every month to both Parties.

(R. at 5.)

The JVA further provided for the management and control of the affairs of the venture, the daily operations of a mine, and other related issues. (R. at 5-7.) Significantly, Triple 7 undertook responsibility under the JVA “of raising funds for the acquisition costs of the project.” (R. at 6.) High Country understood that the funding “may come from third party investors or may be borrowed” (R. at 6.) Finally, pursuant to paragraph 10, the JVA would terminate upon the written agreement of all parties. (R. at 7.)

The Parties attempted to perform the project. Two months into the project, Triple 7 was forced to fire High Country. (R. at 117.)

On February 16, 2017, High Country filed a Complaint to commence a lawsuit against Triple 7. (R. at 1-15.) Triple 7 moved to dismiss that Complaint on March 24, 2017. Thereafter, High Country moved to amend the Complaint, which the Court permitted. (R. at 16-20.)

On September 7, 2017, High Country filed an Amended Complaint. (R. at 21-24.) The Amended Complaint alleges that the JVA required Triple 7 to list High Country as a 49% co-grantee on the deed it obtained from Wellston. (R. at 21-24.) As a result, High Country asked the Court to bestow upon its counsel the power of executing a deed on behalf of Triple 7. (R. at 24.) It also asked the Court to permit them to apply to have High Country’ names included in any mining permits and other papers related to the Wellston property and also to compel Triple 7 to cooperate with these efforts. (R. at 21-24.) Finally, the Amended Complaint asked the Court to award them attorney’s fees, despite the fact that neither the JVA nor their claims permit it. (R. at 24.)

In response, on October 18, 2017, Triple 7 asserted counterclaims for: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; (3) breach of fiduciary duty; (4) unjust enrichment; (5) violations of the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101 et seq.; and (6) declaratory judgment. (R. at 25-61.)

High Country later sought to amend their complaint again, this time seeking to add Damien Caldwell and Michael Church as defendants. On November 2, 2018, the Court denied that motion. (R. at 80-83.)

On December 1, 2018, the parties entered into the Settlement Agreement. (R. at 117 and 331-342.) The Settlement Agreement provided, among other things, that Triple 7 would pay High Country \$600,000 (“Settlement Payment”) and both parties agreed that they would forever release and discharge their claims and counterclaims. (R. 333-341).

The Settlement Agreement provided that the Lis Pendens High Country had recorded on the property would be immediately released (a term that High Country willfully violated). (R. at 118 and 336.) More specifically, paragraph 5 provided as follows:

Discharge and Release of Liens/Lis Pendens. Within fifteen (15) calendar days of the Effective Date of this Agreement, High Country, Woodrow W. Church, and Darren J. Spencer agree to release and discharge any and all liens or claims of title filed against the Deed, the mining-related permits or the mineral rights which are the subject of, and defined in, the Deed including, without limitation, the Notice of Lis Pendens, dated July 28, 2017 (filed July 21, 2017), and filed in the office of the Clerk of McDowell County, West Virginia in the Lis Pendens Book 0002, page 0292.

(R. at 118 and 336.)

Even more significant is the fact that High Country expressly relinquished in the Settlement Agreement any right to be co-grantees on a deed, the very action that they seek to take with their Motion. (R. at 118 and 337.) In paragraph 9.2 of the Settlement Agreement, High Country agreed:

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.

(R. at 118 and 337.)

When all parties executed the Settlement Agreement on December 1, 2018, High Country voluntarily and expressly discharged, relinquished, disclaimed, and released the very relief they now ask the Court to grant them. (R. at 118 and 337.) In paragraph 10 of the Settlement Agreement, High Country agreed that they no longer would interfere with Triple 7's mining operations. (R. at 118 and 337.) More specifically, they agreed:

No Trespass. As of the Effective Date, High Country, Woodrow W. Church, and Darren J. Spencer agree that they are not entitled to access or interfere with, for any purpose, Triple 7's mining activities or any 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. subject to the other conditions set forth in this Section and Section 3.2. Any such access is unauthorized and will constitute trespass or a violation of other laws under the state laws of West Virginia. . . .

(R. at 119 and 337.)

Finally, High Country agreed in paragraph 15 of the Settlement Agreement that they no longer would disparage Triple 7 or its reputation. (R. at 119 and 338.) They agreed:

Non-Disparagement. The Parties will not disparage one another in a manner likely to be harmful to them or their business, business reputation, or personal reputation. provided, however, that nothing in this Agreement shall be deemed to prohibit any person from testifying truthfully under oath pursuant to any lawful court order or subpoena or otherwise responding to or providing disclosures required by law.

(R. at 119 and 338.)

Triple 7 was unable to obtain the funds needed to make the Settlement Payment by January 31, 2019. (R. at 119 and 344.) Accordingly, it asked High Country for a short extension. (R. at 119 and 344.) High Country agreed to grant a two-month extension but they extracted a heavy price on Triple 7. (R. at 119 and 344.) In order to receive the extension, High Country required Triple 7 to pay it \$100,000 that would not be credited to the final settlement amount. (R. at 119 and 344-346.) In addition, High Country now required Triple 7 to pay a settlement amount of \$1,600,000 for a total extension and payment amount of \$1,700,000. (R. at 343-346.)

Triple 7 paid the \$100,000 extension fee and another \$100,000 of the payments called for in the Extension Agreement. (R. at 119 and 348.) When Triple 7 requested another short extension of approximately 60 days, High Country were only willing to grant that extension if Triple 7 agreed to an additional \$200,000 being added to the amount of the Settlement Payment. (R. at 120 and 347-351.) Triple 7 was able to pay \$600,000 of the amount called for in the Second Extension Agreement. (R. at 120 and 354.) However, because High Country had increased that amount so severely, Triple 7 was not able to pay the full amount by the deadline. (R. at 120 and 354.)

