IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0155

TRIPLE 7 COMMODITIES, INC.,

Plaintiff

V.

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

Respondents.

RESPONDENTS' HIGH COUNTRY MINING, INC., WOODROW W. CHURCH AND DARREN J. SPENCER APPEAL BRIEF

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STATEMENT OF THE CASE

This is an appeal from the Circuit Court of Mercer County, West Virginia involving two small coal companies. High Country Mining, Inc., (High Country) and Triple 7 Commodities, Inc. (Tripe 7), both West Virginia corporations, entered into a Joint Venture Agreement (JVA) for the purpose of jointly acquiring mineral rights and mining permits associated with a coal mining property in McDowell County, West Virginia. The sellers were Wellston Coal, LLC and Royal Energy Resources, Inc. (Wellston). The parties were purchasing minerals and mining permits, but not the surface, which was owned by third parties. The JVA was executed by the parties on August 22, 2016. The original agreement was that Triple 7 would be entitled to fifty-one percent (51%) ownership and High Country forty-nine percent (49%) ownership for reasons that are not relevant to this appeal. High Country asserts that the express purpose of the JVA was for the parties to jointly acquire the mineral rights and mining permits but that Triple 7 violated the express terms of the JVA by acquiring a deed from the previous owners of the minerals and permits, Wellston Coal, LLC (Wellston) in the name of Triple 7 only, leaving High Country off of the deed entirely. High Country then filed suit in Mercer County, West Virginia seeking to have a new deed written with High Country as a co-owner of the minerals and mining permits, as per the terms of the JVA.

The parties litigated for approximately two and one-half (2-1/2) years, during which time there was much written discovery including the revelations of multiple emails and text messages between the parties leading up to and following the formation of the JVA. Finally, the parties agreed on a settlement of all issues between the parties which agreement was reduced to writing in the form of a CONFIDENTIAL SETTLEMENT AGREEMENT AND MUTUAL RELEASE (Settlement Agreement), executed by the parties on December 1, 2018. By the terms of that

Settlement Agreement Triple 7 was to pay to High Country $600,000.00 within 60 days. At the conclusion of sixty (60) days Triple 7 had not paid any portion of the $600,000 and asked for an extension of time to perform the agreement. Ultimately, the parties entered into three (3) written extension agreements, each constituting discreet separate contracts replacing the previous agreements and providing for modifications of amounts to be paid by Triple 7 to High Country and new schedules for payment of those sums of money. The third and final extension agreement required the last payment to be made to High Country in August 2019. However, Triple 7 was still unable to pay the agreed amounts to High Country within the prescribed time limits. Triple 7 asked for an additional extension of time. High Country refused any additional extensions and declared Triple 7 to be in default of the third and final settlement agreement. High Country moved the court for an order naming High Country's attorney Special Commissioner for the purpose of executing a deed naming High Country as a co-owner with Triple 7 of the minerals and permits with High Country owning fifty one percent (51%) and Triple 7 forty-nine percent (49%). The new percentages had been agreed to in the third extension agreement. Triple 7 objected to that motion and alleged multiple breaches of the original Settlement Agreement by High Country. Triple 7 argued that those breaches relieved Triple 7 of its obligations under the third extension agreement. As a result of that objection there were two (2) hearings, a deposition and briefs on the issue of whether High Country breached the original Settlement Agreement and whether High Country was entitled to be named a co-owner of the minerals and permits. The Circuit Court ruled in favor of High Country and entered an Order dated January 27, 2020 naming High Country's attorney Special Commissioner for the purpose of executing a deed granting High County fifty-one percent (51%) ownership of the minerals and rights to the mining permits and Triple 7 forty-nine percent (49%) ownership of the

minerals and rights to mining permits. It is from the Order of the Circuit Court of Mercer County, West Virginia that Triple 7 prosecutes this appeal.

STATEMENT OF FACTS

In order to properly understand the issues between the parties, it is necessary to first review the terms of the JVA. The two (2) pertinent paragraphs are paragraphs numbered 3 and 4 on the first page of the JVA. (R.5)

Paragraph no. 3:

"(3) Formation and purchase of Wellston Coal properties and all related all mineral rights.

> Now therefore, the parties do hereby constitute themselves as an exclusive joint venture for the purpose of performing and completing the purchase of Wellston Coal property and sales of contracts to end buyers that the Parties may be able to access. This joint venture arrangement will also include all available coal producing properties that the parties may collectively be able to acquire."

Paragraph 4:

"(4) Profits and Losses.

> Both Parties agree that any all net profits resulting from operations pursuant to this JV shall be shared with 51% to be distributed to 777 and its affiliates, 49% distributed to High Country..."

The clear intention of the parties is expressed in paragraph no. 3. The parties would jointly acquire the Wellston property. According to paragraph 4, the profits would be divided 51% to Triple 7 and 49% to High Country. In reality, the JVA probably required the parties to own the minerals and mining permits equally on a 50%/50% basis. The parties agreed to divide the profits to Triple 7 of 49% interest and High Country a 51% interest for reasons not germane to this appeal.

In spite of the plain language of the JVA, Triple 7 acquired a deed from Wellston dated September 13, 2016, which granted Triple 7 sole ownership of the mineral rights and mining permits. (R.9) High Country did not appear on the deed in any way. High Country asserted that the issuance of the deed in the name of Triple 7 only was in violation of the express terms of the JVA. High Country thus filed suit in the Circuit Court of Mercer County, West Virginia.

While it is true that the JVA did not have specific language stating that High Country's name would appear on any deed to the Wellston property, the plain meaning of paragraph no. 3 was that the property be acquired and held jointly.

High Country sued to have its name placed on a deed making it co-owner of the minerals and permits with Triple 7, per the terms of the JVA. High Country did not sue for monetary damages.