Accordingly, it asked High Country for one additional extension of approximately 60 days. (R. at 120 and 352-357.) High Country only were willing to agree to this extension on the condition that the already over-inflated Settlement Payment be doubled, and they charged Triple 7 a \$100,000 fee for the extension. (R. at 120 and 352-357.) On June 4, 2019, the parties entered into a "Third Extension to Confidential Settlement Agreement and Mutual Release." (R. at 120 and 352-357.) Under this extension, High Country required Triple 7 to pay an additional \$3,000,000.00 in addition to the \$100,000 extension fee and despite the fact that Triple 7 already

had paid High Country \$900,000.00. (R. at 120 and 352-357.) This is six times the amount of the original Settlement Amount. (R. at 121.) Triple 7 made the \$100,000 extension payment under the Third Extension Agreement, but ultimately was unable to pay the full amount that High Country tried to extort. (R. at 120.)

This result is not surprising and none of the parties will dispute three facts in this case:

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

Indeed, Triple 7 made payments exceeding the original Settlement Amount without knowledge that High Country had previously committed material breaches of the Settlement Agreement. Had Triple 7 known of High Country's prior breaches, it would have not: (1) continued to seek extensions; (2) agreed to High Country's excessive demands for the extensions; or (3) made any payments due to High Country's material breaches.

On July 9, 2019, High Country finally took steps to record a release of the Lis Pendens they represented they would release by December 16, 2018. (R. at 376.) However, that release was not a complete release. Rather, it stated that "the parties to said civil action [had] agreed to a settlement of all issues between them" but that the "settlement [was only] partially paid." (R. at 376.) As a result, a question remained about the scope of the release of the Lis Pendens. (R. at 395.)

At the time and before the first release of Lis Pendens was recorded, Triple 7 was attempting to obtain financing to pay the Settlement Amount to High Country. It had been operating under the assumption that High Country had fulfilled their representation and

agreement to fully release the Lis Pendens. (R. at 393-394.) As a result, Triple 7 had made representation to each potential lender that it owned the property at issue and that it had clear title to that property. (R. at 270-271, 275, and 394-395.) As part of Triple 7's discussions with potential lenders, it provided those lenders with a copy of the deed to the property showing that title was vested in Triple 7. (R. at 270-271, 275, and 394-395.)

The release High Country recorded was ambiguous and continued to cloud the title to the property. Two loan brokers with whom Triple 7 was working to try to obtain financing to pay the Settlement Amount advised Triple 7 that the release High Country filed was "unclear," "ambiguous," and did not clearly state the scope of the release. (R. at 275-276 and 395-396.) High Country's failure to record a complete release in the time frame to which they agreed precluded Triple 7 from obtaining the financing needed to make the Settlement Payment. (R. at 271, 275-276, 295, and 394-396.)

On September 3, 2019, High Country deposed Damian Caldwell, Triple 7's Chief Executive Officer. (R. at 193-328.) The fact that the release was unclear and ambiguous, that at least two loan brokers advised Triple 7 of the problem with the release, and its impact on Triple 7's attempts to obtain funding in order to make the Settlement Payment became clear. (R. at 271, 275-276, 295, and 394-396.) The issues became so clear that High Country immediately recorded an Amended Release of Lis Pendens that explicitly stated that "the parties to said civil action hav[e] agreed to a settlement of all issues between them to their mutual satisfaction" and removed any reference to the settlement being partially paid or partially performed by Triple 7. (R. at 377.)

SUMMARY OF ARGUMENT

High Country committed a material breach of the Settlement Agreement before Triple 7. Therefore, Triple 7 was relieved of its obligations under the Settlement Agreement based upon the First Breach Doctrine. Accordingly, Triple 7's subsequent failure to pay the Settlement Amount did not constitute a breach of the Settlement Agreement or entitle High Country to a reformation of the deed granting it a fifty-one percent (51%) interest in the property.

In addition, Triple 7 should not have been deemed in default of the Settlement Agreement based upon its failure to pay the revised settlement amount contained in the Third Extension because the Third Extension was procedurally and substantively unconscionable. For example, High Country raised the settlement amount by 600% when the value of its claim had decreased by twenty-eight percent (28%). Also, the Circuit Court should not have permitted the reformation of the deed in High Country's name because High Country expressly waived its right to have its name on the deed. Finally, the Circuit Court dismissed Triple 7's unreleased Counterclaim *sua sponte*, without providing Triple 7 with any notice or an opportunity to be heard in violation of the Due Process Clause of the Fourteenth Amendment.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Triple 7 posits that, pursuant to *Rule 18(a)* of the *West Virginia Rules of Appellate Procedure*, *Rule 19(a)* oral argument is appropriate, necessary, and that the decisional process would be significantly aided by *Rule 19(a)* oral argument. *Rule 19(a)* oral argument is appropriate because the Circuit Court: (1) committed numerous errors in the application of settled law; (2) engaged in an unsustainable exercise of discretion where the law governing that discretion is settled; and (3) committed error by making factual findings supported by insufficient evidence and against the weight of the evidence.

ARGUMENT

A. High Country Materially Breached The Settlement Agreement.

The Circuit Court committed reversible error when it found that High Country's breach of the Settlement Agreement was not material and that the breach did not relieve Triple 7 of any further performance under said agreement. While the Circuit Court properly acknowledged the existence and scope of the first breach doctrine, it made egregious mistakes in its interpretation and application of the "materiality" factors set forth in the Restatement (Second) of Contracts § 241 (1981). The Circuit Court's legal and factual findings were so irrational that they resulted in a "settlement" that was substantially more onerous on Triple 7 than a default under the Amended Complaint would have been. Said differently, it would have been better for Triple 7 to have simply defaulted than to have been subject to the terms of the Settlement Agreement as interpreted by the Circuit Court.

1. The First Breach Doctrine

The Circuit Court correctly held that, "Generally, a party who commits the first breach of a contract is not entitled to enforce the contract." (R. at 515), *citing Federal Insurance Co. v. Starr Electric Co.*, 242 Va. 459, 468, 410 S.E.2d 684, 689 (1991). Also, if the initial breach is material, the other party to the contract is excused from performing his contractual obligations." (R. at 515), *citing Neely v. White*, 177 Va. 358, 366, 14 S.E. 2d 337, 340 (1941). The first breach doctrine, which excuses the contractual obligations of one party due to the material breach of the other party, has been adopted as law in West Virginia. *W. Virginia Human Rights Comm'n v. Smoot Coal Co.*, 186 W. Va. 348, 353, 412 S.E.2d 749, 754 (1991), *citing Eastern Oil Company v. Coulehan*, 65 W.Va. 531, 64 S.E. 836 (1909).

Finally, the Circuit Court correctly acknowledged that, "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 as essential purpose of the contract." (R. at 516), *citing Rogers v. Relyea*, 184 Mont. 1, 601 P.2d 37, 40-41 (1979). Thus, under West Virginia law, because High Country's initial breach was material, Triple 7 was relieved from performing its obligations under the Settlement Agreement without having to make a showing of actual damages.

2. Materiality of Breach

While the Circuit Court correctly relied upon the Restatement (Second) of Contracts § 241 as a guide in determining the materiality of High Country's breach, it utterly failed in its interpretation and application of § 241 to that breach. According to § 241, the following circumstances are significant in determining whether a breach was material:

- (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; and
- (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.

Restatement (Second) of Contracts § 241 (1981). The Circuit Court committed such significant errors in its application of all of these materiality factors that reversal of its Order is required.

a. The extent to which Triple 7 was deprived of its expected benefit.

The first factor to be considered is the extent to which the injured party was deprived of the benefit which it reasonably expected. The Circuit Court committed two significant errors in its analysis of this factor. First, it used an improper standard in determining the extent to which Triple 7 was denied the benefit it expected. Second, it ignored the specific benefits Triple 7 sought under the Settlement Agreement and replaced them with some generic benefit applicable to all Settlement Agreements.

There is not an articulated standard set forth in § 241(a). The provision simply states that a court is to consider "the extent" of the deprived benefit. However, Comment b. of § 241 does offer some guidance. First, Comment b. expressly states that there "is no simple rule and all circumstances must be considered." Second, it twice implies that the proper standard is whether the deprived benefit was "significant" ("In construction contracts, for example, defects affecting structural soundness are ordinarily regarded as particularly 'significant'").

Nevertheless, the Circuit Court ignored this guidance and applied a hard and fast rule that the breach was not material because Triple 7 "was not *completely* deprived" of the benefit it expected. (R. at 517) (emphasis added). This was not a simple mistake by the Circuit Court, as it later doubled down when it held, "The evidence presented is certainly not enough to conclude that Triple 7 was *completely* deprived of the benefit it reasonably expected under the Agreement..." (R. at 519) (emphasis added). Thus, the Circuit Court ignored the express language of Comment b. and instituted a bright-line rule that this factor will always go against the non-breaching party unless it was "completely" deprived of its expected benefits under the contract. Not only does this bright-line test contradict the "no rule" language of Comment b., it obviates a court's ability to "consider the extent" to which a benefit was denied under § 241(a).

Not only is the Circuit Court's adoption of a "completely deprived" standard not sanctioned by §241(a), it is downright illogical as illustrated by the following example. Consider an agreement in which a contractor agrees to build a 4,000 square foot home with landscaping that includes the planting of numerous shrubs, flowers and a fifteen foot dogwood tree within six (6) months. The cost of the entire project is \$400,000 with the payment being due at the end of the six month period when the project is supposed to be completed. At the end of the six month period, the contractor has planted the dogwood tree but has done nothing else. Despite there only being a single tree planted on an otherwise empty dirt lot, the contractor sends the owner an invoice seeking payment of the entire \$400,000. According to the Circuit Court's reasoning, because the homeowner has not been *completely* deprived of his expected benefit due to the planting of a single dogwood tree, he is not relieved of his obligation under the contract and must pay the contractor \$400,000 or be subject to a breach of contract claim by the contractor. Such an outcome is unreasonable, illogical, and unfortunately completely acceptable under the Circuit Court's "completely deprived" standard.

The Circuit Court also committed error by ignoring the specific benefits Triple 7 was entitled to under the Settlement Agreement and replacing them with some generic benefit applicable to all Settlement Agreements. The Court continuously identified Triple 7's intended benefit under the agreement as nothing more than "wanting to settle the lawsuit." (R. at 517-518.) To be exact, the Circuit Court determined that:

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 or 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.

(R. at 517-518). While the Circuit Court made sure to emphasize that Triple 7 wanted to settle the lawsuit, it completely discounted the terms upon which the parties actually agreed to settle. For example, the parties did not only agree to "fully and finally resolve any and all future Claims" related to the ownership of the deed, the ownership of the mining-related permits and the applicability of the joint venture agreement.

The parties agreed to settle all claims with Triple 7 retaining one-hundred percent (100%) interest in the deed to the property and the mining-related permits. (R. at 332-333). The parties also agreed that the Joint Venture Agreement was rescinded and that High Country would not have any control or input over Triple 7's mining operations. (R. at 336). In addition, the parties agreed High Country would not have access to the mine property or be able to interfere with Triple 7's mining operations. The entire purpose of the Settlement Agreement was that Triple 7 would have one-hundred percent control of the property with clear title that was free and clear of any lien or claim by High Country. In return, Triple 7 agreed to pay High Country \$600,000.

At the time the Settlement Agreement was executed, there was a Notice of Lis Pendens filed in McDowell County by High Country that called into question Triple 7's ownership of the property and the mining-related permits. (R. at 326). Accordingly, Paragraph 5 of the Settlement Agreement expressly required that High Country release the Notice of Lis Pendens within fifteen (15) days of the execution of the Settlement Agreement. (R. at 336). The purpose of this provision was two-fold. First, High Country was obligated to release the Lis Pendens because it agreed that Triple 7 owned one-hundred percent (100%) of the property and that it no

longer had a potential claim to the property. In essence, the Notice of Lis Pendens was no longer accurate and placed an improper cloud on Triple 7's title.