The parties litigated the underlying case for approximately two and on-half (2-1/2) years, as aforesaid. The parties produced numerous emails and text messages, which revealed the negotiations and interactions of the parties leading up to and subsequent to the execution of the JVA. Finally, the parties entered into an Agreement entitled "CONFIDENTIAL SETTLEMENT AGREEMENT AND MUTUAL RELEASE" (Settlement Agreement), which was executed by the Parties on December 1, 2018. The Settlement Agreement was written entirely by counsel for Triple 7. A copy of the original Settlement Agreement is part of the appeal record. (R.331). The pertinent portions of the Settlement Agreement were Section 3, sub-paragraphs no. 3.1, 3.2, 3.3 and 3.4. Also central to this appeal is paragraphs no. 5, paragraph 9.2, and paragraph 15, all of which will be described below.

The relevant paragraphs stated as follows:

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 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 in their Complaint with the parties being co-owners of the mineral rights and rights to mining permits with Triple7 owning 51% and Plaintiffs owning 49%;

3. Pursuant to Paragraphs 3.3 and 3.4, if the $600,000 was paid to High Country as agreed, the underlying lawsuit and Counterclaim would be dismissed with prejudice and Triple 7 would remain the sole owners of the subject mineral rights and mining permits, with High Country having no remaining interest in the minerals or permits;

4. Pursuant to Paragraph 5, High Country would file a release of the Notice of Lis Pendens that it had previously filed on July 21, 2017, within fifteen (15) calendar days of the execution of the Settlement Agreement;

5. Pursuant to Paragraph 15, the Parties agreed not to disparage each other in a manner that would be harmful to their business or personal reputations.

In its Appeal Brief Triple 7 also raises the terms expressed in Section 9.2 of the Settlement Agreement which stated,

> "**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 made 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."

NOTICE OF LIS PENDENS AND OTHER ALLEGED BREACHES BY HIGH COUNTRY

High Country agrees that the original Settlement Agreement required High Country to release the Notice of Lis Pendens that it had filed on July 21, 2017 by December 15, 2018. However, that was not accomplished until July 9, 2019. In July 2019 the parties were operating under the third extension agreement. That agreement required Triple 7 to pay to High Country $1,100,000 by July 9, 2019 and an additional $1,800,000 thirty (30) days later. Triple 7 had failed to make the required payments within the agreed schedules in the original Settlement Agreement and the first two extensions. Partial payments had been made that totaled either $800,000, according to High Country's records, or $900,000, according to Triple 7's records. High Country is willing to use $900,000 for the purposes of this proceeding. The third agreement required Triple 7 to pay High Country $1,100,000 by July 9, 2019 and an additional $1,800,000 thirty (30) days later.

On July 8, 2019 Damian Caldwell, on behalf of Triple 7, informed Woodrow Church that a lender had seen that the Notice of Lis Pendens had not been released. Counsel for Triple 7 also telephoned counsel for High Country the same day to bring to the attorney's attention that the Notice had not been released. Counsel for High Country was on his summer vacation at that time. However, High Country's counsel immediately telephoned his secretary and dictated a Release of Notice of Lis Pendens. The Release was prepared and placed on record before noon the following day, less than twenty-four (24) hours after being notified by Triple 7. A copy of the recorded Release was sent to counsel for Triple 7 the same day so that counsel could see that it had been recorded. At that point, counsel for Triple 7 had no complaints about the language of

the Release. Damian Caldwell then continued to negotiate with Woodrow Church. Mr. Caldwell left a voicemail on Mr. Church's cell phone stating that now that the Notice of Lis Pendens had been released the lender was ready to grant to Triple 7 funds with which Triple 7 could pay the $1,100,000. Because the Release was late being recorded, High Country granted to Triple 7 an additional ten (10) days to make the payment. The additional time was requested by Triple 7 with the assurance that said $1,100,000 payment would be made within that timeframe. Thus, Damian Caldwell was satisfied that any breach caused by the late filing of the Release of Notice of Lis Pendens was cured and that the lender providing the $1,100,000 was still ready to come forth with the money. A short additional extension was needed for the payment because of the delay in filing the Release. The extension was granted for the time requested by Damian Caldwell. However, a second payment of $1,800,000 was due thirty (30) days after the payment of the $1,100,000.

At that time Mr. Caldwell informed Mr. Church that the second payment of the $1,800,000 was coming from a different lender who did not know anything about the Notice of Lis Pendens and that the payment would also be later than previously agreed to. Mr. Caldwell then asked for some additional time to make the $1,800,000 payment. Thus, after the Release of Notice of Lis Pendens had been recorded and the defect cured, Mr. Caldwell continued to negotiate for additional time for the settlement terms. He did not at that point revoke the Settlement Agreement and the three (3) extensions or the amounts owed. His desire was to continue with the third extension agreement, with some extra time allowed. (R.222) Obviously Mr. Caldwell believed that the breach was cured and the cure was accepted.

When Mr. Caldwell made it clear that he could not make the final payment of $1,800,000 as scheduled, Mr. Church refused any additional extensions of time. He declared Triple 7 to be in

default. Out of good faith, Mr. Church then notified Mr. Caldwell not to make the $1,100,000 payment, which Mr. Caldwell allegedly had in hand and was ready to pay. Had High Country wanted to take advantage of Triple 7 at that time it could have accepted the $1,100,000 from Mr. Caldwell bringing the total amount actually paid by Triple 7 to $2,000,000. High Country could then have allowed some additional time for Triple 7 to produce the remaining $1,800,000. Had Triple 7 paid the $1,100,000 and then failed to produce the remaining $1,800,000 High Country would have been in the enviable position of having received $2,000,000 while still being entitled to 51% ownership of the minerals and permits. However, High Country could not do that in good faith. High Country no longer believed the promises of Triple 7 and did not believe that Triple 7 would be able to produce the remaining $1,800,000. Therefore, High Country instructed Triple 7 not to make the $1,100,000 payment if Triple 7 knew for a fact that it would not be able to pay the remaining $1,800,000 on time. Triple 7 could not make the final payment on time. Thus, High Country saved Triple 7 $1,100,000.