Triple 7 also made the release of the Notice of Lis Pendens a requirement of settlement because it was concerned that it placed a cloud on its title that would preclude it from using the property as collateral to obtain a loan to pay the \$600,000 settlement payment. Mr. Caldwell testified that the need for clear title and the release of the Notice of Lis Pendens was an essential term of the Settlement Agreement:

Q: But in that December 1, 2018 Settlement Agreement, from Triple 7's perspective, what were some of the essential terms or requirements of the agreement?

A: Number one, we had to have the ability to offer the property with *clear title, clean title*, because of the nature of the business at the time...

Q: And so was one of the *essential terms* of the Settlement Agreement High Country *releasing the lis pendens*?

A: *Absolutely*. That's what we asked for.

(R. at 262) (emphasis added). The reason for the fifteen day requirement is clear. By requiring that the Notice of Lis Pendens be removed within fifteen days, Triple 7 would have forty-five (45) days to secure funding to pay the \$600,000, which was due sixty (60) days from the execution of the Settlement Agreement. Thus, pursuant to the express terms of the Settlement Agreement, Triple 7 expected to receive complete ownership and control of the property and the mining operations. It also expected to have clear title to the property with the Notice of Lis Pendens being released within fifteen days. It also expected to have forty-five days in which it could obtain \$600,000 of financing by using the unencumbered property as collateral.

Triple 7 clearly did not get what it expected under the Settlement Agreement. It did not get one-hundred percent control of the property with clear title that was free and clear of any lien

or claim by High Country. Its payment to High Country was not \$600,000. It did not have forty-five days to obtain financing with unencumbered collateral, and it does not have the right to mine the property without High Country's permission. Instead, it ended up paying High Country \$900,000. Instead of owning one-hundred percent (100%) of the property, it owns a minority interest of forty-nine percent (49%). Instead of having the Notice of Lis Pendens removed within fifteen (15) days, it took 267 days to have it properly removed. Instead of having forty-five (45) days to obtain funding with unencumbered collateral, Triple 7 had zero days. Every single payment due by Triple 7 under the Settlement Agreement and the three extensions were due *before* the Notice of Lis Pendens was properly removed on September 9, 2019. The discrepancy between what Triple 7 was entitled to receive and what it actually received is telling:

	<u>Original Settlement Agreement</u>	<u>Actual Resolution</u>
Triple 7 Property Interest	100%	49%
High Country Property Interest	0%	51%
Triple 7 payment to High Country	\$600,000	\$900,000
Lis Pendens Removed	15 days	267 days
Days to Obtain Funding Unencumbered	45 days	0 days
Need High Country Permission to Mine	No	Yes

It is simply mindboggling that the Circuit Court believes Triple 7 got what it expected simply because the case settled. Under that rationale, the Court could have required Triple 7 to pay \$3,000,000 and give up ninety-five percent (95%) of its interest in the property and Triple 7 would still have been deemed to have gotten what it wanted "because the case settled." In fact, it would have been better for Triple 7 to have not answered High Country's Amended Complaint and to have let High Country obtain default judgement against it. Since the Amended Complaint sought a 49% interest in the property with *no* payment, Triple 7 would have saved \$900,000 and would still own a controlling interest in the property if it had simply defaulted. Clearly, this factor weighs in favor of Triple 7.

b. Extent to which Triple 7 can be adequately compensated.

The second factor to be considered in determining whether a breach is material is the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived. Both the Circuit Court and High Country confuse this factor with the separate and distinct issue of whether Triple 7 actually proved economic damages. It is this latter issue that High Country raised in the lower court and to which Triple 7 objected. More particularly, High Country argued below that Triple 7 could not prove that it was damaged because it could not show that potential lenders refused to loan Triple 7 money as a result of the Notice of Lis Pendens not being released. (R. at 406-409).

Damages are simply not a part of the materiality analysis. In fact, the Circuit Court acknowledged that "proof of a specific amount of monetary damages is not required" when there is a material breach. (R. at 516). It is inconsistent for the Circuit Court to hold that a showing of damages is not necessary when the breach is material, and then find that the breach was not material due to a lack of damages.

The gist of this factor relates to the *type of harm* incurred and whether it can be remedied purely by compensatory damages. If the alleged injury is economic and quantifiable then it likely will not be characterized as material. However, if the alleged injury is non-economic or unquantifiable, then the non-breaching party cannot be fully compensated, and the breach may be characterized as material. *In re Old Carco LLC*, 452 B.R. 100, 128 (Bankr. S.D.N.Y. 2011).

The ultimate alleged injury sustained by Triple 7 as a result of High Country's breach is not that it could not obtain funding, as that is simply a consequence of High Country's breach. The actual injury sustained by Triple 7 is that it paid High Country an additional \$300,000 and that it lost a controlling interest in the property due to the reformation of the deed. While the

\$300,000 injury is clearly economic and quantifiable, Triple 7's loss of 51% of its real property interest is not. That is because West Virginia recognizes that "the equitable remedy of specific performance is routinely awarded in contract actions involving real property, on the premise that each parcel of real property is unique." *Allegheny Country Farms, Inc. v. Huffman*, 237 W. Va. 355, 360, 787 S.E.2d 626, 631 (2016). Thus, "it is presumed by the courts that the *remedy at law is inadequate*, due to the nature of the subject matter, because no two parcels of real estate are the same." *Id.* (emphasis added). Since Triple 7 lost a significant portion of its interest in the real property as a result of High Country's Breach, and because West Virginia law recognizes that such a loss of real property has no adequate remedy at law, this factor also weighs in Triple 7's favor.

c. The extent of High Country's forfeiture.

The third element considered by the Circuit Court was the extent to which High Country would suffer forfeiture if its breach was determined to be material. The Circuit Court's analysis of this factor is woefully incorrect and misguided. Importantly, the Circuit Court expressly held that "High Country will suffer a major forfeiture if either breach is deemed material," and yet did not even identify what that forfeiture would be. (R. at 519).

The Circuit Court failed to identify a forfeiture because there was none. This element is meant to address the situation where the breaching party significantly performs *after* the alleged breach and loses the benefit of that performance because the non-breaching party is relieved of any further obligation under the contract. There is no such forfeiture here, as High Country only had one substantive obligation under the Settlement Agreement, it had to release the Notice of Lis Pendens within fifteen (15) days. That was it. High Country had to take no other action

pursuant to the Settlement Agreement. Thus, it had nothing to forfeit because it had no other substantive obligation under the Settlement Agreement.

Triple 7 must make two additional points on this issue. First, the Circuit Court acknowledged that a breach is more likely to be material if it occurs early, which it did in this case. (R. at 519). The Circuit Court tried to down play High Country's breach by stating, "Although the failure to release the Notice of Lis Pendens *technically* occurred early, neither party realized the breach until after substantial negotiations occurred." (R. at 519-520) (emphasis added). First, there is nothing "technical" about the timing of High Country's breach. The breach occurred within fifteen (15) days of the signing of the Settlement Agreement and it remained uncured for over 250 days and it remained uncured past the expiration of Triple 7's last payment date under the Third Extension.

Second, the Circuit Court incorrectly stated that High Country's breach was irrelevant because Triple 7 was unaware of it. Section 237, Comment c. of the Restatement (Second) of Contracts directly contradicts the Circuit Court. Comment c. reads in part:

c. Ignorance immaterial. The non-occurrence of a condition of a party's duty has the effects stated in § 225 even though that party does not know of its non-occurrence. See Comment e to § 225. It follows that one party's material failure of performance has the effect of the non-occurrence of a condition of the other party's remaining duties, under the rule stated in this Section, *even though that other party does not know of the failure*. If the other party is discharged as the result of *an unjustified material failure of which he is ignorant*, he has a claim for damages for total breach (§ 245)...

(emphasis added). Thus, High Country is not relieved of its material breach just because Triple 7 was not initially aware of the breach. Accordingly, the third factor also weighs in Triple 7's favor.

d. The likelihood that the party failing to perform will cure its failure.

The Circuit Court's analysis of this factor was exceptionally deficient. First, the Circuit Court stated, "Once High Country realized their failure to perform, they released the Notice of Lis Pendens." (R. at 464). This is incorrect. The High Country did not realize their failure to release the Notice of Lis Pendens, but instead, were made aware of their failure by Triple 7. (R. at 215-216). The Circuit Court further stated, "Defendant argues that the first release was not a full release...The Court takes no position with regard to whether the first release was full or partial..." (R. at 464). It is disconcerting that the Circuit Court would applaud High Country for releasing the Notice of Lis Pendens without first determining whether the release was actually effective. This is especially so considering that Triple 7 brought it to the Circuit Court's attention that the initial release was defective. (R. at 359-405). In fact, the Circuit Court was provided deposition testimony that multiple lenders refused to provide Triple 7 funding because they believed that the initial release was insufficient. (R. at 275). Despite this fact, the Circuit Court felt that the sufficiency of the initial release was not important and all that mattered was the fact that High Country filed something.

Worse yet, the Circuit Court praised High Country for its filing of the second release of the Notice of Lis Pendens on September 9, 2019. That date is very important. High Country filed its Motion to Appoint Special Commissioner on August 6, 2019. (R. at 95). To put that in perspective, at the time High Country filed its motion seeking reformation of the deed due to Triple 7's alleged default under the Settlement Agreement, High Country had not yet filed the correct release or cured its own material breach of the Settlement Agreement. As such, the first release was defective and the second release was too little too late. Yet for some reason the Circuit Court chose to reward High Country for these two hollow gestures. High Country did

not effectively attempt to cure its default, and accordingly, the fourth factor also weighs in Triple 7's favor.

e. Extent of High Country's Good Faith and Fair Dealing.

The final factor the Circuit Court considered in determining whether the breach was material was the extent that High Country's conduct comported with standards of good faith and fair dealing. The Circuit Court glossed over this factor with minimal analysis. In fact, its sole basis for finding that this factor weighed in favor of High Country was, "the willingness of High Country to promptly correct their failure to release the Notice of Lis Pendens shows it acted in good faith." (R. at 520). As noted above, it took High Country two attempts and 267 days to properly remove the Notice of Lis Pendens. That is not being prompt.

More importantly, the Circuit Court completely ignored High Country's shakedown of Triple 7. On December 1, 2018 High Country acknowledged in Paragraph 9.4 of the Settlement Agreement that the \$600,000 payment from Triple 7 was "a fair and reasonable settlement of the Claims based on their respective individual and independent assessments, with the assistance and advice of counsel." (R. at 337). However, by June 4, 2019, High Country had raised the total settlement contained in the Third Extension by \$3,000,000 to a total of \$3,600,000. That is an increase of 600% in just seven months.

High Country justified this increase on the fact that coal prices had increased substantially during the time between the execution of the Settlement Agreement and the execution of the Third Extension, and that it was entitled to benefit from that increase. However, Mr. Church of High Country acknowledged that at the time the Settlement Agreement was signed the price of coal was approximately \$125.00 a ton. (R. at 580). Mr. Church further testified that as of the hearing date on High Country's Motion to Appoint Special Commissioner,

October 1, 2019, the price of coal was only \$90.00 a ton. (R. at 580). Thus, the price of coal actually dropped by twenty-eight percent (28%) during the time that High Country raised the settlement amount by 600%. This proves that High Country did not raise the settlement amount because of an increase in the price of coal as it represented to the Circuit Court. Instead, it raised the settlement price to an outrageous level for one of two reasons. It either knew it could extract an unreasonable amount from Triple 7 under threat of default, or it actually wanted to raise the settlement amount so high that it could force a default. Regardless of the reason, High Country's conduct violates the implied standard of good faith and fair dealing. As such, the fifth and final factor weighs in Triple 7's favor. Given that all five factors undoubtedly weigh in Triple 7's favor, the Circuit Court committed reversible error when it found that High Country did not commit a material breach of the Settlement Agreement.