An important point to consider here is that Damian Caldwell indicated, by voicemail left on the cell phone of Woodrow Church, a transcript of said voicemail was included herein at R. 219, that the lender of the $1,800,000 was not supposed to know about the Notice of Lis Pendens. That indicates clearly that Mr. Caldwell was trying to prevent lenders from knowing that Triple 7 owed a large amount of money to High Country which would have to be paid out of the proceeds provided by that funder. In other words, Triple 7 was not making full disclosures to potential lenders about the contingent liability owed to High Country and the potential for High Country to end up owning approximately one-half of the assets on which funders were being asked to loan or invest money.

It should also be noted that Notice of Lis Pendens is not itself a lien. During the entire life of the Settlement Agreement and extensions there were no liens of record on the subject assets. A Notice of Lis Pendens is simply notice to the world that there is outstanding litigation involving the asset and creating a potential, or contingent, liability attached to the real estate so that any lender should be aware of. Releasing the Notice of Lis Pendens does not release the underlying liability. The underlying lawsuit, or contingent liability, remains and should be revealed to a potential funder as part of the required disclosures when applying for a loan or investment.

In multiple places in its brief Triple 7 makes reference to the fact that it had represented to potential lenders that it owned the assets at issue and that it had clear title to the property. Triple 7's now asserts that the presence of the Notice of Lis Pendens on the public record put them in the awkward position of having to represent to lenders that it had clear title to the property, when in fact there was a very substantial contingent liability owed to High Country which, if not paid, would result in Triple 7 losing approximately one-half of the assets offered as the basis for the loan.

That raises a very interesting question. Was Triple 7 making fraudulent representations to potential lenders/investors that they owned the subject property solely and clear of any liens or potential liabilities? Generally applications for loans or investments, or financial statements, require the entity seeking the loan or investment to make full disclosures, under oath, about lawsuits, contingent liabilities, or other potential clouds on the title that the lender should know about. Obviously Triple 7's obligations to High Country fall in that category. Thus, Triple 7 had an obligation to inform any potential lender/investor of the lawsuit, which had not been

dismissed, and the tremendous risk to ownership of the asset upon failure to make payment to High Country.

Most private lenders/investors require oversight or accountability for the use of the money provided to the borrower so that the lender can be sure that the funds are used for the designated purpose. For example, a funder providing $2,000,000 to a borrower would like to be sure that the $2,000,000 is being used for the purposes asserted by the borrower and not for exotic vacations or a new upscale home. If Triple 7 were to borrow millions of dollars in the form of a loan or investment for the operation of the mine and had not made it known to the funder that hundreds of thousands or a few million dollars had to be paid to High Country, Triple 7 would have had difficulty explaining to the funder what happened to that money once paid to High Country. If Triple 7 were attempting to borrow money from a Federal lender or from a source whose money was guaranteed by the Federal government and Triple 7 had failed to reveal the obligation to the lender, Triple 7's loan application might have been deemed fraudulent and might have subjected Triple 7 to Federal criminal prosecution.

Damian Caldwell testified at a deposition on September 3, 2019 that he told every potential funder about the lawsuit, the Settlement Agreement and the amount owed to High Country. (R. 213, 214 and 271) He indicated that he had approached ten (10) or more potential funders. (R.269) He testified that all of them understood the outstanding obligation to High Country and the fact that the obligation must be satisfied from the proceeds of the loan/investment.

This creates a perplexing conflict in the representations of Damian Caldwell at deposition and Triple 7 in its brief. In its appeal brief Triple 7 complains that the failure to timely release

the Notice of Lis Pendens prevented Triple 7 from misrepresenting to lenders/investors that it had clear unencumbered title to the property and were thus harmed by High Country's late filing of the Release of Notice of Lis Pendens because it allowed potential funders to discover the fraudulent misrepresentation by Triple 7. Or, if we take Mr. Caldwell's sworn testimony to be truthful, the continued presence of the Notice of Lis Pendens on the record was not a material breach because Mr. Caldwell had personally informed every potential funder about the outstanding lawsuit and settlement agreement. The conflict raises the question of whether Mr. Caldwell lied to potential funders in his application for funds and, thus, lied again under oath at his deposition. He either lied in both instances or told the truth in both instances. If he notified the potential lenders of the lawsuit, as he swore he did, the Notice of Les Pendens was simply redundant to the notice personally offered by Mr. Caldwell and was not a material breach.

High County hereby asserts that we should assume Damian Caldwell was telling the truth at his deposition. Thus, it is an undisputed fact in this case that Damian Caldwell personally notified every potential lender/investor about the lawsuit, the settlement and that a large portion of any proceeds requested by Triple 7 must be paid to High County in order to clear the title to the subject minerals and permits. The continued presence of the Notice of Lis Pendens was therefore redundant and meaningless to any potential funder and therefore could not possibly be a material breach.

As stated above, when the Release of Notice of Lis Pendens was filed, a copy was sent immediately to counsel for Triple 7. Neither Triple 7 nor its attorney objected to the way the Release was written. It was titled "Release of Lis Pendens". It stated, " High Country Mining, Inc., by its President, Woodrow W. Church, do (sic) hereby release that Notice of Lis Pendens filed by High Country Mining, Inc. on the 21st day of July, 2017, and recorded in Lis Pendens

Book 002, at Page 292 in relation to that Civil Action filed in Mercer County, West Virginia styled High Country Mining, Inc. vs. Triple 7 Commodities, Inc., and bearing Civil Action No. 17-C-77-MW... ". The Release expressed a very clear intent to fully release the notice. As stated before, a Notice of Lis Pendens is not itself a lien. It is only a notice. It cannot be partially released, as can a mortgage lien. It is either release or it isn't released. The underlying lawsuit has either been dismissed or has not been dismissed. In this case, it had not been released because Triple 7 had not yet fulfilled its obligations.