B. High Country expressly waived the right to be a co-grantee on a deed.

The Circuit Court erred when it concluded that High Country did not waive its right to be listed as co-grantees on a deed. (R. at 464-467.) In so doing, the Court recognized that, pursuant to paragraph 9.2 of the Settlement Agreement, High Country expressly waived all claims they had to being listed as a co-grantee on a deed “[u]pon execution of this Agreement by all Parties.” (R. at 466.) However, the Circuit Court also recognized the argument advanced by the High Country that, taking the entire Agreement as a whole, the High Country’ waiver of claims to ownership was only effective when Triple 7 made the settlement payment contemplated by the Agreement. (R. at 467.) The Circuit Court found that it should interpret paragraph 9.2 to reach that result based on its belief that other paragraphs of the Agreement (namely paragraphs 3.1, 3.2 and 9.1) and the Extension Agreements created a patent ambiguity. (R. at 465 and 466.) Accordingly, the Court found that it was entitled to revise the meaning of the clear language of

paragraph 9.2 of the Agreement to change the triggering event that made its provision applicable to the Parties.

The Circuit Court erred in its holding because paragraph 9.2 of the Agreement unambiguously sets forth the parties' agreement and, as High Country point out, was prepared and entered into when the parties had the advice and consent of counsel. (R. at 410.)

Provision 9.2 of the Settlement Agreement specifically states:

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 right conveyed to Triple 7 through the Deed.*

(emphasis added). The language of this provision is clear, unambiguous and not subject to alternate interpretations. The Circuit Court implicitly acknowledged this but went on to interpret the paragraph based on its belief that it conflicted with other paragraphs and “no extrinsic evidence [was] offered to explain the ambiguity.” (R. at 467.) As noted above, the Circuit Court relied on paragraphs 3.1, 3.2 and 9.1 in finding paragraph 9.2 ambiguous, thus permitting the Circuit Court to reverse its meaning. However, none of those paragraphs compel that result.

Taking paragraph 9.1 first, it is recognized 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. However, that provision is superseded by Section 9.2 because the specific provisions of a contract control over potentially conflicting general provisions. *United States v. Yooho Weon*, 722 F.3d 583, 590 (4th Cir. 2013). There is no doubt that the Settlement Agreement was negotiated by counsel for each party and executed by all parties, therefore, Section 9.2 is binding and the High Country have waived all of their claims of ownership in the property.

Additionally, there is no conflict between paragraphs 9.1 and 9.2. Paragraph 9.1 addresses the general release of the Parties' claims upon Triple 7's settlement payment. That release applies to High Country' claim for attorney's fees, which were part of the claims they asserted in this case (R. at 24), and Triple 7's counterclaims. (R. at 35-55.) It is true that paragraph 9.1 might be read to include High Country' waiver of the right to be listed as a co-grantee on a deed had paragraph 9.2 not existed. However, while paragraph 9.1 addresses the release of the Parties' claims generally, paragraph 9.2 governs specifically High Country' waiver of their right to be listed as a co-grantee. It provides expressly and without equivocation that such right is waived when the parties sign the Settlement Agreement.

The Circuit Court also found an ambiguity in the Settlement Agreement because paragraph 3.2 thereof purported to give High Country the right to be named as co-grantees on a deed if Triple 7's settlement payment was not made. (R. at 465.) However, that section is inoperable because of the broad waiver language in Section 9.2 by which High Country waived all "claims or Claims" in the property. High Country' claim to the property pursuant to Section 3.2 is a "Claim" pursuant to the Settlement Agreement. Section 1.1 defines a "Claim" as:

any and all right...obligations, compensation...or any other remedies or relief of any character whatsoever...whether known or unknown, whether now-existing or hereinafter arising, whether contingent or non-contingent...whether in law or in equity, under any ...contract, agreement, ...or any source of duty or obligation of any kind whatsoever... past, present or future.

(emphasis added). There is no doubt that High Country' claim to the property falls within the extremely broad language set forth in Section 1.1 of the Settlement Agreement. As such, it is waived pursuant to Section 9.2. It should also be noted that provisions such as 9.2 often contain exceptions such as, "excepting any claim or right to the property High Country may have pursuant to Section 3.2 above." However, Section 9.2 of the Settlement Agreement contains no

such exception. Given that Section 9.2 comes after Section 3.2, and given that Section 9.2 expressly waives any claim or claims High Country have to the property, their claims/Claims are waived and their Motion should be denied.

In addition, the Circuit Court referred to paragraph 3.1 of the Agreement in connection with holding that the Settlement Agreement contained a patent ambiguity. (R. at 465.) Paragraph 3.1 merely sets forth the original settlement payment amount and does not in any way contradict paragraph 9.2. Nothing in paragraph 3.1 provides that High Country continued to have a right to be listed as co-grantees on a deed.

Finally, the Circuit Court held that the extension agreements further supported the finding that there was a patent ambiguity in the Settlement Agreement with respect to paragraph 9.2. (R. at 467.) In particular, the Circuit Court pointed to the language in the extension agreements that, if Triple 7 did not timely make the settlement payment, High Country would be entitled to “all remedies provided under paragraphs 3.1 and 3.2 of the original Settlement Agreement.” (R. at 345, 350, 356 and 467.) The references to these provisions do not create a patent ambiguity. As discussed above, paragraph 3.1 does not provide any rights for High Country to be listed as co-grantees on a deed. Further, as discussed above, paragraph 3.2 is made subject to the later provisions in paragraph 9.2 and the reference to paragraph 3.2 by implication carries with it a reference to paragraph 9.2.

Based on the foregoing, the Circuit Court erred when it held that High Country had not waived their rights to be listed as co-grantees on a deed.

C. Equity demands that the Motion be denied.

The Circuit Court erred in finding that the Settlement Agreement and extension agreements procedurally and substantively conscionable. (R. at 467-472.)

The doctrine of unconscionability means that, “because of an overall and gross imbalance, one-sidedness or lopsidedness in a contract, a court may be justified in refusing to enforce the contract as written.” *Sylb. Pt. 12, Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), *overruled in part and on other grounds, Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530 (2012) (“Brown I”). “Unconscionability is an equitable principle, and a determination of whether a contract or provision therein is unconscionable should be made by the court.” *Troy Mining Corp. v. Itmann Coal Company*, 176 W. Va. 599, 346 S.E.2d 749 (1986). If a court, as a matter of law, finds a contract or any clause of a contract to be unconscionable, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause to avoid any unconscionable result. *Sylb. Pt. 16, Brown*.