It is important to note that Damian Caldwell testified at his deposition that no potential funder ever told him that the Notice of Lis Pendens, or underlying lawsuit, had anything to do with refusing a loan/investment. In fact, Mr. Caldwell stated that he had actually been able to borrow approximately $4,000,000 from various sources over a period of time for use at the subject coal mine. Mr. Caldwell testified that he was in negotiations with a group named Armada in an effort to borrow $25,000,000 for starting and operating the mine before the parties reached their original Settlement Agreement in December of 2018, before the Notice of Lis Pendens was required to be released. He testified that he had informed Armada about the lawsuit. Mr. Caldwell testified that Armada ultimately refused to loan money on the project because it was "too risky". (R.265) Coal mines are notoriously high risk investments.

It was only when High Country informed Triple 7 in July 2019 that it would not grant an additional extension for the time by which Triple 7 must pay the final $1,800,000 that Triple 7 complained about the late filing of the Release of Notice of Lis Pendens. At that time Mr. Caldwell sent Mr. Church a message saying that if High Country would permit Triple 7 to pay High Country $1,600,000, in addition to the $900,000 that had already been paid, Triple 7 would not sue High Country for the alleged breach. In other words, even at that late stage Triple 7 still

wished to pay High County a very large amount of money, bringing the total settlement amount to $2,500,000, or Triple 7 would sue High Country over the late filing of the Release of Notice of Lis Pendens. Triple 7 obviously believed that any breach created by the late filing of the Release had been cured when the Release was filed, but now wanted to use the late filing as leverage to force High Country to continue with the settlement between the parties, although under altered terms. Triple 7 was still trying to continue with the settlement contract between the parties and was still offering to ultimately pay $1,900,000 more than the $600,000 specified in their original Settlement Agreement. It was High Country who then declared that the contract was breached by Triple 7.

Triple 7 also alleged High Country to have breached provisions of the original Settlement Agreement expressed in sections 10 and 11 that prohibited trespass on the subject property and required the parties from making disparaging comments about each other publically that might harm the reputations of the other. (R.337) However, as the Circuit Court noted, Triple 7 produced no witnesses or credible evidence of either alleged breach. Triple 7 did not dedicate much effort on those issues in its brief. It would be a waste of time and space to talk about those allegations in this brief.

ALLEGED WAIVER BY HIGH COUNTRY

As Triple 7 argues in its Brief, the original Settlement Agreement, written entirely by counsel for Triple 7, included paragraph 9.2 , which stated:

> "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 made 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."

That paragraph clearly should not have been included in the Settlement Agreement. It is inconsistent with paragraphs 3.1, 3.2, 3.3 and 3.4, as detailed above. It is also inconsistent with the very purpose of High Country's lawsuit, which sought specifically to have its name placed on a deed as co-owner of the minerals and permits. The idea that High Country intended to waive its right to ever be placed on the deed is also inconsistent with the three consecutive extensions to the Settlement Agreement. Each extension granted High Country the specific right to have its name placed on a deed, as co-owner of the minerals and permits should Triple 7 fail to make payments in the amounts agreed to and on the agreed schedule. Thus, paragraph 9.2 of the original Settlement Agreement is totally inconsistent with every other document in this case including the JVA, the resulting lawsuit, the Settlement Agreement and the three extensions thereto. It creates an ambiguity or inconsistency on its face. At any rate, the three contractual extensions entered into between the parties subsequent to the original Settlement Agreement eliminate that ambiguity. At no time during the negotiation of the three extensions to the Settlement Agreement did Triple 7 ever claim that High Country had already waived its right to have its name placed on the deed.

TERMS OF THE THREE EXTENSION AGREEMENTS

As stated previously, Triple 7 failed to produce the money owed to High Country in the original Settlement Agreement within sixty (60) days. In fact it produced no money within the sixty (60) days. Triple 7 then sought extensions for the time by which it was required to pay sums to High Country. Each extension granted more time, but increased the amount to be paid to High Country as consideration for the additional time. At the end of time granted in the

Settlement Agreement and the first two extensions Triple 7 had either not paid anything or was only able to make partial payments. More time was always requested by Triple 7 with greater sums offered as inducement. The third extension agreement provided that the total settlement amount, including amounts already paid by that time, would be $3,600,000. The relief granted to High Country, should Triple 7 be unable to make the agreed payments on the agreed schedule, was that High Country would be entitled to have its name placed on a deed as co-owner with Triple 7. High Country's ownership would then be 51% and Triple 7's interest would be 49%.

All of the settlement agreements, including the original Settlement Agreement and the three extensions, were negotiated primarily between Damian Caldwell on behalf of Triple 7 and Woodrow Church on behalf of High Country. As Mr. Church testified at the hearing held on October 2, 2019, the settlement amounts and the schedule for payments in the Settlement Agreement and the first two extensions were primarily proposed by Mr. Caldwell. It was not until negotiations for the third extension agreement that Mr. Church became more assertive and perhaps more demanding in his terms. (R.552)

For the original Settlement Agreement and all three extensions, once the amounts and payment schedules were agreed upon between Mr. Caldwell and Mr. Church, counsel for High Country and Triple 7 were notified of the agreements so that counsel could reduce the agreements to writing. As stated before, the original Settlement Agreement was written entirely by counsel for Triple 7. The first extension agreement was also written by counsel for Triple 7. The two extensions thereafter were simply modeled upon the first extension agreement. In each situation the parties both had advice of counsel, negotiated with equal knowledge of the assets, facts and conditions that existed for both parties and came from equal negotiating positions.

Although the payment amounts continued to escalate with each extension and the final amount agreed to was six (6) times higher than the amount first agreed to in the original Settlement Agreement, the final amount still represented a good deal for Triple 7. At the hearing held on October 2, 2019 Woodrow Church testified that at the time of original Settlement Agreement the quality of coal in question was selling for about $120 per ton. According to an engineering study performed by the previous owner there was approximately four million (4,000,000) tons, recoverable, of good quality metallurgic coal on the property. (R.578) That means the retail value of the coal located on the property would have been about $480,000,000. Mr. Church testified that the profit margin was about $50 per ton. That would mean the total profit to be realized by both parties was about Two Hundred Million Dollars ($200,000,000.00). High Country's 49% interest in the coal at that time would have been approximately Ninety-Eight Million Dollars ($98,000,000.00) That, of course, would be a potential to be realized over years of mining. Thus, for Triple 7 to pay $3,600,000 was a very desirable outcome for Triple 7. Coal is a commodity, so its price varies with time.

No one testified at the hearing for Triple 7 and Mr. Church's numbers were not disproved. Throughout the negotiations between the parties for the settlement agreements the value of High Country's share of the assets far exceeded any amounts agreed to by Triple 7.

SUMMARY OF ARGUMENT

1. High Country denies that any breach created by the late filing of Release of Notice of Lis Pendens was not a material breach of the Settlement Agreement. Further, even it had been a material breach, Triple 7 accepted the late filing of the Release of Notice of Lis Pendens as an acceptable cure of the breach of the Settlement Agreement by continuing to move

forward with the Settlement Agreement and the three contractual extensions. Therefore, Triple 7's subsequent failures to pay the original settlement amounts and the amounts agreed to in the three extensions were, in fact, defaults by Triple 7 allowing for the reformation of the Deed to the subject minerals and mining permits granting High Country a 51% ownership interest.

2. Triple 7 asserts that the settlement amounts recited in the third extension agreement were procedurally and substantively unconscionable. High Country hereby asserts that they could not have been procedurally or substantively unconscionable because the amounts and time payment schedules were arrived at by mutual negotiations directly between the parties and that both parties had advice of counsel and the resulting agreements were written by counsel for the parties with equal input by two (2) parties on equal footing. Also, the amounts agreed to were reasonable in relation to the value of the subject asset.

3. Triple 7 asserts that High Country expressly waived its right to have its name on the deed in the first Settlement Agreement. However, that is not true. Triple 7 is selecting certain narrow language from the Settlement Agreement that defies the other express terms of the Settlement Agreement. Triple 7's argument also is nonsensical, considering the language in the original JVA called for joint ownership of the property, that High Country filed the underlying lawsuit entirely for very purpose of having its name placed on the deed as co-owner of the subject minerals and permits. Triple 7's argument also makes no sense when we consider that Triple 7 subsequently entered three (3) more settlement contracts with High Country which each provided that High Country's name would be added to a deed for the subject minerals and permits should Triple 7 fail to pay agreed sums on an agreed schedule. At no time during the formation of the three (3) extensions did Triple 7 make the argument that High County was no longer entitled to have its name on a deed to the minerals and permits. Further, had High

Country actually intended to waive its right to have its name ever placed on a deed to the subject assets, and Triple 7 failed to pay the agreed amount, the waiver would not have been supported by consideration. Therefore, any contract by which High Country would voluntarily waive its right to have its name on such deed would legally fail for lack of consideration.

4. Finally, Triple 7 alleges that the Circuit Court committed error by dismissing Triple 7's Counterclaim in the underlying civil action. However, the four (4) settlement agreements entered into between the parties were intended by the parties to resolve all issues in litigation, both Complaint and Counterclaim. Thus, the underlying claims of both parties were no longer to be considered. Once the Settlement Agreement was entered into the remedies provided for in the Settlement Agreement and three (3) subsequent extensions did not include reviving either parties' claims in the underlying action.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

High Country asserts that it is not necessary to have oral arguments in this Appeal. There is nothing that the parties can say that has not already been fully developed in the briefs.

ARGUMENT

A. High Country Materially Breached The Settlement Agreement.

Triple 7 correctly asserts that West Virginia is a First Breach State. Triple 7 argues that High Country's failure to have the Notice of Lis Pendens released in a timely fashion constituted a material breach of the original Settlement Agreement, which breach then relieved Triple 7 of any obligations to High Country. Triple 7 also argued that High Country breached the original Settlement Agreement by violating the provisions that High County not trespass on the subject

property and not make disparaging comments publically about Triple 7. As the Circuit Court noted, during the litigation below Triple 7 did not introduce witnesses or credible evidence as to the allegations of trespass or disparaging comments. Therefore the only breach that Triple 7 dedicates its efforts to now is the late filing of the Notice of Lis Pendens.

1. *The First Breach Doctrine*

The Circuit Court correctly analyzed the provisions of the First Breach Doctrine in West Virginia as expressed in *Federal Insurance Co. v. Starr Electric Co.*, 242 Va. 459, 468, 410 S.E. 2d 684, 689 (1991); and *Hurley v. Bennett*, 163 Va. 241, 253, 167 S.E. 171, 175 (1934). The Doctrine states "Generally, a party who commits the first breach of a contract is not entitled to enforce the contract." (Federal, supra, at 689 citing Hurley) However, there are conditions that must be met in order to make a proper determination as to whether there has been a material breach of the contract that would bring the present case into the definition of material breach. In *Neely v. White,* 177 WV. 358, 366, 14 S.E. 2d 337 (1941) the court emphasized that "Before performance of one party will excuse the other from performing his contract or give him a right of recission, the act failed to be performed must be go to the root of the contract." In the present case, High Country did not commit any breach that was material and that went to the root of the contract.

It is clear that the Release of the Notice of Lis Pendens was not so fundamental to the Settlement Agreement that failure to file the Release on the original schedule defeated an essential purpose of the contract. Mr. Caldwell was already negotiating with a potential funder named Armada, before the parties entered in to the original Settlement Agreement, for funds that would have allowed Triple 7 to pay High Country the original $600,000 on schedule. Mr.

Caldwell told Armada about the lawsuit with High Country before the Settlement Agreement was even entered into. At that time there was no obligation by High Country to release the Notice of Lis Pendens. Armada informed Triple 7 that it would not loan the money because it was "too risky".