“Under West Virginia law, we analyze unconscionability in terms of two component parts: procedural unconscionability and substantive unconscionability.” *Brown I*, at 285. 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. *Id.* This Court then set forth the following guidelines in determining 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 result in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstance surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, . . . the adhesive nature of the contract, and the manner and setting in which the contract was formed.

In addressing procedural unconscionability, the Circuit Court relied on the fact that the Settlement Agreement was not in preprinted form but was negotiated by both parties when they were represented by counsel. (R. at 471.) Further, the Circuit Court relied on the fact that the Settlement Agreement and extensions do not appear to contain any “hidden or unduly complex terms.” (R. at 471.) Finally, the Circuit Court found that “[t]here has been no evidence presented to show that there was unfairness in the bargaining process of the Settlement Agreement nor the Extensions.” (R. at 471.)

However, the Circuit Court failed to take into consideration the fact that High Country had represented that they would release the Lis Pendens they previously recorded that created a cloud on the title to the property almost immediately upon the Parties signing the original Agreement. (R. at 336.) High Country agreed to release that Lis Pendens within fifteen (15) days of the effective date of the Settlement Agreement, which was the date of the last signature thereon. (R. at 331 and 336.) The Settlement Agreement was signed on December 1, 2018, which means High Country represented that they would release the Lis Pendens that created a cloud on the title by no later than December 16, 2018. (R. at 336 and 342.) Triple 7 relied on High Country’ representation that the Lis Pendens would be released. (R. at 270-71.) Whenever seeking to obtain funding that would be used, at least partly, to make the settlement payments, Triple 7 represented to lenders that it alone had clear title to the property at issue and that there was no Lis Pendens. (R. at 271.)

The significance of High Country’ obligation to release the Lis Pendens and their representation that they would do so virtually immediately upon the signing of the Settlement Agreement cannot be overstated. It is the only affirmative duty High Country agreed to undertake.

The fact that they did not release the Lis Pendens created a hidden term that was extremely significant to Triple 7. Moreover, the fact that they did not release the Lis Pendens but continued to negotiate with Triple 7 like they had, all the while extracting from it an ever-increasing amount of a settlement payment, creates unfairness in the bargaining process of the Extensions. This unfairness amounts to procedural unconscionability.

This Court has set forth the guidelines for analyzing substantive unconscionability as follows:

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 the public policy concerns.

Brown I, 228 W. Va. 646, 724 S.E.2d 250.

When addressing substantive unconscionability, the Circuit Court recognized it was “somewhat harsh” to increase the amount of the settlement payment to a final amount that was six and one-half (6-1/2) times the initial settlement payment in exchange for an extension of the deadline to make that payment from January 31, 2019 to August 5, 2019. (R. at 472.) However, the Circuit Court did not find this six and one-half times increase substantively unconscionable because High Country had referenced an engineering report that indicated that there may be over \$100,000,000 worth of coal under the property at issue. (R. at 472.)

The Circuit Court’s error is twofold. First, as noted above, it ignored the fact that High Country’ failure to perform under the Settlement Agreement caused Triple 7 to unknowingly make misrepresentations when it was attempting to obtain financing. Those misrepresentations had the effect of precluding Triple 7 from obtaining the financing it needed in order to pay the

settlement amounts. Second, a vague reference to an engineering report by High Country was not sufficient evidence upon which to base the Circuit Court's finding and did not adequately explain to the Circuit Court the conditions under which any mining activity could take place. The amount of any coal reserves even if they were worth hundreds of millions of dollars, cannot be sold for any amount of money if financing cannot be obtained to allow Triple 7 to conduct mining operations.

Further, it should not be forgotten that the Settlement Agreement called for Triple 7 to pay High Country \$600,000 by January 31, 2019. Triple 7 began making payments on that amount but was unable to pay all of it. The extension agreements took advantage of Triple 7's lack of awareness that High Country had failed to release the Lis Pendens to extort Triple 7 into paying vastly inflated amounts of money.

Triple 7 already paid High Country \$900,000 by June 7, 2019. In other words, High Country have received 1.5 times the amount of the Settlement Payment to which they agreed. And, they had received all of this money with only a slight delay of approximately five months. Nonetheless, the extension agreements call for the overly-harsh effect of requiring Triple 7 to pay more than \$2,000,000 more to High Country.

All of this money, \$3,600,000 in total, was due by August 5, 2019. In other words, for the simple extension of the Settlement Payment deadline from January 31, 2019 to August 5, 2019 (approximately seven months), Triple 7 was paying 500% interest.

The one-sidedness of this arrangement is easily seen. While Triple 7 was taking on this additional, multi-million dollar burden of paying the vastly increased Settlement Payment, High Country took on no additional burden, save having to wait a few months for part of their money. Even this wait was not as long as it may first appear. In fact, by the time Triple 7 made its May

3, 2019 payment, High Country had received more than the \$600,000 that they were supposed to receive by January 31, 2019 (a delay of approximately four months). It is not commercially reasonable to expect Triple 7 to pay what amounts to 500% interest for a delay of approximately four months. Such an arrangement amounts to substantive unconscionability, and the Circuit Court erred in finding otherwise.

D. The Circuit Court Committed Reversible Error by Dismissing Triple 7's Counterclaim.

Triple 7 filed a Counterclaim against High Country in which it alleged numerous claims including: 1) breach of contract; 2) breach of the implied duty of good faith and fair dealing; 3) breach of fiduciary duty; 4) unjust enrichment; and 5) declaratory judgment. (R. at 25). Pursuant to Paragraph 9.1 of the Settlement Agreement, the parties agreed to mutually release all "Claims, claims, demands, damages, losses, liabilities, obligations, debts, liens, costs, attorneys' fees, actions or causes of action" against each other "effective upon receipt of Triple 7's Settlement Payment." (R. at 336) (emphasis added).