Mr. Caldwell testified at his deposition, that he approached ten or more funders in an attempt to borrow money for the mining operation, including the payment of the agreed settlement amounts to High Country. He told each potential funder about the underlying lawsuit and the need to pay High Country in order to clear title to the assets. Thus, had any potential lender seen the Notice of Lis Pendens on public record it would not have been surprised. The Notice of Lis Pendens was redundant to the actual notice given by Damian Caldwell. Mr. Caldwell also testified that Triple 7 was able to borrow approximately $4,000,000 over time from various sources, even with the Notice of Lis Pendens on record. He also testified that no lender indicated that the underlying lawsuit was the reason for the refusal of any loans/investments. It is far more likely that, as with Armada, investing large amounts of money into a startup coal mine is just "too risky". Coal mines are a notoriously high risk investment.

In the West Virginia Supreme Court case *Atlantic Bitulithic Co. v. Town of Edgewood*, 103 W.Va 137, 137 S.E. 223 (W.Va 1927), this Court dealt with a similar situation where there had been an alleged breach of contract by one party. The court delineated three remedies the injured party had available to it in order to be fairly compensated for the breach by the other party. However, at page 225 the court stated, "There is no breach so long as the 'injured party elects to treat the contract as continuing. Zuck & Henry v. McClure & Co., 98 Pa. 541." In other words, if the injured party doesn't believe the alleged breach was so serious as to make the injured party want to abandon the contract, there is no breach.

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When Triple 7 secured a lender for the first payment due of $1,100,000 under the third extension the lender asked that the Notice of Lis Pendens be released. High Country recorded a release within less than twenty-four (24) hours. Damian Caldwell, at that time, was satisfied that the problem with the Notice of Lis Pendens was cured, as was his lender. He verified in his deposition (R. 222) that he still wanted to move forward with the third extension contract. It was only when Mr. Church refused the additional extension for the payment of the final $1,800,000 that Mr. Caldwell decided to fall back on the late filing of the Release as a means to force High Country to continue with the settlement. At that point Mr. Caldwell sent the message to Mr. Church that unless Triple 7 was allowed to pay an additional $1,600,000 by the end of July 2019 Triple 7 would sue High Country. Mr. Caldwell had accepted the cure and wanted to continue with the contract. Therefore, under the law as expressed in Atlantic, supra, there was no breach. Obviously, the Notice of Lis Pendens was not keeping Triple 7 from acquiring funds. In fact, Triple 7 had already borrowed approximately $4,000,000 from various sources over time, in spite of the fact that the Notice of Lis Pendens remained on public record.

2. *Materiality of Breach*

Both the Circuit Court and Triple 7 rely upon the Restatement (Second) of Contracts, § 241, as a guide in determining the materiality of High Country's breach. According to Section 241, the following circumstances are to be considered by the Court in determining whether a breach was material:

The Circuit Court correctly analyzed the above stated factors in relation to the case at hand.

(a) the extent to which the injured party will be deprived of the Benefit which he reasonably expected;

In the case at hand Triple 7 asserts that it was denied an expected benefit of the Settlement Agreement because High Country was late in recording the Release of Notice of Lis Pendens. The benefit that it claims it lost was the ability to represent (misrepresent) to potential lenders/ investors that Triple 7 was the sole owner of the subject minerals and permits, free of any claims by others, even though the lawsuit was still pending. Triple 7 argues that by not being able to make such representation they were not able to raise the funds necessary to pay the agreed settlement amounts.

That is an incredible argument for Triple 7 to make. A Notice of Lis Pendens is not a lien. It is simply notice to the world that there is a lawsuit pending which represents a contingent liability that may affect the decision of a lender/investor as to whether or not to make the a loan or investment. Damian Caldwell testified that he personally informed every potential lender/investor about the lawsuit and settlement obligations owed to High Country. The Notice of Lis Pendens was redundant and harmless because Mr. Caldwell had personally given the same notice, or disclosure.

The fact that Mr. Caldwell informed every potential funder of the underlying lawsuit, together with the fact that Mr. Caldwell continued to move forward with the settlement after the Release was filed and the fact that Triple 7 was able to borrow approximately $4,000,000 while the Notice of Lis Pendens was still on record, all indicate that the failure to release the Notice on the original schedule was not an essential purpose of the original Settlement Agreement. Therefore the late filing did not deprive Triple 7 of an expected benefit.

Simply put, the failure to release the Notice of Lis Pendens in a timely fashion did not deprive Triple 7 of any benefit whatsoever.

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

There is no need to compensate Triple 7 for anything. Triple 7 was not deprived of anything. Damian Caldwell informed all lenders about the underlying lawsuit and the need to satisfy payments to High Country. The only purpose of the Notice of Lis Pendens is to inform the world of the unresolved lawsuit, which Damian Caldwell also did himself. Therefore the presence of the Notice of Lis Pendens on public record was meaningless. He was never told by any lender that the lawsuit was a reason to refuse funding. Mr. Caldwell had lenders that were still ready to grant funds with which to pay $1,100,000 and $1,800,000 as required in the third extension agreement. He simply needed more time to close those loans. When Mr. Church refused to grant additional time, Mr. Caldwell claimed he could still pay $1,600,000 by the end of July 2019, which was approximately three (3) weeks into the future. Mr. Caldwell had also been able to borrow $4,000,000 in spite of the Notice of Lis Pendens. The presence of the Notice of Lis Pendens obviously did not prevent Triple 7 from acquiring funds. Thus Triple 7 suffered no harm whatsoever that they should be compensated for. Additionally, Mr. Caldwell wanted to continue with the contract, meaning there was no breach.

(c) the extent of to which the party failing to perform or to offer to perform will suffer forfeiture;

The Circuit Court was correct in saying that High Country would "suffer a major forfeiture if either breach is deemed material". In fact, if the breach were determined to be material and Triple 7 thus permitted to avoid its obligations under the third extension, High Country would be forced to forfeit fifty-one (51%) percent ownership of the minerals and permits worth tens of millions of dollars. In its brief, Triple 7 argues that High Country's breach occurred early. However, for that argument to have meaning, the failure to timely release the

Notice of Lis Pendens would have to have been a material breach that went to the root of the contract and defeated an essential purpose of the contract for Triple 7. For the reasons stated above, that is clearly not the case.

(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

To the extent that the late filing of the Notice of Lis Pendens was a breach, that breach was cured. The Release was filed within twenty-four (24) hours, to the satisfaction of Triple 7 and its counsel. Damian Caldwell acknowledged and accepted that the breach was cured. He was satisfied, as was his lender. He continued to move forward with the settlement, even to the extent of threatening to sue High Country if Triple 7 was not allowed to pay an additional $1,600,000, bringing the total settlement to $2,500,000.

An Amended Release of Notice of Lis Pendens was offered by High Country when Damian Caldwell testified at deposition that he, or a potential lender, had indicated that the wording of the first Release was somehow insufficient. An Amended Release of Notice of Lis Pendens was offered by High Country to Triple 7. Upon approval of the language of the amended Release by counsel, High Country recorded the amended Release.

(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.

The fact that High Country was willing to grant Triple 7 three (3) distinct and separate contractual extensions on the time for Triple 7 to fulfill its settlement obligations by itself shows that High Country was acting in good faith. The amounts and schedule for payments of the original Settlement Agreement and the first two (2) agreed extensions were primarily the

proposals of Damian Caldwell on behalf of Triple 7. It was only in negotiations for the third extension that Mr. Church, on behalf of High Country, became more assertive in his demands.

When Triple 7 informed High Country that the Notice of Lis Pendens had not been timely released to High Country's attention, a Release was recorded in less than twenty-four (24) hours, to the apparent satisfaction of Triple 7 and its attorney. When Mr. Caldwell first expressed, at his deposition, that a potential lender had expressed concern about the language in the Release of Notice of Lis Pendens, counsel for High Country immediately offered a new release. High Country did in fact produce an amended release which was recorded promptly.

When Triple 7 asked for more time for the payment of $1,100,000 under the third extension, High Country consented to the additional time asked for without additional penalty or payment. When Triple 7 revealed that it would not be able to pay the final $1,800,000 in a timely fashion, High Country suggested that Triple 7 not pay the $1,100,000 that it was prepared to pay. High Country thereby saved Triple 7 from paying $1,100,000 that it would have borrowed and would have been required to repay to a lender. All of those actions on the part of High Country demonstrate good faith and fair dealing.

By contrast, Triple 7 secured the deed to the subject minerals and permits from Wellston in its name only, thus circumventing High Country and breaching the JVA. It was that bad faith dealing by Triple 7 that precipitated the lawsuit and brings this case to this court. High Country demonstrated good faith and fair dealing throughout its association with Triple 7, beginning with the formation of the JVA. It is Triple 7 who has consistently failed to show good faith and fair dealing.

B. High Country Expressly Waived The Right To Be A Co-Grantee On A Deed.

In its brief, under Part B, Triple 7 claims High Country expressly waived the right to be co-grantee on any deed for the subject minerals and permits upon the mere execution of the Settlement Agreement on December 1, 2018. Triple 7 is "cherry picking" by citing a single paragraph, paragraph 9.2, of the Settlement Agreement. Counsel for High Country wrote the entire agreement. Paragraph 9.2 should not have been included in the Settlement Agreement because it defies the very purpose of the Settlement Agreement and creates an unnecessary ambiguity.

As stated in the review of facts, Paragraphs 3.1 expressly stated that Triple 7 would pay to High Country, Woodrow W. Church and Darren J. Spencer, collectively, $600,000 within sixty (60) days as a "full and final settlement of Claims asserted or which could have been asserted by, or through, High County Mining...". Paragraph 3.2 stated that if the $600,000 was not paid to High Country within sixty (60) calendar days, 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..."

To say that High Country unilaterally and unconditionally released its right to have its name placed on the deed simply by signing the Settlement Agreement, without knowing it would be paid, is ludicrous. The argument defies the fact that the JVA called for such co-ownership, that High Country filed a lawsuit for the sole purpose of having its name placed on a deed to the minerals and permits and that the very purpose of entering into the original Settlement

Agreement was for Triple 7 to pay High Country $600,000 in order to settle High Country's claim to have its name placed on such deed. Each of the three subsequent extension agreements also provided that High Country would have its name placed on a deed upon default be Triple 7.

If High Country had intentionally forever waived its right to have its name placed on the deed simply by signing the Settlement Agreement and if Triple 7 then failed to pay $600,000 as agreed, High Country would have released the very right that it sued for and spent two and one-half (2-1/2) years litigating without any compensation whatsoever. Not only would such agreement be ludicrous on its face but it would be unenforceable for lack of consideration.

The fact that Triple 7's attorney included such provision in the original Settlement Agreement and now argues the legitimacy of that provision could be interpreted as an act of bad faith on the part of Triple 7 and another attempt to defraud High Country.

C. Equity demands that the Motion be denied.

Triple 7 argues that the agreements were procedurally unconscionable because the parties were in unequal bargaining position. This could not be further from the truth. High Country is owned and operated by two lifelong coal miners, Woodrow W. Church and Darren J. Spencer, both of whom have never done anything but mine coal. Triple 7 is a corporation with apparently several stockholders in addition to Damian Caldwell. The principal negotiator, spokesman and CEO of Triple 7 is Damian Caldwell. Damian Caldwell apparently has a background in banking, as he alluded in his deposition. (R. 243). Mr. Caldwell therefore does have some commercial background and is financially more experienced and more financially savvy than either Mr. Church or Mr. Spencer. Also, both parties were represented by counsel throughout two and one-half (2-1/2) years of litigation and the formation of the Settlement Agreement and the three

contractual extensions to that agreement. Counsel for Triple 7 was a graduate of Yale Law School and was a partner in a major law firm with offices in Washington, D.C. and New York City. He is a very accomplished and very polished attorney. He was certainly capable of advising Triple 7 throughout the litigation and in its decision to pay sums to High Country in order to resolve the lawsuit. He was very capable of advising them through each of the four (4) settlement agreements. That attorney wrote the original Settlement Agreement in its entirety.