Triple 7 agreed to release its causes of action against High Country upon its payment of the Settlement Amount. Since the Settlement Payment was not made, Triple 7 did not release its causes of action against High Country. Despite this fact, upon granting High Country's Motion to Appoint Special Commissioner, the Circuit Court dismissed the remainder of the case and struck it from its docket. (R. at 529.) It is important to note that the Circuit Court took this action *sua sponte*, as High Country did not request the dismissal of the case or the dismissal of Triple 7's Counterclaim. As such, Triple 7 did not have notice that the Circuit Court was considering dismissal of its Counterclaim and it was deprived of an opportunity to be heard on this issue prior to the actual dismissal of its Counterclaim. Thus, the Circuit Court's dismissal of

Triple 7's Counterclaim deprived Triple 7 of procedural and substantive due process in violation of the Fourteenth Amendment of the U.S. Constitution.

To succeed on a procedural due process claim, a plaintiff must satisfy three elements. First, he must demonstrate that he had a constitutionally cognizable life, liberty, or property interest. *Iota Xi Chapter Of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 145 (4th Cir. 2009). Second, he must show that the deprivation of that interest was caused by “some form of state action.” *Id.* Third, he must prove “that the procedures employed were constitutionally inadequate.” *Patterson*, 566 F.3d at 145.

Triple 7 satisfies all three elements. First, “[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Second, Triple 7 lost its Counterclaim by state action, namely the entry of the Circuit Court's order that expressly dismissed the case. Finally, the procedures employed were constitutionally defective because there were no procedures. Triple 7 was completely denied of its right to notice and the opportunity to be heard before the Circuit Court considered and dismissed its Counterclaim.

To succeed on a substantive due process claim, a plaintiff must satisfy two elements. First, it must prove that that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation's history and tradition,” *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934), and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed,” *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). Second, the plaintiff must provide a “careful description” of the asserted fundamental

liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 720–21, 117 S. Ct. 2258, 2268, 138 L. Ed. 2d 772 (1997).

Triple 7 satisfies both of these elements. First, the right to file suit to protect one's property interests is so fundamentally rooted in our jurisprudence that it has been deemed a property right that is protected by the Fourteenth Amendment. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Second, Triple 7 can carefully articulate the fundamental liberty interest because it is expressly set out in the West Virginia Constitution:

The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

(emphasis added). *W. Va. Const. art. III, § 17*. Accordingly, Triple 7 is entitled to seek a remedy in the courts of this state for the damage done to it by High Country, and the courts shall not deny the just administration of that claim. However, that is what precisely happened in this case. The Circuit Court unjustly denied Triple 7's Counterclaim without a request to do so and without any substantive consideration. As such, the Circuit Court denied Triple 7's procedural and substantive due process rights guaranteed it under the Fourteenth Amendment.

CONCLUSION

The Circuit Court's decision should be reversed for four (4) reasons. First, High Country engaged in a course of conduct to undermine the very Settlement Agreement they signed and have taken every possible step to prevent Triple 7 from complying with the agreement and its purpose. These actions amounted to repeated breaches of the agreement that began within days of its execution. Second, High Country expressly relinquished any right to be listed as co-grantees or to make any claims of ownership in the Settlement Agreement. Third, the balance of

the equities require that High Country not be given a windfall after it frustrated the purpose of the Settlement Agreement and still received more than one and one-half times (1.5x) the amount of the Settlement Payment. Finally, Triple 7's Counterclaim should not have been dismissed without a substantive adjudication on the merits.

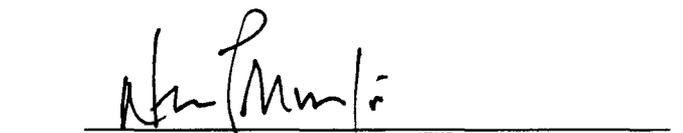
WHEREFORE, Triple 7 respectfully requests that this Honorable Court find that the Circuit Court committed the aforementioned reversible errors, and accordingly, *reverse* and *remand* the Circuit Court's decision to appoint a special commissioner in its entirety with specific findings that: 1) High Country's failure to timely release the Lis Pendens was a material breach of the Settlement Agreement that relieved Triple 7 of any further obligation under the Settlement Agreement; and 2) Triple 7's Counterclaim against High Country is reinstated.

TRIPLE 7 COMMODITIES, INC.

By Spilman Thomas & Battle, PLLC



Nicholas S. Preservati (WV Bar #8050)
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
P.O. Box 273
Charleston, WV 25321-0273
Phone 304.340.3800; Facsimile 304.340.3801
npreservati@spilmanlaw.com



Nicholas P. Mooney (WV Bar No. 7204)
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
P.O. Box 273
Charleston, WV 25321-0273
Phone 304.340.3800; Facsimile 304.340.3801
nmooney@spilmanlaw.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0155

TRIPLE 7 COMMODITIES, INC.,

Triple 7,

v.

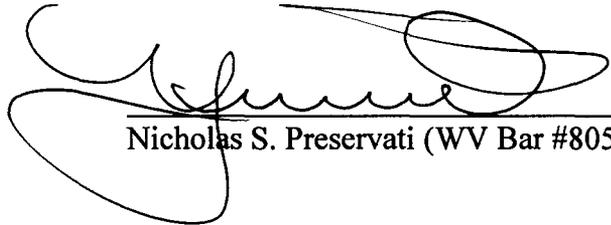
**HIGH COUNTRY MINING, INC.,
WOODROW W. CHURCH, AND
DARREN J. SPENCER,**

Respondents.

CERTIFICATE OF SERVICE

I, Nicholas S. Preservati, hereby certify that a copy of the foregoing **TRIPLE 7 COMMODITIES, INC.'S APPEAL BRIEF** was served via U.S. Mail, postage prepaid, this 29th day of June, 2020, to the following:

William H. Sanders, III, Esquire
Sanders Austin & Flanigan
320 Courthouse Road
Princeton, WV 24740
304-425-4155 (*facsimile*)



Nicholas S. Preservati (WV Bar #8050)