Triple 7 did not have to enter into any of the agreements. Triple 7 chose to enter into the agreements because it did not want the case to go to trial. Triple 7 also believed the value of the assets justified the amounts agreed to. Triple 7 could have refused to enter into any agreements with High Country but that would have required a jury trial on the underlying facts of the case, which apparently Triple 7 was not comfortable doing. Triple 7 firmly believed that paying High County the agreed amounts was in its best interest and that the value of the property justified the amounts. Thus, there was no procedural unconscionability.

In its argument that there was procedural unconscionability Triple 7 asserts that the fact that the Notice of Lis Pendens was not released in a timely fashion caused Triple 7 to unintentionally misrepresent to lenders that it held clear title to the assets. (See Triple 7 Brief, pg. 31). For Triple 7 to now claim that High Country's failure to timely release the Notice of Lis Pendens created a procedural unconscionability which was unfair to Triple 7 because put Triple7 in the position where it might be caught in its dishonest misrepresentations to lenders is a bizarre argument, to say the least.

Considering that Triple 7 must prove that there was both procedural and substantive unconscionability, failure to prove procedural unconscionability should end the analysis. However, it is also clear that there is also no substantive unconscionability.

Triple 7 argues that by the time the third extension to the original Settlement Agreement was executed the total settlement amount had grown to $3,600,000 from the $600,000 that was agreed to in the original Settlement Agreement. That is true. However, Woodrow Church testified at the hearing on October 2, 2019 that there is approximately four million (4,000,000) tons of metallurgical coal, recoverable, on the property and that were the subject of the deed from Wellston and that High Country was suing for. That fact was known to Triple 7 and to High Country equally. As stated hereinbefore, the net value of four million (4,000,000) tons of metallurgic coal is quite substantial. For Triple 7 to be able to purchase High County's forty-nine percent (49%) interest for $3,600,000 was a very good deal. Had Triple 7 actually paid High Country $600,000, as originally agreed to, for its forty-nine percent (49%) interest it would have been a tremendous windfall to Triple 7. They simply were simply not able to do what they promised they could do.

As stated above, Mr. Caldwell threatened to sue High Country unless High Country would allow Triple 7 to pay an additional $1,600,000 by the end of July 2019. That would have been in addition to the $900,000 already paid. Thus Triple 7 was offering to pay a total of $2,500,000. That is more than four (4) times the amount of the original settlement agreed to in December of 2018. Clearly Mr. Caldwell felt that the value of the assets justified a large payment and that such payment was not unconscionable in his mind.

D. The Circuit Court committed reversal error by dismissing Triple 7's Counterclaim.

Both the Complaint of High Country and the Counterclaim of Triple 7 were resolved by the four settlement agreements entered into between the parties. At no time did Triple 7 negotiate for the right to revive its Counterclaim, unilaterally, should it have failed to pay the settlements as agreed to in the various settlement agreements. This argument is so strange as to be difficult to even address. The Complaint and Counterclaim would have been presented had the matter gone to trial. However, Triple 7 offered payment of money in order to avoid going to trial. Following the original Settlement Agreement, the only legal question was whether the final extension agreement was enforceable. It is inconceivable that Triple 7 really believes that because it defaulted in its obligations under the settlement agreements it can now, unilaterally, continue to trial on its Counterclaims against High Country. Triple 7's Counterclaim cannot survive Triple 7's default on the third extension agreement. The only remedy available, if Triple 7 failed to make its payments was that High Country would receive the requested deed showing a fifty-one percent (51%) ownership of the subject minerals and permits. There was nothing in any of the agreements that permitted Triple 7 to proceed to trial on its Counterclaim under the circumstances of its default.

CONCLUSION

The decision of the Circuit Court of Mercer County, West Virginia was well reasoned and properly decided. The failure to timely release the Notice of Lis Pendens was absolutely meaningless because Damian Caldwell testified, under oath, that he had informed every lender that he applied to about the pending lawsuit and obligation to High Country Mr. Caldwell personally gave each lender the very same notice as the Notice of Lis Pendens. Further, Mr.

Caldwell did in fact secure funders for payments of $1,100,000 and $1,800,000 and was able to borrow Four Million Dollars ($4,000,000.00) from various sources over some time, while the Notice of Lis Pendens was still on record. Additionally, when High Country did record the Release of Notice of Lis Pendens, Mr. Caldwell was satisfied that any breach was cured and continued forward to resolve the case under the settlement contract. Mr. Caldwell specifically stated that no lender indicated that the pending lawsuit was the reason for the failure with any additional lenders to provide funds to Triple 7.

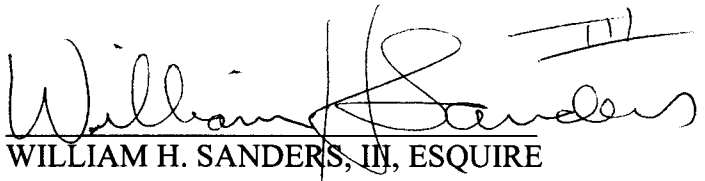
No credible evidence was ever produced to show that High Country trespassed on the property following the execution of the Settlement Agreement or that High Country disparaged Triple 7 in any manner after execution of the Settlement Agreement.

It is also clear that neither High Country nor Triple 7 believed that High Country intended to forever waive its right to have its name placed on a deed to the assets as co-owner when it executed the original Settlement Agreement.

It is also clear that the Settlement Agreement and three (3) extensions were not unconscionable from either procedural or substantive standpoint.

WHEREFORE, High Country respectfully requests that this Honorable Court uphold the ruling of the Circuit Court of Mercer County, West Virginia as entered on January 27, 2020.

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

By: 

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0155

TRIPLE 7 COMMODITIES, INC.,

Plaintiff

V.

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

Respondents.

CERTFICATE OF SERVICE

I, William H. Sanders, III, Attorney for Respondents, do hereby certify that I served a true copy of RESPONDENTS' HIGH COUNTRY MINING, INC., WOODROW W. CHURCH AND DARREN J. SPENCER APPEAL BRIEF to the following by depositing same, postage prepaid in the US Mail on this the 13th day of August, 2020.

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